

[Cite as *Lindsay v. Garfield Heights*, 2019-Ohio-1359.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 107230 and 107236

NELL LINDSAY

PLAINTIFF-APPELLEE

vs.

CITY OF GARFIELD HEIGHTS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-813804

BEFORE: E.T. Gallagher, P.J., Keough, J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: April 11, 2019

ATTORNEYS FOR APPELLANTS

For Redflex Traffic Systems, Inc.

Quintin F. Lindsmith
James P. Schuck
Brickler & Eckler, L.L.P.
100 South Third Street
Columbus, Ohio 43215

For the City of Garfield Heights

John D. Latchney
O'Toole, McLaughlin, Dooley & Pecora Co., L.P.A.
5455 Detroit Road
Sheffield Village, Ohio 40546

Timothy J. Riley
Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEES

Patrick J. Perotti
Patrick J. Brickman
Nicole T. Fiorelli
James S. Timmerberg
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077

EILEEN T. GALLAGHER, P.J.:

{¶1} In this consolidated appeal, defendants-appellants, the City of Garfield Heights and Redflex Traffic Systems, Inc., appeal an order certifying a class of plaintiffs who claim the city

issued unlawful traffic citations that were generated by unmarked traffic cameras. Appellants raise the following assignment of error for review:

The trial court erred as a matter of law in granting Plaintiff's motion for class certification where the class is facially defective, where Plaintiff and all other class members lack standing, and where Plaintiff failed to present evidence to meet the seven requirements of Civ.R. 23.

{¶2} After careful review of the record and relevant case law, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶3} In November 2009, Garfield Heights passed Ordinance No. 63-2009, which amended the city's codified ordinances by enacting Garfield Heights Codified Ordinances ("G.H.C.O.") 313.11. In an effort to "reduce the frequency of vehicle operators speeding and running red lights," G.H.C.O. 313.11 provided for the "use of automated cameras to impose civil penalties upon red light and speeding violators" within the city.¹ The ordinance provided that:

This Section applies whenever traffic is controlled by traffic control signals exhibiting different colored lights, or colored lighted arrows, successively one at a time or in combination.

G.H.C.O. 313.11(a)(3). The ordinance also required the intersections with the installed automated cameras to have "visible postings upon approach of the intersection indicating that the intersection is equipped with an automated traffic control signal monitoring system." G.H.C.O. 313.11(a)(4).

{¶4} Under the ordinance, a civil fine was imposed on the owner of any vehicle detected by one of the cameras to have been operating a motor vehicle in violation of the ordinance. If a vehicle violated the ordinance, the system generated a notice of liability, which was mailed to the

¹ In November 2010, the ordinance was repealed by a voter referendum.

owner of the vehicle apprising him/her that (s)he must pay a \$100 civil penalty or oppose the alleged violation within 15 days of receiving the notice of liability. G.H.C.O. 313.11(e) and (f).

The ordinance directed that “an individual desiring a hearing [was] required to post payment equal to the amount of the civil penalty before an appeal hearing [would] be scheduled.” G.H.C.O. 313.11(e)(1)(c). “The failure to give notice of request for review within this time period shall constitute a waiver of the right to contest the notice of liability.” *Id.* If the vehicle owner or responsible party chose to contest the notice of liability, Section (3)(2) of the ordinances set forth affirmative defenses that could be considered by the hearing officer.

{¶5} The Garfield Heights Police Department administered and enforced the ordinance. Garfield Heights contracted with Redflex, a third-party vendor, to install and operate the cameras and systems used to detect violations. Although the city was responsible for enforcing violations, Redflex performed administrative functions, including processing, encrypting, and storing the video and photographs of violations. Redflex then sent the relevant images to the city for review.

{¶6} On November 1, 2010, the plaintiffs’ class representative, Nell Lindsay, received a notice of liability in the mail. The notice stated that the city’s photo enforcement program captured a recorded image of her registered vehicle driving in excess of the posted speed limit on Turney Road on October 26, 2010. The notice instructed Lindsay that if she wished to schedule a hearing and have the matter reviewed by a Hearing Officer, she was required to pay a bond in the amount equal to the civil penalty and an administrative fee in the amount of \$50.00, for a total payment of \$150.00.

{¶7} On September 16, 2013, Lindsay filed a class action complaint against defendants, setting forth causes of action for denial of due process, denial of equal protection, civil

conspiracy, “unlawful and void notices and collections,” and unjust enrichment. The complaint alleged that the mobile unit that recorded her traffic violation failed to comply with the requirements of G.H.C.O. 313.11(a)(3) and (4) because “defendants erected cameras illegally at places not controlled by a traffic signal * * * and without erecting the warning signs required by the ordinance.” The complaint further alleged that defendants violated her due process and equal protection rights under the Ohio Constitution by requiring individuals to pay \$150.00 to receive an administrative hearing.

{¶8} On October 17, 2013, Lindsay filed a motion for class certification, arguing “[t]his matter is appropriate for class certification because (1) thousands of individuals have been affected; (2) the Defendants’ conduct was identical to all class members; and (3) common questions of fact and law predominate over individual issues, which are nonexistent.” In the motion, Lindsay alleged that the class includes:

All persons issued citations or other notice of liability pursuant to Garfield Heights Ordinance Number 63-2009, which were not issued as a warning, and upon which there was not a finding of no liability pursuant to subsection (e) of the ordinance.

{¶9} In March 2014, appellants filed separate motions in opposition to the motion for class certification. Appellants each argued, in part, that (1) Lindsay lacked standing to represent the class because she failed to exhaust her administrative remedies, and (2) her claims were barred by res judicata because she did not contest the violation and paid her ticket.

{¶10} Following extensive hearings on the motion for class certification, the trial court issued an entry granting Lindsay’s motion for class certification. The trial court found Lindsay satisfied the requirements of Civ.R. 23 and certified the following class:

All persons issued a notice of liability pursuant to Garfield Heights Ordinance No. 63-2009, excluding those notices issued as a warning; that resulted in a finding of

no liability pursuant to subsection (e) of the ordinance; and were otherwise dismissed.

{¶11} Appellants now appeal from the trial court's judgment.

II. Law and Analysis

{¶12} In their sole assignment of error, appellants argue the trial court erred as a matter of law in granting Lindsay's motion for class certification where the class is facially defective, where Lindsay and all other class members lack standing, and where Lindsay failed to present evidence to meet the seven requirements of Civ.R. 23.

{¶13} To be eligible for class certification pursuant to Civ.R. 23, a plaintiff must establish that (1) an identifiable and unambiguous class exists, (2) the named representative of the class is a class member, (3) the class is so numerous that joinder of all members of the class is impractical, (4) there are questions of law or fact that are common to the class ("commonality"), (5) the claims or defenses of the representative plaintiff or plaintiffs are typical of the claims and defenses of the members of the class ("typicality"), (6) the representative parties fairly and adequately protect the interests of the class ("adequacy"), and (7) one of the three requirements of Civ.R. 23(B) is satisfied. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 6.

{¶14} Failure to satisfy one of the Civ.R. 23(A) requirements is fatal to a request for class certification. *Musial Offices, Ltd. v. Cuyahoga Cty.*, 2014-Ohio-602, 8 N.E.3d 992, ¶ 19 (8th Dist.). The party seeking class certification bears the burden of demonstrating that the requirements of Civ.R. 23(A) and (B) are met. *Id.*

{¶15} The Ohio Supreme Court has held that "[a] trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be

disturbed absent a showing of an abuse of discretion.” *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 509 N.E.2d 1249 (1987), syllabus. We apply the abuse of discretion standard in reviewing class action determinations to give deference to “the trial court’s special expertise and familiarity with case-management problems and its inherent power to manage its own docket.” *Id.* at 201.

{¶16} Nevertheless, “the trial court’s discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23.” *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998). The trial court may only certify a class if it finds, after a rigorous analysis, that the moving party has demonstrated that all the factual and legal prerequisites to class certification have been satisfied. *Id.*

{¶17} We begin our analysis by assessing whether the class, as defined by the trial court, is identifiable and unambiguous. An “identifiable class” requires that the class definition be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. *Hamilton* at 71-72. In other words, “the class definition must be precise enough ‘to permit identification within a reasonable effort.’” *Id.* at 72, quoting *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988).

{¶18} As stated, Lindsay’s motion to certify a class requested the trial court to define the class as follows:

All persons issued citations or other notice of liability pursuant to Garfield Heights Ordinance Number 63-2009, which were not issued as a warning, and upon which there was not a finding of no liability pursuant to subsection (e) of the ordinance.

{¶19} In the trial court’s entry granting class certification, however, the court did not adopt the precise language used in the class definition proposed by Lindsay. Rather, the trial court adopted the following class definition:

All persons issued a notice of liability pursuant to Garfield Heights Ordinance No. 63-2009, excluding those notices issued as a warning; that resulted in a finding of no liability pursuant to subsection (e) of the ordinance; and were otherwise dismissed.

{¶20} In this case, the court’s use of language that varied from the proposed class definition has proven to be consequential. Significantly, the parties have competing interpretations of the definition and, therefore, dispute whether Lindsay is a member of the class as defined by the court. Accordingly, it is necessary to address the parties’ competing interpretations of the class definition.

{¶21} On appeal, appellants interpret the class definition as including (1) all persons issued a notice of liability pursuant to Garfield Heights Codified Ordinances No. 63-2009, excluding those notices that were issued as a warning; (2) that resulted in a finding of no liability pursuant to subsection (e) of the ordinance; and (3) were otherwise dismissed. Thus, appellants argue that the class, as currently defined by the trial court, “includes only one class of individuals — those who received a ‘notice of liability * * * that resulted in a finding of no liability and were otherwise dismissed.’” In other words, appellants maintain that the definition does not include individuals, such as Lindsay, who were found liable under the ordinance and paid the issued citation.

{¶22} In support of their position, appellants rely on the rules of grammar and the court’s intentional use of semicolons following an internal comma. Appellants explain their interpretation as follows:

A plain grammatical construction of the class definition supports this interpretation. The presence of the semi-colon after the word “warning” is indicative of the main clause of the sentence. It reflects the universe of class members — those who received non-warnings of liability. This main class is modified further by the information after the first semi-colon to include only those who were found not liable and those who had their notice of liability dismissed. In other words, the definition provides that the class of members consists of “type x” (those who received a notice of liability) * * * that possess certain features — a notice of liability that resulted in a finding of no liability or dismissal.

{¶23} Based on the foregoing interpretation of the class, appellants maintain that the class “is facially defective and cannot be certified as a matter of law because (1) neither Lindsay nor any other class member has suffered an injury in fact, and thus lack standing; (2) none of the class members have suffered harm; and (3) Lindsay is not a member of the class.”

{¶24} In contrast, Lindsay contends that appellants’ interpretation of the defined class “is an intentional fabrication designed to mislead this court.” She argues the “trial court broadly defined the class as all persons who received notice of liability, then excluded from that class definition persons who had not been harmed because their notices of liability were simply warnings, or because their notices of liability had been dismissed.” Thus, Lindsay interprets the class definition as including all persons issued a notice of liability pursuant to Garfield Heights Codified Ordinances No. 63-2009, excluding those notices that: (1) were issued as a warning; (2) resulted in a finding of no liability pursuant to subsection (e) of the ordinance; or (3) were otherwise dismissed. Relying on this interpretation of the class definition, Lindsay contends the class is identifiable and unambiguous. Lindsay states that “[appellants’] argument to the contrary is frivolous.”

{¶25} Generally, we must read words and phrases in context and construe them in accordance with rules of grammar and common usage. “Semicolon” is defined as “a mark of punctuation (;) indicating a degree of separation greater than that marked by a comma and less

than that marked by a period: used chiefly to separate units that contain elements separated by commas, and to separate closely related coordinate clauses.” *Webster’s New World Dictionary* 1220 (1994). When elements in a series are particularly complex or when one or more of the elements contains an internal comma, the sentence may be clearer with semicolons instead of commas separating the elements. *Chicago Manual of Style* 326 (16th Ed.2010). Thus, a semicolon may be used to distinctly and clearly separate elements in a series where, as here, one of the elements contains an internal comma.

{¶26} After careful consideration, we find no merit to Lindsay’s contention that the appellants have “deliberately misstated” and “fabricat[ed]” the trial court’s definition of the class. In fact, appellants’ interpretation of the class definition is reasonable given the trial court’s use of an internal comma and subsequent semicolons. Applying rules of grammar, the trial court’s use of semicolons suggests that the court intended to create separate requirements of class members after using an internal comma in the first clause to exclude individuals who only received a citation warning. Thus, it is reasonable to interpret the defined class as having three separate conditions — with the first condition containing an exclusion.

{¶27} Having acknowledged the reasonableness of the appellants’ grammatical position, this court is equally cognizant of the fact that the trial court’s intentions in granting Lindsay’s motion to certify a class do not comport with the appellants’ interpretation of the class definition. Presumably, the grammatical structure of the current class definition does not adequately reflect the trial court’s intentions. Certainly, the trial court did not intend to construct a class definition that inherently eliminates Lindsay from being a member of the class. Given the context of the trial court’s judgment in Lindsay’s favor, her interpretation of the class definition is also reasonable, notwithstanding the punctuation used therein.

{¶28} However, this court cannot ignore the ambiguity of the defined class based on the presumed intent of the trial court. As currently defined, the trial court’s class definition is overly ambiguous and is subject to more than one reasonable interpretation. As a result, the parties have spent much of their opposing appellate briefs disputing the scope of the defined class and the circumstances under which an individual would qualify as a class member. In the absence of precise language, the certified class is not sufficiently identifiable. Accordingly, we conclude that a class action cannot be maintained under Civ.R. 23 using the class definition as currently constructed. The trial court, therefore, abused its discretion in certifying the class as defined.

{¶29} The Supreme Court of Ohio has stated that if the appellate court finds an abuse of discretion by the trial court in its definition of the class, the appellate court should not proceed to formulate the class itself. Rather, the court should remand the matter to the trial court. *Stammco*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 12. This is because “the trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties.” *Id.* Thus, rather than attempt to redefine the class ourselves, we remand the case to the trial court to do so. Because we remand the case to the trial court to clarify and complete the class definition, we do not reach appellants’ challenges to the remaining Civ.R. 23 requirements because their arguments are predicated on their interpretation of the ambiguous class definition.

{¶30} Appellants’ sole assignment of error is sustained. Judgment reversed, class decertified, and cause remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

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

EILEEN T. GALLAGHER, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN A. GALLAGHER, J., CONCUR