STATE OF MICHIGAN

COURT OF APPEALS

TODD DAWSON, RONALD J. HALE, WILBUR LOEW, MICHAEL MEDORE, and MICHELLE ZAINEA, Plaintiffs-Appellants, v SECRETARY OF STATE and DEPARTMENT OF TREASURY, Defendants-Appellees.	FOR PUBLICATION March 20, 2007 9:15 a.m. No. 264103 Court of Claims LC No. 05-000043-MM Official Reported Version

Before: Wilder, P.J., and Zahra and Davis, JJ.

DAVIS, J. (*concurring in part*).

Plaintiffs appeal as of right an order of the Court of Claims granting summary disposition to defendants pursuant to MCR 2.116(C)(8) and (10). This case involves a challenge to the validity of Michigan's driver responsibility law (DRL), MCL 257.732a, under the United States and Michigan constitutions. Because I conclude that the DRL imposes a constitutionally permissible criminal fine, I concur in affirming the decision of the Court of Claims.

The specific challenge to the DRL is to the "driver responsibility fee" it imposes. Under MCL 257.732a, the Secretary of State is directed to "assess" "fees" in various amounts under various circumstances, including accumulation of points on a driving record or violation of certain enumerated laws. The Secretary of State is directed to terminate the driving privileges of any individual who fails to pay an assessed fee. Collected fees are to be transmitted to the Department of Treasury, which is then directed to allocate the collected funds between the general fund and a special fire protection fund in a specified manner. The fees assessed under the DRL are in addition to any fees, fines, or costs imposed in court directly pursuant to the violation of an enumerated law. Driving privileges will be restored upon payment of delinquent assessments and any other fees. Each plaintiff in this case was assessed a "driver responsibility fee" in some amount pursuant to MCL 257.732a.[1] Plaintiffs assert that the "fees" violate the

[1] Apparently, not all the plaintiffs have paid the driver responsibility fees assessed, but this fact is not relevant to the disposition of this appeal.

Michigan and United States constitutional guarantees against double jeopardy[2] and equal protection,[3] and they further assert that the "fees" constitute taxes in violation of the Michigan Constitution's uniformity of taxation[4] and distinct statement clauses.[5]

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the nonmoving party and grants summary disposition only if the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. A motion brought under MCR 2.116(C)(8) should be granted only if the complaint is so legally deficient that recovery would be impossible even if all well pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id*. at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. The proper interpretation of a statute is likewise reviewed de novo, with the primary purpose of discerning the intent of the Legislature, which is generally best discerned from the language of the statute itself. *Neal v Wilkes*, 470 Mich 661, 664-665; 685 NW2d 648 (2004). Whether a statute violates the federal constitution is also a question of law reviewed de novo. *Westlake Transportation, Inc v Pub Service Comm*, 255 Mich App 589, 616; 662 NW2d 784 (2003).

The first question to be addressed is the nature of the driver responsibility fee. The fact that the statute styles the amount imposed as a "fee" is not controlling. "The precise nature of a burden imposed by public authority is not necessarily determined by the name applied to it but depends on the intent of the legislative body prescribing it, the purpose thereof, and the incidents pertaining to it." *City of Dearborn v State Tax Comm*, 368 Mich 460, 471; 118 NW2d 296 (1962). The question therefore is what the *burden actually is*, irrespective of the label given to it. In my view, the possibilities appear to be that the DRL imposes a *fee*, as stated in the statute, that the DRL surreptitiously imposes a *tax*, or that the DRL actually imposes a *punishment*. Unfortunately, distinguishing between these is not an exact science.

Although "fees" are presumed to be valid and constitutional, they must bear some reasonable resemblance to the expenses they purport to defray, and the "[p]olice power may not be used as a subterfuge to enact and enforce what is in reality a revenue-raising ordinance." *Northgate Towers Assoc v Royal Oak Charter Twp*, 214 Mich App 501, 504; 543 NW2d 351 (1995), vacated in part on other grounds 453 Mich 962 (1996). However, a "fee" does not become a "tax" *merely* by charging more than the ostensibly related expense; rather, it must be an *unreasonably* larger amount, and that determination must give some deference to "'the sound discretion of the legislature, having reference to all the circumstances and necessities of the

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[2] US Const, Am V; Const 1963, art 1, § 15.

[3] US Const, Am XIV; Const 1963, art 1, § 2.

[4] Const 1963, art 9, § 3.

[5] Const 1963, art 4, § 32.

case.'" *City of Dearborn*, *supra* at 472, quoting *Vernor v Secretary of State*, 179 Mich 157, 168; 146 NW 338 (1914). Even some "incidental revenue" will not convert a fee into a tax. *Kircher v Ypsilanti*, 269 Mich App 224, 232; 712 NW2d 738 (2005).

Expressed slightly differently, our Supreme Court explained that no "bright-line test" exists to distinguish between fees and taxes, but there are several general characteristics to which a court should look. *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). Generally, fees are proportionate payments given in exchange for, and to support, some technically optional benefit or service; taxes are compulsory payments intended to raise revenue for the benefit of the public as a whole. *Id*. at 161-162. "A true 'fee' . . . is not designed to confer benefits on the general public, but rather to benefit the particular person on whom it is imposed." *Id*. at 165. If the payment goes to benefit the general public, it is a tax. *Id*. at 165-166.

The third possibility is that the DRL imposes neither a fee nor a tax, but a fine. "A 'fine' is commonly defined as '[a] pecuniary punishment imposed by [a] lawful tribunal upon [a] person convicted of [a] crime or [a] misdemeanor.'" *People v Houston*, 237 Mich App 707, 716; 604 NW2d 706 (1999), quoting Black's Law Dictionary (5th ed). See also *Random House Webster's College Dictionary* (2001), which defines "fine" as "a sum of money imposed as a penalty for an offense or dereliction" or "a penalty of any kind." Further, "[a] fine imposed pursuant to a conviction for possession with intent to deliver a controlled substance is a criminal punishment that serves the object of deterrence." *Houston*, *supra* at 716. In other words, the purpose of a fine is to deter behavior rather than to raise revenue or fund a service.

When the driver responsibility fee is viewed in light of these three possibilities, I conclude that the only one that fits is a fine. There is no evidence whatsoever that the assessed costs bear any relationship to anything the assessed drivers, or even drivers generally, receive in exchange. The funds are only *collected* by the Secretary of State; they are then transmitted to the Department of Treasury, where they are applied to the *general* fund and to a *fire protection* fund. The DRL clearly imposes a burden that is not proportionate to anything, is not exchanged for any identifiable individual service or benefit, and goes to benefit the general public. However, even if most drivers do so out of necessity, drivers are not technically compelled to pay the fines assessed. They can avoid the driver responsibility fee by obeying the law, and the DRL provides no mechanism for compulsory collection of the assessment. Therefore, the DRL lacks both the relationship to the affected activity required for it to be a fee and the compulsory nature of collection required for it to be a tax.

Conversely, it is obviously designed to deter undesirable acts by drivers. The Legislature saw fit to create a detailed framework for how much must be paid for what kinds of violations of which laws. This is highly consistent with a desire to deter and punish different behaviors on the basis of the severity thereof. Notwithstanding its designation as a "fee," and notwithstanding the Legislature's allocation of the proceeds, the Legislature clearly implemented the DRL with the goal of penalizing drivers for committing certain offenses or derelictions. I am unaware of any authority stating that the Legislature's decision to allocate the proceeds from such a sanction is of any significance. I conclude that the DRL imposes a fine, rather than a fee or a tax. It is therefore unnecessary to address the constitutional provisions pertinent to taxes.

Defendants argue that, if this is the case, the DRL imposes a *civil* penalty rather than a criminal one. I disagree. Defendants cite *Hudson v United States*, 522 US 93, 99; 118 S Ct 488; 139 L Ed 2d 450 (1997), which significantly notes that whether a particular punishment is civil or criminal turns in large part on whether a given legislature has expressed a preference for either. Here the Legislature has created a distinction between "civil" fines and "criminal" fines, stating that a "crime" includes acts or omissions punishable by, among other things, a "[f]ine not designated a civil fine." MCL 750.5(b). Several other sections of the Michigan Compiled Laws contain a reference to "a fine that is not a civil fine." The Legislature has therefore established that fines are, by default, criminal unless designated civil. If it had been designated a civil penalty, it might still be considered criminal, but only with "'the clearest proof'" that the Legislature's intent was truly punitive. *Hudson*, *supra* at 100 (citation omitted). It is worth noting that a fine that "'is overwhelmingly disproportionate to the government's damages and expenses'" may still be considered criminal punishment even if designated civil. *Dep't of Consumer & Industry Services v Greenberg*, 231 Mich App 466, 470-471; 586 NW2d 560 (1998) (citation omitted). The driver responsibility fee has not been explicitly designated as civil, so I conclude that the DRL imposes a criminal fine.

However, I find no double jeopardy violation here. The double jeopardy clauses protect against successive prosecutions for the same criminal offense arising out of the same conduct, and they protect against multiple punishments for the same criminal offense. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001); *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The assessment by the Secretary of State is not a "successive prosecution," so only the latter protection is implicated. The protection against multiple punishments is a limitation on the courts and on the prosecution, not on the Legislature; its purpose is "to ensure that courts confine their sentences to the limits established by the Legislature." *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998). Therefore, the question is really one of legislative intent: although it is *presumed* that the Legislature generally does not intend to punish the same offense under multiple statutes, a clear indication that the Legislature intended otherwise must be followed. *People v Robideau*, 419 Mich 458, 469-470; 355 NW2d 592 (1984). In other words, "the only interest of the defendant is in not having more punishment imposed than intended by the Legislature." *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986). "Thus, we need only determine whether the Legislature has authorized multiple punishments." *Mitchell*, *supra* at 696.

As discussed, the DRL imposes a criminal fine that is automatically imposed on the basis of being found guilty of other criminal acts. It does not seem reasonable to conclude other than that the Legislature intended to impose the fine in the DRL as a punishment in addition to whatever other punishment is imposed for violating the laws enumerated in the DRL. This appears to be a situation in which the Legislature did indeed intend to punish the same offenses under multiple statutes. Therefore, as long as the individuals affected have not been subjected to any penalties or burdens beyond what the Legislature intended, their rights to be free from double jeopardy have not been violated. The DRL imposes a constitutionally permissible criminal fine on drivers as an additional punishment for other criminal violations.

I concur in affirming the decision of the Court of Claims.

/s/ Alton T. Davis