

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, Plaintiff, vs. CITY OF DES MOINES, Defendant.</p>	<p>CASE NO. CE 49273 RULING ON MOTION PURSUANT TO IOWA R.CIV.P. 1.276 AND TO EXPAND FINDINGS AND RECONSIDER RULING ON MOTION FOR CLASS CERTIFICATION</p>
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A contested hearing on an expedited basis was held on January 13, 2006 on the plaintiff's motion pursuant to IowaR.Civ.P. 1.276, as well as her motion to expand findings and reconsider the court's ruling denying her motion for class certification. The court heard arguments and evidence by way of professional statement, all of which were reported. Upon consideration of the arguments and evidence supplied at the hearing, and being otherwise duly advised in the premises, the court rules as follows:

Ruling on the questions raised by these motions has been stayed while the defendant's interlocutory appeal on the court's ruling on the plaintiff's second motion for summary judgment has been pending. IowaR.App.P. 6.6.2(2). A decision having been filed on May 26, 2006 directing in part that these issues may now be resolved, and procedendo having issued from that decision, the court is now in a position to rule.

The thrust of plaintiff's motion to expand findings and reconsider understandably pertains to the court's sole basis for denying the motion for class certification—that the plaintiff had failed to establish that she could adequately represent the class, specifically in the area of the financial obligations contemplated by this litigation if allowed to

proceed as a class action. In response to that ruling, the plaintiff and her counsel have restructured their fee agreement to provide that she will no longer bear the consequences of having to bankroll this litigation on her own. Counsel for the plaintiff has requested the court's approval of this restructured arrangement pursuant to IowaR.Civ.P. 1.276, and accordingly reconsider and grant her motion for class certification.

The court has had the opportunity to review the amended fee agreement in light of the new Rules of Professional Conduct and the manner in which they and rule 1.276 (neither of which were in existence at the time of the Stone case which was at the heart of its ruling denying class certification) impact the adequacy of representation issue. In addition, it has reviewed the decision in Comes v. Microsoft Corp., 696 N.W.2d 318 (Iowa 2005), which specifically addresses the viability of Stone in light of the advent of the new rules, specifically IowaR.Prof.Conduct 32.1.8(e). The Comes decision makes it clear that allowing counsel to advance the costs of class action litigation pursuant to rule 32.1.8(e) and rule 1.276 is sufficient to establish a plaintiff's ability to provide adequate financial resources and representation of the purported class. Id. at 327.

Present counsel of record for the plaintiff, as well as the Brick Law Firm who has obligated itself to be responsible for 70% of the advanced costs and expenses, stand ready to absorb the financial consequences that may be forthcoming should no monetary relief be awarded, to the degree any litigation expenses are not taxed as costs to the defendant. Counsel for the defendant conceded he has no concerns regarding the financial wherewithal of these firms to shoulder the financial load that may be required as this litigation proceeds. Therefore, based on the revised fee agreement and the authorities cited by the plaintiff, the court reconsiders its prior ruling, and now specifically finds that

the new fee agreement is approved pursuant to IowaR.Civ.P. 1.276(2), and that accordingly the plaintiff has now established she has or can acquire adequate financial resources to ensure that the interests of the class will not be harmed, as required by IowaR.Civ.P. 1.263(2)(c). With this finding, the court also concludes that the plaintiff will be able to fairly and adequately protect the interests of the purported class, as required by IowaR.Civ.P. 1.262(2)(c). The court having previously found the remaining requirements for certification have been met by the plaintiff, the plaintiff's motion for class certification should be and is hereby granted.

In its resistance to plaintiff's motion, the defendant focuses almost entirely on whether the plaintiff and the class are even entitled to a refund of a tax which was illegally assessed. This issue has been raised for the first time in this resistance. This fact notwithstanding, there is no need for the court to consider the defendant's argument at this time. Again, the Comes decision is instructive, if not dispositive of this issue. In Comes, the defendant challenged the certification of the purported class on the basis that it relied upon flawed or incomplete expert analysis on the issues of commonality and damages. The Iowa Supreme Court quickly disposed of the defendant's argument:

Microsoft's argument fails because, in effect, it asks the court to make a class-certification ruling based on the merits of the case, something we have uniformly rejected. See, e.g., Kramersmeier v. R.G. Dickinson & Co., 440 N.W.2d 873, 879 (Iowa 1989) (“[A] reversal of the trial court's certification order for failure of proof of reliance would be tantamount to requiring proof of plaintiffs' ability to ‘win on the merits,’ a showing clearly not contemplated by [the rules] or prior decisions of this court.”). This court has instead consistently held that class certification does not involve an inquiry into the merits of a case. See, e.g., Luttenegger, 671 N.W.2d at 438 (“In short, the question of certification is a procedural one ‘that does not ask whether an action is legally or factually meritorious.’”); Vos, 667

N.W.2d at 46 (“The appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they, as a class, have common complaints.’ For this reason, the court does not conduct a preliminary inquiry into the merits of a suit in a certification hearing.” (Citation omitted.)); Martin, 435 N.W.2d at 367-68 (“In a certification hearing, the court does not ‘conduct a preliminary inquiry into the merits of a suit.’ Obviously, that is not to say that the court may not require sufficient information to form a reasonable judgment in deciding whether to certify a class action. But the trial court's focus is directed at whether ‘class members have common complaints that can be presented by designated representatives in a unified proceeding.’” (Citations omitted.)).

Comes and the other authorities quoted above make it unmistakably clear that the type of objection based on the validity of the refund claim being made by the plaintiff and class is premature, to the degree it is tied to the certification issue. In addition, even if the class were not in a position to obtain monetary relief from the defendant, they still should be allowed to go forward as a class to pursue the declaratory and injunctive relief awarded the plaintiff individually.¹ Therefore, certification should be allowed on all remaining requests for relief, and the legal issues raised on the refund issue will await another hearing.²

IT IS THEREFORE ORDERED that the plaintiff's motion to expand findings and reconsider is granted. The court specifically finds that the plaintiff has or can acquire adequate financial resources, considering IowaR.Civ.P. 1.276, to ensure that the interests

¹ Counsel for the defendant suggested at the hearing that the defendant is already bound by the court's grant of declaratory and injunctive relief to the plaintiff individually as extended to the entire purported class. The court is unwilling to accept this premise at this time.

² The same is true regarding the defendant's argument that a significant portion of the purported class may not wish to go forward with the litigation, as it may result in a proportionately higher tax bill for them in the event a property tax increase is required to offset the lost revenue from the franchise fees. This is a matter that is better left to after notice is made to the class and members are given an opportunity to opt out. IowaR.Civ.P. 1.266, 1.267. Of course, should counsel's prediction come to fruition, the defendant can always pursue decertification if it appears the class in significant part is unwilling to proceed with the litigation.

of the class will not be harmed, as required by IowaR.Civ.P. 1.263(2)(c), and the plaintiff will fairly and adequately protect the interests of the class, as required by IowaR.Civ.P. 1.262(c).

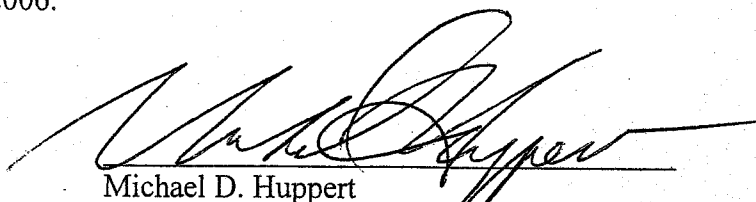
IT IS FURTHER ORDERED that the court approves the amended fee agreement between the plaintiff and her counsel pursuant to IowaR.Civ.P. 1.276(2), specifically as concerns the provisions allowing for counsel to advance costs and expenses and making the repayment of such costs and expenses contingent upon the outcome of this litigation.

IT IS FURTHER ORDERED that the plaintiff's motion for class certification is granted. The court specifically incorporates by reference its previous findings as contained in its ruling on motion for class certification filed on January 12, 2006 not otherwise amended or enlarged herein. This action shall proceed as a class action on behalf of the following class: all persons, firms, or corporations who have paid a franchise fee, from July 27, 1999 to the conclusion of this litigation, pursuant to the Gas and Electric Franchise ordinance passed by the City of Des Moines in effect for the applicable period. This class action may be maintained to determine what declaratory, injunctive or monetary relief may be awarded to the class relative to the validity or legality of the franchise fees assessed by the defendant to the class for the time period in question, to the degree such relief has not already been awarded to the named plaintiff individually.

IT IS FURTHER ORDERED that further proceedings in this matter in the district court shall be scheduled and held before Judge Don C. Nickerson, who has

assumed responsibility for the undersigned's docket, effective December 30, 2005,
pursuant to Administrative Order 2005-42.

Dated this 23rd day of June, 2006.

A handwritten signature in black ink, appearing to read "Michael D. Huppert", written over a horizontal line.

Michael D. Huppert
Judge, Fifth Judicial District of Iowa

Copies to:

Brad Schroeder ✓
Mark Godwin ✓
Hon. Don Nickerson ✓