IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-1317
Lower Tribunal No(s).: 1D10-2972,
2009-CA-001386

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

CASE NO.: SC10-1319
Lower Tribunal No(s).: 1D10-2978,
2009-CA-001386

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

Appellant(s)/Petitioner(s) Appellee(s)/Respondent(s)

THE TRIAL LAWYERS SECTION OF THE FLORIDA BAR'S AMENDED BRIEF IN FAVOR OF APPELLEES/RESPONDENTS AS AMICUS CURIAE

Clifford C. Higby, Esquire
Chair of the Trial Lawyers Section
Florida Bar No.: 0793809
BRYANT & HIGBY, CHARTERED
Post Office Box 860
Panama City, Florida 32402
Telephone: 850-763-1787
Telefax: 850-785-1533
E-Mail: chigby@aol.com

Kimberly A. Ashby, Esq.
Florida Bar Number: 322881
AKERMAN SENTERFITT
Post Office Box 231
CNL Tower II, Suite 1200
420 South Orange Avenue
Orlando, FL 32802-0231
Telephone: 407-423-4000
Telefax: 407-843-6610
E-Mail:kashby@akerman.com
Special Counsel for The Trial Lawyers Section of The Florida Bar

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INTRODUCTORY STATEMENT REGARDING AMICUS CURIAE

The Trial Lawyers Section of The Florida Bar wishes to express its gratitude for the Court's allowance of its appearance as amicus curiae in this case. The Trial Lawyers Section consists of both plaintiff and defense attorneys, commercial litigators, and board certified trial attorneys, with approximately 6000 members. The Trial Lawyers Section supports three basic tenets, year after year, each of which is fundamental to the membership as well as to all litigants who have causes which accrue in Florida. These three positions are: 1) supporting legislation which promotes access to the courts and to defend against unconstitutional impediments to such access; 2) support of an independent judiciary, and 3) support of adequate funding for the state courts' system.

The Trial Lawyers Section adopts fully the Statement of the Case and Facts, as well as the Standard of Review, provided in Appellees' Brief.

This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on September 2, 2010 consistent with applicable standing board policies. It is tendered solely by the Trial Lawyers Section and supported by the separate resources of this voluntary organization – not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

SUMMARY OF ARGUMENT

The Court should affirm the findings of the trial court and rule that the filing fee statutes at issue are facially unconstitutional. There was no factual dispute that the filing fees generated by the statutes are placed into the State General Revenue fund. "Fees" collected for a particular public service cannot be deposited into the General Revenue fund without them being deemed an illegal tax and an impermissible and unconstitutional denial of free access to the courts. This has been the law in Florida for nearly a century, and there are no compelling reasons to change the law in this area.

ARGUMENT

I.. THE CONSTITUTIONALITY OF THE FILING FEE STATUTES IS PURELY A LEGAL ISSUE PROPERLY DISPOSED OF BY SUMMARY JUDGMENT

Summary judgment was properly granted and the trial court correctly held the statutes diverting court "filing fees" are unconstitutional. As Appellees argue in their brief, there are several reasons why the statutes at issue are unconstitutional. The "fees" provided for in the statutes are really taxes in light of the fact they are delivered to the General Revenue fund. Because the "fees" are really "taxes" negates any argument by Appellants that the issue is moot or cured because the "fees" are put back into the court system. Even if this were not true, Appellants cannot represent or assure this Court that the legislature's return of the

"fees" into the operation of the court system will always occur going forward. If they could make such a representation, it would be fair to question why there would be cycling of the fees through the General Revenue account only to always return back to the court system from whence they came.

Although Appellants argue that there are factual issues which should have precluded summary judgment, there is no dispute in the record that a material portion of the "fees" are deposited into the General Revenue funds of the State, and it is left to the discretion of the state legislature as to what portion of those funds will be returned to fund the operation of the court system. These facts are the fundament of the case and controversy and are sufficient for the Court to determine the statutes to be facially unconstitutional, as applied. For these reasons, summary judgment was appropriate and the trial court properly ruled as a matter of law. *See Zingale v. Powell*, 885 So. 2d 277, 280 (Fla. 2004).

II. THE STATUTES EARMARKING FILING FEES FOR DEPOSIT INTO THE GENERAL REVENUE FUND ARE UNCONSTITUTIONAL ON THEIR FACE

Access to the courts is such an innate principle to the establishment of government that it may be traced back to the Magna Carta. *See Flood v. State ex rel. Homeland Co.,* 95 Fla. 1003, 1009 117 So. 385, 387 (1928). Reference to the basic grant of this access has been a part of the Florida Constitution for centuries. *See Fla. Const., Art. I, §21.* When that fundamental right is threatened or

challenged, it is incumbent upon the Court, and groups such as The Trial Lawyers Section, to squarely confront the issue and seek the eradication of unconstitutional impediments to this right.

Florida law has stood for the undiluted maintenance of the right of access in those instances where there has been a legislative intrusion. The two cases most applicable and aligned with the present case both have logical application to the constitutional questions which were posed then and remain the same today. *See Flood v. State ex rel. Homeland Co.*, 95 Fla. 1003, 117 So. 385 (1928); *Farrabee v. Board of Trustees*, 254 So. 2d 1 (Fla. 1971). As Appellees also note, the *Flood* and *Farrabee* decisions have been cited with unreserved approval by other state supreme courts, throughout the country. *See LeCroy v. Hanlon*, 713 S.W. 2d 335 (Tex. 1986); *Fent v. State of Oklahoma ex.rel. Department of Human Services*, 2010 WL 165086 (Okla. 2010); *Crocker v. Finley*, 99 Ill. 2d 444, 459 N.E. 2d 1346 (Ill. 1984); *Safety Net For Abused Persons v. Honorable Robert Secura and Honorable Kathryn Boudreaux*, 692 So. 2d 1038 (La. 1997); *see also G.B.B. Investments, Inc. v. Hinterkoph*, 343 So. 2d 899 (Fla. 3d DCA 1977).

Beginning in *Flood*, the Court defined and analyzed the distinction between a "fee" and a "tax". The "fee" in question was a "docket fee" imposed by jurisdictions where there was a single county comprising the entire circuit. When the suit amount in controversy exceeded $500, a $10 docket fee was charged to the

litigant, which was later turned over to the board of county commissioners for the express purpose of establishing and maintaining a public law library. As defined by the Court in *Flood*, a fee is an assessment levied once for a particular government service and a tax is levied for a general public purpose. Notwithstanding the fact that the docket "fees" were earmarked for the expenses of a "particular" service", i.e. a public law library, the Court rejected the argument that the docket fee was actually a 'fee" as legally defined because "[n]o part of the so-called fee is appropriated for the payment of any services rendered by the clerk rendering the service in this case." *Id.* at 1008. Thus, the docket fee was really an illegal tax on those who must bring their causes into court.

Petitioners claim there is a legal distinction in *Flood* because the money was being diverted to the county General Revenue and not to the State. This does not explain how it would change the analysis of fee versus tax, however. If the fee is really a tax for general public purposes, as the Court described in *Flood,* it would not matter if the general public purpose was being carried out by the county or the state. In either event, the charge labeled "fee" was not going for the payment of the special service being rendered by the clerk.

The second opinion of this Court which supports the Appellees' position is *Farrabee v. Board of Trustees*, 254 So. 2d 1 (Fla. 1971). The Court considered the constitutionality of an "excess fee" of $3 which was to be assessed by the clerk of

the court in Lee County as part of the filing fee. The excess fee was originally designed to pay the County's expenses for maintaining the County law library. In prior years, the Clerk had turned over the excess fee to the County for this purpose. When the excess fee was increased, and it was demonstrated that the fees generated were greater than the actual expenses of the library and the balance of the fees were going into the County's General Revenue funds. The Clerk then ceased paying the fees to the County and challenged the legality of the "fee" as an illegal tax.

The Court in *Farrabee* ruled again that the description of the "fee" was a misnomer because the placement of the balance of the "excess fee" into General Revenues made those funds available for the building of roads, schools, and other non-court public works and operations. *Id.* at 5. The Court noted in particular that the excess fee was otherwise acceptable if used to operate a public law library, given the increasing complexities of the law and the need for available resources to litigants. *Id*. at 5. In this way, the excess fee, as originally created was a direct service for the litigant and therefore could be properly characterized as a fee if used exclusively for that purpose. Once any part of the excess fee was paid over into General Revenues it ceased being a legally sustainable fee and instead became an unconstitutional tax.

Flood and *Farrabee* have stood the test of time for valid reason. The fundamental right of access to the courts has never changed. Neither has there been any modification to the analysis of fees versus taxes to inspire a need to revisit these opinions. Indeed, if the Court were to reduce the impact of these holdings, the specter of all manner of General Revenue "fees" would be in play, and harkens back to the history behind poll taxes and other ill-conceived and unconstitutional levies.

Petitioners place great reliance on *Fox v. Hunt,* 619 So. 2d 1364 (Ala. 1993). In *Fox*, a separate fee was charged to a party who requested a jury trial. Although it is questionable whether this fee would pass constitutional muster in Florida, the case is otherwise distinguishable in any event. In *Fox*, the Supreme Court of Alabama noted that the "fee" charged totaled $50 which did not even cover the per diem reimbursements and mileage paid to the jurors for their service. *Id.* at 1367. In *Fox*, the court did not distinguish between a tax and a fee. Instead, the Alabama Supreme Court noted that the imposition of a small tax or fee as part litigation costs had been "recognized immemorially" in Alabama law. *Id. at 1365 (*citing *Swann & Billups v. Kidd,* 79 Ala. 431 (1885). Further, and most disturbingly, the court in *Fox* did not address the question of whether the statute would pass constitutional muster if the legislature did not return to the court system a number

equal to or exceeding the amount of the "jury trial fees" deposited into the General Revenue.

Petitioners cannot distinguish the same conclusions regarding the lack of constitutionality determined to exist in other states. For example, in *LeCroy v. Hanlon*, 713 S.W. 2d 335 (Tex. 1986), the Supreme Court of Texas highlighted the importance and urgency for the state supreme courts to champion the special individual rights which are inherent in state constitutions. *Id.* at 339. *(*"Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans.") As the Texas court noted, state constitutions were, in many ways, the original guarantors of individual rights. *Id* at 338, n. 3. The Texas Constitution has an "open courts provision" similar to the Florida Constitution. *See Tex. Const. Art. I, §13.* Relying on *Farrabee*, the Texas Supreme Court held filing fees that go to the state General Revenues are unreasonable impositions on the state constitutional right of access to the courts, regardless of the size of the fee. *Id.* at 342.

Despite Appellants' contentions to the contrary, the unconstitutional character of the statutes may not be redeemed or remedied by putting the money back where it belongs. The nature of the violation of the constitutional rights guaranteed by the Florida Constitution is not rectified by year to year legislative efforts to refund to the courts what should have never been taken in the first place.

The vast majority of the state courts which have ruled on this issue have decided that once the filing fees are directed to the General Revenues the individual litigant is aggrieved, and there can be no rational basis for the removal of the funds even if they are designated to be replaced later.

Similarly, the Supreme Court of Illinois held unconstitutional a state statute which imposed a separate charge for litigants in dissolution of marriage proceedings, which funds were delivered to the General Revenues of the state. *Crocker v. Finley*, 99 Ill. 2d 444, 459 N.E. 2d 1346, 77 Ill. Dec. 97 (Ill. 1984). The Illinois Constitution has a similar provision that guarantees the right to obtain justice freely. *See Ill. Const. Art. I, §12.* The court recognized it was not inherently offensive to charge some fee to litigants who avail themselves of the court system. 459 N.E. 2d at 1350. It was a completely different matter when those fees were poured into the General Revenues. *Id.* The court concluded that court filing fees could only be used for purposes relating to the operation and maintenance of the courts. *Id.* at 1350-51.

As recently as January, 2010, the Supreme Court of Oklahoma reached the same conclusion in *Fent v. State,* 2010 WL 165086 (Okla. 2010) (Okla. Case No. 107116, January 19, 2010). In *Fent,* the petitioner challenged as an illegal tax on litigants the collection of money by the court clerks for the use of the Department of Human Services and the Attorney General. The court recited nearly identical

historical bases for the right of access to the courts as is present in Florida, dating back to its original statehood. The *Fent* opinion also chronicles the majority of opinions in this area which support the conclusion that these types of filing fees delivered to the General Revenues for all types of public purposes are facially unconstitutional. *Id. (citing inter alia Crocker;La Marche v. McCarthy* 965 A. 2d 992 (N.H. 2008); *Cook v. Municipal Court of Pine Bluff,* 699 S.W. 2d 1985 (Ark. 1985)).

For all of the reasons expressed herein, and including those arguments contained in Appellees' Brief, the Court should affirm the findings of the trial court and rule that the filing fee statutes at issue are facially unconstitutional.

III. THE STATUTES ARE UNCONSTITUTIONAL AS APPLIED BECAUSE THEY IMPERMISSIBLY SHIFT THE FEES ACCEPTED FOR USE IN THE COURT SYSTEM AND SEND THOSE FUNDS TO GENERAL REVENUE FOR USE IN NON-COURT RELATED ACTIVITIES

Appellants argue that the constitutional violations are "cured" by subsequent efforts by the Legislature to reappropriate the earmarked filing fees back into the state court system, citing *Fox v. Hunt*, 619 So. 2d 1364 (Ala. 1993). In addition to the arguments made in Point II, it is essential to note Alabama does not utilize the dual strict scrutiny/rational basis tests for testing statutes alleged to impair fundamental constitutional rights of access to courts as set forth in Florida. *See Mitchell v. Moore*, 786 So. 2d 521 (Fla. 2001).

Since the subject statutes impinge on the fundamental right of access to the courts, the burden of proof is on the state, not the Appellees, to prove that the statutes are constitutional. *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 626 (Fla. 2003). Appellants cannot show the legislature has, and will always, reappropriate the diverted filing fees back into the state court system in the future.

The Trial Lawyers do not address the separate issue of whether the Order Granting Summary Judgment went too far in finding that the subject statutes violate the fundamental constitutional court-funding requirements contained in *Article V, §14 of the Florida Constitution*. As Appellees accurately point out, the Court need not reach this issue if it finds, as it should, that the statutes create an unconstitutional impediment to access to the courts in Florida.

CONCLUSION

The Order Granting Summary Judgment should be affirmed in all respects. The Court should determine sections 28.241(2), 34.041(d), 28.241(1)(a) and 28.241(1)(a)(2)(d), Florida Statutes, are unconstitutional, invalid and void.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all counsel listed below via E-Mail, Telefax and U. S. Mail, this 3rd day of September, 2010 to the following:

Davisson F. Dunlap, Jr., Esquire
Dunlap & Shipman, P.A.
2065 Thomasville Road, Suite 102
Tallahassee, FL 32308-0733
Telephone: (850) 385-5000
Telefax: (850) 385-7636
dave@dunlapshipman.com
Attorneys for Appellees

Dexter Douglass, Esquire
Douglass Law, LLC
Post Office Box 1674
Tallahassee, FL 32302
Telephone: (850) 224-6191
Telefax: (850) 224-3644
ddouglass@douglass-law.com
Attorneys for Appellees

Michael T. Callahan, Esquire
Callahan & Martinez, LLC
2935-1st Avenue North, Second Floor
St. Petersburg, FL 33713
Telephone: (727) 894-3535
Telefax: (727) 502-9621
mick@callahanmartinez.com
Attorney for Appellees

Sidney L. Matthew, Esquire
Sidney L. Matthew, P.A.
Post Office Box 1754
Tallahassee, FL 32302
Telephone: (850) 224-7887
Telefax: (850) 681-3122
sidmatthew@earthlink.net
Attorneys for Appellees

Charles H. Baumberger, Esquire
Rossman, Baumberger, Spier & Connolly, P.A.
44 West Flagler Street, 23rd Floor
Miami, FL 33130
Telephone: (305) 373-0708
Telefax: (305) 577-4370
baumberger@rbrlaw.com
Attorney for Appellees

John Edwin Fisher, Esquire
Fisher, Rushmer, Werrenrath, Dickson, Talley & Dunlap, P.A.
20 North Orange Avenue, Suite 1500
P. O. Box 712
Orlando, FL 32802-0712
Telephone: (407) 843-2111
Telefax: (407) 422-1080
jfisher@fisherlawfirm.com
Attorney for Appellees

Joseph P. Milton, Esquire
Milton, Leach, Whitman, et al.
815 South Main Street, Suite 200
Jacksonville, FL 32207-9056
Telephone: (904) 346-3800
Telefax: (904) 346-3692
jmilton@miltonleach.com
Attorney for Appellees

Scott D. Makar, Esquire
Courtney Brewer, Esquire
400 South Monroe Street, #PL-01
Tallahassee, FL 32399-6536
Telephone: (850) 414-3300
Telefax: (850) 414-9650
Jon.glogau@myfloridalegal.com
Attorney for Petitioners, Florida Legislature and Justice Administrative Commission

Bill McCollum, Esquire
Jonathan A. Glogau, Esquire
Richard T. Donelan, Jr., Esquire
Kate M. Dingolt, Esquire
Constitutional Issues Section
Florida Depart. of Financial Services
200 East Gaines St., Suite 464
Tallahassee, FL 32399
Telephone: (850) 413-3010
Telefax: (850) 413-3029
Richard.donelan@fldfs.com
Attorney for Petitioner, Alex Sink, Chief Financial Officer

C. Howard Hunter, Esquire
Landis V. Curry, III, Esquire
Hill Ward Henderson, P.A.
101 East Kennedy Boulevard
Suite 3700
Tampa, FL 33602
Telephone: (813) 221-3900
Telefax: (813) 221-2900
hhunter@hwhlaw.com
lcurry@hwhlaw.com
Attorneys for FLABOTA as
Amicus Curiae

/s/Kimberly A. Ashby
Kimberly A. Ashby, Esq.
AKERMAN SENTERFITT
Post Office Box 231 (38202)
420 South Orange Avenue
Suite 1200
Orlando, FL 32801
Telephone: (407) 423-4000
Telefax: (407) 843-6610
E-Mail: kashby@akerman.com
Special Counsel for The Trial
Lawyers Section of The Florida Bar

and

Clifford C. Higby, Esquire
Chair of the Trial Lawyers Section
Florida Bar No.: 0793809
BRYANT & HIGBY, CHARTERED
Post Office Box 860
Panama City, Florida 32402
Telephone: 850- 763-1787
Telefax: 850-785-1533
E-Mail: chigby@aol.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that The Trial Lawyers Section Of The Florida Bar's Brief In Favor Of Appellees/Respondents As Amicus Curiae Brief, complies with the requirements of Rule 9.210, Fla. R. App. P., and is printed in Times New Roman 14-point font.

/s/Kimberly A. Ashby
Kimberly A. Ashby, Esq.
Florida Bar No.: 0322881