

IN THE SUPREME COURT OF OHIO

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

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**APPELLANTS' MEMORANDUM IN OPPOSITION TO  
APPELLEES' MOTION FOR SANCTIONS**

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Appellees (“Musial”) filed a Motion for Sanctions along with their Opposition to Appellants’ reconsideration motion. Musial’s sanctions request is not well taken for a number of reasons.

Initially, this Court has been very reluctant in awarding sanctions. Undersigned counsel is unaware of any case where this Court has granted sanctions against a party that filed a motion authorized under this Court’s rules of practice in a jurisdictional appeal. Typically, this Court has only granted sanctions against *pro se* litigants filing clearly frivolous actions in this Court. *State ex rel. Kreps v. Christiansen*, 88 Ohio St.3d 313, 725 N.E.2d 663 (2000). (sanctions awarded against pro se attorney for repeated writ cases, affidavits of disqualification, and federal 1983 litigation filed against judges hearing \$2,325 collections case). When this Court has granted sanctions, it is against litigants seeking an extraordinary writ that “is not reasonably well grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.” *Id.* at ¶ 10 citing *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629, 635–636, 716 N.E.2d 704, 710–711. If Musial thought the County’s 2012 writ action<sup>1</sup> qualified as frivolous, it should have asked for sanctions when it intervened in that writ case back then --- not now.

Incredibly, Musial’s motion for sanctions attempts to graft on this Court’s writ of prohibition case onto the proceedings in the lower courts below. At page 2 of Musial’s sanctions request, Musial claims the “trial court observed” and “the trial court explained” **not** what Judge Clancy actually ordered in her written *orders* below – but what her lawyers *argued* in the writ case filed in this Court. That is seriously misleading. In reality, the trial court has not yet fully and finally ruled on the “special statutory procedure” issue that Musial claims is frivolous. Judge

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<sup>1</sup> *Cuyahoga Cty., Ohio & Steen, Fiscal Officer v. Hon. Maureen Clancy*, Sup. Ct. No. 2012-1522.

Clancy merely entertained jurisdiction (wrongly) and denied the County's motion for summary judgment after considering all material facts in Musial's favor. Tr. Ct. Journal Entry entered **May 17, 2012**.

Judge Clancy's denial of summary judgment even predates the most recent version of Musial's ever evolving causes of action found in its Second Amended Complaint filed **June 6, 2012**. Judge Clancy has not yet even considered whether Musial's writ of mandamus claim "seek[ing] correction of a clerical error" (the only cause of action the court of appeals seems to have approved)<sup>2</sup> may withstand the County's future summary judgment motion on that new claim. Musial's mandamus claim only surfaced *after* briefing on the County's dispositive motions was completed. At bottom, there are serious procedural anomalies here sufficient to deny Musial's baseless request for sanctions.

The County's pending Motion for Reconsideration seeks, at least, a hold for decisions in either *Cincinnati Bd. of Ed. v. Testa, Tax Comm.*, Ohio Sup. Ct. No. 2013-1426 (argued June 24, 2014)<sup>3</sup> or *Felix v. Ganley Chevrolet, Inc.*, Ohio Sup. Ct. No. 2013-1746 (argued Sept. 24, 2014).<sup>4</sup> ("*Felix*"). Rather than responding to those specific propositions of law presently before this Court, Musial's sanctions motion then devotes the next four (4) pages to regurgitating its version of the facts. Let's be clear, the County **has not** "admitted" anything despite Musial's repeated

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<sup>2</sup> Ap. Op. at ¶ 12. ("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.")

<sup>3</sup> See Appellee Tax Commissioner's Prop. of Law No. 1: "A board of education can only raise challenges to the Tax Commissioner's determination on real property exemption applications through the special statutory proceedings provided by the General Assembly."

<sup>4</sup> See Appellant, Ganley's 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."

claims to the contrary. Mtn. for Sanctions at p. 14. Attorney Perotti and his associate later claim to have incurred \$10,106.25 in fees associated with Musial's opposition to reconsideration and sanctions motion. Mtn. at p. 19. Their exorbitant bill makes the County's point. If they billed \$10,106.25 to draft and file 17 pages of (mostly recycled) text, how much are they claiming in total attorneys' fees to date? They will claim Millions and that will make this case impossible to settle. Class action litigation was never intended to be used against Ohio counties in this manner. That's why (1) the legislature enacted a special statutory procedure for valuation disputes; (2) dissatisfied taxpayers must pay under protest and file an action within one year to recover alleged over-assessments; and, (3) the legislature enacted R.C. 2744.

Why haven't Musial and the putative class members been harmed (the central issue in *Felix*)? Mtn. at p. 8. Because, as presently defined, none of the class members have valid claims. Neither does Musial.<sup>5</sup> The Eighth District punted the pay-under-protest issue to a later date, "not specifically address[ing] 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." Ap. Op. ¶ 34. In *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, this Court found,

A colorable claim does not satisfy the requirements of Civ.R. 23. **Nor can compliance with the rule be presumed from allegations in a complaint.** Rather, in this instance, Cullen had to demonstrate, and the trial court had to find, that questions common to the class in fact predominate over individual ones, and proof of predominance necessarily overlaps with proof of the merits in this case.

Id. at ¶ 34. (Emphasis added).

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<sup>5</sup> Denying class certification, Judge Clancy reasoned, "In addition, [Musial] purports to represent an entire class, although he paid his 2009 taxes without objection." Jur. Memo, Appx. 28. This finding was not disturbed on appeal: "Musial paid the ...tax bill ... without protest." Ap. Op. ¶ 4.

This Court reversed certification in *Cullen*, holding that the Eighth District had erroneously found predominantly common issues on the basis of what plaintiffs were alleging they could prove on a class-wide basis, *Cullen* at ¶¶ 33-34, rather than on the basis of a “rigorous analysis of the evidence presented by the parties,” *Id.* at ¶ 52. Here, the *Musial* Panel appears to have made the exact same error by taking Musial’s allegations in the Second Amended Complaint about “clerical error” *as proven fact* – when the Trial Court had not even made a determination on clerical or fundamental error. To make matters significantly worse, the Court of Appeals declined to address the pay-under-protest failure that defeats certification under these facts. *Ap. Op.* at ¶ 34. The trial court found a lack of predominance because it “would require mini-trials on each set of facts and circumstances.” *Cullen* at ¶ 50. See also, *Tr. Ct. Op.* attached to County’s *Jur. Memo*, *Appx.* at 29. One of the many individualized facts and circumstances, as already noted by Judge Clancy, is “whether the [putative] class member paid the property tax under protest...” See *Jur. Memo*, *Appx.* at 29. The Court of Appeal’s failure to resolve this issue means the class, as ordered certified by the Eighth District, includes taxpayers who weren’t harmed because they voluntarily paid their property taxes.

Contrary to Musial’s arguments, the County does not own a money tree. These 2009 property tax dollars were not sequestered and hoarded in the County’s cash vault. The property taxes have been distributed to the over thirty municipalities and parks and schools and libraries located in Cuyahoga County. These entities from which Musial and the putative class members wish to “disgorge” these “ill-gotten tax receipts” aren’t even parties to this case. What exactly is going on here? The County generally keeps less than twenty percent of the total property taxes collected with the rest going to the municipalities, libraries, and, the lion’s share to the schools.

## CONCLUSION

The Eighth District has had repeated difficulties on class action cases which this Court has had to address. See *JNT Properties LLC*,<sup>6</sup> *Stammco II*,<sup>7</sup> *Cullen*,<sup>8</sup> *Lingo*,<sup>9</sup> *Felix*.<sup>10</sup> That's three class actions cases where this Court reversed the Eighth District (with another argued last week) in less than two years. If Musial's class action is allowed to proceed, the trial court's findings that class members' claims will be impossible to determine without evaluating these situations on a case-by-case basis will have been wholly ignored. Judge Clancy reviewed the depositions, the briefs and held a two-hour hearing before she made her class action ruling. The Court of Appeals reviewed a cold record and listened to each side for fifteen minutes. This Court has found that Judge Clancy was in the best position to make these manageability determinations<sup>11</sup> and, in any event, the putative class includes unharmed taxpayers who voluntarily paid their bills. That's exactly what the trial court found. *Id.* at Appx. 29. That defeats class certification. If allowed to proceed, perhaps it's not too late to put to the electors of Cuyahoga County a Dworken and Bernstein Special Assessment on November's ballot. Maybe then, the putative members will simply opt-out of this class action. Musial's motion for sanctions is without merit and should be denied.

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<sup>6</sup> 134 Ohio St.3d 209, 981 N.E.2d 804, 2012-Ohio-5369, Nov. 21, 2012 (No. 2011-1392)

<sup>7</sup> 136 Ohio St.3d 231, 994 N.E.2d 408, 2013-Ohio-3019, Jul. 16, 2013 (No. 2012-0169)

<sup>8</sup> 137 Ohio St.3d 373, 999 N.E.2d 614, 2013-Ohio-4733, Nov. 5, 2013 (No. 2012-0535)

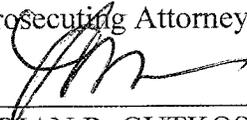
<sup>9</sup> 138 Ohio St.3d 427, 7 N.E.3d 1188, 2014-Ohio-1052, Mar. 25, 2014 (No. 2012-1774) (In *Lingo*, this Court affirmed the Eighth District's reversal of certification on other grounds).

<sup>10</sup> 138 Ohio St.3d 1413, 3 N.E.3d 1215, 2014-Ohio-566, Feb. 19, 2014 (No. 2013-1746)

<sup>11</sup> *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 12. ("The trial court is in the best position to consider the feasibility of gathering and analyzing class-wide evidence.")

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Opposition to Motion for Sanctions of Defendants-Appellants, Cuyahoga County, et al. was served by U.S. mail and via e-mail this 1st day of October, 2014, upon the following counsel:

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