Appeal No. SC100376

In The
Supreme Court of Missouri

BENJAMIN RAMIREZ
Individually and On Behalf of All Others Similarly Situated
Plaintiff/Appellant

vs.

MISSOURI PROSECUTING ATTORNEYS' & CIRCUIT ATTORNEYS' RETIREMENT SYSTEM
Defendant

and

DIRECTOR OF REVENUE, and
TREASURER OF THE STATE OF MISSOURI,
Defendants/Respondents

Appeal from the Circuit Court of
Jackson County, Missouri
Case No. 2116-CV12717

APPELLANT'S REPLY BRIEF

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ARGUMENT

Defendants/Respondents the Director of Revenue and the Treasurer of the State of Missouri ("State Defendants") base their arguments regarding the Seven Surcharges' constitutionality on: (1) a misstatement of the test established by this Court in *Harrison v. Monroe Cnty.*, 716 S.W.2d 263 (Mo. banc 1986); (2) an incorrect reading of *Fowler v. Mo. Sheriffs' Ret. Sys.*, 623 S.W.3d 578 (Mo. banc 2021); (3) confusion on the purpose of court costs; and (4) a misconception of the significance when court costs are assessed.

Applying the test established in *Harrison* and confirmed in *Fowler*, as discussed in detail below, the Seven Surcharges involved in this case are not "reasonably related to the expense of the administration of justice." Therefore, the Seven Surcharges violate Article I, Section 14 of Missouri's Constitution, the State Defendants are not entitled to summary judgment, and the trial court's Amended Judgment should be reversed.

The test of whether court costs violate Article I, Section 14 was established in 1986 by this Court in *Harrison* and later confirmed in *Fowler*. "The proper test is whether the court costs required are reasonably related to *the expense of* the administration of justice." *Harrison*, 716 S.W.2d at 267 (emphasis added). The State Defendants, however, repeatedly misstate that test by ignoring "the expense of" and arguing the Seven Surcharges are constitutional because they are "reasonably related to the administration of justice". (Respondents' Brief p. 20, 26, 27, 29, 31, 32, 65).

Contrary to the State Defendants' argument (Respondents' Brief p. 24-25), *Fowler* did apply the *Harrison* test to court costs assessed in felony and misdemeanor criminal cases. In *Fowler*, the plaintiffs sued on behalf of a putative class of all Kansas City municipal court litigants who paid the surcharge under § 57.955. *Fowler*, 623 S.W.3d at 581. However, the surcharge imposed by § 57.955 was not limited to municipal court cases and this Court's ruling regarding its unconstitutionality was also not limited to municipal court cases. In fact, § 57.955 applied in all civil and criminal cases, stating:

> "There shall be assessed and collected a surcharge of three dollars *in all civil actions* filed in the courts of this state *and in all criminal cases* including violation of any county ordinance or any violation of criminal or traffic laws of this state, including infractions, but no such surcharge shall be assessed when the costs are waived or are to be paid by the state, county or municipality or when a criminal proceeding or the defendant has been dismissed by the court."

Fowler, 623 S.W.3d at 580 (quoting § 57.955.1 RSMo; emphasis added).

In addressing the constitutionality of § 57.955, this Court found that *Harrison* was directly on point. *Fowler*, 623 S.W.3d at 584. This Court held:

> *Harrison* laid down a bright-line rule that court costs used to enhance compensation paid to executive officials are not "reasonably related to the expense of the administration of justice" and, therefore, violate article I, § 14. Like SB 601, § 57.955 requires the collection of a court cost used to enhance the compensation of executive department officials—retired county sheriffs. Applying *Harrison*'s bright-line rule, § 57.955 is not "reasonably related to the expense of the administration of justice" and therefore, violates article I, § 14 of the Missouri Constitution.

Fowler, 623 S.W.3d at 584-85. This Court's holding in *Fowler* was not limited to costs collected in municipal court cases, thus making clear the test established by *Harrison* applies to both civil and all criminal court costs.

The State Defendants' misstatement of this test of constitutionality underscores their fundamental misunderstanding of court costs. Court costs are intended to defray some of the costs incurred by the operation of the courts. Black's Law Dictionary defines "costs", in relevant part, as: "The charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees. – Also termed *court costs*." Black's Law Dictionary p. 372 (8th ed 2004) (emphasis in original). Court costs are not intended to be used as a form of punishment for a losing party in either civil or criminal cases.

Except for the DNA Profiling Analysis Fund surcharge, the Seven Surcharges impose the same surcharge in all criminal cases to which they apply regardless of the severity of the charge involved. Treating those surcharges as "punishment" for convicted defendants distorts the purpose of court costs and violates Article I, Section 14's requirement that court costs be "reasonably related to the expense of the administration of justice."

Likewise, the requirements of Article I, Section 14 are not dependent on when the court costs are assessed. Court costs impose a "cost" for accessing the courts whether assessed when a case is filed or after judgment has been rendered. A plaintiff that prevails in a civil case is not ultimately responsible for court costs as those are generally taxed

against the defendant. Rule 77.01. Ultimately, it does not matter. This Court found the plaintiff in *Harrison* had standing despite the contingent nature of the obligation to pay court costs.

Court costs are a "cost" for accessing the court system whether the court costs are collected or assessed before or after the case is resolved.

> That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

Mo. Const. Art. I, § 14. "In its modern manifestations, however, the constitutional proscription against the sale of justice extends to guarantee access to the courts without a requirement of payment of unreasonable charges." *Harrison*, 716 S.W.2d at 267. Article I, Section 14 guarantees all parties, including civil plaintiffs, civil defendants, and criminal defendants, "access to the courts without a requirement of payment of unreasonable charges." *Harrison*, 716 S.W.2d at 267.

Further, the fact that five of the Seven Surcharges are $2.50 or less does not magically make those surcharges constitutional. Instead, the relatively small amount of the Seven Surcharges for each individual shows that a class action suit is necessary to justify the time and expense involved in contesting the Seven Surcharges' validity. Without the possibility of recovery on behalf of a class, it would be virtually impossible for individual plaintiffs to pursue a claim that the Seven Surcharges are unconstitutional.

The Seven Surcharges involved in this case are *not* "reasonably related to *the expense of* the administration of justice" and violate

Article I, Section 14. The State Defendants are not entitled to summary judgment and the trial court's Amended Judgment must be reversed.

I. The DNA Profiling Analysis Fund

When discussing the DNA Profiling Analysis Fund, the State Defendants mischaracterize the test established in *Harrison*, arguing that accurate DNA evidence can help "enhance the administration of justice" and that DNA services are "necessary for the overall administration of the criminal justice system in Missouri." (Respondents' Brief p. 28). A court cost surcharge is not reasonable simply because it relates to the "administration of justice". As this Court stated, "[w]ere that the test, court costs could be collected to pave roads leading to the courthouse." *Harrison*, 716 S.W.2d at 267.

The investigation and prosecution of crimes is an Executive Department function, and this Court has held that court costs cannot be used to pay for Executive Department activity. The surcharge funding the DNA Profiling Analysis Fund is *not* "reasonably related to *the expense of* the administration of justice" and violates Article I, Section 14.

II. The Brain Injury Fund

The State Defendants argue the Brain Injury Fund surcharge "can mitigate the negative health effects imposed on victims by those who break the State's traffic laws and inflict severe and debilitating injuries on others. This purpose is reasonably related to administering justice to those victims." (Respondents' Brief p. 31). First, there is nothing about the Brain Injury Fund that is limited to victims of a crime. Second, even

with respect to those who are victims of crimes, financing the "transition and integration of medical, social and educational services or activities for purposes of outreach and supports to enable individuals with traumatic brain injury and their families to live in the community", § 304.028.1 RSMo, is *not* "reasonably related to *the expense of* the administration of justice." In fact, the Executive Department entity charged with administering the Brain Injury Fund agrees that it does not pay any expenses related to Missouri's judicial system. (D36 p. 1-2 ¶ 1-2).

The State Defendants continue to misstate and misapply the test established by *Harrison* and *Fowler*. The surcharge funding the Brain Injury Fund is *not* "reasonably related to *the expense of* the administration of justice" and violates Article I, Section 14.

III. The Independent Living Center Fund

The State Defendants echo the same arguments regarding the Independent Living Center Fund as those made for the Brain Injury Fund (Respondents' Brief p. 31), and they fail for the same reason.

The State Defendants also argue that the Independent Living Center Fund "decreases the chance that individuals will encounter the justice system" and provides for "legal services". (Respondents' Brief p. 31, 32). While these services may be worthwhile and laudable, they are *not* "reasonably related to *the expense of* the administration of justice." In fact, the Executive Department entity charged with administering the Independent Living Center Fund is not aware of *any* ways in which it

bears a reasonable relationship with the expenses for the administration of justice in Missouri's court system. (D36 p. 2 ¶ 3-4).

Consequently, the surcharge used to fund the Independent Living Center Fund violates Article I, Section 14, of the Missouri Constitution and is unconstitutional as a matter of law.

IV. Motorcycle Safety Trust Fund

The State Defendants argue the Motorcycle Safety Trust Fund surcharge is "reasonably related to the administration of justice" because the programs it supports "decrease the chances of encounters with the court system". (Respondents' Brief p. 33). Again, the State Defendants have applied the wrong test. Like the other funds, the Executive Department entity responsible for administering the Motorcycle Safety Trust Fund is not aware of any way in which it pays for expenses related to Missouri's judicial system. (D36 p. 2 ¶ 5-6).

Applying the proper test, this surcharge is *not* "reasonably related to *the expense of* the administration of justice" and violates Article I, Section 14.

V. Missouri Office of Prosecution Services Fund

The State Defendants argue the surcharge funding the Missouri Office of Prosecution Services Fund is constitutional because expenses related to assisting prosecutors "are patently 'related to' the "administration of justice' because '[t]he State has a compelling interest in protecting the public from crime.'" (Respondents' Brief p. 28-29) (quoting *In re Care & Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. banc 2003)). While it may be true that prosecutors honestly and ably

performing their duties "'*aid* the courts in the administration of justice'" (Respondents' Brief p. 29) (quoting *Clark v. Austin*, 101 S.W.2d 977, 981 (Mo. banc 1937); emphasis added), *aiding* the courts in the administration of justice is different from being "reasonably related to *the expense of* the administration of justice."

The investigation and prosecution of crimes is an Executive Department function, and this Court has held that court costs cannot be used to pay Executive Department activities. Like the surcharges in *Fowler* and *Harrison*, the Missouri Office of Prosecution Services Fund surcharge takes money collected as court costs and uses that money for Executive Department functions. The Missouri Office of Prosecution Services Fund is *not* "reasonably related to the expense of the administration of justice" and violates Article I, Section 14.

VI. The Spinal Cord Injury Fund

The State Defendants make the same argument regarding the Spinal Cord Injury Fund surcharge as they did about the Brain Injury Fund surcharge. (Respondents' Brief p. 30-31). Similarly, the Executive Department entity charged with administering the Spinal Cord Injury Fund is not aware of any ways in which it is used to pay expenses related to Missouri's judicial system. (D36 p. 3 ¶ 7-8). For the same reasons stated regarding the Brain Injury Fund surcharge, the Spinal Court Injury Fund surcharge is *not* "reasonably related to *the expense of* the administration of justice" and violates Article I, Section 14.

VII. The Crime Victims' Compensation Fund and Services to Victims Fund

The State Defendants' arguments regarding the Crime Victims' Compensation Fund surcharge misstates the courts' obligations under § 595.209. The State Defendants argue that "[t]he Crime Victims' Compensation Fund is used to carry out *judicially-related* activities." (Respondents' Brief p. 30) (emphasis added). The State Defendants then state:

> Under Missouri law, crime victims have the right to be kept informed on the status of criminal cases in which they are involved as victims, including the case status, any court dates, whether the defendant is released on bond or for any other reason, whether the defendant has escaped from a detention facility, the defendant's projected date of release from confinement, and any scheduled parole or release hearings.

(Respondents' Brief p. 30). Interestingly, these listed rights do not involve any obligations of the judiciary. *See* § 595.209.1(3), (4), (5), (6) RSMo. Missouri courts have very limited obligations under § 595.209. *See* § 595.209.1(12), (17) RSMo. Consequently, the State Defendants are incorrect when suggestions the listed services would be paid for by the courts if not for the Crime Victims' Compensation Fund surcharge.

There is no reasonable relationship between the Crime Victims' Compensation Fund, the Services to Victims Fund, or the other activities financed by the surcharge in § 595.045.1 and "the expense of the administration of justice." The surcharge established by § 595.045.1 violates Article I, Section 14 of the Missouri Constitution and is unconstitutional as a matter of law.

VIII. The State Defendants Did Not Raise the Constitutionality of Five of the Funds in Their Motion

As explained in the Appellant's Brief, if this Court decides to address only issues raised in the State Defendants' Motion for Summary Judgment, then summary judgment regarding five of the Seven State Funds must be reversed because the trial court granted summary judgment on a ground not raised in the motion. (Appellant's Brief p. 67-70). More importantly, as discussed above, the Seven Surcharges involved in this case are *not* "reasonably related to the expense of the administration of justice" and violate Article I, Section 14. The State Defendants are not entitled to summary judgment and the trial court's Amended Judgment should be reversed.

IX. The State Defendants Received, Appreciated, and Retained a Benefit from the Seven Surcharges

The State Defendants argue that summary judgment was proper "because Plaintiffs cannot establish that either the Director or the Treasurer received any *personal benefit* from the challenged surcharges or the seven State Funds[.]" (Respondents' Brief p. 36) (emphasis added); (*see also* Respondents' Brief p. 37) ("[N]either the Director nor the Treasurer received any *personal benefit* from the challenged surcharges.") (emphasis added). It is clear the State Defendants have been sued in their official capacities. (D179 p. 18 ¶ 58). Whether they *personally* received any benefit from the Seven Surcharges is irrelevant.

The State Defendants are representatives of the State who receive, deposit, maintain custody of, authorize payments from, and manage the funds belonging to the State of Missouri. The Department of Revenue

("DOR") takes the money collected from the Seven Surcharges and deposits it into the State's account. (D179 p. 13 ¶ 41, p. 42 ¶ 136, p. 43 ¶ 138-139). The money collected from the Seven Surcharges is deposited into the State of Missouri's single bank account and co-mingled with nearly all the State's money. (D179 p. 44 ¶ 153). The Treasurer's office: (1) is the financial system/financial institution for the State of Missouri's state funds (including the Seven Funds) (D179 p. 44 ¶ 146); (2) is custodian of the Seven Funds (D179 p. 44 ¶ 147); (3) is the Chief Financial Officer for the State of Missouri (D179 p. 44 ¶ 148); (4) manages state revenue and investments (D179 p. 44 ¶ 149); and (5) authorizes State payments (D179 p. 44 ¶ 150-51). The Treasurer also maintains discretion whether to authorize payments made for the Seven Funds. (D179 p. 46 ¶ 161). Finally, the Treasurer has an obligation to follow the law and monitor the legality of all state money and protect it from fraud and abuse. (D179 p. 46 ¶ 160).

The State of Missouri also keeps as general revenue all interest and investment gains for five of the Seven Funds. (D179 p. 45 ¶ 154).

It cannot be legitimately disputed that the State benefits from the Seven Surcharges. The money from the Seven Surcharges is used to fund the Seven State Funds. The Seven State Funds are used for purposes established by the State of Missouri. The Seven State Funds are all used for Executive Department activities, programs, or purposes. Consequently, the State benefits from use of the money from the Seven Surcharges for the activities, programs, or purposes for which the Seven State Funds were created. Further, it would be unjust for the State to

retain the benefit of money collected through unconstitutional court cost surcharges.

The issue here is whether the State Defendants, who are the State officials charged with collecting and controlling the State's funds, can be sued to recover the amounts by which the State has been unjustly enriched through the collection of unconstitutional surcharges. The State of Missouri has been unjustly enriched by collecting, depositing, maintaining custody of, and spending the funds obtained through the unconstitutional Seven Surcharges. The State Defendants are the officials tasked with collecting, depositing, maintaining custody over, and spending the money of the State of Missouri. The DOR takes the money collected from the Seven Surcharges and deposits it into the State's account. (D179 p. 13 ¶ 41, p. 42 ¶ 136, p. 43 ¶ 138-139). The State Defendants admit that the Treasurer's role involves having custody of the State's funds. (Respondent's Brief p. 44 n. 3) ("The evidence is uncontroverted that the Treasurer's role is exclusively custodial in nature ….").

In *Gas Service Co. v. Morris*, 353 S.W.2d 645 (Mo. 1962), the plaintiff filed suit against the Missouri Director of Revenue, Secretary of State, Treasurer, Auditor, and Comptroller seeking recovery of a domestication tax which the plaintiff claimed was illegally assessed and collected. *Gas Service Co.*, 353 S.W.2d at 646. This Court recognized that the action constituted an action against the State, explaining:

> Inasmuch as the averments of the petition compel the conclusion that the money collected as additional domestication tax was paid into the coffers of the State of Missouri, and inasmuch as the

> judgment sought against defendants in their official capacities could be satisfied only from money in the state treasury, it seems apparent that the relief sought is against the state. Under such circumstances it is clear and we so hold that in so far as the *petition attempts to state an action against the named defendants in their respective official capacities, the action is one against the State of Missouri*.

Gas Service Co., 353 S.W.2d at 647-48 (emphasis added).

As *Gas Service Co.* makes clear, Plaintiff's action against the State Defendants in their official capacities is an action against the State, which has clearly benefited from the Seven Surcharges. Further, because of their involvement in collecting, depositing, maintaining custody of, and spending the State's funds, the State Defendants are the proper defendants in this action for unjust enrichment against the State.

The State Defendants have been sued in their official capacities, and, thus, Plaintiff has sued the State of Missouri. The State of Missouri has received the money from the Seven Surcharges, that money was deposited in the State's account, that money has earned interest and income for the State, and that money has been used for the purposes established by the statutes creating the Seven State Funds and imposing the Seven Surcharges. The summary judgment facts support the conclusion that the State has received, appreciated, and retained the benefits from the Seven Surcharges. Consequently, the State Defendants are not entitled to summary judgment.

X. Sovereign Immunity Does Not Apply

The State Defendants are not entitled to sovereign immunity as Plaintiff's claim for unjust enrichment is not a tort claim. Further, consent is implied with respect to Plaintiff's unjust enrichment claim seeking restitution for the State's collection of unconstitutional court cost surcharges.

The State Defendants' reliance on *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913 (Mo. banc 2016), is misplaced. That case involved tort claims for trespass and negligence. *Metro. St. Louis Sewer Dist.*, 476 S.W.3d at 914. Consequently, this Court's opinion was addressing whether sovereign immunity applied to tort claims and did not address the issue in this case. As this Court explained:

> Sovereign immunity is:
>
> A judicial doctrine which precludes bringing suit against the government without its consent. Founded on the ancient principle that "the King can do no wrong," it bars holding the government or its political subdivisions liable for the *torts* of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment.

Metro. St. Louis Sewer Dist., 476 S.W.3d at 921 (quoting Black's Law Dictionary at 1396 (6th ed. 1990); emphasis added). The fact that sovereign immunity only applies to tort actions is evident from § 537.600, which provides:

> Such sovereign or governmental *tort* immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect[.]

§ 537.600.1 RSMo (emphasis added).

The State Defendants argument still "reflects a fundamental, but not uncommon, confusion of the doctrine of sovereign immunity from liability in tort with the separate, but related, doctrine that the sovereign cannot be sued without its consent. Section 537.600 deals *solely* with the State's sovereign immunity from liability in *tort*[.]" *Kubley v. Brooks*, 141 S.W.3d 21, 29 (Mo. banc 2004) (emphasis in original). Sovereign immunity under § 537.600 "applies *only* to suits in tort." *Kubley*, 141 S.W.3d at 29 (emphasis in original).

A claim for unjust enrichment is not a tort claim.

> The right to restitution based upon unjust enrichment is not confined by the form of action or by the traditional limits of law or equity jurisdiction. It operates on equitable principles, but draws its source from law as well as equity. It cuts across contract and tort and stands separately.

Petrie v. LeVan, 799 S.W.2d 632, 635 (Mo. App. W.D. 1990) (footnote omitted). Even when seeking a money judgment, a claim for unjust enrichment is not a tort claim seeking compensatory damages. Plaintiff's claim is an equitable claim for unjust enrichment seeking restitution of the amount by which the State Defendants were unjustly enriched by their receipt and use of the unconstitutional Seven Surcharges. As a result, sovereign immunity under § 537.600 does not apply. Because sovereign immunity does not apply to a claim for unjust enrichment, Plaintiff was not required to plead an exception.

Further, the State Defendants' reliance on *Kleban v. Morris*, 363 Mo. 7, 247 S.W.2d 832 (1952), is misguided. In that case, the legislature had provided a method for seeking a tax refund which the plaintiffs did not

follow. *Kleban*, 373 Mo. at 15-16, 247 S.W.2d at 837. In contrast, the legislature has not established any procedure for obtaining a refund when unconstitutional court cost surcharges are collected.

Finally, as discussed in the Appellant's Brief, consent is implied in the circumstances of this case. The law does not allow the State to charge unconstitutional court surcharges.

> The law gives many advantages to governmental entities, including official immunity, sovereign immunity, and the public duty doctrine. It also allows entities such as the County to purchase insurance policies to protect against losses that result from the dishonesty of employees such as Margaret King. It simply does not allow a governmental entity to charge more for services rendered than prescribed by statute.

Investors Title Co. v. Hammonds, 217 S.W.3d 288, 298 (Mo. banc 2007). If a county is not protected from an action when the county charged more than allowed by statute, the State likewise cannot be protected from an action when the State charged unconstitutional court surcharges.

The prohibition on suits against the State without its consent is designed to protect the State. In contrast, Article I, Section 14 is designed to protect the people from the State. The Missouri Constitution is the higher authority and takes precedent. Until the legislature provides for a reasonable method for obtaining restitution of unconstitutional court cost surcharges, consent to sue the State to obtain restitution must be implied.

Sovereign immunity does not apply to Plaintiff's claim for unjust enrichment and consent to suit is implied under the facts of this case.

Consequently, the State Defendants are not entitled to summary judgment.

XI. Plaintiff Is Not Required to Join the Courts and Office of Administration

The State Defendants continue to rely on the cases of *Baker v. Crossroads Academy-Central St.*, 648 S.W.3d 790 (Mo. App. W.D. 2022), and *Midwest Freedom Coalition, LLC v. Koster*, 398 S.W.3d 23 (Mo. App. W.D. 2013). (D123 p. 17-19). The question of whether a justiciable controversy existed in both those cases arose in the context of a claim for declaratory judgment. *Crossroads Academy-Central St.*, 648 S.W.3d at 798; *Midwest Freedom Coalition, LLC*, 398 S.W.3d at 26. Plaintiff's action against the State Defendants is not for declaratory judgment.

Despite the State Defendants' contentions otherwise, the relief sought does determine whether a justiciable controversy exists. As in *Fowler*, if Plaintiff prevails on his claim for unjust enrichment, he and the class members will be entitled to restitution from the State, which retained the benefit of the Seven Surcharges. *Fowler*, 623 S.W.3d at 583. This Court, in *Fowler*, determined the constitutionality of § 57.955 without the joinder of the parties that enforced the surcharge established by that section. The courts and the Office of Administration are not necessary parties to this action.

Plaintiff has stated a justiciable claim against the State Defendants for unjust enrichment "[b]ecause complete relief can be accorded among the named parties[.]" *Fowler*, 623 S.W.3d at 583. The State Defendants are not entitled to summary judgment.

XII. Plaintiff Is Not Required to Join the Entities that Use the Seven State Funds

As explained in the Appellant's Brief, this Court's decision in *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738 (Mo. banc 2016), is inapplicable because the plaintiff in that case alleged an agent of the "Fund" had made fraudulent and negligent representations. *City of Harrisonville*, 495 S.W.3d at 745. "City's claim, if any, was against the Fund's Board of Trustees for *the misrepresentations of its agents*." *City of Harrisonville*, 495 S.W.3d at 750 n. 5 (emphasis added).

Plaintiff's claim is clearly distinguishable from the tort claim asserted in *City of Harrisonville*. Plaintiff is not claiming that any of the Seven State Funds are liable for misrepresentations or any other tortious conduct. Plaintiff is claiming that the State, through the State Defendants which he sued in their official capacities, has been unjustly enriched by the unconstitutional Seven Surcharges. Further, nothing in *Fowler* suggests that a plaintiff seeking restitution of unconstitutional surcharges must sue the entities that use the funds.

The State Defendants also argue that Plaintiff's failure to join the entities that use the Seven State Funds "creates a remedy issue", i.e., Plaintiff cannot recover from the State Defendants because they are not authorized to pay restitution. (Respondents' Brief p. 56-58). That argument is misplaced.

> Courts usually do not examine the pocketbook of the defendant to determine whether a suit may be maintained. If a cause of action is stated and all necessary prerequisites to maintenance of such suit exist, the case is heard. Only if and when a judgment is rendered is attention given as to whether the judgment is

> collectible. The same should be true here. If, as we find, the State impliedly has consented to waive its sovereign immunity and to be sued on this contract, the plaintiff should be entitled to proceed with his suit and secure an adjudication thereof. The matter of collectibility will come later.

V.S. DiCarlo Constr. Co. v. State, 485 S.W.2d 52, 57 (Mo. 1972).

The State Defendants have been sued in their official capacities, and, thus, Plaintiff sued the State of Missouri. As such, the State Defendants are the proper parties to this action and not entitled to summary judgment.

XIII. Plaintiff Did Not Voluntarily Pay the Surcharges

The State Defendants argue that the affirmative defense of the voluntary payment doctrine bars Plaintiff from bringing a claim for unjust enrichment. The doctrine provides "that a person who voluntarily pays money *with full knowledge of all the facts in the case*, and in the absence of fraud and duress, cannot recover it back, though the payment is made without a sufficient consideration, and under protest." *Huch v. Charter Communs, Inc.*, 290 S.W.3d 721, 726 (Mo. banc 2009) (citation and internal quotation marks omitted; emphasis added).

But, this Court has confirmed the voluntary payment doctrine is not always available. *Huch*, 290 S.W.3d at 727. It was not available as a defense to the Missouri Merchandising Practicing Act. *Huch*, 290 S.W.3d at 727. It was also not available where a client paid fees for document production that constituted an unauthorized practice of law. *Huch*, 290 S.W.3d at 727 (citing *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339 (Mo. banc 2007)). Most relevant to this case, the

doctrine is not available where the money is paid under duress, under fraud, or under a mistake of fact. *Huch*, 290 S.W.3d at 726.

As recognized in *Claflin v. McDonough*, 33 Mo. 412 (1863), threat of legal process does not constitute duress when the party making the payment *knows the demand is illegal*. That case explains:

> a voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity, (unless to redeem or preserve his person or goods,) is not the subject of action for money had and received.

Claflin, 33 Mo. at 416 (citation and internal quotation marks omitted). The threat of legal process is not duress when the party knows the demand is illegal because that party can show that liability does not exist. *Claflin*, 33 Mo. at 416. "Missouri does not recognize the threat of legal process as duress because the party threatened with legal process is entitled to plead and prove that he is not liable." *Smith v. City of St. Louis*, 409 S.W.3d 404, 420 (Mo. App. E.D. 2013). Such is not the case here. There is no evidence that Plaintiff knew the Seven Surcharges were illegal or unconstitutional. Consequently, Plaintiff did not know that he could prove he was not liable for those unconstitutional surcharges.

This issue was also thoroughly, and most recently, examined under similar circumstances in *Damon v. City of Kansas City*, 419 S.W.3d 162, 193 (Mo. App. W.D. 2013). There, automobile owners brought a class action against the City of Kansas City and a company that operated the city's red-light camera enforcement system, challenging the validity of the city's red-light camera ordinance.

> [I]t is well settled that restitution will be granted to remedy a payment made because of a mistake of law if the surrounding facts raise an independent equity, as when the mistake is induced, or is accompanied by inequitable conduct of the other party.

Damon, 419 S.W.3d at 193 (citing *W. Cas. & Sur. Co. v. Kohm*, 638 S.W.2d 798, 800 (Mo. App. E.D.1982)).

Contrary to the State Defendants' argument, independent equity does preclude application of the voluntary payment doctrine in this case. *Damon*, 419 S.W.3d at 193. In 1986, "*Harrison* laid down a bright-line rule" that court costs must be "'reasonably related to the expense of the administration of justice'". *Fowler*, 623 S.W.3d at 584-85. There is no reasonable argument that the Seven Surcharges meet that test. Under the test established in *Harrison* and confirmed in *Fowler*, the State of Missouri has been on notice for decades that the Seven Surcharges are unconstitutional. Here, as in *Damon*, the State Defendants may not be absolved from responsibility when the State knew or should have known the Seven Surcharges were unconstitutional for decades.

Further, Plaintiff did not know that the court costs he paid included the Seven Surcharges and would go to the Seven State Funds. (D179 p. 46 ¶ 163-65; see also D9 p. 7 ¶ 24). The voluntary payment doctrine only applies when a person "pays money *with full knowledge of all of the facts* in the case[.]" *Damon*, 419 S.W.3d at 192 (emphasis in original). Plaintiff did not have "full knowledge" of the surcharges included in the court costs he was ordered to pay.

Genuine issues of material fact exist regarding whether the voluntary payment doctrine applies. Consequently, the State Defendants are not entitled to summary judgment and the Amended Judgment should be reversed.

XIV. The Seven Surcharges Have Been Unconstitutional and Void Since Established

The State Defendants' arguments for prospective-only application of a finding that the Seven Surcharges are unconstitutional ignore the realities in this case. First, as discussed in the Appellant's Brief, a finding in favor of Plaintiff would establish that it is unjust for the State to retain the unconstitutional surcharges. Consequently, a prospective-only application of that finding is unwarranted. Further, the test for prospective verses retroactive application supports the normal retroactive application.

Retroactive application is the norm and prospective application only applies in unusual circumstances. *Trout v. State*, 231 S.W.3d 140, 148 (Mo. banc 2007) (supplemental opinion). The full three-factor test established by this Court to determine if a decision should be given prospective only application is:

> First, the decision in question must establish a new principle of law by overruling clear past precedent. Second, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of

> the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.

Sumners v. Sumners, 701 S.W.2d 720, 724 (Mo. banc 1985) (citations and internal quotation marks omitted).

The first factor is clearly not met here. One, a finding that the Seven Surcharges are unconstitutional does not involve overruling any prior decisions by this Court. Two, applying the test established in *Harrison* and confirmed in *Fowler* does not involve establishing a new principle of law. *Harrison* has been the established law in Missouri since 1986.

Likewise, the second factor does not support prospective-only application. Prospective-only application would encourage the State to continue to enact and collect unconstitutional court cost surcharges. The State could enact such surcharges yet keep all the money collected until a decision by this Court declaring the surcharge unconstitutional. Further, without retroactive application, it is financially prohibitive for a party that has been forced to pay the Seven Surcharges to contest the constitutionality. At most, an individual will have to pay $76 regarding the Seven Surcharges with respect to one criminal case. (Appellant's Brief p. 11). A person paying the Seven Surcharges cannot be expected to spend the time and money necessary to litigate the constitutionality of those surcharges simply to avoid paying $76. Consequently, prospective-only application would discourage challenges to the constitutionality of any court costs surcharges in either this case or the future.

The third factor supports retroactive application as well. Finding the Seven Surcharges unconstitutional under the test established by

Harrison does not involve a change in the law. The State has known since 1986 that court costs must be "reasonably related to the expense of the administration of justice." *Harrison*, 716 S.W.2d at 267.

Finally, the State of Missouri maintains a budget surplus of more than Six *Billion* Dollars. (D179 p. 47 ¶ 171). There is no hardship if the State is required to provide restitution of the amount it unconstitutionally received that is determined to be unjust for it to retain. There is no basis for prospective-only application of any finding that the Seven Surcharges are unconstitutional, and the State Defendants are not entitled to summary judgment.

XV. Plaintiff's Claim Is Not Barred by Judicial Immunity

Despite arguing that Plaintiff's claims are barred by judicial immunity in the Suggestions in Support of the State Defendants' Motion for Summary Judgment (D123 p. 30-31), the State Defendants now admit that they are not entitled to judicial immunity. (Respondents' Brief p. 67-68). Consequently, the State Defendants are not entitled to summary judgment.

XVI. A Motion to Retax Costs Is Not a Proper Remedy for a Claim the Seven Surcharges Are Unconstitutional

The State Defendants continue to argue that Plaintiff was required to contest the constitutionality of the Seven Surcharges through a motion to retax costs. (Respondents' Brief p. 63-64). A motion to retax costs is simply not a proper method for contesting the constitutionality of the Seven Surcharges, and it is unrealistic to believe that a constitutional claim could have been litigated in that fashion.

A motion to retax costs "is applicable only to the ministerial taxation of costs by the clerk after entry of judgment." *Beecham v. Evans*, 136 Mo. App. 418, 421, 117 S.W. 1190, 1191 (1909). "The trial court retains jurisdiction to exercise its ministerial duty to correct errors made by the clerk in taxing court costs that do not require judicial determination or investigation." *Solberg v. Graven*, 174 S.W.3d 695, 701 (Mo. App. S.D. 2005). Determining the constitutionality of the Seven Surcharges is not a "ministerial duty."

Plaintiff's claim is not that the courts or the clerks made errors in assessing court costs. Costs, including the Seven Surcharges, were assessed as required by the various statutes. Plaintiff's claim is that the statutes establishing the Seven Surcharges are unconstitutional. A motion to retax costs is not a proper forum for assessing the constitutionality of the surcharges required by statute. The State Defendants are not entitled to summary judgment.

XVII. There Is No Constitutional Application of the Seven Surcharges

The State Defendants' final argument is that any constitutional application of the Seven Surcharges should be severed from any unconstitutional application, claiming that the Seven Surcharges can be constitutionally applied to cases involving criminal convictions. (Respondents' Brief p. 68-69). That argument misconstrues this Court's holdings in *Harrison* and *Fowler*. Under those cases, there are no constitutionally valid applications of the Seven Surcharges.

Fowler dealt with § 57.955 which provided:

> "There shall be assessed and collected a surcharge of three dollars in all civil actions filed in the courts of this state and in all criminal cases including violation of any county ordinance or any violation of criminal or traffic laws of this state, including infractions, but no such surcharge shall be assessed when the costs are waived or are to be paid by the state, county or municipality or when a criminal proceeding or the defendant has been dismissed by the court."

Fowler, 623 S.W.3d at 580 (quoting § 57.955.1 RSMo). This Court held: "Applying *Harrison*'s bright-line rule, § 57.955 is not 'reasonably related to the expense of the administration of justice' and therefore, violates article I, § 14 of the Missouri Constitution." *Fowler*, 623 S.W.3d at 585. This Court did not limit the finding of unconstitutionality to civil cases or criminal cases where the defendant was not convicted. This Court found § 57.955 unconstitutional because the assessed surcharge was not "reasonably related to the expense of the administration of justice."

The same is true in this case. The Seven Surcharges are not "reasonably related to the expense of the administration of justice." Under *Harrison* and *Fowler*, the Seven Surcharges are unconstitutional. There are no applications of the Seven Surcharges that do not violate Article I, Section 14 of the Missouri Constitution.

The State Defendants seek to make it as difficult procedurally as possible, if not impossible, for anyone to pursue a claim that any statutory court cost surcharges are unconstitutional. The State Defendants also seek to make it as difficult as possible, if not impossible, for anyone who succeeds in contesting the constitutionality of those surcharges to recover any restitution from the State. Their intent is to discourage anyone from seeking to hold the court cost

surcharges unconstitutional so the State can continue to collect the tens of millions of dollars those surcharges generate. The test established in *Harrison* and *Fowler* is meaningless if no one can pursue a claim that certain statutory court costs violate Article I, Section 14 of the Missouri Constitution.

CONCLUSION

The Seven Surcharges are *not* "reasonably related to the expense of the administration of justice" and violate Article I, Section 14 of the Missouri Constitution. Therefore, the trial court erred in granting the State Defendants' Motion for Summary Judgment. Additionally, the grounds raised in the State Defendants' Motion for Summary Judgment do not support the trial court's grant of summary judgment. Consequently, this Court should declare the Seven Surcharges unconstitutional, reverse the trial court's Amended Judgment, and remand for a trial regarding Plaintiff's and the Class Members' claim for unjust enrichment.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATE

I certify that this Appellant's Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b), that the entire brief contains 7,735 words, and that this Appellant's Reply Brief was served pursuant to Rule 103.08.

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