

IN THE SUPREME COURT OF OHIO

14-0814

MUSIAL OFFICES LTD. and
STATE ex rel. MUSIAL OFFICES LTD.,

Appellees,

v.

COUNTY OF CUYAHOGA, et al.

Appellants.

Case No. _____

On Appeal from the
Cuyahoga County
Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. 99781

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS COUNTY OF CUYAHOGA, ET AL.

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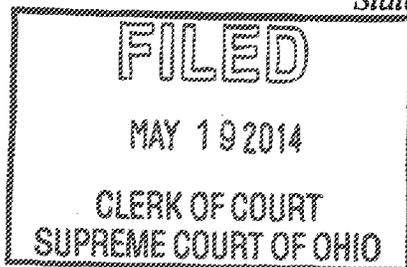
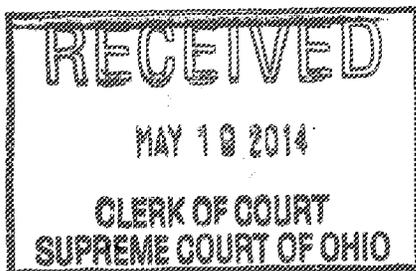


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THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A foundational principle of class action law is that a putative class action which includes individuals who did not sustain any actual harm or damage as a result of the challenged conduct must fail. See *Stammco, LLC v. United Tele. Co. of Ohio* 136 Ohio St.3d 231, 994 N.E.2d 408 (2013) at ¶53 (hereinafter referred to as “*Stammco II*”); *Felix v. Ganley Chevrolet Inc. et al.* 8th Dist. No. 98985, 2013-Ohio-3523 *appeal allowed by Felix v. Ganley Chevrolet, Inc.*, 138 Ohio St.3d 1413, 3 N.E.3d 1215, 2014-Ohio-566 (Feb. 19, 2014). (“*Felix*”). The Eighth District’s disregard of the special statutory procedure governing Board of Revision (“BOR”) complaints, along with the prerequisites for class certification, threatens that fundamental principle.

In reversing the trial court’s denial of class certification, the Eighth District’s decision creates uncertainty regarding finality of decisions of the BOR, and ostensibly opened all Ohio counties to unforeseen liability for valuation disputes thought to have been settled years ago. Ohio’s legislature developed a statutory scheme to create fairness and finality in resolving property valuation issues and distributing property taxes to governmental subdivisions. The Panel’s flawed decision creates an unwarranted work-around for taxpayers who fail to follow this statutory scheme in a timely manner. It seriously disrupts financial planning, on both the county and local levels, ordering claw-backs of property taxes collected years ago.

While this Court’s decision in *Felix v. Ganley Chevrolet, Inc.*, No. 2013-1746, may be informative in this case, it may or may not necessarily be outcome determinative. Depending on the basis and scope of the Court’s decision, *Felix* may control the outcome here—or it may not.

If the decision in *Felix* as to its first proposition of law (which mirrors Proposition of Law No. 1 in this Memorandum) is answered in the affirmative, review in this case may still be warranted in order to clarify why at least some of the putative class members do not, and never did, have a claim, thus preventing certification.

STATEMENT OF THE CASE AND FACTS

A. Musial Files a 2008 Valuation Decrease Complaint in the BOR

This case's origin actually begins with another quasi-judicial proceeding which became final long ago. Appellee, Musial Offices Ltd. ("Musial") is the owner of real property at 28885 Center Ridge Road, Suite 202, Westlake Ohio ("the Property."). Sometime in late 2005, the County Auditor assigned a tax valuation of \$679,500 to the Property for tax year 2006. Pursuant to Ohio law, Musial received a tax bill that clearly reflected that valuation. In January 2009, Musial filed a decrease complaint with the Cuyahoga County BOR ("the BOR") for tax year 2008 (the last year of a triennium) with respect to the property, seeking a valuation reduction from \$679,500 to \$499,000. The Westlake Board of Education filed a Counter Claim with the BOR in May, 2009 seeking no reduction in taxable value for tax year 2008. In November 2009, the BOR held a hearing on the matter. In January 2010, the BOR issued a decision letter to Musial – with a copy to Counsel for Westlake Schools – informing Musial that the Board of Revision lowered its 2008 tax valuation from \$679,500 to \$499,000.

B. The Property is Revalued in 2009's Triennial Update; Musial Voluntarily Pays

The year 2009 was a "triennial update year" in which the Auditor¹ was required to fix a new value upon Musial's property and all real property in the county. Pursuant to this duty, on December 1, 2009, the Cuyahoga County Auditor's office generated and sent to Musial a 2009 tax bill which clearly informed Musial that the 2009 value of the property was set at \$679,500. The bill also informed Musial that the deadline to pay was January 20, 2010. Musial voluntarily paid the property tax bill generated on December 1, 2009. Musial did not file any protest before paying this bill. Ap. Op. at ¶ 4.

¹ On January 1, 2011, Cuyahoga County converted to a charter form of government pursuant to Art. X, Sec. 3 of the Ohio Constitution. The Auditor's Office is now referred to as the Office of the Fiscal Officer.

C. Musial Had Several Options, But Exercised None of Them

Having received its 2009 tax bill in December of 2009, Musial was on notice that the auditor had valued his property for 2009 at \$679,500. Upon receipt of the notice of valuation sent to it in December of that year, Musial had several options.

- (1) It could have filed a 2009 decrease complaint at any time up to March 31, 2010 pursuant to R.C. 5715.19(A)(1) -- or,
- (2) It could have notified the BOR that it wanted the hearing on its 2008 Complaint to be expanded into a hearing on both the 2008 and 2009 tax years, *i.e.* a continuing complaint, pursuant to *AERC Saw Mill Village, Inc. v. Franklin Cty. Bd. of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468 -- or,
- (3) It could have decided that it was not in its interest to file a decrease complaint due to the expense -- or,
- (4) It could have paid the tax bill for 2009 under protest and demanded a refund pursuant to R.C. 2723.03 -- or,
- (5) It could have appealed the BOR's January 13, 2010 decision² finding value in 2008 pursuant to R.C. 5717.01 or 5717.011 and assigned as error the BOR's failure to include a separate valuation on the property for tax year 2009.

However, *Musial failed to do any of the above*. Moreover, it paid both its first and second half 2009 taxes based upon a \$679,500 property value without then making written payment-under-protest. Rather than following administrative procedures set forth in Ohio law governing

² Musial's 2008 decrease Complaint, filed with the BOR on January 16, 2009. The BOR's determination of 2008's value at \$499,000 was never appealed either to the Board of Tax Appeals or to the Cuyahoga County Court of Common Pleas. The County argued for dismissal below based upon clear Ohio law providing that: "Where a party fails to exhaust available administrative remedies, allowing declaratory relief would serve 'only to circumvent an adverse decision of an administrative agency and to bypass the legislative scheme.'" *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Commrs.*, 132 Ohio St.3d 47, 2012-Ohio-1861, ¶19.

complaints as to valuations of property, Musial bypassed that special statutory scheme³ and filed this entirely new civil case, seeking class certification.

D. The County Challenges the Common Pleas Court's Subject Matter Jurisdiction

Appellants, County of Cuyahoga, et al. (collectively "the County") filed a motion to dismiss Musial's class action for lack of subject matter jurisdiction. The County argued that the trial court had no authority under law to address the merits of Musial's Complaints because it sought to bypass a special statutory procedure. *State, ex rel. Iris Sales Co., v. Voinovich*, 43 Ohio App.2d 18, 332 N.E.2d 79 (1975) at ¶3 of the Syllabus. In response to Cuyahoga County's motion to dismiss pursuant to Ohio Rule Civ. P. 12(B)(1) for lack of subject matter jurisdiction, Musial filed its second amended complaint in June 2012, adding a claim for mandamus relief,⁴ in addition to its original four causes of action, and maintaining its request for class certification.

Shortly after filing the Second Amended Complaint, Musial requested class certification in June 2012. Musial asked that the trial court certify the following class:

Cuyahoga County property owners who filed a complaint against valuation for tax year 2008 that resulted in the [BOR] reducing the taxable value of the property, whose 2009 property value was taxed using a higher value.

The putative class members' "grievance" seems to be that a successful owner's 2008 lowered value should automatically carry over to 2009. This proposed definition reflects a fundamental, but critical, misunderstanding of Ohio law as it relates to property valuations.

³ *State, ex rel. Iris Sales Co., v. Voinovich*, 43 Ohio App.2d 18, 332 N.E.2d 79 (1975) at ¶ 3 of the Syllabus ("Because Chapters 5715 and 5717 of the Ohio Revised Code establish special statutory procedures for testing the valuation and assessment of real property for tax purposes, declaratory judgment is an inappropriate remedy which should not be granted as an alternative to these statutory procedures.").

⁴ Refuting the plaintiff's legal theories has been like trying to hit a moving target – every time a claim is beaten down, a different one pops up in its place. The mandamus cause of action was added, over objection, in Musial's first amended complaint –but failed to include an affidavit. Musial amended again, over objection, to add the affidavit to its mandamus claim in June 2012.

Based upon clear Ohio law, the County again sought dismissal of the Amended Complaints based upon jurisdictional grounds and the fact that plaintiff simply does not have a valid cause of action against anyone. While the trial court denied the County's motions, the County continues to contend that Musial's case should have been dismissed, as it is built upon a confusing mish-mash of absolutely incorrect legal theory and unsubstantiated hysteria and inaccurate newspaper accounts of BOR decisions. Solely for purposes of seeking jurisdiction before this Court, the County will refer to Plaintiff's case *as if* Musial had stated a valid cause of action.

E. The Trial Court Entertains Jurisdiction, But Denies Class Certification

The trial court refused to certify a class of taxpayers who filed BOR decrease complaints for tax year 2008 that resulted in a reduction, but that subsequently received a higher 2009 valuation. In its Order, the trial court reasoned that class certification failed under Civ. R. 23(B) due to lack of predominance. See Appx. 28-29. The Court was particularly troubled that "a factual analysis of each plaintiff and their corresponding property would be required" and listed a litany of ten possible, factual variations.

F. The Court of Appeals Reverses and Orders a Taxpayer-Class Certified

Both parties appealed the trial court's Order. Musial appealed denial of certification and the County cross-appealed. On February 20, 2014, the Court of Appeals issued an Opinion ("Ap. Op.") that reversed the trial court's refusal to certify a class under Rule 23(B)(3). Ap. Op. ¶ 36. In its Opinion, the Eighth District declined to even acknowledge this Court's recent opinions in *Stammco II*, *supra*, or *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733. Both of these decisions were either discussed in the briefing or filed as supplemental authority prior to argument. Bafflingly, the Court of Appeals also declared that "[Musial's] case does not involve a valuation dispute." Ap. Op. at ¶ 12. The Panel also seemed

to imply that Musial's most recent cause of action, in mandamus, is the only valid one. *Id.* But Musial's *allegation* of clerical error, was strangely accepted as proven fact by the Panel. *Id.* Assuming there was *any error* for purposes of this analysis – which the County denies – the alleged error Musial describes would not have been of the “clerical” variety. See, R.C. 319.35.

A clerical error is one that the Fiscal Officer can readily ascertain by review of his own internal records. *Id.* This Court has noted that “clerical errors are those of the bookkeeping or copying genre while fundamental errors are those committed in the exercise of the subject administrative officer's judgment and discretion.” *Ryan v. Tracy*, 6 Ohio St.3d 363, 366 (1983) at fn. 4. Other courts have considered clerical errors as “those which are computational in nature” and do not require the auditor to employ any decision-making skills related to his position. *State ex rel. Ney v. DeCourcy*, 81 Ohio App.3d 775, 780 (1992). Nowhere in Musial's most recent Complaint is it alleged that the Fiscal Officer (county auditor) could have inspected or examined documents *available at the auditor's office or in the recorder's office* to discover the alleged valuation error of Musial's property. Clearly, under R.C. 319.34 and 319.36, the Fiscal Officer has no clear legal duty⁵ to do what Musial is requesting a Court order him to do. Thus, Musial has no clear legal right to the relief requested and denial of class certification was absolutely appropriate --- in fact, the case should be dismissed.

The County requested reconsideration and *en banc* review noting that both sides extensively briefed the “special statutory procedure” issue, which the Eighth District recast as a “failure to exhaust administrative remedies” issue. *Ap. Op.* at ¶¶ 10-12. Likewise both sides

⁵ Shortly after Musial's mandamus claim was added, the County unsuccessfully requested a writ of prohibition in this Court. *Cuyahoga County, et al. v. Hon. Maureen Clancy*, Sup. Ct. Case No. 2012-1522. In its Response to this Memo, Musial will likely imply that this Court's dismissal of the County's prior writ action equates to a “rejection” of arguments made herein regarding the trial court's lack of subject matter jurisdiction. However, if this Court intends to issue a merits decision, then the Ohio constitution requires it to expressly say so. Ohio Const., Article IV, Section 2(C).

extensively discussed *State ex rel. Iris Sales v. Voinovich*, 43 Ohio App.2d 18, 23 (1975) --- and the Panel failed to address that decision issued by the Eighth District nearly thirty years ago. (“Because Chapters 5715 and 5717 of the Ohio Revised Code establish special statutory procedures for testing the valuation and assessment of real property for tax purposes, declaratory judgment is an inappropriate remedy which should not be granted as an alternative to these statutory procedures.”) *Id.* at Syllabus. Two appellate judges dissented from denial of *en banc* review. Appx. 01.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

A class action cannot be maintained on behalf of a putative class that includes individuals who did not sustain actual harm or damage as a result of the challenged conduct, which is a required part of the rigorous analysis under Ohio R. Civ. P. 23.

For the reasons that follow, *at least some* of the putative class members do not have a claim, thus preventing certification. This Court has recently accepted the above proposition of law in *Felix*. In the instant case, Musial’s proposed class would include a large number of members who clearly have no cause of action at all, *even under plaintiff’s wrongheaded theory of the case*. For instance, the proposed class would include taxpayers who filed complaints in 2008, had those complaints fully adjudicated in that year, and then, consistent with Ohio law, had new property values set for them by the Auditor for the ensuing 2009 tax year. Such putative members would have no grievance with either the BOR or the Auditor. Contrary to Musial’s claim this is not a “practice of arbitrarily increasing the class members’ property valuations for tax year 2009, after the [BOR] had reduced those valuations for tax year 2008.” Musial’s *Motion to Certify* at p. 8.

Moreover, putative class members who successfully challenged their 2008 valuation would not be entitled to have that valuation “carry over” to 2009 because 2009 was a “triennial update” year in which the auditor was under a statutory duty to fix a new value pursuant to R.C. 5715.24 and R.C. 5715.33. See, *Sheldon Rd. Assoc., L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581; *AERC Sawmill Village, Inc. v. Franklin Cty. Bd. of Revision*, supra. See also, *Fogg-Akron Assoc., L.P. v. Summit Cty. Bd. of Revision*, 124 Ohio St.3d 112, 2009-Ohio-6412, ¶10 where this Court held that even if a factual basis otherwise existed for viewing a complaint as continuing, the filing of a complaint in the next following triennium⁶ halted the automatic carryover of the value determined of the prior complaint. Furthermore, a Court could only reach the merits of the putative class members’ “grievance” within the context of the statutory procedure found in Title 57 of the Ohio Revised Code.

This Court has clearly articulated that a carryover value cannot displace a new value resulting from a triennial update performed by the Auditor pursuant to his mandatory duty year. Musial has conflated and confused the “carry over value” rule with the “continuing complaint” rule, believing the putative class is appropriately defined. See *Infra*. Proposition of Law No. 4.

Proposition of Law No. 2:

A court of common pleas cannot adjudicate class-wide claims for declaratory and injunctive relief or claims for equitable disgorgement or equitable restitution of taxes paid because the class action would bypass a special statutory procedure. R.C. 5715.19

Ohio law is clear that courts have no jurisdiction to hear actions seeking declaratory or injunctive relief when such actions seek to resolve matters committed to special statutory proceedings. This doctrine appears to have been first pronounced by this Court in the case of

⁶ Musial filed another decrease Complaint as to the property’s 2010 valuation on March 31, 2011 seeking a reduction to \$499,000. Once again, the School District opposed that Complaint and requested no reduction from \$679,500. The matter was heard by the BOR on May 3, 2012 and a decision issued on May 14, 2012 finding a value for 2010 at \$503,600. This BOR decision was not appealed either.

Bashore v. Brown, 108 Ohio St. 18 (1923). This Court has more recently recognized the numerous Ohio appellate court cases setting forth the principle that prohibited the bypassing of special statutory proceedings by filing actions seeking declaratory or injunctive relief.

Courts of appeals have uniformly held that actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed. *Dayton Street Transit Co. v. Dayton Power & Light Co.* (1937), 57 Ohio App. 299, 10 O.O. 500, 13 N.E.2d 923; *State, ex rel. Iris Sales Co., v. Voinovich* (1975), 43 Ohio App.2d 18, 72 O.O.2d 162, 332 N.E.2d 79; *Wagner v. Krouse* (1983), 7 Ohio App.3d 378, 7 OBR 479, 455 N.E.2d 717; *Beasley v. East Cleveland* (1984), 20 Ohio App.3d 370, 20 OBR 475, 486 N.E.2d 859; and *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App.3d 183, 530 N.E.2d 928. Each of these actions was decided on direct appeal, not by issuance of a writ of prohibition. However, since it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve matters committed to special statutory proceedings, their decisions should always be reversed on appeal, except when they dismiss the actions. *We find this tantamount to a holding that courts have no jurisdiction to hear the actions in the first place, and now so hold.*

State ex rel. Albright v. Court of Common Pleas of Delaware Cty. 60 Ohio St.3d 40, 42 (1991).

(Emphasis added).

In *Albright*, this Court cited with approval the case of *State ex rel. Iris v. Voinovich*, 43 Ohio App.2d 18, a case the Panel below refused to even acknowledge. In *Iris*, the plaintiff brought suit against the county auditor on his own behalf and as a representative of a class consisting of county taxpayers alleging that the county auditor and others, in violation of their statutory duties, “maintained a discriminatory tax classification” of real property for tax purposes that benefitted country clubs and golf courses in Cuyahoga County. 43 Ohio App. 2d 18, 19. The trial court granted the defendants’ motion to dismiss based upon the grounds that the common pleas court lacked jurisdiction. On appeal to the Court of Appeals for Cuyahoga County, the Court affirmed the dismissal holding that:

A general rule regarding declaratory judgments is that where a special statutory method for the determination of a particular type of case has been provided, it is

not proper to by-pass this statutory procedure by means of a declaratory judgment**81 action. *Laub v. Wills* (1943), 72 Ohio App. 496, 509-510, 53 N.E.2d 530, citing Borchard on Declaratory Judgments (2d Ed.) at 342. See also *Dayton Street Transit Co. v. Dayton Power & Light Co.* (1937), 57 Ohio App. 299, 13 N.E.2d 923.

Id at 19. The *Iris* court went on to hold that the taxpayer had bypassed the statutory procedures available through the board of revision by bringing suit in the common pleas court:

Rather than follow these statutory procedures, plaintiff has attempted to by-pass the county board of revision and the board of tax appeals by initiating this action in common pleas court.

Although Rule 57 of the Ohio Rules of Civil Procedure permits declaratory relief where appropriate, even when another adequate remedy exists, declaratory relief should not be granted in those situations where a special statutory proceeding has been provided for that purpose. Declaratory relief pursuant to **83 Rule 57 of the Ohio Rules of Civil Procedure is inappropriate where it would result in the bypass of a special statutory proceeding. The circumvention of these special statutory procedures would nullify the legislative intent to have specialized tax questions initially determined by boards and agencies specifically designed and created for that purpose.

Id. at 23.

The foregoing cases are directly applicable to this case because the resolution of tax valuation disputes is committed to special statutory proceedings under Ohio law. The means by which a taxpayer may test the auditor's determination of the taxable value of real property is set forth in detail in Chapters 5715 and 5717 of the Revised Code. The General Assembly has prescribed that complaints regarding property tax valuation originate in the Board of Revision ... not be brought as putative class actions in courts of common pleas.

Proposition of Law No. 3:

Where complete relief is afforded in the nature of special statutory proceedings, as in this case in the form of a property valuation complaint in the Board of Revision, an action for damages, declaratory judgment, and injunction cannot be used as a substitute for such proceedings.

Notwithstanding Musial's protestations, R.C. 5715.19(A) is the sole "jurisdictional gateway" by which taxpayers can initiate a challenge to the County Auditor's determination of value for a particular parcel of real property. *Toledo Public Schools Bd. of Ed. v. Lucas Cty. Bd. of Revision*, 124 Ohio St.3d 490, 2010-Ohio- 253, ¶ 10. The challenge is initiated by the filing of a complaint in the Board of Revision. *Knickerbocker Properties, Inc. XLII v. Delaware Cty. Bd. of Revision*, 119 Ohio St.3d 233, 2008-Ohio-3192, ¶ 11. By enacting R.C. 5715.19 and 5717.02, the General Assembly intended to have tax controversies resolved (at least initially) by the administrative agencies of this state. A writ of mandamus and/or "a declaratory judgment action [are] not the appropriate vehicle[s] to challenge the determinations of the [defendant] Auditor..." *State ex rel. Mansfield Motorsports Speedway, L.L.C., v. Dropsey*, 5th Dist. No. 11CA65, 2012-Ohio-968, ¶ 36 appeal denied by --- N.E.2d ----, 2012-Ohio-3054 (Ohio Sup. Ct. Jul 5, 2012). See also, *Lingo v. State*,-- N.E.3d ---, Slip Op. 2014-Ohio-1052, Syllabus at ¶ 1 ("Declaratory judgment is not a proper vehicle for determining whether rights that were previously adjudicated were properly adjudicated." Per O'Connor, C.J., with three justices concurring and one justice concurring in judgment only.)

Proposition of Law No. 4:

The Auditor's reappraisal of real property when preparing a "current" triennial tax abstract terminates the possibility of carrying forward a determination of the BOR that corrected a prior year's abstract, regardless of the Auditor's mistaken representation that such determination would be "carried forward." *AERC Saw Mill Village Inc. v. Franklin Cty. Bd. of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468.

Musial's argument misunderstands of the difference between the "carry over value" rule and the "continuing complaint" rule. For instance, the proposed class would include taxpayers who filed complaints in 2008, had those complaints fully adjudicated in that year and then new values were set by the Auditor for the ensuing 2009 tax year. Contrary to Musial's claim this is

not a “practice of arbitrarily increasing the class members’ property valuations for tax year 2009, after the [BOR] had reduced those valuations for tax year 2008.” *Motion to Certify* at p. 8. The putative class members’ “grievance” is that a successful owner’s 2008 value should automatically carry over to 2009, despite the intervening update revaluation performed by the Auditor pursuant to the duty under R.C. 5715.24 and 5715.33. Such class members have no cognizable claims against the Auditor or the BOR under the Ohio Supreme Court’s clear holding in *AERC Sawmill Village, Inc. v. Franklin Cty. Bd. of Revision*, 127 Ohio St. 3d 44, 2010-Ohio-4468, ¶ 32. (carryover provision of R.C. 5715.19(D) “operates with full force only when the auditor is not under a separate statutory duty to adjust the value assigned to the property”); Accord, *Sheldon Rd. Assoc., L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶ 24 at fn.1 (“The auditor’s duty to conduct a reappraisal would ordinarily preclude carrying over the previous year’s valuation.”). Furthermore, a Court could only reach the merits of the putative class members’ “grievance” within the context of the statutory procedure found in Title 57 of the Ohio Revised Code.

This Court has clearly articulated that a carryover value cannot displace a new value resulting from a triennial update performed by the Auditor in a mandatory-duty year. Musial, and the Court of Appeals, conflated and confused the “carry over value” rule with the “continuing complaint” rule, believing the putative class is appropriately defined. The trial court recognized these distinctions and appropriately denied Musial’s request to certify a class on March 18, 2013 finding “the issue of predominance is dispositive of this motion.” Appx. 28-29. (“Each of the [putative] class member’s claim would require an individualized factual analysis and determination of the relevant circumstances.”)

Proposition of Law No. 5:

Once a common pleas court rejects class certification for a lack of predominance under Rule 23(B)(3), a reviewing court cannot reverse and order a class certified when individualized, class member, inquiries are required to determine potential liability. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, applied.

The trial court correctly concluded that any such claim cannot be certified as a class action due to the *predominance of individual issues* over common ones. As the trial court stated in its March 18, 2013 ruling, “Each of the [putative] class member’s claim would require an individualized factual analysis and determination of the relevant circumstances.” Appx. 029. The trial judge rightly saw the inherent difficulty in attempting to re-review thousands of putative class members’ valuation complaints and notifications. Insufficient issues of law and fact predominated to include those County taxpayers who filed BOR Complaints, obtained final decisions and allegedly saw their tax valuations increase in 2009. The individual issues involved with such an amorphous inquiry both outnumbered and outweighed the common issues of law and fact. These include, but are not limited to, whether the taxpayer appealed, whether the taxpayer was commercial versus residential, what municipality they owned property in, and whether they received an increase in 2009 as a result of the Auditor conducting the “triennial update” required by statute. “Because of the variation of the facts among the class members and the need to review each individual transaction, class treatment of the common-law claims would result in mini-trials where each class member would be reviewed to determine if they met the class definition.” *Perme v. Union Escrow Co.*, 8th Dist. No. 97368, 2012-Ohio-3448 at ¶17.

The trial judge’s reservations were thoroughly discounted and discarded by the Court of Appeals, despite the admonition from this Court: “A finding of abuse of discretion, particularly if

the trial court has refused to certify, should be made cautiously.” *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201 (1987). (Emphasis added).

Proposition of Law No. 6:

A court of common pleas cannot adjudicate class-wide claims for declaratory and injunctive relief or claims for equitable disgorgement or equitable restitution of taxes paid over one-year prior to commencement because pursuit of those claims is barred by R.C. 2723.01 *Ryan v. Tracy*, 6 Ohio St.3d 363 (1983).

If a named plaintiff is barred from asserting a statutory claim (like potential recovery of “the illegal levy or collection of taxes” under R.C. 2723.01), the plaintiff cannot establish the typicality requirement. *DiLucido v. Terminix Int’l*, 450 Pa. Super. 393, 676 A.2d 1237, 1242 (1996); *Debbs v. Chrysler Corp.*, 2002 PA Super 326, ¶ 79, 810 A.2d 137 (2002) (“A class representative is not typical of the class if her individual claims are legally barred.”).

This rule applies when the named plaintiff’s claims are barred by the statute of limitations: “When the statute of limitations bars the claims of the sole class representatives, class certification is inappropriate.” *Brooks v. Lincoln Nat’l Life Ins. Co.*, E.D. Tex. No. 5:03CV256, 2008 U.S. Dist. LEXIS 121483, *58 (Feb. 12, 2008); citing *Franze v. Equitable Assur.*, 296 F.3d 1250, 1255 (11th Cir. 2002)

Quezada v. Loan Ctr. of Cal., Inc., E.D. Cal. No. 2:08-00177, 2009 U.S. Dist. LEXIS 122537, *24-*25, 2009 WL 5113506, *7 (Dec. 17, 2009) states it directly: “a putative class representative’s claims fail to meet the typicality requirement when they are subject to a statute of limitations defense that differs from other class members and would become a significant focus of the litigation.” *Id.*

This Court recently held these foundational issues should be examined as part of the trial court’s rigorous analysis. “At the certification stage in a class-action lawsuit, a trial court must

undertake a rigorous analysis, which may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ. R. 23." *Stammco II*, 136 Ohio St.3d 231, (2013) at Syllabus.

The operative facts clearly and unequivocally establish that Musial commenced this action more than one year from the date it voluntarily paid its first half 2009 real property taxes.

R.C. 2723.01 states as follows:

Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, **but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.** (Emphasis supplied).

Here, Musial paid first-half 2009 taxes for the Westlake commercial property on January 19, 2010. Musial commenced this action on January 24, 2011. Therefore, there is no dispute of any nature whatsoever that this action was filed more than one year following the date a portion of the disputed taxes, i.e. 2009, were collected by the County. Accordingly, class action certification was properly denied because Musial's claim is not typical due to Musial's failure to comply with the one-year limitations statute.

CONCLUSION

Based on this Court's recent decisions in *Stammco II* and *Cullen* and for the reasons set forth above, Appellants respectfully request this Court to accept review, and to further consider whether, under these facts, this may be an appropriate case in which to enter judgment summarily pursuant to Sup. Ct. Prac. R. 7.08(B)(3). Likewise, this Court should hold this case pending the decision in *Felix v. Ganley Chevrolet, Inc.*, Sup. Ct. No. 2013-1746 (granted Feb. 19, 2014). Alternatively, the Court should accept jurisdiction over this case so that these important issues can be reviewed on their merits.

Respectfully submitted,

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Revision*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendants-Appellants, Cuyahoga County, et al. was served by U.S. mail and via e-mail this 16th day of May, 2014, upon the following counsel:

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State ex rel. Musial Offices Ltd.*



BRIAN R. GUTKOSKI
Assistant Prosecuting Attorney

Court of Appeals of Ohio, Eighth District
County of Cuyahoga
Andrea Rocco, Clerk of Courts

Musial Offices, Ltd.

Appellant

COA NO. LOWER COURT NO.
99781 CP CV-746704

COMMON PLEAS COURT

-vs-

County of Cuyahoga, et al.

Appellees

MOTION NO. 472801

Date 04/03/2014

Journal Entry

This matter is before the court on appellee's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellee has not shown that there is any conflict between the panel's decision and other decisions of this court. Appellee's disagreement with the panel's conclusion that this case is not a dispute about the valuation of real property, and its objection to the fact that the panel did not find that the class included persons who were not injured by the challenged conduct, do not demonstrate that a conflict exists. Therefore, appellee's application for en banc consideration is denied.



FRANK D. CELEBREZZE, JR., JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM MCCORMACK, J.,
KENNETH A. ROCCO, J., and
MELODY J. STEWART, J.

Dissenting:

MARY J. BOYLE, A.J., and
SEAN C. GALLAGHER, J.

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OF THE COURT OF APPEALS
By A. Rocco Deputy

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

MUSIAL OFFICES, LTD.

Appellant

COA NO.
99781

LOWER COURT NO.
CP CV-746704

COMMON PLEAS COURT

-vs-

COUNTY OF CUYAHOGA, ET AL.

Appellee

MOTION NO. 472812

Date 04/03/14

Journal Entry

Defendant-appellee, County of Cuyahoga, application for reconsideration is denied. Upon review of the application and brief in opposition of reconsideration, the court fully considered all the evidence in the record before rendering its decision instructing the trial court to certify the class and proceed on the merits of the class action.

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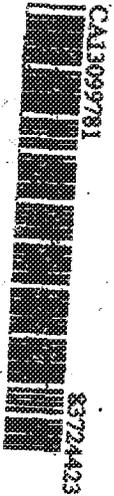
CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By W. Musak Deputy

Presiding Judge KATHLEEN ANN KEOUGH,
Concurs

Judge MARY EILEEN KILBANE, Concurs

Eileen T. Gallagher
EILEEN T. GALLAGHER
Judge

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ALL PARTIES - COSTS TAILED



[Cite as *Musial Offices, Ltd. v. Cuyahoga Cty.*, 2014-Ohio-602.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99781

MUSIAL OFFICES, LTD.

PLAINTIFF-APPELLANT
and CROSS-APPELLEE

vs.

COUNTY OF CUYAHOGA, ET AL.

DEFENDANTS-APPELLEES
and CROSS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-746704

BEFORE: E.T. Gallagher, J., Keough, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: February 20, 2014

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EILEEN T. GALLAGHER, J.:

{¶1} Plaintiff-appellant, Musial Offices, Ltd. (“Musial”), appeals the denial of its motion for class certification in its case against defendants-appellees, Cuyahoga County (“Cuyahoga County” or “the county”), to recoup overpaid property taxes. In a cross-appeal, Cuyahoga County challenges the trial court’s determination that Musial established certain requirements for class certification. The county also asserts the trial court lacked jurisdiction to hear Musial’s claims. We find the trial court had jurisdiction and reverse the trial court’s judgment denying class certification.

{¶2} Musial is the owner of real property located at 2885 Center Ridge Road, Westlake, Ohio. In 2005, the county auditor assigned a tax valuation of \$679,500 to Musial’s property for the 2006, 2007, and 2008 tax years. In 2009, Musial filed a decrease complaint with the Cuyahoga County Board of Revision (“Board of Revision” or “Board”) for the 2008 tax year. The Westlake Board of Education filed a counterclaim seeking to retain the auditor’s valuation. The Board of Revision did not hold a hearing on Musial’s complaint until November 25, 2009.

{¶3} On December 14, 2009, Musial received a property tax bill for the first half of 2009.¹ The tax bill reflected a tax valuation of \$679,500 and indicated that payment was due on January 20, 2010. On January 13, 2010, Musial received a letter of correction

¹ The 2009 tax year was the first year of a triennial period. Pursuant to R.C. 5715.33, the county auditor must reappraise all real property within the county once every six years, i.e., the “sexennial reappraisal” and reappraise property values at the interim three-year point, i.e., “the triennial update.”

from Frank Russo ("Russo"),² who served as both the county auditor and secretary of the Board of Revision, stating that the valuation of Musial's Westlake property for the tax year 2008 had been reduced from \$679,500 to \$499,000. The letter further stated: "If no action is taken, the Board's decision will be reflected in your next tax bill."

{¶4} Musial paid the December 2009 tax bill for the first half of 2009 without protest. In an affidavit, Mark Musial, Musial's principal, explained that because the correction letter indicated the correction would be reflected in Musial's next tax bill, he did not think any further action was necessary. However, in June 2010, Musial received a property tax bill for the second half of 2009 that reflected a tax valuation of \$679,500 instead of the Board of Revision's reduced valuation. In response to the tax bill, Mark Musial sent a letter to Russo and the Board of Revision demanding correction of the 2009 valuation. Musial received no response. Mark Musial sent a second letter again demanding correction of the 2009 property valuation on August 31, 2010.

{¶5} Marty Murphy ("Murphy"), the acting administrator of the Board of Revision, called Mark Musial and informed him that "hundreds" of taxpayer were similarly overcharged and that the Board was considering applying its \$499,000 valuation to Musial's property for the 2009 tax year. Murphy indicated that if the county made corrections, they would be made without any action from Musial. Murphy also admitted that the Board of Revision's \$499,000 valuation for the 2008 tax year should have applied

² On January 1, 2011, Cuyahoga County converted to a charter form of government pursuant to Article X, Section 3, Ohio Constitution. The new Cuyahoga County Charter created the position of a Fiscal Officer, who is appointed by the County Executive, which replaced the formerly elected Auditor. See County Charter 5.02.

to the 2009 tax year. These statements were consistent with reports Mark Musial had read in the Plain Dealer of numerous property owners who were overcharged in their 2009 property tax bills.

{¶6} The corrections Musial sought were never made. Thus, Musial filed a complaint in the Cuyahoga County Common Pleas Court on January 24, 2011, alleging that the county erroneously applied 2007 property values to assess the class members' 2009 property taxes instead of the 2008 value ordered by the Board of Revision. Musial subsequently amended the complaint and asserted claims for disgorgement, unjust enrichment, violation of due process and equal protection, injunctive relief, and mandamus. The county filed a Civ.R. 12(B)(1) motion to dismiss the complaint for lack of subject matter jurisdiction, which the trial court converted to a motion for summary judgment and denied.

{¶7} It is undisputed that the county overcharged numerous property owners in real estate tax bills for the 2009 tax year. On June 28, 2012, Musial filed a motion for class certification asking the court to certify the following class:

Cuyahoga County property owners who filed a complaint against valuation for tax year 2008 that resulted in the Board of Revision reducing the value of the property, whose 2009 property value was taxed using a higher value.

Following a hearing, the trial court denied the motion for class certification. Musial now appeals, arguing the court should have granted class certification. In its cross-appeal, the county asserts four assignments of error challenging the trial court's jurisdiction and its determination that Musial established certain factors required by Civ.R. 23 for class

certification. We discuss the county's fourth assignment of error first because without jurisdiction, the remaining assigned errors would be moot.

Jurisdiction

{¶8} In its fourth cross-assignment of error, the county argues the trial court lacked jurisdiction to hear Musial's complaints because Musial's recourse was through a statutorily prescribed administrative procedure, and there is no legal authority that confers original jurisdiction to the common pleas court for tax valuation complaints. The county contends Musial illegally attempted to circumvent a statutory scheme that requires it to exhaust its administrative remedies before invoking the court's jurisdiction.

{¶9} Although the trial court denied the county's motion for summary judgment, which is an interlocutory order, we are compelled to address the question of subject matter jurisdiction, which may be raised at anytime. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 82 Ohio St.3d 37, 693 N.E.2d 789 (1998). Indeed, an appellate court may sua sponte consider subject matter jurisdiction even if it was not raised below. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 684 N.E.2d 72 (1997). Whether the trial court had jurisdiction is a question of law we review de novo. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 4-5.

{¶10} Failure to exhaust administrative remedies is not a jurisdictional defect per se. Nevertheless, Ohio law requires that the complainant must exhaust any administrative remedies before invoking the common pleas court's jurisdiction. *Jones v.*

Chagrin Falls, 77 Ohio St.3d 456, 462, 674 N.E.2d 1388 (1997).³ As the United States Supreme Court has stated,

[e]xhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

Weinberger v. Salfi, 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). The purpose of the doctrine "is to permit an administrative agency to apply its special expertise * * * and in developing a factual record without premature judicial intervention." *S. Ohio Coal Co. v. Donovan*, 774 F.2d 693, 702 (6th Cir.1985). The judicial deference afforded administrative agencies is to "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court." *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 306, 93 S.Ct. 573, 34 L. Ed.2d 525 (1973). See also *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111, 564 N.E.2d 477 (1990), quoting *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457 45 L.Ed.2d 522 (1975).

{¶11} The county argues Musial failed to comply with the procedures outlined in R.C. 5715.19 for contesting real property valuations for tax purposes. R.C. Chapter 5717 also sets forth a specific procedure for the appeal of decisions of a county board of revision to either the Board of Tax Appeals, R.C. 5717.01, or to the court of common pleas in which the property is located, R.C. 5717.05. Neither chapter authorizes the

³ See also *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111, 564 N.E.2d 477 (1990) and *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 29, 406 N.E.2d 1095 (1980).

common pleas court to hear valuation disputes involving property valuations for tax purposes unless the matter is before the court on appeal. R.C. 5717.01. Thus, courts of common pleas do not have original jurisdiction to hear property tax valuation cases and have only appellate jurisdiction conferred on them by statute. *See, e.g., Holm v. Clark Cty. Auditor*, 168 Ohio App.3d 119, 2006-Ohio-3748, 858 N.E.2d 877 (2d Dist.) (Many courts have held that compliance with these statutes is jurisdictional and not merely procedural.).

{¶12} However, this case does not involve a valuation dispute. Musial, on behalf of the putative class, is not challenging the Board of Revision's valuation of its property. Musial seeks correction of a clerical error in the auditor's office that reinstated 2007 valuations for the 2009 tax year instead of applying the valuations determined by the Board of Revision. Rather than seek a new valuation for its property, Musial seeks a mandamus order compelling the county fiscal officer to correct the errors and issue refunds.

{¶13} The county asserts that Musial's claims nonetheless challenge the valuation of its property because the 2009 tax year was a triennial update year. Pursuant to R.C. 5715.33, the county auditor is required to update appraisals of real property the third year ("triennial update," R.C. 5715.24; 5715.33) of a six-year period (the "sexennial reappraisal"). The county maintains that these periodic update appraisals prevent carryover of the previous year's valuations. Therefore, the county argues, Musial's class action is in fact challenging the 2009 valuation of its property.

{¶14} However, R.C. 5715.19(D) contains carry-over value provisions and continuing complaint provisions. *Columbus Bd. of Edn. v. Franklin Cty Bd. of Revision*, 87 Ohio St.3d 305, 307, 720 N.E.2d 517 (1999). Pursuant to R.C. 5715.19(D), the Board of Revision is required to hear and render a decision on a decrease complaint within 90 days after the filing of the complaint. This 90-day requirement is mandatory, and a taxpayer may not be penalized for the Board's failure to act within 90 days. *Mott Bldg. Inc. v Perk*, 24 Ohio Misc. 110, 263 N.E.2d 688 (1969). Thus, if a complaint filed for the current year is not determined by the Board within the time for such determinations, the complaint and any related proceedings must be continued by the Board as a valid complaint until the complaint is finally determined by the Board. R.C. 5715.19(D); *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 74 Ohio St.3d 639, 660 N.E.2d 1179 (1996).

{¶15} Furthermore, the valuation determined by the Board of Revision automatically carries over "for any ensuing year" until the complaint is finally determined. *Id.* This rule holds true even when the ensuing year is the first year of a triennial period, unless the taxpayer files a fresh complaint. *See Cincinnati School Dist. Bd. of Edn.* at 640-643. Indeed,

it would be ludicrous for a property owner to win a reduction in valuation for a given tax year only to face the old higher value in the ensuing tax year simply because the Board had not issued a determination in a timely manner. The General Assembly clearly intended for there to be stability in property values where none of the exceptions in R.C. 5715.19(A)(2) apply.

Concord Columbus, L.P. v. Testa, 122 Ohio App.3d 205, 701 N.E.2d 449 (10th Dist.1997) (Close, J., dissenting).

{¶16} Since the Board of Revision's valuation of Musial's property for the 2008 tax year was determined in 2010, that valuation automatically carried over to 2010. Musial is not challenging the Board's valuation of its property but rather is seeking to enforce the Board of Revision's valuation. Indeed, one of Musial's claims was brought pursuant to R.C. 2723.01, which expressly confers jurisdiction on the common pleas court to hear claims for recovery of overpaid taxes. Musial is therefore not required to comply with the statutorily prescribed administrative proceedings for valuation disputes for the common pleas court to have jurisdiction over Musial's claims.

{¶17} The county's fourth assignment of error is overruled.

Class Certification

{¶18} In Musial's sole assignment of error, it argues the trial court erred in denying its motion for class certification. In the county's first three assigned errors, it argues the trial court erred in finding that Musial satisfied certain elements necessary for class certification, including typicality, adequacy, and commonality. We discuss these assigned errors together because they are interrelated.

{¶19} To be eligible for class certification pursuant to Civ.R. 23, the plaintiffs must establish the following seven prerequisites: (1) an identifiable and unambiguous class must exist, (2) the named representatives of the class must be class members, (3) the class must be so numerous that joinder of all members of the class is impractical, (4) there must be questions of law or fact that are common to the class ("commonality"), (5) the claims or defenses of the representative parties must be typical of the claims and defenses of the members of the class ("typicality"), (6) the representative parties must fairly and

adequately protect the interests of the class (“adequacy”), and (7) one of the three requirements of Civ.R. 23(B) must be satisfied. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 6. The party seeking class certification bears the burden of demonstrating that the requirements of Civ.R. 23(A) and (B) are met. *Hoang v. E*trade Group*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151 (8th Dist.).

{¶20} The Ohio Supreme Court has held that “[a] trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion.” *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. We apply the abuse of discretion standard in reviewing class action determinations to give deference to “the trial court’s special expertise and familiarity with case-management problems and its inherent power to manage its own docket.” *Id.* at 201.

{¶21} Nevertheless, “the trial court’s discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23.” *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998). The trial court may only certify a class if it finds, after a rigorous analysis, that the moving party has demonstrated that all the factual and legal prerequisites to class certification have been satisfied. *Id.*

{¶22} As previously stated, Musial seeks to certify a class defined as “all Cuyahoga County property owners who filed a complaint against valuation for the tax year 2008 that resulted in the Board of Revision reducing the taxable value of the

property, whose 2009 property value was taxed using a higher value.” The trial court found, and it is not disputed, that the class definition is “definite enough so that it is administratively feasible for the court to determine whether a particular individual is a member.” *Stammco*, 125 Ohio St.3d 91, 926 N.E.2d 292, at ¶ 7. It is also undisputed that joinder of all members, who are in the thousands, is impractical. And since Musial’s complaint seeks an order directing the fiscal officer to correct its failure to apply the Board’s valuation to its property for the 2009 tax year, it is a member of the class. Thus, the first three prerequisites enumerated in Civ.R. 23(A) are satisfied.

Typicality

{¶23} In its first assignment of error, the county argues the trial court erred in finding that Musial’s claims are typical of all the members of the class.

{¶24} “The requirement for typicality is met where there is no express conflict between the class representatives and the class.” *Hamilton*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442, at ¶ 77. In evaluating typicality, the court must determine “whether the named plaintiffs’ claims are typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.” *Neal v. Casey*, 43 F.3d 48, 55 (3d Cir.1994).⁴ “Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the

⁴ The Ohio Supreme Court has held that because Civ.R. 23 is virtually identical to Fed.R.Civ.P. 23, “federal authority is an appropriate aid to interpretation of the Ohio rule.” *State ex rel. Davis v. Pub. Emps. Ret. Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶ 28, citing *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987).

claims of the class members, and if it is based on the same legal theory.” *Id.*, quoting *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir.1992).

{¶25} Here, Musial’s claims are typical of all putative class members because their claims arise from the same course of conduct and are based on the same legal theories. The members of the class are property owners who received a ruling from the Board of Revision lowering their property tax valuations but who were subsequently overcharged because the new values were not reflected in their 2009 tax bills. The members’ interests in recovering the amounts they overpaid under these circumstances are completely aligned and there is no inherent conflict of interest. Therefore, the trial court properly found the typicality requirement was met.

Adequacy

{¶26} In its second assignment of error, the county argues the trial court erred in finding that Musial satisfied the adequacy requirement of Civ.R. 23(A)(4).

{¶27} Adequacy refers to the class representative’s ability to protect all the members’s interests in the action. In making this determination, courts must consider two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992); *New Albany Park Condo. Assn. v. Lifestyle Communities, Ltd.*, 195 Ohio App.3d 459, 2011-Ohio-2806, 960 N.E.2d 992, ¶ 53 (10th Dist.).

{¶28} A class representative is adequate, provided that his interest is not antagonistic to that of the prospective class members. *New Albany Park Condo. Assn.* at

¶ 54. The representatives' counsel is adequate if the lawyers are "qualified, experienced and generally able to conduct the proposed litigation." *Helman v. EPL Prolong, Inc.*, 7th Dist. Columbiana No. 2001-CO-43, 2002-Ohio-5249, ¶ 49.

{¶29} As previously stated, Musial's interests are completely aligned with the interests of all members of the class and there is no evidence to suggest that Musial's interests are antagonistic to those of the other class members. Furthermore, Musial's counsel has demonstrated not only that they are competent to handle class actions, but also that they have been and will continue to zealously prosecute the action on behalf of all members of the class. Therefore, we agree with the trial court's conclusion that Musial and its counsel will adequately protect all class members' interests in the action.

Commonality

{¶30} In the county's third assignment of error, the county argues the trial court erred in finding that Musial satisfied the commonality requirement of Civ.R. 23(A)(2). In its sole assignment of error, Musial argues the trial court erred in finding that it failed to satisfy the predominance requirement of Civ.R. 23(B)(3). The trial court's denial of class certification was based on the predominance requirement of Civ.R. 23(B)(3).

{¶31} Pursuant to Civ.R. 23(A)(2), plaintiffs must show that "there are questions of law or fact common to the class." Thus, commonality requires that the class members' claims "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir.2012), quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 1 ___, 131 S.Ct. 2541, 2548, 2551, 180 L.Ed.2d

374 (2011). Thus, Civ.R. 23(A)(2) asks whether there are issues common to the class, and Civ.R. 23(B)(3) asks whether these common questions predominate. *Wolin v. Jaguar Land Rover N. Am., L.L.C.*, 617 F.3d 1168, 1171 (9th Cir.2010).

{¶32} The question whether common questions predominate over individual questions is a separate inquiry, distinct from the requirements found in Civ.R. 23(A)(2). *Wal-Mart*, 131 S.Ct. at 2556. This balancing test of common and individual issues is qualitative, not quantitative. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir.1996). Thus, there need be only a single issue common to all members of the class, and the “fact that questions peculiar to each individual member of the class member remain after the common questions of the defendant’s liability have been resolved does not dictate the conclusion that a class action is impermissible.” *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir.1988). Where common issues predominate, the class members “will prevail or fail in unison.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 2____, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013).

{¶33} There are several common legal issues affecting the county’s liability vis-a-vis the class members. We have already determined that class members’ decrease complaints that were not heard and decided within the 90-day period required by R.C. 5715.19 carried over until the Board of Revision ultimately rendered a decision without further filing by the original taxpayer. See R.C. 5715.19(D). We have also determined that class members were not required to first file an action with the Board of Revision to correct the valuations reflected in their 2009 tax bills before filing a complaint in the

common pleas court because they were not challenging the valuations. They were merely seeking to enforce the Board's valuation and recover overpayment of taxes.

{¶34} We have not specifically addressed the question whether R.C. 5715.22, which allows for the refund of excess taxes, relieves the class members of any obligation to have paid their 2009 property taxes under protest in order to recover the overcharges in this lawsuit.⁵ The answer to this question will affect the county's liability for overcharges.

{¶35} In its journal entry denying class certification, the trial court indicated that fact-specific inquiries are necessary to determine liability and damages and that class certification is therefore "unsuitable." However, the answers to the common legal issues, such as whether plaintiffs were required to pay their 2009 taxes under protest to preserve their rights to recover overcharges, will determine liability for all members.

{¶36} Furthermore, the class members are not disputing the facts individual to each member, such as when the taxpayer was notified of a reduction, when each complaint against valuation was filed, or whether the Board's reduced valuation was properly reflected in the subsequent tax bills. These facts are readily ascertainable from the county's Fiscal Officer's computer system. Even each plaintiff's damages are easily identified without litigation. Since there is no need to litigate these facts, there would be

⁵ We answered questions regarding whether complaints carry-over when the Board fails to render a decision in a timely manner and whether taxpayers are required to file fresh complaints for subsequent tax years if they have a complaint pending because answers to these questions were necessary for determining the trial court's jurisdiction. We did not answer the question whether taxpayers should have paid their 2009 taxes under protest to preserve their right to recoup overcharges because it did not affect our jurisdictional analysis.

no need for mini trials to establish them. In this case, common legal issues that relate to the county's liability to the class members predominate, even though some individualized inquiry is required to determine damages. Therefore, Musial satisfied the commonality and predominance requirements of both Civ.R. 23(A)(2) and 23(B)(3).

Statute of Limitations

{¶37} In its first three assignments of error, the county argues class certification should have been denied because Musial's claims are barred by the one-year statute of limitations set forth in R.C. 2723.01.

{¶38} R.C. 2723.01 states:

Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.

{¶39} The county argues that Musial failed to bring this action within one year of paying the second half of its 2009 taxes. The county asserts that Musial paid the second half of its 2009 taxes on January 19, 2010, and Musial commenced this action on January 24, 2011. However, Musial's January 19, 2010 payment was for the first half of 2009. Musial made the payment because Russo's correction letter, dated six days earlier, advised Musial that the Board's decision would be reflected in its next tax bill. It was not until July 2010 that Musial received the tax bill for the second half of 2009, which did not reflect the Board's decision. Musial filed its complaint on January 24, 2011, less than seven months after it paid its second half of the 2009 tax bill. Therefore, Musial's claims for recovery of overpaid taxes are not barred by the statute of limitations.

{¶40} Therefore, the county's first three assignments of error are overruled. Musial's sole assignment of error is sustained. We remand the case to the trial court with instructions to certify the class and proceed on the merits of the class action.

It is ordered that plaintiff-appellant recover from defendants-appellees costs herein taxed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY EILEEN KILBANE, J., CONCUR



**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

MUSIAL OFFICES, LTD.
Plaintiff

COUNTY OF CUYAHOGA
Defendant

Case No: CV-11-746704

Judge: MAUREEN CLANCY

JOURNAL ENTRY

P1 MUSIAL OFFICES LTD MOTION FOR CLASS CERTIFICATION, FILED 06/28/2012, IS DENIED. OSJ.

OST 3/15/2013
Judge Signature Date

03/15/2013

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MUSIAL OFFICERS, LTD.)
PLAINTIFFS)
)
vs.)
)
COUNTY OF CUYAHOGA, ET AL.)
DEFENDANTS)

CASE NO. CV-11-746704
JUDGE MAUREEN CLANCY
JOURNAL ENTRY

INTRODUCTION

This matter is before the Court on Plaintiff's Motion for Class Certification. Plaintiff and Defendant have fully briefed the issues and a hearing was held in court and on the record on December 7, 2012. After full consideration of the parties' briefs and oral arguments regarding class certification, the Court hereby denies class certification.

Plaintiff Musial Offices, Ltd. is a property owner who filed a complaint against tax valuation for 2008 with the Cuyahoga County Board of Revision. Plaintiff received a reduction and was notified through a letter of correction. Plaintiff was subsequently charged an increase in tax valuation for the year 2009. The Plaintiff seeks to certify a class defined as, "all Cuyahoga County property owners who filed a complaint against valuation for tax year 2008 that resulted in the Board of Revision reducing the taxable value of the property, whose 2009 property value was taxed using a higher value."

1. Plaintiff has alleged on behalf of himself and all other similarly situated individuals that they, as Cuyahoga County property owners, have been overcharged for their tax-year 2009 property taxes by defendants based on receiving a reduction in value for the

previous year, 2008. As defined, Plaintiff and all of the proposed class members are property owners in Cuyahoga County whose property values were reduced for the 2008 tax year and then increased for the 2009 tax year and never received a refund for the overcharge.

2. Plaintiff received notice of a valuation of his property of \$679,500 for tax year 2008 and thereafter filed a complaint against the valuation of his property with the Board of Revision. Plaintiff's complaint was received by the board on or about January 16, 2009. The Westlake Board of Education filed an opposing complaint on or about May 20, 2009.
3. The Board of Revision heard the Plaintiff's complaint on November 25, 2009 and rendered a decision in a letter dated January 13, 2010, reducing plaintiff's 2008 property tax value from \$679,500 to \$499,000.
4. In December, 2009 Plaintiff received his first tax bill for 2009 which did not reflect any change in the tax value from 2008. It remained \$679,500. The due date for the payment of the tax was January 20, 2010.
5. The reduction notice that the Plaintiff received dated January 13, 2012 stated that the board's decision, essentially reducing the tax value, will be reflected in your next tax bill. Plaintiff received the next tax bill in June, 2012.
6. Plaintiff paid his tax without protest in January, 2010.
7. Plaintiff did not file a reduction complaint for his 2009 tax valuation by the deadline of March 31, 2010. Plaintiff contends that he relied on the decision letter stating that the reduction would be reflected in his next tax bill.

8. Plaintiff's next tax bill after the reduction notice dated January 13, 2010 was issued in June, 2010 for the 2009 tax year. The tax bill did not reflect the reduction of \$499,000 but rather was an increase back to the 2008 value of \$679,500.
9. After the Plaintiff received the June, 2010 tax bill, he sent a protest letter to both the Cuyahoga County Auditor's Office and the Board of Revision demanding that tax bill be corrected to reflect the reduced value.
10. The year 2009 was a triennial update year in Cuyahoga County where the auditor may increase or decrease the value of property in the county by a certain percent or factor assigned to each municipality. The certain percent or factor was assigned to property based on the location of the property and whether it was commercial or residential. The Plaintiff whose property in question is located in the city of Westlake was assessed a zero factor meaning that the value should not change from the Board of Revision decision.

CLASS CERTIFICATION

The party seeking to maintain a class action has the burden of demonstrating that all factual and legal prerequisites to class certification have been met. *Gannon v. Cleveland*, 13 Ohio App.3d 334, 335, 469 N.E.2d 1045 (1984). A class action may be certified only if the court finds, after a rigorous analysis, that the moving party has satisfied all the requirements of Civ.R. 23. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442, 448 (1998). A plaintiff must prove by a preponderance of the evidence that class certification is appropriate. *Warner v. Waste Mgmt.*, 36 Ohio St. 3d 91, 521 N.E.2d 1091 (1988).

Civ.R. 23 sets forth seven requirements that must be satisfied before a case may be maintained as a class action. Those requirements are as follows: (1) an identifiable class must

exist and the definition of the class must be unambiguous, (2) the named representatives must be members of the class, (3) the class must be so numerous that joinder of all members is impracticable, (4) there must be questions of law or fact common to the class, (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three Civ.R. 23(B) requirements must be satisfied. *Id.*

Civ.R. 23(B) requires that (1) the prosecution of separate actions by or against individual members of the class would create a risk of: (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Hamilton*, 82 Ohio St.3d 67, 69 (1998).

Under Civ.R. 23 (A), the class description need only be definite enough for it to be feasible for the court to determine if someone is a member. *Brandow v. Wash. Mut. Bank.*, 8th Dist. No. 88816, 2008-Ohio-1714. As the Supreme Court in *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St. 3d 56, 63, 556 N.E.2d 157 (1990), held:

Civ.R. 23 does not require a class certification to identify the specific individuals who are members so long as the certification provides a means to identify such persons ***. The fact that members may be added or dropped during the course of the action is not controlling. The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class.

Plaintiff's proposed description of the class, "Cuyahoga County property owners who filed a complaint against valuation for tax year 2008 that resulted in the Board of Revision reducing the taxable value of the property, whose 2009 property value was taxed using a higher value," is readily identifiable and unambiguous.

In addition, the class representative must be a member of the proposed class. The Court finds that the evidence produced demonstrates by a preponderance of the evidence that Plaintiff is a member of the putative class.

Under Civ.R. 23 (A), the putative class must be so numerous that joinder of members is impracticable. Courts have not specified numerical limits for the size of the class action. If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking. *Hamilton*, 82 Ohio St.3d (1998). Herein, Plaintiffs presented evidence that thousands of individuals that filed a complaint with the Board of Revision for tax year 2008 experienced a reduction in their 2008 property tax value, and then an increase in their 2009 property tax value. The evidence presented by the Plaintiff satisfies the numerosity requirement.

Furthermore, courts generally have given permissive application to the commonality requirement in Civ. R. 23(A). *Marks v. C.P. Chemical Co.*, 31 Ohio St. 3d 200, 509 N.E.2d 1249 (1987). "Professor Miller indicates: '[t]ypically, the subdivision (a)(2) requirement is met without difficulty for the parties and very little time need be expended on it by the ... judge.'" *Id.* citing, *An Overview of Federal Class Actions: Past, Present and Future* (2 Ed. 1977), at 22. In

the instant case, the Court finds that there are common issues of law and fact related to any potential class members who received a reduction and then increase in their property tax values for the years, 2008 and 2009.

Moreover, for class certification, Plaintiff must show that the representative parties will fairly and adequately protect the interests of the class. This requirement is divided into two parts: (1) the adequacy of the representative class members and (2) the adequacy of counsel for the representative class members. *New Albany Park Condo. Ass'n v. Lifestyle Cmty., LTD.*, 195 Ohio App. 3d 459, 2011-Ohio-2806, at ¶53. A class representative is adequate, provided that his interest is not antagonistic to that of the prospective class members. *Id.* at ¶ 54, citing *Marks v. C.P. Chem. Co., Inc.*, 509 N.E.2d 1249 (1987). The representatives' counsel will be deemed adequate where the lawyers are "qualified, experienced and generally able to conduct the proposed litigation." *Helman v. EPL Prolong, Inc.*, 7th Dist. No. 2001-CO-43, 2002-Ohio-5249, ¶ 40, quoting *Hansen v. Landaker*, 10th Dist. No. 99AP-1134, 2000 Ohio App. LEXIS 5675 (Dec. 7, 2000). Herein, Plaintiff maintains that his interests are not antagonistic to that of the prospective class members. Evidence was not presented to suggest otherwise. Also, Plaintiff presented evidence that his counsel is qualified and experienced in handling class action lawsuits. Based upon the foregoing, the Court finds that the Plaintiff has proven, by a preponderance of the evidence, that the Plaintiff and his counsel will fairly and adequately protect the interests of the class.

The typicality requirement under Civ.R.23 is satisfied where there is no express conflict between the representatives and the class. *Warner v. Waste Mgmt.*, 36 Ohio St. 3d 91, 521 N.E.2d 1091, at 98 (1988). Plaintiff maintains that he is not in conflict with any potential class

member and no evidence was presented to suggest otherwise. Therefore, the Court finds that the Plaintiff has met his burden regarding the typicality requirement.

In moving for class certification, Plaintiff contends that class certification is warranted pursuant to Civ.R. 23. In addition, Plaintiff contends that all of the Civ.R. 23 requirements have been met including Civ.R. 23 (B)(3)'s requirements that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other methods of adjudication for the claims presented. While some evidence of numerosity, commonality and other requirements under Civ.R. 23, appear to exist as presented through the evidence, questions remain as to whether Civ.R. 23 (B)(3) requirements have been met.

Again, the Court finds that, although Civ.R. 23 enumerates multiple factors, the issue of predominance is dispositive of this motion. Performing a "rigorous analysis" of the Civ.R. 23(B)(3) predominance requirement necessitates an examination of "common" versus "individual" issues. A predominance inquiry is far more demanding than the Civ.R. 23(A) commonality requirement and focuses on the legal or factual questions that qualify each class member's case as a genuine controversy. *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-1473, 2002-Ohio-5499, citing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (C.A.11, 1997). Therefore, in determining whether common questions of law or fact predominate over individual issues, "it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication." *Young v. FirstMerit Bank*, 8th Dist. No. 94913, 2011-Ohio-614, at ¶19 (discretionary appeal not allowed *Young v. FirstMerit Bank, N. A.*, 129 Ohio St. 3d 1476, 2011-Ohio-4751, 953 N.E.2d 842, 2011).

In the instant case, the Court finds that the Plaintiff has failed to meet his burden for class certification under Civ.R. 23(B). The Court finds that while common fact issues may exist amongst many individuals in the proposed class, the common questions of law or fact do not predominate over individual questions in Plaintiff's purported class. Each class member's claim would require an individualized factual analysis and determination of the relevant circumstances. Moreover, a class action would not be the superior method of determining Plaintiff's claim as each purported member's claim is dependent upon their own unique set of circumstances and could not be established in a single adjudication.

The Court finds that a factual analysis of each plaintiff and their corresponding property would be required. Each plaintiff would have to present evidence of their specific circumstances, including but not limited to: the 2008 tax determination, each member's initial complaint, the 2009 tax determination, if and when the class member was notified of a reduction in the tax value, whether the Board of Revision valuation was properly reflected in the next tax bill, whether the Board of Revision conducted a hearing within the statutory time period, whether the class member was afforded a continuing complaint, whether the class member paid the property tax under protest, the parcel's location in Cuyahoga County and the factors that are specific to each municipality in making valuation changes and any subsequent proceedings and the outcome. In addition, Plaintiff purports to represent an entire class, although he paid his 2009 taxes without objection. Certainly some of the proposed members of the class did not voluntarily pay their taxes and instead objected to the 2009 determination, resulting in no actual damages or in subsequent proceedings. The Court finds that these factual issues do not simply require damage calculations for each plaintiff, but would require mini-trials on each set of facts and circumstances.

CONCLUSION

Where circumstances require fact-specific inquiry into the details of each plaintiff in order to determine liability and damages, class certification is unsuitable. *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151. Having failed to satisfy all of the requirements of Civ.R. 23, Plaintiffs' Motion for Class Certification is hereby denied.

3/14/2013


Judge Maureen E. Clancy

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MAR 18 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By W. J. [Signature] Deputy