

COURT OF APPEALS, STATE OF COLORADO
Case No. 94CA1466

**BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT
OF APPELLANT, CITY OF COLORADO SPRINGS**

CITY OF COLORADO SPRINGS

Plaintiff-Appellant

v.

JOHN TIPTON, in his capacity as the Executive Director of the Department of Revenue of the State of Colorado, AMELIE A. BUCHANAN, in her capacity as Deputy Director of the Department of Revenue of the State of Colorado, the DEPARTMENT OF REVENUE of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellees

COLORADO MUNICIPAL LEAGUE
GEOFFREY T. WILSON, #11574
General Counsel
1660 Lincoln Street
Suite 2100
Denver, Colorado 80264
(303) 831-6411

January 9, 1995

TABLE OF CONTENTS

Table of Authorities	ii
I. Statement of Facts	1
II. Issues Presented	1
III. Introduction	1
IV. Summary of Argument	2
V. Argument	3
A. Imposition of a constructive trust on use taxes erroneously paid to and held by the State is appropriate	3
VI. Conclusion	9
Appendix A - Colorado Springs Ordinance 7-2-105	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Beatty v. Guggenheim Exploration Co.</u> , 225 N.Y. 380, 122 NE 378 (1919)	4
<u>In re Marriage of Allen</u> , 724 P.2d 651 (Colo. 1986)	5, 6
<u>Cablevision of Breckenridge v. Tannhauser, et al.</u> , 649 P.2d 1093 (Colo. 1982)	5, 6
<u>Lyons v. Jefferson Bank and Trust</u> , 793 F. Supp. 981 (D. Colo. 1992)	4
<u>Lyons v. Jefferson Bank and Trust</u> , 793 F. Supp. 989 (D. Colo., 1992)	6, 9
<u>Mancuso v. United Bank</u> , 818 P.2d 732 (Colo. 1991)	7
<u>Mt. Sneffels Company v. Estate of Scott</u> , 789 P.2d 464 (Colo. App. 1989)	5, 7
<u>Page v. Clark</u> , 197 Colo. 306, 592 P.2d 792, (1979)	4
<u>People v. 21020 Colo. Highway 74, Jefferson County</u> , 791 P.2d 1189 (Colo. App., 1989)	5
<u>Ralston Oil and Gas Company v. July Corp.</u> , 719 P.2d 334, 338 (Colo. 1985)	4
<u>Yetter Well Service Inc. v. Cimarron Oil Company, Inc.</u> 841 P.2d 1068 (Colo. 1992)	5, 7, 9
 <u>Statutes</u>	
Section 29-2-106(1), (3) and (4), C.R.S.	1
Section 39-29-108(2) and (3), C.R.S.	2
 <u>Other</u>	
76 Am. Jur. 2d. <u>Trusts</u> , Section 201	5
Scott, <u>The Law of Trusts</u> , Vol. V, Section 462 (4th Ed. 1989)	8

Scott, The Law of Trusts, Vol. V, Section 470 (4th Ed. 1989) 8

Scott, The Law of Trusts, Vol. V, Section 506 (4th Ed. 1989) 9

Restatement of Restitution, Section 160, Comment d 5, 8

Restatement of Restitution, Section 168(1), Comment a 8, 9

Restatement of Restitution, Section 201(1) 9

Dobbs, Law of Remedies (1st Ed., 1973) 7

Colorado Springs Municipal Ordinance 7-2-105 3

COMES NOW, the Colorado Municipal League as amicus curiae through its undersigned counsel submits this amicus brief in support of Appellant, the City of Colorado Springs (hereafter the "City").

I. STATEMENT OF FACTS

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of facts in the City's Opening Brief (hereafter, "City's Brief").

II. ISSUES PRESENTED

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of issues presented in the City's Brief.

III. INTRODUCTION

This appeal presents a question of immense importance to the 199 Colorado municipalities that impose sales and use taxes. Of these, 45 home rule municipalities collect their own sales and use taxes, the remainder (154) have their sales taxes collected by the State (see Section 29-2-106(1),(3) and (4), C.R.S.; 42 counties also have sales taxes collected by the State). The State is responsible for returning to this latter group the taxes which it collects on their behalf.

The State's threshold argument in the case at bar has been that it has no obligation to return the City's money, because the statutes pertaining to refunds (see: Section 39-29-108,(2) and (3), C.R.S.) permit refunds only to "taxpayers," and the City is not a taxpayer (see: State's "Motion and Brief for Summary Judgement and Answer Brief" to District Court, Rec. ppg. 00276-00277.

Obviously, in the absence of equitable relief such as that sought by the City here, this argument would defeat any obligation on the State's part to return wrongfully held city or town money that comes into its possession by whatever means. Of course, this would include the situation presented here, where a vendor in a locally collecting home rule municipality erroneously pays municipal taxes to the State. But the State's argument potentially reaches much further than that, since even those municipalities whose taxes are directly collected by the State are not "taxpayers." If these municipalities do not receive all of their tax money from the State, what is to be their recourse?

Clearly, when the State ends up with sales and use tax money that rightfully belongs to a city or town, the State is unjustly enriched. Equity should provide a remedy, and a rigid, narrow definition of "unjust enrichment" should not be permitted to frustrate relief.

IV. SUMMARY OF ARGUMENT

Imposition of a constructive trust on City funds held by the State is proper under the facts

of this case. The District Court's decision not to impose a constructive trust was based upon any inappropriate, narrow definition of "unjust enrichment," and was error. The District Court decision is contrary to Colorado court decisions and published authorities, as well as the purposes of equity and the constructive trust remedy. The District Court's decision should be reversed.

V. ARGUMENT

The Colorado Municipal League hereby adopts and fully incorporates by reference the arguments in the City's Brief, and in addition submits the following:

- A. Imposition of a constructive trust on use taxes erroneously paid to and held by the State, is appropriate.**

In the case at bar, two Colorado Springs businesses collected \$255,065.57 in City use taxes. Once collected, this money was subject to the following provision of the City sales and use tax ordinance:

7-2-105: TRUST STATUS OF TAX:

A. City Property in Trust: All sums of money paid by the consumer to the retailer as taxes imposed by this Article shall be and remain public money and the property of the City in the hands of such retailer. Such retailer shall hold the same in trust for the sole use and benefit of the City until paid to the Director of

Finance as herein provided. It shall be unlawful for any retailer to fail or refuse to pay to the Director of Finance all such sums.

(Appendix A)

Notwithstanding their clear fiduciary duty to hold the money in trust for and pay it over to the City, the businesses breached this obligation and paid the money to the State of Colorado. There is no remedy at law by which the City may force the State to disgorge the City's money. For the State to retain in excess of a quarter of a million dollars to which it is obviously not entitled, is plainly wrong. Equitable relief, in the form of a constructive trust on City monies wrongfully held by the State, is appropriate. As Judge Cardozo remarked in one of the leading cases in this area:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 NE 378, 380 (1919).

This view of the constructive trust remedy has been echoed by numerous Colorado courts. See e.g.: Lyons v. Jefferson Bank and Trust, 793 F. Supp. 981, 985 (D. Colo. 1992); In re Marriage of Allen, 724 P.2d 651, 657 (Colo. 1986); Ralston Oil and Gas Company v. July Corp., 719 P.2d 334, 338 (Colo. 1985); Page v. Clark, 197 Colo. 306, 315, 592 P.2d 792, 798 (1979)

The constructive trust remedy is available notwithstanding an absence of wrongdoing by the party presently in possession of the property subject to the trust. In Mt. Sneffels Company v. Estate of Scott, 789 P.2d 464 (Colo. App. 1989) it was said that:

Constructive trusts are raised by equity . . . under circumstances in which, although the property was acquired originally without fraud, it is against equity that it should be retained by him who holds it.

Ibid. 789 P.2d at 466. See also: Yetter Well Service Inc. v. Cimarron Oil Company, Inc., 841 P.2d 1068 (Colo. 1992); People v. 21020 Colo. Highway 74, Jefferson County, 791 P.2d 1189 (Colo. App., 1989). Accord: 76 Am. Jur. 2d, Trusts, Section 201.

The constructive trust is:

. . . an equitable device used to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs. . . The purpose of the remedy is to prevent the defendant from being unjustly enriched at the plaintiff's expense.

In re Marriage of Allen, supra, 724 P.2d at 656-657; see also: Restatement of Restitution, Section 160, particularly, Comment d.

The District Court refused to impose a constructive trust on the funds held by the State solely¹ on the basis that, in the District Court's opinion, the City could not prove each and every element of an unjust enrichment claim, as those elements were announced in Cablevision of Breckenridge v. Tannhauser, et al, 649 P.2d 1093 (Colo. 1982), a quasi-contract (not

¹ In the trial court the State argued that the City did not have standing to maintain this action, that the City was not an "aggrieved party" as contemplated by Section 24-4-106(1), C.R.S. and that the City was time barred from maintaining this equitable action. The Court found against the State on each of these arguments and the State does not appeal those rulings.

constructive trust) case. According to Cablevision, one of the elements that must be shown "to recover under a theory of quasi-contract or unjust enrichment" is that "a benefit was conferred on the defendant by the plaintiff." Ibid. 649 P.2d at 1096. Thus, the District Court concluded that:

. . . as a matter of law . . . the City did not confer a benefit upon the State. Rather, the taxpayers of the City conferred a benefit upon the State. Accordingly, the Court finds that the State has not been unjustly enriched by the City and declines to impose a constructive trust upon the taxes erroneously paid by Honeywell and Ampex to the State.

(Rec. p. 00296).

The District Court's imposition of a requirement that the City prove each element of a quasi-contract/unjust enrichment claim when seeking relief through a constructive trust remedy was inappropriate. In Lyons v. Jefferson Bank and Trust, 793 F. Supp. 989 (D. Colo., 1992), defendant, an innocent third party recipient of misappropriated funds, objected to imposition of a constructive trust on those funds. Defendant argued that plaintiffs had not proven all the elements of unjust enrichment. Defendant's argument was rejected.

. . . defendant confuses this equitable doctrine [unjust enrichment] with the equitable remedy of constructive trust. The two doctrines are distinct. Although Allen uses the phrase "unjust enrichment" in discussing application of the constructive trust doctrine in that case, the Court's use of that phrase cannot be construed as requiring proof of the formal elements of an unjust enrichment claim in a constructive trust action. See, In re Marriage of Allen, 724 P.2d at 660. Rather, the phrase is used in its colloquial sense to measure liability where the constructive trustee was an innocent donee.

Ibid 793 F. Supp. at 992 - 993.

The wooden requirement presumed by the District Court in the case at bar would completely foreclose use of the constructive trust remedy in any case where the defendant received the subject property from other than the plaintiff. Respectfully, the decision of the District Court was wrong and should be overturned by this Court. The District Court decision is at odds with the well established view, embraced by Colorado courts, that a constructive trust may be imposed on property held by innocent third parties.

For example, in Yetter Well Service Company v. Cimarron Oil Company, Inc., supra, the Court characterized the constructive trust as "an extremely flexible remedy" [citing Mancuso v. United Bank, 818 P.2d 732 (Colo. 1991)], that is "appropriate if innocent third persons have subsequently acquired an interest in the property. Ibid. 841 P.2d at 1070. See also: Mt. Sneffels Company v. Estate of Scott, supra. Yetter is instructive here, because that case affirmed imposition of a constructive trust on property held by the defendant, an innocent transferee from plaintiff's judgement debtor. Significantly, no benefit was conferred on the defendant by the plaintiff.

As a leading authority in the field has stated:

It is entirely appropriate to award a constructive trust as a means of forcing restitution to prevent unjust enrichment. For this purpose it does not much matter how the unjust enrichment came about. What must give concern is not the method by which the defendant enriched himself but the fairness and workability of the judicial decree. . . . Since the constructive trust is only a remedy it can be administered with considerable flexibility.

Dobbs, Law of Remedies, Section 4.3, at page 246, (1st Ed., 1973) (emphasis added).

Comment d to Section 160 of the Restatement of Restitution addresses "Unjust enrichment and unjust deprivation" in the context of constructive trusts. The comment makes no mention of any requirement that the plaintiff confer the benefit directly upon the defendant.

In most cases where a constructive trust is imposed the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the affect is to prevent a loss to the plaintiff and a corresponding gain to the defendant, and to put each of them in the position he was before the defendant acquired the property.

Restatement of Restitution, Section 160, Comment d. Accord: Scott, The Law of Trusts, Vol. V, Section 462 (4th Ed. 1989).

Subsequent sections of the Restatement make it clear that a constructive trust may be imposed notwithstanding that the holder of the property did not receive it from the plaintiff. For example, Section 168(1) provides:

Where a person holding property in which another has a beneficial interest transfers title to the property in violation of his duty to the other, the transferee holds the property subject to the interest of the other unless he is a bonafide purchaser.

Restatement of Restitution, Section 168(1). Accord: Scott, The Law of Trusts, Vol. V, Section 470 (4th Ed. 1989). Especially pertinent to the present case, since City Ordinance 7-2-105 expressly provides that the use tax money transferred to the State was held in trust by the collecting businesses for the "sole use and benefit of the City," is the following comment to Section 168(1).

a. Transfer by a Fiduciary. If a trustee in breach of a trust transfers trust property to a person who is not a bonafide purchaser, the transferee does not hold the property free of the trust, but holds it upon a constructive trust for the beneficiaries of the trust.

Restatement of Restitution, Section 168(1), Comment a. Also pertinent here is Section 201(1):

Where a fiduciary in violation of his duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon a constructive trust for the beneficiary.

Restatement of Restitution, Section 201(1). Accord: Scott, The Law of Trusts, Vol. V, Section 506 (4th Ed. 1989). Obviously, in none of the foregoing situations is it required that the benefit which may be recovered through the constructive trust remedy be conferred directly by the plaintiff upon the defendant holder of the property.

VI. CONCLUSION

The State's retention of the City's money, received as a result of a breach of fiduciary duty to the City, is plainly wrong. Equitable relief, in the form of a constructive trust, is appropriate in this case. The constructive trust remedy is an "extremely flexible remedy." Yetter, supra. Given the Court's decision in Lyons v. Jefferson Bank and Trust, supra, and taking into consideration the equitable purposes of the constructive trust remedy, the decision of the District Court to deny the trust solely because the City did not directly confer a benefit on the State was error.

WHEREFORE, the League urges this Court to reverse the decision of the District Court and permit imposition of a constructive trust on City funds held by the State.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Geoffrey T. Wilson', is written over a horizontal line.

Geoffrey T. Wilson, #11574
Colorado Municipal League
1660 Lincoln Street, Suite 2100
Denver, Colorado 80264
(303) 831-6411

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing brief was sent by U.S. postal service, postage prepaid, on the 9th day of January, 1995, to the following:

Ms. Carolyn Lievers
Assistant Attorney General
1525 Sherman Street
5th Floor
Denver, Colorado 80202

M. Allen Ziegler, Jr.
Assistant City Attorney-Corporate
P. O. Box 1575
Colorado Springs, Colorado 80901

A handwritten signature in cursive script, reading "Becky Pluye", is written over a horizontal line.

7-2-105: TRUST STATUS OF TAX:

- A. City Property in Trust: All sums of money paid by the consumer to the retailer as taxes imposed by this Article shall be and remain public money and the property of the City in the hands of such retailer. Such retailer shall hold the same in trust for the sole use and benefit of the City until paid to the Director of Finance as herein provided. It shall be unlawful for any retailer to fail or refuse to pay to the Director of Finance all such sums.
- B. Segregated Account: If a licensee is suffering financial difficulty, or is delinquent in making payment of sales tax collected, or is apparently using tax money collected for his own purposes, the Director, in his discretion, may require the trust funds to be kept segregated in special account at a bank or other financial institution. Withdrawals from said account shall only be payable to the Director of Finance and the Director of Finance shall be authorized to make withdrawals from said account. Where said account is not kept as required herein, all the property of the taxpayer shall be considered as trust property of the City. (Ord. 76-168; Ord. 91-161; 1968 Code §3-108)

7-2-106: STATUTE OF LIMITATIONS:

- A. Assessments, Collections and Liens: The taxes for any period, together with interest thereon and penalties with respect thereto, imposed by this Article shall not be assessed nor shall any notice of lien be filed, or distraint warrant issued, or suit for collection be instituted, or any other action to collect the same be commenced, more than three (3) years after the date on which the tax was or is payable; nor shall any lien continue after such period, except for taxes assessed before the expiration of such period, and notice of lien with respect to which has been filed prior to the expiration of such period, in which case such lien shall continue only for one year after the filing of notice thereof.
- B. False and Fraudulent Returns: In the case of a false or fraudulent return with intent to evade tax, the tax together with interest and penalties thereon, may be assessed, or proceedings for the collection of such tax may be begun at any time.
- C. Extensions: Before the expiration of such period of limitation, the taxpayer and the Director of Finance may agree in writing to an extension thereof, and the period so agreed on may be extended by subsequent agreements in writing.
- D. Failure to File a Return: In the case of failure to file a return, the tax, with interest and penalties thereon, may be assessed and collected at any time. (Ord. 85-274)