ORIGINAL

CASE NO. 15-1138

In the Supreme Court of Ohio

ON APPEAL FROM THE FRANKLIN COUNTY COURT OF APPEALS,
TENTH APPELLATE DISTRICT
CASE NO. 14AP-764

DOUGLAS P. LABORDE., *et al.*

Plaintiffs-Appellees

v.

CITY OF GAHANNA, *et al.*

Defendants-Appellants

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANTS-APPELLANTS CITY OF GAHANNA AND JENNIFER TEAL

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case is of public or great general interest because it presents three critical issues that will profoundly affect and impact all Ohio political subdivisions that collect municipal income taxes: (1) whether R.C. Chapter 2723 (Enjoining and Recovering Illegal Taxes and Assessments) and its one year statute of limitations governs the recovery of illegally collected municipal income taxes; (2) whether the determination of entitlement to a refund requires an individualized examination of each resident's municipal income tax return, thereby preventing class certification; and (3) whether the complete lack of need precludes class certification when an individual plaintiff's actions would accomplish the same result. This is a case of first impression.

If allowed to stand, the decision opens the floodgates to, and expressly sanctions, a new and unsupported method to obtain municipal income tax refunds (class action litigation) and a new statute of limitations (three years). Ohio political subdivisions, like the City of Gahanna, desire stability in their collection of municipal income taxes and the process by which refunds are granted. The court of appeals decision affects every political subdivision that collects municipal income tax and touches the lives of every Ohioan. It has broad general significance.

The decision of the court of appeals destroys a municipality's administrative structure for processing municipal income tax refunds and undermines the legislative intent of R.C. Chapter 2723. The public interest is affected if the plain meaning of R.C. 2723.01 is not applied. The standard definition of "illegal" is that which is not authorized by law or contrary to law. Black's Law Dictionary (4th Edn. 1968) at p. 882. The court of appeals framed the issue incorrectly by finding these taxpayers were "not contending that it is illegal to collect taxes pursuant to GCC Section 161.18," and instead determined the City was "interpreting [its] statute incorrectly." The

court of appeals's "distinction is one without a difference. If the tax as collected by the City is not illegal, that is, the income tax and related credit are not authorized in a way allowed by GCC Section 161.18, then how do these taxpayers have any claim? If not brought as an administrative appeal, the only other mechanism to obtain a refund is R.C. Chapter 2723. The implication of the decision allows a municipal income tax payer to file civil litigation which is governed specifically by a one year statute of limitations, but take advantage of a city's or village's longer three year administrative appeal statute of limitations. Had the General Assembly or the City of Gahanna intended for this, they would not have chosen the words they did. The practical effect of the decision is the judicial elimination of the one year statute of limitations set forth in R.C. 2723.01 because litigants will be able to avoid the statute's application simply by alleging a municipality is incorrectly interpreting its own statute. Such an end run around R.C. Chapter 2723 undermines the constitutional authority of the legislature and the important public interest served by statutes of limitations.

This appeal also presents the Court with the opportunity to make clear the commonality and predominance requirements of Civ. R. 23(A) and (B)(3) are not satisfied in a taxpayer class action lawsuit because individual evidence is needed to prove each class member's claim. The court of appeals, like the trial court before it, improperly stopped its commonality and predominance analysis when it saw the case involved a single municipal income tax code section. While the alleged injury in a municipal tax refund case may arise from a single statute, the proposed class members' claims still depend upon individual permutations. Unlike a product liability case, where the mere purchase of a defective product gives rise to a claim, a municipal income tax code does not automatically cause an overpayment of municipal income taxes or a miscalculation of a tax credit. The individual and/or his accountant must independently use the

statute and calculate the amount owed. A determination of how a municipal income tax statute operates for each tax return requires evidentiary proof of how each taxpayer utilized the statute. The individual taxpayer, not the municipality, interprets the tax code and prepares a return. The decision of the court of appeals sets a dangerous precedent that allows an unchecked and automatic class certification process for municipal income tax lawsuits, or frankly, any class of plaintiffs who challenge the application of a single statute, contract, policy, or rule. Such a system cannot be reconciled with this Court's and the United States Supreme Court's class action jurisprudence that mandates class-wide proceedings must generate common answers. If this erosion of the commonality and typicality requirements is allowed to stand, Ohio municipalities will be subject to these unwarranted taxpayer class action lawsuits.

Finally, if allowed to stand, the decision effectively eliminates "need" as a relevant factor in determining whether the class action is superior to other available methods for the fair and efficient adjudication of the controversy. The purpose of a class action is to simplify the resolution of complex litigation, not complicate it. Certification of a class greatly increases expenses and the pressure to settle litigation, which is why class action litigation is an exception to the customary rule that litigation is to be conducted on behalf of individual parties. This litigation is no different than an "as-applied" constitutional challenge in that the requested relief will automatically accrue to the benefit of those in the proposed class without resort to class action litigation. The taxing authority (here the City of Gahanna) would have applied the trial court's decision to all resident taxpayers. In other words, a decision in LaBorde's favor would have accrued to the benefit of others similarly situated. However, Ohio municipalities now will be forced to defend class action taxpayer lawsuits even though an individual plaintiff's action will accomplish that same result. Such expensive and time-consuming litigation will overrun

and undermine the judicial system and benefit no one other than class action lawyers. There is great interest in Ohio municipalities not wasting scarce time and public money defending class action lawsuits when there is no need.

STATEMENT OF THE CASE AND FACTS

The City of Gahanna's municipal income tax code is set forth in Chapter 161 of the Codified Ordinances of the City of Gahanna. Jennifer Teal serves as the City's Finance Director. The Regional Income Tax Agency (RITA) was created by the Regional Council of Governments to collect and distribute municipal income tax. The City of Gahanna appointed RITA as its Tax Administrator.

Gahanna City Code (GCC) Section 161.08, which outlines the Tax Administrator's duties, provides "[i]t shall be the duty of the Tax Administrator to collect and receive the tax imposed by this Chapter in the manner prescribed therein, to keep an accurate record thereof, and to report all monies so received." Gahanna residents receive a credit for taxes paid to another municipality. GCC Section 161.18(a) governs these credits, is at the center of this controversy, and states in relevant part

> [e]very individual taxpayer who resides in the City, but who received net profits, salaries, wages, commissions, distributions from associations, or other compensation for work done or services performed or rendered outside the City, if it is made to appear that he has paid a municipal income tax or excise tax based on income, or such net profits, salaries, wages, commissions, distributions from associations, or other compensation in another municipality, shall be allowed a credit of eighty-three and one-third percent (83-1/3%) of the amount so paid by him or in his behalf in such other municipality to the extent of the tax assessed by this chapter, by reason of such net profits, salaries, wages, commissions or other compensation earned in such other municipality where such tax is paid. In no instance shall the allowable credit for tax paid another municipality exceed the amount of tax imposed by this chapter.

This case arises from Karla and Douglas LaBorde's ("LaBorde") attempt to sidestep R.C. 2723.01's one year statute of limitations and use a civil lawsuit to obtain refunds for the municipal income taxes they, and the putative class members, allegedly overpaid.

The Franklin County Court of Common Pleas certified LaBorde's July 3, 2012 complaint as a class action. The trial court certified the following class:

> All individual taxpayers who reside in the City of Gahanna, had taxes withheld or paid to a municipality other than Gahanna at a tax rate greater than 1.5%, and who filed a municipal income tax return with Gahanna on or after July 2, 2008.

The trial court also ruled LaBorde and the Class were entitled to refunds for all returns filed on or after July 3, 2008.[1] The trial court's decision authorizing a four year statute of limitations was not supported by Ohio law. The trial court also failed to conduct a rigorous analysis into whether the prerequisites of Civ. R. 23 had been satisfied.

Appellants City of Gahanna Finance Director Jennifer Teal, the City of Gahanna, and RITA appealed to the Tenth District Court of Appeals, Franklin County. The court of appeals affirmed in part, and reversed in part, the trial court's decision. Germane to this appeal, the court of appeals found: (1) the three year statutes of limitations set forth in GCC Section 161.12(d) and R.C. 718.12 applied; (2) Civ. R. 23(A)(2) and (B)(3)'s commonality and predominance requirements were satisfied because the "pivotal legal issue is the proper interpretation of GCC Section 161.18;" and (3) Civ. R.23(B)(3)'s requirements were met because there existed a need for class certification. According to the court of appeals, "[i]f the class is not certified, the approximately 12,000 class members would each have to bring individual claims for refunds."

[1] The trial court found the LaBorde's attorneys' interpretation of how the tax credit under Section 161.18(a) should be calculated was correct. However, because the trial court also denied all motions of summary judgment on another issue and wanted to hold a damages hearing, the merits (how the municipal income tax credit should be calculated) were not a final appealable order, and therefore are not issues in this appeal.

The court of appeals erred in applying GCC 161.12(d)'s three year statute of limitations, which governs administrative appeals to the City's Board of Tax Appeals rather than R.C. 2723.01's one year statute of limitations, to LaBorde's civil lawsuit. The court of appeals also erred in ignoring the fact that each particular class member's municipal income tax return is dependent on a variety of factors, including how the tax payer interpreted and applied GCC Section 161.18(a). The court of appeals also erred in failing to recognize a determination in LaBorde's favor, regarding the correct interpretation and application of GCC Section 161.18(a), would accrue to the benefit of all Gahanna residents. And, there is nothing in the record to suggest the City of Gahanna would refuse to apply this decision consistently and refund all amounts owed.

In support of their positions on these issues, appellants the City of Gahanna and Jennifer Teal present the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

Unless filing an administrative appeal governed by a municipal income tax code, R.C. Chapter 2723.01's one year statute of limitations applies to all civil actions to recover the illegal collection of taxes.

The decision below certified a class of Gahanna residents who filed municipal income tax returns since July 2, 2009, or within three years of when the complaint was filed. R.C. Chapter 2723 specifically governs the enjoining and collecting of illegal taxes and assessments. R.C. 2723.01 states "[c]ourts 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." The court of appeals, however, found this statute and argument

"unpersuasive." Following LaBorde's argument, the court of appeals determined LaBorde was "not contending that it is illegal to collect taxes pursuant to GCC Section 161.18(a). Rather, [LaBorde] argue[s] that the City is interpreting the statute incorrectly." This reasoning is illogical. Statutes of limitations serve great public interests by ensuring fairness to defendants, encouraging prompt prosecution of causes of action, and helps avoid stale claims. *See Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, 90 N.E.2d 1244.

At its core, LaBorde is challenging the validity of municipal income taxes paid. It makes no difference whether LaBorde's theory rests on the illegality of Section 161.18 or the incorrect interpretation of the tax credit. The court of appeals made a distinction without a difference. If the tax as collected by the City of Gahanna is not illegal, then how does LaBorde and the class have a claim? LaBorde is challenging the Gahanna municipal income tax code as it was applied and enforced by the City. This challenge is analogous to an as-applied constitutional challenge of a statute. Such a challenge is still a constitutional challenge. Here, LaBorde is arguing GCC Section 161.18(a) as applied to their tax return was incorrect.[2] Such a claim still challenges the legality of the tax as collected, and as such, it is subject to the one-year limitation in R.C. 2723.01.

The court of appeals compounded this error when it applied the three year statute of limitations found in GCC Section 161.12(d) and R.C. 718.12. These three year statutes of limitations govern claims for municipal income tax refunds made only to the Gahanna Board of Tax Appeals. In essence, the court of appeals allowed LaBorde (and the putative class) to have the best of everything. LaBorde avoided filing an administrative appeal and opted for a class

[2] It is interesting to note the City of Gahanna and Jennifer Teal did nothing to illegally collect any municipal income tax or force their alleged incorrect interpretation of GCC Section 161.18 upon LaBorde. LaBorde's accountant applied GCC Section 161.18 and calculated the Gahanna municipal income tax credit owed.

action lawsuit. LaBorde and the putative class then were afforded the three year statute of limitations reserved for administrative appeals.

Proposition of Law No. II:

Class certification is properly denied when liability turns on individual issues of each class member, regardless of whether the same contract, policy, or statue may be at issue for all class members.

A standardized contract, policy or municipal income tax ordinance does not guarantee that a class claim can be established by common proof. A standardized interpretation of a municipal income tax ordinance gives no assurance that it predominates over questions affecting individual class members. The existence of a single standard statute, contract, rule or policy does not, *ipsa facto*, establish that class members were all treated in the same, allegedly wrongful manner.

For example Wal-Mart had a company-wide policy giving its local supervisors discretion when making employment decisions. Despite Wal-Mart's standard policy, the United States Supreme Court held the plaintiffs had not proven commonality, let alone predominance's "far more demanding" standard. *Wal-Mart Stores v. Dukes*, __ U.S. __ 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). The commonality and predominance issues can be misread easily because '[a]ny competently crafted class complaint literally raises common questions.' *Id.* at 131 S.Ct. 2551. "It is not every question that will suffice; at a sufficiently abstract level of generalization, almost any set of claims can be done to display commonality." *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). As the Supreme Court explained in *Wal-Mart*, it "is not the raising of common questions – even in droves – but rather the capacity of class-wide proceedings to generate common answers." *Wal-Mart Stores v. Dukes*, 131 S.Ct. at 2551. "Commonality requires the plaintiff to demonstrate the class members 'have suffered the same injury.'" *Id.*

Similarly, in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), the plaintiffs tried to certify a class action by claiming Motel 6 had a policy of discriminating against African-Americans by denying them hotel accommodations, placing them in separate units, and providing the class members with substandard service. Nevertheless, the court held the plaintiffs could not establish predominance because they could not show, through common evidence, that each class member had been adversely affected by the alleged policy.

"Courts are wary, for obvious reasons, of granting class status in cases where individual proof regarding numerous class members must be adduced to establish liability or a defense to liability." *Corder v. Ford Motor Company*, 283 F.R.D. at 342 – 343 (citing *Butler v. Sterling*, 210 F.3d 371, 2000 WL 353502, at *6 (6th Cir. Mar. 31, 2000) (unpublished table decision) (noting that "the Advisory Committee Notes to Rule 23(b)(3) advise against class certification where a defendant has a defense to liability that will vary with each individual class member"); *Yadlosky v. Grant Thorton, L.L.P.*, 197 F.R.D. 292, 298–299, 301 (E.D.Mich. 2000) (denying motion for class certification where individualized proof of reliance was required).

Class certification has been denied even when an alleged breach of a standardized contract lies at the center of the controversy. *Newell v. State Farm Gen. Ins. Co.*, 118 Cal.App.4th 1094, 1103 (2004). As the California Court of Appeals noted "[e]ven if State Farm and Farmers adopted improper claims practices to adjust Northridge earthquake claims, each putative class member still could recover for breach of contract and bad faith only by proving his or her individual claim was wrongfully denied, in whole or in part, and the insurer's action in doing so was unreasonable."

Here, the court of appeals took a simplistic and erroneous approach to its analysis. The court held the class members met the commonality and predominance requirements because "all

the claims arise from the standardized application of the City's interpretation of GCC Section 161.18." What the court of appeals failed to appreciate is that each class member could recover only by proving his or her municipal income tax credit was incorrectly calculated because of the City of Gahanna's interpretation of GCC 161.18(a). Thus, each class member's potential recovery involves an individual assessment of how his/her municipal income tax was prepared and calculated. The issues that must be addressed include not only whether the class member received a municipal income tax credit under GCC Section 161.18(a), but also whether the taxpayer or an accountant prepared the return, whether the preparer reviewed and interpreted GCC Section 161.18(a), how the class member's municipal income tax and credit was calculated, and finally, whether the City of Gahanna's standardized interpretation of GCC Section 161.18 affected, altered, or influenced the class member's municipal income tax return and credit. These issues are clearly predominant over the only issue arguably common to the class.

The court of appeals did not engage in a rigorous analysis of Civ. R. 23(A)(2) or (B)(3). Instead, it stopped upon finding the City of Gahanna has a standard policy/interpretation of GCC Section 161.18(a). Had the court of appeals continued its analysis, it would have discovered the City's alleged mistaken formula for calculating the municipal income tax credit under GCC Section 161.18 was not mechanically applied to each class member because each class member prepared his or her own tax return and independently calculated his or her own municipal income tax credit.

Proposition of Law No. III:

Class certification is properly denied when a determination in favor of the individual plaintiff would necessarily establish a legal framework applicable to all class members.

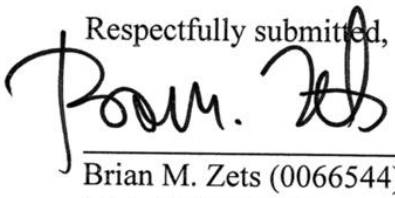
Within the criteria of Rule 23(B), the 'need' for class action treatment in a sense may be considered a vital, if not determinative, consideration as need inevitably relates to the problems of superiority, fairness, and efficiency. These latter considerations may not be applied mechanically without a consideration of relative needs or necessities." *Davis v. Pub. Emps. Ret. Bd.*, 2006-Ohio-5339, ¶ 32. When applying Civ.R. 23(B)(3), a court will must consider the need, or whether an individual plaintiff's action would accomplish the same result without the additional burden and expense of a class action, even though necessity is not specifically listed as a factor in the rule. *Id.* at ¶ 33. Need is a relevant factor to determine whether the class action is "superior to other available methods for the fair and efficient adjudication of the controversy," as required for certification pursuant to Civ.R. 23(B)(3). Even this Court has recognized that "[t]he application of a need requirement," for purposes of determining whether to certify a class action, "advances the purpose of a class action, which is 'to simplify the resolution of complex litigation, not complicate it.'" *Warner v. Waste Mgmt., Inc.*, 36 Ohio St.3d 91, 97, 521 N.E.2d 1091 (1988).

The court of appeals bluntly concluded "[i]f the class is not certified, the approximately 12,000 class members would each have to bring individual claims for refunds." Yet, the record is void of any evidence suggesting the City of Gahanna would not have refused to apply an adverse decision to all resident taxpayers. A decision on the merits of LaBorde's individual claim would necessarily result in the City of Gahanna applying the same municipal income tax credit formula to all residents. Further litigation would be necessary only if the City of Gahanna refused to comply with a lawful court order.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellants City of Gahanna and Jennifer Teal respectfully request this Court accept jurisdiction to review these propositions of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 13th day of July 2015 that a true and accurate copy of the foregoing ***Memorandum in Support of Jurisdiction*** was served via email and regular United States Mail, postage prepaid, upon the following:

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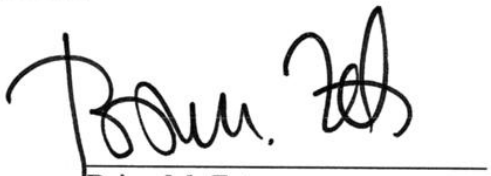

Brian M. Zets

APPENDIX A

Court of Appeals Decision dated May 28, 2015

0A169 - X46

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Douglas P. LaBorde et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 14AP-764 (C.P.C. No. 12CV-8517)
City of Gahanna et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
Douglas P. LaBorde et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 14AP-806 (C.P.C. No. 12CV-8517)
The City of Gahanna et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Regional Income Tax Agency,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on May 28, 2015

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Reminger Co., LPA, Gregory D. Brunton and *Zachary B. Pyers*, for appellant Regional Income Tax Agency.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Defendants-appellants, city of Gahanna ("Gahanna"), Gahanna Finance Director Jennifer Teal ("Director Teal"), and the Regional Income Tax Authority ("RITA"), collectively referred to as ("the City") appeal from the September 11, 2014 decision and entry of the Franklin County Court of Common Pleas determining that this matter may be maintained as a class action and that the City is not entitled to statutory immunity as provided in R.C. Chapter 2744. For the reasons that follow, we affirm in part and reverse in part.

Factual and Procedural History

{¶ 2} Plaintiffs-appellees, Douglas and Karla LaBorde, initiated this action on July 3, 2012, seeking a determination that the way the Gahanna and RITA have interpreted Section 161.18 of the Gahanna City Code ("GCC") has resulted in an over-collection of taxes from Gahanna residents who work in municipalities outside Gahanna that assess municipal tax rates higher than the 1.5 percent charged by Gahanna. The LaBordes' position is that the tax itself is legal, but because of the erroneous way the City interprets the statute, it is not being enforced properly.

{¶ 3} The complaint alleged both state and federal claims. The City removed the action, and the federal claims were dismissed by the federal district court. The dismissal was affirmed by the Sixth Circuit Court of Appeals in *LaBorde v. Gahanna,* 561 Fed. Appx. 476 (6th Cir.2014). The remaining state law claims are as follows: Count one- Declaratory Judgment as to GCC Section 161.18 (credit for tax paid to another municipality); Count two- Declaratory Judgment as to Tax Form 37 (the form prescribed by the City and used to calculate the tax credit for tax paid to another municipality); Count three- Declaratory Judgment as to GCC Section 161.05 (concerning whether the City is mandated to offset credits calculated under GCC 161.18); Count four- Taking under Article 1, Section 19 of the Ohio Constitution; Count seven- Injunctive Relief (against using Form 37 in its present form); Count eight- Unjust Enrichment; Count nine- Strict Liability Under R.C. 9.39 (civil liabilities of officers and employees).

{¶ 4} In the complaint, the LaBordes set forth the following class:

> All individual taxpayers who reside in the City of Gahanna, had taxes withheld or paid to a municipality other than Gahanna at a tax rate greater than 1.5%, and filed a RITA Form 37.

(Complaint, at ¶ 46.)

{¶ 5} Later, after discovery, the LaBordes moved for class certification on behalf of:

> All individual taxpayers who resided in the City of Gahanna, had taxes withheld or paid to a municipality other than Gahanna at a tax rate greater than 1.5%, and who filed a municipal tax return with Gahanna on or after July 3, 2008 (the "Class").

(Amended Motion For Class Certification (May 2, 2014).)

{¶ 6} The complaint asked for declaratory and injunctive relief, an award of damages and/or restitution, pre- and post-judgment interest, and costs and expenses including reasonable attorney fees.

{¶ 7} All the parties moved for summary judgment. The trial court granted summary judgment in favor of the LaBordes on Counts one, two, and three, their interpretation of GCC Section 161.18(a) (credit for tax paid to another municipality), the use of Form 37, and their entitlement to a refund of amounts overpaid. The LaBordes' motion for summary judgment as to Count seven, injunctive relief, was dismissed as moot because of the trial court's ruling as to Count two.

{¶ 8} The trial court granted the City's motion for summary judgment with respect to Count four, unconstitutional taking, and dismissed the claim.

{¶ 9} The trial court granted the City's motion for summary judgment as to Count eight, unjust enrichment, and dismissed the claim.

{¶ 10} The trial court found genuine issues of material fact with respect to Count nine, strict liability under R.C. 9.39, and denied both motions for summary judgment with respect to that claim.

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{¶ 11} The trial court granted the motion for class certification as set forth in the amended motion for class certification, and appointed the LaBordes as class representatives, and appointed the LaBordes' counsel as class counsel.

{¶ 12} The trial court then stated that it would issue an order setting the matter for a hearing on the remaining issues of the strict liability claim and the amount of damages and restitution that plaintiffs are entitled to recover.

Assignments of Error

{¶ 13} This appeal followed with Gahanna and Director Teal assigning the following as error:

> 1. The trial court erred and abused its discretion when it granted Karla and Douglas LaBordes' motion for class certification.
>
> 2. The trial court erred when it determined the City of Gahanna and Jennifer Teal were not immune from damages under R.C. Chapter 2744.

{¶ 14} RITA has assigned the following as error:

> 1. The trial court erred when it certified this matter as a class action.
>
> 2. The trial court erred with [sic] it determined that the Regional Income Tax Authority was not entitled to political subdivision immunity under O.R.C. §2744.

Statutory Immunity

{¶ 15} Although there are outstanding issues that would normally preclude appeal at this stage of the litigation, an order denying political subdivision immunity is immediately appealable, as is an order granting class certification. *Hubbell v. Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839, ¶ 12 (immunity); *Cincinnati v. Harrison,* 1st Dist. No. C-130195, 2014-Ohio-2844, ¶ 19 (immunity); R.C. 2505.01(B)(5) (class action). We shall address the second assignments of error, the issue of immunity, first.

{¶ 16} The City has raised the defense of immunity from the LaBordes' claims under R.C. Chapter 2744, entitled "Political Subdivision Tort Liability." R.C. Chapter

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2744 provides a three-tiered scheme that grants broad immunity from tort claims for money damages to political subdivisions. *Parker v. Upper Arlington*, 10th Dist. No. 05AP-695, 2006-Ohio-1649, ¶ 9. However, the LaBordes are correct that R.C. Chapter 2744 immunity is not a defense to claims seeking declaratory or injunctive relief. *Id.*

{¶ 17} A review of the claims asserted by the LaBordes shows that, although they are requesting monetary relief in the form of "damages and/or restitution" they have not asserted any tort claims against the City. The LaBordes were awarded summary judgment on their claims for declaratory judgment, but the alleged unconstitutional taking claim and the unjust enrichment claim were dismissed by the trial court. It should be noted that neither claim sounds in tort. The only remaining claim has not been adjudicated, and is one for statutory strict liability under R.C. 9.89.

{¶ 18} By its very language and title, R.C. Chapter 2744 applies to tort actions for damages. *Big Springs Golf Club v. Donofrio*, 74 Ohio App.3d 1, 2 (9th Dist.1991); *Brkic v. Cleveland*, 124 Ohio App.3d 271, 282 (8th Dist.1997); *Parker* at ¶ 9; *State ex rel. Fatur v. Eastlake*, 11th Dist. No. 2009-L-037, 2010-Ohio-1448, ¶ 34; *Cincinnati* at ¶ 30-31. Therefore, political subdivision tort immunity is not available to the City as a defense to the LaBordes' claims that do not sound in tort.

{¶ 19} Additionally, the LaBordes' claim for money damages does not entitle the City to immunity. Despite the LaBordes' prayer for damages, not every claim for monetary relief constitutes money damages. *Windsor House, Inc. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-367, 2011-Ohio-6459, ¶ 21, citing *Interim Healthcare of Columbus, Inc. v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 07AP-747, 2008-Ohio-2286, ¶ 15. Here, the LaBordes seek refunds of the amount of their municipal taxes they overpaid.

> Unlike a claim for money damages where a plaintiff recovers damages to compensate, or substitute, for a suffered loss, equitable remedies are not substitute remedies, but an attempt to give the plaintiff the very thing to which it was entitled. *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 801 N.E.2d 441, 2004-Ohio-28, at ¶ 14, citing *Ohio Hosp. Assn. v. Ohio Dept. of Human Serv.* (1991), 62 Ohio St.3d 97, 579 N.E.2d 695. Such remedies represent a particular privilege or entitlement, rather than general

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> substitute compensation. *Keller v. Dailey* (1997), 124 Ohio App.3d 298, 304.

Interim Healthcare at ¶ 15.

> Consequently, a party seeks equitable relief when "[t]he relief sought is the very thing to which the claimant is entitled under the statutory provision supporting the claim." *Zelenak v. Indus. Comm.*, 148 Ohio App.3d 589, 774 N.E.2d 769, 2002–Ohio–3887, at ¶ 18, citing *Henley Health Care v. Ohio Bur. of Workers' Comp.* . (Feb. 23, 1995), Franklin App. No. 94APE08–1216, and *Keller, supra.* A specific remedy, seeking reimbursement of the compensation allegedly denied, is not transformed into a claim for damages simply because it involves the payment of money. *Id.*, citing *Ohio Edison Co. v. Ohio Dept. of Transp.* (1993), 86 Ohio App.3d 189, 194

Interim Healthcare at ¶ 16.

> Cases in which a plaintiff claims a state agency has wrongfully collected certain funds are characterized generally as claims for equitable restitution. *Morning View Care Center–Fulton v. Ohio Dept. of Job & Family Servs.*, Franklin App. No. 04AP-57, 2004-Ohio-6073, at ¶ 19. Similarly, a claim that seeks to require a state agency to pay amounts it should have paid all along is a claim for equitable relief, not monetary damages. *Zelenak, supra*, at ¶ 19.

Interim Healthcare at ¶ 17.

{¶ 20} In the final analysis, should the LaBordes ultimately succeed on their complaint, the result will be Gahanna paying the LaBordes an award of money, not in the form of money damages but in the form of refunds of overpayments of taxes they paid to Gahanna. Because the relief sought is not money damages, the City is not entitled to statutory immunity under R.C. Chapter 2744.

{¶ 21} The second assignments of error are overruled.

Class Certification

{¶ 22} We turn now to the issue of class certification. The trial court granted the motion for class certification, appointment of the LaBordes as class representatives, and

appointment of the LaBordes' counsel as class counsel. Gahanna has raised multiple challenges to certification.

{¶ 23} Rule 23 of the Ohio Rules of Civil Procedure governs class action certification in Ohio. That rule provides, in pertinent part:

> **(A) Prerequisites to a class action**
>
> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(B) Class actions maintainable**
>
> An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:
>
> (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; or
>
> (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

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> adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action."

Standard of Review

{¶ 24} We review the issue of class certification under an abuse of discretion standard. *Smith v. State Teachers Ret. Bd.*, 10th Dist. No. 97APE07-943 (Feb. 6, 1998), citing *Marks v. C.P. Chemical Co., Inc.*, 31 Ohio St.3d 200 (1987), syllabus. Moreover, "[a] trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions." *Id.* at 201. Therefore, the issue before us is whether the trial court abused its discretion in granting class certification.

{¶ 25} The burden of proving the elements of Civ.R. 23 for class certification is on the party seeking certification, and failure to prove any element precludes such certification. *Rinder v. Med. Protective Co.*, 4th Dist. No. 2002CA00354, 2003-Ohio-3855, ¶ 20. In order to maintain a class action, the requirements of Civ.R. 23(A) and 23(B) must be met. The threshold requirements of Civ.R. 23 are:

> (1) an identifiable class must exist and its definition must be unambiguous; (2) the named representatives of the class must be among its members; (3) joinder of all class members must be impracticable because of their number; (4) questions of law or fact must be common to the class; (5) the representative parties' claims or defenses must be typical of the claims or defenses of the class; (6) the representative parties must protect fairly and adequately the interests of the class; and (7) one of three requirements set forth in civil procedure rule must be met.

State ex rel. Davis v. Pub. Emps. Retirement Bd., 111 Ohio St.3d 118, 122-23, 2006-Ohio-5339, ¶ 21, quoting *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71 (1998).

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{¶ 26} The City has raised multiple arguments against class certification.

Statutes of Limitations

{¶ 27} The City asserts it was error to expand the scope of the class to include taxpayers who filed after July 8, 2008, because a one-year statute of limitations pursuant to R.C. 2723.01 applies to the action. R.C. Chapter 2723 governs the enjoining and collecting of illegal taxes and assessments. Alternatively, Gahanna argues a two-year statute of limitations for actions filed against political subdivisions applies pursuant to R.C. 2744.04(A), part of the Political Subdivision Tort Immunity Act discussed above.

{¶ 28} As discussed by the trial court, we find this argument unpersuasive. The LaBordes are not contending that it is illegal to collect taxes pursuant to GCC Section 161.18(a). Rather, they argue that the City is interpreting the statute incorrectly. Therefore, R.C. Chapter 2723 has no application. Furthermore, for the reasons discussed in connection with the second assignments of error, R.C. 2744.04(A) does not apply either.

{¶ 29} GCC Section 161.12(d), entitled "Collection of unpaid taxes and refunds of overpayments," provides as follows:

> Taxes erroneously paid shall not be refunded unless a claim for refund is made within three (3) years from the date on which such payment was made or the return was due, or within three (3) months after final determination of the federal tax liability, whichever is later.

{¶ 30} Similarly, R.C. 718.12 provides, in pertinent part:

> Civil actions to recover municipal income taxes and penalties and interest on municipal income taxes shall be brought within the later of:
>
> (i) Three years after the tax was due or the return was filed, whichever is later * * *.

{¶ 31} These statutes specifically apply to overpayments of municipal income taxes, and these specific provisions should prevail over the more general provisions cited by the City. Therefore, any class certified by the trial court should be limited by a three-year statute of limitations. Since the case was filed on July 3, 2012, the trial court must

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amend the scope of the class certified accordingly to reflect a three-year statute of limitations.

Identifiable Class

{¶ 32} Gahanna argues that the trial court erred in finding that the proposed class was unambiguous because individualized inquiries into each potential class member are necessary. Specifically, Gahanna claims there is no way to know how an individual calculated and filed his or her municipal income tax return, how it was prepared, whether the class member used Form 37, whether the class member or the member's accountant was forced to use the City's interpretation of GCC Section 161.18 or if the member came to that conclusion of their own free will.

{¶ 33} We find this argument unpersuasive. Gahanna's attempt to graft additional requirements onto the class is unnecessary. The class does not distinguish between taxpayers who prepared their own returns and those who hired someone to do so. The class does not distinguish between those who used Form 37 and those who did not. The class consists of (1) residents of Gahanna, (2) who filed a Gahanna Municipal Tax Return, (3) who had taxes withheld or paid to another municipality at a rate greater than 1.5 percent.

{¶ 34} Moreover, RITA, which is in charge of processing Gahanna's tax returns, has indicated that it is capable of printing off a report that would show the names, addresses, contact information, and damage amounts as alleged in this case for the members of the class. (Deposition of Lora Gischel at 110, 851 of 2534 electronic record.) RITA can and did generate a report that lists the cities in which Gahanna residents worked, those cities' tax rates, the residents' wages and earnings in those cities, and the amount of taxes withheld in those cities. RITA has identified a class of more than 12,000 members under the definition adopted by the trial court. Thus, joinder would be impractical.

{¶ 35} The definition is specific and relates to the use of standardized instructions and procedures for filing municipal tax returns. Also, the class members are easily identified.

LaBordes as Class Members

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{¶ 36} Gahanna next argues that Karla and Douglas LaBorde are not members of the proposed class because they did not calculate and file their own municipal tax returns, but instead, had their accountant prepare, calculate, and file their returns.

{¶ 37} When certifying a class under Civ.R. 23, the class representatives must be members of the class and have the same interests as the proposed class members. *Warner v. Waste Mgmt. Inc.*, 36 Ohio St.3d 91, 96 (1988).

{¶ 38} The LaBordes fulfill all of the requirements of the proposed class. They reside in Gahanna and work in municipalities with income tax rates higher than Gahanna's 1.5 percent. Their returns demonstrate that they filed their Gahanna tax returns using the calculation required by the City. Regardless of whether a class member used Form 37 or prepared the return in some other manner, there was deposition testimony that the return would be denied if the calculation did not match up with the City's interpretation of GCC Section 161.18.

Commonality and Typicality

{¶ 39} The City argues that a class action will not generate common answers because certain factors defeat commonality. The claimed dissimilarities are the same factors already discussed above. Did the taxpayer personally prepare the return? Did the taxpayer use Form 37? Did the taxpayer follow the instructions on Form 37? What calculation did the taxpayer employ? What interpretation of GCC Section 161.18 did the taxpayer follow?

{¶ 40} Commonality deals with shared issues of law or fact. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir.1998). It requires a common issue that would advance the litigation. Id. "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Baughman v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St.3d 480, 485, 2000-Ohio-397. The claims of the representative parties must be typical of the claims or defenses of the class, and there must be no express conflict between the class representatives and the class. Civ.R. 23(A)(3); *Hamilton* at 77.

{¶ 41} Here, the class definition accepted by the trial court does not require the use of Form 37. Additionally, the City's witnesses acknowledged that any return that was not

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calculated in accordance with the City's interpretation of GCC Section 161.18 would be rejected. Thus, the claimed dissimilarities are not germane to the litigation.

{¶ 42} The pivotal legal issue is the proper interpretation of GCC Section 161.18. This satisfies the commonality requirement. Moreover, the LaBordes' claims are typical of the rest of the class because they fulfill the criteria for the class, and all members of the class are challenging the same course of conduct based on the City's interpretation of GCC Section 161.18. Here, the LaBordes are in a situation identical to that of putative class members, and therefore satisfy the typicality requirement. *Marks* at 202.

Representative Parties Adequately Represent the Class

{¶ 43} Gahanna claims that the LaBordes will not fairly and adequately protect the interests of the class. Gahanna bases this on the LaBordes' unfamiliarity with the details of the lawsuit and minimal involvement.

{¶ 44} Under Ohio law, the adequacy requirement has two components. First, "[a] representative is deemed adequate so long as his interest is not antagonistic to that of other class members." *Id.* at 203; *Hamilton* at 78. Here, the LaBordes' interests are aligned with those of the class. Second, the representatives' counsel must be qualified, experienced, and generally able to conduct the proposed litigation. *Warner* at 98. The City does not contest this component.

Civ.R. 23(B)(3)

{¶ 45} The final mandatory finding for class certification is that one of three requirements set forth in Civ.R. 23(B) must be met. The LaBordes are proceeding under Civ.R. 23(B)(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.").

{¶ 46} Citing *Frisch's Restaurant, Inc. v. Conrad*, 10th Dist. No. 05AP-412, 2005-Ohio-5426, Gahanna argues there is no need for class certification in this case because the LaBordes' requested relief would automatically accrue to the benefit of those in the proposed class.

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{¶ 47} In *Frisch's*, the appellants sought class certification to challenge the manner in which the administrator of the Bureau of Workers' Compensation handled dividend credits on retrospectively rated state fund premiums. *Id.* at ¶ 10.

{¶ 48} This court stated that the issue is "whether the requested relief would automatically accrue to the benefit of those in the proposed class without resort to class litigation." *Id.* at ¶ 26. This court determined that the requested relief would automatically benefit any organization in the same position as appellants. *Id.*

{¶ 49} The situation here is different. If the class is not certified, the approximately 12,000 class members would each have to bring individual claims for refunds. Individually, the members of the class lack the strength to litigate their claims. It is unlikely that the class members would file new suits given the relatively small amounts involved in individual recoveries, the cost of adequate representation, not to mention the massive drain on judicial and administrative resources. *See Hamilton* at 80 (certifying a class of mortgagors seeking redress for a lender's method of miscalculating mortgage rates).

{¶ 50} Finally, Gahanna argues no single set of operative facts can establish liability for all class members. Gahanna reiterates the same arguments discussed above as to whether an individual used Form 37, and how they calculated and filed their municipal income tax return.

{¶ 51} For the same reasons as discussed previously, the trial court did not abuse its discretion in ruling that common questions of law predominate. Although different taxpayers may have prepared and filed their returns differently, all the claims arise from the standardized application of the City's interpretation of GCC Section 161.18. *See Hamilton* at 80 (the gravamen of every complaint within the subclass is the same and relates to the use of standardized procedures and practices).

Standing

{¶ 52} In addition to the same arguments Gahanna has brought regarding class certification, RITA has raised some additional arguments under this assignment of error. RITA first argues that the LaBordes lack standing because they failed to file their taxes under written protest and they failed to issue a notice to sue in accordance with R.C.

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2723.03. RITA contends that R.C. 2723.01 is the exclusive remedy in this action. RITA also attacks the LaBordes' standing on the ground that they failed to exhaust their administrative remedies.

{¶ 53} R.C. 2723.03 provides, as follows:

> Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect them. Actions to recover taxes and assessments must be brought against the officer who made the collection, or if he is dead, against his personal representative. When they were not collected on the county duplicate, each corporation or board which is entitled to share in the revenue so collected must be joined in the action.
>
> If a plaintiff in an action to recover taxes or assessments, or both, alleges and proves that he or the corporation or deceased person whose estate he represents, at the time of paying such taxes or assessments, filed a written protest as to the portion sought to be recovered, specifying the nature of his claim as to the illegality thereof, together with notice of his intention to sue under sections 2723.01 to 2723.05, inclusive, of the Revised Code, such action shall not be dismissed on the ground that the taxes or assessments, sought to be recovered, were voluntarily paid.

{¶ 54} It is uncontroverted that the LaBordes did not file their municipal income tax returns under protest or issue a notice of intent to sue. The requirements of R.C. 2723.03 would be mandatory if the LaBordes had brought their action pursuant to R.C. Chapter 2723. But they did not.

{¶ 55} The failure to exhaust argument is in actuality an affirmative defense to the underlying declaratory judgment action and not a standing argument. The argument is not subject to appeal at this time as it relates to the merits of the trial court's ruling on the declaratory judgment action. Because it is not within the scope of the present appeal in this case, and we will not address the issue at this time.

{¶ 56} To have standing, a plaintiff must "possess the same interest and suffer the same injury shared by all members of the class that he seeks to represent." *Hamilton* at 74. Moreover, the United States Supreme Court has held that in order to have standing, there must be an injury in fact that is concrete and particularized, a causal connection

between the injury and the conduct complained of, and that the injury will be redressed by a favorable decision granting the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The LaBordes easily meet these requirements.

{¶ 57} The first assignments of error are sustained in part and overruled in part. The class must be modified to reflect a three-year statute of limitations. The remaining arguments are not well-taken.

{¶ 58} Based on the foregoing, the decision and entry of the trial court granting the plaintiffs' motion for class certification, and the denial of the defendants' motion for summary judgment on the basis of sovereign immunity is affirmed in part and reversed in part, and the matter is remanded to the trial court for further proceedings in accordance with this decision.

Judgment affirmed in part, reversed in part;
remanded for further proceedings.

BROWN, P.J., and HORTON, J., concur.

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APPENDIX B
Judgment Entry dated May 29, 2015

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Douglas P. LaBorde et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 14AP-764 (C.P.C. No. 12CV-8517)
City of Gahanna et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
Douglas P. LaBorde et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 14AP-806 (C.P.C. No. 12CV-8517)
The City of Gahanna et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Regional Income Tax Agency,	:	
Defendant-Appellant).	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on May 28, 2015, appellants' first assignments of error are sustained in part and overruled in part. Appellants' second assignments of error are overruled. The matter is remanded to amend the scope of the class certified to reflect a three-year statute of limitations. In all other respects it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

TYACK, DORRIAN & LUPER SCHUSTER, JJ.

/s/JUDGE
Judge G. Gary Tyack

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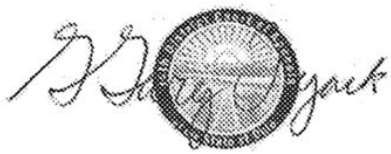
Tenth District Court of Appeals

Date:	05-29-2015
Case Title:	DOUGLAS P LABORDE -VS- GAHANNA CITY ET AL
Case Number:	14AP000764
Type:	JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge G. Gary Tyack