

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN,

Plaintiff-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

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Case No. 12-0535

On Appeal from the Cuyahoga
Court of Appeals, Eighth App.
Dist., No. 10-095925

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
AND OHIO INSURANCE INSTITUTE

Thomas E. Szykowny (0014603)
Michael Thomas (0000947)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 E. Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com

*Counsel for Amici Curiae National Association of
Mutual Insurance Companies and Ohio Insurance
Institute*

W. Craig Bashein (0034591)
Counsel of Record
John P. Hurst (0010569)
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216
Tel: (216) 771-3239
Fax: (216) 781-5876

and

Paul W. Flowers (0046625)
Terminal Tower, 35th Floor

Mark A. Johnson (0030768)
Counsel of Record
Joseph E. Ezzie (0075446)
Robert J. Tucker (0082205)
BAKER & HOSTETLER LLP
65 East State Street, Suite 2100
Columbus, OH 43215-4260
Tel: (614) 228-1541
Fax: (614) 462-2616
mjohnson@bakerlaw.com

and

Michael K. Farrell (0040941)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485
Tel: (216) 621-0200
Fax: (216) 696-0740

and

FILED
MAR 30 2012
CLERK OF COURT
SUPREME COURT OF OHIO

50 Public Square
Cleveland, OH 44113
Tel: (216) 344-9393
Fax: (216) 344-9395

Counsel for Appellee Michael E. Cullen

Robert Shultz (pro hac vice)
HEYL, ROYSTER, VOELKEK & ALLEN
Suite 100, Mark Twain Place III
105 West Vandalia Street
PO Box 467
Edwardsville, IN 62025
Tel: (618) 656-4646

*Counsel for Appellant State Farm Mutual
Automobile Insurance Company*

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI CURIAE NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES AND OHIO INSURANCE INSTITUTE 1

STATEMENT OF PUBLIC OR GREAT GENERAL INTEREST 4

STATEMENT OF THE CASE AND FACTS 10

ARGUMENT 11

 Proposition of Law No. 1:

 In ruling on class certification, courts may and should examine merits issues
 that are relevant to Civil Rule 23 requirements. 11

 Proposition of Law No. 2:

 In ruling on class certification, courts may and should examine the reliability
 and admissibility of expert testimony that is relevant to Civil Rule 23
 requirements..... 11

 Proposition of Law No. 3:

 A class definition may not condition class membership on disputed, individual
 elements of liability..... 11

 Proposition of Law No. 4:

 In ruling on class certification, courts may not rely on allegations that
 hypothetical “computer algorithms” can identify class members..... 11

 Proposition of Law No. 5:

 Where class members’ claims are based upon different communications with
 different persons, and only some of these communications were allegedly
 scripted, individual issues predominate over common issues. 13

 Proposition of Law No. 6:

 It is an abuse of discretion to certify a subclass in the absence of a class
 representative who is a member of the subclass. 14

 Proposition of Law No. 7:

 Rule 23(B)(2) does not authorize class certification when the named plaintiff
 lacks standing to seek declaratory or injunctive relief..... 14

CONCLUSION..... 15

**STATEMENT OF INTEREST OF AMICI CURIAE NATIONAL ASSOCIATION
OF MUTUAL INSURANCE COMPANIES AND OHIO INSURANCE INSTITUTE**

The issues raised by this appeal are extremely important to amici curiae, to their members, and to the entire Ohio insurance industry. The ruling by the Court of Appeals dilutes critical requirements of Ohio Rule of Civil Procedure 23 that are essential to the fair and efficient resolution of class claims, and insurers have been among the primary targets of over-reaching class actions. Class members' shared status as policyholders who made insurance claims has been viewed in some cases as sufficient commonality to warrant class certification, even when that shared status is not determinative of the relevant disputes of fact or law underlying their individual claims. For example, the only issues that are common to the class in the present case – that each class member reported windshield damage under a State Farm automobile insurance policy and chose to repair rather than replace the windshield – are not dispositive of any disputed liability issues for any class member. Indeed, it would not advance the resolution of the class members' individual claims one iota if those common issues were undisputed.

Cases that do not meet the rigorous class action requirements of Ohio Civil Rule 23 cannot be adjudicated justly or economically in a single class action proceeding. The protections that these requirements provide against the potential abuses of mass litigation are lost, and litigation costs soar. The present appeal is such a case, and amici curiae urge this Court to review – and ultimately reverse – the class certification ruling below.

The costs of defending a class action involving tens of thousands of disparate claims are enormous. Moreover, it may be impossible as a practical matter for insurers to challenge the various individual factual and legal deficiencies in the individual claims at trial. In the present case, every one of the 100,000 class members' claims must be considered separately due to (1) the differences in the provisions of their insurance policies, which changed several times during

the class period, (2) the differences in the conversations they had with different State Farm agents, telephone representatives of Lynx, a glass claims administrator, and glass-shop employees about whether their windshields should be repaired or replaced, and (3) the differences between the varying costs of replacing the windshields in the different makes and models of different class members' automobiles, in different time periods, and the varying amounts of the deductibles specified in their insurance policies.

This appeal is also extremely important to amici curiae because the class certification order is based on plaintiff's unsupported presumptions. The Court of Appeals felt bound to accept plaintiff's allegation that the State Farm insurance policies give policyholders the right to cash payments for windshield damage, even though the unambiguous policy language states otherwise, and even though this presents a question of law. Similarly, the Court felt obligated to credit the opinion of plaintiff's expert that windshield repairs can never return a windshield to preloss condition, despite the absence of any preloss condition requirement in the insurance policy for windshields, and despite a pending *Daubert* motion to exclude that opinion. State Farm's expert, a former Ohio Superintendent of Insurance, provided testimony in the trial court that insurance laws in other states endorse windshield repairs rather than replacement and "recognize[] what is widely known, that is, windshield repairs benefit consumers by helping to lower repair costs and keeping auto insurance premiums lower...." (Covington Report, at 4.) The Ohio Department of Insurance has specifically examined and approved State Farm's windshield claims practices. (*Id.*, at 14-17, 24-26.)

There are many different reasons why policyholders may prefer to repair rather than replace windshields with minor damage. The repair process is less time consuming and burdensome; replacement breaks the factory windshield seal, raising fears of leaks and other

problems; and windshield repair is a more economical choice for many policyholders, who thereby avoid paying a deductible and incurring an expensive loss in their claims history. At least one state has formally recognized that windshield repairs benefit all policyholders by lowering the costs of claims and has mandated repairs rather than replacement. See 211 Mass. Code Regs. 133.04(3).

No one except class counsel benefits when insurance companies must pay massive litigation costs and extortionate settlements to resolve contrived class actions based on unsupported assumptions that gloss over the non-common differences (and deficiencies) in individual class members' claims. These costs distort the risk/premium calculus on which insurance premiums are based and cause market inefficiencies that can lead to higher costs for policyholders. The link between higher costs for insurers and higher premiums for policyholders is even more direct when, as in this case, the defendant is a mutual insurance company that is, in essence, owned by its members.

Amici curiae National Association of Mutual Insurance Companies ("NAMIC") and Ohio Insurance Institute ("OII") are gravely concerned about the Court of Appeals' ruling below and the precedential effects it will have for insurers and insureds. NAMIC is the largest property and casualty insurance trade and advocacy association in the United States, and more than 40 of its member companies provide automobile insurance to Ohio residents. It has been active in promoting sensible and fair insurance laws and regulations since its inception in 1895, and its 1,400 members include mutual insurance companies, stock insurance companies, and reinsurers. NAMIC participates as amicus curiae in significant insurance cases before appellate courts, including this Court and the United States Supreme Court, to promote a stable legal environment in which the insurance industry can meet the needs of individuals and businesses alike.

Amicus curiae OII is a professional trade association representing property and casualty insurance companies and reinsurers doing business in Ohio. It provides a wide range of insurance-related services to its members and to the public, media, and government officials. Among other activities, OII monitors litigation in Ohio courts that raises important issues of insurance law, and it has participated as amicus curiae in several landmark insurance cases decided by this Court.

Both amici curiae are uniquely qualified to provide this Court with a broad perspective on the impact of the ruling below on the insurance industry, as well as practical insight into the specific issues it addressed. NAMIC and OII each identified this appeal as having major ramifications for insurers and insureds alike, and they join here in urging the Court to accept jurisdiction.

STATEMENT OF PUBLIC OR GREAT GENERAL INTEREST

This appeal presents purely legal questions about class certification that are within the Court's discretionary jurisdiction to resolve matters of public or great general interest. The Court of Appeals' decision is one of several recent Ohio appellate rulings that have loosened the rigorous class certification requirements that ensure the efficiency and fundamental fairness of class action litigation. If it is not reviewed by this Court, the ruling below will encourage counsel in Ohio and elsewhere to use Ohio courts to convert simple and straight-forward disputes into complex and expensive class actions on behalf of tens of thousands of hypothetical class members whose claims have no relevant disputed issues in common.

The issues in this appeal are extremely important not only to amici curiae NAMIC and OII and their members, but also to everyone in this State who pays insurance premiums. Insurers must incur substantial costs to defend sprawling class actions that are replete with individual

issues requiring individual consideration, and they must incur further substantial costs to pay settlements that provide a windfall to class members. In the present case, plaintiff requested certification of claims seeking hundreds of dollars for each class member to “indemnify” them for theoretical costs of replacing windshields that were never replaced, based solely on plaintiff’s unsupported and still untested presumptions.

It is especially important that the Court exercise its jurisdiction in this particular case. The class approved by the Court of Appeals is extraordinarily large, with approximately 100,000 members whose claims span a period of more than two decades. More importantly, the Court of Appeals’ ruling conflicts with many of the class action principles that the United States Supreme Court addressed last summer in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), and raises several significant questions:

- Is Ohio Civil Rule 23 a mere pleading standard under which a plaintiff’s allegations must be accepted as true for purposes of class certification even when they are contradicted by the evidence of record?
- Does Ohio Civil Rule 23 prohibit courts from considering any issues that touch on the merits of the action, including purely legal questions of contract interpretation, when they rule on class certification motions?
- Does Ohio Civil Rule 23 prohibit courts from considering the legal reliability of expert opinions offered in support of class certification motions?
- Does Ohio Civil Rule 23(B)(2) authorize courts to certify claims that request individualized monetary damages for each class member?
- Does Ohio Civil Rule 23(B)(3) authorize courts to certify claims when the issues they have in common are not determinative of any significant disputed elements of individual class members’ claims?

Each of these issues, standing alone, raises crucial questions about class certification that warrant this Court’s review. Together, they present an opportunity for the Court to clarify Ohio jurisprudence in the wake of the *Dukes* decision. Only the Supreme Court of Ohio has the

constitutional authority, and the concomitant responsibility, to clarify these legal principles under Ohio law.

The United States Supreme Court found these issues to be important enough to warrant a writ of certiorari in *Dukes*. Its subsequent decision in that case emphasized that class actions are neither fair nor economical unless they meet the “rigorous” requirements of Federal Rule of Civil Procedure 23. Its analysis of those requirements is important here because this Court has long recognized that Ohio Civil Rule 23 is coextensive with Federal Civil Rule 23 and that federal authority is appropriate for understanding and applying the Ohio Rule. See *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200, 201 (1987).

First, the *Dukes* Court emphasizes that “Rule 23 does not set forth a mere pleadings standard.” 131 S.Ct. at 2551. Instead,

[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc. ... “[A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable.”

131 S.Ct. at 2551 (original emphasis), quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 161 (1982).

The Court of Appeals held in the present case that class certification was proper based on, inter alia, plaintiff’s allegation that “a mathematical calculation to determine whether a given windshield replacement is more expensive than a given deductible [i.e., whether a policyholder has an actual injury and meets the class definition] can be accomplished... in a straight-forward, mechanical manner.” (2011 – Ohio – 6621, at ¶ 34.) The Court similarly concluded, based on plaintiff’s allegations, that “computerized algorithms and State Farm’s databases” can be used to determine whether a specific class member actually sustained an injury-in-fact. (*Id.*, at ¶ 36.)

While plaintiff offered no support for his allegations, State Farm submitted unrefuted evidence that it has neither data nor computer algorithms that can mechanically determine whether a policyholder suffered any financial loss. The evidence established that determining whether the cost of a replacement windshield for each policyholder exceeded that policyholder's deductible would require a painstaking individual review of the make, model, year, and date of repair for the vehicles of each of 100,000 class members during the 20-year class period, and the costs of each of the multiple replacement windshields available for each of those vehicles. The *Dukes* Court explained that courts cannot certify a class on the basis of a plaintiff's unsupported allegations; plaintiff must "affirmatively demonstrate... compliance" with the requirements of Civil Rule 23. 131 S.Ct. at 2551.

Second, the *Dukes* decision stressed that a class cannot be certified unless courts find "after a rigorous analysis" that all prerequisites of class certification have been met and, "[f]requently, that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." 131 S.Ct. at 2551, quoting *Falcon*, supra, 457 U.S. at 160-61. "Nor is there anything unusual about that consequence: the necessity of touching aspects of the merits in order to resolve preliminary matters... is a familiar feature of litigation." 131 S.Ct. at 2552.

The Court of Appeals in this case presumed the truth of critical allegations plaintiff offered to meet class certification requirements because they also touched on aspects of the merits of the claims. For example, its finding that common issues predominated was based on plaintiff's allegation that the State Farm insurance policy provided all policyholders with a mandatory "cash payment option" that they could choose even if their windshields were neither repaired nor replaced. The Court of Appeals pointed out that the language of the policy does not

include this alleged mandatory option, and instead leaves cash payments entirely to State Farm's discretion, but it believed that it could not resolve that question:

[T]he [insurance policy] may provide for a cash payment option, as Cullen argues, but that may be discretionary to be decided exclusively by State Farm. Further, "a court should not create an obligation not found in the contract's terms." [Citations omitted.] But none of those issues need be decided at this time because class certification is not akin to a motion for summary judgment.

2011-Ohio-6621, at ¶24. The Court of Appeals erred by refusing to address this purely legal question of contract interpretation. If the terms of the insurance policy do not give policyholders the right to receive a cash payment for windshield damage, the predicate for the trial court's finding that common issues predominate evaporates. The trial court erred by presuming that the policy provides that right and then finding on that basis that the class certification requirements are satisfied.

Third, the *Dukes* Court suggested that courts cannot conclude that Civil Rule 23 requirements have been met on the basis of expert opinions unless those opinions are legally reliable:

The parties dispute whether [plaintiff's expert witness] Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and ... *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class action proceedings. 222 F.R.D. at 191. We doubt that is so....

131 S.Ct. at 2553-54 (emphasis added). Other courts have followed *Dukes* and have required that expert opinions offered to meet class certification requirements must meet *Daubert* standards. See, e.g., *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011).

In the present case, the Court of Appeals found that common issues predominated with respect to policyholders who filed windshield claims prior to 1997 on the basis of plaintiff's

expert's opinion that a windshield can never be repaired properly and must always be replaced whenever it has any chips, cracks, or other minor damage. (Supra, at ¶ 33.) But the reliability and admissibility of that expert opinion is the subject of a still-pending *Daubert* motion by State Farm, and plaintiff did not meet his burden of proving compliance with Civil Rule 23 by simply presuming the reliability of that opinion.

Fourth, the United States Supreme Court held in *Dukes* that Rule 23(b)(2) “does not authorize class certification” when each class member seeks “an individualized award of monetary damages.” 131 S.Ct. at 2557.

Permitting the combination of individualized [damages] and classwide [injunctive] relief in a (b)(2) class is ... inconsistent with the structure of Rule 23(b).... In the context of a class action predominantly for money damages, we have held that absence of notice and opt-out [rights for class members] violates due process.... We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request – even a “predominating request” – for an injunction.

131 S.Ct. at 2558-59.

The Court of Appeals certified plaintiff's proposed class under Rule 23(B)(2) despite the fact that each class member seeks separate individualized monetary damages, and without addressing the fact that the sole named plaintiff is no longer a State Farm policyholder and thus has no standing to request injunctive relief. It did not explain why plaintiffs should be allowed to nullify the protections of Rule 23(B)(3) by simply joining a request for (B)(2) certification with a request for (B)(3) certification.

Fifth, the *Dukes* Court emphasized that an issue is not a “common issue” for purposes of class certification unless it is “of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity

of each one of the claims in one stroke.” 131 S.Ct. at 2550. Class members may share any number of “common issues” – e.g., they may all be State Farm policyholders who chose to have damaged windshields repaired rather than replaced – but those issues do not predominate for purposes of Rule 23(B)(3) unless plaintiff establishes that their resolution will be dispositive of some disputed element of each of the individual class members’ claims.

In this case, plaintiff alleged that State Farm directed Lynx to use a “common script” to persuade policyholders to choose windshield repairs rather than windshield replacement. But the Court of Appeals acknowledged that no such script existed during the first six years of the class period, and that in later years Lynx made different statements to different policyholders. (2011-Ohio-6621, at ¶32.) Moreover, different policyholders had different conversations about windshield repair and replacement with various State Farm agents and with various glass-shop workers that were neither scripted nor uniform. The contents of each conversation, during every time period, depended upon the individual circumstances of the policyholder. The alleged use of a “script” during some of the conversations during part of the class period does not present a common issue whose resolution would help determine the validity of all class members’ claims.

The issues on which the Court of Appeals diverged from *Dukes*, supra, frequently arise in class action litigation. Together, they reflect a loosening of Civil Rule 23 requirements that are essential to the fundamental fairness and efficiency of class action litigation. These issues were important enough to warrant the United States Supreme Court’s consideration in *Dukes*, and they similarly warrant this Court’s consideration here.

STATEMENT OF THE CASE AND FACTS

Amici curiae NAMIC and OII adopt and incorporate Appellant’s Statement of the Case and Facts.

ARGUMENT

Proposition of Law No. 1:

In ruling on class certification, courts may and should examine merits issues that are relevant to Civil Rule 23 requirements.

Proposition of Law No. 2:

In ruling on class certification, courts may and should examine the reliability and admissibility of expert testimony that is relevant to Civil Rule 23 requirements.

Proposition of Law No. 3:

A class definition may not condition class membership on disputed, individual elements of liability.

Proposition of Law No. 4:

In ruling on class certification, courts may not rely on allegations that hypothetical “computer algorithms” can identify class members.

The first four propositions of law asserted by appellant State Farm in this appeal address closely related principles of class certification discussed by the United States Supreme Court in *Dukes*, supra. The Court of Appeals believed that it could not address any questions that overlapped the merits of the action in determining whether a class should be certified, including whether the terms of the State Farm insurance policies include a mandatory “cash payment option” (Proposition of Law No. 1), whether expert opinions relevant to class certification meet applicable legal standards (Proposition of Law No. 2), whether the class definition improperly includes a disputed merits question as to whether policyholders have an injury-in-fact (Proposition of Law No. 3), and whether unidentified “computer algorithms” can be used to identify policyholders who sustained no financial losses (Proposition of Law No. 4). In each

instance, the Court of Appeals accepted plaintiff's presumptions as true and held that they satisfied class certification requirements.

Class certification is too important, and the resulting costs too high for both insurers and policyholders, for courts to simply accept a plaintiff's word that Civil Rule 23 requirements have been met. "Rule 23 does not set forth a mere pleadings standard," and "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Dukes*, 131 S.Ct. at 2551.

In this case, whether the State Farm insurance policy provides a "cash payment option" to policyholders is a purely legal question of contract interpretation that is critical to plaintiff's motion for class certification. The trial court nevertheless refused to consider this question. The trial court also should have considered State Farm's motion to exclude the opinions of plaintiff's experts – which similarly raises a pure question of law – instead of simply assuming for class certification purposes that the opinions meet applicable legal standards. Moreover, the existence of the hypothetical "computer algorithms," which purportedly make it possible to determine which policyholders actually sustained a financial loss, is essential to plaintiff's request for class certification and thus part of his burden of proof.

There is no conceivable reason that courts should refrain from ruling on these types of issues and simply accept the truth of unfounded assumptions a plaintiff offers in support of class certification. This Court should review the ruling below and clarify for Ohio courts – as the *Dukes* Court did for federal courts – that a party requesting class certification has the burden of affirmatively establishing that all Rule 23 requirements are satisfied, and that this requires evaluation of the factual and legal issues pertinent to class certification even if they overlap with merits issues.

Proposition of Law No. 5:

Where class members' claims are based upon different communications with different persons, and only some of these communications were allegedly scripted, individual issues predominate over common issues.

Amici curiae also agree with State Farm that class certification under Civil Rule 23(B)(3) is improper in this case because issues common to the class do not predominate over individual issues. In *Dukes*, supra, the Court explained that class action proceedings under this Rule are neither fair nor economical unless resolution of common issues will advance the claims of class members, i.e., "determination of their truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S.Ct. at 2550.

In this case, plaintiff alleges that the class members were "steered" into choosing windshields repairs, rather than replacement, in conversations that some class members had with State Farm agents and – during part of the class period – conversations that some class members had with Lynx telephone representatives. The alleged "steering" cannot simply be inferred from the fact that the conversations occurred; the record below establishes many legitimate reasons why some policyholders preferred repairs to replacement. Plaintiff also cannot ignore the fact that different class members had conversations with different agents and/or different claims administrators. Moreover, plaintiff concedes that the conversations with State Farm agents occurred over a 20-year time period and were not scripted or standardized in any way, and he offered nothing to refute that class members had other relevant unscripted conversations with glass-shop employees about whether their windshields should be repaired or replaced.

Accordingly, every class member must establish from the totality of his or her own personal conversations with different people at different times that they were "steered" into choosing windshield repairs. This will require evidence at trial of every relevant conversation

each individual class member had about repairing a windshield. Liability cannot be established on a common class basis, common issues do not predominate over individual issues, and certification under Civil Rule 23(B)(3) is improper.

Proposition of Law No. 6:

It is an abuse of discretion to certify a subclass in the absence of a class representative who is a member of the subclass.

Proposition of Law No. 7:

Rule 23(B)(2) does not authorize class certification when the named plaintiff lacks standing to seek declaratory or injunctive relief.

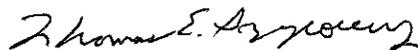
In its final two Propositions of Law, State Farm correctly points out that certification of a subclass of pre-1997 claimants was improper because, inter alia, there is no class representative who is a member of that subclass, and that certification of all claimants' claims under Civil Rule 23(B)(2) was improper because, inter alia, class members seek individualized monetary damages and the sole class representative, who is no longer a State Farm policyholder, lacks standing to seek injunctive relief. See, e.g., *Stammco v. United Telephone Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, at ¶ 6 ("the named representatives must be members of the class").

Plaintiff's windshield was repaired in 2003, and therefore he is not a member of – and cannot represent – the subclass of policyholders whose windshields were repaired prior to 1997. A subclass must independently satisfy the requirements of Civil Rule 23. See Civil Rule 23(C)(4)(b). Moreover, because plaintiff is not a State Farm policyholder, he lacks standing to seek an injunction or declaratory relief on behalf of any member of the class or subclass. Once again, the ruling below loosens the requirements of Civil Rule 23, and it should be reviewed and reversed by this Court.

CONCLUSION

For the reasons set forth above, amici curiae NAMIC and OII urge the Court to exercise its jurisdiction in this matter.

Respectfully submitted,



Thomas E. Szykowny (0014603)
Michael Thomas (0000947)
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 E. Gay Street
PO Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com

*Counsel for Amici Curiae National
Association of Mutual Insurance Companies
and Ohio Insurance Institute*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum in Support of Jurisdiction of National Association of Mutual Insurance Companies, and Property Casualty Insurance Association of America* was served by U.S. mail this 30th day of March, 2012, on the following:

W. Craig Bashein
Counsel of Record
John P. Hurst (0010569)
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216

Paul W. Flowers
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113

Counsel for Appellee Michael E. Cullen

Mark A. Johnson
Counsel of Record
Joseph E. Ezzie
Robert J. Tucker
BAKER & HOSTETLER LLP
65 East State Street, Suite 2100
Columbus, OH 43215-4260

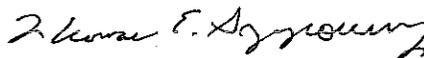
and

Michael K. Farrell
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485

and

Robert Shultz
HEYL, ROYSTER, VOELKEK & ALLEN
Suite 100, Mark Twain Place III
105 West Vandalia Street
PO Box 467
Edwardsville, IN 62025

*Counsel for Appellant State Farm Mutual
Automobile Insurance Company*



Thomas E. Szykowny (0014603)