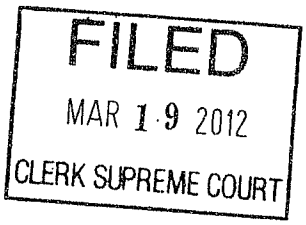
BEFORE THE IOWA SUPREME COURT



No. 09-1473

LISA KRAGNES, et al.,

Plaintiffs-Appellees/Cross-Appellants,

vs.

CITY OF DES MOINES,

Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HON. MICHAEL HUPPERT, DON NICKERSON & JOEL NOVAK

APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF THE ISSUES

I. THE OPINION OVERLOOKS OR MISAPPLIES LEGAL PRINCIPLES THAT LIMIT THE TRIAL COURT'S DISCRETION TO IGNORE INTRACLASS CONFLICTS.

Hansberry v. Lee, 311 U.S. 32, 40-44, 61 S. Ct. 115, 117-19 (1940)

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PETITION

Appellant/Cross-Appellee City of Des Moines, pursuant to Rule 6.1205 of the Iowa Rules of Appellate Procedure, seeks rehearing in the Iowa Supreme Court of the Court's opinion of March 2, 2012. The opinion overlooks or misapplies controlling law on two class certification issues, as further explained below. The Court on rehearing should modify its opinion to recognize that the class was improperly certified. In the alternative, the Court should remand for modification of the class certification order to allow class members to opt out.

I. THE OPINION OVERLOOKS OR MISAPPLIES LEGAL PRINCIPLES THAT LIMIT THE TRIAL COURT'S DISCRETION TO IGNORE INTRACLASS CONFLICTS.

Regardless of the perceived benefits of a class action as a remedial device, a court may certify a class only as allowed by the Iowa Rules of Civil Procedure. Moreover, the Iowa class action rule cannot be applied in a manner that violates the constitutional rights of absent class members. The constitutional rights of members resisting the class position are violated when a class is certified despite conflicting interests among class members. *See Hansberry v. Lee*, 311 U.S. 32, 40-44, 61 S. Ct. 115, 117-19 (1940). A trial court abuses its discretion, and its certification decision must be

reversed, when the decision turns on an erroneous application of the Iowa class action rule and/or disregards relevant constitutional principles. The trial court in this case abused its discretion under the applicable standard in certifying the class in this case. This Court's opinion overlooks or misapprehends the applicable limits on trial court discretion.

The opinion as an initial matter misinterprets and misapplies the Iowa class action rule by focusing on the fact that the City collected the franchise fee from each class member. The existence of a common question of law among class members and the adequacy of the named class member's representation are separate inquiries. *See Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 45 (Iowa 2003); Iowa R. Civ. P. 1.262(2). Commonality in legal theory does not override the need for separate representation when members of the class have conflicting remedial goals. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856-58, 119 S. Ct. 2295, 2319-20 (1999). Here, no doubt exists of class members' conflicting interests.

The opinion also ignores the interrelationship between class certification analysis and the differing types of class actions. The opinion upholds the trial court's denial of class members' right to opt out. Nevertheless, the opinion in addressing the intraclass conflict issue cites

without distinction to several decisions that specifically recognize and emphasize the ability of class members to opt out. *E.g., Lockwood Motors v. General Motors Corp.*, 162 F.R.D. 569, 578 (D. Minn. 1995) ("the dealers who are opposed to this lawsuit may 'opt-out' of the class"); *Martino v. McDonald's Sys.*, 81 F.R.D. 81, 86 (N.D. Ill. 1979) ("If franchisees are indeed satisfied with the [franchisor's] system, they may opt out of the class action"). Such decisions do not support the trial court's disregard of intraclass conflict in the present case.

Finally, the opinion fails to acknowledge – let alone effectively address – the most analogous case put forth by either party. That case, cited and discussed in the City's briefs, is *Evans v. Metropolitan Utilities Dist.*, 176 N.W.2d 679 (Neb. 1970). The plaintiff in that case sought certification of a class of utilities customers to pursue the potential repayment by a city of more than $4 million. *Id.* at 680-81. The Nebraska court readily recognized that the litigation, if successful, would benefit utilities customers who were not city taxpayers at the expense of utility customers who were. *Id.* at 681. The court thus declined to certify a class consisting of both taxpaying and non-taxpaying utilities customers. *Id.*

The record in the present case clearly establishes the same conflict that existed in the Nebraska case. The inverse relationship between the franchise fee and the property tax is historical fact. There is no speculation about it. The only speculation in the case is the speculation in the opinion that the City might somehow be able to finance a refund of some $40 million without increasing property taxes. The opinion (like the record below) identifies no possible independent source of such funds. Any suggestion that the City would not need to raise additional funds is not only highly unrealistic, but does not avoid the issue of intraclass conflict. To the degree the City might divert monies from general city purposes to the specific purpose of making refunds to past utilities customers, this action in and of itself would result in a re-allocation of the burden of City finance between those who do and do not pay property tax. The intraclass conflict would still exist.

The opinion notes that the named class representative is a taxpayer but does not explain how this makes the intraclass conflict speculative or illusory. Kragnes' pursuit of this action particularly is not evidence that no intraclass conflict exists: Kragnes has candidly admitted that she is willing to suffer economic loss for the sake of invalidating the franchise fee. (App.

137). This economic loss is the essence of the intraclass conflict. Significantly, the plaintiff in the Nebraska utilities case discussed above also was a taxpayer as well as a utilities customer. *Evans*, 176 N.W.2d at 681. The Nebraska court correctly looked past that fact, recognized the clear intraclass conflict, and denied certification. *Id.*

Kragnes had the burden of proving the elements necessary to class certification, including the lack of relevant intraclass conflict. *See Vos*, 667 N.W.2d at 45. Kragnes' speculation is inadequate to carry her burden in the face of the realities of municipal finance, as ably discussed in the dissenting opinion.

The Court should amend its opinion by adopting the dissent of Chief Justice Cady as the ruling of the Court on the issue of intraclass conflict, replacing Division III.A of the opinion. Because this would result in decertification of the class, the Court should delete as no longer necessary Divisions III.B, D, and E of the opinion. The opening and conclusion of the opinion should be modified to reflect these changes.

II. THE OPINION OVERLOOKS THE U.S. SUPREME COURT'S MOST RECENT COMMENTS ON OPT-OUT RIGHTS.

If this Court on rehearing fails to amend its opinion to require decertification of the class, it should re-visit the issue of the class members' constitutional right to opt out. The opinion focuses on what the Iowa and model class action rule allow rather than on what the U.S. Constitution allows, and it does not acknowledge the latest pronouncements of the U.S. Supreme Court on the scope of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965 (1985).

The U.S. Supreme Court in *Shutts* clearly held that at least in some circumstances, a member of a plaintiff class with a claim for monetary relief has a due process right to opt out of the class. *Id.* at 812, 105 S. Ct. at 2974. While *Shutts* involved a due process argument only on behalf of out-of-state class members, the Court has subsequently recognized that the constitutional opt-out right extends more broadly. For example, the Court in *Adams v. Robertson*, 520 U.S. 83, 85, 117 S. Ct. 1028, 1029 (1997) (*per curiam*), granted certiorari to consider whether a state court erred in failing to extent opt-out rights to all members of a plaintiff class; however, the

Court dismissed certiorari as improvidently granted because the issue had not been adequately raised in state court.

The U.S. Supreme Court, in a decision issued while this case was under submission, has now given an even clearer indication that due process opt-out rights are not limited to the specific context presented in *Shutts*. In *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2559 (2011), the Court described the reach of the *Shutts* decision as follows: "In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process." The Court then continued to state that while it had not yet reached the issue, there was a "serious possibility" that due process under the Fourteenth Amendment of the U.S. Constitution might require the granting of an opt-out right even if monetary claims did not predominate. *Id.* The Court in *Dukes* was interpreting Rule 23(b)(2) of the Federal Rules of Civil Procedure, under which class members do not have opt-out rights. *Id.* at 2557-59. The Court pointed to the constitutional due process implications as a ground for interpreting Rule 23(b)(2) as not applying in the particular case. *Id.* at 2559. No difference in principle exists between the federal rule and the Iowa class action rule on the opt-out issue.

The Court's considered language in *Dukes* regarding *Shutts* and due process opt-out rights is entitled to deference in other courts. *See generally Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007).

This Court should amend Division III.B of its opinion to recognize that because the litigation involves claims for monetary relief on behalf of class members, class members have a constitutional due process right to opt out. The Court should further amend its opinion to limit the refund award to the amounts paid by class members who do not opt out.

CONCLUSION

In considering this petition for rehearing, the Court should review the procedural history of this appeal. The trial court decision was entered on September 2, 2009. Both parties filed applications for interlocutory review. The applications initially were denied in a single-justice order. Upon the City's motion for three-justice review of the order, three justices sustained the applications and set expedited deadlines for briefing and filing an appendix under Iowa Rule of App. P. 6.902(2). The Court also ordered that the case be given submission precedence over other civil cases that did not have priority status under that rule. (Order, Nov. 19, 2009).

The appeal was deemed ready for submission on April 7, 2010. The Court subsequently entered an order assigning the case for submission without oral argument on September 2, 2010. (Order, May 27, 2010). No decision in the case had been made prior to the Court's entry of an additional order determining that the case should be resubmitted to the Court, again without oral argument, on July 13, 2011. (Order, July 12, 2011). The Court's decision was filed on March 2, 2012, approximately eighteen months after the date of initial submission.

In advocating for interlocutory review in its motion for three-justice review of the single-justice order, the City stated:

> The determinative issues concerning Plaintiff's claim for relief have been fully tried and are ripe for review. Stresses created by the uncertainty surrounding those issues has for several years seriously inhibited City government's ability to make budgetary decisions that are vital to the wellbeing of the 200,000 citizens of Des Moines. The City is required by statute to certify its budget and property tax rates to the county auditor each year by March 15th for the fiscal year beginning July 1st. *See* Iowa Code §384.2 (2009). Next year will be the fifth consecutive year of budgetary uncertainty created by the pendency of this case. This uncertainty adversely affects decisions regarding City operations and capital improvements. Operational decisions must be hedged and important capital improvements cannot be considered or must be postponed. The challenges that face all government bodies in current economic conditions are compounded for the City and its citizens by uncertainty regarding the outcome of this litigation. An urgent

> need exists for this court to eliminate that uncertainty by interlocutory review of the district court orders.

(Order, Nov. 19, 2009). The case plainly was not given the priority status that it deserved and that was promised in the three-justice order. Regardless of this Court's possible reasons for its delay in decisionmaking, the submission and decision delay have exacerbated the budgetary uncertainty that affects the wellbeing of all of the citizens of Des Moines.

This Court seems to scold City government for having resisted Plaintiff's action and for resisting certification of the class. Apart from the fact that the Court's criticism is guided by hindsight, the result under the Court's opinion inevitably will have a serious adverse impact on the citizens of Des Moines, including many of those whom Kragnes purports to represent. Our class action rule is not intended to permit and foster the harm that this case has inflicted and will continue to inflict on the people of Des Moines. This case is an example of the class action cases that give lawyers and judges a bad name.

The Court should grant this petition for rehearing and, upon rehearing, the Court should modify its opinion as requested in this petition.

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of printing the foregoing Appellant's Petition for Rehearing as $ 74.80 (exclusive of sales tax, delivery and postage).

Connie S. Lane

CERTIFICATE OF FILING

I hereby certify that I filed the foregoing Appellant's Petition for Rehearing by mailing eighteen copies to the Clerk of the Iowa Supreme Court on the 16th day of March, 2012.

Connie S. Lane

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2012, I served the foregoing Appellant's Petition for Rehearing by mailing a copy thereof to:

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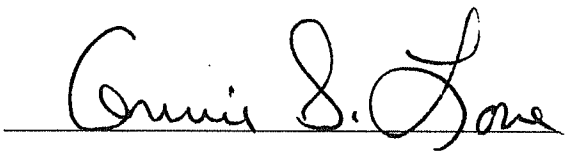
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,107 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: March 16, 2012



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