

REPORTS
OF
Cases Argued and Determined
IN THE
COURT of CLAIMS
OF THE
STATE OF ILLINOIS

VOLUME 50

Containing cases in which opinions were filed and
orders of dismissal entered, without opinion
for: Fiscal Year 1998—July 1, 1997-June 30, 1998

SPRINGFIELD, ILLINOIS
1999

(Printed by authority of the State of Illinois)
(PRT 3078288—300—7/99)

PREFACE

The opinions of the Court of Claims reported herein are published by authority of the provisions of Section 18 of the Court of Claims Act, 705 ILCS 505/1 *et seq.*, formerly Ill. Rev. Stat. 1991, ch. 37, par. 439.1 *et seq.*

The Court of Claims has exclusive jurisdiction to hear and determine the following matters: (a) all claims against the State of Illinois founded upon any law of the State, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for certain expenses in civil litigation, (b) all claims against the State founded upon any contract entered into with the State, (c) all claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the Governor stating that such pardon is issued on the grounds of innocence of the crime for which they were imprisoned, (d) all claims against the State in cases sounding in tort, (e) all claims for recoupment made by the State against any Claimant, (f) certain claims to compel replacement of a lost or destroyed State warrant, (g) certain claims based on torts by escaped inmates of State institutions, (h) certain representation and indemnification cases, (i) all claims pursuant to the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen & State Employees Compensation Act, (j) all claims pursuant to the Illinois National Guardsman's Compensation Act, and (k) all claims pursuant to the Crime Victims Compensation Act.

A large number of claims contained in this volume have not been reported in full due to quantity and general similarity of content. These claims have been listed according to the type of claim or disposition. The categories they fall within include: claims in which orders of awards or orders of dismissal were entered without opinions, claims based on lapsed appropriations, certain State employees' back salary claims, prisoners and inmates-missing property claims, claims in which orders and opinions of denial were entered without opinions, refund cases, medical vendor claims, Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen & State Employees Compensation Act claims and certain claims based on the Crime Victims Compensation Act. However, any claim which is of the nature of any of the above categories, but which also may have value as precedent, has been reported in full.

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Morton, Illinois

Chief Justice - January 15, 1993—
Judge - February 26, 1987—January 15, 1993

ROBERT FREDERICK, Judge
Urbana, Illinois
June 1, 1992—

DAVID A. EPSTEIN, Judge
Chicago, Illinois
June 20, 1994—

FREDERICK J. HESS, Judge
Belleville, Illinois
January 21, 1997—

NORMA F. JANN, Judge
Chicago, Illinois
May 1, 1991—

RICHARD MITCHELL, Judge
Jacksonville, Illinois
February 24, 1993—

ANDREW M. RAUCCI, Judge
Chicago, Illinois
November 9, 1994—
February 28, 1984—June 1, 1992

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January 14, 1991—

KATHERINE A. PARKER
Deputy Clerk and Director
Springfield, Illinois
rch 1, 1995—

CASES ARGUED AND DETERMINED
IN THE COURT OF CLAIMS
OF THE STATE OF ILLINOIS
REPORTED OPINIONS

FISCAL YEAR 1998

(July 1, 1997 through June 30, 1998)

(No. 81-CC-0053—Claim dismissed.)

DORA B. LARSON, Administrator of the Estate of VICTORIA J.
LARSON, Deceased, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Order filed September 15, 1997.

CORYN, WALKER & MEEHAN (GERALD J. MEEHAN, of
counsel), for Claimant.

JAMES E. RYAN, Attorney General (DEBORAH L.
BARNES, Assistant Attorney General, of counsel), for Re-
spondent.

IMMUNITY—*Local Governmental and Governmental Employees Tort Immunity Act does not apply to State.* The Local Governmental and Governmental Employees Tort Immunity Act applies to local governments and, by its express terms, does not apply to the State or its employees. (overruling *Flaim v. State* (1975), 30 Ill. Ct. Cl. 635.)

SAME—*public official immunity—discretionary acts undertaken in good faith—respondeat superior.* A public official is immune from individual liability for the performance of discretionary duties undertaken in good faith, and when a court of competent jurisdiction finds State employees to be immune from suit, the State is immune under the doctrine of *respondeat superior*.

SAME—*tort claim against State employees arising out of girl's murder by parolee—public immunity applied—claim dismissed.* In a claim against the State arising out of the murder of a 12-year old girl by a parolee, where there

Respondent failed to reject the product for more than two months after delivery, and the basis for the rejection was not reasonable or supported by the evidence. Respondent breached its agreement by refusing to pay for the items.

It is therefore ordered, adjudged and decreed that the Claimant is awarded sixteen hundred twenty-five and no/100 (\$1,625) in full and complete satisfaction of this claim.

(No. 96-CC-3412—Claimant awarded \$5,455.52.)

MARILYN SCHWARTZ, Claimant, *v.* THE STATE OF ILLINOIS,
Respondent.

Opinion filed September 26, 1997.

LEVIN & BREND (JEFFREY W. BREND, of counsel), for
Claimant.

JAMES E. RYAN, Attorney General (MICHAEL F. ROCKS,
Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*reasonable settlements with alternative-source defendants satisfy exhaustion requirement.* Reasonable settlements with alternative-source defendants suffice to satisfy the Court of Claims exhaustion requirements, in lieu of full pursuit of all alternate sources to judgment and collection, and the Court has not insisted on autonomic exhaustion beyond reason, as in the case of a judgment-proof defendant.

SAME—*tax refund erroneously paid to Claimant's former husband—attempts to recover from judgment-proof husband in divorce case satisfied exhaustion requirement—award granted.* The Claimant was awarded an amount representing her half of a State joint income tax refund which was erroneously paid by the Department of Revenue to her ex-husband, since there was no significant question as to the Claimant's entitlement to the refund or the State's responsibility for the error, and the Claimant's prior attempts to recover from the husband in the parties' dissolution proceeding until learning that he was judgment-proof satisfied the exhaustion requirement.

OPINION

EPSTEIN, J.

This is a former wife's claim for half of an Illinois income tax refund jointly claimed by and jointly payable to her and her former husband that was erroneously paid to him. The State says she should sue him for the money, rather than have the State pay twice. She replies that she tried, but he is broke. The State says that is not good enough. This Court says it is, and that the State should pay her and recover the excess from him when and if it can. For the reasons that follow, we will award the requested 47% of the refund amount to the Claimant.

The Facts

Marilyn Schwartz, f/k/a Marilyn Goldboss (when she was married to Lee Goldboss) brings this \$5,455.52 claim for her half (actually 47%) of a State income tax refund for tax years 1986, 1987, and 1988 that the Department of Revenue (IDR) approved but then erroneously paid to Lee Goldboss, who by then was the Claimant's ex-husband, instead of jointly to him and her. The IDR has acknowledged its refund error. The facts are substantially undisputed.

Marilyn and Lee, both then Illinois residents and married to each other, filed joint state income tax returns for years 1986-88 and paid their taxes for those years from joint (marital) property. In 1989, still filing jointly, Marilyn and Lee reported a net operating loss, which allowed them to file amended returns for 1986-88 claiming refunds totalling \$11,607.50. This they did, also jointly, after their divorce.

The couple divorced in June, 1990. Under their 1990 divorce judgment, which incorporated a marital settlement agreement, Marilyn received 47% of the marital

assets and was (undisputedly) therefore entitled to 47% of any joint tax refund. After the divorce, but before the State issued the refund, Lee asked the IDR to send the refunds to him instead of to the accountant designated on the amended returns; the IDR not only directed the three refund warrants to Lee, but also “dropped off” Marilyn’s name, so that the warrants ultimately issued and sent by the Comptroller were made out to Lee alone as well as mailed to him. Of course, he cashed them.

In 1995, in response to inquiries from Claimant, the IDR acknowledged its error when it “dropped off” Claimant’s name, and admitted that “the refunds should have gone out in both names.” (Tr. Ex. No. 8.) The IDR nevertheless refused to pay Claimant her share of the refunds.

Claimant filed suit. Proceeding within the divorce case in the Circuit Court, Claimant filed a complaint against her former husband, the IDR, the Attorney General, her accountants, and two banks. She necessarily dismissed the IDR from that action, as it could not and would not consent to suit in that forum, and proceeded against Lee Goldboss, her former husband, who was required to and did file an asset disclosure statement pursuant to local rule 13.3(b) of the Circuit Court of Cook County. In that disclosure, Mr. Goldboss reported under oath that he then had no income or assets. (Tr. Ex. No. 11.) Claimant then filed her refund claim in this Court.

The Issues

As argued in this Court, there are only two issues, which may well be termed non-issues as neither is terribly substantial in light of the arguments advanced:

First is whether the Claimant was and is entitled to 47% of the refund amount.

Second is whether the Claimant has adequately exhausted her prospective alternate sources of recovery under the “exhaustion” requirements of section 25 of the Court of Claims Act (705 ILCS 505/25) and section 790.90 of the Court of Claims Regulations. (74 Ill. Admin. Code 790.90.) The exhaustion issue boils down to whether or not the Claimant adequately exhausted her potential recovery of her share of the refunds from her ex-husband Lee Goldboss.

Opinion

There is no significant question of Claimant’s entitlement to 47% of the total refund; this is not substantially disputed by the Respondent. There is no dispute that the original tax liabilities, tax returns, and tax payments were all jointly made and were all joint responsibilities of Marilyn and Lee when and as married. There is no dispute that the funds involved were marital property when paid as taxes to the State, and there is no genuine issue about the legal character of the refunds as repayments of marital property. Finally, the Respondent does not dispute that the divorce judgment entitles Claimant to 47% of all marital property.

The exhaustion issue is a trifle more substantial. Under the facts at hand, the issue becomes whether or not this Court’s exhaustion of alternate recovery sources requirement mandates that a claimant pursue a judgment-proof defendant beyond the point when there is a reasonable (or as here, undisputed) determination of the fact of such defendant’s inability to pay a judgment on the asserted liability if one were obtained. Claimant relies on the “rule of reason” construction of our exhaustion requirement, citing the settlement precedents in *Dellorto v. State* (1979), 32 Ill. Ct. Cl. 435, and *J.F. Inc. v. State* (1988), 41 Ill. Ct. Cl. 5, which held that reasonable settlements with

alternative-source defendants suffice to satisfy our exhaustion requirements, in lieu of full pursuit of all alternate sources to judgment and collection. This Court has not insisted on autonomic exhaustion beyond reason, when reason is shown. A judgment-proof defendant can be one such reason to forego further litigation which thus appears futile, although this Court is always skeptical of that justification.

In this case, two factors inform our decision. First, pursuit by Marilyn of her former husband, Lee, was attempted in good faith (and with extraordinary motive as well as incentive) and was only terminated when he had affirmatively and under oath showed himself to be judgment-proof in a judicial proceeding. Second, in the unusual circumstances of this case, where the Respondent itself put the sought-after funds into the hands of the putative alternative source—and thus generated the need for the Claimant to seek recovery from that source—this Court is not inclined to a rigid application of our exhaustion rule. Here, Marilyn Schwartz did enough. We will not withhold her wrongfully unpaid refund and force her to pursue her impoverished ex-husband. It is far more appropriate, significantly more efficient and considerably more just for the IDR now to cure its error by paying the Claimant her legitimate tax refund, and by assuming the responsibility of collecting the excess refund from Mr. Goldboss when and if he subsequently has income or assets.

Order

Claimant Marilyn Schwartz is awarded the sum of \$5,455.52 as her 47% share of her and Lee Goldboss' joint Illinois income tax refund for tax years 1986, 1987 and 1988, in full satisfaction of this claim. Judgment of \$5,455.52 is entered for Claimant against the Respondent.
