

**IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY, OHIO**

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KAREN SHANAHAN,

Appellant,

vs.

CITY OF TOLEDO,

Appellee.

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No. CL09-1077

(accelerated calendar)

**APPEAL FROM THE COURT OF COMMON PLEAS OF LUCAS COUNTY**

**BRIEF FOR APPELLANT,  
KAREN SHANAHAN**

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**Statutes:**

Ohio Revised Code § 2723.01

Ohio Revised Code § 2723.03

Ohio Revised Code § 2723.05

## **ASSIGNMENTS OF ERROR**

- I. The trial court erred by applying Revised Code § 2723 to this case, because the assessment at issue is a “fee,” rather than a “tax.”
  
- II. The trial court erroneously concluded that Appellant could not maintain an action for damages. By filing a civil complaint, Appellant met the requirements of § 2723.03 as to all “refuse fee” payments paid subsequent to the complaint.
  
- III. Because Appellant’s lawsuit is properly maintainable as an action for damages, the trial court erred by denying class certification.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether a “refuse fee” constitutes a “tax or assessment” within the meaning of Ohio Revised Code § 2723.
- II. Whether filing a civil complaint is sufficient to meet the notice requirements of R.C. § 2723.01.
- III. Whether a notice given by a class representative is sufficient notice for all members of a proposed class action.

## STANDARD OF REVIEW

Ohio courts review questions of law *de novo*. *City of Urbana ex rel. Newlin v. Downing*, 43 Ohio St. 3d 109, 115. Decisions to grant or deny class certification are subject to the “abuse of discretion” standard. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St. 3d 67 (1998) However, in this case, the trial court’s denial of class certification rests on questions of law properly reviewed *de novo*.

## PROCEDURAL HISTORY

On February 28, 2008, Appellant Karen Shanahan filed a class action complaint alleging that Toledo’s “refuse fee” constitutes an unlawful tax. In the complaint, Appellant sought, *inter alia*, compensatory damages, declaratory and injunctive relief, and attorney fees. On April 10, 2008, Appellant filed her First Amended Complaint, and Appellee City of Toledo answered the First Amended Complaint on April 24, 2008.

After an exchange of interrogatories and requests for discovery, Appellant filed a Motion for Class Certification on June 2, 2008. The trial court scheduled an initial pretrial conference on June 27, 2008. At the June 27 hearing, the trial court scheduled a further hearing on August 15, 2008, for the purpose of resolving the issue of class certification, and any related discovery matters.

On July 25, 2008, Appellee City of Toledo filed a motion opposing class certification. Appellant replied to this motion on August 4, 2008. Following a second series of discovery requests related to class certification, the trial court scheduled a second pre-trial conference on November 7, 2008. At this conference, the trial court set final deadlines for additional briefings on the issue of class certification. On November 21, 2008, Appellee City of Toledo filed a supplemental “Motion in Opposition to Class

Certification.” In this memorandum, the City claimed a new defense which it did not raise in its answer or in its previous memorandum in opposition. The City now claimed that R.C. 2723.03 provides a complete defense because “the only individuals who can make a claim for recovery of illegal taxes or assessments are those who have filed a written protest of the payment and also have given notice of their intent to sue.” Thus, the City argued, the class must be limited to those who filed a written protest.

On January 27, 2009, Appellant filed a “Motion to Stay the Decision on Class Certification and for Partial Summary Judgment,” requesting the trial court to resolve the question of whether Toledo’s “refuse fee” constituted a “fee” or a “tax.” The trial court ruled on this motion in the “Opinion and Judgment Entry” dated February 25, 2009. In its opinion, the trial court found Ohio Revised Code § 2723.03 applied to the facts of this case, thereby precluding Appellant from recovering damages. The trial court also decided that § 2723.03 applies to both “fees” and “taxes,” and thus declined to rule on the question of whether the refuse fee was a “fee” or a “tax.” Based on these rulings, the trial court also denied Appellant’s request for class certification.

On March 23, 2007, present counsel filed with this Court a timely notice of appeal.

### **STATEMENT OF THE CASE**

On or about April 28, 2007, Appellee City of Toledo enacted the “refuse fee,” to go into effect May 28, 2007. The “refuse fee” is set forth in Sections 208-210, of Appendix B, “Rules and Regulations Issued by the Director of Public Service, Regulations Governing Refuse Collection.” Section 208, entitled “Fees,” states the following:

“For the collection of refuse from any dwelling, building or other property permitted her within these regulations, the property owner shall pay a refuse fee of \$5.50 per month. If the structure consists of multiple units, the fee shall be \$5.50 per month per unit. Property owners who return a signed pledge card or electronically register to participate in the City of Toledo Curbside Recycling Program shall pay a refuse fee of \$3.00 per month. Where the structure consists of multiple units and the property owner recycles at each unit, the fee shall be \$3.00 per month per unit.”

Section 209, entitled “Collection of Fees,” states the following:

The City shall include the monthly refuse fee on the property owner’s City water & sewer bill and the property owner shall pay the fee in the manner and amount specified on the bill. A property owner may, by agreement, require a tenant or lawful occupant to pay to the City the monthly refuse fee; however, in the event of nonpayment, the property owner remains responsible for paying the fee. If any fees or miscellaneous charges relating to refuse service are not paid in full on or before the due date noted on the bill provided by the City, an amount equal to five percent (5%) of the amount billed shall be added to the total amount owed by the customer.

Appellee City of Toledo enacted the “refuse fee” for the purpose of making up a deficiency in the general fund. The collection of money from the “refuse fee” is placed in Defendant’s general fund and is not placed in trust for costs associated with refuse collection. Property owners in the City of Toledo subject to the “refuse fee” must pay the amounts described in § 208, regardless of whether refuse is collected. Under this regime, any property owner failing to pay the “refuse fee” is subject to a variety of penalties.<sup>1</sup>

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<sup>1</sup> Section 210, entitled “Delinquent Fees,” states the following: “When charges for refuse service are not paid when due, the City may: (a) Terminate water service to the property pursuant to existing written policy; (b) Forward the account for collection by an outside collection agency; (c) Transfer the delinquency to any other property owned by the account holder that receives service from the Department of Public Utilities; (d) Bring an action at law for the collection of the delinquent amount; or (e) Certify the charges, together with any penalties, to the County Auditor, who shall place the certified amount on the real property tax duplicate of the property receiving, directly or indirectly, refuse services from the City. The amount certified shall be a lien on the property served from the date placed on the list and duplicate and shall be collected in the same manner as other taxes, except that, notwithstanding section 323.15 of the Ohio Revised Code, a county treasurer shall accept a payment in such amount when separately tendered as payment for the full amount of such unpaid refuse fees and associated penalties.

Toledo City Council voted to repeal §§ 208-210, effective April 30, 2008. On March 25, 2008, Toledo City Council amended T.M.C. § 963.03, to include a new a tax on property owners for refuse collection to go into effect after April 30, 2008. Mayor Carleton S. Finkbeiner approved T.M.C. § 963.03 on April 4, 2008. T.M.C. § 963.03(2)

(b) states:

“After April 30, 2008 for the periodic disposal of garbage and rubbish from any dwelling, restaurant, retail store, apartment house or office building, the property owner shall pay a monthly refuse fee based on the following schedule, provided that where the structure consists of multiple units, the monthly fee shall be per unit:

	Non-recycle	Recycle
May 1, 2008 – April 30, 2009	\$7.00	\$2.00
May 1, 2009 – April 30, 2010	\$8.50	\$1.00
Beginning May 1, 2010	\$10.00	- 0 –

For those property owners who pledge to recycle, the Director of Public Service may establish regulations governing how recycling pledges are made and enforced. The Director of Public Service is also authorized to establish a fine for those property owners who break pledges to recycle. The Director of Public Service may establish regulations governing waivers of the fee for owners of structures who have in force a contract with a commercial hauler to collect garbage and rubbish from their premises.”

As with §§ 208-210, the “refuse fee” provided for T.M.C. § 963.03 was enacted for the purpose of making up a deficiency in the general fund. The “refuse fee” is collected via the water bill, is placed in the City’s general fund, and must be paid regardless of

whether refuse is actually collected from the person paying the fee. T.M.C. § 963.03 also provides substantial penalties for failure to comply.<sup>2</sup>

As described in Appellant's First Amended Complaint, both versions of the "refuse fee" are unlawful appropriations. First, Appellee uses its water billing statements as a vehicle for collecting these monies in violation of Chapter 743 of the Ohio Revised Code. Second, T.M.C. § 963.23 and Section 104 of the Toledo City Charter do not permit the Director of Public Services to collect money from property owners for refuse collection. Third, Toledo City Council did not approve the "refuse fee" provided for in §§ 208-210. Due to the size and scope of the appropriation, the "refuse fee" is invalid absent a referendum by the voters. And, Title VII of the Ohio Revised Code and the Toledo City Charter do not permit Appellee City of Toledo to levy additional taxes on property owners for refuse collection as required by Ohio Const. Art. XII, § 2.

In her "Motion to Stay the Decision on Class Certification and for Partial Summary Judgment," Appellant Shanahan asked the trial court to first determine whether or not R.C. 2723.03 was even applicable in this case because it does not apply to "fees," only to taxes. Shanahan argued that the collection of monies by the City was properly considered to be a fee and R.C. 2723.03 therefore did not apply. In any event, Shanahan could not properly amend her complaint or proposed class until she knew

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<sup>2</sup> T.M.C. § 963.03(2)(d) states: "When charges for garbage and rubbish disposal service are not paid when due, the City may: (1) Terminate water service to the property pursuant to existing written policy; (2) Forward the account for collection by an outside collection agency; (3) Transfer the delinquency to any other property owned by the account holder that receives service from the Department of Public Utilities. (4) Bring an action at law for the collection of the delinquent amount; (5) Certify the charges, together with any penalties, to the County Auditor, who shall place the certified amount on the real property tax duplicate of the property receiving, directly or indirectly, the garbage and rubbish disposal services of the City. The amount certified shall be a lien on the property served from the date placed on the list and duplicate and shall be collected in the same manner as other taxes, except that, notwithstanding section 323.15 of the Revised Code, a county treasurer shall accept a payment in such amount when separately tendered as payment for the full amount of such unpaid refuse fees and associated penalties."

whether or not the ordinance constituted a “tax” or a “fee.” On 2/23/2009, the trial court overruled Shanahan’s Motion for summary judgment and for class certification. The court based its ruling on case where a license fee was considered to fall within the meaning of the words “taxes and assessments” used in the statute. Accordingly Appellant herein asserts as her first assignment of error the following:

### **ARGUMENT ON ASSIGNMENTS OF ERROR**

#### **I. ASSIGNMENT OF ERROR NO. 1**

#### **THE TRIAL COURT ERRED WHEN IT RULED THAT R.C. 2723.03 APPLIES TO CLAIMS FOR THE RECOVERY OF ILLEGAL FEES.**

Pursuant to R.C. 2723.03, an action may be brought “to enjoin the collection of *taxes and assessments* [emphasis added].” The refuse collection fee implemented by the City is not a tax or assessment within the meaning of this statute.

#### **A. When the meaning of a statute is clear statutory construction is not necessary.**

“[A] statute which is unambiguous and definite on its face is to be applied as written and not construed.” *Harding v. Conrad* (June 17, 1997), Franklin App. No. 96APE11-1592, citing *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995. See also *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 254-255, 2002-Ohio-4172. In other words, if the plain meaning application of a statute is apparent on its face, no further application of the rules of statutory construction are necessary.

R.C. 2723.03 by its own wording applies to “taxes and assessments”. It does not apply to all manner of revenue collection a governmental entity might choose to engage in. Fees are conceptually different than taxes as further set forth below. This large

body of case law which defines the differences would have never come into existence if taxes really meant fees.

The trial court found this refuse fee to fall within the “taxes and assessments” wording of the statute, relying on the holding in *Paramount Film Distributing Corp. v. Tracy*, 175 Ohio St. 55, 191 N.E.2d 839 (Ohio, 1963). In *Paramount*, the Court found the word “taxes” embraced film censorship license fees. Those license fees were more accurately “taxes,” and the holding in *Paramount* is therefore not applicable in every case.

The case *sub judice* is not dealing with “license fees,” but rather, “refuse fees.” Appellant respectfully suggests that refuse collection fees are not the same as a license fee and that the Supreme Court of Ohio did not intend this holding to be interpreted to mean that all fees are taxes *per se* under § 2723.03. The statute doesn’t address fees on its face and there is no reason to engage in further analysis or statutory construction. Section 2723.03, Revised Code, does not apply as the license fees collected herein were not taxes. See *City of Toledo v. Buechele*, 19 Ohio Cir. Ct.R. 127, affirmed without written opinion, 65 Ohio St. 603, 63 N.E. 1126. If the legislature wanted this statute to apply to fees it could have easily said so. The monies collected by the City are properly considered to be a “fee.”

Ohio makes a legal distinction between taxes and fees and the the issue of whether an item is a fee or a tax is decided as a matter of law. To determine whether a government action such as the “refuse fee” is a fee or a tax, courts must determine its character by its incidents, operations, and effect. *City of Franklin v. Harrison* (1957), 79 Ohio Law Abs. 399, 153 N.E.2d.

Ohio is not alone in making this legal distinction. Numerous courts in the 50 states have examined the issue of when collected funds are a fee or a tax. "Fees," unlike "taxes," confer a special benefit on fee payers in a manner not shared by those not paying the fee like the Toledo "refuse fee." *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000); *Shea v. Boston Edison Co.*, 431 Mass. 251, 727 N.E.2d 41 (2000). Charges like the Toledo Refuse Fee reasonably calculated to do nothing more than compensate a governmental agency for its services are fees, not taxes, even though they must be paid in order that the right may be enjoyed. *Southview Co-op. Housing Corp. v. Rent Control Bd. of Cambridge*, 396 Mass. 395, 486 N.E.2d 700 (1985). A fee is also imposed in the government's exercise of its police powers. *City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993).

To determine whether a particular charge is a "fee" or a "tax," the general inquiry is to assess whether the charge is for revenue raising purposes, making it a "tax," or for regulatory or punitive purposes, making it a "fee." *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130 (4th Cir. 2000); *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983); *City of Jefferson v. Missouri Dept. of Natural Resources*, 863 S.W.2d 844 (Mo. 1993); *City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997); *Franks & Son, Inc. v. State*, 136 Wash. 2d 737, 966 P.2d 1232 (1998), cert. denied, 526 U.S. 1066, 119 S. Ct. 1458 (1999).

The Kansas Supreme Court provided that the difference between a tax and a fee is as follows:

“[A] tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. In contrast, a fee is paid in exchange for a special service, benefit, or privilege not automatically conferred upon the

general public. A fee is not a revenue measure, but a means of compensating the government for the cost of offering and regulating the special service, benefit, or privilege. Payment of a fee is voluntary--an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered." *McCarthy v. City of Leawood* (Kan. 1995), 894 P.2d 836; at 845.

Washington uses the following three part test for distinguishing the difference between a fee and a tax: (1) The purpose of the charge; (2) Where the money raised is spent; and (3) Whether people pay the cost because they use the service. *Lane v. City of Seattle* (Wash., 2008), 194 P.3d 977. Under this standard, the stated purpose of the charge is to defray the cost of trash service, however the money raised is from property owners within the city of Toledo regardless of if they use the service, and the City spends the money however it likes since it comes from the general fund. The City's actions fail the last two prongs of the above test.

Massachusetts sets forth the following standard to determine whether a charge is a legitimate fee: (1) Legitimate fees are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society; (2) Legitimate fees are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service thereby avoiding the charge; and (3) Legitimate fees are collected to raise revenues but to compensate the governmental entity providing the services for its expenses. *Silva v. City of Attleboro* (Mass., 2008), 2008 WL 3906314.

Ohio courts have had numerous opportunities to determine whether or not funds collected by a municipality or considered to be a "tax" or a "fee" and follow the same analysis used by other states.

In the case of *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111, the Ohio Supreme Court refused to adopt a general rule or specific test for determining if a collection is a fee or a tax. Instead, the Court stressed that this “must be done on a case-by-case basis dependent upon the facts and circumstances surrounding each assessment.” *Id.* at 115, 579 N.E. 2d 705. But the *Withrow* Court discussed 1) whether the charge is imposed for a governmental service; 2) whether the charge generates excess funds that are placed in a general fund, rather than being segregated and used for purposes related to the fee; 3) whether a direct benefit is provided to the public; and 4) whether the measure is regulatory as opposed to revenue-generating.

Using the above analysis it is clear that the City's collection of monies to support refuse collection services is a “fee.” This charge meets factor one because it is imposed for a primarily a private service (refuse collection); 2) the charges are placed in the general fund, rather than being segregated and used for purposes related to the fee<sup>3</sup>; 3) direct benefit is provided primarily individual home owners; and 4) whether the measure is regulatory to a specific service and not created to generate general revenue for all city expenses.

In *A & M Builders, Inc. v. City of Highland Hghts.*, 2000 WL 45859 (Ohio App. 8 Dist. Jan 20, 2000) (NO. 75676), the court had to determine whether a “Park and Recreational Improvement Fee” constituted a “tax” or a “fee.” According to the *A & M* court:

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<sup>3</sup> In Ohio a fee assessed for refuse collection and removal is not a tax unless it "exceeds the 'cost and expense' to governments of providing the service in question." *Granzow v. Bureau of Support* (1990), 54 Ohio St.3d 35, 38. It is apparent from discovery responses that the city's collection of this fee does not cover the cost of refuse collection.

“[A] ‘fee’ is a charge imposed by a government in return for a service. ‘Taxation’ refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people. Determining whether an assessment is a fee or a tax must be done on a case-by-case basis dependent upon the facts and circumstances surrounding each assessment. In addition, the Supreme Court of Ohio has held that a ‘fee’ is in fact a ‘tax’ if it exceeds the ‘cost and expense’ to government of providing the service in question. [internal citations omitted]” *Id.*

In fact, of the numerous cases reviewed by Appellant, there is not a single case, where a refuse fee has been found to be a "tax". See *Home Builders Ass'n of Dayton v. City of Beavercreek*, Not Reported in N.E.2d, 1996 WL 812607, Ohio Com.Pl., February 12, 1996 (NO. 94 CV 0012, 94 CV 0062); *Thompson v. Green*, 12 Ohio Supp. 1, 1943 WL 6278 Ohio Com.Pl. 1943 (not a tax); *City of Portsmouth v. Kinker*, 1984 WL 5648 (Ohio App. 4 Dist. Sep 11, 1984) (NO. 1450) (both sides agreed it was a fee).

There does not appear to be a single case from any state that has ever found a “refuse fee” to be a tax. The City's attack on class certification is based upon this fee being a tax. Based upon the considerable consistency of authority set forth above, Appellant requests this Court to rule that the monies collected are a “fee,” and Revised Code § 2723.03 therefore does not apply to the “refuse fee.”

## **II. ARGUMENT ON ASSIGNMENT OF ERROR NO. 2**

### **THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT APPELLANT COULD NOT MAINTAIN AN ACTION FOR DAMAGES.**

#### **A. By filing a civil complaint, Appellant Shanahan met the requirements of § 2723.03 as to all “refuse fee” payments paid subsequent to the complaint.**

Even if Revised Code § 2723.03 applies to an action to recover an assessment such as Toledo’s “refuse fee,” Appellant Shanahan would only be precluded from

recovering “refuse fee” payments made prior to filing her complaint. In relevant part, Revised Code § 2723.03 states as follows:

“If a plaintiff in an action to recover taxes and assessments, or both, alleges and proves that he or the corporation or deceased person whose estate he represents, at the time of paying such taxes or assessments, filed a written protest as to the portion sought to be recovered, specifying the nature of his claim as to the illegality thereof, together with his notice of intent to sue under sections 2723.01 to 2723.05, inclusive, of the Revised Code, such action shall not be dismissed on the ground that the taxes or assessments, sought to be recovered, were voluntarily paid.”

Revised Code § 2723 reflects two public policies. First, § 2723 protects municipalities from unfair surprise by requiring a taxpayer-plaintiff to file a written notice of protest as a prerequisite to recovering illegal taxes or assessments. In furtherance of this policy, “the written protest and notice of intention to sue provisions of R.C. 2723.03 are mandatory and must be strictly adhered to if an action for the recovery of allegedly wrongfully collected taxes is to be maintained.” *Ryan v. Tracy*, 453 N.E.2d 661 (Ohio, 1983). As an additional restriction, § 2723.01 “prohibits the recovery of taxes where an action for such recovery is not commenced within one year of payment of the tax.” *State ex rel. Bassichis v. Zangerle*, 126 Ohio St. 118 (1933).

The second public policy advanced by § 2723.03 is facilitating taxpayer lawsuits to recover illegal taxes or assessments. As § 2723.03 states, “if” a plaintiff files proper notice, “such action shall not be dismissed on the ground that the taxes or assessments, sought to be recovered, were voluntarily paid.” In absence of this provision, potential tax-recovery plaintiffs would face an uncomfortable decision. On one hand, continuing to pay the tax creates a presumption of voluntary payment, thereby precluding recovery. On the other hand, refusing to pay the tax or assessment would leave a plaintiff vulnerable to fees and other penalties. Section 2723.03 allows a

plaintiff to rebut the presumption of voluntary payment by filing a notice of protest. In this way, § 2723.03 creates a path around a difficult procedural barrier, thereby facilitating actions to recover taxes.

**B. Filing a civil complaint meets all notice requirements set forth in § 2723.03.**

To comply with Revised Code § 2723.03, a taxpayer-plaintiff must file notice meeting four basic requirements. By its nature, a civil complaint satisfies each of these requirements. First, a complaint is a signed writing served on the defendant municipality. Second, a well-pleaded complaint will specify the nature of the plaintiff's "claim as to the illegality" of the tax. Third, a complaint provides a clear "notice of intent to sue," and notice "as to the portion sought to be recovered."

The final requirement under § 2723.01 is that the protest notice be filed "at the time of paying such taxes or assessments." In the case of a periodic tax or assessment, such as the "refuse fee," one instance of notice of intent to sue is sufficient to notify a municipality that the plaintiff is also paying subsequent installments under protest. The essence of § 2723.03 is that a plaintiff may rebut the presumption of voluntary payment by filing a protest notice at the time challenged "taxes or assessments" are paid. In absence of a protest notice, payments of a tax or assessment are presumed voluntary, precluding recovery. However, in this case, Appellant filed a complaint challenging Appellee's "refuse fee" on statutory and state constitutional grounds. Assuming, *arguendo*, that § 2723 applies to this case, under *Ryan v. Tracy*, Appellant is not entitled to recover "refuse fee" funds prior to filing her complaint. 453 N.E.2d 661. In light of Appellant's complaint, which provides clear notice of intent to sue and specific allegations of illegality, there is no reason to presume

that payments of the “refuse fee” subsequent to the complaint are “voluntary.” It would be patently absurd to require Ms. Shanahan to renew her “protest” of a tax with each subsequent payment, now that the City is fully aware of her complaint and legal issues it raises. Consequently, each of Ms. Shanahan’s payments of the refuse fee subsequent to filing her complaint were made “under protest” within the meaning of Revised Code § 2723, and these funds are therefore recoverable in an action for damages.

### **III. ARGUMENT ON ASSIGNMENT OF ERROR NO. 3: The trial court erred by not certifying the proposed class.**

#### **A. Under Ohio Civ.R. 23, Appellant Shanahan’s notice is sufficient to meet the requirements of R.C. § 2723.03 for the entire proposed class.**

In denying class certification, the trial court reasoned as follows:

“If the [plaintiff] does not limit the proposed class to other taxpayers who also have complied with the statute, the court should not certify the class as the class does not meet the numerosity requirement.”<sup>4</sup>

Here, the trial court relies on *Gottlieb v. City of S. Euclid*, 810 N.E.2d 970 (Ohio App. 8 Dist., 2004). However, as a careful reading of *Gottlieb* reveals, the *Gottlieb* court did not hold that a class action based on R.C. § 2723.03 must be limited to “other taxpayers who also complied with the statute”:

“While we recognize that the entire action was certified for class treatment...we do not believe certification of a damages claim to recover a license fee is appropriate in the absence of evidence showing that the class representatives paid the fee under under protest and that the class, as restricted to those paying the fee under protest, meets the numerosity requirement.” *Id.* at P32.

Here, the *Gottlieb* court is simply saying that limiting a class to “those paying the fee under protest” precludes a class action where the number of protesters is too small to justify a class action, rather than joinder. This reading of *Gottlieb* is more sensible, in

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<sup>4</sup> “Opinion and Judgment Entry,” page 4.

light of the public policy underlying the class action device. Under Ohio law, the class action is an appropriate vehicle for the recovery of an illegal tax. However, as a practical matter, requiring every class member to individually file notice of intent to sue makes the class action impossible. Section 2723.03 is essentially a jurisdictional requirement. Simply put, a court does not have jurisdiction to hear an action to recover taxes paid prior to the filing of a protest notice. The essence of a class action is that only the class representative needs to meet procedural formalities before the court. Individual class members are not directly involved in the litigation, while the class representative handles the litigation, including procedural and jurisdictional matters. As such, it is entirely appropriate for Appellant Shanahan to file a protest notice on behalf of a class of citizens subject to the “refuse fee.”

Moreover, to allow the City of Toledo to continue to collect the “refuse fee” with impunity is to encourage the enactment of illegal taxes by assuring municipalities that they will never be required to pay any portion of it back. Prior to the enactment of 2723.01-2723.05 it was not possible to recover wrongfully collected taxes.

*Pennsylvania R. Co. v. Scioto-Sandusky Conserv. Dist.*, 137 N.E.2d 891 (1956). The enactment of these provisions opened the doors to the courthouse for those that have been aggrieved by illegal assessments and illegally collected taxes. However, there is not a requirement to file a protest to seek injunctive relief nor is there to recover the unexpended portions. In fact, it would be contrary to the intention of § 2723.01-2723.05 to interpret these sections in a way that prevents Appellant and the proposed class from exerting their collective rights under the Ohio Constitution.

**B. Even if § 2723.03 bars recover of damages, the proposed class may nevertheless recover “unexpended” taxes under § 2723.05.**

As an additional basis for denial of class certification, the trial court stated:

“Ohio courts find that claims for injunctive and/or declaratory relief relating to improper taxes and assessments are unnecessary if a trial court finds [t]he case not properly maintainable as a class-action for damages. Ordinarily, Ohio courts require that actions seeking only to enjoin allegedly unlawful or unconstitutional taxes and fees should be brought as individual actions, because class certification is not the ‘superior’ method for dealing with such claims [internal citations omitted].”<sup>5</sup>

Contrary to the trial court’s reasoning, however, the proposed class will be entitled to collect damages under § 2731.05, even if § 2731.03 precludes recovery of past “refuse fee” payments in their entirety. Section 2723.05 requires the City of Toledo to repay any “unexpended” portion of wrongfully collected taxes and assessments. The trial court’s decision to deny class certification was based on the notion that no damages were recoverable by class members. Furthermore, the trial court determined that class certification was not required seek injunctive relief as an injunction would inure to benefit of all interested parties. However, to make that determination is to overlook the potential recovery of the unexpended funds pursuant to § 2723.05.

In this case, the collection of the “refuse fee” is ongoing and periodic. The City of Toledo continues to collect the “refuse fee,” despite this action. As a result, at any given time there will be a substantial amount of unexpended funds available to recover under ORC 2723.05. The prospect of the recovery of even this fractional portion of damages establishes the numerosity requirement that the trial court found to be lacking. If Appellant Shanahan prevails at the trial level, these funds are recoverable irrespective of the filing of a protest notice prior to filing the action. Thus, there are potential

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<sup>5</sup> “Opinion and Judgment Entry,” page 4.

damages available for the entire proposed class. For this reason, the trial court erred by denying class certification.

### **PRAYER FOR RELIEF**

For the reasons discussed above, Appellant Karen Shanahan respectfully requests this Court to find that the “refuse fee” enacted by Appellee is a “fee,” and further find that such fees are not subject to the requirements of Revised Code § 2321. As such, Appellant requests this court to order the trial court to certify Appellant’s proposed class. In the alternative, Appellant requests this Court remand to the trial court for additional proceedings consistent with this opinion.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Appellant's Brief was served via U.S. mail this 4th day of May, 2009 to the following:

Adam Loukx  
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