

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CW 1849

PRIDE NETWORK, INC.

VS.

THE TOWN OF AMITE CITY

JUDGMENT RENDERED:

NOV 04 2016

ON APPLICATION FOR SUPERVISORY REVIEW FROM THE
TWENTY-FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF TANGIPAHOA
STATE OF LOUISIANA
DOCKET NUMBER 2014-0002988

HONORABLE JEFFREY S. JOHNSON, PRESIDING

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PRIDE Network, Inc.

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Amite, Louisiana

Counsel for Defendant/Respondent
The Town of Amite City

BEFORE: GUIDRY, WELCH, HIGGINBOTHAM, THERIOT, AND
HOLDRIDGE, JJ.

Handwritten initials:
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GUIDRY, J.

PRIDE Network, Inc. (PRIDE), a business awarded the franchise to install a video cable system in the Town of Amite City (Amite), seeks review of the denial of its motion for summary judgment. In its motion, PRIDE sought declaratory relief and other relief related to a permit fee that Amite assesses in addition to the statutorily-authorized franchise fee for use of and construction in Amite's street rights of way. For the following reasons, we reverse the judgment of the trial court denying PRIDE'S motion for summary judgment and hereby grant the motion, but we will remand the matter for a determination of the refund amount owed.

PERTINENT FACTS AND PROCEDURAL HISTORY

PRIDE, the relator in this writ application, was awarded a state video cable franchise in February 2011. In early 2013, PRIDE sought to provide video services to Amite, the respondent. In order to do so, PRIDE had to install underground fiber optic cable in Amite's public servitudes. Amite demanded a permit fee from PRIDE every time PRIDE requested a permit to install its fiber optic cable. PRIDE made each payment as demanded under protest.

In October 2014, PRIDE filed the underlying lawsuit against Amite, seeking a declaratory judgment that Amite had no legal right to assess the construction permit fees and seeking a refund of such fees paid. It is undisputed that as of April 14, 2015, PRIDE had paid permit fees under protest in the amount of \$161,617.00, representing \$1.00 per linear foot of underground cable installed. Amite answered the lawsuit and filed a reconventional demand against PRIDE for the costs of public utilities, labor, and material.

PRIDE filed a motion for summary judgment in April 2015, asserting as a matter of law that Amite had no right to charge any levy, fee, or other assessment for or in connection with the use of public servitudes other than the statutorily-

authorized franchise¹ fee based on a percentage of PRIDE's gross revenue, as discussed herein. PRIDE sought a declaratory judgment to this effect and an order for Amite to return \$161,617.00, the amount of the construction permit fees paid under protest, with interest from the dates paid.

The trial court heard PRIDE's motion for summary judgment on June 1, 2015. The trial court denied the motion for summary judgment in open court on that date. It signed judgment accordingly on July 13, 2015, and notice of judgment was issued on July 15, 2015.

PRIDE timely filed a writ application.² On reviewing the writ application and Amite's opposition, we elected to issue a writ of certiorari. We ordered the parties to submit additional briefs and set the matter for oral argument. PRIDE assigned the following as error:

1. The Trial Court erred in finding that a municipality may charge permit or other fees to a state video cable franchise holder in connection with the installation of fiber optic cable, because such finding is contrary to the Louisiana "Consumer Choice for Television Act."
2. The Trial Court erred in denying plaintiff's Motion for Summary Judgment.

DISCUSSION

First issue - Construction permit fee

Primarily at issue in this writ application is whether the Louisiana "Consumer Choice for Television Act," La. R.S. 45:1361 *et seq.* (CCTA),

¹ "Franchise" means an initial authorization, or renewal of an authorization, issued by a franchising authority regardless of **whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, that authorizes the construction and operation of a cable system**, or other wireline facilities used to distribute video programming services, in the public rights of way." (Emphasis added.) La. R.S. 45:1363(6).

² PRIDE timely filed its notice of intent to seek supervisory writs and its initial writ application. This Court, however, issued a "WRIT NOT CONSIDERED" action on November 18, 2015 (case number 2015 CW 1373), on the grounds that the writ application did not appear to be timely. The writ action gave PRIDE until December 4, 2015, to file a new application. PRIDE filed the present writ application on December 1, 2015. In addition to the information provided in the prior writ application, PRIDE included a transcript excerpt showing that the original writ application was filed timely. The defect in the first application was therefore cured.

authorizes Amite to impose a separate, one-time construction permit fee in addition to the continuing fee assessed under La. R.S. 45:1366(A) at the time PRIDE actually installs cable lines in Amite's public rights of way. PRIDE seeks interpretation of this statutory scheme within the framework of a summary judgment.³

When summary judgment is granted in the context of statutory interpretation, there are no material issues of fact in dispute and the sole issue before us is a question of law as to the correct interpretation of the statute at issue. State v. Louisiana Land and Exploration Company, 12-0884, p. 8 (La. 1/30/13), 110 So. 3d 1038, 1044. Further, no prohibition exists against the granting of summary judgment in an action for declaratory judgment. Nosser v. Health Care Trust Fund Board of City of Shreveport, 27,619, p. 10 (La. App. 2d Cir. 1/24/96), 666 So. 2d 1272, 1278. In granting summary judgment in such a case, a trial court does nothing more than declare that the question of construction or validity before the court is one in which there are no genuine issues of material fact to be resolved. Nosser, 27,619 at p. 10, 666 So. 2d at 1278; see also Louisiana Hospital Association v. State, 13-0579, p. 1 (La. App. 1st Cir. 12/30/14), 168 So. 3d 676, 688 (concurring opinion), writ denied, 15-0215 (La. 5/1/15), 169 So. 3d 372.

Also at issue is whether the fees paid under protest should be reimbursed to PRIDE. In this regard, Amite does not challenge PRIDE's affidavit claiming that it has paid permit fees under protest, calculated at the rate of \$1.00 per linear foot, and totaling \$161,617.00 as of the date of the affidavit. Further, Amite's city administrator swore in an affidavit filed in opposition to PRIDE's motion for summary judgment that the disputed fee was required for PRIDE to obtain a permit

³ Since the motion for summary judgment at issue was filed in the trial court in April 2015, the version of La. C.C.P. art. 966 in effect at that time applies to our review. See 2015 La. Acts, No. 422, § 2: "The provisions of this Act shall not apply to any motion for summary judgment pending adjudication or appeal on the effective date [January 1, 2016] of this Act."

for construction and that the fee was imposed at the same rate collected from all other providers that use Amite's public rights of way.

The Louisiana Legislature intends for the CCTA to occupy the entire field of cable and video service franchising regulation, preempting any ordinance or resolution passed by a local government subdivision "that purports to address cable or video service franchising or regulation."⁴ Resolution of this dispute turns on the terms of the CCTA. In this regard, the trial court relied primarily on La. R.S. 45:1366(F) and La. R.S. 45:1374(C) to deny PRIDE's motion for summary judgment. Louisiana Revised Statutes 45:1366(F) provides as follows:

No local governmental subdivision shall levy any tax, license, fee, or other assessment on a cable service provider or video service provider for or in connection with the use of public rights of way other than the franchise fee authorized by this Section or fee authorized by R.S. 45:1370 or a cable franchise fee or other fee imposed upon a cable service provider or video service provider in an existing franchise prior to August 15, 2008. No local governmental subdivision shall levy any other tax, license, fee, or other assessment on a cable service provider or video service provider or its subscribers, which is not generally imposed and applicable to a majority of all other businesses. Nothing in this Subsection shall restrict the right of any local governmental subdivision to impose ad valorem taxes, service fees, sales taxes, or other taxes and fees lawfully imposed on other businesses within such local governmental subdivision. [Emphasis added.]

Louisiana Revised Statutes 45:1374(C) provides as follows:

Nothing contained in this Chapter^[5] shall impair the lawful exercise of existing police powers of the local governmental subdivisions in which cable service or video service is delivered, including but not limited to the right to require construction permits and utility pole attachment agreements. [Emphasis added.]

⁴ Louisiana Revised Statutes 45:1362(D) provides in pertinent part:

[T]he Legislature of Louisiana intends that the Chapter occupy the entire field of cable and video service franchising regulation in the state of Louisiana and, except as provided herein, shall preempt any ordinance, resolution, or similar matter adopted by a local governmental subdivision that purports to address cable or video service franchising or regulation. [Emphasis added.]

⁵ Louisiana Revised Statutes 45:1374(C) is found in Title 45, Chapter 10-a, which is entitled the "Consumer Choice for Television Act."

The trial court expressed the following in denying PRIDE's motion for summary judgment:

Here is the ruling of the court and the reasons therefore. I am going to deny the motion for summary judgment. Specifically, I would look at the provisions of 45:1366 (F), and it says as follows, no local governmental subdivision shall levy any tax, license, fee, or other assessment on a cable provider or video service provider for or in connection with the use of public rights of way.

I find great meaning to the term use of public rights and I believe this Subsection G is in connection with the use of those public rights. Subsequent to the enactment of 45:1366, 45:1374 was enacted which sequentially follows 1366^[6] and the State reserved to local municipalities, including the Town of Amite, which would permit - - which would be included in that provision, the authorization to allow for construction permits.

I have in 20 ... years of practicing law and 46 years of living, never have seen the city of any municipality or parish, order or give permits without a fee associated therewith. So I can believe that it is implicit in the retention of those powers that they are entitled to charge a permit fee, and it is not for the use, it is for the permit to actually do and I think that there is a distinction there in the law between what the Town of Amite is allowed to do with respect to a construction permit, where they are charging you to use that which would be ongoing and what that five percent limits you to ongoing, then I would tend to agree. But since it is the initial permit that is just an initial one[-]time fee, I believe that they reserve those powers and I am going to deny your motion for summary judgment.

Even so, PRIDE and Amite cite and apply the CCTA differently than does the trial court in support of their respective positions. As to PRIDE, it points to La. R.S. 45:1366(G), which provides:

The certificate franchise fee authorized by this Section shall be **in lieu of any permit fee**, encroachment fee, degradation fee, inspection fee, or other fee assessed by a local governmental subdivision on a certificate holder **for occupation of or work within its public rights of way**. [Emphasis added.]

PRIDE asserts that this statute is abundantly clear in providing that the certificate franchise fee "shall be in lieu of any permit fee" or "other fee" assessed by a local government for occupation of or work within its public rights of way. The

⁶ Both La. R.S. 45:1366 and La. R.S. 45:1374 were adopted at the same time by 2008 La. Acts, No. 433, § 1, effective August 15, 2008.

referenced certificate franchise fee “shall not exceed five percent of the holder’s gross revenues.” La. R.S. 45:1366(A).⁷

PRIDE does not challenge Amite’s right to require a permit, and it recognizes Amite’s right to know what is being done in its rights of way. PRIDE does dispute, however, whether the right to require a permit creates authority to charge a fee other than the one authorized in La. R.S. 45:1366(A), as Amite and the trial court imply. PRIDE asserts that the right to require a permit and the right to charge a construction fee are separate concepts that should not be conflated.

In contrast, Amite points to several references in the CCTA that state the Act is subject to Amite’s lawful exercise of police power. See La. R.S. 45:1362(D), La. R.S. 45:1366(C)(2), La. R.S. 45:1366(F), and La. R.S. 45:1374(C). Because of these reservations of local police power, Amite asserts that La. R.S. 45:1362(D)’s mandate is not absolute and unqualified as to the CCTA’s preemption of ordinances, resolutions, or similar matters adopted by local political subdivisions. Particularly, Amite asserts that the specific language of La. R.S. 45:1366(F), set out above, preserves Amite’s right to impose fees when they are generally imposed on all other businesses, such as the permit fees imposed in this matter. Further,

⁷ Louisiana Revised Statutes 45:1366(A) provides as follows:

The holder of a certificate may be required, pursuant to an ordinance adopted by the local governmental subdivision, **to pay a franchise fee equal to a specified percentage of such holder's gross revenues** received from the provision of cable service or video service to subscribers located within the municipality or unincorporated areas of the parish and from advertising disseminated through cable service or video service and home shopping services as allocated under Subsection D of this Section. **The fee shall not exceed five percent of the holder's gross revenues.** The fee shall be uniformly applied to all holders of a state-issued certificate of franchise authority within the local governmental subdivision. The local governmental subdivision shall provide a copy of the enabling ordinance to the holder of a certificate as a condition to receiving any franchise fee payments. As a condition precedent to a certificate holder’s obligation to pay a franchise fee established or changed pursuant to this Section, the local governmental subdivision shall provide each certificate holder with a copy of each rate change notification at least forty-five days in advance of the effective date of the rate change. [Emphasis added.]

Amite asserts that charging construction permit fees is an inherent exercise of its police power to require construction permits as provided in La. R.S. 45:1374(C).

No genuine issue as to material fact appears to be at issue here. Only a legal issue appears to remain in determining whether Amite can charge a separate, one-time construction permit fee in addition to the continuing fee authorized by La. R.S. 45:1366(A) and assessed when PRIDE actually installs its cable lines in Amite's public rights of way. The present dispute arises under the CCTA, La. R.S. 45:1361 *et seq.*, and resolution of this legal question revolves around the following statutory sections or subsections:

- La. R.S. 45:1366(G), fully set out above, which provides that the “certificate franchise fee” is “in lieu of any permit fee, ... , or other fee ... for occupation of or work within [a local governmental subdivision’s] public rights of way.”
- La. R.S. 45:1374(C), fully set out above, which recognizes that Amite’s police powers cannot be impaired and that Amite has the right to require a construction permit.
- La. R.S. 45:1366(F), fully set out above, which contain the following three sentences that appear to allow:
 - 1) fees not levied “for or in connection with” use of the rights of way by a cable provider;
 - 2) “any other” fee that is generally imposed and applicable to a majority of all other businesses; and
 - 3) fees lawfully imposed on other businesses within a local governmental subdivision, notwithstanding the provisions of the first two sentences.⁸

Scope of La. R.S. 45:1366(G)

PRIDE asserts that La. R.S. 45:1366(G) provides that the certificate franchise fee is “**in lieu of any permit fee ... or other fee assessed by a local**

⁸ The third sentence of La. R.S. 45:1366(F) states that “[n]othing in this Subsection shall restrict the right of any local governmental subdivision” from imposing a generally applicable tax or fee. The phrase “this Subsection” appears to make the provisions contained therein to apply to paragraph F of La. R.S. 45:1366 only. Paragraph G makes reference to the “certificate franchise fee authorized by this Section.” This authorized fee is found in paragraph A of La. R.S. 45:1366. Further, paragraph A refers to paragraph D of the statute as “Subsection D of this Section.” Thus, the third sentence of paragraph F appears to limit only the other provisions of paragraph F.

governmental subdivision ... **for occupation of or work within** its public rights of way.” (Emphasis added.) In her affidavit, Amite’s city administrator attests that the up-front fee Amite charges was “to obtain a permit for construction ... from ALL other providers who use the public rights-of-way[.]” She also attests that Amite requires “payment of the construction permit” from all who have constructed on the public rights of way.

PRIDE argues that since Amite admits it charges a permit fee to construct within the rights of way, and construction is clearly a “work,” Amite cannot collect a fee beyond the percentage certificate franchise fee. We note that the trial court stated its understanding that La. R.S. 45:1366(G) applies only to the use of the rights of way, not to initial construction. This interpretation, however, seems at odds with the statute’s prohibition of any permit fee or other fee for work within the rights of way.

Scope of La. R.S. 45:1374(C)

Amite argues that the “construction permit” fee is permissible, the above notwithstanding, because La. R.S. 45:1374(C) provides that “[n]othing contained in [the CCTA] shall impair the lawful exercise of existing police powers ... including but not limited to the right to require construction permits[.]” The trial court seemed to agree when it stated that it had never heard of a permit without a fee and that the right to charge a construction permit fee “is implicit in the retention of those [police] powers.”

Even so, while the trial court could possibly imply the power to levy such a fee as a police power in the absence of contrary statutory language, here La. R.S. 45:1366(G) provides that the percentage cable franchise fee PRIDE is required to pay is “in lieu of any permit fee ... or other fee” assessed by Amite on PRIDE “for occupation of or work within [Amite’s] public rights of way.”

Scope of La. R.S. 45:1366(F)

While the first sentence of La. R.S. 45:1366(F) appears to preclude any fee levied “for or in connection with” use of the right of way, and the second precludes the levy of “any other ... fee ... not generally imposed on other businesses,” the third sentence provides that “[n]othing in [paragraph F] shall restrict” the right to impose “fees lawfully imposed on other businesses within such local governmental subdivision.” Amite relies on the third sentence only in its arguments. This language from the third sentence appears to allow Amite to impose any fee that it lawfully imposes on other businesses, and is therefore in conflict with La. R.S. 45:1366(G), which provides that the percentage certificate franchise fee is in lieu of any other fee, apparently including construction permit fees.

In this regard, Amite’s city administrator attested in her affidavit that Amite collected the construction permit fee from all other providers who use the public rights of way and that the payment is required of all who have constructed on the public rights of way.

Conflict between La. R.S. 45:1366(F) and La. R.S. 45:1366(G)

To the extent that the third sentence of La. R.S. 45:1366(F) deals with the same subject matter as La. R.S. 45:1366(G) and other statutes, courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless if a construction giving force to and preserving all words can legitimately be found. Black v. St. Tammany Parish Hospital, 08-2670, p. 10 (La. 11/6/09), 25 So. 3d 711, 717. Where two statutes deal with the same subject matter, they should be harmonized if possible, as it is the duty of the courts, in the construction of statutes, to reconcile laws. La. C.C. art. 13; Black, 08-2670, p. 10, 25 So. 3d at 717. However, if there is a conflict, the statute specifically directed to

the matter at issue must prevail as an exception to the statute more general in character. Black, 08-2670, p. 10, 25 So. 3d at 717-18.

Applying these principles, the third sentence of La. R.S. 45:1366(F), at best, gives a local political subdivision general power to impose fees on certificate-holding cable companies that are lawfully imposed on other businesses within such local governmental subdivision. Amite's arguments in this regard might be more persuasive but for La. R.S. 45:1966(G). This subsection is more specifically directed to the matter at issue since it provides that the certificate franchise fee is "in lieu of" any permit fee or other fee "for occupation of or work within its public rights of way."

The meaning and intent of the law are to be determined "by considering the law in its entirety and all other laws on the same subject matter and by placing a construction on the law that is consistent with the express terms of the law and with the obvious intent of the legislature in enacting the law." Black, 08-2670, p. 9-10, 25 So. 3d at 717. In this regard, the Louisiana Legislature has expressed its intent in La. R.S. 45:1362(D) to have the CCTA occupy the entire field of cable and video service franchising regulation and to preempt ordinances, resolutions, or similar instruments that purport to address cable or video service franchising regulation.

Here, Amite is entitled to impose a franchise fee up to five percent of PRIDE's gross revenue from its cable operations. La. R.S. 45:1366(A). The Louisiana Legislature has stated its intention that this fee be in lieu of other fees or charges for or in connection with use of the public rights of way.

Second issue - Reimbursement of fees

In PRIDE's motion for summary judgment, it seeks the return of all the funds it has paid under protest as construction permit fees through April 16, 2015,

or \$161,617.00, with interest from the dates paid. However, in arguments before this court, PRIDE advised that it is also seeking reimbursement of all sums paid under protest, including any sums that may have accrued while this matter has been pending before this court. For this reason, and further considering that the pending reconventional demand filed by Amite has not been resolved, we believe it prudent to simply remand this matter to the trial court for an exact determination of any refund owed to PRIDE.

DECREE

On *de novo* review of the judgment denying PRIDE Network, Inc.'s motion for summary judgment, we conclude that it is entitled to a grant of partial summary judgment as prayed for against the Town of Amite City. Accordingly, we grant its writ application.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the July 13, 2015 judgment of the trial court denying PRIDE Network, Inc.'s motion for summary judgment is reversed and partial judgment is rendered in favor of PRIDE Network, Inc. and against the Town of Amite City.

IT IS FURTHER ORDERED, ADJUDGED, AND DECLARED that PRIDE Network, Inc. has the right to construct facilities along, over, and within the public rights of way owned, maintained, and provided by the Town of Amite City and that the Town of Amite City may not levy any fee or other assessment on PRIDE Network, Inc. for or in connection with the use of public rights of way other than a franchise fee pursuant to the Louisiana Consumer Choice for Television Act, La. R.S. 45:1361, *et seq.*

This matter is thus remanded to the trial court for a determination of any refund owed to PRIDE Network, Inc. and any offset owed to the Town of Amite City should it prevail on any aspect of its reconventional demand. In all other

respects, summary judgment is denied, and this matter is remanded to the trial court for further proceedings.

WRIT GRANTED WITH ORDERS.