STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2019 CA 1696
AND
2019 CW 1277

CARL KRIELOW, GLENDON MARCEAUX, PHILLIP J. WATKINS, AND 44 SIMILARLY SITUATED PLAINTIFFS

VERSUS

LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY

Judgment Rendered: DEC 30 2020

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 612175

Honorable Janice G. Clark, Judge Presiding

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BEFORE: HIGGINBOTHAM, THERIOT, AND WOLFE, JJ.

HIGGINBOTHAM, J.

This appeal involves a dispute over the modification of a class definition in a previously certified class action that stems from the Louisiana Supreme Court's declaration that La. R.S. 3:3534 and La. R.S. 3:3544 (the "Rice Statutes") are unconstitutional. Also pending is a motion to dismiss the appeal and a writ application, both referred to this appeal panel for consideration.

BACKGROUND

The plaintiffs, Carl Krielow, Glendon Marceaux, Phillip J. Watkins, and 44 similarly situated individuals (collectively referred to as the "Rice Growers"), filed a petition for declaratory and injunctive relief on May 16, 2012. The Rice Growers' lawsuit challenged the constitutionality of the Rice Statutes that authorized the Commissioner of the Louisiana Department of Agriculture and Forestry (the "LDAF") to collect monetary assessments imposed on the Rice Growers. The collected funds were then paid to the Louisiana Rice Promotion Board and the Louisiana Rice Research Board (collectively referred to as the "Rice Boards") to promote the growth and development of the rice industry in Louisiana. The LDAF was the original named defendant and the Rice Boards were added as defendants in the Rice Growers' first amended petition. In 2013, the supreme court declared the Rice Statutes to be unconstitutional, as an improper delegation of legislative authority. We will not repeat the procedural history of the case leading up to that point; however, a thorough review of the case history and the legislative scheme behind the assessments is outlined in the supreme court's decision. See **Krielow v. Louisiana Dept. of Agric. & Forestry**, 2013-1106 (La. 10/15/13), 125 So.3d 384.

Following the supreme court's ruling, the Rice Growers amended their petition a second time and sought class certification for the restitution of the wrongful assessments common to all Rice Growers that sold rice in Louisiana from January 28, 1992, through 2014. The LDAF and the Rice Boards filed various

exceptions, including an exception of prescription. After a hearing in June 2014 and another hearing in October 2014, the trial court signed a judgment on June 16, 2015, establishing and certifying a twelve-year class period. Additionally, the trial court ruled on the exception of prescription, finding that all of the Rice Growers' claims for assessments paid more than ten years before the Rice Growers filed their lawsuit in 2012 had prescribed. Therefore, the trial court certified the class (hereinafter referred to as the "2015 Certification order") to include all Rice Growers who had paid assessments from May 16, 2002, through July 31, 2014.[1]

While the trial court's ruling on the 2015 Certification was pending, the Rice Boards urged an exception raising the objection of no cause of action and sovereign immunity from unjust enrichment claims. The trial court denied the Rice Boards' exceptions, and this court denied the Rice Boards' writ application and request for a stay. The supreme court, however, granted a writ in favor of the Rice Boards and instructed the trial court to reconsider its rulings in light of a supreme court decision, **Canal/Claiborne Ltd. v. Stonehedge Development, LLC**, 2014-0664 (La. 12/9/14), 156 So.3d 627, 640, whereby the court held that quasi-contractual claims for unjust enrichment do not fall within the waiver of sovereign immunity from suits in contract or tort against the state, a state agency, or a political subdivision. See **Krielow v. Louisiana Rice Promotion Board**, 2014-1604 (La. 4/17/15), 168 So.3d 390. As a result, the trial court issued a new judgment that acknowledged the Rice Boards' defense of sovereign immunity and dismissed the Rice Growers' unjust enrichment claims.

On August 3, 2015, the Rice Growers filed a third amending petition, alleging that their payment of the unconstitutional assessments amounted to their property being taken without due process of law. The Rice Growers also filed a motion for

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[1] In 2014, the Louisiana Legislature amended and reenacted the Rice Statutes to remove their unconstitutional aspect. See 2014 La. Acts No. 216, § 1 and 2014 La. Acts No. 345, §§ 1 and 2.

new trial due to inconsistent judgments on the unjust enrichment claims. The trial court issued another judgment dated May 4, 2016, clarifying that the Rice Growers' claims for unjust enrichment were dismissed with prejudice, but that the Rice Growers still had claims for the taking of their property without due process of law, conversion, and "any other claims available at law or in equity." The Rice Boards sought supervisory review of the trial court's ruling, and on July 21, 2016, this court ruled that the Rice Growers no longer have a cause of action for unjust enrichment or "any other claims." **Krielow v. Louisiana Rice Promotion Board**, 2016-0743 (La. App. 1st Cir. 7/21/16)(unpublished writ action), writ denied, 2016-1601 (La. 11/18/16), 210 So.3d 289. This court also noted that because the trial court had previously ruled that all actions delictual in nature had prescribed, this court was unable to ascertain what causes of action, if any, remained.

Almost a year later, on May 31, 2017, the Rice Growers filed a motion to amend the class definition and a renewed motion to approve the class notice and method of dissemination. They also filed a fourth amended petition on September 29, 2017, alleging that the assessments constituted an unconstitutional taking and a recurring intentional tortious act that constituted an unlawful conversion. On October 19, 2017, the trial court signed a judgment amending the class definition to include a much narrower three-year class period, beginning one year before the lawsuit was filed and ending two years after it was filed. Thus, the defined class (hereinafter referred to as the "2017 Certification order") included all Rice Growers' claims for paid assessments levied on proceeds from rice sold in Louisiana from May 16, 2011, through July 31, 2014. The trial court also approved the proposed class notice and method of dissemination related to the amended class definition. No party sought review of the 2017 Certification order.

In November 2018, the Rice Growers once again sought to amend the class definition, seeking to modify the 2017 Certification order to create 23 (one-year

each) subclasses to include all Rice Growers' claims for paid assessments levied on proceeds from rice sold in Louisiana from July 1, 1992, through July 31, 2014. This proposed definition of the class period was much broader than the prior 2017 Certification order, as it covered more than twenty years instead of the previously ordered three-year class period. The Rice Growers also requested that a new notice, notice plan, and notice administrator be approved by the trial court. In response, the LDAF and the Rice Boards filed a motion to decertify the class. The trial court heard the Rice Growers' motion to amend on January 7, 2019, and took the matter under advisement. A September 9, 2019 minute entry indicates the trial court ruled that the class definition, notice, and notice plan would be amended as requested (hereinafter referred to as the "2019 Certification order"). The trial court did not sign a written judgment regarding the 2019 Certification order until October 30, 2019.

In the meantime, while the motions to amend and decertify were pending under advisement, the trial court issued a case management schedule that called for the class notice to be sent to class members by July 12, 2019. The LDAF and Rice Boards objected, noting that the class definition was not yet established since the trial court had taken the most recent motion to amend under advisement. Therefore, the LDAF and Rice Boards contended that the 2017 Certification order still governed the class notice procedures. However, in an attempt to comply with the case management schedule, the Rice Growers proceeded to issue the class notice to the disputed expanded class that the trial court had not yet approved rather than the class approved in the 2017 Certification order. The Rice Boards filed a motion to stay the Rice Growers' issuance of the class action notice and operation of a website that contradicted the 2017 Certification order. The Rice Board further requested that the Rice Growers be found in contempt of the 2017 Certification order and be ordered

to send notice that the disputed and expanded class notice was legally defective and without court approval.

The Rice Growers did not directly file an opposition to the motion to stay. Instead, the Rice Growers filed a supplemental brief to address the issues raised in the Rice Boards' motion to stay. The Rice Growers contended that all of the issues could be cured with a trial court order granting the Rice Growers' motion to amend and expand the class definition and approval of the new class notice and notice plan. The trial court denied the Rice Boards' motion to stay in a minute entry on August 27, 2019. The LDAF and Rice Boards' motion to decertify was not addressed by the trial court. The LDAF and Rice Boards filed a writ application to seek review of the trial court's denial of their motion to stay. That writ was referred to this appeal panel. See **Krielow v. Louisiana Dept. of Agriculture and Forestry**, 2019-1277 (La. App. 1st Cir. 10/16/19)(unpublished writ action).

Additionally, the Rice Board filed a suspensive appeal from the written judgment containing the 2019 Certification order dated October 30, 2019, which was granted.[2] We note that the October 30, 2019 judgment also contained the trial court's denial of the Rice Boards' motion to stay. Because the Rice Boards timely filed an application for supervisory writ seeking review of the trial court's denial of the motion to stay, which, by order of this court is to be considered with this appeal, we will exercise our supervisory jurisdiction to review the merits of the motion to stay in this appeal of the 2019 Certification order.[3]

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[2] The LDAF also appealed the 2019 Certification order, but the record does not contain a signed order of appeal. Thus, the LDAF is not a party to this appeal. Nevertheless, we acknowledge throughout the opinion that the LDAF and the Rice Boards are the defendants in this matter.

[3] While the record reflects that the trial court prematurely signed the Rice Boards' order of appeal on October 3, 2019, once the trial court signed the judgment containing the 2019 Certification order on October 30, 2019, any previously existing defect created by the premature order of appeal was cured. See **Nomey v. State, Dept. of Highways**, 325 So.2d 732, 733 (La. App. 2d Cir. 1976) (a premature order of appeal should be given effect where the trial court judgment was subsequently signed in close proximity of time.) See also **Palmer v. Wren**, 361 So.2d 1206 (La. 1978).

The Rice Growers filed a motion in this court to dismiss the Rice Boards' suspensive appeal, urging that the 2019 Certification order merely modified the class definition and is not an appealable judgment. On March 3, 2020, the motion to dismiss was referred to this appeal panel for consideration.

The Rice Boards assert two assignments of error in this appeal:

1. The trial court erred in modifying the class definition to expand the commencement of the class period from one year prior to the filing of the lawsuit, to approximately twenty (20) years prior to the filing of the lawsuit.

2. The trial court erred in approving the amended class notice and notice plan.

Before addressing the assignments of error, we must initially consider the Rice Growers' underlying motion to dismiss the Rice Boards' suspensive appeal, because it concerns this court's subject matter jurisdiction.

MOTION TO DISMISS

Interlocutory judgments are appealable only when expressly provided by law. La. Code Civ. P. art. 2083(C). Louisiana Code of Civil Procedure article 592 expressly provides for appellate jurisdiction to entertain an appeal from class certification judgments. The Rice Growers urge that the 2019 Certification order merely modifies the constituency of the previously certified class, and as such, it is a non-appealable interlocutory judgment. Conversely, the Rice Boards argue that this court has appellate jurisdiction over the judgment containing the 2019 Certification order pursuant to La. Code Civ. P. art. 592(A)(3)(c) and (d).

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation may be made in search of the intent of the legislature. La. Civ. Code art. 9. When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole. La. Civ. Code art. 12. The starting point for interpretation of any statute must be the

language of the statute itself. **Barrilleaux v. NPC, Inc.**, 98-0728 (La. App. 1st Cir. 4/1/99), 730 So.2d 1062, 1064, writ denied, 99-1002 (La. 5/28/99), 743 So.2d 672. Where it is possible to do so, it is the duty of the courts in the interpretation of laws to adopt a construction of the provision in question that harmonizes and reconciles it with other provisions. **Id.** at 1065. The meaning of a statute is to be interpreted by looking to all sections taken together so that no section, clause, sentence, or word becomes superfluous or meaningless. **Bridges v. Brunt Construction, Inc.**, 2003-1383 (La. App. 1st Cir. 12/30/04), 898 So.2d 402, 406, writ denied, 2005-0299 (La. 4/8/05), 898 So.2d 1288. If a statute is not clear on its face, the meaning must be determined. Statutory interpretation is in the province of the judiciary. The paramount consideration in interpreting a statute is ascertaining the legislature's intent and the reasons that prompted the legislature to enact the law. **Id.**

The pertinent sections of La. Code Civ. P. art. 592, which are applicable to class actions with regard to appeals, provides as follows in subsection (A)(3):

> (c) If the court finds that the action should be **maintained** as a class action, it shall certify the action accordingly. If the court finds that the action should not be **maintained** as a class action, the action may continue between the named parties. In either event, the court shall give in writing its findings of fact and reasons for judgment provided a request is made not later than ten days after notice of the order or judgment. **A suspensive or devolutive appeal**, as provided in Article 2081 et seq. of the Code of Civil Procedure, **may be taken as a matter of right from an order or judgment provided for herein**.
>
> (d) **In the process of class certification**, or at any time thereafter before a decision on the merits of the common issues, **the court may alter, amend, or recall its initial ruling on certification and may enlarge, restrict, or otherwise redefine the constituency of the class or the issues to be maintained in the class action**. [Emphasis added.]

The Rice Growers urge that subsection (A)(3)(c) applies to class certification judgments, which are appealable, but not to judgments modifying, amending, or redefining the constituency of the class. The Rice Growers further aver that subsection (A)(3)(d) applies to modification judgments, and by its clear language, does not provide the right to appeal an interlocutory judgment modifying the

constituency of the previously certified class. The Rice Boards argue that this issue has been addressed by Louisiana courts and the jurisprudence allows appeals on class certification judgments that expand or restrict a class definition.

In support of their position, the Rice Boards rely on **Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc.**, 2007-146 (La. App. 3rd Cir. 12/12/07), 971 So.2d 1257, 1261, writ denied, 2008-0094 (La. 3/14/08), 977 So.2d 931, where the appellate court upheld an initial class certification, but remanded to the trial court "to address certain inadequacies in the class definition." On remand, the trial court denied the defendant's motion seeking to decertify the class and granted the plaintiffs' motion to broaden the class definition. The defendant appealed, and in response, the plaintiffs filed a motion to dismiss, arguing that La. Code Civ. P. art. 592 only permits appeals from initial certification orders, not definition modifications in an already-certified class. The Third Circuit noted that the plaintiffs were rigidly limiting the right to appeal the certification of a class, where La. Code Civ. P. art. 592 speaks in terms of whether the class action should be "maintained" and that the class certification process is framed as "fluid." **Id.** at 1262-63.

Pursuant to well-settled principles of statutory construction, we find that the Rice Growers are incorrect in reading the two subsections of La. Code Civ. P. art. 592 in isolation, rather than together in their entirety. There are many times during a class certification process when the trial court may opt to amend, alter, recall, enlarge, redefine, or restrict its initial ruling on certification. We find there is little justification for restricting a party's right to appeal class certification to the period immediately following the trial court's initial ruling. When a trial court is called upon to rule whether to change its initial class certification ruling, it is deciding whether the class action *should be maintained.* This is precisely the matter at issue in both subsections of La. Code Civ. P. art. 592. We agree with the Third Circuit that "[t]o hold otherwise would impede unnecessarily class action defendants' ability

to address potential errors in class certification, as errors concerning class certification cannot practically be corrected on appeal after trial on the merits" and "also would run contrary to Louisiana courts' longstanding policy favoring appeals." **Id.** at 1263.

Accordingly, we deny the Rice Growers' motion to dismiss the Rice Boards' suspensive appeal of the modification of the class definition from three years to over twenty years, which we find to be a significant and material alteration and expansion of the previously approved class certification. We further note that our ruling is in accord with federal class action law, Fed. Rule Civ. Proc. 23(f), upon which Louisiana's class action statute is largely derived. The Louisiana Supreme Court has stated that reference to cases that interpret the federal class action law is appropriate where there is a lack of Louisiana jurisprudence on a particular issue. See **Doe v. Southern Gyms, LLC**, 2012-1566 (La. 3/19/13), 112 So.3d 822, 828; **Banks v. New York Life Ins. Co.**, 98-0551 (La. 12/7/98), 722 So.2d 990, 994. Rule 23(f) authorizes interlocutory appeals of orders "granting or denying class-action certification," and in interpreting the language of Rule 23(f), the federal courts allow parties to appeal any order that "materially alter[ed] a previous order granting or denying class certification." **Driver v. AppleIllinois, LLC**, 739 F.3d 1073, 1076 (7th Cir. 2014). The **Driver** court noted that requiring a "material alteration" is "both practical and interpretive" insofar as without such a requirement, parties could seek review "whenever there was the slightest change in the class definition." **Id.** The Rice Boards aver that the trial court's modification most definitely constitutes a "material alteration" expanding the time period in the class definition by twenty years. We agree and, therefore, we exercise our appellate jurisdiction to review the judgment containing the 2019 Certification order that greatly expanded the time period in the class definition.

STANDARD OF REVIEW

A trial court has broad discretion in deciding whether to certify a class, and it has the same discretion to amend or reverse its decision at any time. **Mire v. Eatelcorp., Inc.**, 2004-2603 (La. App. 1st Cir. 12/22/05), 927 So.2d 1113, 1118, writ denied, 2006-0209 (La. 4/24/06), 926 So.2d 549. Class action certification is purely procedural. Thus, the likelihood of any plaintiff's success on the merits is not properly part of the certification process. **Id.** at 1117. The standard of review for class action certifications is bifurcated. The factual findings are reviewed under the manifest error standard, but the trial court's judgment on whether or not to certify the class is reviewed by the abuse of discretion standard. **Boudreaux v. State, Dept. of Transp. and Development**, 96-0137 (La. App. 1st Cir. 2/14/97), 690 So.2d 114, 119.

LAW AND ANALYSIS

A rigorous analysis must be used to determine whether a class action meets the requirements imposed by law, since this procedural device is an exception to the rule that litigation be conducted by and on behalf of the individually named parties. **Doe**, 112 So.3d at 829. The party seeking to maintain the class action has the burden of proving that all of the statutory class certification criteria have been satisfied. **Id.** at 830. The issue before us is whether the Rice Growers affirmatively demonstrated that the previously defined class period of three years (the 2017 Certification order) should be expanded to a 23-year class period with one-year subclasses (the 2019 Certification order). Conclusory allegations of a pleading alone are insufficient to establish the existence of or an element of a class. See **State v. Ford Motor Co.**, 2006-1810 (La. App. 1st Cir. 6/27/07), 965 So.2d 438, 442, writ denied, 2007-1580 (La. 10/12/07), 965 So.2d 405.

At the hearing on the Rice Growers' motion to amend the class definition and notice plan, the Rice Growers did not introduce any evidence to support the need to

expand or clarify the class definition for the class notice. There was no evidence of what the class notice or proposed website for potential class members would look like. The Rice Growers relied on their memorandum in support of the expanded class definition and counsel's argument at the hearing. The Rice Boards argued that the trial court should maintain the 2017 Certification order's class definition comprising three years, because allowing the class to be expanded to over twenty years would conflict with the prior rulings of the trial court, this court, and the supreme court. The Rice Boards contend that the Rice Growers have not shown newly discovered facts or a change in law that would support the expanded class definition.

Our review of the record reveals a series of court orders that were ultimately reflected in the 2017 Certification order of the three-year class period, as well as the trial court's approval of the class notice plan that accompanied the 2017 Certification order. The record is devoid of evidence of any change in facts, or change in the law of the case, or new facts or law that would support the drastically expanded class definition reflected in the 2019 Certification order. Thus, we conclude that the trial court abused its discretion in issuing the 2019 Certification order that redefined and expanded the class and approved a new class notice plan. While the trial court may modify the size and status of a class definition, the modification must be substantiated by detailed findings of fact. See **Pollard v. Alpha Technical**, 2010-0788 (La. App. 4th Cir. 8/12/11), 102 So.3d 71, 95, writ denied, 2011-1969 (La. 11/14/11), 75 So.3d 946. Unfortunately, that is what is lacking in the record before us. Furthermore, jurisprudence requires that some change of circumstance be shown before a class definition may be modified under La. Code Civ. P. art. 592(A)(d). Similar to evidence necessary to decertify a class, in order to modify a class definition, the trial court must consider whether a party has submitted new issues not previously considered by the trial court or whether there has been a material change

in the facts, law, or circumstances of the case. See **Guidry v. Dow Chemical Company**, 2016-0757 (La. App. 4th Cir. 3/1/17), 214 So.3d 78, 88-89, writ denied, 2017-0554 (La. 5/19/17), 221 So.3d 78. The record contains no ruling or evidence after the 2017 Certification order that would support expanding the class definition and notice plan to potential class members over a span of 23 years. Therefore, we are constrained to vacate the October 30, 2019 judgment containing the 2019 Certification order and approval of class notice plan and method of dissemination of the class notice.

Given our ruling vacating the trial court's 2019 Certification order and approval of the amended class notice plan, we find that the Rice Boards' writ application regarding the denial of their motion to stay is now moot. Therefore, we deny the writ referred for consideration with this appeal. This case is remanded for further proceedings.

CONCLUSION

For the assigned reasons, we deny the Rice Growers' motion to dismiss this appeal. Further, we vacate the October 30, 2019 judgment containing the 2019 Certification order, and we reinstate the previous 2017 Certification order contained in the judgment dated October 19, 2017, including the class notice and dissemination plan approved in that judgment. We also deny the Rice Boards' writ application, 2017 CW 1277, as moot. Additionally, we remand the case for further proceedings. Each party is to pay its own costs associated with this suspensive appeal, related writ, and motion to dismiss.

MOTION TO DISMISS DENIED; OCTOBER 30, 2019 JUDGMENT OF THE TRIAL COURT VACATED; OCTOBER 19, 2017 JUDGMENT OF THE TRIAL COURT REINSTATED; WRIT 2017 CW 1277 DENIED AS MOOT; AND CASE REMANDED FOR FURTHER PROCEEDINGS.