

IN THE SUPREME COURT OF OHIO

MUSIAL OFFICES, LTD. and STATE ex	:	Case No. 2014-0814
rel. MUSIAL OFFICES, LTD.,	:	
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
	:	Eighth Appellate District
vs.	:	
	:	Court of Appeals
COUNTY OF CUYAHOGA, et al.,	:	Case No. CA-13-099781
	:	
Defendants-Appellants.	:	
	:	
	:	
	:	

PLAINTIFFS-APPELLEES' MEMORANDUM OPPOSING JURISDICTION

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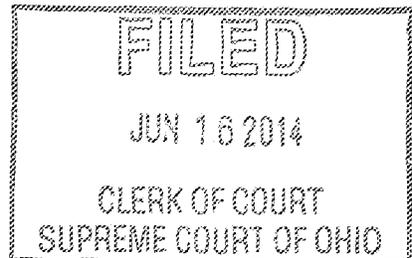


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PLAINTIFFS-APPELLEES' MEMORANDUM OPPOSING JURISDICTION

I. Introduction.

No substantial constitutional questions or matters of public or great general interest are present in this case. This case involves a unique set of circumstances in which Cuyahoga County knowingly overcharged thousands of taxpayers for their tax-year 2009 property taxes. After admitting that it had overcharged thousands of taxpayers, the appellants made a public statement through the Plain Dealer that they would refund the overcharges, without the taxpayers having to contact the County, because the County knew from its own records who had been overcharged, and by how much. But the overcharges were never refunded, and this litigation ensued. This fact pattern is not likely to recur because it is the result of a one-time confluence of events, including: extraordinary delays in processing complaints against valuation; a clerical error by the County in using the wrong valuations to conduct its triennial update; a form letter (no longer in use) indicating that the Auditor would use a valuation determined by the Board of Revision's on the next tax bill, when, in fact, the Auditor had no intention of using that valuation; and, a refusal by the County to refund overcharges, although it admitted the overcharges, and had all of the information necessary to make the refunds.

Not only are the appellants' arguments not of great public interest, they are frivolous. For example, in their sixth proposition of law, the appellants argue that the named plaintiff, Musial Offices, filed its complaint outside of the one-year limitations period. This argument was rejected by the Eighth District because it is demonstrably false. Musial Offices paid a disputed tax bill less than seven months before it filed its complaint. *Musial Offices, Ltd. v. County of Cuyahoga*, 8th Dist. No. CV-746704, 2014-Ohio-602, at ¶ 39. The appellants don't dispute the facts as set forth by the Eighth District, they simply ignore them as inconvenient.

II. Facts.

The facts are straightforward. Plaintiff and the class members all filed complaints against valuation regarding their property tax valuations for tax year 2008. They all prevailed on their complaints, and the Board of Revision reduced their property valuations accordingly. All of the class members received refunds of the excess payments for their tax-year 2008 taxes. They were then improperly overcharged for tax year 2009 because the County disregarded the Board of Revision decisions in determining their tax-year 2009 valuations.

For example, named plaintiff Musial Offices filed a complaint against valuation for tax year 2008 on January 16, 2009. Almost a year later, on January 13, 2010, Musial Offices received a letter from Frank Russo, who served as both the Auditor and the secretary of the Board of Revision, noting a reduction in valuation from \$679,500 to \$499,000 for tax year 2008. The letter also stated: "If no action is taken, the Board's decision will be reflected on your next tax bill." *Musial Offices, Ltd. v. County of Cuyahoga*, 8th Dist. No. CV-746704, 2014-Ohio-602, at ¶ 4. This same letter was sent to everyone who prevailed on their tax-year-2008 complaint against valuation. But the promise that the new valuation would appear on the next tax bill wasn't true.

The next tax bill that Musial Offices received in June 2010 reflected the *old* valuation of \$679,500. *Id.* This made *no* sense. The County applied a zero factor to Musial Offices' property for purposes of the triennial update that it performed for tax year 2009. The use of a "zero factor" means the County determined that the property neither increased nor decreased in value. To be clear, the County did not individually inspect and appraise every property in Cuyahoga County for purposes of the triennial update. Instead, it applied a fixed percentage, by community, to the 2008 valuation. The problem? The County used the wrong 2008 values for

Musial and the rest of the class. For Musial Offices, this resulted in a valuation increase of \$180,500.

Faced with this baseless and improper \$180,500 increase in its property valuation, Musial Offices' principal, Mark Musial, sent two letters to the Auditor, Frank Russo, demanding a correction of the tax-year 2009 valuation. *Id.* In response, Marty Murphy, the acting administrator of the Board of Revision informed Mark Musial that (1) "hundreds" of taxpayers had been similarly overcharged; (2) the County was discussing making refunds; (3) those refunds would require no action by taxpayers; (4) the \$679,500 valuation was incorrect; and (5) the \$499,000 valuation was the correct valuation for tax year 2009. *Musial Offices*, 2014-Ohio-602, at ¶ 5. Consistent with Murphy's statements to Musial, on September 23, 2010, the Plain Dealer reported that "county officials ... had confirmed as of Wednesday that they overcharged the owners of at least 6,500 properties." And, on August 31, 2010, the Plain Dealer reported that "[a]ffected taxpayers will not need to contact the county to receive credits or refunds. Murphy said county officials will identify those entitled to relief." Given the facts in the record, the Eighth District concluded: "It is undisputed that the county overcharged numerous property owners in real estate tax bills for the 2009 tax year." *Musial Offices*, 2014-Ohio-602, at ¶ 7.

Although the county publicly confirmed the errors that Murphy had admitted to Mark Musial, the ministerial correction in valuation for Musial and all others was never made. With no other recourse, Musial Offices filed a complaint in Cuyahoga County Common Pleas Court on January 24, 2011. *Id.* at ¶ 6.

Why were the class members overcharged? Because it took the Board of Revision almost a year to hear the complaints against valuation, in violation of the timeframe required by the Revised Code for deciding complaints against valuation, which is 90 days. R.C. 5715.19(D).

When a reduction in valuation is ordered, this timing requirement is key because the Auditor must receive the Board of Revision's decision to know the correct value to use in the next update.

While the Board of Revision sat on Musial Offices' complaint against valuation, the Auditor proceeded with its triennial update using the *old* valuation of Musial Office's property, which did not reflect the Board of Revision's decision. So instead of using the \$499,000 valuation determined by the Board of Revision, the Auditor used the \$679,500 valuation that Musial Offices had successfully challenged. The same is true for the thousands of other taxpayers, who are the class members in this litigation.

Because the taxpayers' complaints against valuation were not timely decided, they had continuing complaints against valuation for tax year 2009. R.C. 5715.19(D); *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 74 Ohio St.3d 639, 641-42 (1996). The significance of the continuing complaints is that the class members were not required to file a new complaint against valuation for tax year 2009 to exercise their rights under R.C. Chapter 5715. *Musial Offices*, 2014-Ohio-602, ¶ 14.

Further, the class members all received the letter from Russo stating that the reduced valuation would be reflected on their next tax bill. Murphy admitted at his deposition that this representation was false because of the delay in deciding the complaints and called it "bad language." Therefore, based on both the continuing complaint provision and the correspondence from Russo, who was both the Auditor and the Secretary of the Board of Revision, class members had no reason to file a new complaint against valuation for tax year 2009. And when Musial Offices raised the issue with the incorrect valuation, the County's response was: We know about it. We can fix it. You don't need to do anything.

III. Procedural History.

Musial Offices filed its class action complaint on January 24, 2011. On October 12, 2011, the appellants filed a motion to dismiss, or in the alternative, for summary judgment. On December 6, 2011, Musial Offices filed its first amended complaint. The appellants filed a new dispositive motion on December 12. In a May 15, 2012 opinion and order, the trial court treated the appellants' dispositive motion as a motion for summary judgment and denied it.

Musial Offices filed a second amended complaint on June 6, 2012, and on June 28, moved to certify a class of "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." While the motion for class certification was pending, the County filed a complaint for a writ of prohibition in the Supreme Court on September 7, 2012. That complaint was dismissed by this Court on November 28, 2012. The trial court denied Musial Offices' motion for class certification on March 18, 2013. Musial Offices timely appealed, and in a February 20, 2014 journal entry and opinion, the Eighth District reversed the trial court's decision, with instructions to the trial court to certify the class and proceed on the merits.

IV. The Appellants Intentionally Misstate the Basis for Musial Offices' Claim

The County argues that the "putative class members' 'grievance' seems to be that a successful owner's 2008 lowered value should automatically carry over to 2009." Appellant's Memo, p. 4. That is false. The class members simply want the County to apply the *correct* valuation for tax year 2009.

The following facts are undisputed: the Board of Revision determined that the correct valuation for Musial Offices' property for tax year 2008 was \$499,000; and, the auditor applied a

zero factor to Musial Offices' property for purposes of the 2009 triennial update, i.e., the auditor determined that Musial Offices' property neither increased nor decreased in value from tax year 2008 to tax year 2009. Therefore, the \$180,500 increase in the value of Musial Offices' property was inexplicable. The correct valuation for tax year 2009 was \$499,000, which is arrived at by applying a zero factor (no increase) to the \$499,000 valuation from tax year 2008.

As the Eighth District astutely observed: "It is undisputed that the county overcharged numerous property owners in real estate tax bills for the 2009 tax year." *Musial Offices*, 2014-Ohio-602, at ¶ 7. Given the overcharges, the Eighth District noted: "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." *Id.* at ¶ 15. The outcome rejected by the Eighth District as "ludicrous" is exactly the outcome demanded by the County.

V. *Proposition of Law No. 1.*

The appellants contend that a class action cannot be maintained on behalf of a putative class that includes individuals who did not sustain actual harm.

The evidence in this case is that County officials told the Plain Dealer that at least 6,500 class members had been overcharged. Where is the evidence that any of the class members in this case suffered no harm? The appellants have presented not a scintilla of evidence that the class definition includes individuals who were not overcharged. And, the appellants cite no law in support of their proposition that a class containing a handful of members who are not entitled to restitution defeats certification of a class containing thousands of individuals who were overcharged.

For the foregoing reasons, the appellants' first proposition of law neither poses a substantial constitutional question nor makes this a case of public or great general interest.

VI. *Proposition of Law No. 2.*

For their second proposition of law, the appellants argue that Musial Offices and the class members have bypassed a special statutory procedure. That is false.

All of the class members filed complaints against valuation for tax year 2008. And, as the Eighth District explained, "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)." *Musial Offices*, 2014-Ohio-602, at ¶ 14. For example, a complaint against valuation filed in 1993 that was not decided until 1996 "continued to be valid for tax year 1996 and [the complainant] was not required to file a fresh complaint for that year." *Columbus Bd. of Educ. v. Franklin County Bd. of Revision*, 87 Ohio St.3d 305, 307 (1999). Here, it is undisputed that the class members had continuing complaints for tax year 2009, and had no obligation to file a new complaint against valuation. Therefore, they did not bypass a special statutory procedure.

In support of their position, the appellants cite to *State ex rel. Iris Sales Company v. Voinovich*, 60 Ohio St.3d 40, 42 (1991). In *Iris Sales*, the plaintiff never filed a complaint against valuation with the Board of Revision. Here, all of the class members pursued their administrative remedy, and received a reduction in valuation.

For the foregoing reasons, the appellants' second proposition of law neither poses a substantial constitutional question nor makes this a case of public or great general interest.

VII. *Proposition of Law No. 3.*

The appellants argue that complete relief in the form of a complaint against valuation was available; therefore, Musial Offices could not properly bring this action in common pleas court. The appellants ignore the fact that the class members followed the special statutory procedure by filing complaints against valuation, and achieved favorable results. The problem arose because the County failed to abide by those results.

Apparently, the appellants believe that the class members needed to file new complaints against valuation for tax year 2009. But, why should they have done that when they had been told by the Auditor that the Board of Revision's decision for tax year 2008 would be reflected in their next tax bill?

For example, Musial Offices received a letter from Auditor Frank Russo in January 2010 stating that the \$499,000 value determined by the Board of Revision would be reflected in Musial Offices next tax bill. At that point, why would Musial Offices file a new complaint against valuation? By the time Musial Offices' next tax bill arrived in the summer of 2010, the March deadline for filing a complaint against valuation had passed. Musial Offices' problem did not stem from any failure to file a *new* complaint. It resulted from the Auditor not using, for the triennial update, the value determined by the Board of Revision due to the Board of Revision's untimely decision regarding Musial Offices' complaint against valuation.

The appellants knew that the 2009 valuations were wrong. They told Musial Offices and the Plain Dealer that they were. As the Eighth District noted, Musial Offices "is not challenging the Board of Revision's valuation of its property. Musial [Offices] seeks correction of a clerical error in the auditor's office that reinstated the 2007 valuations for the 2009 tax year instead of applying valuations determined by the Board of Revision." *Id.* at ¶ 12.

The acting administrator of the Board of Revision confirmed the error when he told Musial and the public that no further action was necessary on their part because the taxpayers who had been overcharged had been identified and the appellants would refund the overcharges based on their own records. At that point, there was no administrative remedy left for the taxpayers to exhaust. Instead, it was up to the County to honor the Board of Revision's determination.

The County's position is that the government can fail to fulfill its statutory duty to timely resolve complaints against valuation; decline to address thousands of continuing complaints against valuation arising from its failure; tell taxpayers NOT to do anything, because it knows about the problem and is going to fix it; and, then argue that the resulting lawsuit should be dismissed on the grounds that the taxpayers never gave the government a chance to fix the problem through the appropriate administrative procedures. That is ludicrous.

For the foregoing reasons, the appellants' third proposition of law neither poses a substantial constitutional question nor makes this a case of public or great general interest.

VIII. *Proposition of Law No. 4.*

The appellants argue that the triennial update for tax year 2009 precluded the possibility of a carryover value from tax year 2008.

Watch the pea very carefully here as the appellants play their shell game. Musial Offices valuation for tax year 2008 was \$499,000. The auditor applied a zero factor to that valuation, i.e., an increase of zero percent, and arrived at a valuation of \$679,500 for tax year 2009. Did the auditor come up with the right number? No. The Eighth District noted that Musial Offices and the class members were overcharged.

So on what basis are the appellants arguing that the auditor's valuation as a result of the 2009 triennial update is correct? They don't have a basis for that argument. The Auditor's valuation for tax year 2009 was wrong, as was acknowledged by Marty Murphy to Mark Musial, and as was publicly admitted by the County to the Plain Dealer. Musial Offices isn't arguing that the valuation for tax year 2008 should carryover to tax year 2009. Musial Offices is arguing that the correct valuation for tax year 2009—\$499,000—should be applied.

The County's entire "carryover" argument is premised on the false assumption that the class members are asking the trial court to ignore a new and valid valuation in favor of an old valuation. The County's argument fails because the valuation it set for tax year 2009 is demonstrably wrong. The class members simply want the County to apply the triennial update factor to the appropriate valuation, i.e., the valuation determined by the Board of Revision for tax year 2008.

The county cites *AERC Saw Mill Village, Inc. v. Franklin County Board of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468, in support of its position. In *AERC Saw Mill*, the auditor conducted a sexennial reappraisal of the property for tax year 2005, and arrived at a valuation of \$17,900,000. *Id.* at ¶ 4. After the sexennial reappraisal, the property owner decided to settle a dispute regarding the tax year 2002 valuation of the property by stipulating to a value of \$20,100,000 for that year. The auditor then decided to change his valuation for 2005 from \$17,900,000 to \$20,100,000 on the theory that the stipulated value from 2002 should carry over to 2005 and 2006 based on the continuing complaint language of R.C. 5715.19(D). *Id.* at ¶¶ 5-6.

The *AERC* Court concluded that simply because the taxpayer had a continuing complaint from 2002 that was not resolved until 2006, the stipulated value for tax year 2002 did not override the auditor's sexennial reappraisal from 2005. Restated, the auditor set a valuation for

tax year 2005 based on a reappraisal of the property, the taxpayer agreed that the valuation was correct, and the auditor then changed its valuation, not because it believed that the 2005 valuation was wrong, but solely because a mechanical application of the continuing complaint provision mandated that result.

The critical distinction between this case and *AERC* is that in *AERC* neither the taxpayer nor the auditor argued that the \$17,900,000 valuation from the sexennial reappraisal was wrong, or that it was arrived at based on an admitted clerical error. Instead, it was a correct valuation based on an actual viewing of the property. Here, there was no viewing of any property. The process was a mathematical application of the 2009 percentage factor to the tax-year 2008 valuation. The Auditor used the wrong tax-year 2008 valuation because the Board of Revision's decision was not timely. The correct valuation, based on the Board of Revision's tax-year 2008 decision, and the Auditor's use of a zero factor for the triennial update is \$499,000. That is not a "carryover" valuation, it is the correct valuation.

For the foregoing reasons, the appellants' fourth proposition of law neither poses a substantial constitutional question nor makes this a case of public or great general interest.

IX. *Proposition of Law No. 5.*

The appellants argue that the appellate court cannot reverse the ruling of a trial court when the trial court has erred in finding that common issues do not predominate.

As noted, the County admitted, before this litigation commenced, that it knows which taxpayers were overcharged, and that it can calculate their refunds. Murphy expressly told Mark Musial and the public that no input was needed from taxpayers to determine the amount of the refunds. But in briefing class certification, the County attempted to mislead the trial court and

the Eighth District by suggesting that all of the properties were viewed and individually appraised for the purpose of the triennial update. They were not.

At oral argument, the presiding judge asked the County *three* times whether the triennial update involved an onsite viewing and reappraisal of the property. Each time, the County's counsel avoided giving a direct answer to the question. Why? Because, the trial court's ruling on predominance would only make sense in the context of an actual reappraisal of each of the properties. Otherwise, there would be no reason to treat the undisputed facts contained in the County's computer records as disputed issues requiring "mini-trials."

The County nevertheless insisted that a "mini-trial" would be necessary regarding when each taxpayer filed their complaint against valuation, received their Board of Revision decision, and whether the Board of Revision's decision was reflected on their tax bill. The Eighth District recognized that the purported individual issues were actually undisputed facts contained in the appellants' own computer records:

[T]he 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 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.

Musial Offices, 2014-Ohio-602, at ¶ 36.

The Eighth District's holding that undisputed issues of fact, which can be resolved by reference to the defendant's records, do not defeat class certification is a correct statement of the law. *In re Consolidated Mortgage Satisfaction Case*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 10 (the "mere existence of different facts associated with various members of a proposed class is not

by itself a bar to certification of that class”); *Wells v. McDonough*, 188 F.R.D. 277, 279 (N.D. Ill. 1999) (“[t]he existence of individual questions that are ministerial in nature or otherwise easy to resolve does not defeat a certification petition”); *Briggs v. United States*, No. C 07-05760 WHA, 2009 U.S. Dist. LEXIS 5442, at *27-28 (N.D. Cal. Jan. 16, 2009) (holding that undisputed individual account facts relating to the delinquency date of the debt, the amount of the debt, and the administrative charges imposed do not defeat certification).

The appellants cite *Cullen v. State Farm Mutual Automobile Insurance Company*, 137 Ohio St.3d 373, 2013-Ohio-4733 in support of their position. But *Cullen* is inapposite. The *Cullen* court summarized the difficulties in identifying the class members and their damages in that case as follows: “the determination of preloss and postrepair condition, the preloss value and the costs to repair or replace a particular windshield, and the individual knowledge and consent of each class claimant *entail inspection of thousands of automobiles* and an individualized assessment of the damages each class member sustained, if any.” (Emphasis added.) *Id.* at ¶ 50. The County has admitted that it can determine the amount of restitution owed each class member by calculations based on its own computer records. The appellants produced in discovery a spreadsheet that is the official record of each parcel in this class. That spreadsheet contains the information necessary to calculate the overcharges. Nobody has to inspect any properties to identify the class members and calculate their restitution.

The Eighth District correctly recognized that the trial court’s predominance analysis was improper and did not accord with the spirit of Rule 23. As the Supreme Court of Ohio explained in *In re Consolidated Mortgage Satisfaction Cases*, 2002-Ohio-6720, at ¶ 10, if the mere existence of different facts for the class members barred class certification, “then a great majority of motions for class certification would be denied.”

For the foregoing reasons, the appellants' fifth proposition of law neither poses a substantial constitutional question nor makes this a case of public or great general interest.

X. *Proposition of Law No. 6.*

The appellants argue that Musial Offices filed its complaint after the limitations period had run.

The Eighth District rejected the limitations period argument, noting that "Musial [Offices] filed its complaint on January 24, 2011, less than seven months after it paid its second half of the 2009 tax bill." *Id.* at ¶ 39. The appellants are silent on how the Eighth District erred in its analysis of this issue.

For the foregoing reasons, the appellants' sixth proposition of law neither poses a substantial constitutional question nor makes this a case of public or great general interest.

XI. *Conclusion.*

The appellants are appealing from a decision of the Eighth District instructing the trial court to certify a class under Rule 23. The appellants only made one arguments relating to Rule 23: common issues do not predominate. But courts, including the Supreme Court of Ohio, have rejected the argument that undisputed facts that can be resolved by reference to the defendant's records defeat class certification. Here, the County admitted that it could make the refunds of the overcharges without further input from the taxpayers.

The remainder of the appellants' arguments are based on mischaracterizations of the facts of this case: (1) The appellants claim that Musial Offices complaint was filed after the limitations period had run, when, in fact, it was filed within 7 months after its cause of action arose. (2) The appellants claim that, as defined, the class contains large numbers of taxpayers who suffered no harm, but the appellants have not identified a single class member who suffered no harm. (3) The

appellants claim that the class members bypassed a statutory procedure, when, in fact, every class member filed a complaint against valuation for tax year 2008. (4) The appellants claim that the class members want the County to apply a “carryover” valuation, when, in fact, the class members want the appellants to apply the correct valuation for tax year 2009 as opposed to the fictional valuation arrived at by the Auditor using the wrong valuation from tax year 2008.

For all of the foregoing reasons, the appellants’ propositions of law neither pose a substantial constitutional question nor make this a case of public or great general interest. Therefore, this Court should not accept jurisdiction of this matter.

Respectfully submitted,



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