

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Plaintiffs-Appellees,

v.

UNITED TELEPHONE COMPANY, OF OHIO AND SPRINT NEXTEL CORPORATION,

Defendants-Appellants.

Case No.: 2012-0169

On Appeal From the Fulton County Court of Appeals, Sixth Appellate District, Case No. F-11-003

APPELLANTS' MOTION TO RECONSIDER DECISION NOT TO ACCEPT DISCRETIONARY APPEAL

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Pursuant to Supreme Court Practice Rule XI, Section 2(A)(1), appellants United Telephone Company of Ohio and Sprint Nextel Corporation (“United Telephone”) respectfully move this Court for reconsideration of its order declining—in a 4-3 vote—jurisdiction. The authority to reconsider allows the Court to “correct decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, at ¶ 5 (internal quotations omitted); S.Ct.Prac.R. XI(2)(A).

After this Court reversed class certification, *Stammco, LLC v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, the trial court correctly declined to certify a class that was nearly identical to, and every bit as flawed as, the class this Court struck down. Nonetheless, the Sixth District Court of Appeals reversed, erroneously finding that the trial court abused its discretion.

In the short time since this appeal was filed, review has been sought in three more cases that present nearly identical Rule 23 issues. *Cullen v. State Farm*, 2012-0535; *Wolfe v. Grange Indemnity*, 2012-0497; *Agrawal v. Ford Motor Credit*, 2012-0462. In fact, the appellants in *Cullen* and *Wolfe* seek review of the exact issue presented in United Telephone’s Proposition of Law No. 1. And in *Cullen*, review on that issue is also urged by nine different amici acting on behalf of hundreds of thousands of businesses and organizations of every size and kind. These facts alone confirm the significant public and general interest in the issues raised here.¹

¹ In the alternative, United Telephone requests that the Court hold in abeyance its ruling on this motion until its decisions in these cases to provide uniform guidance on this issue.

If the Sixth District's decision stands, it will place Ohio law at odds with federal jurisprudence and the increasing number of states that have clarified their laws since *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

Since this appeal was filed, state supreme courts and federal courts continue to address *Wal-Mart's* impact on their class action law, and have even decertified classes in light of *Wal-Mart*.² Indeed, courts have cited *Wal-Mart* at least 137 separate times since United Telephone's motion for jurisdiction was filed. This Court should also consider *Wal-Mart's* impact and accept review.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition Of Law No. I: A Trial Court Does Not Abuse Its Discretion By Evaluating The Merits Of The Plaintiffs' Claims When Denying Class Certification.

For decades Ohio courts have incorrectly held that they cannot consider merits issues when ruling on class certification. These errors stem from the incorrect reading of *Eisen v. Carlisle*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) that appears in *Ojalvo v. Bd. of Trustees*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984), and that the Supreme Court expressly rejected in *Wal-Mart*.³ *Wal-Mart*, 131 S.Ct. at 2552.

In *Wal-Mart*, the Supreme Court held that the rigorous analysis requirement makes it appropriate to consider merits issues in ruling on class certification. *Id.*; see

² *E.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011); *M.D. v. Perry*, No. 11-40789, 2012 WL 974878 (5th Cir. March 23, 2012); *Nationwide Life Ins. Co. v. Haddock*, No. 10-4237, 2012 WL 360633 (2d Cir. Feb. 6, 2012); *Brinker Restaurant Corp. v. The Superior Court of San Diego County*, S166350, 2012 Cal. LEXIS 3149 (April 12, 2012); *Alexander v. Norfolk S.*, 11-C-2793, 2012 La. LEXIS 487 (March 9, 2012).

³ As discussed in United Telephone's memorandum for jurisdiction, Ohio courts routinely cite *Ojalvo* both as precluding any consideration of the merits and as requiring them to accept as true the facts alleged in a complaint when ruling on class certification.

also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 fn. 12, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1977) (“The more complex determinations required in Rule 23(b)(3) [damages] class actions entail even greater entanglement with the merits”); *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct 2364, 72 L.Ed.2d 740 (1982) (court’s rigorous analysis of Rule 23 issues often involves consideration of merits issues).

The Court then specifically rejected as “the purest dictum” the view that *Eisen* precludes consideration of merits issues at the class certification stage:

A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) is sometimes mistakenly cited to the contrary: “We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” * * * To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

Wal-Mart, 131 S.Ct. at 2552, fn. 6.

Nonetheless, the Sixth District relied on *Ojalvo* and its now-rejected reading of *Eisen*. Specifically, the Sixth District held that the trial court abused its discretion because, in the course of concluding that the plaintiffs had “not met their burden of establishing” that certification was proper, the trial court correctly noted that: (i) because United Telephone only delivers third-party charges, the real “culprits,” if any, are third parties initiating invalid charges, and (ii) no statute or case law requires United Telephone to re-verify the charges that it delivers. *Stammco, LLC*, Fulton C.P. No. 05CV000150 at *1, 15; *Stammco, LLC*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 13.

The Sixth District did not disagree with the trial court’s observations; nor did it find that the trial court considered those issues for any purpose other than class certification. Class certification was the only issue before the trial court, it was the only

issue upon which it ruled, and it was the only purpose for which it *could have* made its accurate observations. But the Sixth District ruled that under *Ojalvo* even the discussion of such issues in denying the class is more than a mistake in judgment, it is an abuse of discretion. *Stammco, LLC*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶¶ 13, 47-50.

Contrary to *Wal-Mart*, the Eighth District in *Cullen* and the Fifth District in *Wolfe* both erroneously found that they could not consider merits issues when ruling on class certification. Repetition of these errors post-*Wal-Mart* shows that the Court must clarify Ohio law on this point.

Proposition Of Law No. II: The Trial Court Did Not Abuse Its Discretion By Refusing To Certify A Fail-Safe Class Improperly Defined By The Merits.

Because the plaintiffs' class definition "turns on the ability to bring a successful claim on the merits," the trial court determined that class members "would be bound only by a judgment favorable to Plaintiffs, but not by an adverse judgment." *Stammco, LLC*, Fulton C.P. No. 05CV000150 at *13. Because this is the very definition of an improper "fail-safe" class, the trial court denied certification. *Id.* at *12-13. Specifically, "the 'merits' of the individual's claim 'defines' the proposed class." *Id.* If United Telephone won on the merits, there would be no judgment against a class that would be res judicata, and the plaintiffs' lawyers could keep suing United Telephone with new class representatives until they won.

In their opposition to jurisdiction, the plaintiffs concede that fail-safe classes are improper (Opp. Juris. 8-9), and they do not dispute that every other court in the country faced with the issue (except the Sixth District) has rejected fail-safe classes. Rather, the plaintiffs argue that their class is not defined by the merits, even though they concede in

their opposition brief that their class definition consists of customers who never gave *prior authorization* to United Telephone: “[A] class member is a [United Telephone] customer who did not authorize [United Telephone] to put third-party charges on its bill.” (Opp. Juris. 9.)

The plaintiffs’ argument ignores the plain language of their own definition, which explicitly focuses on the core merits issue in the case—namely, whether customers authorized third party charges. If United Telephone proves that a customer authorized third party charges, then United Telephone should be entitled to a judgment in its favor with respect to that particular customer. The court, however, could not enter judgment against that particular customer because the customer would no longer fit the class definition. Thus, the trial court did not abuse its discretion by holding that the new class definition (like the old one) would impermissibly permit one-way intervention. Ohio should not be the only state or federal court in the country to permit fail-safe classes.

Proposition Of Law No. III: The Sixth District Improperly Rejected This Court’s Determination That The Proposed Class Definition Did Not Permit Class Members To Be Identified With Reasonable Effort.

The plaintiffs concede in their opposition to jurisdiction that this Court reversed class certification because “[t]he ‘class definition d[id] not allow the class members to be readily identified.’” (Opp. Br. 10, quoting *Stammco, LLC*, 2010-Ohio-1042, at ¶ 1.) But contrary to this admission, the plaintiffs then argue that this Court held that the class definition was problematic *only* because it was ambiguous. (*Id.* at 10-11.)

The trial court, however, properly read this Court’s opinion as reversing class certification because the definition was both ambiguous and also did not permit identification of class members with reasonable effort. *Stammco, LLC*, 2010-Ohio-1042, at ¶ 1, 10, 11, 14. This Court correctly held that to determine whether a person was

a class member, “the court must determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill.” *Stammco, LLC*, 2010-Ohio-1042 at ¶ 11.

Moreover, for each class member, this Court stated that the “trial court must examine testimony by the person claiming to be a member of the class and what most likely will be conflicting testimony by Sprint or the third party.” *Id.* This Court also noted that “the class here cannot be ascertained merely by looking at [United Telephone’s] records.” *Id.* These issues have nothing to do with ambiguity and everything to do with the reasonable identifiability of the class.

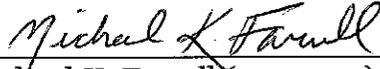
Every other court in the country—except the Sixth District—has uniformly denied class certification in so-called “cramming” cases. *Midland Pizza, LLC v. Southwestern Bell Tel. Co.*, Kansas No. 10-2219-CM-GLR (Nov. 18, 2011); *Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, S.D. Ind. 1:09-CV-34-SED-DML, 2010 WL 4751659, at *4 (Nov. 16, 2010); *Brown v. SBC Communications*, S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770, at *3 (Feb. 4, 2009); *Stern v. AT&T*, C.D. Calif. No. 05-8842, 2009 WL 481657, at *21 (Feb. 23, 2009).

Consistent with this Court’s decision and the above cases, the trial court correctly determined that the new definition—virtually identical to the old, rejected definition—did not permit class members to be identified with reasonable effort. The trial court stated that the new class definition failed “to address the Supreme Court’s concern for ‘consent’ and ‘authorization,’” and that the records of United Telephone did not permit class members to be identified with a reasonable amount of effort. *Stammco*, Fulton C.P. No. 05CV000150, at *10, 11. This Court should review this case, enforce its prior holding, and reinstate the trial court’s denial of class certification.

CONCLUSION

For the reasons set forth above and in their memorandum in support of jurisdiction, United Telephone respectfully requests that the Court reconsider its April 18, 2012 decision declining jurisdiction, and accept this appeal for review.

Respectfully submitted,



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