[Cite as *Shanahan v. Toledo*, 2009-Ohio-5991.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Karen Shanahan	Court of Appeals No. L-09-1077
Appellant	Trial Court No. CI0200802348
v.	
The City of Toledo	**DECISION AND JUDGMENT**
Appellee	Decided: November 13, 2009

* * * * *

Scott A. Ciolek and Anthony J. DeGidio, for appellant.

Adam W. Loukx, Acting Director of Law, and Keith J. Winterhalter, Senior Attorney, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant brings this accelerated appeal from the judgment of the Lucas County Court of Common Pleas, denying certification of a class action in a suit challenging the propriety of a city's institution of a trash collection charge.

{¶ 2} On April 28, 2007, the Director of Public Service for appellee, city of Toledo, promulgated rules and regulations related to refuse collection within the city. Included in these rules was the institution of a $5.50 monthly "refuse fee." The fee was reduced to $3.00 per month if the property owner opted to participate in the city's curbside recycling program. The fee was to be added to the property owner's water and sewer bill. Delinquent charges and penalties were to be certified to the county auditor, placed on the tax duplicate and "be collected in the same manner as other taxes * * *."

{¶ 3} On February 28, 2008, appellant, Karen Shanahan, filed suit on behalf of herself and other Toledo taxpayers, contesting the legality of the refuse fee. Appellant characterized the fee as a tax and sought a declaration that the fee/tax was unlawful. Appellant also requested an injunction against its continued collection and a refund for herself and members of her class. She sought to define the class as "all current and former property owners in the city of Toledo who are or were required to pay a tax on their property for refuse collection without voter approval by referendum or Toledo City Council approval * * *."

{¶ 4} On March 25, 2008, Toledo City Council enacted an ordinance providing for a "monthly refuse fee." The contents of the ordinance are essentially the same as those promulgated by the public service director in 2007, except the monthly fee is increased, commencing May 1, 2008, to $7.00: recyclers $2.00. In subsequent years, the base fee is to increase annually and the recycling fee is to decrease annually until May 1, 2010, when the refuse fee is set at $10.00 and the fee for those who recycle is eliminated.

{¶ 5} Appellant filed her first amended complaint on April 20, 2008, adding a claim that the March ordinance created a "wrongful tax" and amending the proposed class to include future property owners who will be taxed by operation of the ordinance. Appellee answered, denying impropriety.

{¶ 6} On June 2, 2008, appellant moved to certify a class, "* * * consisting of all current and former property owners in the city of Toledo who are or were required to pay a tax on their property for refuse collection * * * from about April 28, 2007, until the present date, and including, for the purposes of injunctive and declaratory relief, future property owners in the City of Toledo and renters, past and future, who pay the tax by contract with their landlords."

{¶ 7} Appellee filed a memorandum and subsequent supplemental memorandum in opposition. In the latter filing, appellee insisted that one who seeks to recover an illegal tax or assessment may do so only by complying with notice of protest and intent to sue requirements articulated in R.C. 2723.03. Appellee argued that, since there is no evidence that any member of appellant's proposed class satisfied the statute, the class, as proposed, is overbroad and certification should be denied.

{¶ 8} Appellant responded with a motion to stay consideration and a motion for partial summary judgment on the applicability of R.C. Chapter 2723 in this matter. In her memorandum in support, appellant argued that R.C. Chapter 2723 only applies to taxes and assessments. The refuse collection fee, appellant now insisted, is not a tax or assessment, but a fee.

{¶ 9} The trial court rejected appellant's argument, ruling that, in Ohio law, a "fee," although legally distinguishable from a tax, is encompassed in the words "taxes or assessments" found in R.C. 2723.03. Consequently, the court denied appellant's motion for a partial summary judgment, declaring the refuse assessment within the operation of the statute. Absent evidence that appellant complied with the statute, the court concluded, it would be improper to certify a class which she is not demonstrably qualified to represent.

{¶ 10} From this judgment, appellant now brings this accelerated appeal. In three assignments of error, appellant maintains that the trial court erred in applying R.C. Chapter 2723 to the case, that appellant, in fact, satisfied R.C. 2723.03 by filing a civil complaint and that the trial court erred in denying appellant class certification.

{¶ 11} Appellee devotes a substantial portion of its brief arguing that the matter before us is not a final appealable order.

{¶ 12} An order of a trial court, pursuant to Civ.R. 23(C), determining that an action shall or shall not be maintained as a class action, is a final appealable order. R.C. 2505.02(B)(5). Consequently, appellee's argument is without merit.

{¶ 13} In her second assignment of error, appellant insists that she satisfied the notice requirements of R.C. 2723.03 when she instituted the action that underlies this appeal. This argument was never presented to the trial court. "Issues not raised and tried in the trial court cannot be raised for the first time on appeal." *Holman v. Grandview Hosp. & Med. Ctr.* (1987), 37 Ohio App.3d 151, 157, citing *Republic Steel Corp. v. Bd.*

of Revision of Cuyahoga Cty. (1963), 175 Ohio St. 179. Accordingly appellant's second assignment of error is not well-taken.

{¶ 14} Appellant's remaining assignments of error are related. The court concluded that the protest and notice requirements of R.C. 2723.03 are applicable in this matter. There was no evidence before the court that appellant had satisfied those requirements. Since satisfaction of those requirements would be necessary to represent any class seeking to recover the refuse fee, the court refused to certify a class.

{¶ 15} There are seven prerequisites necessary before a court may certify a case as a class action pursuant to Civ.R. 23: (1) there needs be an identifiable class and the definition of the class must be unambiguous; (2) the party named as representative of the class must be a member of the class; (3) the class must be so numerous that joinder of all members is impractical; (4) there must be common questions of law or fact to the class; (5) the claims or defenses of the representative party must be typical of the claims or defenses of the class; (6) the representative party must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met. Civ.R. 23(A), (B); *Warner v. Waste Mgmt.* (1988), 36 Ohio St.3d 91, 95, et seq.

{¶ 16} The issue in the present matter is whether appellant is a member of a class that is entitled to recovery.

{¶ 17} R.C. 2723.01 expressly authorizes courts of common pleas to enjoin the illegal levy or collection of "taxes and assessments" and to entertain an action to recover

them after having been collected. A claim to recover must be brought within one year of collection.

{¶ 18} In material part, R.C. 2723.03 provides:

{¶ 19} "* * * If a plaintiff in an action to recover taxes or assessments, or both, alleges and proves that he * * *, 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 [R.C. 2723.01 to 2723.05 inclusive,] such action shall not be dismissed on the ground that the taxes or assessments, sought to be recovered, were voluntarily paid."

{¶ 20} The written protest and notice provisions of R.C. 2723.03 are mandatory and failure to comply bars any action brought under R.C. 2723.01 to recover previously paid taxes and assessments. *Ryan v. Tracy* (1983), 6 Ohio St.3d 363, paragraph one of the syllabus.

{¶ 21} Even though appellant's complaint and original pleadings specifically sought to characterize the refuse fee as a "tax" she now argues at length that she is outside the requirements of R.C. Chapter 2723, because the monies she seeks to recover are not "taxes or assessments," but "fees." The trial court rejected this assertion, concluding that, although legally distinguishable from taxes, "fees" are within the meaning of the words "taxes and assessments" as used in R.C. 2723.03.

{¶ 22} "A fee is a charge imposed by a government in return for a service it provides; a fee is not a tax." *State ex rel. Petroleum Board v. Withrow* (1991), 62 Ohio

St.3d 111, 113, citing *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145. Neither of these cases implicate the application of R.C. 2723.03 nor its predecessors.

{¶ 23} English and American authorities from the early nineteenth century recognized a right to recover illegal taxes, assessments and certain fees in a common law action against the tax collector personally. The remedy was ordinarily the use of a writ of assumpsit for money had and received. *Paramount Film Distributing Corp. v. Tracy* (1962), 118 Ohio App. 29, 31. The antecedent of the present R.C. Chapter 2723 was enacted in 1856 to provide the taxpayer with a more adequate remedy. While broadening the grounds for recovery, the enactment added a one year statute of limitations to protect a collecting officer from a prolonged period of contingent liability. Id. at 32.

{¶ 24} Courts further circumscribed the remedy. Voluntary payment of even illegal taxes and assessments was held to constitute a waiver of the right to recover. *Pennsylvania RR. Co. v. Scioto-Sandusky Conservancy Dist.* (1956), 101 Ohio App. 61, 67. Nevertheless, it would eventually be held that payment of a tax to avoid a penalty, when made under protest and accompanied with a notice of an action to recover, is not voluntary and an action may be maintained. Id., citing *Western Union Telegraph Co. v. Meyer, Treas.* (1876), 28 Ohio St. 521. This ruling would find its way into R.C. 2723.03. *Pennsylvania RR. Co.* at 68.

{¶ 25} The statute is remedial, *Amherst Builders Assn. v. Amherst* (Mar. 7, 1979), 9th Dist. No. C. A. 2776, and should be broadly construed to effect its purpose. *Paramount Film Distributing* at 33. Historically, the statute's purpose was to provide

taxpayers with a method to recover taxes and assessments. In that respect, the statute should be construed broadly to encompass a wide range of levies which might reasonably be characterized as taxes or assessments.

{¶ 26} "In various legal contexts, distinctions can be drawn between license fees, inspection fees, tolls, tribute, tallage, impost, duty, custom, and even between a 'tax' and an 'excise.' Generally these distinctions have to do with problems of uniformity, permissible classification and discrimination, and concepts of the economic base of the exaction. But in broad and general usage the word 'taxes' includes all these." Id.

{¶ 27} Both the regulation and the ordinance refer to the refuse fees as taxes. Indeed, until it became inconvenient, appellant referred to the refuse fees as taxes. As the trial court noted, license "fees" have been previously held to be within the ambit of R.C. 2723.03. *Paramount Film Distributing*, supra, at 56-57; *Gottlieb v. S. Euclid*, 157 Ohio App.3d 250, 2004-Ohio-2705, ¶ 30. Given the breadth of interpretation that the statute is afforded, the apparent initial consensus that the fees were taxes and prior decisions that license fees were encompassed within R.C. 2723.03, we must concur with the trial court that the "fees" of which appellant complains are also within the statute.

{¶ 28} Accordingly, the trial court did not err in applying R.C. 2723.03 in this matter and appellant's first assignment of error is not well-taken. Since a class representative must be a member of the class and appellant has not established that she is one of those who satisfied R.C. Chapter 2723, the trial court did not err in certifying her requested class. As a result, appellant's third assignment of error is not well-taken.

{¶ 29} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. This matter is remanded to said court for further proceedings in conformity with this decision. Appellant is ordered to pay the court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE