S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TIFFANY DOBSON and JENNIFER BROGNO, Plaintiffs-Appellants,	UNPUBLISHED January 23, 2007
v CITY OF ANN ARBOR, Defendant-Appellee.	No. 257634 Washtenaw Circuit Court LC No. 03-001282-CZ

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiffs Tiffany Dobson and Jennifer Brogno appeal by right the trial court's order granting summary disposition in favor of defendant city of Ann Arbor pursuant to MCR 2.116(C)(5) and (C)(8). We affirm.

This case involves a dispute arising from the "franchise fee" charges included in plaintiffs' Comcast cable bills. Plaintiffs assert that the portion of their bills designated as a "franchise fee" is in reality a tax levied by defendant on cable subscribers. Plaintiffs further allege that defendant levied this "tax" without voter approval and incorporated excess revenue into its general fund, in violation of the Headlee Amendment to the Michigan Constitution. Defendants contend that the franchise fee is paid by the cable provider, not the cable subscribers, and is not a tax. Plaintiff filed the instant suit on November 18, 2003, seeking to recover the excess "franchise fees" collected by defendant. The trial court granted summary disposition to defendant, finding that plaintiffs lacked standing to bring the claims alleged and failed to state a claim on which relief could be granted. Specifically, the trial court concluded that the franchise fee is not an impermissible tax under the Headlee Amendment.

Plaintiffs maintain that the trial court erred in determining that they were not real parties in interest and did not have proper standing to bring this suit. MCR 2.116(C)(5). We do not agree. The issue whether a party has standing is a question of law that we review de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

To bring a cause of action under this provision, a party must have standing as described in the Headlee Amendment:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the

> applicable unit of government his costs incurred in maintaining such suit. [Const 1963, art 9, § 32.]

"Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy." *House Speaker v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993). Standing requires more than a personal stake in the outcome of the litigation; to have standing, "a plaintiff must demonstrate that his or her substantial interest will be detrimentally affected in a manner different from the citizenry at large." *MOSES, Inc v SEMCOG*, 270 Mich App 401, 414; 716 NW2d 278 (2006). To demonstrate standing, a party must establish the following:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [*Lee*, *supra* at 739, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).]

Similarly, a party must establish that it is a real party in interest in order "to protect defendant from being repeatedly harassed by a multiplicity of suits for the same cause of action . . . ." *Kearns v Michigan Iron & Coke Co*, 340 Mich 577, 581; 66 NW2d 230 (1954), quoting *Poy v Allan*, 247 Mich 385, 388; 225 NW2d 532 (1929). In tax cases, to establish that he is a real party in interest, a taxpayer must identify a threat that he will "sustain substantial injury, loss, or damage as a taxpayer through increased taxation and its consequences." *Grosse Ile Comm for Legal Taxation v Grosse Ile Twp*, 129 Mich App 477, 487-488; 342 NW2d 582 (1983). Essentially, "[s]ome special grievance must be shown." *Id.*

In the present case, plaintiffs are not the real parties in interest because the franchise fee at issue is imposed on Comcast and not on individual consumers. Thus, plaintiffs suffer no actual injury, loss, or damage. Further, no contractual relationship exists between plaintiffs and defendant. Although plaintiffs may pay other taxes to the city of Ann Arbor, they do not pay the alleged "tax" at issue in this case. It is critical that the "taxpayer" to whom standing is granted is one to whom the tax applies. See *Grosse Ile Comm for Legal Taxation*, *supra.* Accordingly, plaintiffs do not have standing under Section 32 of the Headlee Amendment, and the trial court properly dismissed their complaint for this reason.

Although we need not consider the other issues raised by plaintiff on appeal, we briefly address plaintiff's argument that the trial court also erroneously granted summary disposition to defendant because the franchise fee that Comcast paid to defendant was actually a tax. Because plaintiffs, as Comcast subscribers, were required to pay a "franchise fee" in their Comcast bills, they were the payers of this city-imposed franchise "tax." We disagree.

We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion

under MCR 2.116(C)(8) tests the legal sufficiency of plaintiffs' complaint on the pleadings alone. *Id.* at 119-120. The motion should be granted only if plaintiffs' claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.*

The Headlee Amendment, Const 1963, art 9, § 31, states as follows:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt v Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). "Generally, a 'fee' is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." *Id.* at 161, quoting *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 209; 591 NW2d 52 (1998). Conversely, a "tax" is designed to raise revenue. *Id.*

Three criteria are considered when distinguishing between a fee and a tax. *Id*. First, "a user fee must serve a regulatory purpose rather than a revenue-raising purpose," although a fee may also be used to raise money as long as it is in support of the underlying regulatory purpose. *Id.*; *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Second, a user fee must be proportionate to the necessary costs of the service. *Bolt*, *supra* at 161-162. Third, a fee must be voluntary in nature, meaning that the payer of the fee must be able to refuse the commodity or service. *Id.* at 162. A fee also confers benefits only on those who pay the fee, not the general public or even a portion of the public who do not pay the fee. *Graham*, *supra* at 151. The aforementioned criteria are considered in their totality rather than in isolation. *Bolt*, *supra* at 167 n 16. Accordingly, "a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee." *Graham*, *supra* at 151.

On considering the *Bolt* criteria, we conclude that the Comcast franchise fee is not a tax. Although Comcast must pay the fee in order to maintain a right-of-way to run cable lines through the city, Comcast is not obligated to offer cable service to the residents of Ann Arbor and can take its business elsewhere. See *Kowalski v City of Livonia*, 267 Mich App 517, 519-520; 705 NW2d 161 (2005). Comcast voluntarily chose to offer cable services to Ann Arbor residents and subject itself to the franchise fee. Further, the franchise fee is not designed to raise revenue for the city of Ann Arbor. Again, Comcast pays this fee in order to run cable lines along Ann Arbor's public streets. In addition, the parties do not indicate that the fee is disproportionate to the cost that Comcast's use of the public roadways places on defendant. Although plaintiffs assert that defendant merged $299,718 of $1,361,280 in revenue from cable licensing fees into its general fund in 2002, plaintiffs fail to indicate if defendant accrued similar surpluses in other years or if it spent money from the general fund in other years to maintain these rights-of-way. Regardless, even if defendant transferred approximately 22 percent of its revenue from the franchise fees to the general fund, after considering the *Bolt* criteria in their totality, we still conclude that the franchise fee is not a tax. See also *Kowalski*, *supra* at 521.

Further, the city imposed this fee on Comcast, the cable provider, and not on cable subscribers. Comcast, not the cable subscribers, must pay the city of Ann Arbor five percent of gross revenue. Although Comcast has made a business decision to recoup this fee from its subscribers, the cable customers owe the city of Ann Arbor nothing.[1] In *Sims v Firestone Tire & Rubber Co*, 56 Mich App 440, 443-444; 224 NW2d 103 (1974), aff'd 397 Mich 469 (1976), the plaintiff, a retail customer, was required to pay a fee as part of his bill corresponding to the amount of sales tax statutorily imposed on the defendant for that transaction. By charging the fee, the defendant recovered the value of the sales tax from its customers. *Id.* at 447. The *Sims* Court concluded that the sales tax was levied against Firestone and that the consumers were not the "taxpayers." Although Firestone had the right to attempt to recover the cost of the tax from its customers, this did not make the customers "taxpayer." *Id.* at 445. Similarly, Comcast had the right to recover the value of the franchise fee from its subscribers. The recovery of the franchise fee did not subject plaintiffs to an improper city tax. Accordingly, even if plaintiffs had standing, dismissal of their complaint for failure to state a claim on which relief could be granted would be appropriate.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

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[1] We note that the Federal Cable Act, 47 USC 542(f), contemplates that cable providers must pay franchise fees and permits providers to itemize a certain amount on their bills to cover those fees.