STATE OF MICHIGAN

COURT OF APPEALS

SUPER MART, INC., d/b/a MOONEY OIL COMPANY, BY LO OIL COMPANY, and KH MATTIS, INC.,

Plaintiffs-Appellants,

v

DEPARTMENT OF TREASURY and STATE OF MICHIGAN TREASURER,

Defendants-Appellees.

UNPUBLISHED
July 25, 2006

No. 265758
Ingham Circuit Court
LC No. 04-000960-AW

SUPER MART, INC., d/b/a MOONEY OIL COMPANY, BY LO OIL COMPANY, and KH MATTIS, INC.,

Plaintiffs-Appellants,

v

DEPARTMENT OF TREASURY and STATE OF MICHIGAN TREASURER,

Defendants-Appellees.

No. 265759
Court of Claims
LC No. 04-000099-MZ

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right from circuit court and court of claims orders summarily dismissing their consolidated actions against defendants pursuant to MCR 2.116(I)(2). We affirm, albeit on different grounds. See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

Plaintiffs are wholesale distributors and retail sellers of refined petroleum products in Michigan and operate over fifty gasoline stations. These actions arise out of plaintiffs' contention that the Michigan underground storage tank financial assurance (MUSTFA) fee

assessed and collected by defendants pursuant to 2004 PA 390 was an unconstitutional tax; thus, this Act is invalid. Because the Act is invalid, plaintiffs alleged, the previous version of MCL 324.21501 *et seq*. remains in effect under which defendants were required to stop collecting the disputed fee by June 30, 2003, entitling them to a refund of the payments made subsequent to that date. Defendants' challenge to plaintiffs' standing to pursue this action was denied but the matter was dismissed on the merits, after a finding that the MUSTFA fee was a permissible regulatory fee and not a tax. Because on de novo review we conclude that plaintiffs did not have standing to challenge defendants' collection of the MUSTFA fee from refiners and importers of petroleum, we affirm the dismissal of these actions. See *Lee v Macomb Co Bd of Commr's*, 464 Mich 726, 734; 629 NW2d 900 (2001).

The Michigan underground storage tank financial assurance (MUSTFA) fund, MCL 324.21506(1), was created by part 215 of the natural resources and environmental protection act (NREPA), MCL 324.101 *et seq*. Its objective, in part, was to address problems associated with releases from petroleum underground storage tank systems, MCL 324.21504, and its stated purpose was:

> to preserve and protect the water resources of the state and to prevent, abate, or control the pollution of water resources and groundwater, to protect and preserve the public health, safety, welfare, to assist in the financing of repair and replacement of petroleum underground storage tanks and to improve property damaged by any petroleum releases from those tanks, and to preserve jobs and employment opportunities or improve the economic welfare of the people of the state. [MCL 324.21505.]

To finance the MUSTFA fund, an "environmental protection regulatory fee" was imposed on all refined petroleum products sold for resale and consumption in the state. MCL 324.21508(1). This regulatory fee, referred to as a MUSTFA fee, was to be collected by defendants, MCL 324.21508(2), to be used, as directed by MCL 324.21506(4), "for the cleanup and prevention of environmental contamination resulting from releases of refined petroleum products from underground storage tank systems . . . ." MCL 324.21508(1). "The regulatory fee shall be 7/8 cent per gallon for each gallon of refined petroleum sold for resale in this state or consumption in this state . . . ." *Id*. And, this regulatory fee was to be collected from in-state refiners and importers of petroleum into the state. Specifically,

> The department of treasury shall precollect regulatory fees from persons who refine petroleum in this state for resale in this state or consumption in this state and persons who import refined petroleum into this state for resale in this state or consumption in this state. [MCL 324.21508(2).]

Plaintiffs are neither refiners nor importers of petroleum, they are wholesalers and retailers of petroleum. Defendants have not collected the regulatory fee from plaintiffs. Plaintiffs' contention is that they have been forced to pay the regulatory fee by the suppliers of petroleum but that does not translate into a legally protected interest. Just as plaintiffs have passed through the charge to their customers, i.e., people who purchase gas at their gas stations, the refiners and importers have passed through the charge to plaintiffs, their customers. Thus, if plaintiffs have standing to challenge the regulatory fee, then so would plaintiffs' customers have standing to challenge the regulatory fee. This position is untenable.

The standing doctrine requires that a party plaintiff have the right to invoke the power of the court to adjudicate a justiciable controversy. *Lee*, *supra* at 735-736. This standing requirement is rooted in the constitution; particularly in the separation of powers doctrine, ensuring that judicial power is sought and exercised within the confines of the judiciary's tripartite authority. Const 1963, art 3, § 2; *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004); *Amway v Grand Rapids R Co*, 211 Mich 592, 598; 179 NW 350 (1920). That "judicial power" includes the review and resolution of an actual controversy between interested and adverse parties which will ultimately affect existing legal relations. See *Nat'l Wildlife Federation*, *supra*; *Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993).

In a challenge to standing, the focus is on the party bringing the claim not on the claim itself, i.e., whether the plaintiff is the proper party to request adjudication of the issue. See *Nat'l Wildlife Federation*, *supra* at 615; *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). In accord with the requirement that judicial power be exercised only in justiciable matters, the standing doctrine is jurisdictional in nature therefore it may be raised at any time and may not be waived by the parties. See *Michigan Chiropractic Council v Comm'r of Financial & Ins Svcs*, 475 Mich 363; ___ NW2d ___ (2006); see, also, *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999); *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633 n 3; 537 NW2d 436 (1995).

To establish standing, at minimum, the plaintiff must prove three elements:

> 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).]

Applying this test to the facts of this case, it is clear that plaintiffs lack standing. First, they have not suffered the requisite injury in fact because defendants did not invade a legally protected interest which is particularized or distinct from that suffered by the public generally. See *Nat'l Wildlife Federation*, *supra*; *Dodak v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993). Plaintiffs were not paying the statutory MUSTFA fee, the in-state refiners and importers of petroleum were paying it. Defendants had no authority to collect the MUSTFA fee directly from plaintiffs. Accordingly, plaintiffs cannot meet the causation element of the standing test either. The alleged economic injury was not caused by defendants, who did not directly collect the fee from plaintiffs, it was caused by the independent action of a third party—the suppliers—who were not before the court.

The conclusion we reach in this case is analogous to the conclusions reached in cases brought by purported "taxpayers" challenging the imposition of a tax or fee that was paid directly by another party. For example, in *Morgan v Grand Rapids*, 267 Mich App 513; 705

NW2d 387 (2005), a cable television subscriber sued defendant city to recover a "franchise fee" that defendant city had charged the cable provider who then recouped the fee from its subscribers. *Id*. at 514-515. Although that case was dismissed on statute of limitations grounds, this Court noted that the

> case is analogous to a sales tax scenario in which the seller passes on the sales tax obligation to the buyer but remains primarily liable to pay the tax. In those situations, courts have generally held that the sellers must challenge the illegal taxes directly, and the consumers have no standing to pursue tax relief . . . . In short, when the tax obligation falls primarily on the retailer, "retailers are considered to be the taxpayers." In this case, [defendant], as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders. [*Id*. at 515 (citations omitted).]

Likewise, here, the statutorily-imposed financial obligation fell directly on plaintiffs' suppliers, not on plaintiffs; thus, plaintiffs do not have standing to challenge the statute.

And, this Court recently held, in the case of *Stop Taxing our Petroleum v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 2006 (Docket No. 265631), that an association of petroleum retailers lacked standing to challenge the MUSTFA fee challenged here. Although we are not bound by this decision, MCR 7.215(C)(1), we have considered its reasoning—that plaintiffs "have neither been assessed nor have they paid the regulatory fee at issue" and that the claimed injuries "are predicated on the independent action of the refiners and importers in allegedly passing on the cost"—and find it persuasive.

In conclusion, we affirm the dismissal of these claims, albeit on different grounds. Because plaintiffs did not have standing to bring these actions, we need not address the substantive issues on appeal. See *Detroit Fire Fighters Ass'n*, *supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto