

[Cite as *Estate of Mikulski v. Centerior Energy Corp.*, 2011-Ohio-696.]

[Please see original opinion at 2010-Ohio-6167.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94536

ESTATE OF JEROME MIKULSKI, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CENTERIOR ENERGY CORPORATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-490020

BEFORE: Celebrezze, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: February 17, 2011

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ON RECONSIDERATION¹

¹ The original announcement of decision, *Mikulski v. Centerior Energy Corp.*, Cuyahoga App. No. 94536, 2010-Ohio-6167, released December 16, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellants, Elzetta Mikulski and the executor of the estate of Jerome Mikulski, appeal the denial of class certification in a suit brought against appellees, FirstEnergy Corp. (FirstEnergy), successor by merger to Centerior Energy Corp., and certain subsidiaries (collectively “Centerior”), claiming Centerior misstated the nature of payments it made to shareholders from 1987 through 1997. Appellants allege Centerior represented that the payments to shareholders were dividends but, in fact, they substantially consisted of returns of capital. After a thorough review of the record and law, we remand the case for further consideration.

{¶ 2} Appellants assert that in the mid-1980’s, Centerior began improperly manipulating its corporate earnings to appear more profitable. Centerior made payments to shareholders that it purported were dividend payments, which caused appellants to pay taxes on those payments as ordinary income. Appellants argue these payments largely consisted of returns of capital, which were not taxable or taxable only at the lower rate applicable to capital gains. According to appellants, this resulted in substantial overpayment of state and federal taxes for many years.

{¶ 3} Appellants allege the misstatement occurred because of Centerior’s improper use of construction loan debt servicing costs in

decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A).

calculating its earnings and profits (“E&P”). The calculation of E&P is important because any payment to shareholders up to E&P is accounted as a dividend and taxed as ordinary income, but amounts that exceed E&P are classified as a return of capital, which reduces the shareholder’s basis in the stock — resulting in no current tax liability — or is taxed as a capital gain to the extent that the payments exceed the shareholder’s basis.²

{¶ 4} In December 2001, appellants filed four separate suits against Centerior and certain of its subsidiaries alleging claims of fraud and breach of contract and seeking class certification.³ Appellants defined the class in the instant case as “[a]ll common shareholders of * * * Centerior, and all beneficial owners of Centerior common shares, who in any year beginning in 1988 and continuing through 1998, inclusive, were issued a Form 1099-DIV or substitute therefor by Centerior or its agents reporting the tax status of distributions made by Centerior during any of the calendar years from 1987 through 1997, inclusive, and the communities comprised of them and their spouses, if any, excluding therefrom:

²This is a simplification of the tax concepts involved. The reduction of basis would also have further implications on the sale of the stock.

³The instant appeal comprises the third such suit. Appellants claim that four suits were necessary in order to encompass all the classes of shareholders injured by the systematic misstatement of payments to shareholders.

{¶ 5} “(i) common shareholders and beneficial owners who sold such shares (which had by that time been converted to shares of FirstEnergy) on or after January 1, 2005; (ii) shareholders identified by a federal taxpayer identification number other than a social security number, excepting nominees which held shares of Centerior common stock for or on behalf of beneficial owners who are identified for tax purposes by a social security number; (iii) Defendants, their predecessors and successors; (iv) the officers and directors of Defendants, their predecessors and successors; (v) counsel of record in this action and their respective parents, spouses and children; and (vi) judicial officers who enter an order in this action and their respective parents, spouses and children.”

{¶ 6} Centerior sought removal of the cases to federal court. Ultimately, the cases were remanded to the state court for lack of jurisdiction.

The instant cause proceeded to a three-day hearing on class certification, which began on January 15, 2009.

{¶ 7} The trial court issued its ruling on December 22, 2009, denying class certification, finding that “liability as to each plaintiff’s claim could not be ascertained on a class-wide basis in a single adjudication[.]” Appellants then filed the instant appeal.

Law and Analysis

Predominance

{¶ 8} Appellants first argue that “[t]he trial court abused its discretion in finding that resolution of the issue of Centerior’s liability in this case requires an individual-by-individual analysis of the claims of every class member, and in concluding therefore that the common issues of fact and law do not predominate.”

{¶ 9} The class action was envisioned, in part, to give collectively injured parties the ability to seek a common redress, but in aggregating claims into a single proceeding certain rights are given up. To that end, Civ.R. 23 sets forth a number of factors that must be met in order to grant class certification. As the trial court correctly stated, “[i]n Civ.R. 23(A), courts recognize two implicit requirements: (a) the identification of an unambiguous class, and (b) membership in the class by the representative plaintiff; and, four explicit requirements: (a) numerosity, (b) commonality, (c) typicality, and (d) adequacy of representation.” See *Warner v. Waste Mgmt. Inc.*, 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091. The trial court found that appellants met these criteria.

{¶ 10} The final requirement is that appellants must qualify under one of the three categories set forth in Civ.R. 23(B). Appellants claim they qualified as a Civ.R. 23(B)(3) class. Civ.R. 23(B)(3) requires that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. “The purpose of Civ.R.

23(B)(3) was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy. *Hamilton* [*v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 80, 1998-Ohio-365, 694 N.E.2d 442]. This provision of the rule was enacted to enable numerous persons who have small claims that might not be worth litigating in individual actions to combine their resources and bring an action to vindicate their collective rights. *Id.*” *Ritt v. Billy Blanks Ents.*, 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶56.

{¶ 11} As stated in *Hamilton*, “Civ.R. 23(B)(3) provides that an action may be maintained as a class action if, in addition to the prerequisites of subdivision (A), 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.” *Id.* at 79-80.

{¶ 12} In order to satisfy the predominance requirement, the appellant must show that the common questions of law and fact represent a significant aspect of the class and are capable of resolution for all members of the class in a single adjudication. *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 799, 589 N.E.2d 1348. The mere assertion that common issues of law or fact predominate does not satisfy the express requirements under the rule.

As the court in *Waldo v. N. Am. Van Lines, Inc.* (W.D. Pa. 1984), 102 F.R.D. 807, stated: “[It] is not simply a matter of numbering the questions in the case, labeling them as common or diverse, and then counting up. It involves a sophisticated and necessarily judgmental appraisal of the future course of the litigation * * *.” *Id.* at 812.

{¶ 13} Where the circumstances of each proposed class member need to be analyzed to prove the elements of a claim or defense, then individual issues predominate and class certification would be inappropriate. *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 314, 473 N.E.2d 822. The decision by a trial court to certify a class is reviewed for an abuse of discretion. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 2000-Ohio-397, 727 N.E.2d 1265.

{¶ 14} In the present case, the trial court determined that in order to prevail, appellants must demonstrate that they were actually damaged as an element of their breach of contract and fraud claims. Generally, difficulty incurred in calculating damages will not bar class certification. See *Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc.*, 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531, ¶62; *Hamilton* at 81. However, in Ohio, “one element common to the vesting of actions in tort and contract is the necessity of actual damages.” *Wolf v. Lakewood Hosp.* (1991), 73 Ohio App.3d 709, 716, 598 N.E.2d 160, citing *Midwest Specialties, Inc. v. Firestone*

Tire & Rubber Co. (1988), 42 Ohio App.3d 6, 536 N.E.2d 411; *Vasu v. Kohlers, Inc.* (1945), 145 Ohio St. 321, 332, 61 N.E.2d 707; Prosser & Keeton, *Law of Torts* (5th Ed. 1984) 165, Section 30, and 765, Section 110. See, also, *Mihelich v. Active Plumbing Supply Co.*, Cuyahoga App. No. 90965, 2009-Ohio-2248, ¶21 (“[A]ctual damages are an essential element of a breach of contract claim.”).

{¶ 15} We agree with the trial court that liability could not be determined on a class-wide basis for the class as defined by appellants. In order to prevail, the plaintiffs would have to show that they were actually damaged by Centerior’s misstatements. Centerior’s misstatements could only have been harmful if they affected the plaintiffs’ tax liability. Those class members who did not pay taxes in any relevant year in which they received a 1099-DIV from Centerior could not have suffered any actual damage from the misstatement. The individual question of whether the class member paid taxes and, if so, how Centerior’s misstatement affected their tax liability, would predominate over common questions. The trial court did not abuse its discretion by finding that, for the class as defined by appellants, individual questions predominate. *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151.

{¶ 16} Appellants challenge the factual basis for the trial court’s determination that the class would likely include shareholders who were not

injured. However, even appellants concede that some part of the class as defined below consisted of persons who did not pay taxes; they only dispute the size of this group. Even if this group is very small, however, the court did not abuse its discretion when it determined that the process of identifying these persons would predominate over the questions common to the class. Predominance is a qualitative inquiry, not a quantitative one. *Waldo v. N.Am. Van Lines, Inc.* (W.D. Pa. 1984), 102 F.R.D. 807.

Amendment of Class Definition

{¶ 17} In their third assignment of error, appellants assert that the trial court abused its discretion by failing to amend the proffered class definition to cure the deficiencies it found. Appellants cite to *Ritt* and argue that instead of denying class certification, the court should have amended the class definition.

{¶ 18} In *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, the Ohio Supreme Court noted that “when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of proof that does not focus on questions affecting only individual members. If a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis.” *Id.* at 430.

{¶ 19} Here, if appellants' allegations are true, there is the kind of generalized fraud the *Cope* and *Ritt* courts found to warrant class certification. Further, in *Hoang*, this court recognized that it is not the amount of damages that must be shown on a class-wide basis, but rather the fact that members of the class were damaged. *Id.* at ¶21.

{¶ 20} It is unclear from the record in this case whether redefining the class to include only those individuals who filed tax returns for any of the years in question would cure the predominance defect and preserve Centerior's due process rights. However, "any doubts a trial court may have as to whether the elements of class certification have been met should be resolved in favor of upholding the class." *Carder Buick-Olds* at ¶17. Appellants argue that any individuals who filed a return in any of the included years would suffer some damages. Based on this argument, a redefinition of the class could resolve the predominance problem because the fact of damage could be shown on a class-wide basis, leaving only the amount of damages to be determined. As previously noted, difficulty incurred in calculating damages will not bar class certification. *Id.* at ¶62.

{¶ 21} The trial court has already determined that the class is readily identifiable, and defining the class to include only those individuals who filed a tax return in any of the given years would appear to solve the predominance problem if this was indicative of injury. Because the record is unclear

regarding appellants' assertion that the fact of damage can be demonstrated simply by showing that a putative class member filed a tax return in any given year, this cause must be remanded to the trial court for further consideration.

{¶ 22} Judgment reversed and this cause is remanded for further consideration consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR