FSM SUPREME COURT APPELLATE DIVISION

SENATOR MARK MAILO, individually and as President of the Senate, Chuuk State Legislature, Appellant/Plaintiff, vs. CHUUK HEALTH CARE PLAN, a Public Corporation Appellee/Defendant.	APPEAL CASE NO. C2-2013 (Civil Action No. 2012-1031)

OPINION

Argued: October 10, 2014
Decided: March 23, 2015

BEFORE:

Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Aliksa B. Aliksa, Specially Assigned Justice, FSM Supreme Court*
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court**

*Chief Justice, State Court of Kosrae, Tofol, Kosrae
**Chief Justice, State Court of Yap, Colonia, Yap

APPEARANCES:

For the Appellant: Brian Dickson, Esq.
Legislative Counsel
Chuuk State Legislature
P.O. Box 377
Weno, Chuuk FM 96942

For the Appellee: Johnny Meippen, Esq.
Legal Counsel
Chuuk State Health Care Plan
P.O. Box 705
Weno, Chuuk FM 96942

* * * *

HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo

Issues of law are reviewed de novo on appeal. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 21 (App. 2015).

Appellate Review – Standard – Civil Cases – De Novo; Civil Procedure – Summary Judgment – Grounds

An appellate court applies the same standard in reviewing a trial court's grant of summary judgment as that initially employed by the trial court under Rule 56(c). Thus, the standard of appellate review of a summary judgment is a de novo determination that there was no genuine issue of material fact and that the prevailing party was entitled to judgment as a matter of law. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 22 (App. 2015).

Appellate Review – Standard – Civil Cases – De Novo; Civil Procedure – Summary Judgment – Grounds

In reviewing a trial court's grant of summary judgment, the appellate court applies the same standard employed by the trial court under FSM Civil Rule 56. Under Rule 56, unless a court, viewing the facts and inferences in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the court must deny the motion. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 22 (App. 2015).

Taxation; Taxation – Fees

A "fee" is a charge fixed by law for services of public officers and is regarded as compensation for services rendered, but a charge having no relation to services rendered, assessed to provide general revenue rather than compensation, is a "tax." Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 22 (App. 2015).

Taxation; Taxation – Fees

Any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in general benefit, is a "tax," while a "fee" is generally regarded as a charge for some particular service. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 22 (App. 2015).

Taxation; Taxation – Fees

The primary purpose of a "tax" is to obtain revenue for the government, while the primary purpose of a "fee" is to cover expense of providing a service or of regulation and supervision of certain activities. In distinguishing fees from taxes, fees are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 22-23 (App. 2015).

Taxation; Taxation – Fees

There is a three-part test to determine whether an assessment is a tax or a fee: 1) what entity imposes the charge; 2) what population is subject to the charge; and 3) what purposes are served by the use of the monies obtained by the charge. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 23 (App. 2015).

Taxation; Taxation – Fees

Fees that are paid into the general public treasury, and disbursable for general public expenses, are taxes. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 23 (App. 2015).

Taxation; Taxation – Fees

If the premiums collected were a tax, the funds would be deposited into the Chuuk treasury, which can only be appropriated by law for a public purpose. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 23 (App. 2015).

Taxation; Taxation – Fees

When all revenues received under a system of medical or health insurance, and all other revenues received by the Health Department as payment for medicine and medical services, must be separated

from any general fund established by the Legislature and used only for medical purposes, this supports the position that premiums collected by the insurance plan do not fall under the characteristics of a tax because the funds collected are mandated to be separated from other funds collected. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 23-24 (App. 2015).

Taxation; Taxation – Fees

When, although it is the employed residents of Chuuk who are making health insurance premium contributions, the benefit of medicines and medical services are applied to the general public this would favor considering the payments a tax instead of a fee. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 24 (App. 2015).

Taxation; Taxation – Fees

Generally, an assessment may be a fee rather than a tax when it is not used for a general purpose but is used to defray the expense of performing the duties imposed on the agency and for the general purpose and expense of carrying an act into effect. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 24 (App. 2015).

Taxation – Constitutionality

When the purpose of the collected funds is specifically for health and medical services and the Chuuk Legislature cannot appropriate the funds collected as premiums and use those funds for other public purposes and when, although the medical services are applied to the general public, the insurance premiums collected are not a tax and thus the method used to calculate premiums is not an unconstitutional tax on income. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 24 (App. 2015).

Statutes – Construction

Generally, a statutory provision is directory and not mandatory if it requires that certain actions be completed, but does not prescribe the result which should follow if those actions are not completed. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 25 (App. 2015).

Statutes – Construction

The legislature's intention as to whether a statutory provision is mandatory is determined from the language used. Generally, a provision is directory and not mandatory if it requires that certain actions be completed, but does not prescribe the result that should follow if those actions are not completed. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 25 n.6 (App. 2015).

Constitutional Law – Interpretation

A constitutional provision that requires things to be done without prescribing the result that will follow if those things are not done is directory in character. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 25 (App. 2015).

Statutes – Construction

Despite the usage of the word "shall," FSM case law dictates that if the statute does not advise what will happen if the action is not carried out, then the statutory provision is directory rather than mandatory. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 25 (App. 2015).

Insurance; Statutes – Construction

When discretionary language "may" is used, which indicates that the insurance board has the power to consider these factors when assessing the insurance premiums and may exercise the power of applying these factors in the future, the discretion to do so is left with the board, and not with the court. Mailo v. Chuuk Health Care Plan, 20 FSM R. 18, 26 (App. 2015).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

I. BACKGROUND

This appeal arises from the FSM Supreme Court Trial Division's October 15, 2013 Order Granting Summary Judgment in favor of the defendant/appellee, Chuuk State Health Care Plan, and against the plaintiff/appellant, Mark Mailo, individually and as President of the Senate of the Chuuk State Legislature.

The Chuuk Health Care Plan (herein the "Plan") was created by the Chuuk Health Care Act of 1994, Chk. S. L. No. 2-94-06. The Act created a health care insurance system for the residents of the State of Chuuk. However, the system was not implemented until 2004 when the Plan began to collect health insurance premiums of 2.5% of Chuuk residents" wages and salaries and matching 2.5% contribution from their employers. The employee pays half and the employer pays half. Chk. S. L. No. 2-94-06, § 5-4 (1) and (2). In June 2012, the premium assessment was increased from 2.5% to 3%.

On November 20, 2012, the plaintiff, Mark Mailo (herein "Mailo"), filed this lawsuit alleging that the percentage method of assessing the health insurance premium is an unconstitutional tax. He sought a preliminary injunction to halt the increase of the premium from 2.5% to 3%. Mailo v. Chuuk Health Care Plan, 18 FSM Intrm. 501, (Chk. 2013).

Mailo does not contend that the Chuuk Health Care Plan Act itself is unconstitutional, but he does contend that the method that the Plan has chosen to assess its premium is unconstitutional. Mailo has alleged that the health insurance premiums are a tax. Mailo also contends that since the premium assessment does not vary based on the number of an enrollee's dependents or on risk factors, it violates the statutory guidelines, found in Chk. S.L. No. 2-94-06, § 5-1 for the establishment of the Plan's premium amounts.

II. ISSUES PRESENTED

Mailo raises the following issues on appeal based on the Trial Division's Summary Judgment in favor of the Plan:

1) Is the method used by the Plan to calculate the premiums collected from members of the Plan an unconstitutional tax on income?

2) Shall the Board of Directors of the Plan be required to provide for the popular election of Board members by members of the Plan?

3) Shall the Board of Trustees for the Plan be required to create a method of assessing premiums based on risk factors, as is commonly deemed best practices within the insurance industry?

III. STANDARD OF REVIEW

Issues of law are reviewed de novo on appeal. Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 14 (App. 2006); George v. Nena, 12 FSM Intrm. 310, 313 (App. 2004); Tulensru v. Wakuk, 10 FSM Intrm. 128, 132 (App. 2001); Nanpei v. Kihara, 7 FSM Intrm. 319, 323-24 (App. 1995); Rosokow v.

Bob, 11 FSM Intrm. 210, 214 (Chk. S. Ct. App. 2002); Phillip v. Moses, 10 FSM Intrm. 540, 543 (Chk. S. Ct. App. 2002).

An appellate court applies the same standard in reviewing a trial court's grant of a summary judgment motion as that initially employed by the trial court under Rule 56(c). Thus, the review is de novo. Chuuk v. Secretary of Finance, 9 FSM Intrm. 424, 430 (App. 2000); Taulung v. Kosrae, 8 FSM Intrm. 270, 272 (App. 1998); Nahnken of Nett v. United States, 7 FSM Intrm. 581, 585-86 (App. 1996).

The standard of review of a summary judgment on appeal is a de novo determination that there was no genuine issue of material fact and that the prevailing party was entitled to judgment as a matter of law. Kosrae v. Skilling, 11 FSM Intrm. 311, 315 (App. 2003); Department of Treasury v. FSM Telecomm. Corp., 9 FSM Intrm. 353, 355 (App. 2000).

In reviewing the trial court's grant of summary judgment, the appellate court applies the same standard employed by the trial court under FSM Civil Rule 56. Under that rule, unless a court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the court must deny the motion. In considering a motion for summary judgment, the court views the facts and inferences in the light most favorable to the nonmoving party. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 358 (App. 2003).

IV. Analysis

1) *The Constitutionality of the method used by the Plan to calculate the premiums collected from members*

Mailo argues that since the premium contributions are assessed and paid as a percentage of a person's wages or salary, the contributions are actually a tax on income, and is therefore unconstitutional because the power to tax income is an exclusive power of the national government, pursuant to FSM Constitution article IX, § 2 (e).[1] The court below held that the wages collected are a fee, and not a tax, thus the collection of premiums are not unconstitutional.

First, the Court must define the terms tax and fee.[2] "Fee" is a charge fixed by law for services of public officers and is regarded as compensation for services rendered, but a charge having no relation to services rendered, assessed to provide general revenue rather than compensation, is a "tax." Crocker v. Finley, 459 N.E.2d 1346, 1350 (Ill. 1984); Cook County v. Fairbank, 78 N.E. 895, 896-98 (Ill. 1906).

Any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in general benefit, is a "tax," while a "fee" is generally regarded as a charge for some particular service. Dickson v. Jefferson County Bd. of Ed., 225 S.W.2d 672, 675 (Ky. 1950).

---

[1] FSM Constitution article IX, § 2(e) states "The following powers are expressly delegated to Congress . . . to impose taxes on income." "Income tax" is defined as "A tax on an individual's or entity's net income." Black's Law Dictionary 1497 (8th ed. 2004).

[2] A "Fee" is defined as "A charge for labor or services, esp. professional services." *Id.* at 647. A "Tax" is defined as a monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue." *Id.* at 1496.

Primary purpose of "tax" is to obtain revenue for government, while primary purpose of "fee" is to cover expense of providing service or of regulation and supervision of certain activities. City of Huntington v. Bacon, 466, 473 S.E.2d 743, 752 (W. Va. 1996), (citing River Falls v. St. Bridget's Catholic Church, 513 N.W.2d 673, 675 (Wis. Ct. App. 1994)).

In distinguishing fees from taxes, fees are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. Silva v. City of Attleboro, 908 N.E.2d 722, 725 (Mass. 2009) (citing Emerson College v. City of Boston, 462 N.E.2d 1098, 1106 (Mass. 1984)). Here, in consideration of the filings and the evidence presented during the hearing, the purpose of the premiums collected is not for revenue raising purposes, rather, the funds are used to pay for medical services and operation of the Plan.

The trial court used a three part test in determining whether an assessment is a tax or a fee: 1) what entity imposes the charge; 2) what population is subject to the charge; and 3) what purposes are served by the use of the monies obtained by the charge." Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000).

In the matter before the Court, the entity imposing the charge is the Plan, and not the Chuuk State Legislature. Moreover, the increase in the premium payments is not for revenue raising purposes, rather, it is for the increase in the costs of medicines and medical services for the general public. Mailo argues that the Chuuk Legislature authorized the assessment of the premiums by passing Chuuk State Law No. 2-94-06, and delegated and authorized the collection of the premium. Appellant's Br. at 10. However, it is still the Plan which imposes the charge and deposits the funds into a special trust fund.

Fees which are paid into the general public treasury, and disbursable for general public expenses, are taxes. Memphis Natural Gas Co. v. McCanless, 194 S.W.2d 476, 483 (Tenn. 1946). Here, the premiums collected are deposited into a special trust fund known as the Health Care Premium Fund, and not the general fund of Chuuk State.[3] Mailo v. Chuuk Health Care Plan, 19 FSM R. 185, 190 (Chk. 2013) (citing Chk. S.L. No. 2-94-06, § 6-1). If the premiums collected were a tax, the funds would be deposited into the treasury of Chuuk State, which can only be appropriated by law for a public purpose.[4] Chk. Const. art. VIII, § 2.

Chuuk Constitution article X, § 7, which mandates the establishment of a health care system, states:

> The State Government shall provide for the establishment and administration of a comprehensive system of medical or health insurance which is mandatory for all employed residents of the State of Chuuk while present in the State. *All revenues received under*

---

[3] Chuuk State Law No. 2-94-06, § 8-3 states:: "There is hereby created within the Chuuk Treasury a Health Care Premium Fund to which all collections imposed by this Title, along with all civil penalties and interest with respect thereto, shall be deposited."

[4] Chuuk Constitution article VIII, § 2 states:

> No public funds may be paid out of the treasury of the State of Chuuk except as prescribed by statute. The appropriation of public money or property and the use of public credit, directly or indirectly, may only be for a public purpose. No person may be made a direct recipient or beneficiary of public funds, unless pursuant to a public purpose, and no person may be made an allottee of public funds, unless pursuant to an executive capacity.

> *this system of medical or health insurance, and all other revenues received by the Health Department as payment for medicine and medical services, shall be separated from any general fund established by the Legislature and used only for medical purposes.*

(emphasis added).

This particular section further supports the position that premiums collected by the Plan do not fall under the characteristics of a tax because the funds collected are mandated to be separated from other funds collected. The first prong of the three part test is in favor of the Plan.

The second part of the Valero test is to determine what portion of the population is subject to the charge. Here, although it is the employed residents of Chuuk State who are making premium contributions to the Plan, the benefit of medicines and medical services are applied to the general public. Mailo, 19 FSM R. at 190. The second prong of the Valero test would favor Mailo.

Finally, the Court considers the purposes served by the use of the monies obtained by the charge. Generally, an assessment may be a fee rather than a tax when it is not used for a general purpose but is used to defray the expense of performing the duties imposed on the agency and for the general purpose and expense of carrying an act into effect. San Juan Cellular Tel. Co. v. Public Serv. Comm'n, 967 F.2d 683, 685-86 (1st Cir. 1992).

Here, it is clear from the language of the Chuuk State Constitution, *supra*, that the purpose of the funds collected by the Plan is specifically for health and medical services. The Chuuk State Legislature cannot appropriate the funds collected as premiums and use the funds for other public purposes.

Although the second factor of the Valero test seems to be in favor of Mailo, the conclusion of the court below that the premiums collected by the Plan is not a tax is correct when the other factors of the test are taken into account. Accordingly, the method used by the Plan to calculate premiums is not an unconstitutional tax on income.

2) *Popular election of Board members by members of the Chuuk State Health Care Plan*

Mailo's second issue on appeal is the requirement of the periodic selection of Board members by enrollees. Specifically, Chk. S. L. No. 2-94-06, § 2-1(2) states: "[w]ithin five years following the first organizational meeting of the Board, the Board shall submit to the Governor and Chuuk Legislature draft legislation to provide for the periodic selection of Board members by citizen enrollees of the Plan."

Since the establishment of the Board, no draft legislation have been submitted to the Governor and Legislature, and no election of Board members was ever or has been conducted. Mailo argues that the Plan's failure to comply with the requirement of Chk. S. L. No. 2-94-06, § 2-1(2) renders all Boards that have been established since, unlawful, making any decisions and actions ultra vires – void because it was done without authority.

This court dealt with a similar issue in Buruta v. Walter, 12 FSM Intrm. 289 (Chk. 2004). In Buruta, the court analyzed the Chuuk Constitution, specifically art. XIII § 5, which states that each municipality in Chuuk adopt a municipal constitution, and for the state legislature to enact enabling legislation to carry out the establishment of those constitutions. Buruta, 12 FSM Intrm. at 292. The court held that although Romalum municipality did not adopt a constitution, it was still a municipality

of Chuuk State.[5]

Generally, a provision is directory and not mandatory if it requires that certain actions be completed, but does not prescribe the result which should follow if those actions are not completed.[6] *Id.* at 293 (citing Jonas v. Kosrae, 10 FSM Intrm. 453, 459 (Kos. S. Ct. Tr. 2001)). This is also true of a constitutional provision that requires things to be done "without prescribing the result that shall follow if those things are not done . . . is directory in character." *Id.* (citing Panuelo v. Pohnpei, 3 FSM Intrm. 76, 81 (Pon. S. Ct. App. 1987) (construing Pohnpei Constitution Art. 7 as directory since it does not prescribe the result to follow if things are not done and since it contains mere matters of direction not followed by words of positive prohibition)).

Here, since its creation, the Board has not submitted to the Governor and Chuuk Legislature draft legislation to provide for the periodic selection of Board members by citizen enrollees of the Plan. Under Buruta and its supporting authorities, this provision is deemed directory and not mandatory since it does not prescribe a result that shall follow if the provisions of the statute are not carried out.

Mailo argues that because the language of the statute uses the term "shall" when referring to the submission of draft legislation from the Board to the Governor, the prescribed action should be done. Appellant's Br. at 16. Despite the usage of the word "shall," FSM case law dictates that if the statute does not advise what will happen if the action is not carried out, then the statutory provision is directory rather than mandatory. Therefore, the trial court did not err in finding that the requirements pursuant to Chuuk State Law No. 2-94-06, § 2-1(2) were directory and not mandatory.

3) *The method of assessing premiums based on risk factors*

Mailo argues that although the statute lists risk factors to be considered when the Plan set its premium rates, the Plan did not consider any risk of loss when setting the rates, and the assessments are calculated as a percentage of earnings, where no risk factors, relevant to health care, are present. Appellant's Br. at 10.

The relevant section of the statute dealing with this issue is Chk. S.L. No. 2-94-06, § 6-1, which states:

---

[5] Both the constitutional and statutory provisions providing for the municipalities to adopt their own constitutions within three years of the state constitution's effective date are directory, not mandatory. Neither prescribes what result should follow if a municipality fails to adopt a constitution within the allotted time. The Chuuk Constitution does, however, specifically provide that a municipality will "continue to exercise its powers and functions under existing law, pending adoption of its constitution." Chk. Const. art. XIII, § 6. Furthermore, neither the constitutional nor the statutory provision directs the Governor to implement these provisions. The direction is aimed at the others – the municipalities and the Legislature.

Buruta, 12 FSM Intrm. at 294 (footnote omitted).

[6] The legislature's intention as to whether a statutory provision is mandatory is determined from the language used. Generally, a provision is directory and not mandatory if it requires that certain actions be completed, but does not prescribe the result which should follow if those actions are not completed. FSM v. Zhang Xiaohui, 14 FSM Intrm. 602, 611 (Pon. 2007).

Assessments and Premium Amounts.

(1) By regulation, the Board shall assess the requisite amounts and sources of universal coverage for essential care in accordance with State law, and shall determine the premium amounts to be charged by the Plan for additional levels of coverage. The aggregate of all universal coverage payments and premium amounts, along with other sources of income for the Plan, shall be sufficient to pay all costs of benefits under the Plan, the costs of administering the Plan, and reasonable reserves for uncollected debts to the Plan and unexpected demands on the Plan for payment and other purposes;

(2) The Board in its regulations establishing premium amounts, may prescribe differing amounts for enrollees who have no dependents and for enrollees with differing numbers of dependents;

(3) The Board, by regulation, may establish additional classifications for enrollee for which different premiums will be determined, based on one or more of the following:

(a) Covered services for which the enrollee is eligible or is likely to use;

(b) Location;

(c) Risk of or exposure to injury or illness; or

(d) Other factors normally considered by the health and hospitalization programs and the health maintenance organization industry in the determination of premiums.

Here, under § 6-1(2) and (3) *supra*, the discretionary language "may" is used, which indicates that the Board has the power to consider these factors when assessing the insurance premiums and may exercise the power of applying these factors in the future, but the discretion to do so is left with the Board, and not with this Court.

VII. Conclusion

The decision of the Trial Court to grant Summary Judgment in favor of the defendant/appellee, the Plan, is HEREBY AFFIRMED.

* * * *