

ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP SHOP, et al.,	:	Case No. 12-0169
	:	
	:	
Plaintiffs-Appellees,	:	On Appeal From the
	:	Fulton County Court
v.	:	of Appeals, Sixth
	:	Appellate District,
UNITED TELEPHONE COMPANY, OF OHIO AND SPRINT NEXTEL CORPORATION,	:	Case No. 11FU000003
	:	
	:	
Defendants-Appellants.	:	

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF AMICUS CURIAE OHIO CHAMBER OF COMMERCE

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Pursuant to Supreme Court Practice Rule 11.2(B), amicus curiae the Ohio Chamber of Commerce (the "Chamber") respectfully submits this memorandum in support of appellants United Telephone Company of Ohio and Sprint Nextel Corporation's (collectively, "United Telephone") motion to reconsider this Court's decision not to accept this discretionary appeal.

I. The Chamber Has An Important Interest In The Court Once Again Accepting Jurisdiction Of This Case.

The Chamber is a trade association of businesses and professional organizations. It is Ohio's largest and most diverse statewide business advocacy organization. The Chamber's members range from small, family-owned businesses to large multi-national corporations. The Chamber represents all business sectors, including manufacturing, insurance, finance, retail, transportation, and health care. The Chamber is led by a volunteer board of directors consisting of 66 business leaders from all over Ohio.

The Chamber, which includes the Ohio Small Business Council, promotes and protects the interests of its 4,000 business members, including building a more favorable business climate conducive to expansion and growth. The Chamber is dedicated to creating a strong pro-jobs environment in Ohio. As an independent and informed contact point for government and business leaders, the Chamber is a respected participant in public policy discussions. The Chamber formulates policy positions on diverse issues, including public finance, small businesses, health care, environmental regulation, education, taxation, workers compensation, and campaign finance. The Chamber also participates in legislative and administrative proceedings.

Since 1893, through 60 Ohio General Assemblies and 31 governors, the Chamber's missions remains unchanged: "As the state's leading business advocate and

resource, the Ohio Chamber of Commerce aggressively champions free enterprise, economic competitiveness and growth for the benefit of all Ohioans.” Because the Sixth District’s decision jeopardizes those goals, this Court should accept jurisdiction, reverse the Sixth District, and affirm the trial court’s proper denial of class certification.

II. This Case Is Of Great Public And General Interest.

Just as in 2010 when this Court held that the trial court abused its discretion by certifying a class, *Stammco, LLC v. United Telephone Company of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 1, the fundamental Civil Rule 23 issues in this case are still of public and great general interest now. In particular, the Supreme Court’s recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011)—and the new authority applying *Dukes* since United Telephone filed its memorandum for jurisdiction—show that the Sixth District’s unwarranted expansion of class action jurisprudence is more harmful to Ohio businesses (and the thousands of Ohioans they employ) now than it was in 2010. As the Supreme Court recently held, the consideration of merits issues intertwined with class certification issues is proper, and the contrary ruling below only further encourages class action abuse in Ohio.

The Sixth District’s improper application of Civil Rule 23 will lead to forum shopping and increase the number of class actions filed in Ohio, and create significant risk of frivolous class actions being filed against Ohio businesses. Because of the inherent costs and risks associated with class action litigation, Ohio businesses will be forced to settle meritless claims because of the erroneous application and expansion of class certification jurisprudence by the court below. The propositions of law for which United Telephone is seeking reconsideration raise important questions of great public

and general interest, and they are particularly important to the Chamber, its members, and the thousands of people that its members employ.

III. This Court Should Hold That *Dukes* Rejects *Ojalvo*'s Incorrect Reading Of *Eisen*, And That A Trial Court May Evaluate A Case's Merits When Denying Class Certification. (First Proposition of Law.)

The Sixth District's decision—like this Court's and other lower Ohio courts' decisions—conflicts with the Supreme Court's decision in *Dukes*. The sole basis for the Sixth District's ruling that the trial court should not have mentioned merits issues was this Court's decision in *Ojalvo v. Board of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984), which in turn relied on the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). *Stammco, LLC d/b/a The Pop Shop v. United Tel. Co. of Ohio*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶¶ 13, 48-50 (Dec. 16, 2011). Quoting from *Ojalvo* that “Class certification does *not* go to the merits of the action,” the Sixth District held that the trial court's “improper consideration of the merits” was an abuse of discretion. *Id.* at ¶¶ 48, 50 (emphasis in original). The court, however, did not disagree with the trial court's conclusions, or find that the merits issues were considered for any purpose other than class certification. Rather, consistent with *Ojalvo* and other Ohio courts, the Sixth District held that even evaluating merits issues was an abuse of discretion.

But that is not the law under *Dukes*, which made clear that *Eisen* does not preclude an evaluation of the merits during a Rule 23 analysis. “To the extent [*Eisen*'s language] 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.” *Dukes*, 131 S.Ct. at 2552, fn. 6. Because of this issue's great importance to Ohio, the Chamber, along with the United States Chamber of Commerce, the Ohio Alliance for Civil Justice, and the

American Tort Reform Association, recently filed an amicus curiae memorandum in support of jurisdiction devoted entirely to this issue in *Cullen v. State Farm Mut. Auto. Ins. Co.*, Ohio S.Ct. Case No. 2012-0535, and the Chamber incorporates by reference that analysis of *Eisen, Dukes, Ojalvo*, and Ohio Civil Rule 23.

Ohio's decades-long refusal to even permit the consideration of merits issues relating to class certification increases the likelihood that classes that do not pass muster under Rule 23 will be certified. The Supreme Court found the issue of whether merits-related issues may be examined when determining class certification to be important when it accepted certiorari in *Dukes*. Now that the Supreme Court has issued a landmark decision in *Dukes* about the relationship between those issues, this Court should, as other states have done, reconsider its decision and accept jurisdiction here.

IV. This Court Should Hold For The First Time—Consistent With Every Court In The United States Except The Sixth District—That Fail-Safe Classes Are Improper In Ohio. (Second Proposition of Law.)

Permitting the panel's decision below to stand will make Ohio the only state or federal court system in the country to allow fail-safe classes. Even the plaintiffs do not dispute that such classes have been rejected everywhere else. Moreover, this Court has never ruled on the issue. (In 2010, when this Court reversed class certification in this case for other reasons, this Court explicitly did not rule on whether the plaintiffs' class was fail safe. *Stammco*, 2010-Ohio-1042, ¶ 13.)

Trying to avoid the obvious lack of predominance caused by the admitted fact that not all class members were harmed, the plaintiffs (again) defined their class as that subset of customers who were actually harmed. Membership in such a class, however, cannot be determined until after liability determinations are made, i.e., until it is determined that a member did not order a particular service. This is known as a "fail-

safe” class. On remand, consistent with every other court in the country, the trial court held that the “biggest impediment” to certification was that the new proposed class definition was an improper fail-safe class. *Stammco, LLC v. United Telephone Co.*, Fulton C.P. No. 05CV000150 at *12 (December 22, 2010). Nonetheless, the Sixth District held that determination was an abuse of discretion. *Stammco, LLC v. United Telephone Co.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 28, 46.

The trial court determined that if it had certified the plaintiffs’ proposed class, and if they lost at trial (i.e., they did not show that they were charged for something they did not authorize or use), the plaintiffs would, by definition, not be members of the class. Their counsel would no doubt argue that the judgment had no res judicata effect on other class lawsuits on the exact same grounds, allowing the plaintiffs’ counsel to file additional class actions on the exact same grounds until one of the class members finally won at trial. Because the defendant “would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment,” courts outside of Ohio have uniformly rejected such fail-safe classes. *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980).

Allowing such classes in Ohio—namely, where the class is defined by the merits and there are no allegations of classwide fraud or that the conduct at issue harms every class member—will have an extremely negative effect on the business climate in Ohio and put it at a competitive disadvantage. Indeed, because such a class is defined only to include members that were actually harmed by a particular practice, these kinds of allegations could be made about almost every business practice.

This Court should accept jurisdiction so that businesses both large and small will be protected from this unwarranted expansion of class action jurisprudence. Otherwise, Ohio citizens will suffer from the increased cost of doing business in Ohio—from lost

jobs, should companies leave Ohio to avoid the extraordinary risk of liability for a business practices (like delivering the charges at issue here), to the increased costs of the goods and services of the businesses remaining in Ohio.

V. As It Did In 2010, This Court Should Hold That Class Members Cannot Be Identified With Reasonable Effort. (Third Proposition Of Law.)

United Telephone is not involved in the underlying transactions that lead to the third-party charges. The plaintiffs, who are customers of United Telephone, claim United Telephone negligently allowed some unauthorized charges from third parties to show up on their phone bills. The plaintiffs concede, however, that some of the third-party charges were legitimate, and that whether the charges are valid or not is not impacted by United Telephone's delivery of them. Accordingly, as this Court previously stated, an individualized inquiry into each class members' unique situation—including likely conflicting testimony between a class member and a third party regarding whether a charge was authorized—would be required to determine whether he is a class member. *Stammco, LLC*, 2010-Ohio-1042, at ¶ 11.

Consistent with this Court's earlier holding, the trial court held that the latest class definition did not address this Court's "concern for 'consent' and 'authorization,'" and that United Telephone's records did not allow class members to be identified with reasonable effort. *Stammco, LLC v. United Telephone Co.*, Fulton C.P. No. 05CV000150, at *10-11 (Dec. 22, 2010).

The Sixth District reversed the trial court's decision, holding that the revised class definition addressed this Court's concerns about the class definition's ambiguity. *Stammco, LLC*, 2011-Ohio-6503, ¶ 41. The Sixth District, however, ignored this Court's

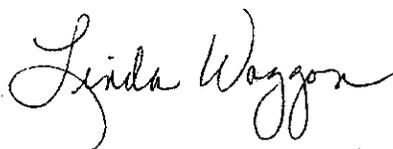
finding that class members were not identifiable—a requirement distinct and separate from ambiguity. *Id.*; *Stammco, LLC*, 2010-Ohio-1042, ¶ 1, 6-7, 10-11, 14.

This Court should review this issue. Any business engaging in multiple, similar transactions will be subject to class actions on the theory asserted against United Telephone here—namely, that some of those transactions allegedly harmed some, but not all, of its customers. Countless other businesses will be presumed to have acted negligently, even if only with respect to one customer. Moreover, businesses would be liable for the improper or fraudulent practices of other businesses of which they have no knowledge.

CONCLUSION

This Court should reconsider its April 18, 2012 announcement declining (over three dissenting votes) jurisdiction, and accept this appeal for review.

Respectfully submitted,



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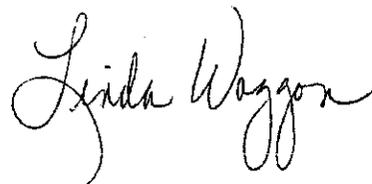
I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this April 30, 2012:

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