IN THE SUPREME COURT OF OHIO

CHARLES MILLER, *et al.*

On their own behalf and on behalf of the class defined herein,

APPELLEES,

vs.

VOLKSWAGEN OF AMERICA, INC., *et al.*

Defendants-Appellants.

CASE NO.: 2009-2108

On Appeal from the
Sixth District Court of Appeals
Case No. E-07-047

MEMORANDUM IN RESPONSE TO JURISDICTION OF APPELLEES CHARLES AND VIVIAN MILLER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST 1

A. The Class Definition 1

B. The Directly Conflicting Florida Decision in Sugarman v. Volkswagen 2

C. Identifiability and Non-Ambiguity 3

D. The Fail-Safe Doctrine 3

E. Numerosity 4

STATEMENT OF THE CASE AND ADDITIONAL FACTS 5

A. Appellees' Claims 5

B. Evidence Presented to the Trial Court Pertaining to Class Certification 5

C. Evidence of Other Class Members 6

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW 8

A. APPELLANT'S PROPOSITION OF LAW NO. 1 8

A Trial Court Abuses its Discretion by Certifying a Class That is Not Administratively Identifiable 8

Appellees' Response to Proposition of Law No. 1 8

B. APPELLANT'S PROPOSITION OF LAW NO. 2 10

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 10

Appellees' Response to Proposition of Law No. 2 10

C. APPELLANT'S PROPOSITION OF LAW NO. 3 11

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 11

Appellees' Response to Proposition of Law No. 3 11

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases **Page**

Adashunas v. Negley (7th Cir. 1980), 626 F.2d 600 10

Cervantes v. Sugar Creek Packing Co., Inc. (S.D. Ohio 2003), 210 F.R.D. 611 11

Currey v. Shell Oil Co.(1996), 112 Ohio App.3d. 312 ..... 11, 12

Dafforn v. Rousseau Assocs., Inc., 1976-2 Trade Cases at 219 (N.D. Ind. 1976) 4, 10

Evans v. U.S. Pioe & Foundry Co. (C.A. 11, 1983), 696 F.2d 925 11

Hess v. Volkswagen of America, Inc., Case No. C-05-205 (Pottawatomie Co., OK, June 16, 2008) 2

Howard v. Ford Motor Co., (Alameda Co., CA Oct. 25, 2001), Action No. 763785-2 1

Howland v. Purdue Pharma, L.P. (2004), 104 Ohio St.3d 584 12

In Re: General Motors Dex-Cool/Gasket Cases, Judicial Council Coordination Proceeding No. 4495 (Alameda Co., California) 9

Indiana State Employees Ass'n v. Indiana State Highway Comm'n. (S.D. Ind. 1978), 78 F.R.D. 724 4

Miller v Volkswagen, Case No. 2004-CV-558 (C.P. Erie County) ..... passim

Miller v. Volkswagen of America, Inc., 2008-Ohio-4736 ..... 2, 3, 4, 7, 8, 9, 11, 12

O'Keefe v. Mercedes-Benz USA, LLC (ED Pa, 2003), 214 F.R.D. 266 1

Olden v. LaFarge Corp. (E.D. Mich. 2001), 203 F.R.D. 254, *aff'd* 383 F.3d 495 (6th Cir. 2004) 12

Shamell Samuel-Bassett v. Kia Motors America, Inc., No. 2199 (Philadelphia Co., PA, Dec. 26, 2006) 1

State v. Burnett, 93 Ohio St.3d 419, 2001-Ohio-1581 3

Sugarman v. Volkswagen of America, Inc. (2005), 909 So.2d 923 2

Williams v. Countrywide Home Loans, Inc., 6th Dist. No. L-06-1120, 2007-Ohio-5353 11

Williamson v. Rubich (1961), 171 Ohio St. 253 12

Rules

Civ.R. 23(A) 12

Civ.R. 23(B)(3) 7, 12

Other

3B *Moore's Federal Practice* ¶ 23.04[1] at 23.32[1] 9

THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

Discretionary review should be rejected. This is a consumer class action and is not one of public or great general interest. The issues presented by Appellant Volkswagen of America, Inc. ("VW") are not novel or of broad application. A class decision by an Ohio Court of Appeals that follows all Ohio Supreme Court precedents, but does not follow the reasoning of one wrongly decided out-of-state court, does not thereby become an issue that is one of public or great general interest. Nor is there, as asserted, a valid "question of first impression in Ohio" within the decisions of either the Trial Court or the Sixth District Court of Appeals. Finally, VW's attempt to create a conflict of authority between several Ohio appellate districts is factually inaccurate.

VW disagrees with the fact that class certification was ordered by the Trial Court and was unanimously affirmed by the Sixth District Court of Appeals. It offers the same arguments that were made to both courts below, in an attempt to convince this Court to reverse those decisions. However, consumer based class certification is, appropriately, the norm in the United Sates and other parts of the world. Similar cases with virtually identical claims against automobile manufacturers and distributors, including a parallel case against Volkswagen, have been certified as class actions across the country. See *Shamell Samuel-Bassett v. Kia Motors America, Inc.*, No. 2199 (Philadelphia Co., PA, Dec. 26, 2006); *Howard v. Ford Motor Co.*, (Alameda Co., CA Oct. 25, 2001), Action No. 763785-2 and *O'Keefe v. Mercedes-Benz USA, LLC* (ED Pa, 2003), 214 F.R.D. 266, as examples.

A. The Class Definition

Appellant contends that members of the class, as defined by the Trial Court and affirmed by the Court of Appeals, cannot be administratively ascertained and, thus, the

certification "subverts the class action's purpose" by requiring individualized evidence for each class member's claim. VW claims that this is a fundamental misstep which is in conflict with established Ohio law and calls for this Court's review. This is a mere tactical smokescreen. The decisions below are in complete compliance with the prior class action decisions in this Court.

The Sixth District Court of Appeals carefully reviewed, and dismissed, VW's arguments after thoroughly analyzing each of the criteria needed for class membership. "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." *Miller v. Volkswagen of America, Inc.*, 2008-Ohio-4736 at ¶ 27. This is a run-of-the-mill case, seeking damages resulting from a defective product for those individuals who were affected. VW's argument was rejected below and is not of such great importance that this Court should review those decisions.

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

A decision made by a single appellate court in another state that disagrees with the decisions of the courts in this state does not somehow raise the decision of the Sixth District to the status of one of public or great general interest. VW argues that a Florida court in *Sugarman v. Volkswagen of America, Inc.* (2005), 909 So.2d 923, arrived at a different conclusion than these Ohio courts below. Incredibly, VW neglects to report that another court in the state of Oklahoma, in *Hess v. Volkswagen of America, Inc.*, Case No. C-05-205 (Pottawatomie Co., OK, June 16, 2008) also rejected the wrongfully decided Florida decision. The *Hess* court was of the same opinion as the *Miller* court, granting class certification on the same facts.

It is a well-settled point of law that while decisions of federal courts and other state courts may be considered, they "constitute persuasive authority only and are not binding on this court." *State v. Burnett*, 93 Ohio St.3d 419, 422-424, 2001-Ohio-1581. It would be next to impossible to reconcile every decision made by an Ohio court with any and all contradictory decisions made in the multitude of other jurisdictions across this nation. As is the case in this situation, decisions from all other jurisdictions are not always fully reconcilable with each other. Such an exercise in futility should not be the goal of this Court.

C. Identifiability and Non-Ambiguity

VW further contends that the result in this case will lead to a large volume of inconsistent and contradictory case law on certification issues relating to ambiguously defined classes which are not identifiable at the time of certification. This argument is nothing more than an extension of the bogus arguments made by VW in the courts below. The trial court found that "[t]he class definition, as hereinafter set forth, is unambiguous." *Miller v. Volkswagen,* Case No. 2004-CV-558 (C.P. Erie County) (Judgment Entry - July 19, 2007 at pg. 18). The Sixth District Court of Appeals likewise held that "the class, as certified herein, is a definite class." *Miller*, 2008-Ohio-4736 at ¶ 27.

Both of the lower court decisions are clear and consistent. Appellant seeks review from this Court merely to voice its disagreement with the decisions made below. The courts below have precisely followed all Ohio Supreme Court precedents.

D. The Fail-Safe Doctrine

It is irrelevant that the court of appeals did not cite from any Ohio case when considering VW's assertion of a fail-safe class. The Sixth District recognized VW's argument as an important consideration, but determined that it did not apply. *Miller*, 2008-Ohio-4736 at ¶ 29.

In a fail-safe class, the "proposed class definition is in essence framed as a legal conclusion." *Indiana State Employees Ass'n v. Indiana State Highway Comm'n.* (S.D. Ind. 1978), 78 F.R.D. 724, 725. A fail-safe class would only exist if the plaintiffs prevailed on the merits of the case. *Dafforn v. Rousseau Assocs., Inc.*, 1976-2 Trade Cases ¶61 at 219 (N.D. Ind. 1976).

The Millers successfully demonstrated that the class is not a fail-safe class, although VW tried to convince both the trial court and the court of appeals that it is. The Court of Appeals discussed this concept in detail and unreservedly rejected VW's arguments. *Miller*, 2008-Ohio-4736 at ¶¶ 28-29 ("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."). Because there is no disagreement regarding the validity of the fail-safe doctrine in Ohio class actions, this is not an important public policy issue.

E. Numerosity

To argue that this case is of public and great general interest, VW resorts to the familiar use of scare tactics. VW threatens that it will be confusing and dangerous to permit this decision to go unchallenged. VW claims that it is important to invoke this Court's guidance on numerosity questions, because VW has determined that the lower courts failed to draw proper conclusions from the data presented. Appellant made these same contentions pertaining to numerosity in the trial court and in the Court of Appeals. Neither court found they had any merit.

In fact, the specific determinations VW seeks from this Court were, indeed, made by the Court of Appeals. VW simply wants another forum in which to make the same arguments. The courts below have precisely followed all Ohio Supreme Court precedents.

STATEMENT OF THE CASE AND ADDITIONAL FACTS

A. Appellees' Claims

Appellees Charles and Vivian Miller filed the Class Action Complaint ("the Complaint") against VW after their 2002 Volkswagen Jetta was damaged in a church parking lot in Huntington, West Virginia. When Mr. Miller backed out of a marked parking space that was equipped with a concrete wheel stop, he heard a scraping noise and the front bumper of the vehicle was pulled from the car.

Mr. Miller took the Jetta to the local Sandusky, Ohio Volkswagen dealership and spoke with the service manager. The Jetta was still under warranty and this was the standard procedure used by Mr. Miller to initiate repairs under the warranty. This time however, the service manager at the VW dealership informed Mr. Miller that the necessary repairs were his responsibility and that Mr. Miller would have to pay for them.

The Millers' Complaint alleges that "[t]he front bumper assembly of the Jetta is manufactured of inferior materials and is prone to considerable damage from normal contact with such fixed objects as street curbs or wheel stops in parking lots." This damage occurs "when the lower part of the front bumper assemble [comes] into contact and hook[s] onto a standard parking wheel stop, as a result of ordinary parking of the Jetta." It is in backing up and pulling away form the parking space that the bumper separates from the vehicle.

B. Evidence Presented to the Trial Court Pertaining to Class Certification

Contrary to VW's representation, the trial court conducted a two-day evidentiary hearing on March 9-10, 2007, not on the merits of the Millers' Complaint, but on class certification. VW's description incredibly misrepresents the essence of Mr. Miller's testimony at this hearing. Many of the statements attributable to Mr. Miller are pure fabrications, with no

support in the record. However, of significance at this juncture, is the fact that Mr. Miller did not make a claim on the warranty because he had been told by the VW service manager that VW would not cover these repairs. Mr. Miller had the Jetta repaired at an independent body shop at his own expense. Mr. and Mrs. Miller may not know the names of any other class members, but they did know they were not to be the only plaintiffs. The Millers believe the cause of the damage is the design of the vehicle itself and not Mr. Miller's driving. The mere fact that VW deems it necessary to recite contested facts, rejected by the fact finding trial court, highlights VW's attempt to convert findings of facts into matter of legal significance and/or of great general interest.

In addition to the testimony of the plaintiffs, the Millers offered testimony from David R. McLellan, a former Chief Engineer of the Corvette for General Motors, as an expert witness. Mr. McLellan tested and examined the Millers' 2002 Jetta and discovered that the plastic under-tray of the vehicle makes contact with a six-inch tire barrier several inches forward of where the tires would act as a stop. (A six-inch tire barrier was attested to as being standard throughout the State of Ohio and the United States.) The plastic pieces underneath the engine sump are trapped between the engine sump and the tire barrier, with the co-efficient of friction high enough between the pieces so that the plastic parts literally stick on the barrier and pull away from the car when it is backing up. McLellan testified that damage will occur to a VW Jetta every time the car is driven up to a standard tire barrier which is high enough that the barrier makes contact with the undercarriage of the vehicle.

C. Evidence of Other Class Members

At the class certification evidentiary hearing the Millers submitted an exhibit compiled from VW records, showing that there were, at least, 1,496 documented complaints

made directly to VW seeking reimbursement for repairs of similar bumper separations. These complaints were received by VW from owners of Jettas in the model years 1999 through 2002. The Millers, who were told that VW would not cover the repairs, did not call in to make a complaint or seek reimbursement and are not part of VW's documented complaints database. In addition, the Millers' exhibit confirms that many of these 1,496 persons paid for several repairs before contacting VW to register a complaint.

VW submitted its own exhibits, which it represented to be subsets of those complaints from Ohio listed in the Millers' compilation. VW has made the argument all along that this subset of complaints somehow shows that the class would include no more than eleven Jetta owners. Based upon the information in the exhibit presented by the Millers that many bumper separations were not reported to VW as they occurred, and the fact that the Millers themselves are not included on VW's exhibits, this exhibit does not accurately represent the number of class members. It was clear to both the Trial Court and the Court of Appeals that not every class member called the VW call center to register a complaint, and that many did so only after having to pay for repairs numerous times.

"As a result of the evidence and the rigorous analysis" of the trial court, this action was certified as a class action. *Miller*, CP Judgment Entry at p. 23. The court of appeals held "that the trial judge did not abuse his discretion in certifying this cause as a class action under Civ.R. 23(B)(3)." *Miller,* 2008-Ohio-4736 at ¶ 48.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

A. APPELLANT'S PROPOSITION OF LAW NO. 1

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

Appellees' Response to Proposition of Law No. 1

There is no disagreement with VW's assertion that a class, to be certified, must be administratively identifiable. This prerequisite to certification was firmly acknowledged by the Court of Appeals. *Miller*, 2008-Ohio-4736 at ¶¶ 25, 27. VW is seemingly arguing in this proposition that it disagrees with the appellate court and believes the definition of the class is so ambiguous that class members cannot be ascertained with reasonable effort. Citing to the fact that counsel for the Millers did not present any additional class members, other than the Millers, to the trial court at the evidentiary hearing on class certification, VW makes the incredible leap that this must mean that no others class members can be identified.

VW takes a quote from the Court of Appeals discussion of the typicality requirement of Rule 23 ("the only members of the class thus far are appellees", *Miller,* 2008-Ohio-4736 at ¶ 38) and uses this out of context to infer that the Court of Appeals was somehow confused about how the trial court would be able to know who is a member of the class, based on the class definition.

In dismissing VW's argument that the class certified was not administratively identifiable, the Sixth District stated:

> 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.

Miller, 2008-Ohio-4736 at ¶ 27.

"The standard for measuring whether a class has been defined with sufficient precision is whether the definition makes it administratively feasible for the court to determine whether a particular individual is or is not a member of the proposed class." 3B *Moore's Federal Practice* ¶ 23.04[1] at 23.32[1]. By reviewing the simple objective criteria identified above by the Sixth District, the trial court will be able to administratively identify those who are clearly members of the class certified. This is a case management issue easily handled by the court, usually with input from experts retained by experienced trial lawyers. This methodology is used effectively in the resolution of class actions throughout the United States. For example, the settlement agreement approved by the California Superior Court on March 20, 2008 *In re: General Motors Dex-Cool/Gasket Cases*, Judicial Council Coordination Proceeding No. 4495 (Alameda Co., California), in which class members – owners of "covered vehicles' who have incurred an expense for a "covered repair" – must submit a claim statement, proof of expenditure and proof of ownership. Such documentation can be administratively reviewed and class membership ascertained with certainty.

B. APPELLANT'S 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.

Appellees' Response to Proposition of Law No. 2

Although VW continues to insist that the class, as defined, is an impermissible "fail-safe" class, neither the Trial Court, nor the Court of Appeals agrees. By definition, a "fail-safe" class can exist only after resolution of the ultimate liability issue. There is no class unless the plaintiff prevails at trial. For example, certifying a class "of children entitled to a public education who have learning disabilities and who are not properly identified and/or who are not receiving special education" could create an improper "fail-safe" class. The class would exist only if it was determined that the public school system did not properly identify these children and/or provide them special education. *Adashunas v. Negley* (7th Cir. 1980), 626 F.2d 600, 603-604. For the same reason, a class of homeowners who were charged "an artificially fixed and illegal brokerage fee" would be improper. If a jury determined that the defendants did not charge any illegal fees there are no class members. *Dafforn*, supra at *1.

In an attempt to make its case, VW inserts requirements for class membership that are not included in the class definition and VW dwells on irrelevant facts. (i.e., the fact that the Millers' vehicle was damaged in West Virginia has absolutely no bearing on whether the class definition requires the court to make a determination on the merits in order to identify individual class members.) VW makes additional arguments that go to the merits of the claims asserted and possible defenses, not the question of class membership.

In this case the class description is not framed as a legal conclusion nor does it require a resolution of any disputed factual or legal issue. Liability turns on whether Appellant

has a legal obligation under theories of express or implied warranty to cover this type of damage. A liability decision on the merits of the Millers' and class members' claims is not necessary to determine who will be members of the class. This class will exist even if VW wins at trial.

C. APPELLANT'S 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.

Appellees' Response to Proposition of Law No. 3

In asserting this proposition of law, VW attempts to manufacture a conflict between two appellate districts. There is no such conflict. The Fourth District, in *Currey v. Shell Oil Co.*(1996), 112 Ohio App.3d. 312, does recognize that "plaintiffs must demonstrate that there is a large class". *Currey*, 112 Ohio App. 3d at 318. This is not at odds with the Sixth District *Miller* decision. VW just disagrees with the Court of Appeals determination that the plaintiffs made this demonstration to the Court's satisfaction.

The Sixth District Court of Appeals' decision clearly states:

> 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 2003), 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. Pioe & Foundry Co.* (C.A. 11, 1983), 696 F.2d 925, 930.

Miller, 2008-Ohio-4736 at ¶ 31 (emphasis added). In determining whether the numerosity requirement is met, a court may consider reasonable inferences that can be drawn from the facts before it. In that regard, the numerosity requirement is satisfied where the exact size of the class is unknown, but general knowledge and common sense indicate that it is large. *Olden v.*

LaFarge Corp. (E.D. Mich. 2001), 203 F.R.D. 254, 269, *aff'd* 383 F.3d 495 (6th Cir. 2004). This is yet another instance where VW must resort to the duty of the Trial Court to make the findings of fact. VW's quarrels with Trial Court fact-findings are not fodder for public or great general interest cases. The Trial Court is charged with fact-finding. The Court of Appeals is charged with reviewing those findings from an abuse-of-discretion standard. Disagreeing with Trial Court findings and Appellate Court rulings does not create issues for review.

Based upon the evidence presented by the Millers the Sixth District concluded that "there could easily be a class of 40 or more". *Miller,* 2008-Ohio-4736 at ¶ 33. This "common sense assumption", that there are a sufficiently large number of class members, was supported by credible evidence, presented by Plaintiffs, of the nature and frequency of the damage, the number of complaints received by VW, including those individual Jetta owners who called to report that this damage occurred more than one time, and the number of Jetta vehicles on the road in Ohio. This finding of numerosity in *Miller* is not in conflict with the holding of the *Currey* court, where there truly was a mere conjecture that there should be a large number of persons who may have developed personal injuries or suffered property damage resulting from airborne fumes, smoke and debris from a chemical explosion.

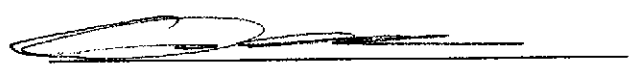
VW's real argument is that, in VW's opinion, the Court of Appeals did not conduct the "rigorous analysis" of each factor listed in Civ.R. 23(A) and (B) mandated by *Howland v. Purdue Pharma, L.P.* (2004), 104 Ohio St.3d 584. But, in fact, it did (as did the trial court) ---- to the letter. VW's disagreement with the decisions below is not a basis for certification. *Williamson v. Rubich* (1961), 171 Ohio St. 253, 254. There is no confusion or conflict or need to clarify the decisions of the Trial Court and the Sixth District Court of Appeals.

CONCLUSION

Class members' vehicles were defectively designed and this caused them to be damaged after parking over normal curbs and wheel stops. Class members had to pay for these repairs out of their own pockets, because VW does not acknowledge liability. The Trial Court certified this case as a class action. The Sixth District Court of Appeals agreed. Appellant continues to dispute those decisions, raising the exact same arguments it did in the courts below.

This is merely another case in which a defendant does not want to proceed under well-established rules for civil procedure. The only issue decided by the Trial Court, and the only issue passed on by the Court of Appeals, was whether class certification was proper. This case is not one of great public or general interest. VW's petition to accept the appeal should be denied. Both Courts below followed the exact historical guidelines established by this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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