

DA 19-0277

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 51

TERRY HOUSER, CLAYTON FISCUS,
TERRY ODEGARD, MAE WOO, THOMAS
ZURBUCHEN, KATHRYN ZURBUCHEN,
ROGER WEBB, on behalf of themselves and
all other similarly situated,

Plaintiffs and Appellees,

v.

CITY OF BILLINGS,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV-18-0778
Honorable Gregory G. Pinski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Doug James, Ariel Overstreet-Adkins, Moulton Bellingham PC, Billings,
Montana

For Appellees:

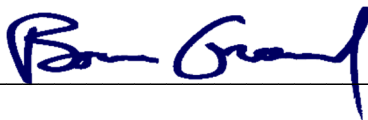
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Decided: March 3, 2020

Filed:



Justice Beth Baker delivered the Opinion of the Court.

¶1 The City of Billings (“City”) appeals the District Court’s order certifying three classes of more than 30,000 Billings ratepayers (“Ratepayers”) who challenge certain “franchise fees” that the City imposed on water, wastewater, and solid waste disposal services. We affirm the class certification order.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 1992, the City enacted and imposed franchise fees on several city services. The fees were based on various city regulations and City Council resolutions. The City ceased imposing the franchise fees in 2018. The Ratepayers sued the City, contending that the fees constituted unlawful sales taxes. The complaint alleged breach of contract and constitutional due process violations and sought restitution. The Ratepayers sought class action certification for those similarly situated persons who paid the water and wastewater fees since January 18, 2010, and the solid waste disposal fees since July 1, 2012; the District Court granted their motion on April 10, 2019. After examining the requirements of M. R. Civ. P. 23 (“Rule 23”), the District Court certified three classes:

All persons or entities who paid monthly metered water charges and were charged franchise fees under Section[s] 16-2 and 16-11 of the City of Billings Rules and Regulations Governing Water and Wastewater Service since January 18, 2010 (the “Water Class”);

All persons or entities who paid monthly wastewater charges and were charged franchise fees under Section[s] 16-6 and 16-11 of the City of Billings Rules and Regulations Governing Water and Wastewater Service since January 18, 2010 (the “Wastewater Class”);

All persons or entities who paid solid waste disposal charges and were charged franchise fees under Section 21-226 of the City of Billings Solid

Waste Collection Code and City Resolution[s] 12-19179, 13-19277, 14-10349, 15-10460, 16-10560, and 17-10635 since July 1, 2012 (the “Solid Waste Disposal Class”).

STANDARD OF REVIEW

¶3 “We afford trial courts the broadest discretion when reviewing a decision on class certification.” *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 25, 371 Mont. 393, 310 P.3d 452 (internal citations omitted). We review class certification orders to determine “whether the court acted arbitrarily without conscientious judgment or exceeded the bounds of reason.” *Jacobsen*, ¶ 25 (internal citations omitted). A district court’s interpretation of a procedural rule like Rule 23 is a matter of law that we review de novo for correctness. *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 13, 385 Mont. 396, 384 P.3d 455.

DISCUSSION

¶4 In order for a class action to proceed, it must first meet the four requirements of Rule 23(a). *Roose v. Lincoln Cty. Emp. Grp. Health Plan*, 2015 MT 324, ¶ 14, 381 Mont. 409, 362 P.3d 40. Specifically, Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). *Jacobsen*, ¶ 28. The party seeking class certification bears the burden of showing that the proposed class certification satisfies the Rule 23(a) requirements.

Byorth, ¶ 16 (citing *Roose*, ¶ 16). When evaluating a proposed class, the district court should engage in a “rigorous analysis” to determine whether the class is suitable for certification, but we have cautioned against assessing “any aspect of the merits unrelated to a Rule 23 requirement.” *Byorth*, ¶ 16 (citing *Sangwin v. State*, 2013 MT 373, ¶ 15, 373 Mont. 131, 315 P.3d 279); *see also Jacobsen*, ¶ 29.

¶5 The City disputes only the commonality factor of Rule 23(a). Rule 23(a)(2) requires that a party seeking class certification prove that the class has common questions “of law and fact.” The City argues that the District Court abused its discretion when it found that the “questions of law or fact” were common to the class. Commonality requires that the class members’ claims “depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Worledge v. Riverstone Residential Grp., LLC*, 2015 MT 142, ¶ 25, 379 Mont. 265, 350 P.3d 39 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2545 (2011)). “To satisfy commonality, the question [must] address the common injury allegedly shared across the class.” *Byorth*, ¶ 29. The City argued that there is no commonality because: (1) the Water Class included members who were barred from the claim by the statute of limitations and thus were not “common to the class”; and (2) the District Court failed to exclude from the certified classes those claims derived from the City’s legislative acts for which the City has legislative immunity.

¶6 We dispense easily with the first concern. The City asserts that because water qualifies as a “good” under the Uniform Commercial Code, the four-year statute of limitations, specified in U.C.C. § 2-725 (codified at § 30-2-725, MCA), applies. Consequently, it argues, because some of the members’ claims would be barred by the four-year limitation period, while others would not, commonality does not exist. Ratepayers agree that the four-year statute of limitations established by U.C.C. § 2-725 applies to the Water Class members’ breach-of-contract claims and acknowledge that the start date of the Water Class should be modified from January 18, 2010, to February 2, 2014. The statute of limitations does not defeat commonality because the common question is the legality of the franchise fee. Under M. R. Civ. P. 23(c)(1)(C), a district court “maintains discretion to modify the class definition at any time until final judgment.” *Rolan v. New West Health Servs.*, 2013 MT 220, ¶ 15, 371 Mont. 228, 307 P.3d 291. The District Court may, on remand, modify the Water Class definition to provide a starting date of February 2, 2014.

¶7 The City next argues that because the Ratepayers’ claims involve both legislative and administrative acts and the City has legislative immunity pursuant to § 2-9-111, MCA, the intermingling of the legislative- and administrative-based claims defeats Rule 23(a)(2)’s commonality requirement and precludes class certification. Ratepayers respond that there is commonality between the class members because “[a]ll 30,000 Plaintiffs in this matter have alleged exactly the same causes of action,” and the City’s invocation of legislative immunity impacts all Ratepayers to the same degree.

¶8 We agree with the Ratepayers. Whether the City has legislative immunity is a merits argument that will stand or fall equally for all members. There is no distinction between class members that would change this question. The common contention of each class member’s claim is that the City violated their rights by improperly charging a franchise fee on water, wastewater, and solid waste services. There is no evidence presented that some Ratepayers were affected by administrative regulations and others were affected by legislative resolutions for the exact same service. There are no material factual disputes—the case focuses entirely on the legality of the City’s franchise fees.

¶9 If the class meets the four requirements of Rule 23(a), there are three avenues under which a class action may proceed under Rule 23(b). *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶¶ 7-8, 396 Mont. 443, 445 P.3d 834. The District Court certified the classes under 23(b)(2) and (3).

¶10 The City argues that the court abused its discretion when it certified the classes under Rule 23(b)(2), allowing for injunctive or declaratory relief. The City asserts that the District Court cannot enjoin the City from exercising its legislative rate-setting powers. Ratepayers assert that district courts have express statutory authority to declare whether a municipal tax is illegal and provide injunctive relief, citing §§ 27-8-202 and -313, MCA. The District Court expressly found Ratepayers’ argument that the “City’s past practices regarding taxation requires an injunction to enjoin future similar franchise fees” to be a “proper basis for injunctive relief, although the propriety of such relief is a question for another day.”

¶11 Rule 23(b)(2) provides that a class action may be maintained if the party opposing the class has acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate to the class as a whole. The first requirement focuses on whether the defendant’s action affects everyone in the same proposed class in a similar fashion. *Knudsen*, ¶ 13 (citing 2 Rubenstein, *Newberg on Class Actions* § 4:28, 104). The second requirement focuses on the “indivisible nature” of the declaratory or injunctive relief—“the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Jacobsen*, ¶ 61 (quoting *Dukes*, 564 U.S. at 360, 131 S. Ct. at 2557). In *Knudsen*, the defined class failed to meet the Rule 23(b)(2) requirements because the party seeking class certification failed to identify a common policy or action by the defendant that affected the entire defined class and failed to show an “indivisible” nature of the injunctive or declaratory relief when the appropriate remedy would result in separate injunctions, not a single one. *Knudsen*, ¶ 15. Here, the Ratepayers have first identified the imposition of franchise fees as a common policy or action that affects the class as a whole in the same fashion. *Knudsen*, ¶ 13. Second, the injunctive or declaratory relief warranted, if any, has an indivisible nature and ultimately will be appropriate for all class members or for none of them. *Jacobson*, ¶ 61.

¶12 The City also asserts that the Ratepayers’ claim for an injunction and declaratory relief is moot because the City no longer charges franchise fees for the services. Again, this inquiry applies equally to all of the class members, and relief awarded, if any, will be to all

class members or to none. There is no individualized distinction between class members that would defeat class certification.

¶13 Finally, for the class action to proceed under Rule 23(b)(3), the court must find that questions of law or fact common to the class members predominate over any questions affecting individual members and that a class action is superior to other available methods for adjudicating their claims. *Knudsen*, ¶ 17. Class determination is proper under Rule 23(b)(3) when the “class members’ claims depend on a common contention that is capable of classwide resolution.” *Knudsen*, ¶ 17 (citing *Worledge*, ¶ 42).

¶14 The City argues that the lack of commonality should preclude class certification because a common legal issue does not predominate where Ratepayers assert claims based on both legislative and administrative acts. In *McDonald v. Washington*, 261 Mont. 392, 404, 862 P.2d 1150, 1157 (1993), we upheld class certification under Rule 23(b)(3) because the question whether the defendant was generally liable for failing to provide adequate quality water and services predominated over questions of individual damages and individual causation. Unlike in *Knudsen* or *McDonald*, the City does not point to any concerns regarding individual liability claims preventing class certification. Instead, the same legal question common to all class members—the City’s potential legislative immunity—predominates over any questions affecting only individual members. The determination whether the City is liable will be uniform for all members. The District Court did not abuse its discretion when it certified the classes under Rule 23(b)(3).

CONCLUSION

¶15 The District Court did not abuse its discretion when it certified the classes. We affirm and remand for further proceedings.

/S/ BETH BAKER

We concur:

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE

Justice Ingrid Gustafson recused herself from the panel considering this appeal.