

# IN THE SUPREME COURT OF TEXAS

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No. 03-0547

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BMG DIRECT MARKETING, INC., PETITIONER,

v.

PATRICK PEAKE, INDIVIDUALLY AND AS REPRESENTATIVE OF OTHERS SIMILARLY  
SITUATED, RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

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**Argued February 18, 2004**

JUSTICE WAINWRIGHT, concurring.

The Court holds that a CD purchaser who pays a void late fee to a music company makes a voluntary payment that he cannot recover, even if he does not know that the fee was void when charged and cannot legally be collected. Under the voluntary payment rule, “it is well settled that money paid under a mistake of law with respect to liability to make payment, but with full knowledge of all the facts on which the claim for payment is based, and on which the right to resist it depends, cannot be recovered.” *Gilliam v. Alford*, 6 S.W. 757, 759 (Tex. 1887). Here, the application of the voluntary payment rule rewards the wrongdoer and punishes the innocent. The innocent purchaser paid what he was billed; the music company wrongfully billed him for late fees

in the contract; and yet the purchaser loses. Application of the voluntary payment rule in the private sector lacks justification and is counterintuitive.

Consider two examples. Along with millions of other Texans, I paid my utility bill in October. When the cold front came through, it reminded me that I needed to pay my monthly utility bill. Having forgotten about the check I wrote a few weeks earlier, I paid the October utility bill again. In a second example, as I paid my October utility bill I noticed that it included an additional fee under a new statute. Unbeknownst to me at the time, the statute was void and later was declared unconstitutional. There was no threat of shutoff from the utility company in either case. A reasonable person would think that if I made a payment I was not obligated to make, I should be able to recoup it in both cases. Not so under the rationale of the voluntary payment rule. I paid twice under a “mistake of fact” in the first circumstance and can recover the duplicate payment, but in the second example I paid under a “mistake of law” and am barred from recovery.

The American Law Institute and some courts have recognized that the distinction between mistake of law and mistake of fact is artificial. The Indiana Supreme Court observed:

[W]e are sympathetic to contemporary scholarly opinion that suggests the distinction between a mistake of law and a mistake of fact is artificial. While the American Law Institute's 1937 Restatement of Restitution is frequently cited for the distinction, the current tentative draft of a new Restatement of Restitution & Unjust Enrichment (Third) eliminates it. The tentative draft—correctly, we think, limits application of the voluntary payment doctrine to situations where a party has voluntarily paid a disputed amount.

*Time Warner Entm't Co. v. Whiteman*, 802 N.E.2d 886, 891 (Ind. 2004) (footnotes omitted) (comparing RESTATEMENT OF RESTITUTION § 45 (1937) with RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 6(2) (Tentative Draft No. 1, 2001)).

The more familiar doctrines of estoppel, quasi estoppel, and waiver preclude recovery of voluntary payments in some circumstances. For example, if a person makes a payment intending to mislead another who detrimentally relied on the payment, the doctrine of estoppel prevents the payor from recovering the payment. *See Airline Commerce Bank v. Wilburn*, 609 S.W.2d 813, 815 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ). Quasi estoppel creates a similar bar but lacks the requirements of misrepresentation or detrimental reliance and instead focuses on the unconscionability of demanding return of the payment after the payor received a benefit. *See Steubner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 164 (Tex. App.—Houston [14th Dist.] 1991, no writ). Waiver occurs when a person intentionally relinquishes a known right, such as paying a bill that both sides dispute. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996) (defining waiver). In fact, estoppel and waiver seem to be the basis of the voluntary payment doctrine. *See Brown v. Oaklawn Bank*, 718 S.W.2d 678, 681 (Tex. 1986) (rejecting voluntary payment defense when payee had not detrimentally relied on the payment); *Ladd v. S. Cotton Press & Mfg. Co.*, 53 Tex. 172, 192-94 (1880) (continuing payments with full knowledge of the facts surrounding the transaction, without fraud or duress, waives payor's right to complain at a later date); *R.G. McClung Cotton Co. v. Cotton Concentration Co.*, 479 S.W.2d 733, 743 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (recognizing that in some cases the payor is allowed to recover a “voluntary” payment if “he clearly never intended to surrender his position”); *W. Tex. State Bank v. Tri-Service Drilling Co.*, 339 S.W.2d 249, 253 (Tex. App.—Eastland 1960, writ ref'd n.r.e.) (recovering a voluntary payment depends upon whether there was an intention by the payor to waive his rights). These doctrines that preclude recovery of a payment in appropriate situations are well-

known and justifiable. We need not employ a legal artifice on unsteady footing to bar innocent persons from justly recovering payments in private transactions.

The Court attempts in the opinion to address an additional concern. It strains to keep the voluntary payment doctrine narrow and emphasizes that it is rarely applicable. The Court states that we have not applied the doctrine in over 40 years. \_\_\_ S.W.3d \_\_\_, \_\_\_. However, I hope that the Court has not awakened a sleeping giant who will seek to interpose the voluntary payment defense to retain payments made by many an innocent purchaser. I would have preferred that rather than applying a dormant doctrine, the Court considered whether the doctrine has a legitimate basis for continued viability in private disputes. The only rationale the Court cites for applying the voluntary payment rule in the private sector is that it “allows entities to rely on contractually agreed-upon late fees received from customers.” *Id.* at \_\_\_\_\_. This is slim justification to allow a seller to keep payments that both he and the purchaser know are not warranted.

On the other hand, the voluntary payment rule for public fees has well-established practical and legal underpinnings, and it is not complicated by distinctions between legal and factual mistakes as it is in the private sector. It has been applied to taxes for over a century.<sup>1</sup> *See City of Houston v. Feizer*, 13 S.W. 266, 267-68 (Tex. 1890). In the taxation context, the rule assists taxing authorities in the orderly conduct of their financial affairs. *Feizer*, 13 S.W. at 267; *see also Salvaggio v. Houston Indep. Sch. Dist.*, 752 S.W.2d 189, 193 (Tex. App.—Houston [14th Dist.] 1988, writ denied). The U.S. Supreme Court also has recognized the “government’s exceedingly strong interest

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<sup>1</sup> The rule has been abrogated by statute in most areas of taxation.

in financial stability” and that unpredictable revenue shortfalls can threaten a state’s financial security. *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, Dep’t of Bus. Regulation of Fla.*, 496 U.S. 18, 37 (1990). The rule also supports the age-old policies of discouraging litigation with the government. *See Austin Nat’l Bank v. Sheppard*, 71 S.W.2d 242, 246 (Tex. 1934); *see also Salvaggio*, 752 S.W.2d at 193. The Court cites no such interests in the private sector for the viability of the voluntary payment rule, and although it states that applying the voluntary payment rule in this case follows the majority rule, that majority is populated by only seven states.

I recognize that the voluntary payment rule has not been modified or abolished in the private sector in Texas, that there are precedents for its application, and that the difficult distinctions between mistakes of law and mistakes of fact that determine whether the rule applies still exist. But we should consider carefully the viability of such a rule in a modern era when the well-known doctrines of estoppel and waiver are available to ensure just outcomes in these cases. Before precluding an innocent purchaser from recovering her mistaken payment from a wrongdoer, we should at least require that the purchaser in some manner harmed the seller or knowingly waived rights to the funds. The voluntary payment rule currently requires neither. Because I have serious concerns about the continued viability of the voluntary payment doctrine in private transactions and the rationale for its existence, I join only the Court’s judgment.

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J. Dale Wainwright  
Justice

**OPINION DELIVERED:** November 18, 2005