

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN

Case No. 12-0535

Plaintiff-Appellee

v.

On Appeal From the
Cuyahoga County Court
of Appeals, Eighth
Appellate District,
Case No. 10-095925

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY

Defendant-Appellant

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**REPLY BRIEF OF APPELLANT STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY**

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, Ohio 43215-4260
T 614.228.1541
F 614.462.2616
mjohnson@bakerlaw.com
jezzie@bakerlaw.com
rtucker@bakerlaw.com

Michael K. Farrell (0040941)
BAKER & HOSTETLER LLP
3200 PNC Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
T 216.621.0200
F 216.696.0740
mfarrell@bakerlaw.com

Counsel for Appellant State Farm Mutual
Automobile Insurance Company

Paul W. Flowers (0046625)
Counsel of Record
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
T 216.771.3239
F 216.781.5876
pwf@pwfco.com

W. Craig Bashein (0034591)
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
T 216.344.9393
F 216.344.9395
wcb@basheinlaw.com

John P. Hurst (0010569)
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
T 216.771.3239
F 216.781.5876

Counsel for Appellee Michael E. Cullen

Thomas Szykowny (0014603)
Michael Thomas (0000947)
Vorys, Sater, Seymour & Peace LLP
52 East Gay Street
Columbus, OH 43215
T 614.464.5671
F 614.719.4900
teszykowny@vorys.com
mrthomas@vorys.com

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

Victor Schwartz (0009240)
Mark Behrens (pro hac vice)
Cary Silverman (pro hac vice)
Shook, Hardy & Bacon, LLP
1155 F Street, NW, Suite 200
Washington, D.C. 20004-1305
T 202.783.8400
F 202.783.4211
vschwartz@shb.com
mbehrens@shb.com
csilverman@shb.com

Counsel for Amici Curiae Ohio Chamber of Commerce, Ohio Alliance for Civil Justice, Chamber of Commerce of the United States of America, and American Tort Reform Association

Kurtis Tunnell (0038569)
Ann Marie Sferra (0030855)
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215-4291
T614.227.2300
F614.227.2390
ktunnel@bricker.com
asferra@bricker.com

Of Counsel for Ohio Alliance for Civil Justice

Elizabeth Wright (0018456)
Brian Troyer (0059671)
Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114
T 216.566.5716
F 216.566.8500
Elizabeth.Wright@thompsonhine.com
Brian.Troyer@thompsonhine.com

Stephanie Chmiel (0087555)
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-6101
T 614.469.3247
F 614.469.3361
Stephanie.Chmiel@thompsonhine.com

Counsel for Amici Curiae Washington Legal Foundation and Ohio Chemistry Technology Council

Philip F. Downey (0040308)
Vorys, Sater, Seymour & Peace LLP
First National Tower
106 South Main Street
Akron, Ohio 44308
T 330.208.1152
F 330.208.1089
PFDowney@vorys.com

Robert N. Webner (0029984)
Robert J. Krummen (0076996)
Vorys, Sater, Seymour & Peace LLP
52 East Gay Street
Columbus, OH 43215
T 614.464.8243
F 614.719.5083
RNWebner@vorys.com
RJKrummen@vorys.com

Counsel for Amici Curiae Grange Indemnity Insurance Company and Grange Mutual Casualty Company

Robin S. Conrad (pro hac vice)
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
T 202.463.5337
F 202.463.5346
rconrad@uschamber.com

Of Counsel for Chamber of Commerce of the
United States of America

Stephen J. Butler (0010401)
Thompson Hine LLP
312 Walnut Street, 14th Floor
Cincinnati, Ohio 45202-4029
T 513.352.6587
F 513.241.4771
Steve.Butler@thompsonhine.com

Jan Chilton (pro hac vice)
Severson & Werson
One Embarcadero Center
Suite 2600
San Francisco, CA 94111
T 415.677.5603
F 415.956.0439
jtc@severson.com

Counsel for Amicus Curiae The American
Financial Services Association

Michael H. Carpenter (0015733)
Katheryn M. Lloyd (0075610)
Carpenter, Lipps & Leeland, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
T 614.365-4103
F 614.365.9145
carpenter@carpenterlipps.com

Counsel for Amici Curiae Nationwide Property
and Casualty Insurance Company, Nationwide
Mutual Fire Insurance Company, Nationwide
Insurance Company of America, Nationwide As-
surance Company, and Nationwide General In-
surance Company

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Class certification was granted by the trial court in this case based on numerous erroneous findings of law and fact. Instead of correcting those errors, the Eighth District held that it was improper to resolve merits issues relevant to class certification and that a class could be certified based simply on Plaintiff's "theory of his case." The Eighth District's analysis was fundamentally erroneous, and class certification should be reversed.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: In Ruling on Class Certification, Courts May and Should Examine Merits Issues that Are Relevant to the Civ.R. 23 Requirements.

A. Consistent with *Dukes*, Ohio Courts Should Examine and Resolve Merits Issues as Necessary to Ensure that the Requirements of Civ.R. 23 Are Met Before Certifying a Class.

In arguing against the class certification standard set forth in *Wal-Mart Stores, Inc. v Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), Plaintiff incorrectly claims (1) that the appropriate standard under Civ.R. 23 is merely to require that his claims are "colorable," and (2) that the "colorable" standard was "State Farm's staunch position" during the class certification proceedings below. (See Merit Br. of Plaintiff-Appellees, Michael E. Cullen, *et al.* ("Pl. Br.") at 26.)

In fact, State Farm argued early on that courts "should 'resolve factual and legal disputes that strongly influence the wisdom of class treatment' even if such issues 'overlap the merits'" and have "'the power to test disputed premises,' legal or factual, that implicate the claim's amenability to class action treatment." (See Def.'s Mem. in Opp. to Pl.'s Mot. for Class Certification at 29-30 (filed Feb. 2, 2010) ("Def.'s Trial Ct. Mem.") (citations omitted); *see also, e.g.*, SF Eighth Dist. Opening Br. at 18 (filed Jan. 26, 2011).) That State Farm also argued that Plaintiff's claims are not colorable does not mean that State Farm waived its primary argument regarding the standard for class certification.

As shown in State Farm's opening brief ("SF Br."), the principles adopted by the United States Supreme Court in *Dukes* accord with this Court's class action jurisprudence. This Court

has recognized that an inquiry into the merits may be necessary to "establish[] the validity of certification under Civ.R. 23." *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 233, 466 N.E.2d 875 (1984). In *Howland v. Purdue Pharma L.P.*, this Court held that a trial court erred in granting certification in a pharmaceutical case without determining the applicability of the "learned intermediary" doctrine to the class members' claims and its effect on common issues and predominance. 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶24. Thus, under this Court's class action jurisprudence, as under *Dukes*, "Rule 23 does not set forth a mere pleading standard," and "[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." *Dukes*, 131 S.Ct. at 2551.

Under this standard, contrary to Plaintiff's contentions, "all doubts" should not "be resolved in favor of certification." (Pl. Br. at 46, citing *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 2000-Ohio-396, 727 N.E.2d 1265.) *Baughman* holds only that "doubts about *adequate representation, potential conflicts, or class affiliation* should be resolved in favor of upholding the class." (Emphasis added.) *Id.* at 487. Civ.R. 23(B)(3) requires affirmatively that the court "find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." It does not authorize class certification if the court is in doubt as to whether the requirements of Civ.R. 23(B)(3) are met.

In the present case, the question of whether predominance and commonality¹ are in fact satis-

¹ Plaintiff improperly contends that the issue of commonality is waived and that "commonality has now blossomed into a dominant theme" in State Farm's brief. (Pl. Br. at 29.) The Eighth District acknowledged that State Farm did not waive commonality as it "relates to predominance." (Op. ¶14 (Appx. D).) Commonality is not addressed separately from predominance in State Farm's brief. Moreover, commonality as defined by *Dukes* (the "common contention * * * must be 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

fied cannot be answered without examining the insurance contracts that form the basis for Plaintiff's claims. Without a determination of the parties' contractual rights and obligations, it is impossible to know what proof would be required to establish a breach of contract and to determine whether that proof can be furnished through class-wide evidence. Likewise, without an examination of the Ohio legal principles governing Plaintiff's bad faith claims, it is impossible to know whether the issues raised by those claims are common or individual. By holding that the trial court was wrong to attempt the task of deciding such necessary preliminary issues, the Eighth District failed to require Plaintiff to prove there were *in fact* common questions of law or fact that predominated over individual questions, as required under *Dukes* and this Court's precedent. Class certification transforms a lawsuit, setting into motion proceedings that require significant expenditures of time and resources by both the court and the parties. Accordingly, actual compliance with the class action prerequisites is and should be required, and before certifying a class, a court should resolve merits issues that fundamentally impact the propriety of class certification – rather than merely accept Plaintiff's theory of his case, as the Eighth District did here.

Contrary to Plaintiff's contentions, these legal issues regarding contract interpretation and the substantive principles of Ohio law regarding claims of bad faith and nondisclosure would not be affected by further discovery. No amount of discovery will change the unambiguous language of State Farm's policies, which at no time have entitled a policyholder to receive a cash payment in the amount of a windshield replacement, have his windshield repaired, and pocket the difference. Nor do State Farm's policies contain any language requiring that a windshield repair return the windshield to its pre-loss condition. What State Farm does offer (and has provided to numerous

claims in one stroke" (131 S.Ct. at 2551)) is a predicate requirement for predominance, which requires that common questions "represent a significant aspect of the case" and are "capable of resolution for all members in a single adjudication." *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200, 204, 509 N.E.2d 1249 (1987).

policyholders) is a guarantee that State Farm will pay for a windshield replacement if the policyholder is not satisfied by the repair. (Supp. 355 ¶¶45-47.)

B. The Purported "Cash-Out Option" Claimed by Plaintiff Does Not Exist and Does Not Satisfy the Requirement of a Predominance of Common Issues.

The Eighth District erroneously held it was inappropriate on class certification to resolve the disputed issue of whether State Farm's policies provided the "cash-out option" claimed by Plaintiff. Resolution of that issue was critical to determining "what the parties would be required to prove at trial," (Citation omitted) *Cox v. Zurn Pex, Inc.*, 644 F.3d 604, 611 (8th Cir.2011), and whether the proof would be class-wide or individual. *See Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir.2012); *see also Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 835 N.E.2d 801, 820-21 (2005) (predominance depended on issues of "uniform contractual interpretation," which should have been decided "at the class certification stage"). An examination of the relevant policy provisions here shows that there is no "cash-out option," and it was an abuse of discretion to certify a class based upon the Plaintiff's theory that such an option existed.

1. The Settlement of Loss Provision.

The policies' Settlement of Loss provision defines State Farm's obligation to pay. The provision states that State Farm will "pay *to* repair" or "pay *to* replace." (Supp. 20, 48 (emphasis added).) This language contemplates a payment for work that is actually done. It does not allow Plaintiff's interpretation that policyholders are entitled to a payment in the amount of replacement and are free to pocket that replacement payment and have their windshield repaired.

Moreover, the Settlement of Loss provision gives State Farm "the *right* to settle a loss" by paying to repair the damaged property or part *or* paying to replace the property or part. (*Id.*) In claiming that this policy language did not "afford a 'unilateral right' to the insurer" (Pl. Br. at 13), Plaintiff simply ignores both the policy language expressly stating that State Farm "ha[s] the

right" and the cases cited by State Farm interpreting the same or similar language as giving the insurer the option to choose the manner of settling a claim. (See SF Br. at 20-21.)² Indeed, though Plaintiff claims that State Farm's policy is different "from those that are offered by its vocal army of *amici*" (Pl. Br. at 12-13), State Farm's policy (not just other insurers' policies) has been specifically held to "provide[] State Farm with the option of paying the actual cash value of the damaged automobile or repairing or replacing its parts." *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So.2d 785, 792 (Ala.Civ.App.2002).

The Settlement of Loss provision defines State Farm's payment obligation under the policy's general coverage provision, which states that State Farm "will pay for loss to your car." It is this language that Plaintiff plucks out of context, asserting that it represents an obligation to make a cash payment to the policyholder for the amount of a windshield replacement in every case of windshield damage. (Pl. Br. at 11-12.) But no such obligation can be found in the language "We will pay for loss to your car." Moreover, when that language is read (as it must be) in conjunction with the Settlement of Loss provision described above, it is crystal clear that the "cash-out option" claimed by Plaintiff does not exist. Thus, contrary to Plaintiff's assertion, the *absence* of a "provision that requires a policyholder to accept a repair instead of a check for replacement value" (Pl. Br. at 13) does not somehow create a right to "a check for replacement value." See *Werner v. Progressive Ins. Co.*, 533 F.Supp.2d 776, 781 (N.D.Ohio 2008) (a "court should not create an obligation not found in the contract's terms").

2. The Policy Provision Permitting Windshield Repair.

Plaintiff's policy, like other State Farm Ohio policies issued from April 1, 1998 to August 31,

² Citing no authority, Plaintiff asserts that the use of the word "settle" in the policy language "We have the right to settle a loss with you or the owner of the property in one of the following ways" "conveys that the right is mutual." (Pl. Br. at 13.) In context, "settle" clearly means to "fix or resolve conclusively." Merriam Webster's Collegiate Dictionary 1139 (11th Ed.2004).

2005, had an added provision that gave policyholders with windshield damage the choice to have a windshield repaired or replaced. That provision also clearly contemplates that a repair or replacement is actually done: the relevant language states that "[i]f we offer to pay for the repair of damaged windshield glass instead of the replacement of the windshield and *you* agree **to have such repair made**, we will pay the full cost of repairing the windshield glass regardless of *your* deductible." (Supp. 19 (italics sic, bold added).)³ Plaintiff incorrectly asserts that this provision is merely a "'deductible waiver' provision" and "confirm[s] that State Farm never possessed the 'unilateral right' to dictate a repair." (Pl. Br. at 34.) On the contrary, if the policyholder's agreement were already required, the first clause of the new provision would be unnecessary.

3. The Policy Provision on Limit of Liability and Cost of Repair or Replacement.

Plaintiff incorrectly claims that State Farm's interpretation of its policy "is completely inconsistent with the 'Limit of Liability' clause," and Plaintiff purports to find a "cash-out option" in that provision. (See Pl. Br. at 13-14.) Under the Limit of Liability, State Farm's liability is limited to "the lower of: 1. the actual cash value; or 2. the cost of repair or replacement * * *." (Supp. 20, 48.) Plaintiff agrees that "actual cash value" applies only to total losses, and not to windshield claims. (Pl. Br. at 14.) Thus, the relevant Limit of Liability is "the cost of repair or replacement." For purposes of the Limit of Liability, the "cost of repair or replacement" may be determined in three different ways: "1. the cost of repair or replacement agreed upon by you and

³ Plaintiff improperly claims that State Farm has taken "contradictory" positions on whether the policies give the policyholder the choice of windshield repair or windshield replacement. (Pl. Br. at 12.) In fact, State Farm's briefing consistently and carefully distinguishes between the policies in effect during the earlier part of the class period and those issued after April 1, 1998. The earlier policies do not contain the provision requiring policyholder agreement for a windshield repair. Later policies, that were issued after State Farm's O&A program was instituted, explicitly provide for policyholder agreement, in the language quoted in the text above. As a matter of practice, even before the policy provision on windshield repair was added, State Farm Agents generally let policyholders choose whether they wanted to have a repair or a replacement.

us; 2. a competitive bid approved by us; or 3. an estimate written based upon the prevailing competitive price * * *." (Supp. 20, 48.) Plaintiff's interpretation of the policy language "the cost of repair or replacement agreed upon by you and us" as creating a right to a cash payment for replacement when the policyholder has a repair is unreasonable and is contradicted by the other two subsections, neither of which provides a "cash-out option."

In short, under the plain meaning of the policy language at issue, there is no "cash-out option" entitling a policyholder to demand a payment for the amount it would cost to replace a damaged windshield, have the windshield repaired instead, and pocket the difference.

C. Extrinsic Evidence as to the Meaning of the Policies Is Inadmissible.

Plaintiff argues strenuously that he is entitled to "present documentary evidence on the issue" of contract interpretation and that further discovery is necessary. (Pl. Br. at 27.) However, "[a]n insurance policy is a contract whose interpretation is a matter of law." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, ¶15. Contrary to Plaintiff's contentions, unless there is ambiguity in the policy language, extrinsic evidence is inadmissible and irrelevant. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶12; (*see also* SF Br. at 22.) If, as here, the language of an insurance policy is unambiguous, "a court may look no further than the writing itself to find the intent of the parties." *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 2007-Ohio-4917, 875 N.E.2d 31, ¶7.

There is no exception to this rule that would permit consideration of the deposition testimony of State Farm employees.⁴ Courts in Ohio have specifically held that "the construction of unambiguous contract terms is strictly a judicial function" and that "the opinions of percipient or expert witnesses regarding the meaning(s) of contractual provisions are irrelevant." *Ruschel v.*

⁴ Many of State Farm's employees testified consistently with the policy language that there was no cash-out option. (*See, e.g.,* Supp. 458, 518.)

Nestle Holdings, Inc., 8th Dist. Nos. 89977, 90500, 2008-Ohio-2035, ¶26; *see also Midwest Specialties, Inc. v. Westfield Ins. Co.*, 2d Dist. No. 14027, 1994 WL 107192, at *6-7 (Mar 30, 1994); (SF Br. at 22-25). Courts around the country adhere to the same rule. *See, e.g., Sheet Metal Workers, Internatl. Assn. v. Architectural Metal Works, Inc.*, 259 F.3d 418, 424 n.4 (6th Cir.2001) ("[T]he construction of unambiguous contract terms is strictly a judicial function; the opinions of percipient or expert witnesses regarding the meaning(s) of contractual provisions are irrelevant and hence inadmissible."). Thus, the deposition testimony cited by the Eighth District and relied upon by Plaintiff does not allow Plaintiff to escape the plain meaning of the contractual language of his policy and does not create common questions of fact.

D. The Policies Expressly Permit State Farm to Pay for Windshield Repair If the Policyholder Agrees, Raising Individual Issues.

The Eighth District majority also failed to consider in its analysis the impact on class certification of the policy provision (in effect beginning April 1, 1998) that gave the policyholders the right to agree, or not agree, to windshield repair. (*See* SF Br. at 25-26.) Plaintiff now appears to contend that agreement is not an individual issue because policyholders did not "appreciate[] the flaws inherent in the chemical process" and because "all acquiesce[d] to the carefully scripted sales pitches." (Pl. Br. at 48.) These arguments fail to negate individual issues of agreement inherent in the transactions at issue. The purported "carefully scripted sales pitches"⁵ varied from individual to individual, depending on the policyholder's questions and responses. (*See* SF Br. at

⁵ Plaintiff makes much of the phrase "Sell! Sell! Sell!" in a Lynx training guide. Plaintiff, however, did not testify to any "hard sell" of windshield repair in his telephone call with Lynx, nor has he provided evidence of any actual "hard sell" to any other policyholder. Far from training operators to "sell" windshield repair improperly, the Lynx training guide advised operators that they should "[n]ever choose the claim type for the policyholder" and that "[t]he policyholder will make the final choice to repair or replace the windshield." (Pl. Supp. 73-74.) Moreover, nothing in the actual wordtrack can be described as a "hard sell." (*See* SF Br. at 5-7.) Indeed, the wordtrack informs policyholders who ask about windshield repair that repair may leave a "slight visual blemish." (Supp. 434.)

5-7, 25-26, 43-45; *infra* at 18.) Moreover, Plaintiff provided no evidence of what knowledge of or experience with windshield repair individual policyholders may have had or what information a policyholder may have been given by his or her glass shop. Furthermore, not only were policyholders informed of their choice between repair or replacement by the policies themselves, but both before and after the provision took effect, State Farm sent notices to policyholders informing them of the provision.⁶ (Supp. 78-79 ¶3-5.) Policyholder agreement is a necessary issue for trial, and the issue is an individual one requiring individual evidence for each policyholder. *See Cicero v. U.S. Four, Inc.*, 10th Dist. No. 07AP-310, 2007-Ohio-6600, ¶42 (class certification denied; whether class members consented to receiving faxes was individual issue).

E. The Policies Do Not Require that Windshield Repair Return the Windshield to Its Pre-loss Condition.

In affirming class certification of Plaintiff's pre-loss condition claims, the Eighth District failed to examine both the policy language and the reliability of the opinions of Plaintiff's experts that were proffered by Plaintiff as class-wide proof that repair could *never* return a windshield to its preloss condition. (*See* SF Br. at 27-29, 32-34; *infra* at 13-14.) In claiming that the policies are breached if a windshield is not returned to preloss condition, Plaintiff relies on language in the policy's Limit of Liability section providing that when State Farm bases its payment on an "estimate written based upon the prevailing competitive price," State Farm "will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition." (Pl. Br. at 36.) This language, however, creates a pre-loss condition standard *only* for estimates written by State Farm "based upon the prevailing competitive price" and *only* for "parts," neither of which are involved here. *See Hall v. State Farm Mut. Auto. Ins. Co.*, 215 F.Appx. 423, 429-30 (6th Cir.2007); (SF

⁶ Agreement also is an individual issue before the Lynx wordtrack came into use because it was State Farm's general practice before 1997 to let policyholders choose between windshield repair or replacement. (SF Br. at 8.)

Br. at 10-11, 27-28.). Despite Plaintiff's contentions to the contrary (Pl. Br. at 39), *Hall* addresses the same policy language at issue here, and its ruling on the meaning of that policy language is not irrelevant simply because *Hall* was decided on a motion to dismiss.

Plaintiff also improperly relies on the testimony of State Farm employee William Hardt as establishing a pre-loss condition standard for windshield repair, as well as on other extrinsic evidence. (See Pl. Br. at 36-37.) Such extrinsic evidence cannot create an obligation that is not in the policy. (See *supra* at 7-8; SF Br. at 22-24.) As Mr. Hardt testified, "[t]he only thorough accurate summarization of what we owe to our customers is in the insurance contract, and anything else might be paraphrasing, summarizations, interpretations, etc." (Dep. of Bill Hardt at 31 (filed Dec. 29, 2009).) The insurance contract itself, as Mr. Hardt testified, refers to preloss condition only in the provision quoted above regarding *estimates* written by State Farm, which must include "*parts sufficient to restore the vehicle to its pre-loss condition.*" (*Id.* at 149.)

The O&A contracts between State Farm and glass companies (quoted by Pl. Br. at 37) are extrinsic evidence with no bearing on State Farm's obligations under the policy. Moreover, under those contracts, the standard relevant to windshield *repair* does not refer to preloss condition. It simply requires that glass shops use "methods and materials" (i.e., resins) that "meet or exceed the vehicle manufacturer's original structural integrity and retention characteristics." (Ex. G to Pl. Reply in Supp. of Class Cert. (filed Mar. 1, 2010).)

Even if State Farm had a contractual obligation to return a windshield to substantially the same condition as before the damage, the issues raised by such a contractual obligation would be overwhelmingly individual, precluding class certification. "Pre-loss condition" means *substantially* the same appearance and function as before the loss, not the precisely identical condition. (See SF Br. at 28 n.15 (citing cases).) The fact that a repair may leave a "slight visible blemish"

(as the Lynx wordtrack informed policyholders who had questions about "What is a Repair?" (Supp. 434)), does not mean that a windshield has not been restored to *substantially* the same condition as it was before the damage. Plaintiff wrongly asserts that the National Windshield Repair Association has "concluded that the quick-fix process would always leave scarring with visual distortion and reduce the structural integrity of the glass." (Pl. Br. at 38.) According to the NWRA, windshield repair is a "permanent process" that "bonds the glass together, restores strength to the windshield, improves the break's appearance and prevents the break from spreading." (See Ex. 28 to SF Appx. of Exs. in Supp. of Opp. to Class Cert. (filed Feb. 2, 2010).)

Thus, as in *Augustus v. Progressive Corp.*, Plaintiff's preloss condition claims would require "individually examining each and every putative class member's vehicle." 8th Dist. No. 81308, 2003-Ohio-296, ¶25; (see also SF Br. at 28-29 (citing cases)). Plaintiff attempts to distinguish *Augustus* with the somewhat confusing argument that in *Augustus*, the "insurer's practices [specification of non-OEM parts] were specifically permitted by the agreement," and thus "[c]lass members could only prevail if they could show that their particular vehicle had been fully restored to its pre-loss condition" (sic). (Pl. Br. at 38.) Plaintiff here conflates two separate rulings in *Augustus*: one, that the insurer's use of non-OEM parts was not a per se breach of the contract, and, two, that because the plaintiffs would have to show that their cars were not returned to pre-loss condition, the necessary factual determinations by their nature "would be highly individualized." *Augustus*, 2003-Ohio-296, ¶26. Here, as in *Augustus*, windshield repair is permitted and cannot be deemed a per se breach of contract, and Plaintiff and the class members here, no less than the plaintiff and class members in *Augustus*, would each have to show that their particular vehicle had not been returned to its pre-loss condition. (See SF Br. at 28-29 (citing cases).) In short, Plaintiff's pre-loss condition claim is not "capable of resolution for all members in a single

adjudication," *Marks*, 31 Ohio St.3d at 204, 509 N.E.2d 1249, and class certification of such claims should be reversed.

F. The Eighth District Failed to Resolve Legal and Factual Issues Affecting Commonality and Predominance With Respect to Plaintiff's Bad Faith Claim.

In holding that there was a predominance of common issues, the Eighth District also failed to examine the purported legal and factual bases of Plaintiff's bad faith/breach of fiduciary duty claim, simply accepting Plaintiff's theory that Ohio Adm.Code 3901-1-54 supports a cause of action if an insurer does not "fully disclose" all pertinent benefits, coverages or other provisions * * *." (Op. ¶22.) Plaintiff admits that "at least one court" has held that Ohio Adm.Code 3901-1-54 does not provide a private cause of action. (Pl. Br. at 31.) In fact, Ohio Adm.Code 3901-1-54(B) expressly states that "[n]othing in this rule shall be construed to create or imply a private cause of action for violation of this rule," and under Ohio law, an "insured has a duty to examine the coverage provided and is charged with knowledge of the contents of the policy." *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶16.⁷

In any case, whether or not an insurer has a fiduciary duty to a particular policyholder is an individual issue. (See SF Br. at 31.) The cases cited by Plaintiff (Pl. Br. at 33) are not to the contrary: *Buemi v. Mutual of Omaha Insurance Co.*, 37 Ohio App.3d 113, 116, 524 N.E.2d 183, 186 (8th Dist.1987), and *Heekin v. Mutual of Omaha Ins. Co.*, 8th Dist. No. 54954, 1989 WL

⁷ The cases cited by Plaintiff do not support Plaintiff's contention that "evidence of noncompliance [with Ohio Adm.Code 3901-1-54] will be admissible during these proceedings." (Pl. Br. at 32.) *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198, involved a violation of the Ohio Basic Building Code, not insurance regulations. *Rak v. Safeco Ins. Co.*, 8th Dist. No. 84318, 2004-Ohio-6284, *Piersoll v. Keaton*, 10th Dist., No. 00AP-392, 2000 WL 1617780 (Oct. 31, 2000), and *Laibson v. CNA Ins. Cos.*, 1st Dist. No. C-980736, 1999 WL 299899 (May 14, 1999), addressed the enforceability of contractual limitations periods where the insurer had not complied with a regulation requiring written denial of a claim and notice of the contractual limitations period and are irrelevant here. *Banks v. Nationwide Mut. Fire Ins. Co.*, 10th Dist. No. 99AP-1413, 2000 WL 1742064 (Nov. 28, 2000), notes but does not decide the parties' dispute as to the applicability of Section 3901-1-54.

4157, at *2-3 (Jan. 19, 1989), both address the specific circumstances that give rise to a fiduciary duty on the part of an insured to provide accurate information about his medical history when a health insurance policy is issued without a medical examination. These cases do not support the contention that the existence of a fiduciary relationship can be proven class-wide here.

Proposition of Law No. II: The Lower Courts' Reliance on Plaintiff's Proposed Expert Testimony as a Basis for Class Certification Was an Abuse of Discretion in the Absence of an Adjudication of State Farm's *Daubert* Challenges.

In affirming certification, the Eighth District improperly relied on Plaintiff's purported experts' testimony without examining the admissibility or persuasiveness of that testimony. (Op. ¶33 (plaintiff "purports to offer expert testimony to show that a windshield can never be repaired to restore it to preloss condition").) Plaintiff asserts that State Farm did not raise this issue in its appeal to the Eighth District. (See Pl. Br. at 43.) As Plaintiff admits, the trial court in granting class certification did not mention the challenged experts. (See *id.*) Thus, the issue was not presented by the trial court's opinion for State Farm to appeal. The issue was raised by Plaintiff's brief in the Eighth District (*see* Pl. Eighth Dist. Br. at 18 (filed Mar. 11, 2011)), by State Farm's response that Plaintiff's experts' opinions were unreliable and that State Farm's motion to exclude had not been ruled upon (SF Eighth Dist. Reply Br. at 7 n.5 (filed Apr. 4, 2011)), and by the Eighth District's explicit reliance on Plaintiff's purported experts' testimony. (Op. ¶33.)

The Eighth District's reliance on Plaintiff's purported experts is part of the larger, central issue in this appeal as to the extent to which courts should resolve issues regarding the legal and factual basis for class certification. State Farm submits that, under *Dukes*, a court should not rely on an expert's opinion as supporting predominance without examining the admissibility and persuasiveness of that opinion. *See Dukes*, 131 S.Ct. at 2553; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir.2011); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811-14 (7th Cir.2012); (SF Br. at 32-34). Absent an adjudication of their reliability and persuasive-

ness, Plaintiff's experts' opinions are not the "significant proof" required to support class certification. *See Dukes*, 131 S. Ct. at 2553-54.

Proposition of Law No. III: A Class Definition May Not Condition Class Membership on Disputed, Individual Elements of Liability.

The Eighth District erroneously affirmed the trial court's adoption of a class definition that required that each class member had sustained injury, i.e., that the cost of replacing the class member's windshield would have exceeded his or her deductible. (*See Op.* at ¶8.)

Plaintiff now misrepresents this issue as merely one of "varying amounts of damages." (*See Pl. Br.* at 44.) The issue is not merely amount of damages, but actual injury, which is a substantive element of liability for each of the class members' claims. It is indisputable that during the twenty year class period, for a large number of policyholders, the cost of windshield replacement to State Farm would not have exceeded the policyholder's deductible. *See Andrade v. Credit Gen. Ins. Co.*, 5th Dist. No. 2000CA00002, 2000 Ohio App. LEXIS 5531, at *27 (Nov. 20, 2000) ("the measure of damages in a breach of insurance contract is the amount that an insurer would have owed under the policy."). Indeed, windshield replacement costs paid by State Farm could be as little as \$49.98, while deductibles ranged up to \$2,000. (*Supp.* 368, 430.)

Plaintiff entirely fails to show how it could be determined which of the approximately 100,000 potential class members sustained injury. Plaintiff merely claims that in support of class certification *he* submitted an affidavit that supposedly established the cost of a replacement windshield for *his* car. (*See Pl. Br.* at 44.) Plaintiff's affidavit, however, merely illustrates that the issue is individual – the affiant, Thomas Uhl (who owns an autobody shop, not an auto glass shop), identifies two replacement windshields at two different replacement costs for Plaintiff's 2001 Jetta. (*Pl. Supp.* 135 ¶6-7.) Mr. Uhl's affidavit does not show that "a class wide injury is both identifiable and readily calculable." (*Pl. Br.* at 44.) Rather, it demonstrates the individual

nature of actual injury in this case. (*See Amicus Curiae* Br. of Nationwide Prop. & Cas. Ins. Co. *et al.*, at 21-24.)

Plaintiff does not explain how it can be determined which replacement windshield should be used in the calculation of injury for each class member. None of the purported data in State Farm's files provides this information. Even assuming, as Plaintiff claims (Pl. Br. at 45), that a VIN number could be used to determine what windshield was *originally* on a particular car, Plaintiff has not provided any class-wide proof that the *original* windshield would likely have been used if a class member had chosen windshield replacement. Moreover, Plaintiff's assertion that VIN numbers can be used to determine the original windshield on a class member's car is a mere assertion made by Plaintiff without substantiating evidence or record support. (*See id.*) In fact, federal regulations require VINs to include decipherable information as to the car's "make, line, series, body type, engine type, and all restraint devices and their location;" they do not require decipherable information as to the car's windshield. *See* 49 C.F.R. 565.15 & Table I (2012); (*see also* SF Br. at 37 & n.23.) In any case, Plaintiff has never claimed that insureds choosing replacement would be entitled to receive the same windshield that was originally on the car or even that they typically would receive the same windshield. The relevant windshield is the appropriate replacement windshield(s) that the class member's auto glass shop would likely have had available and likely used in the hypothetical replacement. Although that information might be ascertainable in some instances from the hundreds of individual glass shops involved in the class members' repair transactions, it is not part of State Farm's records. Thus, membership in the class as defined does not depend solely on State Farm's "actions or practices," but would require looking at what the numerous different glass shops involved in the insureds' transactions would have done for each of the 100,000 class members over a twenty-year period. *Cf. Stam-*

mco, L.L.C. v. United Tel. Co., 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶9.

Neither Civ.R. 23 nor due process permit Plaintiff and the class members to circumvent the need to prove, and have a jury decide, actual injury by making actual injury part of the class definition. The issue is not, as Plaintiff claims, merely a matter of "re-evaluation of a discretionary determination" by the courts below (Pl. Br. at 45), but is central to the fundamental requirements of fairness and efficiency in class actions. The class definition adopted by the trial court and approved by the Eighth District is both legally erroneous and an abuse of discretion.

Proposition of Law No. IV: Plaintiff's Assurance that Unspecified, Hypothetical Computer Algorithms Can Be Used to Identify Class Members Does Not Satisfy the Requirement that Class Members Can Be Identified with Reasonable Effort.

Apart from the disputed individual issues of fact as to actual injury, the calculation of damages for 100,000 class members would be neither simple nor manageable. As Judge Stewart stated, there are "too many damages variables" among class members over the 20-year class period for the class to be manageable, and the Eighth District's "confidence in its ability to wade through the difficulties posed by variable issues relating to damages assessments based solely on the rather nebulous idea that computers can sort it out" was "misplaced." (Op. ¶68-69.)

State Farm's position that Plaintiff has utterly failed to meet his burden of showing that a practical method exists to determine actual injury and damages is not a "newly devised position." (Pl. Br. at 45.) As State Farm explained in opposing class certification in the trial court, proof of actual injury and damages would require individual proof of replacement costs, and the needed information is not contained in State Farm's records. (See Def.'s Trial Ct. Mem. at 44-47.) Moreover, because replacement costs varied dramatically over time, the determination would have to be made at a particular point in time for each damaged windshield. It was part of Plaintiff's burden on class certification to show, with expert or other evidence, that a computer program could be devised to account for all the necessary variables, and to show that the time, labor

and expense involved would be reasonable and manageable. Plaintiff provided no evidence whatsoever on this point, and class certification should have been denied. *See Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 72-73, 1998-Ohio-365, 694 N.E.2d 442 (class members must be identifiable with "reasonable effort" and by means "specified at the time of [class] certification"); *Newton v. Merrill Lynch*, 259 F.3d 154, 191-92 (3d Cir.2001) (rejecting "assurance" that an "expert can devise a formula for calculating injury and damages" class-wide).

Plaintiff clings to the notion that somehow further discovery will reveal that State Farm has "replacement cost databases" that would establish "the replacement cost payments" that Plaintiff claims are due to him and the class members. (Pl. Br. at 45.) State Farm presented uncontradicted evidence that it does not determine the hypothetical cost to replace a windshield that was repaired and that it does not maintain any such information in its files or databases. (Supp. 368-69 ¶¶19-21.) Furthermore, contrary to Plaintiff's contentions, the testimony of State Farm employee Wendy Rogers does not show or suggest that such data exists. In fact, Ms. Rogers testified that she believes that State Farm currently retains claims data for 25 years and was asked only whether the information retained related to the date of loss, policy number, name of insured and qualification of damages. (Dep. of Wendy Rogers at 164-65 (filed Dec. 29, 2009).) Nothing in her testimony indicates that the data necessary to determine the cost for a hypothetical windshield replacement for any particular policyholder exists in State Farm's files or in any independent data base. Thus, the individual inquiries and calculations required to determine actual injury and damages for approximately 100,000 class members would not be simple, manageable or administratively feasible, as required by Ohio law.

Proposition of Law No. V: Where Class Members Not Only Heard Allegedly Scripted Statements, But Had Individual Unscripted Discussions and Were Influenced by Other Individual Considerations, Individual Questions Predominate.

The Eighth District erroneously ruled that the use of a "script" by State Farm's third-party

glass claims administrator Lynx gave rise to commonality and a predominance of common issues for policyholders with post-1997 claims.⁸ (Op. ¶26.) The Eighth District's analysis disregarded relevant evidence of the individual circumstances of each class member's transaction.

Plaintiff asserts that *Lynx operators* did not deviate from their "scripts," claiming that [t]here has never been any evidence that the policyholders were ever advised, even by a 'Maverick' [Lynx operator] of the shortcomings inherent in the glass patching process." (Pl. Br. at 46.) In fact, under the Lynx wordtrack, depending on the questions they asked, some policyholders would have been told that repair might leave a "visible blemish," and others would not. (Supp. 434.) Moreover, it is undisputed that, in the course of their windshield repairs, insureds spoke not only to Lynx operators, but often to their State Farm Agents and always to the personnel at their glass shops, who had no scripts or wordtracks. (Supp. 349 ¶16, 350-51 ¶26.) Plaintiff points to no evidence that insureds' discussions with Agents or glass shops were uniform or even similar. In contrast to the essentially identical transactions in *Cope v. Metropolitan Life Insurance Co.*, 82 Ohio St.3d 426, 696 N.E.2d 1001 (1998), whether policyholders here chose repair because they were "improperly prompted" to do so (Op. ¶30) is an individual issue.

Proposition of Law No. VI: It Is an Abuse of Discretion to Certify a Subclass Without a Representative Who Is a Member of the Subclass.

The Eighth District affirmed certification of a subclass of more than 34,000 policyholders whose claims were not administered by Lynx (including all pre-August 1997 claims and 5% of later claims), for preloss condition claims only. (See Op. ¶29-33.) Plaintiff is not, and does not claim to be, a member of the non-Lynx subclass. The issue is not solely one of standing, as Plaintiff claims. (Pl. Br. at 47.) Rather, the express language of Civ.R. 23(C)(4)(b) (which Plaintiff entirely fails to address) requires that "each subclass [be] treated as a class, and the pro-

⁸ No script or wordtrack was used in claims made before August 1997. (Op ¶32; SF Br. at 7-8.)

visions of this rule shall then be construed and applied accordingly." This provision means that a subclass must independently satisfy the requirements of Civ.R. 23, including the fundamental requirement that the class be represented by a named representative who is a member of the class. *Stammco*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶6.⁹

Under the analogous Fed.R.Civ.P. 23(c)(5), "each subclass must independently meet the requirements of Rule 23," 7AA Charles A. Wright et al., *Federal Practice & Procedure*, Section 1790, at 608 (3d Ed.2005), including representation by a named plaintiff who is a member of the subclass. *See, e.g., Sueoka v. United States*, 101 Fed.Appx. 649, 654 (9th Cir.2004) ("Certification of a subclass fails where a subclass representative is not a member of the subclass he or she seeks to represent."); *Johnson v. Am. Credit Co.*, 581 F.2d 526, 532 (5th Cir.1978) (a subclass must meet the "fundamental requirement" that the "representative must be a member of the class she wishes to represent."); (*see also* SF Br. at 45-46.).

Proposition of Law No. VII: Rule 23(B)(2) Does Not Authorize Class Actions Where the Named Plaintiff Lacks Standing to Seek Declaratory or Injunctive Relief or Where the Relief Sought Merely Lays a Basis for Money Damages.

Plaintiff fails to address the issue of whether he has standing to represent a Civ.R. 23(B)(2) class for injunctive and declaratory relief, given that he is no longer a State Farm policyholder. "Individual standing is a threshold to all actions, including class actions," and to represent a (B)(2) class, Plaintiff "must have a basis for injunctive relief in his own right." *Woods v. Oak*

⁹ The cases cited by Plaintiff (Pl. Br. at 48) do not address the requirement that a named plaintiff be a member of a subclass. In *Peterson v. Progressive Corp.*, 8th Dist. No. 87676, 2006-Ohio-6175, ¶25, the named plaintiff was "clearly a member of both classes" he sought to represent. *Payton v. County of Kane*, 308 F.3d 673 (7th Cir.2002), and *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410 (6th Cir.1998), address issues of multiple defendants, not subclasses. *Sosna v. Iowa*, 419 U.S. 393, 401-03, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), held that if the named plaintiff's claim became moot *after* class certification, the entire case was not mooted. *Sosna* emphasized that "[a] litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." *Id.* at 402-03.

Hill Cmty. Med. Ctr., Inc., 134 Ohio App.3d 261, 268-69, 730 N.E.2d 1037 (4th Dist.1999); *see also Sosna*, 419 U.S. at 403 (named plaintiff in class action seeking injunctive and declaratory relief "must show that the threat of injury . . . is 'real and immediate'"); *Dukes*, 131 S.Ct. at 2559-60 (former Wal-Mart employees "lack standing to seek injunctive or declaratory relief").

In addition, Civ.R. 23(B)(2) authorizes certification of a (B)(2) class only when "final injunctive relief or corresponding declaratory relief" is appropriate with respect to the class as a whole. In his brief, Plaintiff does not explain how the relief he seeks constitutes "*final* injunctive relief or corresponding declaratory relief" and satisfies the requirement that a Civ.R. 23(B)(2) action "must seek primarily injunctive relief." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶13; (*see also* SF Br. at 48-50). Plaintiff does not dispute that the primary claim in this case is for money damages or that the injunctive/declaratory relief he seeks is designed to "lay the basis for a damage award." *See* 7AA Charles A. Wright, et al., at 60, Section 1775. Rather, Plaintiff admits that the relief he seeks for the (B)(2) class is to have the trial court "direct that the pertinent motor vehicle policies require that each class member receive benefits sufficient to replace the damaged windshields." (Pl. Br. at 50.)

CONCLUSION

For all the foregoing reasons and those set forth in its opening brief, State Farm respectfully submits that the Court should reverse certification of the class in this case.

Respectfully submitted,


Mark A. Johnson (0030768)
Counsel of Record for Appellant State Farm
Mutual Automobile Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief of Appellant State Farm Mutual Automobile Insurance Company was served upon the following by electronic and first class U. S. mail, this 19th day of November, 2012:

<p>Paul W. Flowers Terminal Tower, 35th Floor 50 Public Square Cleveland, Ohio 44113 pwf@pwfco.com</p> <p>W. Craig Bashein Terminal Tower, 35th Floor 50 Public Square Cleveland, Ohio 44113-2216 wcb@basheinlaw.com</p> <p>Counsel for Appellee Michael E. Cullen</p> <p>Stephen J. Butler Thompson Hine LLP 312 Walnut Street, 14th Floor Cincinnati, Ohio 45202-4029 Steve.Butler@thompsonhine.com</p> <p>Jan Chilton Severson & Werson One Embarcadero Center Suite 2600 San Francisco, CA 94111 jtc@severson.com</p> <p>Counsel for Amicus Curiae The American Financial Services Association</p>	<p>Thomas Szykowny Michael Thomas Vorys, Sater, Seymour & Peace LLP 52 East Gay Street Columbus, OH 43215 teszykowny@vorys.com mrthomas@vorys.com</p> <p>Counsel for Amici Curiae National Association of Mutual Insurance Companies and Ohio Insurance Institute</p> <p>Victor Schwartz Mark Behrens Cary Silverman Shook, Hardy & Bacon, LLP 1155 F Street, NW, Suite 200 Washington, D.C. 20004-1305 vschwartz@shb.com mbehrens@shb.com csilverman@shb.com</p> <p>Counsel for Amici Curiae Ohio Chamber of Commerce, Ohio Alliance for Civil Justice, Chamber of Commerce of the United States of America, and American Tort Reform Association</p>
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<p>Philip F. Downey Vorys, Sater, Seymour & Peace LLP First National Tower 106 South Main Street Akron, Ohio 44308 PFDowney@vorys.com</p> <p>Robert N. Webner Robert J. Krummen Vorys, Sater, Seymour & Peace LLP 52 East Gay Street Columbus, OH 43215 RNWebner@vorys.com RJKrummen@vorys.com</p> <p>Counsel for Amici Curiae Grange Indemnity Insurance Company and Grange Mutual Casu- alty Company</p> <p>Elizabeth Wright Brian Troyer Thompson Hine LLP 3900 Key Center 127 Public Square Cleveland, OH 44114 Elizabeth.Wright@thompsonhine.com Brian.Troyer@thompsonhine.com</p> <p>Stephanie Chmiel Thompson Hine LLP 41 South High Street, Suite 1700 Columbus, Ohio 43215-6101 Stephanie.Chmiel@thompsonhine.com</p> <p>Counsel for Amici Curiae Washington Legal Foundation and Ohio Chemistry Technology Council</p>	<p>Kurtis Tunnell (0038569) Ann Marie Sferra (0030855) Bricker & Eckler 100 South Third Street Columbus, Ohio 43215-4291 ktunnel@bricker.com asferra@bricker.com</p> <p>Of Counsel for Ohio Alliance for Civil Justice</p> <p>Robin S. Conrad National Chamber Litigation Center, Inc. 1615 H Street, NW Washington, DC 20062 rconrad@uschamber.com</p> <p>Of Counsel for Chamber of Commerce of the United States of America</p> <p>Michael H. Carpenter Katheryn M. Lloyd Carpenter, Lipps & Leeland, LLP 280 Plaza, Suite 1300 280 North High Street Columbus, Ohio 43215 carpenter@carpenterlipps.com</p> <p>Counsel for Amici Curiae Nationwide Proper- ty and Casualty Insurance Company, Nation- wide Mutual Fire Insurance Company, Na- tionwide Insurance Company of America, Na- tionwide Assurance Company, and Nation- wide General Insurance Company</p>
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Robert J. Tucker (00802205)