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EXPLANATION OF WHY THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The governance of class action litigation is of great importance in Ohio jurisprudence as elsewhere. “The class action is a powerful procedural device, offering enormous savings in time and judicial resources while opening up opportunities for both new forms of litigation and potential abuse by litigants.” RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION* 233 (1985). The decision below presents a series of issues, including a question of first impression in Ohio, which are salient even within that inherently pivotal arena. First, the court of appeals ruling conflicts directly with a leading Florida appellate determination of exactly the same case under a sister state’s verbatim version of Rule 23 – a decision from which the instant action is an obvious attempt to escape. In addition, the lower courts’ rulings violates the basic requirements that a class be administratively identifiable and sufficiently numerous. Further, it raises an important issue of first impression as to the prohibition of “fail safe” class definitions applied in other state and federal courts under substantively identical class action rules. Finally, the decision below conflicts with other Ohio appellate authority on the issue of numerosity. As demonstrated below, the facts are crisp and clean, the abuse of discretion below is evident, the unascertainable class definition is hopelessly mired in individual fact questions requiring mini-trials, and the correct approach has been mapped out by a sister state’s courts. In short, this case presents a virtually ideal scenario for review.

A. The Class Definition

The gravamen of plaintiff’s claim in this case is that that bumper covers in 1999-2003 Volkswagen Jetta vehicles can be damaged when driven over “standard” parking barriers or curbs. The Sixth District decision appealed from affirmed certification of the following class:

All individuals and entities in Ohio who purchased, leased or acquired a 1999, 2000, 2001, or 2002 Volkswagen Jetta and who incurred expenses not covered or reimbursed by Volkswagen, when the vehicle suffered damage causing the front bumper assembly to separate from the body of the car as a result of contact of the underbody of the vehicle with a wheel stop, tire barrier or curb, during the period of time wherein the New Car Warranty for that vehicle was in effect. *Miller v. Volkswagen* (Sept. 19, 2008), 6th Dist. No. E-07-047, 2008-Ohio-4736, at ¶7.

This definition articulates at least six separate criteria for membership:

1. Each class member must have “*purchased, leased or acquired*” a 1999-2002 model year Jetta in Ohio.
2. Each must have “*sustained damage to the vehicle’s front bumper.*”
3. In each case, such damage must have “*caus[ed] the front bumper assembly to separate from the car*” as opposed to the myriad other ways in which bumpers can sustain damage or require repair or replacement.
4. Such damage and bumper separation must have occurred “*as a result of contact of the underbody of the vehicle with a wheel stop, tire barrier or curb,*” not in any other manner.
5. Such damage must have occurred within the period when “*the New Car Warranty for that vehicle was in effect*” (a maximum period of time of 2 years for the owners of a 1999-2001 model year vehicles and a maximum period of time of 4 years from the date of purchase for 2002 model year vehicles.)
6. Each such claim must have been “*not covered or reimbursed*” by Volkswagen. (emphasis added)

Yet, among these criteria, only the vehicle model, vehicle ownership, and lack of reimbursement by defendant can be administratively ascertained. In fact, the court below recognized that “[plaintiff’s] damages (the separation of the front bumper assembly of the car from the body) are required to occur as the result of a specified cause (contact of the underbody with a curb or wheel stop) and must take place during a particular time frame (within the new vehicle warranty period.”) *Miller v. Volkswagen*, supra, 2008-Ohio-4736, at ¶ 27. The court of appeals, however, offered no explanation as to how clearly independent occurrences could be resolved for even a single class member without individual investigation, discovery, and trial. Merely shifting these individual factual questions from the “merits” phase to the class definition

or labeling them as “damage” issues cannot remove them from the case, or abridge the defendant’s rights to challenge a claimant’s showing and present evidence specific to that claim. This fundamental misstep by the courts below conflict with established Ohio law, subverts the class action’s purpose, and calls for this Court’s review.

B. The Directly Conflicting Florida Decision in Sugarman v. Volkswagen

A particularly compelling reason for this Court to exercise its discretionary jurisdiction is to reconcile the decision of this Court with that of other states’ courts and federal courts which operate under identically worded versions of Civ.R. 23. See generally, *State v. Hairston* (2008), 118 Ohio St. 3d 289 (looking to sister state and federal construction of identical Constitutional provisions). This exact case has already been decided by the Florida courts, which reached the exact opposite conclusion. *Sugarman v. Volkswagen of America, Inc.* (2005), 909 So. 2d 923, involved identical class allegations against the same defendant as in this case, brought by the same counsel. In interpreting the Florida Rule substantively identical to Civ.R. 23 (Florida Rule of Civil Procedure 1.220(b)) the Florida Court disposed of plaintiffs’ identical legal arguments there as follows:

[Plaintiffs] sued Volkswagen and South Motors alleging that as a result of a design defect they suffered repeated damage to the front bumper assembly of their Volkswagen Jettas. Specifically, they contend that when a Jetta driver pulls completely into a parking space containing a wheel stop or curb, the front bumper assembly hooks onto the stop or curb, and when the driver backs the Jetta out of the parking space, the retainers holding the front bumper assembly detach causing damage ranging from \$50.00 to \$250.00.

... [T]he trial court abused its discretion in certifying a class action because the key element of causation mandates individual inquiry into each plaintiff’s claim. As to each parking accident, the trier of facts must determine specific vehicle conditions, the specific location and manner of the alleged damage, and the actions of the specific driver operating the vehicle. For example, such things as tire pressure, cargo and passenger load of the vehicle, and the condition, location and height of the wheel stop or curb alone would affect the clearance existing at the time of the alleged accident. Even though damage to the vehicle’s bumper

assembly was a common issue raised by all purported class members, *a series of minitrials would be required to determine the causation for each class member's particular claim of loss*. This would therefore defeat the purpose of the class action. *Sugarman*, 909 So.2d at 924-925. (emphasis added)

See also, *Kia Motors America Corp. v. Butler* (2008), 985 So.2d 1133, 1141, discussing *Sugarman*. Aside from a single perfunctory reference, *Miller*, 2008-Ohio-4736, at ¶47, the court of appeals made no attempt to distinguish or address the holding of the Florida court in *Sugarman*. This Court's close consideration on appeal is needed to dispel confusion and to direct the correct outcome under Ohio law, which is no different from the law in Florida.

C. Identifiability and Non-Ambiguity.

Civ.R. 23(A) imposes a requirement that a proposed class be administratively identifiable and that the definition of the class "be unambiguous." *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, 71. If a proposed class cannot be ascertained without vehicle specific discovery and investigation, the class is not administratively identifiable. Where a class is not administratively identifiable, it is by definition unmanageable. In the instant case it is impossible to even predict who will be entitled to notice of the class certification if the decisions below are not reversed.

The appeals court cited this Court's decision in *Warner v. Waste Management, Inc.* (1988), 36 Ohio St. 3d 91, 96, for the proposition that "[a]ny definition of the class must be unambiguous and ascertainable by means of reasonable effort." Yet, in the very next sentence the court cited to this Court's decision in *In re Consol. Mtge Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, at ¶10, for almost the exact opposite proposition, (i.e.) "the mere existence of different facts associated with the various members of the class is not by itself a bar to the certification of that class." The appeals court misapplied the quoted language from *In re Mtge*

Consol. Satisfaction Cases, which addressed the commonality requirement, and not the identifiable/unambiguous requirement.

Clearly, the decision below reflects confusion, with resultant inconsistency and error, in this area of law. It creates uncertainty in that ambiguously defined classes which are not identifiable at the time of certification, which are not identifiable by means of reasonable effort, and which require a series of mini-trials merely to determine membership, nevertheless continue to be certified. The result is a large volume of inconsistent and even contradictory case law on certification issues. Guidance from this Court is needed.

D. The Fail Safe Doctrine

The instant appeal also presents this Court with the opportunity to provide guidance on an important issue in class action law that has been decided in other states and in federal tribunals, but not by Ohio courts. The “fail-safe doctrine” is recognized in a large number of other jurisdictions as an important safeguard against certification in lawsuits where both the class definition and the causes of action alleged are inherently not amenable to class adjudication:

Moreover, basing the class definition on a determination of the merits creates a fail-safe class because if the defendants prevail at trial and Purchasers are unable to prove their theory, then there was never a class to begin with and certification was inappropriate. Therefore, the proposed members of the unsuccessful class would not be bound by the judgment. *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 454 (Tex. 2000) (citing *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 405 (Tex. 2000).

See also, *Ind. State Employers' Ass'n, Inc. v. Ind. Dep't of Highways*, 78 F.R.D. 724, 725 (S.D. Ind. 1978) (rejecting “fail-safe” class definition); *Newton v. Southern Wood Piedmont Co.*, 163 F.R.D. 625, 632 (S.D. Ga. 1995) (denying certification of class of all persons exposed to chemicals from wood treatment plant and “who have specifically evidenced a keratosis” because individualized inquiry into medical condition and exposure would be needed to determine

membership), *aff'd*, 95 F.3d 59 (11th Cir. 1996); *LaBrenz v. American Family Mut. Ins. Co.* (2007), 181 P.3d 328 (Colo. App.); *Capital One Bank v. Rollins*, 106 S.W.3d 286, 293 (Tex. App. 2003); *Ostler v. Level 3 Communications* 2002 WL31040337, (S.D. Ind. 2002).

A fail safe class is created when a court is required to hold “mini-hearings” on the merits of each individual claim in order to determine the members of the class. See generally *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 177. In order to decide whether a proposed class includes merit determinations, a trial court must decide whether that class “rests upon a paramount liability question.” *Dale v. DaimlerChrysler Corp.* 204 S.W.3d 151, 179 (Mo. App. 2006).

The courts below defined the class in terms of bumper damage experienced only under very specific conditions, (e.g.) vehicles that sustained damage to their front bumper, which caused the bumper assembly to separate from the car (as opposed to the myriad other ways, many the fault of a vehicle’s driver, in which bumpers can be damaged and require repair or replacement), and which occurred “as a result of contact of the underbody of the vehicle with a wheel stop, tire barrier or curb” (but not in any other manner). Unless these facts are established as to each claimant, neither class membership nor liability can be established. Where a decision on the merits of a claim is needed to determine whether that person is a member of the class, the proposed class is unmanageable, virtually by definition. See *Noon v. Sailor*, 2000 WL 684274, at *4 (S.D. Ind., 2000)

The court of appeals recognized the plethora of different factors that must be determined for each potential member of the class merely to determine if they are indeed a class member. For example, the driver must have sustained very specific damage to his front bumper, the damages “are required to have occurred as the result of a specified cause” and “must take place

within a specified time frame”, and the class members must have paid for the repairs themselves. *Miller v. Volkswagen*, 2008-Ohio-4736, at ¶27. However, the court ignored the fact that there is no available way to make these determinations for any potential class member without conducting at least discovery deposition, along with individual investigation. Repair records simply do not detail exactly how a bumper is damaged, the precise cause of the damage, driver fault, or the total months the vehicle had been on the road. The only way to determine this type of information is to question, under oath, and to investigate. This process is no less unique and individualized in Ohio than in Florida. See, *Sugarman*, 909 So.2d at 924-925.

The fail safe doctrine, if properly applied, would have precluded the certification of the class below. Notably, in dealing with Assignment of Error II below, which raised this precise issue, the court of appeals did not cite to a single Ohio case, from either state or federal court. Clearly, this is an important public policy issue, one that is commonly litigated in class action practice, and one that this Court should address and resolve.

E. Numerosity

The numerosity requirement of Civ.R. 23(A)(1) also cries out for clarification from this Court. The trial court’s Journal Entry granting class certification that there are insufficient known, existing class members to satisfy the numerosity requirement, stating “Volkswagen’s compilation of a subcategory of this data (Defendants’ Exhibits “J” and “K”) documents that at least eighteen of these known and documented complaints were received from Ohio residents. (Judgment Entry, 7/19/07, p. 11). The court of appeals took an even more circuitous route in finding numerosity, citing the “undisputed” figure of 1,496 calls or written complaints made “nationwide” involving front bumper damage for the relevant model years.” The appeals court went on to recognize that this number included those “contacts made by a dealership.” *Miller*,

2008-Ohio-4736, at ¶28. Further, the court conceded that “the only members of the class thus far are the appellees.” Id. at ¶38. Despite this fact record, the court found that, “[b]ased on the foregoing, *there could easily be* a class of 40 or more, or between 25 and 40, in this cause.” Id. ¶33. (Emphasis added.) Neither court below found that the class in fact had that many members. Furthermore, the lower courts did not explain how membership could be determined without individual investigation, discovery, and at least a “mini-trial.”

As a matter of public policy it will be confusing and dangerous to permit this decision to go unchallenged. Not only did the lower courts engage in impermissible burden shifting, they both failed to draw the proper conclusions from the data presented. Clear guidance from this Court determining both, a) that it is the plaintiff’s burden to prove the existence of a sufficient sized class, not merely the possible existence of a class, and b) that numerosity requires a minimum number of existing class members at the time of certification, would avoid similar missteps. See, e.g., *Currey v. Shell Oil* (1996), 112 Ohio App.3d 312, 319, 678 N.E. 2d 635, appeal not allowed 77 Ohio St.3d 1494, 673 N.E.2d 150.

STATEMENT OF THE CASE AND FACTS

A. The Complaint and First Appeal

Appellees Charles and Vivian Miller (“the Millers”) filed the Class Action Complaint (“the Complaint”) against Appellant Volkswagen of America, Inc., (“Volkswagen”) as well as against two Sandusky area Volkswagen dealers on August 30, 2004. The Millers sustained minor damage to their 2002 Volkswagen Jetta – not in this state but in West Virginia, where they had driven for the funeral of a relative. Based on this incident, the Millers sought certification of a class to recover for repairs to the front bumper and resulting loss of use sustained when Volkswagen Jetta vehicles were driven into or over different parking barriers, wheel stops, curbs,

or other “common obstructions.” The Complaint characterizes these incidents, without additional detail as “normal contact with such fixed objects as street curbs or wheel stops located in parking lots ***.”

The Complaint made no allegation as to what constitutes “normal contact” between a “fixed object” and a bumper, or what if any feature or material is common to the myriad street curbs or wheel stops located in “both public and private” parking lots throughout Ohio and the nation.

On December 27, 2004, the trial court certified two subclasses by way of a seven-word Judgment Entry, without an evidentiary hearing or discovery, and without the benefit of Findings of Facts and Conclusions of Law. On appeal, the Sixth District Court of Appeals reversed the decision of the trial court, on the authority of this Court’s decision in *Howland v. Purdue Pharma, L.P.* (2004), 104 Ohio St.3d 584, finding that the trial court had failed to conduct the necessary “rigorous analysis” into the prerequisites for class certification as stated in Civ.R. 23. *Miller v. Volkswagen* (April 7, 2006), Sixth App. No. E-05-005.

B. Proceedings on Remand

On remand, the trial court allowed discovery prior to conducting an evidentiary hearing. Over the course of two days, March 9-10, 2007, the trial court conducted an evidentiary hearing on the merits of the Millers’ Complaint. The only substantive witnesses at this hearing were the Millers and one expert each for the Millers and Volkswagen respectively.

Mr. Miller was the only driver of the vehicle in the family, and had never damaged the car in Ohio. He testified that the parking barrier that he collided with in West Virginia was shorter than those he typically encountered in Ohio and was installed on a steep slope on a hillside parking lot, that he had owned the vehicle for 26 months prior to damaging it in West

Virginia, that he never made a warranty claim for repairs because he has never believed that the damage to his car was covered by warranty, and that he had never been told by his attorneys or anyone else that he was being asked to function as a class representative. In fact, Mr. Miller did not even know at the hearing that this litigation was filed as a class action lawsuit. Mr. Miller testified that he became involved in this lawsuit when an employee of a body shop informed him that Plaintiffs' counsel was recruiting someone to sue Volkswagen. Both Mr. and Mrs. Miller testified that they did not know of a single other potential class member anywhere in Ohio- and they were the only fact witnesses at the hearing.

For its part Volkswagen produced records of every complaint of any kind that it had ever received concerning any inquiry or complaint, concerning the bumper cover, including many claims having nothing to do with anything resembling the allegations in this case. These records conclusively proved that the absolute greatest possible number of class members was from nine to eleven. These records, which were received into evidence at the evidentiary hearing by the trial court, included all complaints made directly to Volkswagen by all means of communication, including phone, e-mail, traditional mail, etc. Also, these records included every customer complaint made to a dealer that was forwarded to Volkswagen's attention. Thus, any other Jetta owners, other than those identified by Volkswagen, who sustained damage to their front bumper and were denied coverage under their warranty, are unknown to Volkswagen – and therefore unidentifiable – today.

All of the vehicles which comprise the certified class are now out of warranty and have been for at least two years. All vehicles for three out of the four relevant model years (1999-2001) have been out of warranty for five years. The 2002 vehicles have been out of warranty for at least two years. The purported class only includes owners who sustained damage while the

vehicle was under warranty. Thus, there is no possibility that new class members will be created.

After Volkswagen appealed the certification of the class, the certification was affirmed by the Sixth District on September 19, 2008. This appeal timely followed.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

This Court's most recent relevant decision provides the standard for review in this case:

“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. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.”

Hamilton v. Ohio Savings Bank, 82 Ohio St.3d at 70, 694 N.E.2d at 447.

A. PROPOSITION OF LAW NO. 1

A Trial Court Abuses its Discretion by Certifying a Class That is Not Administratively Identifiable.

The court of appeals stated that “the class, as certified herein is a definite class.” *Miller*, *supra*, 2008-Ohio-4736, at ¶27. Earlier in the same paragraph, the court stated in regard to the identifiable requirement of Civ.R 23(A) that “[a]ny definition of the class must be unambiguous and ascertainable by means of reasonable effort.” *Id.*, citing *Warner*, *supra*, 96 Ohio St.3d at 96. Compounding the confusion, the court elsewhere acknowledged that “the **only members** of the class **thus far** are appellees.” *Id.* at ¶38. (Emphasis added.)

As discussed *supra*, the court below sought to avoid the mandate of *Warner* by citing the commonality prerequisite discussed in *In re Consol. Mtge Satisfaction Cases*, 97 Ohio St. 3d 465, 2002-Ohio-6720, at ¶10. The clear fact remains that even today no definite class exists, the class definition is impossibly ambiguous, and the class cannot be ascertained through reasonable effort. Counsel for the Millers had three years to unearth potential class members and came up

completely empty. It is precisely this sort of confusion and ambiguity, which reflects the need for clear guidelines from this Court.

B. PROPOSITION OF LAW NO. 2

A Trial Court Abuses its Discretion in Certifying a Fail-Safe Class, Thereby Obligating the Court to Hold Mini-Trials on the Merits of Each Individual Claim in Order to Determine Class Membership.

The class below is undoubtedly an impermissible fail-safe class in which membership is entirely dependent on facts central to the merits of individual claims. If, upon remand, the class definition remained the same, extensive discovery would be needed to determine whether any potential claimant qualified for membership. Additionally, the defenses and/or affirmative defenses available to Volkswagen, such as contributory negligence, modification of the vehicle, failure to properly maintain the vehicle, and lack of privity will be different for each and every potential class member. The Millers themselves exemplify this situation, as they are excluded from membership in a class for which they are the sole representative because they never made a claim for warranty coverage and never sought reimbursement from Volkswagen. The fact that their mishap occurred in West Virginia highlights the individuality and unmanageability to aggregating claims such as theirs under an ill-conceived “class” rubric.

It seems self-evident that a precondition to membership in a class action alleging breach of warranty claims is that some claim or notice is made under the warranty itself. This is especially when the trial court’s definition requires that class members have “incurred expenses not covered or reimbursed by Volkswagen *** during the period of time wherein the New Car Warranty for that vehicle was in effect.” Clearly, under any warranty, a seller must be given opportunity to face a claim in order to honor the warranty and reimburse the customer. So too

with the Volkswagen warranty. A claim for reimbursement is a condition precedent to reimbursement.

The undisputed data in the record shows that some claims for bumper damage were covered by Volkswagen, while others were not. This decision depended on the very much varied circumstances by which the damage was sustained.

Another defense particular to each claim is whether coverage is excluded by the terms of the Limited New Vehicle Warranty, which excludes damage caused by collision. At the certification hearing, the Millers' expert quibbled with the definition of a "collision" suggested to him, and testified that not all incidents involving damage to a potential class member's bumper were necessarily the result of a collision. However, even under this rationale,, discovery will be necessary for each and every potential class member to determine the applicability of the relevant Limited New Vehicle Warranty and its collision exclusion.

The Florida appellate court in *Sugarman* court recognized that a myriad of different factors "mandates individual inquiry into each plaintiff's claim" including "location and manner of the alleged damage, specific vehicle conditions, actions of the specific driver, tire pressure, cargo and passenger load, location and height of the wheel stop or curb." *Sugarman*, 909 So. 2d at 924. This Court should grant review to align Ohio law with the correct approach taken in *Sugarman* and appropriately resolve a matter of important interstate public policy and general interest.

C. PROPOSITION OF LAW NO. 3

A Trial Court Abuses its Discretion in Certifying a Class Where There are no Known Members of the Class Other than a Solitary Class Representative and Where the Evidence Demonstrates a Maximum Class Size of Less than Forty Persons.

The burden of proof in establishing numerosity is upon plaintiffs, not defendants. *Currey v. Shell Oil Co.*, 112 Ohio App.3d at 319, 678 N.E.2d at 640. It is a plaintiff's burden to prove the "actual existence" of a large class of putative plaintiffs, not simply that there are many parties that could possibly be members of the class. *Id.* Further, the failure to establish any of the prerequisites to class certification shall defeat a request for class certification. *Schmid v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313, 473 N.E.2d 822.

Based on the language of the respective opinions of the Fourth District in *Currey* and the Sixth District below, there is now a conflict between those two districts requiring resolution by this Court. The Millers, at most, demonstrated no more than a *potential* for the existence of additional parties. Although Volkswagen strenuously disagrees that the Millers even demonstrated the potential existence of more than a handful of additional class members, the fact the trial court and court of appeals permitted a class to be certified based solely on the potential, as opposed to the actual, existence of additional class members requires review by this Court.

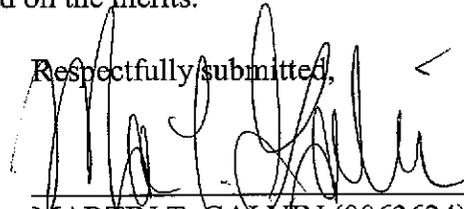
The abuse of discretion standard of review furnishes no warrant for short-changing this Court's mandate in *Howland* of "rigorous analysis" of each factor listed in Civ.R. 23(A) and (B), and of each argument raised by the party opposing certification. This is yet another reason for this Court to accept jurisdiction. If left undisturbed, the decision below will mislead the bench and bar regarding the "rigorous analysis" requirement and will directly lead to other classes being certified based solely on the "potential" for some day reaching the "threshold" level of twenty-five members. This Court should exercise its discretionary jurisdiction not only to re-

affirm the viability of *Howland*, but also to provide needed clarification of the proper interpretation of Civ.R. 23's numerosity requirement to avoid such an assault on Ohio's sound public policy and meticulous application of the requirement of Civ. R. 23.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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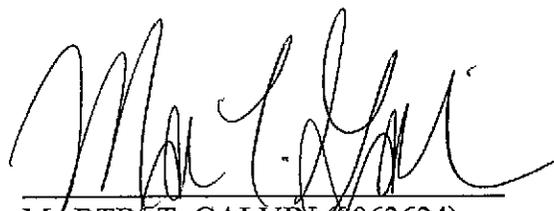
CERTIFICATE OF SERVICE

A copy of the foregoing document was sent by regular U.S. mail on this 28th day of

October, 2008.

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APPENDIX

- APPX1. Miller v. Volkswagen of America, Inc., 2008-Ohio-4736,
Opinion and Journal Entry of the 6th District (Erie County)
Court of Appeals (September 19, 2008).**
- APPX19. Judgment Entry, Court of Common Pleas, Erie County (July 17,
2007).**

MANDATE

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2008 SEP 19 AM 8:01
CAROL A. JOHNSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Charles Miller, et al., on their own behalf
and on behalf of the class defined herein

Court of Appeals No. E-07-047

Appellees

Trial Court No. 2004-CV-358

v.

Volkswagen of America, Inc., et al.

DECISION AND JUDGMENT

Appellant

Decided: SEP 19 2008

Hugh J. Bode and Martin T. Galvin, for appellant.

Dennis E. Murray, Sr. and Donna J. Evans, for appellees.

APPX1

HANDWORK, J.

{¶ 1} This is the second appeal of a judgment of the Erie County Court of Common Pleas certifying this cause as a class action. See *Miller v. Volkswagen of America, Inc., et al.*, 6th Dist. No. E-05-005.

{¶ 2} In August 2004, appellees, Charles and Vivian Miller, filed a class action complaint alleging breach of express warranty and implied warranty of fitness for a

J566/762
9-19-08

J28/599
9-19-08
C.A.

particular purpose against appellant, Volkswagen of America, Inc., as well as Sandusky Motors, Inc., and Cappel Management XV, Inc., d.b.a. Victory Honda of Sandusky. The complaint asserted that on May 21, 2002, appellees purchased a 2002 Volkswagen Jetta from Sandusky Motors, Inc. The complaint further alleged that on July 16, 2004, the front bumper on their Jetta "hooked onto a standard wheel stop" in a parking lot and was damaged when appellees backed out of the parking space. According to appellees, the damage occurred due to a design defect in the front bumper assembly because the bumper and/or the spoiler are lower to the ground than the height of a curb or a concrete tire stop. Finally, appellees stated that when they sought to have their Jetta bumper repaired or replaced, Volkswagen said that it would authorize the repairs to be made without any charge to appellees. The Millers claimed that the corporation later withdrew this authorization, and they were, therefore, forced to pay for repairs.

{¶ 3} In their motion for class certification, appellees asked the court to allow them to represent two classes: Class A and Class B. They proposed that Class A consist of all "individuals and entities who currently own or lease a 1999, 2000, 2001 or 2002 Volkswagen Jetta in Ohio." Proposed Class B would be comprised of: "all individuals and entities in Ohio who purchased, leased or acquired a 1999, 2000, 2001 or 2002 Volkswagen Jetta within the applicable limitation period and who incurred expenses, not covered or reimbursed by [the defendants], when the vehicle suffered damage to the front bumper assembly and as a result of contact with a wheel stop or curb." For Class A, appellees sought injunctive and declaratory relief. For Class B, appellees requested

compensatory damages, prejudgment interest, costs, and attorney's fees. The defendants filed detailed objections to the motion for certification and requested an evidentiary hearing.

{¶ 4} On December 27, 2004, a visiting judge in the court below made, inter alia, the following entry: "Plaintiffs' motion for class certification is granted." Volkswagen of America, Inc., Sandusky Motors, Inc., and Cappel Management XV, Inc., d.b.a. Victory Honda of Sandusky, timely appealed that judgment to this court. *Miller v. Volkswagen of America, Inc., et al.*, at ¶ 7. We reversed the trial court's judgment holding that the court abused its discretion in granting the motion because it failed to make any findings with regard to the Civ.R. 23 prerequisites and did not address the defendants' objections. *Id.* at ¶ 17. We then remanded the trial court's judgment for further proceedings consistent with our decision. *Id.* at ¶ 19.

{¶ 5} Upon our remand, the common pleas court judge held an evidentiary hearing on the question of class certification. Appellees' expert, David R. McLellan, who worked for General Motors and was the Chief Engineer for the design of Chevrolet Corvettes from 1975 until 1992, testified that, in his opinion, the problems with the Jetta's front bumper assembly was a design defect (the assembly is plastic, it does not have aluminum skid bars, the bumper assembly is approximately four inches off the ground that would be damaged every time that one of these Jettas was pulled over a standard six inch wheel stop/tire barrier or curb to the point where the curb or wheel stop was within four or five inches of the same.

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{¶ 6} On July 19, 2007, the trial court filed a 24 page decision in which it discussed the evidence offered at the hearing and examined each of the requisites set forth in Civ.R. 23. The court concluded that appellees failed to offer any evidence as to Cappel Management XV, Inc., d.b.a Victory Honda and Sandusky Motors, Inc., and declined to certify a class action as to these defendants. The court did, however, certify a single class, pursuant to Civ.R. 23(B)(3), as to appellant, Volkswagen of America, Inc. This class is defined as:

{¶ 7} "All individuals and entities in Ohio who purchased, leased or acquired a 1999, 2000, 2001 or 2002 Volkswagen Jetta and who incurred expenses not covered or reimbursed by Volkswagen, when the vehicle suffered damage causing the front bumper assembly to separate from the body of the car as a result of contact with the underbody of the vehicle with a wheel stop, tire barrier or curb, during the period of time wherein the New Car Warranty for that vehicle was in effect."

{¶ 8} Appellant appeals the trial court's judgment and maintains that the following errors occurred in the proceedings below:

{¶ 9} "Assignment of Error I

{¶ 10} "The trial court certified a class which is not administratively identifiable or clearly defined as required by Rule 23(A)

{¶ 11} "Assignment of Error II

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{¶ 12} "By making merits issues determinative of membership in the class, the trial court improperly certified a fundamentally improper and unconstitutional 'Fail Safe' class.

{¶ 13} "Assignment of Error III

{¶ 14} "The few, if any, individuals who might qualify for membership in the class certified below cannot meet the numerosity requirement of Rule 23(A)

{¶ 15} "Assignment of Error IV

{¶ 16} "The claims of the Millers do not share common questions of law or fact, nor are they 'typical' of those of other potential class members under Rule 23(A).

{¶ 17} "Assignment of Error V

{¶ 18} "The Millers, who are not even members of the class certified below, are by definition not adequate class representatives as required by Civ.R. 23(A)(4). Their complete lack of involvement, or even meaningful knowledge, of this action further disqualifies them on that ground.

{¶ 19} "Assignment of Error VI

{¶ 20} "The class certified below fails to meet the applicable requirements of Rule 23(B)(3).

{¶ 21} "Assignment of Error VII

{¶ 22} "The trial court's certification was improper because the type of damage incurred by the class members is excluded from coverage by the terms of the express warranty.

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{¶ 23} "Assignment of Error VIII

{¶ 24} "The trial court's class certification of claims for breach of implied warranty was inappropriate because of lack of privity between Volkswagen and all plaintiffs."

{¶ 25} A trial court has the discretion to certify a cause of action as a class action. *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, syllabus. Thus, we will not disturb the trial court's judgment absent an abuse of discretion, that is, only if the lower judge's attitude in reaching his decision was unreasonable, arbitrary or unconscionable. *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 5 (citation omitted). Nevertheless, a trial court's discretion on the question of class certification is not unlimited, and must be exercised within the framework of Civ.R. 23. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 70. There are seven prerequisites that must be met before a court can certify a case as a class action. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, paragraph one of the syllabus. These prerequisites are: (1) an identifiable class exists and the definition of that class is unambiguous; (2) the named representatives are members of the class; (3) the class is so numerous that joinder of all members is impracticable; (4) questions of law or fact exist that are common to the class; (5) the claims or defenses of the representative parties are those typical of the claims or defenses of the class; (6) the representative parties can fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements is met. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d at 71, Civ.R. 23(A) and (B). Keeping these precepts in mind, we now turn to appellant's assignments of error.

{¶ 26} In its Assignment of Error No. I, appellant maintains that the class certified by the trial court was not administratively feasible to be identifiable or clearly defined at the time of certification. Appellant claims that in order to identify the members of the class, the trial court would be required to inquire into the facts of each individual class member as to the condition of his or her Jetta, driver negligence, the height of the curb or wheel stop, and the location and extent of the damage. In other words, appellant claims that the members of the class in this cause cannot be determined through reasonable efforts. See *Cicero v. U.S. Four, Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600, ¶ 14 (citations omitted).

{¶ 27} An identifiable class must exist at the time of certification. *Warner v. Waste Management, Inc.*, 36 Ohio St.3d at 96. Any definition of the class must be unambiguous and ascertainable by means of reasonable effort. *Id.* Nevertheless, the "mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d at ¶ 10 (discussing the commonality prerequisite). Here, the definition of the class includes only certain individuals who owned Volkswagen Jettas manufactured in certain years, 1999 to 2002. Their damages (the separation of the front bumper assembly of the car from the body) are required to occur as the result of a specified cause (contact of the underbody with a curb or wheel stop) and must take place during a particular time frame (within the new vehicle warranty period). Furthermore, the class members must have paid for the repair of the damage to their Jettas themselves.

These factual issues are central to all of the class, and there is no need to inquire into those matters, e.g., the condition of each Jetta, raised by appellant in order to determine who is a class member. Therefore, the class, as certified herein, is a definite class. See *Walker v. Firelands Community Hosp.* (Oct. 5, 2001), 6th Dist. No. E-01-006.

Accordingly, appellant's Assignment of Error No. I is found not well-taken.

{¶ 28} Appellant's Assignment of Error No. II alleges that the common pleas court certified a fundamentally improper and unconstitutional "fail safe" class by defining the class in terms of bumper damage experienced only under specific conditions. A fail safe class is created when a court is required to hold "mini-hearings" on the merits of each individual claim in order to determine the members of the class. *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 177. In order to decide whether a proposed class includes merit determinations, a trial court must decide whether that class "rests upon a paramount liability question." *Dale v. Daimler Chrysler Corp.* (2006), 204 S.W.3d 151, 179, citing *Intratex Gas Co. v. Beeson* (Tex.2000), 22 S.W.3d 398, 404. In such a case, the class would only be bound by a judgment that is favorable to the class but not a judgment favorable to the defendant. *Id.*; *Dafforn v. Rousseau v. Russell Associates, Inc.* (N.D.Ind.1996), 1976-2 Trade Cases P61, 219. Therefore, to determine whether a class definition includes a merit determination, a court must decide whether the class would still exist if the defendant in the class action prevails at trial. *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d at 179-180, citing *Intratex Gas Co. v. Beeson*, 22 S.W.3d at 405.

{¶ 29} Assuming that appellant was not found liable in the instant case, the class would still exist because determining the members of the class does not rest upon a determination of the merits of this cause. That is, a class of individuals would still exist for: (1) owners of Jettas manufactured from 1999 through 2002; (2) whose front bumper assembly of those vehicles was damaged as the result of contact with a curb or wheel stop/tire barrier ; (3) during the relevant warranty period; and (4) who were required to pay for the repair to their vehicle. Cf. *Intratex Gas Co. v. Beeson*, 22 S.W.3d at 405 (finding that the trial court abused its discretion in certifying class composed of plaintiffs "whose natural gas was taken by the defendant in less than their ratable proportions" because class membership could not be determined until the certified issue, "whether Intratex nonratably took gas from class members" was the central merit issue to be determined at trial); *Dunn v. Midwest Buslines, Inc.* (E.D.Ark.1982), 94 F.R.D. 170, 172 (denying certification of a class composed of persons "who have actually been discriminated against" due to the fact that the class was unlimited until a decision on the merits). Accordingly, appellant's Assignment of Error No. II is found not well-taken.

{¶ 30} Appellant's Assignment of Error No. III urges that the trial court erred in finding that the proposed class met the numerosity requirement of Civ.R. 23(A). Appellant insists that only a maximum of nine Jetta owners during the relevant time frame can be included in the defined class. Initially, we note that appellant adds a requirement for class membership that is not a part of the trial court's definition of the class in this case. Specifically, appellant asserts that in order to be a member of the class

an individual must have filed a claim for reimbursement from Volkswagen for the damaged bumper assembly and been rejected. A plain reading of the class definition, as set forth above, belies this assertion.

{¶ 31} Pursuant to Civ.R. 23(A)(1), class certification is proper in those instances where the "class is so numerous that the joinder of all members is impracticable." Joinder is more likely to be impracticable if, as in this case, each class member's claim involves only a small amount of damages. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d at 75 (citation omitted). A proposed class of more than 40 members generally meets the standard for numerosity. *Warner v. Waste Mgmt., Inc.*, 36 Ohio St.3d at 97, quoting Miller, *An Overview of Federal Class Actions: Past, Present, and Future* (2 Ed.1977) at 22. A class size of less than 25 usually indicates that numerosity is lacking. *Id.* If the class size falls between 25 and 40, there is generally no automatic rule. *Id.* While the representatives in a class action are not required to identify the exact number of members in the proposed class, they are required to produce some evidence or a reasonable estimate of the number of class members. *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-06-1120, 2007-Ohio-5353, ¶ 19, citing *Cervantes v. Sugar Creek Packing Co., Inc.* (S.D. Ohio 2002), 210 F.R.D. 611, 621. A court is, however, permitted to make common sense assumptions in determining whether the numerosity requirement is satisfied. *Id.* at ¶ 19, citing *Evans v. U.S. Pipe & Foundry Co.* (C.A.11, 1983), 696 F.2d 925, 930.

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{¶ 32} Here, appellant claims that only eight calls were made to its customer care center making the same complaint concerning the front bumper of a Jetta manufactured in the years 1999 through 2002. Nevertheless, appellees offered evidence of the fact that 17,500 Jettas for the model years 1999 through 2002 were sold in the state of Ohio. Appellees also point out that the warranty for the Jetta for those years directs the owner to the dealership for warranty service and part replacement; thus, it can be assumed that many of those owners, including the Millers, never called the customer care center.

{¶ 33} Furthermore, it is undisputed that 1,496 calls or written complaints made nationwide involved the repair or replacement of a Jetta's front bumper for the relevant model years. A review of appellee's Exhibit 9 documenting these calls reveals that many of the contacts were made by a dealership seeking reimbursement for repair or replacement of the Jetta's front bumper (many of which could be reimbursement for the same damage suffered by appellees' Jetta), were second or more times that said bumper needed to be replaced or repaired for the same reason (being caught on a wheel stop or curb and pulled off or damaged), were paid one time as "goodwill assistance" or a "goodwill gesture," were deemed to "need [a] diagnosis," or were classified as "concerns noted."¹ Based upon the foregoing, there could easily be a class of 40 or more, or between 25 and 40, in this cause. Therefore the trial court did not err in finding that the

¹Appellant refers to the deposition of Dawn Dameron in its reply brief and attaches excerpts, presumably from that deposition to that brief. We find, however, upon a careful review of the record of this cause, said deposition was never filed in the court below.

numerosity prerequisite was met in the instant case, and appellant's Assignment of Error No. III is found not well-taken.

{¶ 34} In its Assignment of Error No. IV, appellant contends that appellees do not share common questions of law or fact with any other potential class members and are not "typical" of these class members. Appellant bases these contentions on the fact that appellees' Jetta has a four year/50,000 mile warranty while a purported three-fourths of the class have a two year/24,000 mile warranty.

{¶ 35} Under Civ.R. 23(A)(2), the class members must have common questions of law or fact. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d at 77. Nonetheless, every issue or fact need not be common to the class. *Id.* Rather, the existence of a common nucleus of operative facts or common liability satisfies the rule. *Id.* (Citation omitted.) The commonality requirement to class certification requires that "there are questions of law or fact common to the class." Civ.R. 23(A)(2). The commonality requirement is generally given a permissive application. *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St.3d at 202.

{¶ 36} The common nucleus of facts in this cause are that a breach of an express or implied warranty took place when appellant failed to repair or replace the front bumper assembly of Jettas (1999 through 2002 models) that happened as the result of parking over a standard curb or wheel stop during the warranty period. The fact that the different

models had differing warranty periods² has no relevance to this common nucleus because the damages suffered by each member of the class must arise during the life of that warranty—be it two years/24,000 miles or four years/50,000 miles. Accordingly, the trial court did not err in determining that the class members in this cause have both common questions of law and fact.

{¶ 37} The prerequisite of "typicality" requires a court to decide whether the claim of the class representatives is substantially similar to the claims of the other class members, that is, whether there is an express conflict between the class representatives and other members of the class. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d at 77. This inquiry is necessary in order to protect absent class members and to promote "the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class." *Baughman v. State Farm Mut. Ins. Co.*, 88 Ohio St.3d 480, 2000-Ohio-397, at 484, citing 5 Moore's Federal Practice (3 Ed.1977) 23-92 to 23-93, Section 23.24[1].

{¶ 38} Here, the only members of the class thus far are appellees. While this is not the ordinary situation, see *Williams v. Countrywide Home Loans, Inc.*, 2002-Ohio-5499 at ¶ 32, Civ.R. 23(A) expressly contemplates such circumstances by stating: "One or more members of a class may sue or be sued as a representative on behalf of all * * *.

Moreover, in the case under consideration, appellant's only argument against typicality is

²A reading of both "Limited New Vehicle Warranty" clauses reveals that, except for the length of the warranty, they are identical.

that the warranty periods for the Jettas are different. This fact, in and of itself, does not create a conflict between appellees and potential class members because it does not affect the common question of appellant's alleged breach of warranty and or implied warranty.

{¶ 39} For all of the foregoing reasons, appellant's Assignment of Error No. IV is found not well-taken.

{¶ 40} In its Assignment of Error No. V, appellant maintains that appellees are not adequate representatives of the proposed class because they (1) "never made a claim for coverage under their warranty and they never sought reimbursement from appellant;" and (2) failed to demonstrate knowledge of the class action or a willingness to serve as a class representative.

{¶ 41} Appellant's first argument is without merit due to the fact that the definition of the class does not include terms requiring class members to make a claim under their New Car Limited Warranty or to seek reimbursement for repairs from appellant. As to the second issue, Civ.R. 23(A)(4) requires that the representative parties must "fairly and adequately protect the interests of the class." Adequacy of the representative also includes adequacy of counsel.³ *In re: Rogers Litigation, Ms. X v. Rogers*, 6th Dist. No. S-02-042, 2003-Ohio-5976, ¶ 33. The representatives of a proposed class are adequate so long as their interests are not antagonistic to the other class members. *Hamilton Sav. Bank*, 82 Ohio St.3d at 77-78; *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d at 98. Doubts

³The trial court determined that counsel for the class was adequate. Because, however, appellant fails to raise the question of the adequacy of appellees' trial counsel we need not address this issue. See App.R. 12(A).

concerning adequate class representation are resolved "in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand including the augmentation or substitution of representative parties." *Baughman v. State Farm Mut. Auto, Ins. Co.*, 88 Ohio St.3d at 487-488.

{¶ 42} As applied to the instant case, appellant fails to offer any evidence of the fact that appellees' interests are, in any way, antagonistic to any potential class members. Furthermore, while Charles Miller did not realize that he was a class representative, he knew that the hearing in this cause was a "class action lawsuit hearing." On the other hand, Vivian Miller testified that she and her husband knew, from the start, that they were "representing people that have had the same problem that we've had with our Jetta." Thus, we find that the Millers are adequate representatives of this class. Consequently, appellant's Assignment of Error No. V is found not well-taken.

{¶ 43} Appellant's Assignment of Error No. VI contends that appellees failed to establish that common issues of law and fact predominate over individual questions as required by Civ.R. 23(B)(3).

{¶ 44} A Civ.R. 23(B)(3) class action is a damages action. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d at 79. Civ.R. 23(B)(3) provides that a damages action may be maintained as a class action if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual

members and, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

{¶ 45} Performing a rigorous analysis of the Civ.R. 23(B)(3) predominance requirement requires an examination of common issues versus individual issues. *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, ¶ 14, discretionary appeal not allowed, 103 Ohio St.3d 1480, 2004-Ohio-5405. Common questions must only predominate; they do not need to be dispositive of the litigation. *Cicero v. U.S. Four, Inc.*, supra, at ¶ 37, citing *In re Foundry Resins Antitrust Litigation* (S.D. Ohio 2007), 242 F.R.D. 393, 409. A predominance inquiry is, however, more demanding than the Civ.R. 23(A) commonality requirement and focuses on the legal or factual questions that qualify each class member's case as a genuine controversy. *Williams v. Countrywide Home Loans, Inc.*, supra, at ¶ 35.

{¶ 46} Appellant contends that "no one set of operative facts establishes liability to all putative class members." As examples, appellant asserts that the damages of each class member is "markedly different;" that the New Vehicle Limited Warranties are different in terms and duration, that the "contact" that caused the alleged damage to the vehicles are separate occurrences with different factual circumstances that provide "unique affirmative defenses to each Defendant." We disagree.

{¶ 47} The common set of facts that predominate in this cause are that the front bumper assembly, which is composed of plastic, of the Jetta in the named model years is too low for clearance of a standard curb or wheel stop and is thereby damaged. Of

course, the degree of damage might vary as to individual class members, but this does not overcome the predominance of the common set of facts. As stated infra, our review of the relevant Limited New Car Warranties shows no difference in terms, but only in the number of years or mileage, whichever comes first, for the period of coverage. Nor do, in our opinion, any of the other alleged facts, e.g., the fact that Mr. Miller was not wearing his hearing aid at the time of the damage to his car, overcome that predominance. Finally, although appellant's affirmative defenses may differ, e.g., an allegation that the damage occurred when the Jetta was out of warranty, does not, once again, obviate the predominance of the common set of facts in this cause. But, see, *Volkswagen of America, Inc. v. Sugarman*, 909 S.W.2d 923 (finding that individual inquiry into the cause of the damages to each Jetta would require a series of mini-trials).

{¶ 48} Appellant makes no argument, as it failed to do below, relative to the superiority of a class action. The trial court did, however, find that "[a] class action is superior to any other alternative for an efficient adjudication of the issues in this case." We agree and adopt the trial court's findings on this issue as our own. As a result, we hold that the trial judge did not abuse his discretion in certifying this cause as a class action under Civ.R. 23(B)(3). Appellant's Assignment of Error No. VI is found not well-taken.

{¶ 49} Both appellant's Assignments of Error Nos. VII and VIII ask this court to consider the merits of appellees' claims of breach of express warranty and breach of

implied warranty. These issues are, therefore, not ripe for review and will not be addressed by this court.

{¶ 50} The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Erie County.

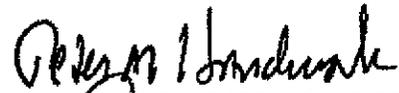
JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Mark L. Pietrykowski, P.J.

Arlene Singer, J.
CONCUR.



JUDGE

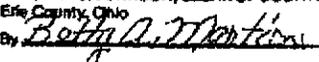

JUDGE


JUDGE

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This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

I HEREBY CERTIFY THIS TO BE
A TRUE COPY OF THE ORIGINAL
FILED IN THIS OFFICE.

BARBARA J. JOHNSON, CLERK OF COURTS
Erie County, Ohio
By 

COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2007 JUL 19 AM 2:59
BARBARA J. JOHNSON
CLERK OF COURTS

CHARLES MILLER, et al. : Case No. 2004-CV-558
: :
On their own behalf and on : :
behalf of the class defined herein, : :
: Judge Tygh M. Tone
Plaintiffs, : :
: :
vs. : :
: :
VOLKSWAGEN OF AMERICA, : **JUDGMENT ENTRY**
INC., et al. : :
: :
Defendants. : :
: :
: APPX19

Plaintiffs Charles Miller and Vivian Miller are the owners of a 2002 Volkswagen Jetta. After parking the car in a church parking lot in the summer of 2004, the front bumper pulled away from the body of the car after it became caught on a concrete tire barrier. Although the car was still under the factory warranty, Mr. and Mrs. Miller were required to pay for the repairs because they were advised that the warranty did not cover that damage.

The Millers allege that this bumper damage is common in the Volkswagen Jetta for the model years 1999 - 2002 and that the vehicle is inherently defective. For the reasons that follow, this Court agrees that the type of damages sustained by the Miller's Jetta is common and is an inherent defect. The Millers moved for the certification of a class of Volkswagen

owners and lessors of Jetta model years 1999-2002 in Ohio who have had to pay the repair cost for front bumper damage incurred in the same manner. The Millers have also moved for certification of a class of all present owners or lessors of Volkswagen Jettas, model years 1999 through 2002, seeking declaratory or injunctive relief. For the reasons explained below, Plaintiffs' motion for class certification under Civ. R. 23(B)(3) is granted and certification under Civ. R. 23(B)(2) is denied at this time.

FINDINGS OF FACT

This Court makes these findings of fact based upon the testimony and evidence presented at a class action hearing conducted on March 8th and 9th, 2007. Plaintiffs originally filed a motion for class certification on September 2, 2004. Defendants moved for a hearing on class certification. The trial court initially certified the class without a hearing on December 27, 2004. Defendants appealed that certification decision and the Court of Appeals of Ohio Sixth Appellate District, Erie County, remanded the matter for further proceedings consistent with its Decision and Judgment Entry of April 7, 2006. This Judgment Entry is in conformity with the Remand Order.

This Court finds that Charles and Vivian Miller are the owners of a 2002 Volkswagen Jetta. (Transcript of Hearing March 8 & 9, 2007 [hereinafter "Trans."]at 19). The Ground Clearance listed for that Jetta is 5.1". (Plaintiffs' Ex. 3). This is the identical ground clearance as listed for the 1999 Jetta. (Trans. at 35, 204-205, Plaintiffs' Ex. 4). While it was

sought by the Plaintiffs, Defendants did not provide the technical data for the 2000 and 2001 Jetta model years. (Trans. at 209). In the absence of any evidence to the contrary, this Court will presume that there are no significant differences in the ground-to-underbody measurements of all of the class vehicles for model years 1999 through 2002.

The written New Vehicle Warranty applicable to Plaintiffs' 2002 Jetta and all 2002 class vehicles is effective for 48 months or 50,000 miles. (Plaintiffs' Ex. 3). Counsel for Defendant Volkswagen of America, Inc. (hereinafter referred to as "Defendant" or "Volkswagen") represented at the hearing that the class vehicles for model years 1999, 2000, and 2001 have New Car Warranties which are effective for 24 months or 24,000 miles. This fact has been confirmed, as to the 1999 vehicles, but no evidence was presented by Volkswagen as to the other model years, although requested by Plaintiffs in discovery. (Trans. at 210-211). The express warranty language for coverage in each of these warranties is identical, irrespective of the differences in the length of the warranty. (Trans. at 210). The evidence also shows that the implied warranties are limited in duration to the period of the written warranties. (Defendant's Ex. F).

While Volkswagen does not usually cover the type of damage sustained by the Millers under the Jetta warranty, it sometimes offers a one-time goodwill payment to a customer that registers a complaint with

Volkswagen. (Trans. at 204, Plaintiffs' Ex. 9). Mr. and Mrs. Miller paid for the repair to their car without the assistance of Volkswagen. (Trans. at 33).

Concrete tire stops or tire barriers are used to prevent cars from parking in certain areas. (Trans. at 166). When a car pulls all the way up to the barrier, this defines where the car is to make a final stop. (Trans. at 196). Volkswagen's expert, Joseph Schaller, testified that the range in height is usually between four to nine inches for a curb and four to six and a half inches for a concrete barrier. (Trans. at 171-172). This height range has been consistent for curbs and barriers for the 33 years Mr. Schaller has been a civil engineer. (Trans. at 176). Defendant demonstrated that, in particular, there are concrete wheel stops in the areas around Sandusky, Ohio and Cleveland, Ohio which are six inches in height. (Trans. at 223, 233, Defendant Exhibits A-1 through A-44). This Court finds that six-inch concrete wheel stops could be found in virtually all geographic areas throughout Ohio.

Plaintiffs' expert witness, David R. McLellan, former Chief Engineer of the Corvette for General Motors Corporation from 1975 through 1992, testified that he examined and tested the 2002 Volkswagen Jetta owned by the Millers. (Trans. at 120-121, 124). Mr. McLellan measured the clearance under the vehicle and determined that the plastic under-tray of the car would come into contact with a six-inch tire stop several inches forward of

where the barrier would act as a wheel stop when the car was driven to the barrier. (Trans. at 128).

Mr. McLellan conducted additional testing on the Miller's Jetta to determine how the car had been damaged. (Trans. at 128-130). Mr. McLellan concluded that, due to the design of the Jetta, the plastic pieces under the engine sump of the vehicle are trapped between the engine sump and the tire barrier, with the co-efficient of friction high enough between the pieces that the plastic parts literally stick on the barrier and pull away from the car when it is backed away from the wheel stop. (Trans. at 134). Mr. McLellan concluded, to a reasonable degree of engineering certainty, that the action of backing away from the tire stop, after the plastic parts had become trapped between the barrier and the engine, is the source of the damage, not the act of pulling up to the tire barrier and parking the car. (Trans. at 134).

Mr. McLellan also testified that in his engineering experience, it was a well recognized design requirement for the automotive industry, as far back as at least 1981 or 1982, that a car must be capable of driving up to a six inch concrete wheel stop or tire barrier without causing damage. (Trans. at 124). Volkswagen offered no testimony to the contrary and the Court accepts the testimony of McLellan for this purpose. The Miller's Jetta was driven up to a tire barrier by Mr. McLellan on only one occasion and the car came apart when it was placed in reverse. (Trans. at 135). Mr. McLellan

testified, again without opposing expert testimony, that the damage that occurred to the Volkswagen Jetta was the result of a design defect. (Trans. at 138). This design defect is present on every Volkswagen Jetta for the model years between 1999 and 2002 and the damage will result when the car is driven all the way up to a tire barrier of six inches or higher. (Trans. at 134-135).

Mr. McLellan's engineering design group at General Motors utilized an aluminum skid bar in the manufacture of a low clearance car, which prevented this type of damage from occurring to that vehicle. (Trans. at 131-132). This could have been done for the Jetta at a cost of approximately \$20 to \$30. (Trans. at 133). Mr. McLellan testified that if the Volkswagen Jetta had been designed and engineered with an underbody protection system, such as the aluminum skid bar used by General Motors, the damage to these vehicles would not have occurred. (Trans. at 138-139).

Volkswagen's expert was a civil engineer whose testimony recounted the results of some research and observations about the various types and heights of curbs and wheel stops in use (Trans. at 166-172). In contrast to the testimony of Volkswagen's expert, Plaintiffs' expert specifically testified that since before 1984, automotive designers recognized the need to protect a car from front-end damage from a six-inch wheel barrier (Trans. at 123-124). Mr. McLellan tested the Miller's vehicle and described the underlying

cause of damage in detail in his expert report (Plaintiffs' Ex. 8). This exhibit was admitted into evidence at the conclusion of Mr. McLellan's testimony, without objection (Trans. at 161-162). This Court has reviewed the exhibit and incorporates its findings herein, by reference.

Volkswagen presented sales figures for Volkswagen Jettas in the model years 1999 through 2002 at 549,255 nationwide. 17,500 of these sales were in the state of Ohio. (Trans. at 219). Plaintiffs presented a compilation of data received from Volkswagen indicating the number of calls or letters received by Volkswagen from customers or dealers seeking assistance with the cost of repairs for bumper repairs. (Plaintiffs' Ex. 9). Volkswagen has documented at least 1,496 complaints of similar bumper separation damages for the Jettas in these same model years. (Trans. at 201-203; Plaintiffs' Ex. 9). The separation of the front bumper from the body of the vehicle is a common occurrence for Volkswagen Jettas in the model years 1999 through 2002, as shown by Plaintiffs' Exhibit 9. Volkswagen's data shows that Volkswagen sometimes reimbursed the dealers or owners for the costs of the bumper repairs, but almost universally treated these damages as an "outside influence" and did not pay the cost of the repairs. (Trans. at 204; Plaintiffs' Ex. 9). Many of the customers contacting Volkswagen for assistance did so because they had previously paid for a similar repair one or more times without initially reporting the incident of damages. (Plaintiffs' Ex. 9).

This Court notes that Defendant, Volkswagen of America, has not fully complied with Plaintiffs' relevant discovery requests. Plaintiffs provided evidence in the form of an affidavit documenting Plaintiffs' efforts to procure the requested information over the past two and a half years. This Court had previously granted a motion to compel discovery filed by Plaintiffs ordering that certain information be provided, yet some of the discovery sought remains outstanding. While this Court notes this fact, it need not take this into consideration in arriving at this decision.

DISCUSSION OF THE LAW

This Court may certify a class where doing so would comply with both Ohio Civ. R. 23(A) and at least one subsection of Civ. R. 23(B). Civ. R. 23(A) requires that four elements be satisfied before an action may be maintained as a class action: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class, *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67; *Baughman v. State Farm Mut. Ins. Co.* (2000), 88 Ohio St.3d 480. Under Civ. R. 23(B)(2) , Plaintiffs must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole". In

addition, or alternatively, Plaintiffs must establish that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Civ. R. 23(B)(3). The Plaintiffs have proved all of these elements.

Plaintiffs must prove by a preponderance of the evidence that class certification is appropriate. "[A]ny doubts a trial court may have as to whether the elements of class certification have been met should be resolved in favor of upholding the class."

Baughman, 88 Ohio St.3d at 487. As one court has stated:

Without the class action device, many actionable wrongs would go uncorrected and persons affected thereby unrecompensed. In essence, the class action device is a bona fide method for redressing violations of the . . . laws and for compelling compliance with their mandates. Accordingly, the interests of justice require that in a doubtful case, . . . any error, if there is to be one, should be committed in favor of allowing the class action.

Explin v. Hirschi (10th Cir. 1968), 402 F.2d 94, 101, *cert. denied*, (1969), 394 U.S. 938.

Plaintiffs have defined two putative classes: Class A consists of all individuals and entities who currently own or lease a 1999, 2000, 2001, or 2002 Volkswagen Jetta in Ohio. Class B is defined as all individuals and entities in Ohio who purchased, leased or acquired a 1999, 2000, 2001 or 2002 Volkswagen Jetta and who incurred expenses not covered or

reimbursed by Volkswagen or Volkswagen Dealers, when the vehicle suffered damage to the front bumper assembly within the applicable limitations period as a result of contact with a wheel stop or curb. Plaintiffs assert that all of the conditions favoring class certification are present for these proposed classes. Volkswagen claims that Plaintiffs have failed to establish numerosity, commonality, typicality, or predominance. The Court addresses these arguments in turn.

I. NUMEROSITY

Civ. R. 23(A)(1) requires that the class be "so numerous that joinder is impracticable." In construing the numerosity requirement, courts have not specified numerical limits. *Pyles v. Johnson* (2001), 143 Ohio App.3d 720; *Basile v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (S.D. Ohio 1985), 105 F.R.D. 506. This determination must be made on a case-by-case basis. *Warner v. Waster Management, Inc.* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091. "Joinder is more likely to be impracticable if the class members can be assumed to lack the ability or motivation to institute individual actions. For example, if [a] class member's individual claims involve only a small amount of damages, class members would be unlikely to file separate actions. Courts have concluded that joinder is impracticable in such circumstances." *Hamilton*, 82 Ohio St.3d at 75 (quoting 5 Moore's Federal Practice (3 Ed. 1997) 23-71, Section 23.22[5]).

There is no set number which equates with impracticability in all cases, but a presumption of numerosity has developed at the 40-member level:

. . . In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.

1 H. Newberg & A. Conte, *Newberg On Class Actions* § 3.05 at 3-25 (3rd ed. 1992).

If the exact size of the class is unknown "[t]he court is entitled to make common sense assumptions in order to support a finding of numerosity." *Peterson v. H & R. Block Tax Servs., Inc.* (N.D. Ill 1997), 174 F.R.D. 87, 81.

In this case, Volkswagen has documented the sale of 17,500 Jettas in the state of Ohio during the proposed class period. Volkswagen's records show that at least 1,496 of the owners of Jettas made a formal complaint to Volkswagen about the bumper damage, either in writing or by contacting Volkswagen at a toll free number. Many of these complaints asserted that this was not the first occurrence. Volkswagen's compilation of a sub-category of this data (Defendants' Exs. J & K), documents that at least eighteen of these known and documented complaints were received from Ohio residents. This Court is convinced that these exhibits do not include every incident of bumper separation that has occurred in Ohio. For example, Mr. and Mrs. Miller are not on any lists, nor would any other Ohio

Jetta owner who, like the Millers, did not file a formal complaint with Volkswagen. Indeed, there is nothing to show that Volkswagen made any attempt to try to identify the extent of the front bumper problem nor to provide any relief despite the fact that it knew that the problem was very extensive.

This Court concludes that every 1999-2002 Volkswagen Jetta that pulls fully up to a tire barrier that is approximately six inches or higher will incur like damage to that of the Plaintiffs. With the large number of Jettas present in Ohio and the probability of damage certain under these conditions, this Court concludes that numerosity is clearly satisfied. Accordingly, Plaintiffs have shown that the class is sufficiently large so that joinder would be impracticable.

II. COMMONALITY

The commonality requirement is satisfied if the court finds "a common nucleus of operative facts." *Pyles*, 143 Ohio App. 3d 720. *Miles v. N.J. Motors* (1972), 32 Ohio App. 2d 350, 291 N.S.2d 758, 763-64. The provision of Ohio Civ. R. 23(A)(2) does not require that all questions of law or fact raised in the dispute be common to all parties. *Marks v. C.P. Chemica Co.* (1987), 31 Ohio St. 3d 200. If there is a common nucleus of operative facts, or a common liability issue, then the rule is satisfied. *Id.* The commonality bar is, in fact, quite low. *Lowe v. Sun Refining & Marketing Co.* (1992), 75 Ohio App.3d 563, 570, 597 N.E.2d 1189; *Arenson*

v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 663 (N.D. Ill. 1996) ("Plaintiffs need only show that there is . . . one question of law or fact common to the class to satisfy the commonality requirement.").

The manner in which the damage is caused to these vehicles is a common element in which each class member shares. Plaintiffs and the proposed class in this case have the same fact pattern. Identical theories of the instrumentality of the damage are applicable to the Millers as those that relate to the entire class. Volkswagen's assertion that Plaintiffs no longer seek to include as class members persons whose vehicles incurred damages as a result of contact with a curb makes no sense when compared to the totality of the record in the evidentiary hearing. It is clear to this Court that the evidence presented is applicable to all tire barriers that are used to define a parking place, whether that barrier is a concrete wheel stop or a curb.

Volkswagen points out that although the written warranty period for the 2002 Jetta is longer than that of the 1999 through 2001 Jettas, the terms of the warranty coverage for all the vehicles is the same. Volkswagen argues that the Jettas are damaged as a result of a "collision" and that a collision is excluded from the warranty. However the evidence warrants the Court's determination that the type of contact described by the Plaintiffs and Plaintiffs' expert is not a "collision." The Millers have asserted an additional claim for breach of implied warranty; in other words, for the implied

warranty of merchantability, which this Court finds to apply to the facts of this case.

In the final analysis, the Millers' claim for breach of express warranty is no different from that of any other vehicle in the class that would have been under warranty at the time it was damaged. The Millers' additional claim for breach of implied warranty is also identical for all class members.

Volkswagen argues that the differences in the reason the Millers purchased their Jetta, or how much cargo or the number of passengers that the Millers customarily carried underscores the individuality of the Millers' claim. However, this Court finds there are sufficient essential questions of both law and fact to clearly satisfy the commonality requirement of Civ. R. 23(A)(2).

III. TYPICALITY

The requirement of typicality serves the purpose of protecting absent class members and promoting the economy of class actions by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class. *Baughman*, 88 Ohio St. 3d at 484 (citing 5 Moore's Federal Practice (3 Ed. 1977)(23-92 to 23-93, Section 23.23[1])). Typicality is satisfied when the named plaintiffs are found to be in a situation identical to that of the putative class members. *Marks*, 31 Ohio St. 3d at 202. Also, "the defenses or claims of the class representative must be typical of the defenses or claims of the class members. They need not be identical."

Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho (1990), 52 Ohio St.3d 56, 64.

“Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff’s injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.” *Baughman*, 88 Ohio St. 3d at 484.

Typicality is also met where there is no express conflict between class representatives and the class. *Hamilton*, 82 Ohio St. 3d at 67; *Warner*, 36 Ohio St. 3d at 98. Plaintiffs argue that their claims are not only typical to those of the putative class, but that they are identical. Volkswagen, however, asserts that any right to recovery for each potential class member depends upon facts entirely unique to the time, place, and circumstances of each occurrence of bumper separation. Volkswagen cites to the decision of

Volkswagen of America, Inc. v. Sugarman, 909 So.2d 923 (Fla. 3rd Dist. Ct. App. 2005), a decision which this Court has fully and carefully reviewed and considered, but which this Court declines to follow because of the evidence presented in this case and the law applicable in the State of Ohio.

The Court recognizes that a named plaintiff who might be subject to unique defenses should fail the typicality requirement. *Robles v. Corporate Receivables, Inc.* (N.D. Ill. 2004), 220 F.R.D. 306, 309. ("The presence of defenses peculiar to the named plaintiff class or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiffs' representative.") (internal quotation marks and citations omitted). However, those elements described by defendants as destroying the typicality of Millers' claims do not apply to Plaintiffs' proof of facts. The defenses listed by Volkswagen, such as contributory negligence, lack of privity and statute of limitations are not unique to the Millers and these can each be addressed by this Court at a later time. The manner in which the Jettas were designed and constructed is the cause of the certain damage under the specified circumstances. The Millers are members of the class they seek to represent. For these reasons, the Court finds that Plaintiffs satisfy the typicality requirement in spite of the individual characteristics of time, place, or operator's conduct.

IV. ADEQUACY OF REPRESENTATION

This requirement is divided into two components: (1) consideration of the adequacy of the representative, and (2) the adequacy of counsel. *Warner*, 36 Ohio St. 3d at 98; *Pyles*, 143 Ohio App.3d at 735. Taking the later inquiry first, Plaintiffs' counsel is extremely familiar with complex civil and class litigation. Plaintiffs' counsel has established a reputation, in this Court and in numerous courts throughout Ohio, for competency, experience, and skill in class actions. Plaintiffs' counsel has diligently pursued this present litigation for almost three years. Volkswagen has not challenged class counsel's adequacy, and this Court, under Civ. R. 23(A)(4), finds class counsel to be more than adequate.

A class representative is deemed adequate if his interest is not antagonistic to that of the other class members. *Marks*, 31 Ohio St. 3d at 200; *Vinci v. American Can Co.* (1984), 9 Ohio St. 3d 98. The Millers have suffered the same injury as all members of the proposed class. In the Court's view, the Miller's pursuit of their claims will prove the claims of the class members. Although Mr. and Mrs. Miller, like most consumers, possess little legal knowledge of the class action mechanism, Mrs. Miller testified that she was aware of the fact that they were representing a group of similarly situated individuals. So "long as a class representative's interests do not conflict with those of the proposed class, she need only have a marginal familiarity with the facts of her case and need not understand the larger

legal theories upon which her case is based.” *Randle v. GC Servs., L.P.*, (N.D Ill. 1998), 181 F.R.D. 602, 604. This Court concludes that Charles Miller and Vivian Miller are adequate class representatives.

Impliedly, Civ. R. 23 also requires that the definition of the class be unambiguous and that the class representatives be members of the class. *Warner*, 36 Ohio St. 3d at 96. The class definition, as hereinafter set forth, is unambiguous. The court finds that it will not encounter any insurmountable problems in determining which individuals are members of the class and that the Millers are members of the class, as hereinafter defined.

V. CERTIFICATION UNDER CIV. R. 23(B)(3).

A class is maintainable under Civ.R. 23(B)(3) when the court determines “that the common questions predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” This Court finds that both the “predominance” and “superiority” requirements are satisfied in this case.

A. Predominance.

Although there is an overlap between commonality and predominance, the requirement that common issues predominate over individual ones in a class certified under Civ. R. 23(B)(3) requires a more demanding analysis. “[T]he common questions must represent a significant aspect of the case

and they must be able to be resolved for all members of the class is a single adjudication." *Schmidt v. Avco Corp.* (1984), 15 Ohio St. 3d 310, 313, 473 N.E. 2d 822.

Plaintiffs argue that the common nucleus of operative facts is the damage caused to the front bumper and front fascia of the vehicle as a result of the design of the Volkswagen Jetta and the components from which it is manufactured. Plaintiffs have shown through expert testimony that the damage is caused when the fascia is torn away from the body of the car while it is backing out of a parking space. The problem exists when the car is driven up to within a few inches of a concrete tire barrier or until the tires make actual contact. This is the normal operation by a driver of a motor vehicle when parking his or her car on the street or in a parking lot.

The type of damage sustained by the Plaintiffs is unlike the kind of damage that would result from a front-end collision with an immovable object and will be easily identifiable. All class members' vehicles were damaged in this identical manner and all class members paid for the necessary repairs to their vehicles for which they should be reimbursed.

Volkswagen has a different view of the case. It argues that the predominance requirement cannot be met "[g]iven the markedly different nature of parking wheel stops throughout the state of Ohio . . . , as well as a myriad of other different factors unique to each circumstance, such as driver awareness, tire pressure, road conditions, and passenger load, which vary

from incident to incident". On Volkswagen's theory, individual issues predominate, which would require the Court to look at each incident to ascertain the reason the bumper pulled away from the car.

The Court believes that Volkswagen misunderstands the nature of the issues in this proceeding. The specific individual variables listed by Volkswagen need not be a consideration because of the proof that the design of the Jetta and the parts from which the underbody of the car are manufactured are the common elements of causation of the resulting damage. The question of whether the vehicle design is defective can be answered universally, and need not be answered on an individual-by-individual basis.

These individual variables mentioned may influence the amount of the damage, but this fact will not destroy predominance. "It is fundamental here that each member of the class [] may not be awarded the same amount of damages in the event [Defendants] are found liable. Nevertheless, the key fact is that the injuries sustained by the class flow from identical operative facts." *Vinci*, 9 Ohio St. 3d at 102.

B. Superiority.

Plaintiffs argue that the class mechanism is particularly appropriate in this instance because it will resolve all claims for all class members in one adjudication. Individuals are less likely to bring their own suits because they are unlikely to have the resources to retain counsel to pursue a small claim.

Volkswagen points out that the Millers were charged only \$60.99 as labor for the repair of their car. (Plaintiffs' Ex. 2). However, this fact underscores a reason for allowing this case to proceed as a class action. The cost of litigation vis-à-vis the size of the expected recovery makes individual lawsuits prohibitively expensive.

Volkswagen does not directly address the issue of superiority, instead arguing that it would be necessary to make separate factual determinations of the circumstances surrounding each incident of bumper separation for each class member. This Court has already determined that this individual analysis would not be needed. The type of damage caused will indicate that the front bumper fascia was pulled off the car and that the cause would be the act of backing away from the tire barrier after making contact with the object that was of such a height as to allow the plastic parts under the car to become trapped between the barrier and the engine.

This court finds that managing all of the claims of class members individually would be burdensome, costly and an inefficient use of time. A class action is superior to any other alternative for a fair and efficient adjudication of the issues in this case. The class, as defined in Plaintiffs' Class B is appropriately certified under Civ. R. 23(B)(3).

VI. CLASS CERTIFICATION UNDER CIV. R. 23(B)(2).

Plaintiffs also seek certification under Civ. R. 23(B)(2). Specifically, Plaintiffs have asked in their Complaint that the Court provide injunctive

relief and a declaration that Volkswagen be responsible for all costs of future repairs necessitated by the defective front bumper assembly for members of Class A. Plaintiffs have asserted causes of action for breach of express warranty and breach of implied warranty. Civ. R. 23(B)(2) authorizes class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

This Court may certify both an injunctive class and damages class in the same action when it is appropriate. See *Warner*, 36 Ohio St. 3d at 95 (holding that class actions may be certified under subsections (B)(2) and (B)(3)).

In this case, Volkswagen has acted on grounds generally applicable to the entire class. Each class member of the proposed Class A owns a Volkswagen vehicle that is designed in such a way that it will be damaged if the operator pulls it into a parking space with a tire stop or curb that is somewhere in the neighborhood of six inches high. However, this Court finds that certification of Class A is unnecessary as to injunctive relief.

Plaintiffs seek a declaration that Volkswagen is liable for future repairs necessitated due to the defect which this Court has found to exist. However, declaratory relief, as well as injunctive relief, are moot at this time in light of this decision and this Court's continuing jurisdiction.

Defendants have raised the issue as to the propriety of certifying a class as to Cappo Management XV, Inc., dba Sandusky Motors and Victory Honda. There was no evidence presented as to them and therefore this Court's order of class certification is as to Volkswagen of America, Inc. only.

CONCLUSION

This Court has conducted a rigorous analysis into whether the prerequisites of Civ. R. 23 have been satisfied, as required by the Ohio Supreme Court in *Howland v. Purdue Pharma L.P.* (2004), 104 Ohio St. 3d 584. As a result of the evidence and the rigorous analysis, this Court determines that this action should be certified as a class action.

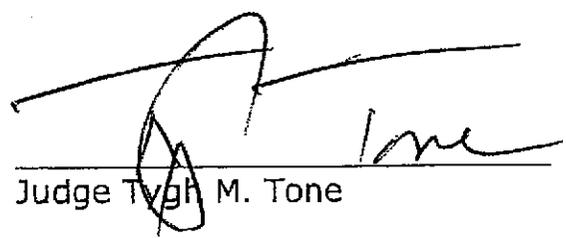
The Court recognizes that Volkswagen has engaged in a vigorous defense against class certification. In doing so, however, this Court also finds that Volkswagen has failed to comply with this Court's prior orders with regard to the discovery that has been propounded to them by Plaintiffs. Pursuant to Civ. R. 37(B)(2)(a), this Court has the discretion to deem those facts sought by Plaintiffs to be established for purposes of this action, but because of the evidence presented and the applicable law finds that the exercise of such discretion is unnecessary and therefore declines to do so at this time.

This Court finds Plaintiffs have established that the proposed class satisfies the requirements of Ohio Rule 23 for certification under Civ. R.

23(B)(3). Plaintiffs' motion for class certification of proposed Class B is granted.

Accordingly, the class that is hereby certified is defined as follows:

All individuals and entities in Ohio who purchased, leased or acquired a 1999, 2000, 2001 or 2002 Volkswagen Jetta and who incurred expenses not covered or reimbursed by Volkswagen, when the vehicle suffered damage causing the front bumper assembly to separate from the body of the car as a result of contact of the underbody of the vehicle with a wheel stop, tire barrier or curb, during the period of time wherein the New Car Warranty for that vehicle was in effect.



Judge T. M. Tone

Date: 7/19/07