ORIGINAL

IN THE SUPREME COURT OF OHIO

MUSIAL OFFICES LTD. and STATE ex rel. MUSIAL OFFICES LTD.,	:	Case No. 2014-0814
Appellees,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
COUNTY OF CUYAHOGA, et al.	:	Court of Appeals Case No. 99781
Appellants.	:	

APPELLANTS' MOTION TO RECONSIDER DECISION NOT TO ACCEPT JURISDICTIONAL APPEAL

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THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Pursuant to Supreme Court Practice Rule 18.02(B)(1), Appellants, Cuyahoga County, et al. (collectively "the County") respectfully move this Court for reconsideration of its order declining to accept this jurisdictional appeal. The Eighth District's decision discarded the trial court's refusal to certify a class action of a mandamus action, and enabled an unwarranted work-around to the exclusive, special statutory procedure that the General Assembly has authorized to contest property tax valuations. The Eighth District's decision flagrantly ignored this Court's recent class action decisions in *Cullen*[1] and *Stammco II*[2] (despite both cases being specifically argued below) and apparently authorized extraction tax dollars from the County which were distributed to the cities, schools, libraries and other stakeholders years ago.

This identical, misguided, theory of ***county*** liability (without naming all necessary parties such as the cities, townships, libraries and parks) via a class action, mandamus claim is also pending before the Hamilton Court of Common Pleas. *Yakov Re, L.L.C. et al. v. Dusty Rhodes, Hamilton County Auditor, et al.* Hamilton Cty. C.P. Case No. A12-06833.[3] Never before have Ohio's counties been exposed to this type of ***class action*** litigation over real property valuation issues. Never before have Ohio's counties subjected to pay class action attorney's fees,

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[1] *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733.

[2] *Stammco, LLC v. United Tele. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶53. Although the Panel's decision below cited the earlier, 2010 *Stammco* decision, 125 Ohio St.3d 91, 926 N.E.2d 292, (*Musial Offices*, 2014-Ohio-602 at ¶19) it failed to cite or discuss this Court's more recent pronouncements, from either *Cullen* or *Stammco II*.

[3] See http://courtclerk.org/case_summary.asp?sec=history&casenumber=A1206833 (Last accessed: Sept. 12, 2014. Registration required for document access). In *Yakov*, the trial court initially dismissed the case. However, the First District ruled Yakov should have been permitted to amend its class action complaint. *Yakov Re, L.L.C. v. Rhodes*, 1st Dist. No. C-130349, 2014-Ohio-2025. The original trial judge has recused herself, as did the second. Today, the case remains pending in the Hamilton County Court of Common Pleas with its third trial judge.

potentially in the millions, for performing their statutory, governmental function, to collect real property taxes and distribute those dollars.

This case presents critical, and unsettled, questions of Ohio law on property tax valuation disputes and the respective roles of trial courts and appellate courts in the key determination of whether a class action gets certified under Civ. R. 23.

Argument on the County's Proposition No. 1 mirrors the first Proposition of Law in *Felix* and will be heard by this Court later this month in its Portage County Session. *Felix v. Ganley Chevrolet, Inc.*, 138 Ohio St.3d 1413, 3 N.E.3d 1215, 2014-Ohio-566 (Feb. 19, 2014) (Sup. Ct. No. 2013-1746). ("*Felix*"). It poses a simple question of law directly applicable to this case: should the Eighth District have reversed and ordered a class action be certified on behalf of those who never sustained any harm? The Court of Appeals did just that. In this taxpayer class, who allege their 2008 valuation didn't "carry over" to 2009, the Eighth District rejected the trial court's concerns that this class was unworkable and failed under the predominance test. The Eighth District then took the remarkable step of holding that Rule 23's requirements were satisfied, over claims about real property taxes that didn't commence in the BOR.

The County is mindful that motions for reconsideration should not simply reargue the case. See S.Ct.Prac.R. 18.02(B). Rather, the authority to reconsider allows the Court to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 5 (internal quotations omitted). This Court should reconsider its decision to decline jurisdiction because appellee Musial Offices, Ltd. ("Musial") misled the Court in its Response to Appellants' Memorandum in Support of Jurisdiction ("Response") by drawing the Court's attention to salacious details about former Cuyahoga County officials, instead of on the law. Musial's allegations about former

Cuyahoga County BOR members and their timecards doesn't excuse Musial's failure to (1) appeal its 2008 determination, (2) request a hearing on 2009 when presenting its 2008 case, (3) file a 2009 BOR complaint in the first year of the new triennium. *AERC Saw Mill Village Inc. v. Franklin Cty. Bd. of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468 controls here, and – assuming subject matter jurisdiction exists – Musial simply has no cognizable claim.

The County therefore asks this Court to accept jurisdiction of these critical issues.

ARGUMENT

I. 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 such a class action bypasses a special statutory procedure: R.C. 5715.19. (Proposition of Law No. 2).

Before any Court can provide relief, it must first examine its subject matter jurisdiction. The special statutory proceedings provided for in R.C. 5715.19, are the *exclusive* methods by which a taxpayer may raise challenges to the valuation of real property. This Court just heard argument on this special statutory procedure issue in June of this year. *Cincinnati Bd. of Ed. v. Testa, Tax Comm.*, Ohio Sup. Ct. No. 2013-1426 (argued June 24, 2014, Prop. of Law No. 1). Because Musial failed to follow this statutory process, Musial failed to impart jurisdiction on any tribunal—including this Court—to consider the merits of its challenges to the BOR's (now final) 2009 valuation determination through any other means. Because the special statutory proceedings are the *exclusive* method, no other tribunal has jurisdiction to hear Musial's – or the putative class' claims, constitutional challenges, or extraordinary writ claim.

As far as the County is concerned, the administrative proceedings furnished by statute are the *exclusive* proceedings, because they are the *only* venue expressly provided for tax valuation contests by the General Assembly. But, as explained in its Memo in Support of Jurisdiction at

pp. 2-3, (hereinafter "Memo"), Musial did not contest or appeal its 2009 property tax valuation via any process outlined in Title 57, Ohio Revised Code.

Therefore, no tribunal can take jurisdiction over Musial's claims outside of this exclusive set of special statutory proceedings. "[W]here the General Assembly has enacted a complete, comprehensive and adequate statutory scheme governing review by an administrative agency, exclusive jurisdiction may be held to lie with such an agency." *State ex rel. Geauga Cty. Budget Commission v. Court of Appeals*, 1 Ohio St.3d 110, 113 (1982); *see, also Westbrook v. Prudential Ins. Co.*, 37 Ohio St.3d 166, 170 (1988) ("[W]here statutory relief is afforded and clearly applies to the circumstances giving rise to the action, the statute constitutes the exclusive avenue for seeking redress.")

The special statutory proceedings in R.C. 5715.19 provide property owners with the exclusive method for challenging the valuation of real property. This Court should not permit the Musial – and others in Cuyahoga County who failed to follow these requirements, to do an end-run around the special statutory proceedings set forth in R.C. 5715.19 by filing an untimely class action complaint in Common Pleas Court.

II. 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. (Proposition of Law No. 3).

This Court has explained that "actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed" and that "courts have no jurisdiction to hear [such] actions in the first place." *State ex rel. Albright v. Court of Common Pleas of Delaware Cnty.*, 60 Ohio St.3d 40, 42 (1991). In fact, the Eighth District ignored its own, well established precedent, "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." *State ex rel. Iris Sales v. Voinovich*, 43 Ohio App.2d 18, 23 (8th Dist. 1975). Accord, *Zupancic v. Wilkins*, 10th Dist. No. 08AP-472, 2009-Ohio-3688, ¶ 25 (finding that an "action for declaratory judgment is not the proper vehicle by which to challenge the Tax Commissioner's decision"); *State ex rel. Davis v. Pub. Emp. Retirement Bd.*, 10th Dist. No. 04-AP-1293, 2005-Ohio-6612, ¶52 (stating "[r]elators have cited to no Ohio cases supporting their contention that in mandamus a class may be certified as to individuals that have not exhausted an adequate administrative remedy."); *Wise v. Clark*, 5th Dist. No. 02CA006, 2003-Ohio-1247, ¶ 18 ("The courts of this state have consistently held that a declaratory judgment action is not appropriate when an adequate remedy at law is available***.")

III. 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. (Prop. of Law No. 1).

Even completely setting aside the County's jurisdictional arguments, this class includes taxpayers who were not damaged, and thus cannot be certified. This principal will be argued to this Court on September 24, 2014 in an off-site session in Ravenna, Ohio. *Felix*, supra. *Felix* involves another class action that the Eighth District improperly certified[4] where the lead plaintiffs were couple bought a car from Ganley Chevrolet. The agreed-to interest rate was zero percent, and the contract included a clause stating that any disputes had to be resolved through arbitration. After their interest rate was increased twice, the couple sued and filed a class action.

[4] At least in *Felix*, the trial court's initial decision ordered certification. Here, the Court of Appeals ignored the trial court's refusal to certify in violation of the admonition from this Court: "A finding of abuse of discretion, <u>particularly if the trial court has refused to certify, should be made cautiously</u>." *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201 (1987). (Emphasis added).

But, since there is nothing inherently wrong with alternate dispute resolution, that class of Ganley customers includes people who haven't suffered actual harm. Thus, the Eighth District again ignored this Court's directives on Rule 23 and that class action shouldn't have been approved.

So too here. Musial's proposed class definition is as follows:

> **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 2009 tax year was the first year of a triennial period." *Musial Offices, Ltd. v. Cuyahoga Cty.*, 8th Dist. No. 99781, 2014-Ohio-602, ¶3, fn1. It's unsurprising that the Eighth District relegated this critical fact to a footnote and failed to even mention *AERC Sawmill Village, Inc. v. Franklin Cty. Bd. of Revision*, 127 Ohio St. 3d 44, 2010-Ohio-4468. 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. Such putative class members have no cognizable claims against the Auditor or the BOR under the Ohio Supreme Court's clear holding in *AERC* supra. at ¶ 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.").

Musial's class, as certified by the Court of Appeals, includes taxpayers who weren't harmed because the entire point of Musial's case: "lower 2009's valuation" is barred by this Court's holding in *AERC*. The Eighth District completely crossed the Rubicon when it unilaterally decreed "[Musial's] case does not involve a valuation dispute." *Musial Offices, Ltd.*,

2014-Ohio-602, ¶12. Look back at Musial's class definition again, above. The word "value" is used twice and "valuation" is used once therein. In an attempt to escape this Court's ruling in *AERC*, the Court of Appeals apparently believes it can ignore facts as well as the law. If this Court adopts the first proposition of law in *Felix*, Musial's class definition fails. Thus, this Court should reconsider its decision to decline discretionary review and hold this case for *Felix*.

IV. **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. (Prop. of Law No. 6) .**

What's truly disturbing is that not only did the Court of Appeal's decision ignore this Court's pronouncements from the above ***tax*** cases--- the Eighth District also blatantly refused to acknowledge this Court's recent ***class action*** decisions. The Eighth District fails to mention *Stammco II* or *Cullen*, supra. In the case below, the Eighth District heard oral argument on January 8, 2014. Prior to Musial's argument in the Court of Appeals, this Court released its *Cullen* decision on November 5, 2013 severely limiting Ohio class actions when individualized, inquiries are needed to determine potential liability. After *Cullen* became final, the County filed it as supplemental authority on December 24, 2013 because the trial court specifically found exactly what this Court held must always defeat class certification. See, Tr. Ct. Decision - Memo at Appx. 29. In the proceedings below, Judge Clancy "[found] 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." Id. The trial court couldn't determine liability without violating *Cullen*'s prohibition on individualized inquires. The Trial 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. Id.

CONCLUSION

As the General Assembly recognized when it enacted R.C. Chapter 5715.19, it is of public and great general interest that tax valuation disputes are resolved using only that method and with finality. Property taxes paid in 2009 and distributed to the nearly thirty various municipalities in Cuyahoga County, along with its countless schools, libraries and parks, simply can't be "disgorged" under a class action theory more than five years later. Should the County do class counsels' job and bring in these real parties in interest so that these alleged ill-gotten tax monies may be "clawed back" from the political subdivisions who received them? The decision of the Court of Appeals below failed to follow the General Assembly's mandate, along with this Court's holdings from both tax and class action cases. This wrongheaded and pernicious class action litigation is being pursued against two of Ohio's largest counties: Cuyahoga and Hamilton; it cannot be said that acceptance of this case would amount to mere "error correction" from the Eighth District. Ohio's counties simply can't afford to be subjected to this unforeseen and expansive liability, and astronomical attorney's fees which undoubtedly will be claimed in the millions.

Accordingly, for the reasons set forth above and in its memorandum in support of jurisdiction, Appellants respectfully request that the Court reconsider its September 3, 2014 announcement declining jurisdiction, and accept this appeal for review. Alternatively, this Court should accept and hold this case pending the decisions in either *Cincinnati Bd. of Ed. v. Testa, Tax Comm.*, Ohio Sup. Ct. No. 2013-1426 (argued June 24, 2014) or *Felix v. Ganley Chevrolet, Inc.*, Ohio Sup. Ct. No. 2013-1746 (to be argued Sept. 24, 2014). 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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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Reconsideration of Defendants-Appellants, Cuyahoga County, et al. was served by U.S. mail and via e-mail this 15th day of September, 2014, upon the following counsel:

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