IN THE SUPREME COURT OF FLORIDA

ALEX SINK,
CHIEF FINANCIAL OFFICER, ETC.

Petitioners,

vs.

CASE NO: SC10-1319/ SC10-1317

1st DCA Case No.: 1D10-2978/1D10-2972

Lower Tribunal No.: 2009-CA-001386

ROBERT M. ERVIN, ET AL.

Respondents.

_________________________________/

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ARGUMENT 1.

THE TRIAL COURT ERRED BY IGNORING DISPOSITIVE ISSUES OF MATERIAL FACT THAT PRECLUDED THE ENTRY OF SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS BELOW.

In order to assert that the lower tribunal did not err in granting summary judgment notwithstanding the existence of substantial issues of material fact, the Answer Brief conflates the standard of proof for a facial constitutional challenge with the standard of proof for a summary judgment. See Answer Brief, at pp. 18-21. The Plaintiffs erroneously contend that the facts are "irrelevant," and the existing factual dispute as to the actual use of General Revenue Fund proceeds is "not pertinent," going on to state:

> The reason for this is clear. Since the mere deposit of funds into the General Revenue Fund constitutes an illegal tax, the Legislature cannot "cure" this invasion of rights by subsequent proof that all of these illegal taxes are ultimately appropriated at the end of the year back into the state court system to pay for the essential costs of the administration of justice.

Answer Brief, at p. 19.

This claim is simply wrong. Plaintiffs have the jurisprudential cart before the factual horse. Both in Farabee v. Board of Trustees, Lee County Law Library, 254 So. 2d 1 (Fla. 1974) and In re: Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987), this Court recognized that the lawfulness of a filing fee is necessarily a fact-dependent question. Whether a filing fee is permissible depends on whether its proceeds are used to pay for the "costs of the administration of

justice today." *See* Farabee, supra, at p.   This Court underscored the functional nature of the test in its advisory opinion to then-Governor Martinez on the constitutionality of his proposed services tax that was to include a tax on legal services:

> Nor should the instant tax in any way constitute a "sale of justice". Art I, §21, Fla. Const. Clearly, the state can directly assess fees and costs for access to the court system only when such fees and costs are directly related to the administration of justice. Any such fees collected cannot be *used* for general revenue purposes. Farabee v. Board of Trustees, Lee County Law Library, 254 So, 2d 1 (Fla. 1974).
> The instant act, however, does not impose a direct charge for the privilege of utilizing the courts. (emphasis added).

In re: Advisory Opinion, *supra*, at 303. The "mere deposit" of filing fee proceeds into the General Revenue Fund cannot be equated with the actual use of monies so deposited "for general revenue purposes." The signal legal error of the order on review, the Answer Brief, and FLABOTA's amicus brief is the same. Each incorrectly claims that where in the State Treasury funds are deposited for the CFO's accounting purposes is the exclusive determinant of what purposes the monies will be used for, irrespective of any subsequent legislative appropriation.

It is undeniable that, for FY2009-2010, no less than $765 million in General Revenue Fund dollars was appropriated by the Florida Legislature to directly support the administration of justice in Florida, including, inter alia, judicial salaries; state attorneys and public defenders; guardians *ad litem*, and judicial nominating commissions. See Ch. 2009-81, Laws of Fla. Yet both the lower

tribunal and the Plaintiffs would have this Court declare "irrelevant" and "not pertinent" over three-quarters of a billion dollars in actual expenditures which were manifestly used to support the administration of justice merely because some of the funds in question may have been collected at county courthouses before being deposited into the General Revenue Fund for accounting purposes.

It was plain error for the lower tribunal to have precluded a factual demonstration that filing fee proceeds were not "used for general revenue purposes" before purporting to grant summary judgment in favor of the Plaintiffs. The error is based solely on an unfounded and irrebuttable presumption that the "mere deposit" of filing fee proceeds into the General Revenue Fund signified that the monies would *only* be spent for impermissible "general revenue purposes." It was plain error for the lower tribunal to have decided to disregard that the State of Florida—in fact—spends far more from its general revenues on the administration of justice than "it receives from the clerk."

The defendants below were entitled to be able to defend the challenged statutes with testimonial and documentary evidence to rebut these plain errors. Under settled Florida law, because the defenders of the impugned statutory provisions were denied the opportunity to prove as a matter of fact that the challenged filing fee proceeds were not "used for general revenue purposes," the summary judgment entered below departed form the essential requirements of law.

CFO Sink, responsible under the Florida Constitution to account for and invest the contents of the State Treasury, urges this Court to bear in mind that this entire dispute is over bookkeeping entries. In the computer driven financial world of the 21st century, there is no vault dedicated to hold "the General Revenue Fund." No citizen of the state could inspect the Clerks of the Court Trust Fund—or any other State Treasury fund. All of the "funds" by which state revenues are accounted for by the CFO are merely accounting devices, comprised entirely of electronic entries organized to keep track of credits and debits against fund balances. In accordance with the requirements of Section 17.57, Florida Statutes, all cash not needed to pay immediate expenditures is commingled and invested at the direction of the CFO. In short, all of the "funds" of the State Treasury are virtual representations of the ebb and flow of state asset balances, not piles of cash "earmarked" (as the Answer Brief would have it) exclusively to be expended for specialized purposes.

Thus, contrary to the overwrought rhetoric of the Answer Brief, the deposit of filing fee proceeds into the General Revenue Fund does not involve any frantic "shuffling" of cash between separate "coffers." It is merely an electronic entry on a balance sheet reflecting a credit to the Fund. This credit entry in no way signifies that the cash represented by the credit must be spent for "general revenue purposes."

This Court's 1987 dictum that filing "fees collected cannot be used for general revenue purposes" is apparently definitive. Both the Answer Brief and the amicus briefs so assert, but it is not. Presumably, the Court intended to draw a bright line distinction between permissible uses of filing fee proceeds—expenditures "directly related to the administration of justice"—as opposed to impermissible uses—expenditures for "general revenue purposes." But the Court never made clear either what it considered to be expenditures "for administration of justice purposes" or expenditures "for general revenue purposes." No subsequent decision of this Court has ever illuminated the matter.

The indeterminacy of the distinction is underscored by the fact that the 1987 advisory opinion from which it is drawn long predated Revision 7 to Article V of the Florida Constitution. Article V, §14(a), as adopted, expressly requires that "Funding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c), shall be provided from state revenues appropriated by general law." This provision, on its face, makes state funding of the administration of justice a "general revenue purpose" that was not within the ken of the Court in 1987.

The brief of amicus FLABOTA holds forth at considerable length regarding the importance of general revenue funding for the judicial branch. CFO Sink wholeheartedly concurs that ample general revenues should be appropriated to

support the administration of justice. Yet FLABOTA also adopts the peculiar circumlocution that filing fee proceeds “cannot be used for general revenue purposes, regardless of whether those general revenue purposes may somehow ultimately involve the courts and their administration.” Contrary to FLABOTA, CFO Sink believes that, irrespective of the original source of the money, the expenditure of general revenue to support the administration of justice is a valid and constitutionally required use of state funds.

Seventy-five years ago, in State ex rel. Kurz v. Lee, 121 Fla.360, 163 So.859 (1935), the Court correctly rejected a form-over-substance approach to issues related to state spending. The Court stated: “[I]n dealing with finance and taxation measures passed by the Legislature, the courts are impelled to look to the substance of a legislative scheme in its practical operation and effect, rather than to the mere form in which it has been contrived and enacted.” CFO Sink urges the Court again to apply this prudential principle and reverse the order on review.

ARGUMENT II.

THE LOWER TRIBUNAL ERRED BY DECLARING THAT FLORIDA STATUTES REQUIRING THE DEPOSIT OF A PORTION OF CIVIL FILING FEES INTO THE GENERAL REVENUE FUND VIOLATE THE FLORIDA CONSTITUTION.

At page 14 of the Answer Brief, Plaintiffs concede that their right of access to the courts of Florida has not been denied or abridged merely because they had to pay the filing fees specified in the statutes challenged below: "Appellees do not contest the amount of the filing fees or their obligation to pay a reasonable filing fee as a condition of lodging their case in court." Plaintiffs never attempted to show—nor could they ever show-- that their resort to court at any level was hindered or obstructed by any actual "sale, denial or delay" in the administration of justice. No cause of action once possessed by the Plaintiffs has been abolished. *See* Kluger v. White, 281 So. 2d 1 (Fla. 1973). Neither Plaintiff, as the precondition to bringing these proceedings, was required to submit copies of all complaints or other initial pleadings he had filed within the last five years. *See* Mitchell v. Moore, 786 So. 2d 521 (Fla. 2001). No "significantly difficult procedural hurdle" for the Plaintiffs was erected by the enactment of the challenged filing fee statutes. *Id*., at 526. Filing fees have not been deemed to be per se violations of the right of access to courts. *See* Psychiatric Assoc. v. Siegel, 610 So.2d 1239 (Fla. 1996); T.A. Ent., Inc. v. Olarte, Inc., 931 So.2d 1016 (Fla. 4th DCA 2006).

The Answer Brief makes crystal clear that Plaintiffs' only quarrel with the challenged statutes is the manner in which the State of Florida accounts for civil filing fee proceeds once they are deposited into the State Treasury. The Answer Brief, at p. 30, asserts that the supposed "illegal taxing scheme is complete upon deposit of the funds into General Revenue," irrespective of the purpose for which the funds might actually be used. According to the Answer Brief, at p. 28, "Appellants repeated attempts to interject facts into this analysis is [sic] futile."

Yet the Plaintiffs insist that the Legislature's determination as to how filing fee proceeds should be accounted for in the State Treasury must be judged by the same "strict scrutiny" standard applied in cases where there has been an actual denial or abridgment of the right of access to court. They assert that CFO Sink and the other Petitioners in this Court "have mistaken their burden of proof. . ." and "failed to carry their burden of proof to introduce evidence" that the challenged accounting treatment is constitutional. Answer Brief, at p. 33. It must be observed, however, that it is difficult, if not impossible, for a party to carry a burden of proof without "interjecting facts." In short, the Plaintiffs offer an impossible standard by which this Court is supposed to judge whether the "mere deposit" of filing fee proceeds into the General Revenue Fund of the State Treasury is somehow facially repugnant to Article I, § 21 of the Florida Constitution.

In 2009, the proceeds of filing fees were expressly classified as state funds. See § 28.37(2), Fla. Stat.(2009). While, historically, filing fees were paid to and retained by the Clerk of Court as reimbursement for his or her court-related services, but that is no longer the case. Court-related services now are funded exclusively by a legislative appropriation, and all filing fee proceeds collected by the Clerks must be remitted to the State Treasury along with other court-related revenues. *Id.*

Court-related revenues, like all other state revenues, are required by law to be deposited into the State Treasury. See § 215.31, Fla. Stat. (2009). There is little question that the State has a compelling state interest in collecting state revenues. Consequently, if it is presumptively unconstitutional for state revenues derived from filing fees to be deposited into the General Revenue Fund for accounting purposes, the only "least restrictive" alternative would be for such revenues to be deposited into another State Treasury fund. This result demonstrates that application of a "strict scrutiny" in the circumstances at bar would be a pointless exercise. No meaningful protection of the right to court access flows from making a different bookkeeping entry as to a filing fee, especially when, as here, the person paying the fee has not actually been denied access to court in the first place.

ARGUMENT III.

THE LOWER TRIBUNAL DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY ORDERING THE CONTINUED COLLECTION OF A FEE IT DECLARED TO BE "UNCONSTITUITONAL AND VOID."

The Answer Brief seeks to excuse the order on review's failure to specify the consequences of its declaration that the challenged statutes are unconstitutional and void. The Answer Brief urges that the only effect of the "narrowly drawn" injunction entered by the lower tribunal is to allow Clerks of Court "to routinely assess and collect" the full amount of the statutory civil filing fees, including the first $80 thereof that is supposed to impinge on the right of access to courts, and "use them for the operation of the court clerks' offices." Answer Brief at 42. As for the CFO's suggestion that some litigants would seek refunds of previously paid "unconstitutional and void" fees, the Answer Brief brands it "sheer folly." *Id.*

The Answer Brief, however, ignores that a Clerk of Court's independent "use" of the additional "first $80" portions of filing fees would exceed his or her state-funded court-related budget, as fixed under the procedures of Section 28.36, Florida Statutes, and released to the Clerk on a quarterly basis by Florida Clerk of Court Operations Corporation. State funds "used" under the authority of the order on review would constitute a judicial appropriation of state revenues over and above the legislative appropriation received by the Clerk. This extra, unauthorized appropriation would also be inconsistent with applicable state spending laws that

have never been invalidated by any court and that were never challenged in proceedings below.

Under the budget regime established by Section 28.36, Florida Statutes, a Clerk is not authorized to "use" the court-related revenues he or she collects. All court-related fines, fees, service charges, and costs are considered state funds and must be remitted by the clerk to the Department of Revenue for deposit into the Clerks of the Court Trust Fund. *See* §§28.245, 28.37(2), Fla. Stat. (2009). In this context, allowing a Clerk unbridled, non-statutory discretion to "use" more than his or her appropriation means that state revenues will not be remitted for deposit in the State Treasury, in direct contravention of Section 215.31, Florida Statutes. Monies represented by the "first $80" proceeds but not deposited into the Treasury can neither be accounted for nor invested by the CFO, as required by law. See §§17.57(1); 17.61(1); 215.32(1) Fla. Stat. (2009) Nor would these monies be available for appropriation in the support of the administration of justice by the Legislature—unlike the current situation where such funds are deposited into the General Revenue Fund, and are so available.

A determination by this Court that these funds "belong" to the Clerk would represent a judicial fixing of appropriations of state funds in facial conflict with Article V, Section 14(d) of the Constitution—both an unnecessary constitutional crisis and an unwise diminution of the total funds available for investment on

behalf of the people of Florida by the CFO. Most importantly, this expedient would in no way compel the Legislature to appropriate additional funds for the underfunded judicial system. In any event, contrary to the blithe assurances of the Answer Brief, if this Court sustains a holding that the "mere deposit" into the General Revenue Fund of filing fee proceeds creates an "illegal tax," litigants--and their lawyers--will soon be demanding refunds of "exactions" previously taken by Clerks of Court under color of state law since 1977.

Since 2003, the State of Florida has been constitutionally required to expend vast sums of its decreasing general revenues in support of the administration of justice. In the order on review, the lower tribunal not only ignored this fact, but also even prohibited the CFO and the other defendants from making a factual record reflecting all the aspects of the administration of justice that are being paid for with state revenues deposited into the General Revenue Fund of the State Treasury.

Whatever validity might remain in its antique jurisprudential underpinnings, the order on review fails utterly to come to grips with today's funding needs under the requirements of Article V, §14 of the Florida Constitution. In the case at bar, where the Plaintiffs expressly deny that the *size* of their filing fee trammels their rights of access to court, no valid dictate of law or policy is answered by finding a constitutional violation based solely on the accounting treatment of filing fee

proceeds. The CFO submits that no constitutional bounds are transgressed if the proceeds of filing fees are deposited into the State's General Revenue Fund as long as a sum greater than or equal to the amount deposited is expended on the administration of justice.

CONCLUSION

Based on the foregoing, the order on review must be reversed.

Respectfully submitted,

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Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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