A. REMY FRANSEN, JR. AND ALLAIN F. HARDIN	*	**NO. 2016-CA-0844**
	*	
VERSUS		**COURT OF APPEAL**
	*	
THE CITY OF NEW ORLEANS, ET AL		**FOURTH CIRCUIT**
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-05170, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Rosemary Ledet, Judge Regina Bartholomew-Woods)

Allain F. Hardin
A. Remy Fransen, Jr.
FRANSEN & HARDIN, P.L.C.
814 Howard Avenue
New Orleans, LA 70113

COUNSEL FOR PLAINTIFFS/APPELLEES

James A. Brown
Shannon S. Holtzman
LISKOW & LEWIS, APLC
701 Poydras Street, Suite 5000
New Orleans, LA 70139

Lawrence Blake Jones
BLAKE JONES LAW FIRM
701 Poydras Street, Suite 4100
New Orleans, LA 70139

-AND-

Errol Conley
LAW OFFICE OF ERROL B. CONLEY
701 Poydras Street, Suite 4100
New Orleans, LA 70139

COUNSEL FOR DEFENDANTS/APPellants

JUDGMENT AMENDED IN PART, AND
JUDGMENT AFFIRMED AS AMENDED
MARCH 28, 2018

Defendants, Linebarger, Goggan, Blair & Sampson, LLP ("Linebarger"), United Governmental Services of Louisiana, Inc. ("UGSL"), and the City of New Orleans ("the City"), and Plaintiffs, A. Remy Fransen, Jr., and Allain F. Hardin, appeal the November 24, 2015 judgment of the trial court granting class certification. For the reasons that follow, we amend the judgment in part, and as amended, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This matter has been before this Court previously on a number of occasions. Plaintiffs filed their original petition in 2002, challenging City Ordinance No. 18637[1] ("the Ordinance"), which the New Orleans City Council passed on March 5, 1998. The Ordinance was enacted to provide for the collection of delinquent *ad valorem* taxes. In order to "encourage prompt compliance by the taxpayers" affected by the Ordinance, the Ordinance imposed a penalty of three percent of the amount of the tax due on the day the tax became delinquent, with interest accruing at a rate of one percent per month that the tax and penalty went unpaid. For all delinquent taxes for prior years not paid by April 1st of the following year, the Ordinance imposed an additional penalty of thirty percent "to defray costs of collection" if the City "referred the collection of the delinquent taxes, penalty and interest to an attorney or collection agent."

The Louisiana Supreme Court, in *Fransen v. City of New Orleans*, 2008-0076, 2008-0087, pp. 4-7 (La. 7/1/08), 988 So.2d 225, 230-32, set forth the relevant background to the matter now before this Court as follows: the City contracted with the law firm of Heard, Linebarger, Graham, Goggan, Blair, Pena &

[1] New Orleans Code of Ordinances, Chapter 150, Article II, sections 150-46.1 through 150-46.6.

Sampson, L.L.P. and UGSL for tax collection services under the Ordinance. A. Remy Fransen, Jr., and Allain F. Hardin filed suit against the City and law firm alleging that the Ordinance was unconstitutional, later adding UGSL as an additional defendant. The parties filed motions for summary judgment regarding the constitutionality of the Ordinance. The district court granted defendants' motion for summary judgment, finding the Louisiana Constitution did not limit the City's options in collecting delinquent *ad valorem* taxes. On appeal, this Court reversed. *Fransen v. City of New Orleans,* 2006–1325 (La.App. 4 Cir. 10/3/07), 970 So.2d 1. Defendants applied for supervisory writs to the Louisiana Supreme Court, which granted writs, *Fransen v. City of New Orleans*, 2008-0076, 2008-0087 (La. 2/22/08), 976 So.2d 1275, and ultimately declared the scheme unconstitutional:

> [W]e find Ordinance No. 18637, codified in the New Orleans Code of Ordinances, Chapter 150, Article II, §§ 150–46.1 through 150–46.6 unconstitutional with respect to any provisions that permit the City to place delinquent ad valorem property taxes on immovables for collection with an attorney or agent and/or that permit the City to proceed in any manner other than by the constitutionally mandated manner of tax sales to collect delinquent ad valorem property taxes on immovables. Article VII, § 25(A) of the Louisiana Constitution prohibits methods or proceedings other than tax sales to collect delinquent ad valorem property taxes. We further find the Ordinance, as codified, unconstitutional to the extent it imposes penalties, other than interest, upon delinquent ad valorem property taxes on immovables. The constitutional provision relating to property taxation permits the governmental subdivision to *impose* only the taxes, interest and costs in proceeding to sell the property for the delinquent ad valorem taxes.

Fransen, 2008-0076, 2008-0087 at pp. 24-25, 988 So.2d at 242.

After several more years of litigation, the district court conducted a class certification hearing over three days, May 26 through 28, 2015. Plaintiffs sought to

certify a class consisting of individuals who paid the unconstitutional fees and penalties between March 6, 1998, and May 6, 2006.

Plaintiffs relied largely on a spreadsheet produced by Walter O'Brien, Finance Operations Manager for the City. Mr. O'Brien testified that he works in the City's treasury department on property tax issues. The spreadsheet covered tax data from May 1, 1998, to April 30, 2005. Mr. O'Brien testified that the spreadsheet contained multiple pieces of data, to wit: the type of tax assessed, the bill number associated with the tax, the tax year, the existence of liens on a particular property, the date payments were received, the amount of *ad valorem* tax paid, the amount of the City penalty paid, the amount of collection agency charges, the name of the assessed owner, and the address. In total, the spreadsheet contained 249,913 entries.

Mr. O'Brien explained that the payments reflected on the spreadsheet could be broken down into taxes, interest, and penalties. However, he noted that the column reflecting the three percent penalty paid to the City was "not purely penalty" but "primarily penalty." He explained that the actual three-percent penalty paid could possibly be determined if the "proper records are still available." He also testified that the City kept track of the thirty-percent payments made to Linebarger and UGSL because the City made the payments to those parties.

On cross-examination, Mr. O'Brien conceded that the column reflecting the "assessed owner" did not necessarily indicate the party to ultimately pay the delinquent tax, interest, and penalties, and that the spreadsheet contained no column identifying the individual actually paying. The spreadsheet lacked additional information, such as whether any checks sent to the City cleared, whether any payments were refunded, or whether payments were made under

protest. Ultimately, despite the shortcomings of the spreadsheet highlighted by defense counsel, the district court admitted the document into evidence.

Plaintiffs also called Li Downing, a Certified Public Accountant, who analyzed the spreadsheet and was admitted as an expert in the areas of data analysis and claims processing. For the period of May 1, 1998, through April 29, 2005, Ms. Downing testified that the City collected 9.89 million dollars in penalties, and Linebarger and UGSL collected 22.4 million dollars in collection fees. Plaintiffs attempted to address perceived issues with the document, as Ms. Downing explained that only a tiny fraction of the payments made could be attributed to payments made by individuals other than the "assessed owner," such as succession proceedings or estate sales.

On cross-examination, Ms. Downing acknowledged that the City, as an "assessed owner," was the top City penalty payer according to the spreadsheet. She further acknowledged that nearly seventy-four percent of payments made, which included the combined City penalty and Linebarger and UGSL collection fees, totaled less than one-hundred dollars. On redirect, Ms. Downing suggested that information regarding the penalties paid could be parsed out from the spreadsheet.

Defendants called their own expert, a Certified Public Accountant, Holly Sharp, who was retained to assess the reliability of the spreadsheet. Based on her analysis, she concluded that the report was "not reliable to the persons or entities who paid the collection penalties." In support of her conclusion, she noted that the spreadsheet did not identify the proper taxpayer under several circumstances, such as when properties were purchased via tax sale or when bankruptcy trustees paid penalties in lieu of assessed owners. She further noted that a number of the assessed owners listed a single name followed by "*et al*," suggesting it would be

difficult to determine who, among several owners, paid what amounts of the penalties and fees. She testified that the spreadsheet included instances of penalties being paid despite there being no tax due. She further explained that banks do not retain canceled checks beyond seven years, and that the Internal Revenue Service retains back tax returns for only the previous six years, presumably presenting difficulties of proof where such documentation would be required.

Plaintiffs additionally called a number of potential class representatives. None testified that they paid the taxes, interest, and penalties "under protest," nor did any specifically testify to rendering payment to any entity other than the City. By judgment dated November 24, 2015, the district court defined the class as follows:

> Those persons and/or entities or their heirs, successors or assigns, who pursuant to New Orleans City Ordinance No. 18637 were assessed city penalties and collection/penalty fees by defendants and who paid these unconstitutional penalties and collection/penalty fees from April 17, 2000 through February 21, 2002.

The district court granted class certification "as to plaintiffs' claims against defendant, The City of New Orleans." Additionally, the district court denied class certification as to Linebarger and UGSL on the issue of excessive legal fees, and granted certification as to the issue of Linebarger and UGSL being debt collectors.

In its reasons for judgment,[2] the district court first explained its rationale for limiting the class, noting that between April 17, 2000, and February 21, 2002, there existed "no applicable prescriptive period within which" to protest enforcement of any provision of the tax law (that is, "payment under protest" as to penalties).

[2] Although it is a settled rule that an appeal is taken from a final judgment not from the trial court's reasons for judgment, it is not improper for an appellate court to consider the reasons for judgment in determining whether the trial court committed a legal error. *Winfield v. Dih*, 2001-1357, p. 8 (La.App. 4 Cir. 4/24/02), 816 So.2d 942, 948 (citing *Donaldson v. Universal Eng'g of Maplewood, Inc.,* 606 So.2d 980, 988 (La.App. 3 Cir.1992).

Specifically, prior to April 17, 2000, La. R.S. 47:2110(A)(2) required "payment under protest" as to "any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto." Payment under protest required that the taxpayer file suit for recovery of the amounts paid within thirty days of the City's receipt of notice that such payment was being made under protest. After April 17, 2000, the same statute was amended, but removed the language "or the enforcement of any provision of the tax laws in relation thereto[,]" thereby removing the requirement that penalties be paid under protest and suit filed within thirty days. Thereafter, on February 21, 2002, the City Council adopted Ordinance No. 20556, requiring that penalties be paid under protest no later than May 1st of the year in which the penalty was imposed, and filing suit within thirty days of payment.

The court then addressed the statutory requirements for class certification as set forth in La.C.C.P. art. 591. First, as to numerosity, regarding claims against the City, the court noted testimony by Ms. Li Downing that the City's records could identify roughly 31,492 potential plaintiffs who paid the unconstitutional penalties between April 17, 2000, and February 21, 2002. The court also noted the absence of proof as to those taxpayers who paid under protest prior to April 17, 2000. As to Linebarger and UGSL, the court found "no evidence" for plaintiffs' claim of excessive legal fees, but did find numerosity met as to the issue of their status as "debt collectors." The court also found a common question of law and fact of whether the "delinquent taxpayers all paid penalties under an unconstitutional Ordinance." However, the court found no such common question as it related to the issue of excessive legal fees collected by Linebarger and UGSL. Next, the court found the claims of Thomas Monahan, III, and Sandra Monahan, who "paid

delinquent taxes and penalties within the relevant time frame," to be "typical of those of the potential class members" and that they would "be able to devote the time and energy needed of a class representative." As to counsel's ability to represent the class, the court held that both Mr. Fransen and Mr. Hardin "have vigorously conducted this litigation for a period of several years" and "have demonstrated the competence, experience, and qualifications necessary for counsel of the potential class." Lastly, the court held that the issues relevant to the class predominated over those affecting only individual members, and that class action was superior to other forms of litigating the claims.

On April 14, 2016, the district court denied Plaintiffs "Motion to Amend and/or for New Trial."

Plaintiffs and Defendants appealed the November 24, 2015 judgment of the district court, both raising numerous assignments of error. Plaintiffs further appealed the April 14, 2016 judgment.

STANDARD OF REVIEW

This Court, in *Gudo v. Administrators of Tulane Educ. Fund*, 2006-1515, pp. 3-4 (La.App. 4 Cir. 9/5/07), 966 So.2d 1069, 1073, explained the applicable standard of review as follows:

> The central issue for this Court to address is whether the trial court erred in granting the motion for class certification. The standard of review of class certification decisions is a bifurcated one. *Watters v. Department of Social Services,* 2005-0324, p. 3 (La.App. 4 Cir. 4/19/06), 929 So.2d 267, 272. A trial court's decision concerning class certification is reviewed under both a manifest error and an abuse of discretion standard. *Parry v. Administrators of Tulane*

Educational Fund, 98-2125, p. 3 (La.App. 4 Cir. 6/30/99), 740 So.2d 210, 212; *Adams v. CSX Railroads,* 92-1077 (La.App. 4 Cir. 2/26/93), 615 So.2d 476. The factual findings are reviewed under the manifest error/clearly wrong standard; the trial court's discretionary judgment on whether to certify the class or not is reviewed by the abuse of discretion standard. *Id.* (citing *Boudreaux v. State, Dep't of Transp. and Dev.,* 96-0137, p. 5 (La.App. 1 Cir. 2/14/97), 690 So.2d 114, 119). These two standards of review correspond with the two-step process for determining whether to certify a class action. First, a trial court must find a factual basis exists to certify an action as a class action. Second, the court must exercise its discretion in deciding if certification is appropriate. *Singleton v. Northfield Ins. Co.,* 2001-0447, p. 7 (La.App. 1 Cir. 5/15/02), 826 So.2d 55, 61.

ANALYSIS

Class Action Procedure

The class action vehicle is a nontraditional procedure meant to allow a representative party or parties to stand in the shoes of similarly situated parties to resolve issues of common interest when joinder of all parties would be impracticable. *Brooks v. Union Pac. R. Co.*, 2008-2035, p. 9 (La. 5/22/09), 13 So.3d 546, 554. Such procedure establishes *res judicata* effect as to those common issues shared by a representative party and those other parties similarly situated. *Id.* The Supreme Court, in *Brooks*, explained:

> The determination of whether a class action meets the requirements imposed by law involves a rigorous analysis. The trial court "must evaluate, quantify and weigh [the relevant factors] to determine to what extent the class action would in each instance promote or detract from the goals of effectuating substantive law, judicial efficiency, and individual fairness." *McCastle v. Rollins Environmental Services of Louisiana, Inc.,* 456 So.2d 612, 618 (La.1984). In so doing, "the trial court must actively inquire into every aspect of the case and should not hesitate to require showings beyond the pleadings." *Id.* (Citing *Stevens, v. Board of Trustees of Police Pension Fund of City of Shreveport,* 309 So.2d 144, 152 (La.1975)). "[I]f there is to be an error made, it should be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require." *Id.* at 620 (citing La. C.C.P. art. 593.1(B); *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir.1968); 1 H. Newburg, Class Actions, § 1160(e) (1977)).

2008-2035 at p. 10, 13 So.3d at 554.

The only purpose of a class action hearing is to determine "whether the case is one in which the class action procedural device is appropriate." *Watters v. Dep't of Soc. Servs.*, 2005-0324 to 2005-0326, p. 7 (La.App. 4 Cir. 4/19/06), 929 So.2d 267, 273. "Thus, 'the court is not concerned with whether the plaintiffs have stated a cause of action or the likelihood that they ultimately will prevail on the merits." *Watters*, 2005-0324 to 2005-0326 at p. 7, 929 So.2d at 273-74 (citing *Munsey v. Cox Communications of New Orleans, Inc.*, 2001-0548, p. 5 (La.App. 4 Cir. 3/20/02), 814 So.2d 633, 636).

Our jurisprudence holds that a "precise definition of the class . . . is essential in a class action proceeding[,]" meaning that the class is definable "objectively in terms of ascertainable criteria." *Anderson v. City of New Orleans*, 2016-1013, pp. 7-8 (La.App. 4 Cir. 6/14/17), 222 So.3d 800, 806. When members of the class are definable, potential class members can "'readily determine'" whether they belong to the class, and the court may render conclusive judgments as to all such members. *Anderson,* 2016-1013 at p. 8, 222 So. 3d at 806 (quoting *Chalona v. Louisiana Citizens Prop. Ins. Corp.*, 08-0257, p. 9 (La. App. 4 Cir. 6/11/08), 3 So.3d 494, 502.

In order to pursue a class action, a plaintiff seeking to maintain the class bears the burden of proving the action satisfies all of the statutory requirements of La.C.C.P. art. 591(A), to wit: numerosity, commonality, typicality, adequate representation, and definability.[3] *Cooper v. City of New Orleans*, 2001-0115, pp. 2-3 (La. 2/14/01), 780 So.2d 1158, 1160 (superseded by statute on other grounds).

[3] Specifically, La.C.C.P. art. 591(A) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all," but only when:

Thirty Day Prescriptive Period and Interruption

Plaintiffs concede that the City, as to itself, may validly impose what Plaintiffs describe as a "pay to play" requirement in schemes such as that presented here. In *Jackson v. City of New Orleans*, 2012-2742, 2012-2743, p. 25 (La. 1/28/14), 144 So.3d 876, 895 (citations omitted), the Louisiana Supreme Court explained:

> To ensure a state's ability to engage in sound fiscal planning, the U.S. Supreme Court has approved the use of post-deprivation relief in taxation disputes, as long as the post-deprivation relief is meaningful, such as when a refund is provided to a successful taxpayer. A state may impose various procedural requirements on actions for post-deprivation relief, such as: (1) that only taxpayers paying under protest would be entitled to relief, and (2) that actions could be subject to short statutes of limitation.

Such is the case here; in order for the City to maintain and plan its budget, those who wished to challenge the tax, interest, and penalties were required to "pay under protest" and file suit within thirty days to recover the payment. Payment under protest serves to put the City on notice that the funds may need to be returned to the taxpayer, and the City must hold the funds in an escrow account until the dispute is resolved. Plaintiffs argue that the same considerations do not apply to private entities, such as Linebarger and UGSL. However, Appellants

> (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.
> (4) The representative parties will fairly and adequately protect the interests of the class.
> (5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case. This prerequisite shall not be satisfied if it is necessary for the court to inquire into the merits of each potential class member's cause of action to determine whether an individual falls within the defined class.

acknowledged in their appellant brief that "[t]his particular issue was not resolved in the lower court" during the class certification hearing. Indeed, as Defendants point out, this is because Plaintiffs never raised this particular argument before the trial court at any time during the class certification hearing, or in their pre- or post-hearing motions. In a similar vein, Plaintiffs additionally alleged denial of due process and access to the courts. These arguments were also not argued at the district court level.

In any event, we find that this Court resolved this issue in *Cooper*, *supra*. In *Cooper*, plaintiff sought review of a judgment denying his application for class certification. 2001-0115 at p. 1, 780 So.2d at1159. As in this case, plaintiff paid the tax, interest, City penalty fees, and thirty percent collection fee. *Id.* The trial court, in denying class certification, found that only fourteen taxpayers had met the requirement of paying the tax under protest as required by La.R.S. 47:2110. *Cooper*, 2001-0115 at p. 5, 780 So.2d at 1161. Plaintiff argued that the district court erred "because none of the provisions of the statute refer to tort claims against a private law firm." *Id.* This Court ruled and reasoned as follows:

> We find no merit in any of Mr. Cooper's arguments on this issue. By its own terms, LSA–R.S. 47:2110(A) applies to "**any person** resisting the payment of the amount of any tax found due, **or** the enforcement of any provision of the tax laws in relation thereto." It is uncontested in this case that Mr. Cooper is not "resisting the payment of the amount of any tax found due." However, the statute also applies alternatively to "the enforcement of any provision of the tax laws in relation to" the payment of any tax found due. Thus, the only question before this court is whether City Ordinance 18637 is a "provision of the tax laws in relation to" the payment of any tax found due.
>
> . . .
>
> As revealed by the purpose statement above, City Ordinance 18637 clearly qualifies as a "provision of the tax laws in relation to" the payment of any tax found due. Accordingly, we find that any

> person wishing to challenge City Ordinance 18637 must comply with the provisions of LSA–R.S. 47:2110.

Cooper, 2001-0115 at pp. 6-7, 780 So.2d at 1161-62 (emphasis in original). We find that we are bound by this Court's ruling in *Cooper*, such that any person resisting the payment of any enforcement provisions related to the payment of a disputed tax—even those administered by a private entity—must pay under protest to preserve his or her rights. Furthermore, based on this conclusion, we find that the district court properly limited the class to only those individuals who paid the unconstitutional penalties and fees between April 17, 2000 and February 21, 2002, as payment under protest was not required as to those penalties and fees only during that period. Lastly, we find that Defendants correctly point out that Plaintiffs' theory of "unjust enrichment" to expand the class fails by the very terms of La.C.C. art. 2298, which declares such remedy as "subsidiary and . . . not . . . available if the law provides another remedy." Indeed, after February 21, 2002, a remedy existed via the "pay under protest" requirements established by the City Council's Ordinance No. 20556.

We are not convinced by Plaintiffs' argument that the filing of the instant lawsuit in 2002 served to interrupt the prescriptive period. Plaintiffs rely on La.C.C.P. art. 596(A), which states that "[l]iberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein." Again, we find that the Louisiana Supreme Court has resolved this issue in the context of an ordinance very similar to the Ordinance. Though it did not address the particular interruption argument raised

herein, the Supreme Court discussed "payment under protest" in depth in *Jackson*, 2012-2742, 2012-2743 at pp. 22-26, 144 So.3d at 894-96:

> The district court in this case granted the City's exception of no cause of action as to Mr. Jackson and Mr. Hardin, dismissing these plaintiffs, for failing to comply with the applicable law requiring payment under protest in order to contest the imposition of penalties and collection fees assessed on these plaintiffs' delinquent ad valorem taxes. The district court also granted the exception of no cause of action as to, and dismissed, a portion of plaintiff KSD's claims (disputing 2008 tax penalties and collection fees) for KSD's failure to timely assert a protest as to these penalties and fees. In so ruling, the district [court] reasoned that the plaintiffs were required to comply with the statutory framework established for a taxpayer to protest sums imposed in connection with delinquent ad valorem taxes and that, insofar as the plaintiffs failed to do so, they were without a cause of action to contest the sums that were not paid "under protest."
>
> . . .
>
> Clearly, the plaintiffs . . . in this case failed to follow the legal requirements necessary to preserve their right to contest the legality of the imposition of delinquent ad valorem penalties and collection fees. Yet, the plaintiffs contend that the payment-under-protest laws should not apply to the unconstitutional penalties and fees at issue herein. We find no merit in this assertion.
>
> . . .
>
> City Code Section 150–49(a)(3) provides that, if the taxpayer follows the procedures set forth and prevails in his/her suit, the taxing unit shall refund the amount held in the escrow account to the claimant. Also, LSA–R.S. 47:2134(C)(4) states that if the taxpayer prevails, the collecting officer or officers shall refund the disputed amount to the taxpayer, with interest at the actual rate earned on the money paid under protest in the escrow account during the period, from the date such funds were received by the collecting officer to the date of the refund. From these provisions, it is evident that the *McKesson* requirement of meaningful post-deprivation relief, in a payment-under-protest procedure, is met by this statutory scheme, which provides a successful plaintiff/taxpayer with a refund, with interest, of illegally collected sums.

As in *Jackson*, Plaintiffs here argue "that the payment-under-protest laws should not apply to the unconstitutional penalties and fees at issue herein." Our Supreme Court found such an argument to have no merit. Here, the class is defined, in part,

temporally. That is, only those parties who paid the unconstitutional penalties and fees between April 17, 2000, and February 21, 2002, qualify as class members. The filing of the instant lawsuit cannot interrupt the prescriptive period for individuals who do not fall within the class definition, and none of the proposed class representatives presented at the hearing testified to having paid under protest, let alone having so paid after February 21, 2002. We find these assignments of error to be without merit.

Judgment on the Merits

Louisiana Code of Civil Procedure art. 592(A)(3)(e) provides that "[n]o order [certifying a class] contemplated in this Subparagraph shall be rendered after a judgment or partial judgment on the merits of common issues has been rendered against the party opposing the class and over such party's objection." In light of the Louisiana Supreme Court's decision in *Fransen v. City of New Orleans*, 2008-0076, 2008-0087 (La. 7/1/08), 988 So.2d 225, finding the Ordinance unconstitutional, Defendants submit the district court's certification of a class runs afoul of the clear language of article 592(A)(3)(e).

In *Duhe v. Texaco, Inc.*, 1999-2002, pp. 8-10 (La. App. 3 Cir. 2/7/01), 779 So.2d 1070, 1077-78, plaintiffs filed a motion for partial summary judgment, which the trial court granted, declaring the defendants to be a "single business entity." Defendants fought class certification after that judgment on the same basis as that presented here. *Id.* In denying defendants' claim in this regard, the Third Circuit Court of Appeal explained:

> The phrase "judgment on the merits," partial or total, means a judgment which would have the effect of res judicata; a judgment based on legal rights as distinguished from matters of practice, procedure, jurisdiction, or form, or preliminary or merely technical points. *See* 23 Words and Phrases *Judgment on the Merits* 430 (1967

> ed. 2000 Supp.). We find that the ruling did not lessen the Plaintiffs' ultimate burden of proof in the case, and did not concern the merits. It was not a judgment or partial judgment on the merits of common issues.

Duhe, 1999-2002 at p. 10, 779 So.2d at 1078.

Class actions are often complex matters, and years of litigation pass before the trial court conducts a hearing to define the class according to the criteria set forth in La.C.C.P. art. 591(A). During that time, there are likely to be a number of judgments on issues that will determine how the litigation proceeds, and judicial efficiency may dictate that a hearing on class certification should and must wait. Though of a different procedural posture, the Second Circuit Court of Appeal's reasoning in *Clark v. Shackelford Farms P'ship*, 38,749 (La.App. 2 Cir. 8/18/04), 880 So.2d 225, is instructive. In *Clark*, the Second Circuit decided whether a motion for summary judgment could be decided *prior to* class certification. *Clark*, 38,749 at p. 2, 880 So.2d at 227. The Court placed special emphasis on La.C.C.P. art. 592(E), describing the article as giving the district courts "very broad authority to determine all matters which 'affect the general order of proceedings.'" *Id.* The Court continued:

> Whereas there is abundant jurisprudence standing for the proposition that it is improper for the trial court to consider the merits of a case ***in*** a class certification hearing we find no jurisprudence that holds that it is improper for the trial court to consider the merits of the case ***prior to*** a class certification hearing. Therefore, although it would be erroneous for a trial court to look to the merits of the underlying action as one of the factors in making its determination about whether a class should be certified, it would not be improper to do so in the case *sub judice,* because there has not been a class certification hearing.
>
> A decision on the merits may render all class certification issues moot; therefore, a trial court may properly refuse to entertain motions for class certification and related discovery until dispositive motions have been resolved. *See Wade v. Kirkland,* 118 F.3d 667, 670 (9th Cir.1997) (holding that "in some cases, it may be appropriate in the

> interest of judicial economy to resolve a motion for summary judgment or motion to dismiss prior to ruling on class certification"). Moreover, the merits of a case have no impact on whether a class may be properly maintained, and a court may decide the merits of a case regardless of whether it is certified as a class action. *Ladd v. Equicredit Corp. of America,* 2001 WL 175236 (E.D.La.2001); *Floyd v. Bowen,* 833 F.2d 529, 534-35 (5th Cir.1987).

Clark, 38,749 at pp. 3-4, 880 So.2d at 228 (footnote omitted).

The First Circuit Court of Appeal, relying on *Clark*, reached the same result in *Cooper v. CVS Caremark Corp.*, 2014-1797, pp. 10-11 (La.App. 1 Cir. 6/17/15), 176 So.3d 422, 428:

> We initially note that the trial court made this determination without ruling on the motion to certify the proceeding as a class action. However, a trial court may decide the merits of a case regardless of whether it is certified as a class action. *Clark v. Shackelford Farms Partnership,* 38,749 (La.App. 2 Cir. 8/18/04), 880 So.2d 225, 228. Consequently, the court may consider and grant a defendant's motion for summary judgment prior to a class certification hearing. *Clark,* 880 So.2d at 228.

In the case before us, similar interests were at play. The constitutionality of the Ordinance was dispositive. To determine the class prior to a determination of the Ordinance's constitutionality would have been a waste of judicial resources had the Supreme Court ultimately upheld the decision of the district court in *Fransen v. City of New Orleans*, 2008-0076, 2008-0087, 988 So.2d 225 (La. 7/1/08). That is, three days' worth of hearings to determine an ascertainable, definable class would have been wasted if the Supreme Court decided the eventual class members had no basis to recover penalties and collection fees. Furthermore, we do not find that the decision in *Fransen* "lessen[s] the Plaintiffs' ultimate burden of proof in the case[,]" *Duhe*, 1999-2002 at p. 10, 779 So.2d at 1078, as Plaintiffs nonetheless bear the burden of proving that the class members paid unconstitutional penalties

and fees and that Defendants must return those illegally obtained funds. Accordingly, we find this assignment of error lacks merit.

Requirements of La.C.C.P. art. 591

Defendants submit that the district court's judgment is inconsistent with the requirements of La.C.C.P. art. 591. Specifically, Defendants suggest there no longer exist "questions of law or fact common to the members of the class," as the Supreme Court has already determined the Ordinance to be unconstitutional.

Furthermore, Defendants argue that individual issues predominate in that evidence that one class member paid penalties and fees does not establish proof that any other member paid penalties and fees. Defendants submit that the spreadsheet further fails to provide support for other individualized questions, such as who paid the delinquent taxes and associated penalties and fees, or how much was paid and on what date. Defendants suggest they "collected back taxes in thousands of bankruptcy proceedings," and that "[d]etermining whether payments attributed to penalties collected in bankruptcies were paid on behalf of persons who have any rights to reimbursement would require scrutiny of the facts of thousands of bankruptcy case records." A similar claim is raised as to tax sale properties, the payment of taxes for which is attributed to the assessed owner, not the tax sale purchaser.

Defendants additionally attack the district court's findings of predominance and superiority, arguing that the finding of unconstitutionality of the Ordinance necessarily eliminates the prospect of future inconsistent judgments for those with legitimate claims. Defendants argue, instead, that each claimant will be required to litigate numerous individual issues to establish a right to recover, and that

"disparities in the size of penalty payments among class members . . . weigh against superiority."

The purpose of a class certification hearing is solely to determine whether the class action procedure is appropriate. *Cooper*, 2001-0115 at p. 3, 780 So.2d at 1160. Generally, we would look to the requirements of numerosity, commonality, typicality, adequate representation, and definability in reviewing this assignment of error. However, Defendants' arguments in this regard appear to focus on commonality and definability, though the various requirements of La.C.C.P. art. 591 may, at times, overlap with each other. "Because a trial court is given wide latitude to analyze the facts relative to the prerequisites for class certification, its decision must be affirmed by an appellate court in the absence of manifest error." *Id.* (citing *Parry v. Administrators of Tulane Educational Fund,* 1998–2125, p. 3, (La.App. 4 Cir. 6/30/99), 740 So.2d 210, 213).

Commonality refers to "a common nucleus of operative facts such as would justify allowing the class action to proceed." *McCastle v. Rollins Envtl. Servs. of Louisiana, Inc.*, 456 So.2d 612, 620 (La. 1984). The commonality requirement is met if plaintiffs can demonstrate that there is "one issue, the resolution of which will affect all or a significant number of plaintiffs". *Clark v. Trus Joist MacMillian*, 2002-676, 2002-512, p. 8 (La.App. 3 Cir. 12/27/02), 836 So.2d 454, 461 (citing *Duhe*, 1999-2002 at p. 12, 779 So.2d at 1078). "To meet the common cause requirement, each member of the class must be able to prove individual causation based on the same set of operative facts and law that would be used by any other member to prove causation." *Guidry v. Dow Chem. Co.*, 2012-0436, 2012-0198, p. 5 (La.App. 4 Cir. 11/14/12), 105 So.3d 900, 905.

Here, there is a “common nucleus of operative facts” as to each potential class member. That is, each individual that ultimately qualifies as a class member will be able to point to the fact that he or she paid City penalties and Linebarger/UGSL fees to which the City and the private entities were not entitled, and which have not been returned. Furthermore, each member would be capable of proving his or her harm by relying on the “same set of operative facts and law that would be used by any other member.” That is, upon becoming delinquent on paying the tax, the City and Linebarger/UGSL imposed unconstitutional penalties and fees to induce prompt payment. We further agree with Plaintiffs that Linebarger/UGSL’s status as “debt collectors” is a common merits issue properly reserved for trial.

The trial court further found the requirements of La.C.C.P. art. 591(B)(3) to be met. That article requires “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.” La.C.C.P. art. 591(B)(3).

We agree that common issues predominate over those issues unique to individual class members. Indeed, as Defendants repeatedly argue in their brief, individual issues do exist, but this is not uncommon in the class action context. Defendants would have this Court rely on *Woodard v. Andrus*, 272 F.R.D. 185, 187 (W.D. La. 2010), in which the U.S. District Court for the Western District of Louisiana denied class certification as to claims that several Louisiana Parishes employed improper fee-collection procedures. However, in finding that individual issues predominated in that case, the court reasoned, in part, that “plaintiffs have launched an omnibus attack on the charging of fees under a 77–part statute across

seven parishes." *Id.* at 195. Such is not the case here; instead, the district court will be addressing claims in the context of penalties and fees paid under a single unconstitutional statute in a single parish. The *Woodard* court also reasoned as follows:

> Even assuming that liability could somehow be established on a class-wide basis, determining each class member's damages would involve many of the same individualized questions, as the amount of damages is inherently related to whether and how much each class member was charged in excess of the statute. Contrary to plaintiffs' claims that proof of overcharges would involve a simple comparison of the amount charged with what Louisiana law allows, it is evident that the ultimate determination of liability and damages for each class member would require a detailed, file-by-file examination of his or her litigation in the relevant parish.

Id. (footnote omitted). In the present case, Defendants suggest that reference to individual documentation makes this case inappropriate for class action resolution. However, multiple decisions from this state's Supreme Court as well as this Court have held otherwise. For example, in *Bartlett v. Browning-Ferris Indus. Chem. Servs., Inc.*, 1999-0494 (La. 11/12/99), 759 So.2d 755, 756, the Louisiana Supreme Court granted certiorari[4] because the Court "was particularly concerned that the court of appeal committed an error of law in denying class certification based primarily on plaintiffs' burden of proving damages." Indeed, the Third Circuit Court of Appeal, in *Bartlett v. Browning-Ferris Indus. Chem. Serv., Inc.*, 1998-341, p. 4 (La.App. 3 Cir. 12/9/98), 726 So.2d 414, 416, reached its conclusion, in part, by emphasizing that the plaintiffs sought recovery for various harms, "including damages for personal injuries, business losses, nuisance or abuse of right, noxious odors and emissions, exposure to hazardous chemicals, fear of

[4] Subsequent developments in the case resulted in the recall of the Supreme Court's writ grant. *Bartlett*, 1999-0494, 759 So.2d at 756-57. Nonetheless, the reasoning of the Supreme Court is instructive here.

cancer and other diseases, and property devaluation. . . . The plaintiffs present claims for a diverse assortment of personal, property and business damages." The Supreme Court continued:

> As we have made clear before and reiterate today, the mere fact that varying degrees of damages may result from the same factual transaction and same legal relationship or that class members must individually prove their right to recover *does not* preclude class certification.

Bartlett, 1999-0494, 759 So.2d at 756 (emphasis in original).

This Court followed suit in *Davis v. Am. Home Prod. Corp.*, 2002-0942, 2002-0943, 2002-0944 p. 9 (La.App. 4 Cir. 3/26/03), 844 So.2d 242, 251 (citations omitted):

> The trial court has vast discretion to balance the probative value of the testimony against its prejudicial effect. The trial judge did not err in finding that the merits of the claims must be proved at the trial on the merits. Proof of causation with respect to questions of individual damages is not part of the criteria for class certification. The fact that varying degrees of damages may result from the same factual transaction and same legal relationship or that class members must individually prove their right to recover does not preclude class certification.

See also Husband v. Tenet HealthSystems Mem'l Med. Ctr., Inc., 2008-1527, 2009-0002, p. 10 (La.App. 4 Cir. 8/12/09), 16 So.3d 1220, 1229 ("Acknowledging individual differences in the quantum of injury among Plaintiff–Appellees, the trial court also properly found that commonality was not defeated on that basis and that certification was not therefore improper.").

Though *Bartlett* was a toxic tort case, it is instructive here. In arguing that individualized issues predominate, Defendants repeatedly reference the future need to refer to individual evidence. Yet, the same could be said for the plaintiffs in *Bartlett*; plaintiffs would be required, depending on their claims, to produce medical records, business records, and property records, each of which would

require individualized scrutiny. Nevertheless, the Louisiana Supreme Court would not have found such resort to individualized evidence to be an impediment to class certification. Similarly, we do not find that the district court manifestly erred in finding commonality, or that common issues predominate over individual issues.

We further find that the district court did not manifestly err in determining the class action procedure to be superior. In *McCastle*, 456 So.2d at 616 (La. 1984), the Supreme Court stated "[t]he requirement of a 'common character' restricts the class action to those cases in which it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." The Court continued, stating that superiority exists when the class action procedure will effectuate substantive law, promote judicial efficiency, and ensure individual fairness. *Id.* at 616. In finding the class action procedure effectuated substantive law, *McCastle* reasoned that:

> The evidence taken at the hearing on defendant's exception to plaintiffs' improper use of a class action indicates that in all likelihood the vast majority of the some 4000 claims asserted are for unreasonable inconvenience and minor, temporary illnesses resulting from inhalation of the odors, fumes and gases emitted by defendants' land farm. Although this fact must be considered in determining the propriety of a class action, our conclusion that most of the claims are relatively small is not intended to preclude any party from later proving a large claim. Nonetheless, since the claims do appear to be small, it is probable that a class action would open the courts to many claims which would not ordinarily be litigated because they could not be prosecuted economically as individual actions. Furthermore, it is probable that in a class action the court is more likely to see the significance of the individual claims of the residents based on defendants' land farm emissions and the consequences of imposing liability upon defendants for the results of their useful and otherwise legal activities. Thus, the court is more likely to arrive at a substantively just conclusion, and the absentees are more likely to be given their due in a class action.

Id. at 619. A similar reasoning applies here. As both Holly Sharp and Li Downing testified, a significant percentage of claims that could be brought by potential class members amount to no more than one-hundred dollars. Accordingly, "it is probable that a class action would open the courts to many claims which would not ordinarily be litigated because they could not be prosecuted economically as individual actions." *Id.* Indeed, La.C.C.P. art. 591(B)(3)(e) specifically addresses this concern.[5] Thus, in this regard, the class action procedure is superior.

The issue of judicial efficiency is closely tied to the "numerosity" requirement of La.C.C.P. art. 591. As to judicial efficiency, *McCastle* stated the class action procedure aims for "the achievement of economies of time, effort, and expense." *Id.* at 619. The Court noted that "problems of manageability" must be considered, but added that "[o]nly if the net benefits of a class action in a particular case are so small in comparison with the net advantages of other adjudicatory methods as to make the class action an inferior method for that case should the court refuse to certify a class." *Id.* at 621. "The determination of numerosity in part is based upon the number of putative class members, but is also based upon considerations of judicial economy in avoiding a multiplicity of lawsuits, financial resources of class members, and the size of the individual claims." *Davis v. American Home Products Corp.,* 2002-0942, 2002-0943, 2002-0944, p. 19 (La.App. 4 Cir. 3/26/03) 844 So.2d 242, 257 (citations omitted). As noted, the benefit of opening the courtroom to claims that likely would not otherwise be litigated weighs in favor of the class action procedure, and we cannot say the net

[5] This subsection reads, "The matters pertinent to these findings include . . . [t]he practical ability of individual class members to pursue their claims without class certification."

benefits of a class action here are so small compared to the net advantages of other adjudicatory methods simply because the plaintiffs will be required to resort to some individualized documentation in supporting their claims and damages. The district court further eliminated manageability issues by limiting the class to those taxpayers who paid during a discrete period in which payment under protest was not required as to the penalties and fees. Again, in this regard, we find that the class action procedure is superior.

Lastly, as to fairness, the *McCastle* Court observed the "fundamental objective of the class action device is the promotion of uniformity of decision to persons similarly situated." *McCastle*, 456 So.2d at 621. The Court also noted that the "size of the claims of the absent members of the class" should be considered, as the greater the claim, the greater one's interest in a separate action. *Id.* Here, Defendants rightly point out that inconsistent judgments would be unlikely as a result of the Supreme Court's finding of unconstitutionality in *Fransen*. However, as we have noted repeatedly, many of those judgments would be unlikely to even be rendered given the amount of damages that would be sought in a significant number of cases.

As to definability, "[t]he class need not be so clearly defined that every class member can be identified at the commencement of the action, as the trial court can modify the class as needed when discovery or the trial adds relevant facts to the record." *Husband*, 2008–CA–1527, 2009–CA–0002 at p. 12, 16 So.3d at 1230. (citing *Duhe,* 99–2002, p. 15, 779 So.2d at 1080). Furthermore, the sheer number of possible claims does not weigh against certification. To the contrary, this Court has previously found that "difficulty in identifying the claimants is one of the factors that make joinder impracticable and a class action appropriate; thus, the

plaintiffs are not required to identify every member of the class prior to certification . . . The class must, however, be definable." *Davis v. Jazz Casino Co., L.L.C.*, 2003-0005, p. 7 (La.App. 4 Cir. 1/14/04), 864 So.2d 880, 888. Here, the class is indeed definable, if not yet fully defined. The district court limited the class to a specific temporal period during which payment under protest was not required, and the district court retains the authority to modify the class as the case progresses to trial.

Amendment of Judgment

Plaintiffs alternatively ask this Court to amend the judgment of the district court to reflect the effective date of Ordinance No. 20556 as March 6, 2002, and not February 21, 2002. Plaintiffs assert that Ordinance 20556 became law on the later date, the date upon which it was returned to the City Council Clerk.

Plaintiffs first raised this claim in a motion to amend judgment/motion for new trial filed after the certification hearing, which the district court denied. The district court's reasons for judgment explained that Plaintiffs' claim "had never been pled or raised . . . until plaintiffs filed this motion [for new trial] and to allow plaintiffs to make it for the first time post-hearing would in effect be giving them a second bite at the apple."

"[A] final judgment may be amended at any time to alter the phraseology of the judgment, but not its substance, or to correct errors of calculation." La.C.C.P. art. 1951. "The appellate standard of review of the ruling on a motion for new trial is whether the trial judge abused his discretion." *Jackson v. Bally's Louisiana, Inc.*, 2009-1574, p. 4 (La.App. 4 Cir. 4/7/10), 36 So.3d 1001, 1004 (citing *Campbell v. Tork*, 2003-1341, p. 4 (La.2/20/04), 870 So.2d 968, 971). In *Palmer v. Leclercq*, 2007-0604, p. 6 (La.App. 4 Cir. 9/24/08), 996 So.2d 21, 25

(citing *McGee v. Wilkinson,* 2003-1178, p. 3 (La.App. 1 Cir. 4/2/04), 878 So.2d 552, 554)(internal citations and footnote omitted), this Court explained the difference between the two motions:

> An amendment to a judgment that adds to, subtracts from, or in any way affects the substance of the judgment, is considered a substantive amendment. To alter the substance of a judgment, the proper recourse is a timely application for new trial, an action for nullity, or a timely appeal.

In *Palmer*, a medical malpractice case, the plaintiffs sought judicial interest from the date of filing of their complaint, or, alternatively, from the date of judicial demand. *Id.* There were two judgments in question. The first judgment, from 2004, awarded interest from the date of judicial demand; the second judgment, from 2006, awarded interest from the date of the filing of plaintiffs' complaint. *Id.* This Court found that the 2006 judgment:

> [D]id not change the substance of the 2004 judgment because according to this Court's interpretation of La. R.S. 40:1299.47(M) in *Raines v. Columbia Lakeland Medical Center, supra,* the date of judicial demand in a medical malpractice case is the date of the filing of the complaint with the board seeking a medical review panel, regardless of the date from which a plaintiff requests interest in a petition.
>
> Even though the 2004 judgment was final at the time of the rendition of the 2006 amended judgment, La. C.C.P. article 1951 allows the trial court "at any time" to amend a final judgment to alter the phraseology of the judgment, but not the substance of the judgment. We conclude that the 2006 judgment merely altered the phraseology of the 2004 judgment to clarify that Mr. and Mrs. Palmer are entitled by operation of law to interest from the date of filing of the complaint with the board seeking a medical review panel. The 2006 judgment did not add to, subtract from, or in any way affect the substance of the 2004 judgment. Thus, the 2006 amended judgment did not contain an improper substantive amendment, and therefore, is not an absolute nullity.

Palmer, 2007-0604 at p. 7, 996 So.2d at 25-26. We find that similar reasoning should be applied here; that is, Plaintiffs presented a valid argument that Ordinance

20556 did not become effective until its return to the Clerk of the City Council. Changing the date of the judgment to reflect this fact does not alter its substance; it merely reflects an accurate application of Section 3-113 of the New Orleans Home Rule Charter.[6]

CONCLUSION

For the foregoing reasons, the judgment is amended in part, and affirmed as amended.

JUDGMENT AMENDED IN PART, AND JUDGMENT AFFIRMED AS AMENDED

[6] This section reads, "The Mayor, within ten calendar days of receipt of an ordinance, shall return it to the Clerk with or without his approval or with his disapproval. If the ordinance has been approved it shall become law upon its return to the Clerk[.]"