

ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO, LLC  
d/b/a THE POP SHOP, *et al.*

Plaintiffs-Appellees,

vs.

UNITED TELEPHONE COMPANY  
OF OHIO, AND SPRINT NEXTEL  
CORPORATION

Defendants-Appellants

Case No.: 08-1822

On Appeal From the Fulton County Court of  
Appeals, Sixth Appellate District,  
Case No. 07-024

FILED  
JUN 11 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

APPELLEES' MOTION TO DISMISS APPEAL AS IMPROVIDENTLY GRANTED, OR  
IN THE ALTERNATIVE, TO STRIKE PORTIONS OF APPELLANTS' MERITS BRIEF

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Pursuant to S.Ct. Prac. R. XIV, Section 4, Plaintiffs–Appellees, Stammco, LLC and Kent and Carrie Stamm respectfully move this Court for dismissal of this discretionary appeal as improvidently granted. In the alternative, Plaintiffs-Appellees move that this Court strike pages 8-15 (Proposition of Law I) and pages 22-26 (“This class action is unmanageable” and “A class action is not superior to other methods of resolving the disputes at issue”) of the Merit Brief of Appellants.

Defendants–Appellants United Telephone Company of Ohio and Sprint-Nextel Corporation have improperly invoked the jurisdiction of this Court by raising an issue in their jurisdictional memorandum and motion to reconsider that was not brought before the Sixth District Court of Appeals.

Additionally, Appellants have filed a merits brief that exceeds the scope of issues identified in their jurisdictional memorandum. The merits brief raises issues which are not properly before the Court and over which this Court did not accept jurisdiction.

The basis for the motion and alternative motion are set forth in the accompanying memorandum in support.

Respectfully submitted,



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## MEMORANDUM

### **I. INTRODUCTION**

In the underlying appeal before the Sixth District Court of Appeals, the Court of Appeals considered three assignments of error in connection with the trial court's certification of this case as a class action. All of these assignments of error dealt with the propriety of the class certified, analyzed under the class action requirements of Civ.R. 23. Defendants-Appellants filed a jurisdictional memorandum with this Court on September 15, 2008 listing two Propositions of Law. The jurisdictional memorandum challenged the description of the class certified as an improper "fail safe" class definition. The memorandum also addressed the Court of Appeals' affirmation of the class certification under Civ.R. 23(B)(3)'s predominance requirement. This Court declined jurisdiction to hear the case by Entry on January 28, 2009, by a vote of 4-3. Thereafter, Appellants filed a motion to reconsider that decision on February 9, 2009 solely on the contention that the class definition certified by the trial court and upheld by the Court of Appeals was a "fail safe" class. This Court then accepted jurisdiction in a Reconsideration Entry on March 25, 2009, by a vote of 4-3.

The class description as a "fail safe" class was never raised by Appellants in the Court of Appeals, and thus Appellants have waived the opportunity to raise it in this Court. Appellants have also filed a merit brief that makes arguments regarding Civ.R. 23(B)(3)'s superiority requirement and the manageability of the class, issues that were never argued, mentioned or alluded to in Appellants' jurisdictional briefing, and over which this Court never accepted jurisdiction. Having failed to challenge the Sixth District's holdings on superiority and manageability in their jurisdictional brief, Appellants have waived the right to challenge them now. It is improper for Appellants to raise an assignment of error on an issue that was not

decided by the Sixth District Court of Appeals and to raise the additional issues which were absent from their jurisdictional brief, in their merits brief, having previously concealed their intent to argue them.

If, as Appellants have argued in their motion to reconsider, the assignment of error that they intended to pursue was the question of a “fail safe” class definition, over which this Court did accept jurisdiction, then this appeal should be dismissed as improvidently granted, because this issue was not raised in the Court of Appeals. In the alternative, and at a minimum, Appellants’ discussion and arguments related to the “fail safe” class definition (Proposition of Law I) and the additional arguments regarding superiority and manageability of the class (pages 22-26), which were not part of their jurisdictional brief, should be stricken from their merits brief.

## **II. LAW AND ARGUMENT**

### **A. Appellants Have Waived The Opportunity To Raise Issues They Did Not Raise In The Court Below.**

All of Appellants’ assignments of error in the Court of Appeals were challenges to the class certification ruling of the trial court. Appellants argued that the trial court abused its discretion in certifying the class, by failing to carefully apply the requirements for class certification under Civ.R. 23, by failing to conduct a rigorous analysis into whether those requirements were met in this case and by failing to make specific findings that those requirements had been met. Appellants also argued that the trial court abused its discretion because no class could be properly certified based upon the claims of the named plaintiffs. (Appellants’ Opening Brief – Court of Appeals at pg. 1). The Decision and Judgment issued by the Sixth District Court of Appeals on August 1, 2008 painstakingly analyzed each and every

requirement that must be met to certify a case as a class action pursuant to Civ.R. 23 (Decision and Judgment Entry – Court of Appeals at ¶¶29-58), finding that “there exists substantial competent probative evidence in the record demonstrating that both the prerequisites of Civ.R. 23(A) and Civ.R. 23(B)(3) have been met”. (Decision and Judgment Entry – Court of Appeals at ¶ 59).

Now, after the Court of Appeals unanimously affirmed the decision of the Fulton County Court of Common Pleas, Appellants devise a new argument to present to this Court. For the first time, Appellants argue that existence of the class, as defined, is dependent upon the plaintiffs’ success on the merits of the cause of action (i.e. a “fail safe” class that does not exist unless the defendant is found liable). This contention is incorrect, but more importantly, it was never argued in the Court of Appeals or the Trial Court.

Upon examining the record of the Sixth District Court of Appeals, there is nothing to indicate that this question was presented to that Court. This Court should not decide an issue that was not raised in the Court of Appeals. “Failure to raise the issue in the court below waives the opportunity to raise it here.” *Specht v. BP America, Inc.* (1999), 86 Ohio St.3d 29, 33, 711 N.E.2d 225, 229 citing *State v. Lorraine* (1993), 66 Ohio St.3d 414, 416, 613 N.E.2d 212, 216. See also *Manigault v. Ford Motor Co.* (2002), 96 Ohio St.3d 431, 435, 775 N.E.2d 824, 828 (“Issues not raised below cannot be considered in an appeal to this court.”); *State v. Lawson* (1992), 64 Ohio St.3d 336, 340, 595 N.E.2d 902 (“this court has applied the doctrine of waiver to bar the defendant from raising on appeal those issues which had gone unchallenged in the courts below.”) “If this court should now consider such a question before it had been presented to the Court of Appeals, [it] would be permitting the defendant to bypass the Court of Appeals and, in effect, appeal from the judgment of the Common Pleas Court directly to this court. Our

Constitution does not authorize any such short-cut.” *State v. Jones* (1965), 4 Ohio St.2d 13, 14, 211 N.E.2d 198, 199.

The decision to allow this discretionary appeal upon reconsideration was not unanimous, and this cause ought not to be heard here. The motion to reconsider is premised upon a claimed error that was not brought to the attention of the Court of Appeals. The appeal in this case should be dismissed on the ground that the motion to reconsider was improvidently allowed.

**B. Appellants Are Not Entitled To Argue In Their Merits Brief Issues That Were Not Addressed In Their Memorandum In Support Of Jurisdiction And Motion To Reconsider.**

Appellants’ attempt to argue issues in their merits brief that they neglected to mention in their jurisdictional brief is improper.

Recently, this Court wrote the following with respect to an appellant’s attempt to raise in its merits brief issues that were not raised in its memorandum in support of jurisdiction:

We note that Martin has also briefed a second proposition of law asserting that AMA’s client list does not satisfy the definition of a trade secret because it contained information that is available to the public via the internet. *However, because Martin never raised this issue in his memorandum in support of jurisdiction, we never agreed to consider it.* Thus, we concern ourselves only with the proposition of law that we accepted for review[.]

*Al Minor & Assoc.s, Inc. v. Martin* (2008), 117 Ohio St.3d 58, 60 at ¶9 (emphasis added). This result is in keeping with this Court’s prior precedent regarding issues that were left out of jurisdictional briefing. See *Whitaker v. M.T. Automotive, Inc.* (2006), 111 Ohio St.3d 177, 179 at ¶ 9, fn.2 (“The appellate court affirmed the propriety of the directed verdict on the fraud claim from which Whitaker has cross appealed. Although Whitaker offers this issue in his brief before this court, because he failed to raise it in his jurisdictional memorandum, it will not be

addressed.”); *Corporex Dev. & Construction Mgmt., Inc. v. Shook, Inc.* (2005), 106 Ohio St.3d 412, 414, fn.1 (“Shook’s brief in this case also raised the issue of whether the appellate court erred by reinstating DSI’s implied-product-warranty claim. Shook, however, failed to raise that issue in its jurisdictional memorandum. As we did not accept jurisdiction based upon that issue, we refrain from addressing it.”); *Estate of Rodley v. Hamilton Cty. Bd. of MRDD* (2004), 102 Ohio St.3d 230, 236 (because appellant failed to raise constitutionality argument in its jurisdictional briefing, “we decline to address this issue.”); *In re Timken Mercy Medical Center* (1991), 61 Ohio St.3d 81, 87 (“[A]ppellant argues that even if we find that the Board employed the proper level of scrutiny, we should reverse its decision as being in conflict with Ohio Admin. Code 3701-12-24. However, in its memorandum in support of jurisdiction, the appellant did not raise or even allude to this issue....Consequently, the question of whether the Board’s decision was based upon a correct reading of Ohio Admin. Code 3701-12-24 is not properly before us and we decline to rule on it.”).

The rule from this Court’s precedent is quite clear: an appellant is not entitled to argue in its merits brief issues that were not raised in its jurisdictional memorandum. Despite this, Appellants have devoted many pages to two issues never referenced in its jurisdictional briefing.

A careful reading of Appellants’ Proposition of Law No. 1 in their jurisdictional memorandum (“A class action cannot be maintained when only some of the putative class members have been injured.”) clearly reveals that Appellants are arguing the predominance requirement for class certification under Civ.R. 23(B)(3). The additional Civ.R. 23(B)(3) requirements of superiority and manageability are not mentioned or even alluded to. These are aspects of the trial court’s class certification decision that were considered in detail by the Court

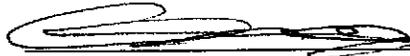
of Appeals. If Appellants had desired to argue those aspects of the Court of Appeals decision, they must have said that in the jurisdictional memorandum in order to give Appellees the opportunity to point out (and give this Court the opportunity to decide) that these are not issues of public or great general interest, but rather, as determined by the Court of Appeals, derive from a precise and detailed analysis of the evidence in the record made by the trial court, well within the sound exercise of its discretion.

### **III. CONCLUSION**

This Court reconsidered its previous decision and accepted jurisdiction of this appeal, induced by Appellants' representations in their motion to reconsider that the crucial issue at hand was the need to establish a policy decision that prohibited a "fail safe" class definition. Although argued to be an issue of public or great general interest, it had not been raised in the courts below. Because it was not raised in the Court of Appeals, Appellees did not have the opportunity to demonstrate to that Court the reason for which that concept did not apply to the class definition. By failing to raise that issue below, Appellants have waived it. This Court accepted jurisdiction based on Appellant's inaccurate representation that the issue could be properly placed before this Court. This Court should now dismiss the appeal as improvidently granted.

On the other hand, should this Court nevertheless determine to entertain the appeal, based upon Proposition of Law No. 1 in Appellant's jurisdictional brief (argued as Proposition of Law II in Appellant's merit brief), Plaintiffs-Appellees respectfully request entry of an Order striking pages 8-15 (Proposition of Law I) and pages 22-26 ("This class action is unmanageable" and "A class action is not superior to other methods of resolving the disputes at issue") of the Merit Brief of Appellants.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellees' Motion To Dismiss Appeal As Improvidently  
**Granted, Or In The Alternative, To Strike Portions Of Appellants' Merits Brief** was  
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on this 9<sup>th</sup> day of June, 2009.



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