

[Cite as *Mikulski v. Centerior Energy Corp.*, 2010-Ohio-6167.]

[**Vacated opinion. Please see 2011-Ohio-696.**]

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:
AFFIRMED**

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: December 16, 2010

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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 affirm the decision of the trial court denying class certification.

{¶ 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. Appellants allege the misstatement occurred because of the way Centerior computed its earnings and profit (“E&P”) and its improper use of construction

loan debt servicing costs in calculating this figure. This is important because, in any given year, Centerior could not pay out more in dividends than its E&P. Anything paid out above E&P is classified as a return of capital, which is taxed as capital gain only to the extent the cumulative payments exceed the price the stockholder paid for the shares.¹

{¶ 3} 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.² 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:

¹This is a simplification of the tax concepts involved. A return of capital would only be taxable to the extent that the payment exceeds the cost basis of the stock. Tr. 404. However, the reduction of basis would also have further implications on the sale of the stock. Tr. 413.

²The 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.

{¶ 4} “(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.”

{¶ 5} 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.

{¶ 6} 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

{¶ 7} 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.”

{¶ 8} 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. Civ.R. 23(B)(3) requires that the questions of law or fact to the members of the class predominate over any questions affecting 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.

{¶ 9} 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.

{¶ 10} 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, labelling 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.

{¶ 11} Where the circumstances of each proposed class member need to be analyzed to prove the elements of the claim or defense, then individual issues would 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.

{¶ 12} In the present case, the trial court determined that in order to prevail, appellants must demonstrate actual damages 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.”).

{¶ 13} In the present case, the dominant issue is whether Centerior misled shareholders about the nature of payments they received, causing them an increased tax burden. In order for appellants to prevail, they must

show that the class suffered actual damages by Centerior's alleged misstatements. Whether a particular class member suffered damages as a result of any misstatement involves a complex analysis of the individual's tax returns for the years in question.³ The problem arises for those putative class members who paid no taxes in the years appellants argue the misstatements occurred. For them, no damages would be suffered. Centerior's expert witness, Robert Torok, analyzed Internal Revenue Service ("IRS") statistics and determined that for the years in question, between 19 and 25 percent of individuals that filed tax returns in the United States did not pay any tax. He concluded that a large proportion of the putative class would have suffered no harm, and therefore would be unjustly compensated by any recovery appellants might win. These class members would also fail to succeed in an individual suit against Centerior for fraud or breach of contract.

³Centerior argues that the tax returns from the years the individuals sold any stock are also required because the logical result of appellants' suit is a decrease in the basis of the stock and an increase in capital gains on its sale. However, because those years are considered "closed" by the IRS, no penalty can befall these putative class members unless they voluntarily seek to reopen the prior tax filings and amend their returns; an unlikely proposition.

{¶ 14} Appellants brought forth Robert Rosen who testified that more focused IRS statistics show that only a very small proportion of individuals who received dividend income had no tax liability for the years in question.

{¶ 15} Appellants liken this case to *Ritt*, supra, where this court affirmed class certification in part for a group of individuals who were enrolled in a “discount club” that charged an annual fee as part of an “up-sell” after ordering exercise videos by telephone. In regard to predominance, this court, relying on the Ohio Supreme Court’s decision in *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, determined that class certification was appropriate because whether the marketing scheme utilized by the defendants was misleading or deceptive does not require individualized testimony and can be established by common proof because standardized practices were at issue. *Id.* at ¶69. The alleged common scheme or fraud engaged in by the defendants in *Ritt* was found to predominate over individual issues. *Id.*

{¶ 16} Here, appellants allege a common scheme perpetrated on all members of the class. However, this case is more analogous to *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, where this court reversed class certification finding that, “[a]lthough all of the plaintiffs’ claims arise out of the same Customer Agreement and a ‘common course of conduct,’ the trial court ignores the fact that liability as to each

individual plaintiff's claims cannot be established in a single adjudication. Each of the plaintiff's claims requires proof of actual injury caused by the alleged wrongdoing before liability can be established." *Id.* at ¶19. In *Hoang*, a customer of E*Trade, an online financial stock brokerage firm, filed suit alleging that a series of system outages disabled E*Trade's service for all its customers and caused injury. In addressing predominance, the *Hoang* panel noted that "some of the plaintiffs have suffered damages as a result of E*Trade's system interruptions while others have not. Some E*Trade customers may not have been trading during any of the system interruptions, in which case they were not injured and have no claims. Customers that were trading may not have suffered any losses as a result of a system interruption, in which case they have no claims. The trading of customers who were affected by the system interruptions would have to be analyzed on a 'trade by trade' basis to determine what price the customer might have obtained had the system interruption not occurred.

{¶ 17} "This analysis is complex because it requires consideration of each individual transaction, other transactions in the same security that occurred in the market, and the market conditions at the time, including the number of orders waiting to be executed in the market, the size and type of those orders, and other factors. Further, some customers who were affected by the system interruptions may have actually benefited from the

interruption, in which case they have no claims.” Id. at ¶24-25. This court concluded, “because the issues relating to liability with respect to each individual plaintiff’s claims make it impossible to prove or disprove the claims of all the members of the class on a simultaneous, class[-]wide basis, class certification is inappropriate.” Id. at ¶28.

{¶ 18} In the present case, similar complex calculations must be done on an individual basis to determine if a putative class member has a valid claim.

Each individual’s tax returns must be analyzed to determine if any tax overpayment occurred. Appellants argue that a class-wide average damage model can be used to approximate the resultant damage done to the class as a whole. However, just as in *Hoang*, some included members would have no injury and no claim. Further, the damage model advanced by appellants had not been tested or peer-reviewed at the time of the certification hearing and was based, in part, on unlikely assumptions. Trying to determine, based on records that have most likely been destroyed,⁴ which class members actually overpaid taxes is a complex and daunting challenge for the court, which requires analysis of individual claims.

Manifest Weight

⁴The fact that people generally do not keep tax returns and other information indefinitely also hampers this analysis. The claims involved here date back some 20 years.

{¶ 19} Similar to their first assignment of error, appellants argue that “[t]he trial court abused its discretion (I) in finding that the class ‘would likely include shareholders who were not injured’ by Centerior’s misreporting of distributions as taxable dividends based on the supported testimony of one of [appellants’] experts, ‘Mr. Fingers,’ [sic] that ‘between 19 and 25 percent of the class members paid no tax,’ and (II) in failing to consider the contrary testimony and IRS evidence on the issue.”

{¶ 20} It is well established that when some competent, credible evidence exists to support the judgement rendered by the trial court, an appellate court may not overturn that decision unless it is against the manifest weight of the evidence. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. The knowledge a trial court gains through observing the witnesses and the parties in any proceeding (i.e., observing their demeanor, gestures and voice inflections and using these observations in weighing the credibility of the proffered testimony) cannot be conveyed to a reviewing court by a printed record. *In re Satterwhite*, Cuyahoga App. No. 77071, 2001-Ohio-4137, citing *Trickey v. Trickey* (1952), 158 Ohio St. 9, 13, 106 N.E.2d 772. In this regard, the reviewing court in such proceedings should be guided by the presumption that the trial court’s findings were indeed correct. *Seasons Coal Co.*, supra. As the Ohio Supreme Court has stated, “it is for the trial court to resolve disputes of fact

and weigh the testimony and credibility of the witnesses.” *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23, 550 N.E.2d 178.

{¶ 21} The trial court’s opinion incorrectly stated that Mr. Finger was appellants’ expert witness; however, the trial court properly summarized his testimony. Appellants claim the trial court’s mistaken belief that Mr. Finger was their witness caused the trial court to give their class certification motion less than fair consideration. Appellants also claim the trial court disregarded their evidence.

{¶ 22} The parties presented expert witnesses who addressed the percentage of individuals in the proposed class who would not be injured by any misstatement in the type of payment they received. Mr. Finger went through the years in question and provided figures, based on IRS statistics, ranging from 19 to 25 percent. Mr. Rosen also used IRS statistics, but only stated that a very small percentage of individuals who received dividend income would have no tax liability for the years in question. The trial court heard this evidence and was in the best position to weigh the credibility. Competent, credible evidence exists in the record supporting the trial court’s determination. The trial court listened to the evidence presented, weighed the challenges involved in administering this class, and determined that individual questions predominated. Typographical error notwithstanding, appellants have failed to show how this was an abuse of discretion.

Sua Sponte Amendment of Class Definition

{¶ 23} Appellants assert that the trial court abused its discretion by failing to amend the proffered class definition to cure the purported deficiencies it found.

{¶ 24} Appellants cite to *Ritt* and argue that instead of denying class certification, the court should have amended the class definition. *Ritt*, however, does not require a court to sua sponte amend a class definition; it merely encourages modification of an otherwise unidentifiable class. See, also, *Warner v. Waste Mgmt., Inc.* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091. Here the class does not fail for lack of identity, but because individual issues predominate.

{¶ 25} There is no easy fix to amend the definition to eliminate this problem. Such was the case in *Barber v. Meister Protection Svcs.*, Cuyahoga App. No. 81553, 2003-Ohio-1520. There, the class definition included “all persons who contracted with the defendants for security * * * services.” *Id.* at ¶31. The trial court created several subclasses to facilitate administration. *Id.* This court went on to note that “the purpose of the class action is to obviate the need to examine each class member’s individual position by establishing a generalized body of evidence sufficient to prove or disprove all of the issues presented by the class. Under the current class definition, this purpose is not achieved because the surrounding

circumstances of each individual must be examined in order to determine class membership. Simply, under the facts as presented, the claims of the individual plaintiffs are undoubtedly more properly suited for individualized litigation rather than class action.” (Internal citations omitted.) Id. at ¶39.

{¶ 26} Similar to *Barber*, the class definition is overly broad, and no easy adjustment to the class eliminates the predominance problem without creating additional problems such as identity. Simply excluding those shareholders who paid no taxes during the years in question creates a larger problem in identifying class members, with a similar analysis of each individual’s tax returns. The trial court did not abuse its discretion in denying class certification rather than adjusting the class definition. Appellants’ final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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