

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
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: On Appeal From the
: Fulton County Court
: of Appeals, Sixth
: Appellate District,
: Case No. F-11-003
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REPLY BRIEF OF APPELLANTS UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION

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FILED
OCT 22 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

Plaintiffs concede that Appellant United Telephone's Proposition of Law No. I is correct and that it is not an abuse of discretion for a trial court to consider merits-related issues when ruling on class certification. Thus, unless the trial court considered such issues for a purpose other than deciding class certification, it did not abuse its discretion.

Contrary to plaintiffs' arguments, the trial court did not consider merits-related issues for any purpose other than evaluating class certification—the only issue before it. Rather, in ruling that certification should be denied because plaintiffs had not met their burden under Rule 23, the trial court correctly noted (i) that plaintiffs had not sued the third parties who initiated the charges they dispute and (ii) that no statute or case law imposes the duties that plaintiffs seek to impose on United Telephone. That is the only reasonable reading of the trial court's opinion. As the United States Supreme Court made clear in *Wal-Mart*, that is not an abuse of discretion. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L.Ed.2d 374 (2011).¹

On appeal, however, the Sixth District chose to ignore *Wal-Mart*. Instead, based on *Ojalvo v. Bd. of Trustees* and the incorrect reading of *Eisen v. Carlisle* rejected in *Wal-Mart*, that court found the trial court abused its discretion by considering merits issues. *Stammco, LLC v. United Telephone Co.*, 6th Dist. No. F-11-003, 2011-Ohio-6503, ¶ 50 (citing *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 233, 466 N.E.2d 875 (1984) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974))).

¹ This Court has stated, and plaintiffs do not dispute, that federal decisions are an "appropriate aid" to courts making rulings under Ohio's Rule 23. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987).

What the Sixth District did not find is critical. It did not find that the trial court acted arbitrarily, that it considered the merits for any purpose other than ruling on certification, that the trial court's statements about the merits were legally or factually incorrect, or even that they were not relevant to class certification. The Sixth District ruled that merely considering merits issues was an abuse of discretion. *Id.* Yet as plaintiffs now concede, and as *Wal-Mart* makes clear, that is simply wrong.

Moreover, the trial court's ultimate ruling was correct and in accord with every other class certification decision in a so-called "cramming" case. Whether in identifying class members or in later deciding if they can recover, plaintiffs' claims cannot be adjudicated without proof that each class member was charged, paid, and was not credited for, a third-party service that he or she did not want or use. That individual proof could never be established for all class members in one stroke. For this additional reason, and regardless of what is stated in its opinion, the trial court's denial of certification should not have been reversed and should now be reinstated.

I. Plaintiffs Concede That It Is Proper For A Trial Court To Evaluate The Merits Of The Plaintiffs' Claims When Considering Class Certification.

Plaintiffs do not argue, nor could they after *Wal-Mart*, that the trial court abused its discretion merely by considering merits issues when ruling on class certification. Instead, plaintiffs try to downplay the impact of *Wal-Mart* on Ohio law and argue that the trial court improperly considered merits issues for some unstated purpose *other* than ruling on class certification. Each of plaintiffs' arguments should be rejected.

A. *Wal-Mart* Made Clear That Many Ohio Cases Were Wrongly Decided Based On *Eisen* Or *Ojalvo*'s Reading Of It.

Plaintiffs' argument that *Wal-Mart* had little or no impact on existing Ohio law is simply incorrect. Prior to *Wal-Mart*, Ohio courts routinely relied upon *Eisen* or *Ojalvo*

to hold that any consideration of merits issues at the class certification stage was improper. Numerous cases following this discredited principle are cited at pp.16-17 of United Telephone's merits brief and additional cases are cited in its jurisdictional memoranda. *See* United Telephone's Memo in Supp. at 5, n.3. Plaintiffs cannot contradict the holdings of these cases.

Wal-Mart made clear that these Ohio cases, and the Sixth District's decision below, were wrong. A trial court must consider the merits in performing the "rigorous analysis" required at class certification.

The Supreme Court's analysis in *Wal-Mart* impacts this case in a number of respects. First, in *Wal-Mart*, the Court noted that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only" and meet due process requirements only if all Rule 23 standards are met. *Wal-Mart*, 141 S.Ct. at 2550, 2560.

Second, the Supreme Court made clear that "Rule 23 does not set forth a mere pleading standard." Rather, plaintiffs seeking class certification "must affirmatively demonstrate" compliance with the Rule. *Id.* at 2551. This statement of plaintiffs' Rule 23 burden is consistent with the *Stammco I* decision. It is also reflected in the trial court's correct finding that plaintiffs "had not met their burden of establishing by a preponderance of the evidence" that certification was proper. *Stammco, LLC v. United Tel. Co. of Ohio*, Fulton C.P. No. 05CV000150, at *1, 15 (December 22, 2010); see *State ex rel. Ogan v. Teater*, 54 Ohio St.2d 235, 247, 375 N.E.2d 1233 (1978) (plaintiff must show certification is proper by preponderance of the evidence); *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 94, 98 fn.9, 521 N.E.2d 1091 (1988) (same).

Finally, the *Wal-Mart* opinion rejected the very rationale upon which *Ojalvo* and the Sixth District's decision below are based—that trial courts are precluded from considering merits issues at the class certification stage. After reiterating that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action,” the Court specifically rejected the notion that trial courts cannot consider such issues when ruling on class certification:

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 (citations omitted)(emphasis added).

Confronted with *Wal-Mart*'s pronouncements, plaintiffs now argue that the trial court's statements about the merits in its class certification decision were *really* made for some other, unstated purpose and that this was *really* the basis for the Sixth District's ruling. Plaintiffs' arguments ignore the relevant standard of review, mischaracterize the rulings of both courts below, and should be rejected.

B. The Appropriate Standard of Review.

Plaintiffs concede that: (i) the trial court had broad discretion in deciding class certification; (ii) reversal of its decision would have been proper only if there was abuse of that discretion; and (iii) abuse of discretion is “more than an error of law or judgment;” it is a decision that is “unreasonable, arbitrary, or unconscionable.”

Appellees' Br. at 20. See *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-

Ohio-5847, 817 N.E.2d 59, ¶ 30; *Marks v. C.P. Chem. Co. Inc.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987) (same).

But plaintiffs simply skip the part that is most relevant here—the deferential standard of review that should have been applied by the Sixth District. Plaintiffs do not dispute that a “finding of abuse of discretion, particularly if the trial court has refused to certify, should be made cautiously.” *Marks* at 201. Indeed, the proper inquiry on appeal is not whether the trial court “erred,” but “whether the trial court’s decision was ‘so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of reason but instead passion or bias.’” *Wilson* at ¶ 12, quoting *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 256-257, 662 N.E.2d 1 (1996). The fact that the “appellate judges might have decided differently” does not justify reversal of a trial court’s certification ruling. See *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71, 694 N.E.2d 442 (1998).

Plaintiffs, like the Sixth District, also ignore the well-settled rule that, where the record supports the trial court’s certification decision, the decision should not be disturbed. See *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984). A “reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof.” (Citation omitted.) *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990); *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, 947 N.E.2d 166, ¶ 7 (correct judgment may not be reversed “simply because it was based in whole or in part on an incorrect rationale”).

Plaintiffs do not argue, and the Sixth District did not find, that the trial court’s decision was “unreasonable, arbitrary, or unconscionable,” that it was “grossly violative of fact or logic,” or that it was the result of “passion or bias.” Rather, plaintiffs assert

that the trial court abused its discretion because they deem the trial court's analysis to be "sketchy" or because it did not sufficiently "articulate" or "explain" its reasoning. (Appellees' Br. at 1, 21, 26.) But that is not an abuse of discretion. See *Hamilton* at 70 (trial court not required to make specific findings as to each Rule 23 requirement).

C. Plaintiffs Mischaracterize The Decisions Below In An Attempt To Show An Abuse of Discretion By The Trial Court.

Plaintiffs admit that "the only issue before the trial court at the time of the trial court's decision was class certification." (Appellees' Br. at 23). Thus, plaintiffs undermine the basis of their claim that the trial court abused its discretion by considering the merits, not to rule on certification, but for some "other pretrial purpose." See *Wal-Mart*, 131 S.Ct. at 2552, fn. 6 (*Eisen* only addresses consideration of merits for pretrial purposes "other than" class certification).

The trial court's opinion begins by stating that plaintiffs "seek to prosecute this action, along with others similarly situated, as a 'class' action." The trial court's opinion ends with the only ruling it made: "Plaintiffs have not met their burden of establishing, by a preponderance of the evidence" that class certification was proper. *Stammco*, Fulton C.P. No. 05CV000150, at * 1, 15; The ordinary meaning of this language makes clear that everything in between relates to class certification. 62 Ohio Jurisprudence 3d, Judgments, Section 31 (2003) (language in judgments to be given its ordinary meaning). Plaintiffs do not dispute that the trial court made its ruling only after reviewing extensive briefing, the voluminous record, as well as hearing extended oral arguments. The trial court's fifteen-page opinion made multiple findings that address class certification, and not some other pretrial issue. These include, inter alia, findings: (1) that plaintiffs' latest class definition failed "to address the Supreme Court's concern for

‘consent’ and ‘authorization’” and was “indeterminate”; (2) that the records of United Telephone did not permit class members to be identified with a reasonable effort; (3) that the class was improperly defined by “[t]he ‘merits’ of the individual’s claim”— whether the charges were authorized; (4) that Ohio law requires seven showings to be made before a class can be certified; (5) that it was permitted to consider any evidence bearing on the issue of certification; and, (6) that the proposed definition created an improper fail-safe class. *Stammco*, Fulton C.P. No. 05CV000150, at *9-14.

Despite all of these findings, plaintiffs argue that “the trial court reviewed the merits to determine the underlying merits of the causes [of action] themselves,” that it made “sua sponte determinations only as to the total merits of the case [that] had no connection to class certification issues,” and that the trial court “simply decide[d]” the case on its merits. (Appellees’ Br. at 22, 18.) This is simply not so. The trial court did not say it was ruling on the merits, and its opinion cannot reasonably be read that way. See 46 American Jurisprudence 2d, Judgments, Section 74 (1969, Supp. 2012) (a judgment must be construed in light of the situation of the court, what was before it, and the accompanying circumstances). Likewise, there is no basis for plaintiffs’ claim that the trial court considered any issue “under the guise” of ruling on class certification, but was really doing something else. (Appellees’ Br. at 23.)

The trial court was not required to explicitly tie each sentence or observation in its opinion to a Rule 23 requirement, or “explain” to plaintiffs’ satisfaction how each of its findings “related to the certification requirements.” Plaintiffs cite no authority imposing that requirement, and there is none.

Plaintiffs’ re-writing of the Sixth District’s decision is equally misleading. The Sixth District *did not* find that the trial court acted unreasonably, arbitrarily, or

unconscionably when it noted (i) that plaintiffs had not sued Bizopia or the other third parties that initiated charges the plaintiffs dispute, and (ii) that no statute or case law imposes a duty on United Telephone to re-verify the charges that it delivers. Nor did the Sixth District conclude that either finding was incorrect, or that the trial court made them for any purpose other than ruling on class certification. And, while the Sixth District stated that the trial court had not *articulated* how these two findings related to class certification, it did not conclude that they were irrelevant to class certification. Rather, the Sixth District reasoned that these findings were “improper considerations of the merits” and that merely considering such matters was an abuse of discretion under *Ojalvo* and its incorrect reading of *Eisen. Stammco*, No. F-11-003, 2011-Ohio-6503, at ¶ 50.

Moreover, as set forth at pp. 23-33 of United Telephone’s merits brief, the trial court’s statements about the merits relate directly to core Rule 23 issues. For example, because plaintiffs sued United Telephone, and not the companies that actually initiated the disputed charges, there are no common legal or factual issues that matter to plaintiffs’ claims. For this same reason, individual issues about the validity or payment of tens of thousands of different charges, initiated by more than 2,000 different third-parties, for hundreds of kinds of services, predominate over any common issues. Plaintiffs’ strategic decision not to sue the third parties also contributes to the continuing impossibility of identifying class members with reasonable effort, and is one of the reasons that any attempt to litigate plaintiffs’ claims on a class-wide basis would be wholly unmanageable.

In sum, all of the statements in the trial court’s opinion were made, and could only have been made, for the purpose of ruling on class certification. This is so because,

unlike in *Eisen* (where class notice issues were pending), there was “no other pretrial matter” pending before the trial court here.

II. Plaintiffs Ignore The Fact That Every Court Besides The Sixth District Has Rejected So-Called “Cramming” Class Actions.

Plaintiffs all but ignore the unbroken line of authority from across the country uniformly denying class certification in so-called cramming cases. While plaintiffs admit that these decisions “all deal with the practice of ‘cramming,’” they baldly assert that “each cited case has essential elements that easily distinguish it from this case.” (Appellees’ Br. at 14.) Plaintiffs, however, never explain what these “essential elements” are because they cannot.

The facts, analyses, and holdings of these cases unequivocally show that the trial court’s denial of class certification was not an abuse of discretion.

- In *Midland Pizza, LLC v. Southwestern Bell Tel. Co.*, the District Court for the District of Kansas denied certification in a cramming case because questions of authorization and payment were individualized issues. “Despite plaintiff’s attempts to characterize it otherwise, the injury at issue here is individualized: whether each class member was billed for, and paid for, unauthorized charges on his or her telephone bill***Defendant is correct that no common proof is possible to demonstrate injury for all class members, because to determine whether or not a charge was authorized will require individualized proof.” 277 F.R.D. 637, 642 (D.Kan.2011).
- In *Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, the District Court for the Southern District of Indiana also denied certification of common law claims for the alleged cramming of third-party charges. “[T]he Court will need to make

individual determinations as to whether each proposed class member authorized the charges for which he was billed by defendants. The result will be multiple mini-trials, each requiring individual proofs***The necessity of this kind of individualized assessment makes class certification inappropriate.” S.D.Ind. No. 1:09-CV-34-SED-DML, 2010 WL 4751659, *4-5 (Nov. 16, 2010). The Seventh Circuit affirmed: “We agree with the district court that common issues would not predominate.” *Lady Di’s, Inc. v. Enhanced Servs. Billing, Inc.*, 654 F.3d 728, 738 (7th Cir. 2011).

- In *Brown v. SBC Communications, Inc., et al.*, the United States District Court for the Southern District of Illinois denied certification in another cramming case against a local telephone provider because the issue of whether each potential class member authorized the services for which he was billed required individualized inquiries that rendered certification impossible. S.D. Ill. No. 05-cv-777-JPG, 2009 WL 260770, *3 (Feb. 4, 2009).
- In *Stern v. AT&T Mobility Corp.*, C.D. Cal. No. 05-8842, 2008 WL 4382796, *9 (Aug. 22, 2008), *reconsideration denied*, 2008 WL 4534048 (Oct. 6, 2008), the United States District Court for the Central District of California denied certification in a cramming case because there is no “plausible class-wide method to prove cramming,” and the existence of individualized defenses also precluded class certification. As this Court later recognized in *Stammco I*, the *Stern* court stated: “The simple fact is that one cannot determine what services were crammed without taking the deposition of each class member to determine what services were authorized.” *See Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042,

926 N.E.2d 292, at ¶ 11 (acknowledging testimony of third party and class member necessary to determine authorization of charges).

Because there are no cramming cases certifying a contested class, plaintiffs cite cases in which the parties agreed to *settle* on a class wide basis. (Appellees' Br. at 18-19.) Because certification in these cases was not contested—and because parties settle for many reasons—such settlements are of no precedential weight. *McDowell v. Morgan Stanley & Co.*, 645 F. Supp.2d 690,696 (N.D. Ill. 2009) (when a case settles, it has no precedential value).²

III. The Bizopia Charge Shows Why This Case Cannot Be Certified.

Plaintiffs deny that they ever authorized third-party website hosting services from Bizopia (one of the charges at issue), and contend that there is not even a reasonable dispute about those charges. (Appellees' Br. at 10-11.) But that issue is not only factually complex but hotly disputed. Discovery revealed that Bizopia spoke to Frank Smith, a Stammco employee, recorded the portion of the call verifying the order for its services, and then faxed a written confirmation of that order to Stammco. (Stamm 73-78; Smith 13-15, Supp. 28-29, 128-130.)

Mr. Stamm testified that, when he called Bizopia to inquire about the charge, Bizopia played the recorded verification for him over the telephone, and faxed another

²In one of those cases, *Moore v. Verizon Comm. Inc.*, the parties expressly agreed that: “Neither this Final Order and Judgment, the Settlement Agreement, nor any of the negotiations, statements, documents or court proceedings related thereto shall be offered or received into evidence, or used for any purpose whatsoever, in this or any other proceedings, other than to obtain approval of the Settlement.” Stipulation and Settlement Agreement, Case No. 09-cv-1823 at 29 (N.D. Calif. Feb. 1, 2012). Another, *In re Bell South Telecommunications, Inc.*, 2006 Florida Atty.Gen. No. L06-3-1185, was brought by the Florida Attorney General, not private litigants, for alleged violations of the Telecommunications Consumer Protection Act, Section 364.601 et. seq. Florida Statutes. Such a settlement is not relevant here.

copy of the written confirmation to Mr. Stamm, which he threw away. (Stamm 74-75, 86-87, Ex. 19, Supp. 29, 32, 56.) Mr. Stamm then spoke to Mr. Smith, who remembered the call and answering questions, but was unable to recall many details. (Stamm 76-77; Smith 13-15, Supp. 28-29, 128-130.) This is why Bizopia, despite Mr. Stamm's threats to sue Bizopia or report it to the Ohio Attorney General, the FCC, or the FBI, did not reverse its initial charges. (Stamm 92-94, Exs. 18, 19, Supp. 33-34, 49, 56.) Obtaining the evidence on this one disputed charge, on a single customer's bill, required written discovery, manual review of bills, payment records, and account notes, and multiple depositions. (Davis Aff. ¶¶ 10, 12-15; McAtee 55-56, Supp. 112-114, 126.) And the issue remains unresolved. Indeed, in their most recent brief, plaintiffs raise another factual dispute about this charge, arguing that Bizopia's recorded verification "was clearly defective in that it failed to include even a minimal verification that the speaker understood the charge and the services he was allegedly ordering." (Appellees' Br. at 10.)

Although plaintiffs pretend otherwise, *Stammco I* recognized that these Bizopia issues—which relate both to the merits and to class certification—are disputed and highly individualized. "[T]he court must determine whether Stammco's employee had authority to authorize Bizopia's charges and whether the employee actually did so." *Stammco I*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, at ¶ 11. "[T]he court must determine individually whether and how each prospective class member had authorized third-party charges on his or her phone bill." *Id.* "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 [United Telephone] or the third party." *Id.*

Contrary to plaintiffs' theory, due process does not permit liability to be proven merely by a plaintiff *saying* that he or she received an invalid charge. A jury will have to consider the evidence and determine the credibility of the Bizopia representative (a party that plaintiffs did not sue), Kent Stamm, and Frank Smith. A jury will also have to determine whether Mr. Smith had actual or apparent authority to bind Stammco.

Yet, even if a jury determined that the Bizopia charges were unauthorized, that verdict would not address any other third-party charge on plaintiffs' bills—let alone charges made to any other United Telephone customer in Ohio. There is no dispute that thousands of third parties submit charges through United Telephone, each with its own and differing services and marketing methods. (Davis Aff. ¶ 16, Supp. 113-115.) Even Mr. Stamm admitted that a court would “have to ask” each class member (and its employees or family members) about each individual charge, and get evidence from each third party. (Stamm 66-71, 128, 136-38, Supp. 27-28, 36, 38-39.)

Performing this analysis for each class member's charges would be impossible. Proof that one customer did, or did not, download a song would not establish whether that same individual requested that a website be made, signed up to place an online advertisement, or downloaded other songs on other days. And proof as to one customer's charges would not impact whether any other customer requested or used any other third-party service.

There are no class-wide allegations of fraud or harm, or any alleged statutory violation. As plaintiffs admit, “Class members, who were harmed, are those who paid for services that were not requested or received.” (Appellees' Br. at 12.) Hence, the only way to determine liability is to examine the claims of each putative class member.

IV. Plaintiffs Mischaracterize The Record.

Plaintiffs argue at length that United Telephone's contracts with the clearinghouses that process third-party charges are similar to one another. (Appellees' Br. at 3.) This is a red herring. Plaintiffs are not parties to, and do not base their claims on, the terms of United Telephone's agreements with the clearinghouses. It is irrelevant that the general terms of those agreements may be similar.

Plaintiffs also describe in detail the mechanics of United Telephone's processing of third-party charges. (*Id.* at 3-5.) But they do not and cannot explain how those issues are relevant to this appeal. The heart of plaintiffs' claims is that they were charged and paid for third-party goods and services that they did not want or receive. Plaintiffs admit: "Whether a particular charge on a customer's bill is a 'legitimate' charge, as Sprint calls it, does depend on whether the customer ordered or approved the specific item or service that is being billed." (Appellees' Br. at 10.)

How United Telephone collects and delivers charges has no bearing on whether the customer requested or used a service, or whether that charge was paid. As Mr. Stamm admits, the validity of charges is determined solely by whether the customer authorized, used and paid for the service at issue. (Stamm 58-59, Supp. 25.)

Plaintiffs may not wish to acknowledge United Telephone's limited role in customers contracting for third-party services, but that is true. There is no dispute that every charge at issue was initiated as a result of transactions between third-party businesses and consumers. United Telephone played no role in these initiating transactions, just as it played no role in Stammco's interactions with Bizopia. (Davis Aff. ¶ 10, Supp. 112.)

While admitting that United Telephone “may not initially have all the facts [of the third-party transactions] at its disposal,” plaintiffs contend that United Telephone should somehow learn every detail of each third-party transaction to determine if a dispute exists regarding the authorization of every third-party service. (Appellees’ Br. at 5.) Plaintiffs cite no authority for such a novel proposition, and it is undisputed that United Telephone has no such records. That information is in the hands of customers, third-party businesses, and clearinghouses. (Davis Aff. ¶¶ 10, 12, Supp. 112-113.)

V. The Trial Court Did Not Abuse Its Discretion By Properly Denying Certification And Considering Merits-Related Issues When Doing So.

Plaintiffs admit that “*Dukes* makes clear that class claims must depend on a common contention.” (Appellees’ Br. at 29.) Here, plaintiffs allege that the common, predominant, easily manageable contention is United Telephone’s alleged “uniform billing practice”—i.e., whether it obtained permission generally to bill customers for third-party goods and services. (*Id.* at 28-29.) But this allegation proves precisely why, consistent with every contested cramming class case in America (except the Sixth District’s decision below), a class could never be properly certified here.

Harm (the fact of injury) and causation are elements of liability that every class member must prove. *Chambers v. St. Mary’s School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998) (negligence); *Ed Schory & Sons, Inc. v. Soc. Nat’l Bank* (1996), 75 Ohio St.3d 433, 433-44, 662 N.E.2d 1074 (1996) (breach of the contractual duty of good faith and fair dealing); *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984) (unjust enrichment). Therefore, unless a plaintiff proves he or she actually paid a charge for a service they never requested or used, and that United Telephone caused the billing to occur, he cannot prove these necessary elements of their

claims. Plaintiffs do not, and have never, alleged that anyone is harmed by paying for a third-party service that they wanted and used, no matter who delivers that charge.

In other words, plaintiffs cannot prove their claims merely by showing that United Telephone “has an obligation to educate its customers about its third-party billing and obtain authorization [to bill customers generally for third-party services].” (Appellees’ Br. at 29.) The fact of injury (paying for a service not requested), causation, and reliance are all crucial elements of plaintiffs’ claims that they have to prove.

Plaintiffs testified that they were not harmed by the mere receipt of any third-party charge, but were only harmed by paying such charges for services that they did not request or authorize. (Stamm 59, Am. Cmplt. ¶¶ 44-45, 53, 59, Supp. 11-13, 25.) This, of course, is true for everyone—there is no harm in paying for a service that one wanted and used, regardless of method of delivery.

The existence of harm can be resolved only on a customer-by-customer, charge-by-charge basis, and requires evidence that only the third parties or customers have. As plaintiffs candidly state elsewhere in their brief, “[n]ot every class member may have a claim for damages[.]” (Appellees’ Br. at 30.)

This illustrates why Ohio courts, consistent with *Midland Pizza, Lady Di’s, Brown*, and *Stern*, routinely deny class certification where actual harm, an unjust benefit from a class member to a defendant, and causation are necessary elements of claims and cannot be proven on a class-wide basis. See *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-3001, 784 N.E.2d 151, ¶ 19 (8th Dist.); *Linn v. Roto-Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, ¶ 14-16; *Terminal Supply Co. v. Farley*, 6th Dist. No. L-90-041, 1991 WL 1577, *6 (Jan 11, 1991); *Repede v. Nunes*, 8th Dist. Nos. 87277, 87469, 2006-Ohio-4117, ¶ 19-20.

Even whether United Telephone obtained permission from customers to bill for third-party services generally is not a common question. Plaintiffs define their class as customers for which United Telephone “had no prior authorization from the customer in writing or by a method acceptable to Sprint sufficient for Sprint to verify that the customer had agreed to such charge.” (Appellees’ Br. at 15 (emphasis added).)

Some local phone customers, including the plaintiffs, affirmatively choose to receive third-party bills with their phone bills (rather than be billed some other way). It is undisputed that this, and a third-party’s verification, authentication, and related methods of order fulfillment, are acceptable to United Telephone as means to determine that customers who do receive charges for third-party services have agreed to, and are properly receiving, those charges. (Supp. Davis Aff. ¶ 3, Supp. 117.)

Consistent with Ohio law and the voluntary payment doctrine, United Telephone also considers a customer’s continued receipt and payment, without objection, of third-party charges to be appropriate verification that the customer agreed both to those specific charges and that type of billing. (*Id.* at ¶ 4, Supp. 118.)

Plaintiffs maintain that United Telephone’s affirmative defenses are common issues that can be decided on a class-wide basis. (Appellees’ Br. at 32-33.) But defenses such as the voluntary payment doctrine, contributory negligence, superseding causation, waiver, and laches are inherently individual and require inquiry into the specific facts of each class member’s claim. *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, ¶28; *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *State ex rel. Dickman v. Defenbacher*, 151 Ohio St. 391, 395, 86 N.E.2d 5 (1949) (in absence of “fraud, duress, compulsion or mistake of fact, money, voluntarily paid by one person to

another on a claim of right to such payment, cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay”).

Plaintiffs also continue to assert, without supporting evidence, that United Telephone’s records can resolve these issues, and that this situation is different than in *Margulies v. Guardian Life Ins. Co. of Am.*, 8th Dist. No. 88056, 2007-Ohio-1601, ¶ 18 (denying certification where manual review of thousands of files was required to identify class members). (Appellees’ Br. at 34-37.) Yet, it is undisputed that without manually reviewing all of its customer bills, United Telephone cannot even identify which customers received third-party charges, or what third parties initiated those charges. (Davis Aff. ¶¶ 10, 13, Supp. 112-114.) Similarly, without such manual, individualized review, United Telephone cannot determine whether customers actually paid specific third-party charges, or whether those customers may have subsequently received credits from the third parties, clearinghouses, or United Telephone. (Davis Aff. ¶ 13, Supp. 113-114.) Indeed, this is one reason why the trial court found that plaintiffs’ 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 effort. *Stammco*, Fulton C.P. No. 05CV000150, at *10, 11.

CONCLUSION

For the above reasons and for those in United Telephone's opening brief, this Court should reverse the Sixth District's decision, reinstate the trial court's denial of class certification, and remand this case with instructions for the trial court to proceed with plaintiffs' individual claims.

Respectfully submitted,



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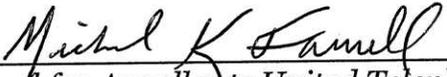
I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 22nd of October, 2012:

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