

CASE NO. 2011- 11-0873

## IN THE SUPREME COURT OF OHIO

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THE ESTATE OF JEROME R. MIKULSKI, et al.  
Plaintiffs-Appellants,

v.

CENTERIOR ENERGY CORP., et al.,  
Defendants-Appellees.

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ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS, EIGHTH  
APPELLATE DISTRICT

COURT OF APPEALS CASE NO. CA-10-94536

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEES,  
CENTERIOR ENERGY CORP. AND FIRSTENERGY CORP.

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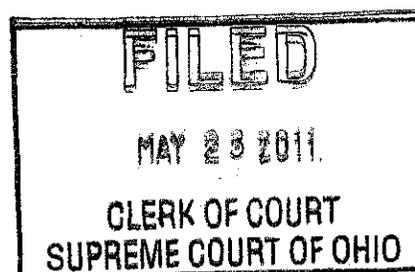
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## I. THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Left undisturbed, the February 17, 2011 decision of the Eighth District Court of Appeals (the "Mikulski Decision"), a copy of which is attached, re-defines and obliterates the standards by which motions for class certifications are judged in Ohio courts. Indeed, the Mikulski Decision alters the burden of proof applicable to such motions and places it clearly on the shoulders of the defendant and the trial court before whom such motions are brought. The import of the Eighth District's unprecedented holding is that a trial court may no longer deny a motion for class certification unless, and until, it sua sponte examines and rejects every conceivable modification of the plaintiff's proposed class definition. Pursuant to the Mikulski Decision, a trial court must not only consider those definitions (and alternate definitions) specifically raised by the class action plaintiff, but all possible modifications and reiterations of those definitions that were not raised, or even considered, by the plaintiff. Accordingly, pursuant to the Mikulski Decision, a plaintiff is fully relieved of his burden to present a viable class definition to the trial court; the burden now belongs *to the court itself* to demonstrate that no certifiable class definition exists. The Mikulski Decision, therefore, serves not only to create an additional, unconscionable, burden to Ohio businesses, but fashions an unprecedented and impossible burden for Ohio's courts.

By upsetting the well-established burden of proof applicable to purported class actions, the Mikulski Decision jeopardizes the interests of businesses in this state. As commentators have noted over the past few years, the proliferation of class action lawsuits have had a profound negative impact on businesses. See, e.g., G. Krueger and J. Serotta, "Our Class System is Unconstitutional," The Wall Street Journal (Aug. 6, 2008) (recounting negative impact class action lawsuits have had on businesses compared to the relatively little value they have had for

consumers and persons other than attorneys). Indeed, it is this negative impact that led Congress to pass the Class Action Fairness Act of 2005, removing much of the control over larger class actions from the state courts. See 28 U.S.C. §§1332(d), 1453, and 1711–1715; E.F. Sherman, “Decline & Fall: As the Golden Age of Consumer Class Actions Ends, the Question Now is Whether They Have a Future,” ABA Journal (June 2007) (“[B]usiness organizations pursued an intensive campaign to sway public opinion, and to lobby Congress and state legislatures for changes in substantive and procedural law that would put the clamps on consumer class actions. And now, opponents of class actions have gotten much of what they were looking for, culminating in the passage by Congress of the Class Action Fairness Act of 2005.”).

It has long been recognized that a trial court’s decision regarding class certification is, from an economic standpoint, the most crucial decision in any purported class action.

In terms of the dynamics and economics of class actions, and most particularly in a Rule 23(b)(3) damage case, the lawyers believe that whether the case will be certified as a class action under Rule 23(c)(1) is the single most important issue in the case. All the lawyers’ weapons and all the litigants’ resources tend to be mobilized to deal with that question. Defense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification. Conversely, plaintiffs’ lawyers believe that their ability to obtain a large settlement turns on securing certification.

Arthur R. Miller, An Overview of Federal Class Actions: Past, Present, and Future, at 12 (1977).

Indeed, the decision regarding class certification has been referenced as potentially being a “cataclysmic, all-or-nothing event.” Developments in the Law— Class Actions, 89 Harv. L. Rev. 1318, 1423 (1976).

Thus, the Mikulski Decision stands as important precedent for Ohio businesses because it has relieved plaintiffs of their burden of proof and, in the process, made it nearly an absolute certainty that plaintiffs (and their attorneys) will obtain class certification even in the most

frivolous of actions. Indeed, saddled with an almost impossible burden to resolve *every* possible class definition (even those not raised) before certification can be denied, Ohio trial court judges have effectively been given a standing order by the Eighth District to find a way to certify *any* class that comes before them.

If left unaltered, the Mikulski Decision makes class actions even more expensive for litigants and more burdensome for trial courts because trial courts now have been directed to find a way to certify every class out of concern that the Court of Appeals may be able to conceive of a modification or re-definition that has not been tested and determine that the trial court failed to meet *its* burden to consider every possible class definition. The Mikulski Decision, therefore, also is of great public or general interest because of the undue burden it places on Ohio trial court judges. In particular, a trial court judge now has the *duty* to consider the entire universe of possible modifications to a plaintiff's class definition, including those modifications never suggested or imagined by the plaintiff.

As discussed below, the Mikulski Decision also is of great public or general interest because it creates a clear conflict with contrary decisions of this Court, other Ohio courts of appeals, and federal courts as well. Indeed, this Court has made clear that the burden to propose a certifiable class under Ohio R. Civ. P. 23 belongs to the plaintiff alone. In accordance, all courts that had previously reviewed the important issues raised by the Mikulski Decision have consistently held that (1) the burden to propose a viable class definition rests solely with the plaintiff; and (2) the trial court does not abuse its discretion by failing to consider modifications or alternate definitions not suggested to it by the plaintiff.

Because the Eighth District's unprecedented decision has serious implications not only for companies transacting business throughout the State of Ohio, but also for Ohio's courts, this

case involves matters of great public and general interest. Defendants-Appellees, Centerior Energy Corp. and FirstEnergy Corp. (collectively, "FirstEnergy"), respectfully request that this Court grant jurisdiction and consider the case on its merits.

## II. STATEMENT OF THE CASE AND FACTS

In December 2001, Plaintiffs-Appellants, Jerome and Elzetta Mikulski (collectively, "Appellants"),<sup>1</sup> initiated the first of four class actions against FirstEnergy Corp. and certain of its subsidiaries and predecessors, each of which cases was based upon the theory that those companies had misapplied federal tax law when calculating the "earnings and profits" that they reported to their shareholders in certain years. According to Appellants' theory, the alleged error caused Appellants, and the other members of their proposed classes, to overpay their taxes in the years at issue in each lawsuit. The action underlying this appeal, commenced in December 2002, was the third of the four cases to be filed by Appellants,<sup>2</sup> but the first of the four cases (and only one to date) to culminate in a decision on class certification.

In their Complaint, Appellants proposed the following class definition:

The members of the Plaintiff class consist of all common shareholders of Centerior, and all beneficial owners of Centerior common shares, who in any year beginning in 1988 and continuing through 1998, inclusive, were issued a Form 1099-DIV or substitute therefor by Centerior or its agents reporting the tax status of distributions made by Centerior during any of the calendar years

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<sup>1</sup> Jerome Mikulski died in 2007 and the Executrix of his Estate, Ms. Charlotte Beck, has been substituted in his place as one of the Plaintiffs.

<sup>2</sup> The action underlying this appeal deals with distributions made in tax years 1987-93 and 1995-97 by Centerior Energy Corp. The first filed action deals with two distributions made in 1986. Mikulski v. Centerior Energy Corp., et al., Cuyahoga County Court Comm. Pleas No. 01-CV-457866, filed December 31, 2001 (J. Sutula, J.). The other two actions deal with distributions made by two separate corporate entities in 1985 and part of 1986. Mikulski v. The Cleveland Electric Illuminating Co., Cuyahoga County Court Comm. Pleas No. 02-CV-490019, filed December 31, 2002 (Ambrose, J.); Mikulski v. The Toledo Edison Co., Lucas County Court Comm. Pleas No. CI-200206364, filed December 31, 2002 (Zmuda, J.).

from 1987 through 1997, inclusive, and the communities comprised of them and their spouses, if any, excluding therefrom:

(i) common shareholders and beneficial owners who sold such shares (which had by that time been converted to shares of FirstEnergy) on or after January 1, 2000;

(ii) shareholders identified by a federal taxpayer identification number other than a social security number, excepting nominees which held shares of Centerior common stock for or on behalf of beneficial owners who are identified for tax purposes by a social security number;

(iii) Defendants, their predecessors and successors;

(iv) the officers and directors of Defendants, their predecessors and successors;

(v) counsel of record in this action and their respective parents, spouses and children; and

(vi) judicial officers who enter an order in this action and their respective parents, spouses and children.

Throughout the litigation, FirstEnergy challenged the viability of this class definition, arguing, principally, that the membership of the class was not identifiable and that the class was defined in such a manner that common issues would predominate over individual issues. Specifically, with regard to identifiability, FirstEnergy argued that Appellants could not identify all of the members of their proposed class because that class, on its face, included beneficial shareholders who could only be identified, if at all, through a review of records held by third parties. Given the years at issue in the case, those records were all almost twenty years old at the time this lawsuit was filed and, in many instances, difficult to locate or non-existent. With regard to predominance, FirstEnergy argued that Appellants' proposed class included persons who were not injured by the alleged conduct to the extent it included persons, among others, who did not incur a tax liability (for any of a number of reasons) in the years at issue in the lawsuit. The trial

court, in order to adjudicate the claims of all of the class members, would have been required to perform individualized inquiries.<sup>3</sup>

Nonetheless, this definition remained the only class definition presented by Appellants until they filed their Post-Hearing Brief. In that Brief, Appellants proposed the following re-definition, which was designed to address FirstEnergy's arguments regarding identifiability but did nothing to address FirstEnergy's arguments regarding predominance:

All **registered** common shareholders of Defendant, Centerior Energy Corp. ("Centerior"), ~~and all beneficial owners of Centerior common shares~~ who in any year beginning in 1988 and continuing through 1998, inclusive, were issued a Form 1099-DIV or substitute therefor by Centerior or its agents reporting the tax status of distributions made by Centerior during any of the calendar years from 1987 through 1997, inclusive, and the communities

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<sup>3</sup> Appellants' lawsuits against FirstEnergy have a long and convoluted history. These matters were removed to the federal courts prior to being remanded to the trial court below. The U.S. Court of Appeals for the Sixth Circuit, sitting en banc, ultimately rejected federal jurisdiction over Appellants' claims, but also communicated its view that class treatment in this case was inappropriate due to the nature of the damages sought by Appellants. Mikulski v. Centerior Energy Corp. (6th Cir. 2007), 501 F.3d 555, 572 (en banc). In its en banc decision, the Sixth Circuit noted:

Throughout this case, this appeal, and this opinion to this point, one aspect of the plaintiff's position has generally been accepted: that each shareholder suffered the same damages, which can be measured by the alleged overpayment of state and federal income taxes. . . . [The presumption of identical damages] is highly suspect, and to the extent that this suspect presumption is relied upon or overlooked in this analysis, the true situation is worth acknowledging. *Each of the individual shareholders presumably, at least theoretically, falls within a particular (differing) income tax bracket, holds a unique investment portfolio (with different gains, losses, deductions, offsets, writeoffs, tax shields, etc., in any given year), and consequently, pays a different amount of taxes.*

Id. (emphasis added). Appellants did not offer any modification to address the predominance concerns raised by the Sixth Circuit.

comprised of them and their spouses, if any, and excluding therefrom:

(i) common shareholders of record and ~~beneficial owners~~ who sold such shares (which had by that time been converted to shares of FirstEnergy) on or after January 1, 2005;

(ii) shareholders identified by a federal taxpayer identification number other than a social security number, ~~excepting nominees which held shares of Centerior common stock for or on behalf of beneficial owners who are identified by tax purposes by a social security number;~~

(iii) Defendants, their predecessors and successors;

(iv) The officers and directors of Defendants, their predecessors and successors;

(v) Counsel of record in this action and their respective parents, spouses and children; and

(vi) Judicial officers who enter an order in this action and their respective parents, spouses and children.

This proposed amended class definition eliminated from its scope all beneficial shareholders of Centerior stock, presumably to satisfy the perceived identifiability concerns caused by the inclusion of such shareholders. Appellants, however, *never* proposed to the trial court any modification that was aimed to address the predominance concerns raised by FirstEnergy (and the Sixth Circuit).

On December 18, 2009, after nearly eleven months of deliberation, Judge Lance T. Mason issued a nine-page reasoned opinion denying Appellants' Motion for Class Certification. Judge Mason found, as FirstEnergy argued, that the evidence adduced at the three-day live hearing demonstrated that individual issues relevant to Appellants' proposed class predominate over any common issues. In particular, Judge Mason found:

The Court finds that questions of law or fact common to the class do not predominate over individual questions. In this case, the

plaintiffs are bringing suit for breach of contract and fraudulent misrepresentation. . . . Here, the Court cannot resolve the issue of liability without undertaking an individual by individual analysis of the claims of each and every class member. . . . Hence, the Court finds that issues surrounding Defendants' liability do not predominate over individual questions.

December 18, 2009 Order, at 8.

Appellants appealed the denial of their Motion for Class Certification and a panel of the Eighth District unanimously *affirmed* Judge Mason's decision, agreeing that Appellants' class was not viable because individual issues predominated over issues common to the class. Furthermore, the Eighth District held that Judge Mason had no obligation to *sua sponte* modify Appellants' class definition or to consider re-definitions not raised by Appellants. Specifically, the Eighth District found:

Appellants cite to [Ritt v. Billy Blanks Ent., Cuyahoga App. No. 80983, 2003-Ohio-3645] and argue that instead of denying class certification, the court should have amended the class definition. Ritt, however, does not require a court to *sua sponte* amend a class definition; it merely encourages modification of an otherwise unidentifiable class. See also Warner v. Waste Mgmt., Inc., (1988) 36 Ohio St.3d 91, 521 N.E.2d 1091. Here the class does not fail for lack of identity, but because individual issues predominate.

Mikulski v. Centerior Energy Corp., Cuyahoga App. No. 94536, 2010-Ohio-6167, at ¶24.

Appellants then filed an Application for Re-Consideration or Consideration En Banc, supported by several Cleveland area lawyers and law professors as amici. The panel of the Eighth District that had unanimously affirmed Judge Mason's decision inexplicably reversed itself, finding instead that Judge Mason should have considered at least one definition not raised by Appellants and, presumably, abused his discretion by not doing so.<sup>4</sup> Specifically, the Eighth

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<sup>4</sup> In the Mikulski Decision, the Eighth District never explicitly stated that it found Judge Mason had abused his discretion. In fact, it did not analyze the standard of review at all. See, generally, Mikulski Decision.

District, in its re-considered decision, disregarded its earlier finding that Ohio law “does not require a court to sua sponte amend a class definition” and found:

It is unclear from the record in this case whether redefining the class to include only those individuals who filed tax returns for any of the years in question would cure the predominance defect and preserve Centerior’s due process rights. . . . Appellants argue that any individuals who filed a return in any of the included years would suffer some damages. Based on this argument, a redefinition of the class could resolve the predominance problem because the fact of damage could be shown on a class-wide basis, leaving only the amount of damages to be determined.

Mikulski Decision, at ¶20. The Eighth District, therefore, remanded this case to Judge Mason to consider the viability of this re-definition— *a re-definition that had never been raised by Appellants in the trial court*. Id., at ¶21. Notably, however, the Eighth District still did not find that either of the definitions actually proposed to the trial court by Appellants were viable.

Mikulski Decision, at ¶¶12-16.

Following the Eighth District’s unprecedented re-consideration of its decision, FirstEnergy filed an Application for Consideration *En Banc* in its own right, noting that the re-definition suggested by the Eighth District was not viable and, more importantly, that it had never been proposed by Appellants. Thus, as FirstEnergy argued, the Eighth District’s decision had the effect of eliminating Appellants’ burden to propose a viable class definition and imposed *upon the trial court* the burden in all future cases to prove a negative— that no viable class definition exists— before it could ever deny a motion for class certification. The Eighth District denied FirstEnergy’s Application for Consideration *En Banc* on April 8, 2011.

### III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**PROPOSITION OF LAW I:** *The Named Plaintiff in a Class Action solely bears the burden of defining the class upon which she seeks certification. The Trial Court has no obligation to consider modifications or alternate class definitions not proposed by the Named Plaintiff and does not abuse its discretion when it denies a motion for class certification, without considering*

*such alternatives, where the Plaintiff has failed to propose a certifiable class definition to the Trial Court.*

The elements that a plaintiff is required to prove in order to obtain class certification are set forth in Ohio R. Civ. P. 23. “The plaintiff bears the burden of establishing the right to a class action.” Burns v. Spitzer Mgt., Inc., 190 Ohio App.3d 365, 2010-Ohio-5369, at ¶5. See also Hamilton v. Ohio Sav. Bank, 82 Ohio St.3d 67, 70, 1998-Ohio-365 (reiterating that plaintiff has the burden to meet Rule 23 prerequisites); Warner v. Waste Mgt. Inc., 36 Ohio St.3d at 96 (stating same). Consistent with his burden, the plaintiff, therefore, has the obligation to propose a certifiable class definition to the trial court. See, e.g., Williams v. Countrywide Home Loans, Inc., Lucas App. No. L-01-1473, 2002-Ohio-5499, at ¶12.

Furthermore, the standard of review relevant to a trial court’s determination that a plaintiff has failed to meet his burden is well-established. Indeed, a trial court judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion. Schmidt v. Avco Corp. (1984), 15 Ohio St.3d 310, 312-13, 473 N.E.2d 822. “Abuse of discretion” is defined as more than an error of law or judgment; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. Ojalvo v. Bd. of Trustees of Ohio State Univ. (1984), 12 Ohio St.3d 230, 232, 466 N.E.2d 875. As this Court has explained the standard:

[W]hile a trial court’s determination concerning class certification is subject to appellate review on an abuse-of-discretion standard, due deference must be given to the trial court’s decision. A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. It is at the trial level that decisions as to class definition and the scope of questions to be treated as class issues should be made. *A finding of abuse of discretion, particularly if the trial court has refused to certify, should be made cautiously.*

Marks v. C.P. Chem. Co. (1987), 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (emphasis added).

Neither the defendant nor the trial court has the burden to prove that no certifiable class exists and Ohio courts of appeals, therefore, cannot find an abuse of discretion when a trial court fails or refuses to consider class definitions not raised to it by the plaintiff. The law on this point had been settled and well-established prior to the re-consideration by the Eighth District in this case. Thus, the Mikulski Decision creates an unprecedented and irreconcilable conflict among the courts of this state.

For instance, in Simpson v. Prudential Ins. Co. of America (Aug. 8, 1994), Butler App. No. CA93-09-173, 1994 WL 409656, at \*7, the Twelfth District reviewed the exact same issue that the Eighth District reviewed here. Consistent with the burdens placed upon plaintiffs by Rule 23, however, the Simpson court reached the opposite conclusion, finding that the burden to present alternative class definitions remained at all times with the plaintiff and holding that class certification was properly denied where the plaintiff had presented no viable re-definition to the trial court:

In addition, appellants' argument that the trial court erred by not attempting to revise the class definition is without merit considering *appellants did not request or suggest any different class definition until after the trial court had rendered its decision*. The trial court appears to have reviewed all the claims and issues in the case before making an informed determination that, due to the predominance of individual issues, no class could or should be certified; *the burden rested upon appellants to suggest a revised definition of the class and demonstrate satisfaction of the requirements for certification*.

Id. at \*7. Similarly, in Cicero v. U.S. Four, Inc., Franklin App. No. 07AP-310, 2007-Ohio-6600, the Tenth District refused to reverse a decision denying a motion for class certification, finding that the trial court did not abuse its discretion when it declined to consider alternative definitions not raised by the plaintiff:

In support of his second assignment of error, appellant argues that the trial court abused its discretion when it denied the motion to

certify on the grounds that the proposed class was unidentifiable, but failed to sua sponte modify the class definition to make it sufficiently identifiable. Citing Ritt, . . . appellant argues that the Supreme Court of Ohio has encouraged the trial courts to exercise their discretion to sua sponte modify an unidentifiable class. In response, appellees argue that the Supreme Court of Ohio has never stated that it is an abuse of discretion for a trial court not to sua sponte modify a class definition. We agree, as our research reveals that this is true. Moreover, as appellees correctly point out and appellant concedes, *appellant never requested that the trial court modify the proposed class definition in the event it found infirmities therein*. We perceive no abuse of discretion on the part of the trial court. For this reason, appellant's second assignment of error is overruled.

Id. at ¶45. The decisions in both Simpson and Cicero are consistent with Ohio precedent, including precedent of this Court, establishing that (1) the burden to propose a certifiable class definition remains with the plaintiff at all times; and (2) the court of appeals reviews a denial of a motion for class certification only for an abuse of discretion, mindful of this Court's admonition that "due deference must be given to the trial court's decision" denying class certification. Marks, 31 Ohio St.3d at 20.

Even other panels of the Eighth District disagree with the Eighth District's ultimate decision in this case. In Clark v. Park 'n Fly, Cuyahoga App. No. 94379, 2011-Ohio-323, for instance, the Eighth District made clear that a trial court need not consider definitions not raised by the plaintiff:

In [Ritt, 2003-Ohio-3645, at ¶21], this court held that "the trial court should have modified the class description so that all plaintiffs were sufficiently identifiable. . . . The failure of the trial court to modify the class itself or to allow plaintiffs to modify it constitutes an abuse of its discretion and thus a reversible error." Id., at ¶22. But our decision in Ritt was based upon the fact "the proposed class could be made more identifiable with little effort" and "especially in light of the fact that . . . plaintiffs did try to clarify the class description" before the trial court ruled on their motion. Id., at ¶21.

The facts in this case, however, are distinguishable from Ritt. ***Here, Clark does not assert that he proposed an alternative class definition to the trial court, which it failed to consider.*** Further, Clark does not even suggest, nor do we see, how his proposed definition could be modified so that it was administratively feasible for a particular member to be identified with any “reasonable effort.”

Id., at ¶28 (emphasis added).

In fact, as explained in Clark, prior to its re-considered decision here, the Eighth District had only remanded decisions denying motions for class certification for consideration of possible modifications where the plaintiff had actually proposed a viable alternative to the trial court. Ritt, 2003-Ohio-3645, at ¶¶20-21; see also Konarzewski v. Ganley, Inc., Cuyahoga App. No. 92623, 2009-Ohio-5827, at ¶47 (finding trial court abused its discretion in case where plaintiff had proposed potentially viable modification in its motion for class certification). Indeed, in Konarzewski, the Eighth District specifically recognized “that failure to modify a class will not typically be deemed an abuse of discretion.” Konarzewski, 2009-Ohio-5827, at ¶49.

Furthermore, under comparable federal law, federal courts have also held that the burden of proposing a workable class definition has always rested with the plaintiff. See Martinez v. Brown (S.D. Cal. Mar. 25, 2011), No. 08-CV-565, 2011 WL 1130458, at \*15 (“To the extent that more precise class definitions are required for certification, ***the burden of composing those definitions fell to Plaintiff, and Plaintiff failed to carry is burden.***”) (Emphasis added). Although addressing a question relating to the creation of sub-classes, as opposed to the modification of the main class definition, the U.S. Supreme Court also has made clear that the burden to present a workable definition remains with the plaintiff. U.S. Patent Comm’n. v. Geraghty (1980), 445 U.S. 388, 408 (“[I]t is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the [movant] and it is he who is required to submit

proposals to the court.”). Here, the Eighth District’s ruling that Judge Mason had the burden to explore possible modifications to Appellants’ class definition that were never raised by Appellants is unprecedented and abrogates this line of well-settled law, creating a troublesome conflict among the courts.

The Mikulski Decision is not reconcilable with Simpson, Cicero, or Clark and, absent consideration by this Court, a conflict will remain among the Eighth, Tenth, and Twelfth Districts. Furthermore, the Eighth District’s decision is not in concert with relevant federal decisions, creating an unprecedented divergence between Ohio and federal law concerning the burden on class certification. Indeed, the Mikulski Decision upsets well-settled (and uniform) law and places the burden *on the trial court* to consider modifications and re-definitions not raised by the plaintiff. The Eighth District has abrogated Ohio precedent establishing that (1) the burden to propose viable class definitions rests solely with the plaintiff; and (2) the trial court does not abuse its discretion by failing to consider modifications or alternate definitions not suggested to it by the plaintiff. The Mikulski Decision, instead, establishes an unworkable standard pursuant to which a trial court may not deny a motion for class certification unless and until it can make a record that it has considered every possible modification to the plaintiff’s class definition. Given the nearly impossible burden that this new standard imposes upon the trial courts of this State, Ohio judges have been virtually directed to certify a class in every class action that comes before them— no matter how frivolous that case may be. This, in turn, greatly increases not only the expenses of companies attempting to do business in Ohio but the burdens to Ohio’s trial courts. As a result, this Court should grant jurisdiction and consider this cause on its merits.

#### IV. CONCLUSION

Absent review by this Court, the standards applicable to the adjudication of motions for class certification, a matter of public and great general interest, will be left in shambles by the Mikulski Decision. For the above stated reasons, Defendants-Appellees, Centerior Energy Corp. and FirstEnergy Corp., respectfully request that this Court grant jurisdiction so that the important issues raised herein will be reviewed on their merits.

~~Respectfully submitted,~~

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## **APPENDIX**

- **February 17, 2011 Journal Entry and Opinion**
- **April 8, 2011 Journal Entry Denying FirstEnergy's Application for Consideration En Banc**



# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94536

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**ESTATE OF JEROME MIKULSKI, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**CENTERIOR ENERGY CORPORATION, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-490020

**BEFORE:** Celebrezze, J., Blackmon, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** February 17, 2011



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PER APP.R. 22(C)

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ON RECONSIDERATION<sup>1</sup>

FRANK D. CELEBREZZE, JR., J.:

Appellants, Elzetta Mikulski and the executor of the estate of Jerome Mikulski, appeal the denial of class certification in a suit brought against appellees, FirstEnergy Corp. (FirstEnergy), successor by merger to Centerior Energy Corp., and certain subsidiaries (collectively "Centerior"), claiming Centerior misstated the nature of payments it made to shareholders from 1987 through 1997. Appellants allege Centerior represented that the payments to shareholders were dividends but, in fact, they substantially consisted of returns of capital. After a thorough review of the record and law, we remand the case for further consideration.

Appellants assert that in the mid-1980's, Centerior began improperly manipulating its corporate earnings to appear more profitable. Centerior made payments to shareholders that it purported were dividend payments, which caused appellants to pay taxes on those payments as ordinary income. Appellants argue these payments largely consisted of returns of capital, which were not taxable or taxable only at the lower rate applicable to capital gains.

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<sup>1</sup> The original announcement of decision, *Mikulski v. Centerior Energy Corp.*, Cuyahoga App. No. 94536, 2010-Ohio-6167, released December 16, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A).

According to appellants, this resulted in substantial overpayment of state and federal taxes for many years.

Appellants allege the misstatement occurred because of Centerior's improper use of construction loan debt servicing costs in calculating its earnings and profits ("E&P"). The calculation of E&P is important because any payment to shareholders up to E&P is accounted as a dividend and taxed as ordinary income, but amounts that exceed E&P are classified as a return of capital, which reduces the shareholder's basis in the stock — resulting in no current tax liability — or is taxed as a capital gain to the extent that the payments exceed the shareholder's basis.<sup>2</sup>

In December 2001, appellants filed four separate suits against Centerior and certain of its subsidiaries alleging claims of fraud and breach of contract and seeking class certification.<sup>3</sup> Appellants defined the class in the instant case as "[a]ll common shareholders of \* \* \* Centerior, and all beneficial owners of Centerior common shares, who in any year beginning in 1988 and continuing through 1998, inclusive, were issued a Form 1099-DIV or substitute therefor by Centerior or its agents reporting the tax status of distributions made by

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<sup>2</sup>This is a simplification of the tax concepts involved. The reduction of basis would also have further implications on the sale of the stock.

<sup>3</sup>The instant appeal comprises the third such suit. Appellants claim that four suits were necessary in order to encompass all the classes of shareholders injured by the systematic misstatement of payments to shareholders.

Centerior during any of the calendar years from 1987 through 1997, inclusive, and the communities comprised of them and their spouses, if any, excluding therefrom:

“(i) common shareholders and beneficial owners who sold such shares (which had by that time been converted to shares of FirstEnergy) on or after January 1, 2005; (ii) shareholders identified by a federal taxpayer identification number other than a social security number, excepting nominees which held shares of Centerior common stock for or on behalf of beneficial owners who are identified for tax purposes by a social security number; (iii) Defendants, their predecessors and successors; (iv) the officers and directors of Defendants, their predecessors and successors; (v) counsel of record in this action and their respective parents, spouses and children; and (vi) judicial officers who enter an order in this action and their respective parents, spouses and children.”

Centerior sought removal of the cases to federal court. Ultimately, the cases were remanded to the state court for lack of jurisdiction. The instant cause proceeded to a three-day hearing on class certification, which began on January 15, 2009.

The trial court issued its ruling on December 22, 2009, denying class certification, finding that “liability as to each plaintiff’s claim could not be

ascertained on a class-wide basis in a single adjudication[.]” Appellants then filed the instant appeal.

## Law and Analysis

### Predominance

Appellants first argue that “[t]he trial court abused its discretion in finding that resolution of the issue of Centerior’s liability in this case requires an individual-by-individual analysis of the claims of every class member, and in concluding therefore that the common issues of fact and law do not predominate.”

The class action was envisioned, in part, to give collectively injured parties the ability to seek a common redress, but in aggregating claims into a single proceeding certain rights are given up. To that end, Civ.R. 23 sets forth a number of factors that must be met in order to grant class certification. As the trial court correctly stated, “[i]n Civ.R. 23(A), courts recognize two implicit requirements: (a) the identification of an unambiguous class, and (b) membership in the class by the representative plaintiff; and, four explicit requirements: (a) numerosity, (b) commonality, (c) typicality, and (d) adequacy of representation.” See *Warner v. Waste Mgmt. Inc.*, 36 Ohio St.3d 91, 96-98, 521 N.E.2d 1091. The trial court found that appellants met these criteria.

The final requirement is that appellants must qualify under one of the three categories set forth in Civ.R. 23(B). Appellants claim they qualified as a Civ.R. 23(B)(3) class. Civ.R. 23(B)(3) requires that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. "The purpose of Civ.R. 23(B)(3) was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 80, 1998-Ohio-365, 694 N.E.2d 442]. This provision of the rule was enacted to enable numerous persons who have small claims that might not be worth litigating in individual actions to combine their resources and bring an action to vindicate their collective rights. *Id.*" *Ritt v. Billy Blanks Ents.*, 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶56.

As stated in *Hamilton*, "Civ.R. 23(B)(3) provides that an action may be maintained as a class action if, in addition to the prerequisites of subdivision (A), 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 that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at 79-80.

In order to satisfy the predominance requirement, the appellant must show that the common questions of law and fact represent a significant aspect of the class and are capable of resolution for all members of the class in a single adjudication. *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 799, 589 N.E.2d 1348. The mere assertion that common issues of law or fact predominate does not satisfy the express requirements under the rule. As the court in *Waldo v. N. Am. Van Lines, Inc.* (W.D. Pa. 1984), 102 F.R.D. 807, stated: "[It] is not simply a matter of numbering the questions in the case, labeling them as common or diverse, and then counting up. It involves a sophisticated and necessarily judgmental appraisal of the future course of the litigation \* \* \*." *Id.* at 812.

Where the circumstances of each proposed class member need to be analyzed to prove the elements of a claim or defense, then individual issues predominate and class certification would be inappropriate. *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 314, 473 N.E.2d 822. The decision by a trial court to certify a class is reviewed for an abuse of discretion. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 2000-Ohio-397, 727 N.E.2d 1265.

In the present case, the trial court determined that in order to prevail, appellants must demonstrate that they were actually damaged as an element of their breach of contract and fraud claims. Generally, difficulty incurred in

calculating damages will not bar class certification. See *Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc.*, 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531, ¶62; *Hamilton* at 81. However, in Ohio, "one element common to the vesting of actions in tort and contract is the necessity of actual damages." *Wolf v. Lakewood Hosp.* (1991), 73 Ohio App.3d 709, 716, 598 N.E.2d 160, citing *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 536 N.E.2d 411; *Vasu v. Kohlers, Inc.* (1945), 145 Ohio St. 321, 332, 61 N.E.2d 707; Prosser & Keeton, *Law of Torts* (5th Ed. 1984) 165, Section 30, and 765, Section 110. See, also, *Mihelich v. Active Plumbing Supply Co.*, Cuyahoga App. No. 90965, 2009-Ohio-2248, ¶21 ("[A]ctual damages are an essential element of a breach of contract claim.").

We agree with the trial court that liability could not be determined on a class-wide basis for the class as defined by appellants. In order to prevail, the plaintiffs would have to show that they were actually damaged by Centerior's misstatements. Centerior's misstatements could only have been harmful if they affected the plaintiffs' tax liability. Those class members who did not pay taxes in any relevant year in which they received a 1099-DIV from Centerior could not have suffered any actual damage from the misstatement. The individual question of whether the class member paid taxes and, if so, how Centerior's misstatement affected their tax liability, would predominate over common

questions. The trial court did not abuse its discretion by finding that, for the class as defined by appellants, individual questions predominate. *Hoang v. E\*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151.

Appellants challenge the factual basis for the trial court's determination that the class would likely include shareholders who were not injured. However, even appellants concede that some part of the class as defined below consisted of persons who did not pay taxes; they only dispute the size of this group. Even if this group is very small, however, the court did not abuse its discretion when it determined that the process of identifying these persons would predominate over the questions common to the class. Predominance is a qualitative inquiry, not a quantitative one. *Waldo v. N.Am. Van Lines, Inc.* (W.D. Pa. 1984), 102 F.R.D. 807.

### Amendment of Class Definition

In their third assignment of error, appellants assert that the trial court abused its discretion by failing to amend the proffered class definition to cure the deficiencies it found. Appellants cite to *Ritt* and argue that instead of denying class certification, the court should have amended the class definition.

In *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, the Ohio Supreme Court noted that "when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an

avenue of proof that does not focus on questions affecting only individual members. If a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis." *Id.* at 430.

Here, if appellants' allegations are true, there is the kind of generalized fraud the *Cope* and *Ritt* courts found to warrant class certification. Further, in *Hoang*, this court recognized that it is not the amount of damages that must be shown on a class-wide basis, but rather the fact that members of the class were damaged. *Id.* at ¶21.

It is unclear from the record in this case whether redefining the class to include only those individuals who filed tax returns for any of the years in question would cure the predominance defect and preserve Centerior's due process rights. However, "any 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." *Carder Buick-Olds* at ¶17. Appellants argue that any individuals who filed a return in any of the included years would suffer some damages. Based on this argument, a redefinition of the class could resolve the predominance problem because the fact of damage could be shown on a class-wide basis, leaving only the amount of damages to be determined. As previously

noted, difficulty incurred in calculating damages will not bar class certification. Id. at ¶62.

The trial court has already determined that the class is readily identifiable, and defining the class to include only those individuals who filed a tax return in any of the given years would appear to solve the predominance problem if this was indicative of injury. Because the record is unclear regarding appellants' assertion that the fact of damage can be demonstrated simply by showing that a putative class member filed a tax return in any given year, this cause must be remanded to the trial court for further consideration.

Judgment reversed and this cause is remanded for further consideration consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and  
LARRY A. JONES, J., CONCUR

The State of Ohio, }  
Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal Entry, Vol. 723 Page 976 Dated: 2-17-11 CA 94536

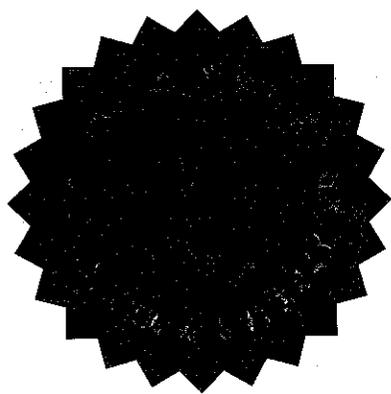
of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Entry, Vol. 723 Pg. 976

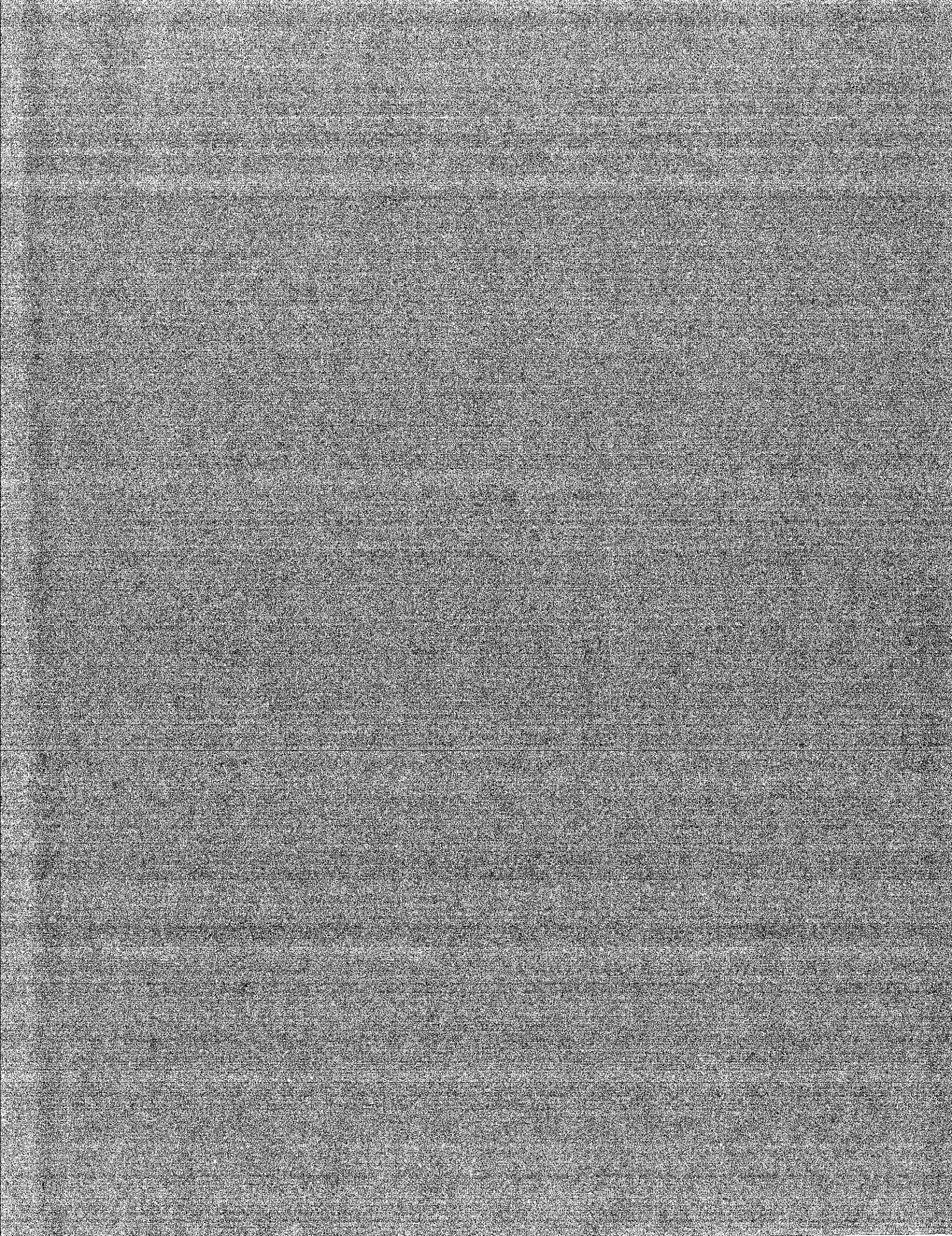
Dated: February 17, 2011 and that the same is correct transcript thereof.

*In Testimony Whereof*, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 20th day of May A.D. 20 11

GERALD E. FUERST, Clerk of Courts

By [Signature] Deputy Clerk





# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

JEROME MIKULSKI (ESTATE), ET AL.

Appellants

COA NO.  
94536

LOWER COURT NO.  
CP CV-490145

COMMON PLEAS COURT

-vs-

CENTERIOR ENERGY CORP., ET AL.

Appellees

MOTION NO. 442341

Date 04/08/2011

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Journal Entry

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This matter is before the court on appellee's application for en banc consideration. Pursuant to App.R. 26, Loc. App. R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

Appellees' arguments that the panel's decision is in conflict with the plaintiff's burden of proof on a motion for class action certification and with the presumption of regularity, and that the panel's decision substituted its own judgment for the trial court's, do not allege any conflict between decisions in this district. We find no conflict between the panel's decision in this case and the decisions in *Clark v. Park 'n Fly*,

Cuyahoga App. No. 94379, 2011-Ohio-323; *Konarzewski v. Ganley, Inc.*,  
Cuyahoga App. No. 92623, 2009-Ohio-5827, *Ritt v. Billy Blanks  
Enterprises*, Cuyahoga App. No. 80983, 2003-Ohio-3645; and *Barber v.  
Meister Protection Services*, Cuyahoga App. No. 81553, 2003-Ohio-1520.  
Accordingly, appellant's application for en banc consideration is denied.

Mary Eileen Kilbane  
MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

Concurring:

- PATRICIA A. BLACKMON, J.,
- MARY J. BOYLE, J.,
- FRANK D. CELEBREZZE, JR., J.,
- COLLEEN CONWAY COONEY, J.,
- EILEEN A. GALLAGHER, J.
- LARRY A. JONES, J.,
- KATHLEEN ANN KEOUGH, J.,
- KENNETH A. ROCCO, J.,
- MELODY J. STEWART, J., and
- JAMES J. SWEENEY, J.

Recused:

SEAN C. GALLAGHER, J.

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ALL PARTIES - COSTS TAKEN

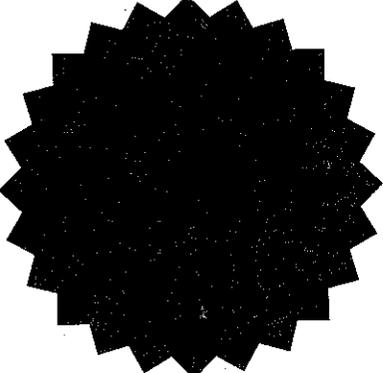
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GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

The State of Ohio, } ss.  
Cuyahoga County.

I, GERALD E. FUERST, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal APPLICATION IS DENIED in CA94536 DATE Apr 18 2011 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal APPLICATION IS DENIED in CA94536 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 20 day of May A.D. 20 11

GERALD E. FUERST, Clerk of Courts

By [Signature] Deputy Clerk

## CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served by electronic and First Class U.S. Mail, this 23d day of May 2011, to the following:

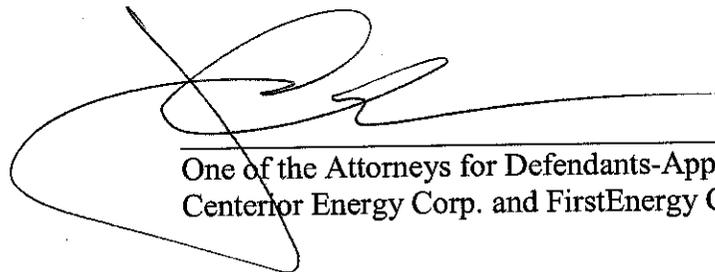
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