

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-1317
Lower Tribunal Nos.: 1D10-2972,
2009-CA-001386

CHARLIE CRIST, ET AL., vs. ROBERT M. ERVIN, ET AL.,

CASE NO.: SC10-1319
Lower Tribunal Nos.: 1D10-2978,
2009-CA-001386

ALEX SINK, CHIEF FINANCIAL OFFICER, ETC., vs. ROBERT M. ERVIN, ET AL.

Appellants

Appellees

**BRIEF OF THE FLORIDA CHAPTER OF THE
AMERICAN BOARD OF TRIAL ADVOCATES
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE CHALLENGED STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY CONVERT OTHERWISE PERMISSIBLE USER FEES INTO UNCONSTITUTIONAL TAXES ON THOSE SEEKING ACCESS TO THE COURTS.....	3
II. THE FLORIDA CONSTITUTION RECOGNIZES THAT USER FEES AND GENERAL REVENUE ARE VITAL, YET DISTINCT FUNDING SOURCES FOR FLORIDA’S JUDICIAL BRANCH.....	6
CONCLUSION	12
CERTIFICATE OF COMPLIANCE.....	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Burke v. Esposito</i> , 972 So. 2d 1024 (Fla. 2d DCA 2008).....	8
<i>Crocker v. Finley</i> , 459 N.E.2d 1346 (Ill. 1984).....	5
<i>Farabee v. Bd. of Trustees, Lee County Law Library</i> , 254 So. 2d 1 (Fla. 1971)	3, 4
<i>Flood v. State ex. rel. Homeland Co.</i> , 117 So. 385 (Fla. 1928)	3
<i>In re Advisory Opinion to the Governor</i> , 509 So. 2d 292 (Fla. 1987)	3, 5
<i>In re Certification of Need for Additional Judges</i> , 29 So. 3d 1110 (Fla. 2010).....	11
<i>Lecroy v. Hanlon</i> , 713 S.W.2d 335 (Tex. 1986)	5
<i>State v. City of Port Orange</i> , 650 So. 2d 1 (Fla. 1994)	4
 Constitutional Provisions	
Art. V, § 14, Fla. Const.....	6, 7
U.S. Const. preamble	9
 Other Authorities	
Seven Principles for Stabilizing Court Funding	2, 13

INTEREST OF AMICUS CURIAE

The Florida Chapter of the American Board of Trial Advocates (“FLABOTA”) is an organization composed of leaders of the eleven Florida local chapters of the American Board of Trial Advocates (“ABOTA”). ABOTA is a national organization of experienced civil trial lawyers that is approximately evenly divided among those who represent plaintiffs and those who represent defendants in personal injury and related cases. ABOTA’s purposes include preserving the jury system, improving practice and procedure in our trial courts, promoting civility and ethical conduct, protecting the independence of our judiciary, and acting as an organization through which trial lawyers in general, and ABOTA members in particular, can speak concerning matters of common and general interest.

FLABOTA’s membership, and that of its constituent chapters, is critically concerned with this case’s impact on the funding and function of Florida’s judicial system, which directly and necessarily affects not only ABOTA members, but their clients and the public. On August 23, 2010, this Court granted FLABOTA leave to file this brief as amicus curiae in support of Appellees.

SUMMARY OF ARGUMENT

This Court should affirm the order on appeal. Under this Court's clear precedent, the statutes at issue (the "Challenged Statutes" described on pages 11-13 of Appellees' Answer Brief) are facially unconstitutional because they impose an impermissible tax on those seeking access to the courts. By diverting a portion of court user fees to the state's general revenue fund, the Challenged Statutes allow those user fees to be utilized for general revenue purposes, a practice that this Court has specifically condemned. The Challenged Statutes create uncertainty and confusion as to whether the diverted fees are properly being used to fund the administration of justice. To guarantee that user fees are not used for impermissible purposes, this Court should enforce its bright line rule of precluding the diversion of court user fees to the general revenue fund.

In addition to affirming the order on appeal, this Court should urge the Florida Legislature to revisit its efforts to adequately fund Florida's judicial branch. The Florida Constitution, as revised by voters in 1998, envisions a funding system where both court users fees and state general revenue are utilized to fund the state judicial branch. By commingling the two, the Legislature has undermined this funding mandate. This Court should also remind the Legislature of the "Seven Principles for Stabilizing Court Funding," which provide substantial guidance on these issues.

ARGUMENT

I. THE CHALLENGED STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY CONVERT OTHERWISE PERMISSIBLE USER FEES INTO UNCONSTITUTIONAL TAXES ON THOSE SEEKING ACCESS TO THE COURTS.

The question before this Court is whether legislation is unconstitutional when it diverts a portion of court user fees to the state's general revenue fund. Based upon this Court's clear precedent, the answer to that question is "yes."

Article I, section 21 of the Florida Constitution guarantees that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Statutes that tax citizens for exercising this fundamental constitutional right are unconstitutional. *See Flood v. State ex. rel. Homeland Co.*, 117 So. 385, 387 (Fla. 1928) (a tax "on those who must bring their causes into court" is "clearly repugnant" to the right of access to the courts), *receded from on other grounds, Farabee v. Bd. of Trustees, Lee County Law Library*, 254 So. 2d 1, 5 (Fla. 1971).

Although "the state can directly assess fees and costs for access to the court system," it can do so "*only when such fees and costs are directly related to the administration of justice.*" *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 303 (Fla. 1987) (emphasis added). Accordingly, "any such fees collected *cannot be used for general revenue purposes.*" *Id.* (emphasis added) (citing *Farabee*, 254 So. 2d at 5).

The Challenged Statutes do exactly what this Court has held is prohibited; they divert a portion of court user fees to the general revenue fund so that the fees can be used for “general revenue purposes.” The Challenged Statutes therefore convert a portion of otherwise permissible court user fees into unconstitutional taxes.

Unlike taxes, user fees are “charged in exchange for a particular governmental service which *benefits the party paying the fee in a manner not shared by other members of society.*” *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994) (emphasis added); *see also Farabee*, 254 So. 2d at 5 (upholding statute requiring a portion of court filing fees be paid to a law library because the law library is “essential to the administration of justice”). The Challenged Statutes do not in any way mandate that the diverted funds be used for purposes that are not shared by other members of society or that are directly related to the administration of justice. Instead, the Challenged Statutes unconstitutionally obligate the clerks of the courts to pay a portion of the court user fees to the general revenue fund so that those fees can be used for general revenue purposes. The Challenged Statutes therefore fail because they do not ensure that the court user fees are being used for permissible purposes—i.e., for purposes directly related to the administration of justice. This conclusion is consistent not only with this Court’s precedent, but also with the numerous decisions from other jurisdictions discussed at length by

Appellees. *See, e.g., Lecroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986) (“We hold that filing fees that go to state general revenues—in other words taxes on the right to litigate that pay for other programs besides the judiciary—are unreasonable impositions on the state constitutional right of access to the courts.”); *Crocker v. Finley*, 459 N.E.2d 1346, 1351 (Ill. 1984) (“If the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general revenue through charges assessed to those who would utilize our courts.”).

Appellants argue that the Challenged Statutes should be upheld because the Legislature *might choose* to appropriate back to the judicial branch as general revenue some of the diverted fees. But this Court has specifically stated that court user fees “cannot be used for general revenue purposes.” *In re Advisory Opinion to the Governor*, 509 So. 2d at 303. As is discussed in Part II of this brief, user fees and general revenue are two constitutionally distinct forms of funding that cannot lawfully be commingled.

Moreover, the issue of whether a particular class of citizens is being improperly taxed should not be left to a futile investigation of how fees diverted to the general revenue fund are ultimately used. As Appellants make clear in their briefs, money is fungible. Once court user fees are diverted to the general revenue fund, it is impossible to conclusively determine whether those diverted fees are being used for court-related programs. Determining the appropriate expenditure of

the user fees becomes a theoretical exercise in “tracking” unidentifiable funds through a budgetary maze. Neither the Florida Constitution nor this Court’s precedent approves such an exercise.

This Court should affirm the decision below under its bright line rule that court user fees cannot be used for general revenue purposes, regardless of whether those general revenue purposes may somehow ultimately involve the courts and their administration. This bright line rule guarantees that Florida’s citizens are not being unlawfully taxed for exercising their fundamental constitutional right to access the courts.

II. THE FLORIDA CONSTITUTION RECOGNIZES THAT USER FEES AND GENERAL REVENUE ARE VITAL, YET DISTINCT FUNDING SOURCES FOR FLORIDA’S JUDICIAL BRANCH.

This Court’s bright line rule that court user fees cannot be used for general revenue purposes is entirely consistent with, if not mandated by, the Florida Constitution’s express provisions regarding judicial funding. As a result of Revision 7, the Florida Constitution expressly contemplates that the judicial branch has two distinct funding sources: (1) user fees, and (2) general revenue. *See* Art. V, § 14, Fla. Const.

Court user fees are the primary funding source for the offices of the clerks of the circuit and county courts performing court-related functions. The Florida Constitution expressly states that “[a]ll funding for the offices of the clerks of the

circuit and county courts performing court-related functions . . . *shall be provided by adequate and appropriate filing fees* for judicial proceedings and service charges and costs for performing court-related functions as required by general law.” Art. V, § 14(b), Fla. Const. (emphasis added). The Legislature is therefore obligated to establish sufficient user fees to fund the court-related functions of the clerks’ offices. If the Legislature is not constitutionally able to impose sufficient user fees to fund such functions, it must then provide “adequate and appropriate supplemental funding from state revenues appropriated by general law.” *Id.* Thus, for purposes of funding the court-related functions of the clerks’ offices, the filing fees are to serve as the primary funding source with general revenue providing any necessary supplemental funding.

The Florida Constitution prescribes a different funding scheme for the state court system. The Legislature is obligated to fund the state court system using general revenue. Article V, section 14(a)-(b) of the Florida Constitution mandates that “[f]unding for the state court system . . . *shall be provided from state revenues appropriated by general law.*” (Emphasis added.) Although the Legislature *may* fund “selected salaries, costs, and expenses of the state courts system” through court user fees, *id.* § 14(b), the primary design of the funding scheme for the state court system is for the Legislature to fund the state court system through general revenue.

Despite these constitutional mandates, the Legislature has commingled and confused the two funding sources. For example, the Legislature has attempted to fund the state court system using user fees, including those diverted into the general revenue fund. As Judge Altenbernd stated in his specially concurring opinion in *Burke v. Esposito*, 972 So. 2d 1024 (Fla. 2d DCA 2008):

Revision 7 as enacted by the electorate amended article V, section 14(a) and (b) of the Florida Constitution to require that “[f]unding for the state courts system . . . shall be provided from state revenues appropriated by general law.” The legislative implementation of the constitutional amendment appears to require quite the opposite—that funding for the state shall be provided from revenues generated by the court system.

Id. at 1028 n.5 (Altenbernd, J., concurring specially) (alteration and omission in original).

By devising a system that relies equally on both user fees and general revenue, the Florida Constitution expressly recognizes the concern of having a funding system that is overly reliant on court user fees. Imposing exorbitant user fees on litigants could result in a chilling effect on Florida citizens’ right of access to the court system. Moreover, most court system “users” cannot, constitutionally or otherwise, be expected to pay special fees for that system. Dependent children, juvenile defendants, indigent litigants, criminal defendants, habeas corpus petitioners, and innumerable other court system “users” cannot and should not, under our system of justice, be expected to pay “user fees.”

While user fees are indispensable to the operation of the court system, our constitutional framers, and indeed, the voters who in their wisdom approved Revision 7, never envisioned that user fees could or should be expected to bear *all* of the court system's costs. They instead envisioned a two-tiered scheme whereby basic clerical and some court expenses are covered by user fees, and the balance provided for by general revenue. The funding mechanism thus recognizes, and enshrines in the Florida Constitution, an additional fundamental truth: the court system benefits not just those who access it to resolve their disputes, but also our society in general, our economy, our commercial relations, and Florida's basic capacity to "secure the blessings of liberty to ourselves and our prosperity." U.S. Const. preamble.

The mere existence of the court system is vital to every facet of our society. The court system's availability to enforce contracts, mediate disputes, collect debts, entitle property, secure interests, and probate estates is vital to the development and sustenance of commerce and Florida's economy. Its facilitation of the enforcement of criminal law, and role in securing the public's safety, is likewise critical not only to tourism and commerce, but to the basic fabric of society and maintenance of the peace. Its availability to adjudicate domestic, family, and related disputes is the thread that holds together our social fabric. In all of these areas and more, the mere existence of the court system, leaving

altogether aside its actual use, is critical to the promotion of Florida's interests at every level.

It is for these obvious reasons that the Florida Constitution attributed unique purposes to court user fees and general revenue. The court user fees and the general appropriations are separate, yet equally vital funding sources for Florida's judicial branch. And while Appellants dispute whether they have a constitutional obligation to "adequately" fund the court system, it is beyond question that for our system of government to succeed, all branches must be adequately funded. While we recognize that Florida is currently facing unprecedented budgetary challenges, the judicial branch—as one of the three essential branches of our government—must be given adequate funding.

The mission of the Florida judicial branch is to "protect rights and liberties, uphold and interpret the law, and provide for the peaceful resolution of disputes." The failure to adequately fund the judicial branch, and particularly the state court system, undermines this mission, which negatively impacts the lives of every citizen, resident, and visitor. As this Court recently made clear:

Florida's court system remains under duress. The state and national recession of the last two years and the resulting budget reductions for the courts are taking a sustained toll on Florida's judges, court staff, and most importantly those who are accessing our courts. Case filings are up and clearance rates are down. Judicial dockets are full, scheduling is problematic, and case processing times are delayed.

See In re Certification of Need for Additional Judges, 29 So. 3d 1110, 1117 (Fla. 2010).

Despite these concerns, and as evidenced by the issue currently before this Court, the Legislature has yet to implement an appropriate and constitutional funding structure for Florida's judicial branch. Therefore, in addition to declaring the Challenged Statutes unconstitutional, this Court should urge the Legislature to specifically consider the "Seven Principles for Stabilizing Court Funding," a copy of which is attached. *See also* Florida State Courts, *Funding Justice*, http://www.flcourts.org/gen_public/funding/index.shtml (last visited on Sept. 1, 2010). One of those specific principles—Principle Two—specifically addresses the user fee issue presently before this Court. Principle Two states:

Court fees assessed and paid by Florida's citizens to access their court system should be dedicated to the court system, as already provided for by state law.

Section 28.37(1), Florida Statutes, states: "Pursuant to s. 14(b), Art. V of the State Constitution, selected salaries, costs, and expenses of the state courts system shall be funded from a portion of the revenues derived from statutory fines, fees, service charges, and costs collected by the clerks of court." In reality, only a small portion of filing fee revenue is dedicated to the courts to support mediation and judicial education programs. The rest of the revenues – from fees, fines, and costs that are not being held by the clerks to fund their offices – is going into Florida's general revenue fund to fund the general purposes of Florida government.

In Florida's system of government, user fees are commonly dedicated back to those functions of government being used by a citizen paying the fee. It is an easily understood, widely accepted, common sense

concept. But the filing fees that court users are paying are not being allocated to the courts. As a consequence of the budget reductions that have occurred, citizens are beginning to experience unreasonable delays in having their cases addressed. A vivid example of this phenomenon is the mortgage foreclosure crisis. Filings have increased from FY 2005-06 to FY 2007-08 by 396%. Clearance rates have dropped to 41%. The fee revenue generated by those additional foreclosure filings could be used by the courts to expand their capacity to process cases more quickly. But that is not happening because the revenue is going to the clerks of court and to the State's general revenue fund. In short, people continue to pay filing fees for timely justice, but the justice they are receiving is being delayed.

As evidenced by the Challenged Statutes, the Legislature has not yet taken the appropriate action to address the concerns raised in the Seven Principles. For the benefit of all Florida Citizens, the Legislature should be reminded.

CONCLUSION

This Court should affirm the trial court's order declaring the Challenged Statutes unconstitutional. This Court should also urge the Legislature to revisit its efforts to adequately fund the judicial branch through both appropriate court user fees and through general revenue, so that such efforts are consistent with the Florida Constitution and the Seven Principles for Stabilizing Court Funding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief of Amicus Curiae is written in Times New Roman 14 point, which complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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I HEREBY CERTIFY that on September 1, 2010, a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to the following:

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