

Plaintiff then makes an unwarranted and illogical leap, and assumes that because there can be exceptions to the no refund rule, they apply to her. On P.14 of her brief she says:

That amount which is in excess of the administrative cost as described above is illegal and void and must be refunded.

(Plaintiff's Brief, P.14).

The first thing one notices about this bold statement is that there is no citation to any authority to support it. The second observation made by a reader who has read the cases cited by the City is that the Plaintiff's allegation is not only conclusory, it is flat wrong.

Let us begin by pointing out that a condition precedent for any refund is that the initial authority to levy the fee must be "wholly wanting" or the fee itself must be "wholly unauthorized."

Newcomb v. City of Davenport, 53 N.W. 232, 233 (Iowa 1892), quoting Dillon on Corporations,

§ 940, 4th Ed. The court there specifically said:

In this case the tax has been paid, but under protest. The plaintiff now assumes the burden of showing the necessary facts to justify a judgment for its return. To do so, she must show something more than a mere irregularity that might have defeated its collection. Mr. Dillon, in his work on Corporations, (4th Ed.) § 940, says: "Actions against a municipal corporation to recover back money upon the ground of the *illegality of the tax or assessment* are, upon principle and the weight of authority, maintainable when, and in general only when, * * * the following requisites exist: (1) The authority to levy the tax, or to levy it upon the property in question, must be *wholly wanting*, or the tax itself wholly unauthorized, in which case the assessment is not simply irregular, but absolutely void; * * * and (3) the payment by the plaintiff must have been made *upon compulsion*, as, for example, to prevent the immediate seizure of his goods, or the arrest of the person, *and not voluntarily*. Unless these conditions concur, *paying under protest* will not, without statutory aid, give a right of recovery." The italics are those of the author, and indicate something of the line between facts that render an assessment absolutely void and those that render it irregular.

(Italics original). Neither condition is present in this case.

The City has authority to levy the franchise fee. The Kragnes court said so in no uncertain terms.

We agree with the City that the implementation of home rule and the Home Rule for Cities Bill does authorize the City to charge a franchise fee.

Kragnes v. City of Des Moines, 714 N.W.2d 632, 639 (Iowa 2006). Obviously, the fee is not “wholly unauthorized.” Rather, it is completely and entirely authorized.

The next question, then, is whether the fee is “wholly wanting.” The Kragnes court answered that question as well. The Court said that clearly the City has some costs associated with managing the presence of utilities in the right of way. Therefore, the fee cannot be “wholly wanting.” The Court says:

Examining the record in the light most favorable to the City and drawing all legitimate inferences from the record, there is no question the grant of the franchises to the utility causes the city to incur some ongoing administrative expenses in the exercise of its police power. These expenses would include the reasonable costs of inspecting, supervising, and otherwise regulating the gas and electric utility franchises.

Kragnes, 714 N.W.2d at 643.

Therefore, *as a matter of law and as the law of this case*, at least some portion of the franchise fee is valid. “There is no question” says the Supreme Court, that the City has “ongoing administrative expenses.”

Because the Supreme Court recognizes, as a matter of law, that the City’s home rule powers allow the franchise fees and that costs supporting the franchise fee do exist, the fee cannot be and has never been “wholly unauthorized” or “wholly wanting,” and thus it is not subject to refund.

Plaintiffs unsupported protestations to the contrary are, therefore, easily disregarded and her first brief point is to no avail.

In addition, Plaintiff is legally mistaken in her belief that any fee in excess of costs is illegal and void in the sense that illegality equals refundability. The status of the law in Iowa is exactly opposite than that claimed in Plaintiff's conclusory allegation. If a government has authority to collect a fee and, in the process, collects more than it is due, the excess amount is not illegal or void. Jewett Realty Co. v. Bd. of Supervisors of Polk County, 33 N.W.2d 377, 379-80 (Iowa 1948). There the court said:

The demand may have been for more than could have been collected, but not for more than plaintiff might recognize his obligation to pay; and when he did voluntarily appear and pay, he did nothing more than discharge a just, although uncollectible, obligation.

Id., quoting from Kehe v. Blackhawk County, 101 N.W. 281, 282 (Iowa 1904). Thus, taxes or fees computed incorrectly are not illegal, "but merely excessive." Id. at 379. Put another way, they are "merely irregular rather than unlawful." Id. at 380.

In Ross v. City of Iowa City, 353 N.W.2d 887 (Iowa 1984) owners of commercial and industrial property sued in equity claiming that a certain tax was illegal. The claimed illegality arose, said the plaintiffs, because the city failed to comply with certain statutory authority. Id. at 888-89. The Court disagreed, saying:

It is well settled that the failure of taxing authorities to comply with statutory requirements is considered an "error" which makes their actions irregular, but not illegal.

Id. at 899, quoting Jewett Realty, 33 N.W.2d at 380.

Here, a utility customer sued in equity claiming franchise fees are illegal. The claimed

illegality arose, said the plaintiff, because the city failed to comply with certain statutory authority. (See Petition, ¶ 7). The same result must obtain – the excess fees are irregular, but they are not illegal. Id.

And, since they are merely irregular, as opposed to illegal, they are not subject to refund. With this proposition the Plaintiff agrees. (Plaintiff's Brief, P.13 wherein she cites to Newcomb for the proposition that a merely irregular tax or fee is not a void or illegal tax or fee).

As such, the City's motion for partial summary judgment should be granted.

BRIEF POINT II

PLAINTIFF'S DURESS ARGUMENT APPLIES, IF AT ALL, ONLY WHEN A "PUBLIC BODY" HAS THE POWER TO DISCONNECT THE UTILITY. THE RECORD IN THIS CASE SHOWS THAT ONLY MIDAMERICAN ENERGY IS INVOLVED IN THE DISCONNECT PROCESS. PLUS, EVEN IF PLAINTIFF'S DURESS ARGUMENT WERE APPLICABLE TO THE FACTS OF THIS CASE, IT WOULD STILL FAIL LEGALLY BECAUSE IT IS BASED UPON PURE SPECULATION – NOT A SINGLE MIDAMERICAN CUSTOMER HAS HAD A UTILITY DISCONNECTED, NOR HAS A SINGLE CUSTOMER EVEN BEEN THREATENED WITH A UTILITY DISCONNECT FOR FAILURE TO PAY THE FRANCHISE FEES AT ISSUE.

Plaintiff places all the weight of her second brief point upon what she calls the "controlling case" of Harbeck v. Sioux City, 202 N.W. 507 (Iowa 1925) (Plaintiff's Brief, P.16). It is a weight that the one-page-long, seldom-cited case cannot bear.

Plaintiff cites the following language from Harbeck on P.16 of her brief:

It is a rule which has often been applied that the payment of money into a public treasury, where the payer is under no other stress or menace than that of a personal action against him for the recovery of such amount; then the payment is voluntary rather than under duress. The appellee relies upon this line of cases.

It is also the rule that where a person or municipality exacts and receives more than is legally due from the payer, while such payer is under the menace of injurious interference with or seizure of his property or person, such payment will not be deemed voluntary. If the payer be menaced only with a personal action against him, he is thereby presented with a sufficient opportunity to test the legality of the demand against him. If he chooses to pay rather than to contest, his payment is deemed voluntary. On the other hand, where the public body has the power of summary procedure such as the power to seize the property or person, or to evict the payer, or to cut off his supply of water, or gas, or of electricity as the case may be, and thereby to effect immediate injury to the payer or to his business, the payer is deemed to stand not in equality with a municipality or other body which makes such demand. The yielding of the payer to a demand under such circumstances is deemed involuntary and a form of legal duress. For cases illustrative of this rule, see the following: *Chicago v. Northwestern Mut. L. Ins. Co.*, 218 Ill. 40, 75 N.E. 803, 1 L. R. A. (N. S.) 770; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 29 S. Ct. 671, 53 L. Ed. 1013; *Bruner v. Clay City*, 100 Ky. 567, 38 S. W. 1062; *Gentry v. Lincoln*, 146 Ill. App. 60.

Id. (underline added).

The two words that the City has underlined are the critical two words. In Harbeck it was the public body that had the power through summary procedure, to effect immediate injury. The Commissioner of Public Safety personally threatened Harbeck with immediate business closure if Harbeck did not pay a license fee. Id.¹

Likewise, in each of the five cases cited in Harbeck, it was the public body that both demanded the fee and threatened immediate consequences if the fee was not paid. Chicago v. Northwestern Mutual Life Ins. Co., 218 Ill. 40, 75 N.E. 803, 804 (1905) [City owned and operated

¹ On P. 15 of her brief Plaintiff accuses the City of “perhaps creating a incomplete understanding of the concept” (sic) by not providing a full quote. And on P.16, she accuses the City of “not addressing a material holding which is a basic premise of the voluntary payment rule as cited in Kraft.” Since both alleged omissions go to the issue of duress, and since the City has shown that the Plaintiff’s reading of Harbeck is in error, the City believes that both accusations are without any merit.

water system threatens to cut off water to customer if bills not paid]; Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 329, 29 S.Ct. 671, 53 L.Ed. 1013 (1909) [Customs collector at Port of New York refuses to let steamship sail for foreign port unless fee first paid]; Bruner v. Clay City, 100 Ky. 567, 38 S.W. 1062 (1897) [City Council refuses to grant liquor license unless exorbitant fee first paid]; Gentry v. Lincoln, 146 Ill. App. 60, (1908) [Chief of police forbids parade start unless fee paid first].

A review of Plaintiff's factual statement reveals several things. First, the record reveals that nobody has been threatened by the City of Des Moines with gas or electricity shutoff for failure to pay a franchise fee.² (See record generally). Second, the record reveals that nobody has been threatened by MidAmerican Energy with a gas or electricity shutoff for failure to pay a franchise fee. (Ousley Depo. P.55, L.23 to P.56, L.12). Third, the record reveals that if anyone ever would be threatened with a gas or electricity shutoff for failure to pay a franchise fee it would be MidAmerican, not the City, not the "public body", doing the threatening. (Ousley Depo. P.24, L.11 to P.53, L.3). Fourth, the record reveals that even if MidAmerican were a "public body," its' procedure for turning off a customer's gas or electricity is lengthy and is not a "summary procedure". (Ousley Depo. P.24, L.11 to P.53, L.3). Fifth, the record reveals that even if MidAmerican were a "public body" the gas or electricity cut off procedure for failure to pay a franchise fee in Des Moines takes about two years, hardly the type of "immediate injury" envisioned by Harbeck. (Ousley Depo. P.57, L.5-23). And finally, the record reveals that even if MidAmerican Energy did end gas or electric service to a customer for a failure to pay a fee, that

² Indeed, only one MidAmerican customer has paid one bill's worth of franchise fees under protest fee, and that protest disappeared after but a single assertion (Deposition of Ousley, P.9, L.10 to P.11, L.24).

decision is solely the decision of MidAmerican Energy. (Ousley Depo. P.56, L.18 to P.57, L.5). Additionally the franchise agreement between the City and MidAmerican only requires the company to remit those franchise fees it collects. The agreement does not require MidAmerican to remit all fees billed. Likewise, the agreement does not require MidAmerican to make any efforts on the City's behalf to collect unpaid franchise fees. Thus, any effort to collect the fees, and any utility cutoff after such an unsuccessful effort, would be completely at the discretion of MidAmerican Energy, not any "public body" as commanded by Harbeck. (Franchise Agreements, Plaintiff's Appendix, P.11-12, 18-19).

Thus, the sole case relied upon by Plaintiff for her second brief point does not support her theory.³ Harbeck requires a "public body" having a "summary procedure" to effect an "immediate injury" in order for the possibility of a fee refund to exist. In this case we have a private utility that does not summarily cut off service to its customers, that has not threatened to cut off a single customer for non-payment of a franchise fee, and that would take about 24 months to cut off the utilities in such a situation if it ever were to exist.

In addition to being legally unsupported, Plaintiff's second brief point is also pure speculation. Plaintiff cannot point to one person who has had their utility disconnected for failure to pay a utility franchise fee. (See record generally). Plaintiff cannot point to one person who has even been threatened with a disconnect for failure to pay a utility franchise fee. (See record generally). And in a summary judgment situation, "Speculation is insufficient to generate a genuine issue of fact." Hlubek v. Pelecky, 701 N.W.2d 93, 95 (Iowa 2005).

³ Since Plaintiff pays no franchise fees pursuant to an injunction she requested, her utilities will never be cut off for non-payment of franchise fees and her affidavit regarding the same is immaterial.

BRIEF POINT III

PLAINTIFF'S CONVENIENT CLAIM OF "MISTAKE OF FACT," COMING FOR THE FIRST TIME SOME TWO AND ONE HALF YEARS AFTER SHE FILED HER SUIT, IS NOT SUPPORTED BY THE RECORD OR THE LAW.

To begin with, Plaintiff's Petition is silent as to any alleged mistake of fact on her part.

Instead, the Petition is replete with allegations that the City has illegally imposed and collected a franchise tax for a number of years. (See Petition, ¶ 6, 8, 10 and Prayer).

When questioned in her deposition, Plaintiff reiterated that her Petition was concerned with the fact that the franchise fee was an illegal tax. (Kragnes Depo. P.6, L.7-16, City's Supplemental Appendix, P. 3).

When questioned in the remainder of her deposition about the payment of the franchise fee, the Plaintiff never once mentioned any alleged mistake of fact. (Kragnes Depo. P.6, L.17 to P.11, L.25, City's Supplemental Appendix, P. 3-4).

In fact, when asked why she filed the lawsuit, Plaintiff evidenced perfect knowledge of the situation. She said, "I just didn't agree with it." (Kragnes Depo., P.7, L.4-8, City's Supplemental Appendix, P. 3).

Indeed, when questioned by her own attorney at deposition, Plaintiff reiterated that her complaint was with the City which was charging and collecting the fee she believed illegal. (Kragnes Depo. P.12, L.8 to P.13, L.5, City's Supplemental Appendix, P. 4).

Second, while Plaintiff eagerly points to the language in Kraft v. City of Keokuk, 14 Iowa 86 (1862) which might allow a refund of a tax or a fee if the same were paid under a mistake of fact, Plaintiff fails to distinguish the facts of Kraft from the facts of this case. Indeed, she does not

attempt to do so. (Plaintiff's Brief, P.19-23). It is probable that her lack of effort in this regard is entirely intentional, as any attempt to distinguish Kraft and this case would be futile. The facts are the same, and there is *no* mistake about that.

In Kraft, the Plaintiff paid a liquor license fee to the City, based upon an ordinance which in turn was based upon a statute. The statute was later invalidated by the Supreme Court. Kraft wanted a refund. The trial court said no and the Supreme Court affirmed, saying:

The plaintiff was ignorant that the act of the legislature referred to was inoperative and void when he paid to the city of Keokuk the \$200 aforesaid.

Id. The Court concluded:

The act against which he seeks relief is his own, voluntary act by which he now must abide.

Id. In fact, in her entire brief, Plaintiff does not cite to a single case which purports to have facts similar to this case and where a refund was given.

Third, Plaintiff cites to a 1984 Polk County District Court opinion in her brief, Des Moines Register and Tribune Company v. Iowa Dep't of Revenue, 1984 WL 180951 (Polk Dist. Ct. 1984), but then tries to pass the case off as being from the Iowa Supreme Court. (Plaintiff's Brief, P.19-20).

Fourth, the alleged mistake of fact, as framed by the Plaintiff is not a mistake of fact at all according to Iowa law. Plaintiff alleges that the mistake of fact is that the City erred in setting the franchise fee by not setting the fee in relation to costs.⁴ She says:

The question of fact is whether the City of Des Moines was

⁴ How this alleged mistake of fact is any different than the mistakes of law alleged in her Petition – formulating and collecting an illegal tax – is entirely unexplained by Plaintiff. Unexplained because there is no difference.

collecting a franchise fee that the City had determined was reasonably related to cost (sic) of administering the fee.

(Plaintiff's Brief, P.21).

The Plaintiff continues:

The citizens paying the franchise fee lacked knowledge concerning the city's computation of costs of administering the electric and gas franchises.

(Plaintiff's Brief, P.21) (underline added).

The ostrich approach adopted by plaintiff – sticking her head in the sand, paying the fee, not bothering to check the city's computations – does not comport with the law governing mistakes of fact. In fact, it is contrary to the law governing the mistake of facts.

In a similar situation, where a person paid a liquor fee but did not check public records to see if the fee was really owed, the Iowa Supreme Court, in denying the requested refund, said:

No one represented to him that the board of supervisors had canvassed the statement or made a record of its findings, nor did he take the trouble to ascertain. He merely "supposed it was all right," without resorting to the public records for information. Mistakes of fact may sometimes result from a misconception of the law, as contended by appellant, when equity will grant relief as in other cases. Baker v. Massey, 50 Iowa, 399; Gerdine v. Menage (Minn.) 43 N.W. 91; Hemphill v. Moody, 64 Ala. 468; Morgan v. Bell (Wash.) 28 Pac. 925, 16 L. R. A. 614. But this was not such a mistake. One cannot well be mistaken as to a fact he has known nothing of, and to which he has given no consideration. The inference reasonably to be drawn from the record is that plaintiff, with many others, acted in reliance on the efficacy of the statement of consent filed prior to the taking effect of the Code; and the mistake, if any there was, was in not knowing that a new statement of consent, with a recorded finding of its sufficiency by the board of supervisors, was essential as a condition precedent to the sale of intoxicating liquors under the protection of the mulct law. This, however, was not a mistake of fact, either as such, or arising out of a misconception of the law, but purely a mistake of law, and it is well settled that taxes voluntarily paid on a mistake of law cannot be

recovered. *Kraft v. City of Keokuk*, 14 Iowa, 86; *Northwestern Union Packet Co. v. City of Muscatine*, 45 Iowa, 185; *Hawkeye L. & B. Co. v. City of Marion*, 110 Iowa, 468, 81 N.W. 718; *Newcomb v. City of Davenport*, 86 Iowa, 291, 53 N.W. 232; *Odendahl v. Rich*, 112 Iowa, 182, 83 N. W. 886; *Tatum v. Town of Trenton (Ga.)* 11 S.E. 705; *Peyton v. Hot Springs County (Ark.)* 13 S.W. 764; *Johnson v. Atkins (Fla.)* 32 South 879. See *Rutledge v. Price Co.*, 66 Wis. 35, 27 N.W. 819.

Ahlers v. City of Estherville, 104 N.W. 453, 454 (Iowa 1905).

Fifth, Plaintiff does not cite a single Iowa case in support of her “mistake of fact” argument.

And finally, at the end of her brief, in a literal last ditch effort, Plaintiff embarks upon a series of statements, not one of which is supported by any authority, CJS included.

Plaintiff says:

In this case the citizens of the City do not have a legal duty to determine the method for calculating the franchise fee or the costs related to the gas and electric franchise.

(Plaintiff's Brief, P.22). Despite Plaintiff's confident statement one must wonder how she would respond to *Kraft's* teaching that:

... the law presumes every man to be cognizant not only of what are its provisions in force, but how far they are valid and operative.

Kraft v. City of Keokuk, 14 Iowa 86 (1862).

Then Plaintiff makes an even more unbelievable statement when she says:

Similarly, the facts that might have demonstrated the mistake of fact are not within the payer's possession or reach because the costs associated with the franchise and the method of calculating the fee in relation thereto were not available in this case.

(Plaintiff's Brief, P.23). The amazing thing is that Plaintiff makes this (again entirely unsupported by any authority) statement after making both franchise agreements a part of her appendix.

Those franchise agreements show the exact method of calculation of the franchise fees. The franchise fees were based upon a percentage of sales and upon nothing else. (Plaintiff's Appendix, 1, 7, 11, 18, 23, 24). Each time the franchise fees were so expressed, they were expressed either by ordinance or resolution passed at a hearing open to the public. Id. Plaintiff could have attended those City Council meetings. Plaintiff could have examined the ordinances or resolutions, as they are public records. Iowa Code § 22.1(3) and 22.2.

Her biggest mistake, it appears, is that she chose to sit on her hands.

CONCLUSION

Plaintiff is not entitled to a refund of any franchise fees because the fees are statutorily allowed and the city does have right-of-way management expenses. Thus, the fees are not wholly unauthorized or wholly wanting. Because neither of those situations exists, and because the existence of one of those situations is a condition precedent to a refund, Plaintiff gets no refund.

Likewise, Plaintiff's duress argument fails. The record establishes, without contradiction or adverse inference, that the City plays no role in the collection of the franchise fees. And, perhaps more importantly, the City plays no role if MidAmerican Energy should ever choose to disconnect utility service for failure to pay a franchise fee.

Lastly, Plaintiff's failure to examine or otherwise become familiar with public documents is not a mistake of fact that will lead her to a refund. Instead, it is just an unfortunate choice on her part.

Plaintiff is not entitled to a refund and the City's Motion for Partial Summary Judgment should be granted.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of attorneys of record herein at their respective addresses

disclosed on the pleadings on 2-16-07

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other:

Signature *Diane Roscoe*