

ORIGINAL

IN THE SUPREME COURT OF OHIO

Michael E. Cullen,

Plaintiff-Appellee,

v.

State Farm Mutual Automobile
Insurance Company,

Defendant-Appellant.

:
:
: Case No. 12-0535
:
:
: ON APPEAL FROM THE CUYAHOGA
: COUNTY COURT OF APPEALS, EIGHTH
: APPELLATE DISTRICT
:
:
: Court of Appeals Case No. 10-095925
:
:
:

REPLY MEMORANDUM OF AMICI CURIAE NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE ASSURANCE COMPANY, AND NATIONWIDE GENERAL INSURANCE COMPANY IN SUPPORT OF APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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MEMORANDUM

Reply on Proposition of Law I: In Ruling On Class Certification, Courts May and Should Examine Merits Issues That Are Relevant To The Civ. R. 23 Requirements.

A. This Court Should Officially Retire The Often Mis-Cited Language Of *Ojalvo*, And Reiterate That A Rigorous Analysis Of Class Criteria May And Should Require Probing The Merits.

When this Court accepted this case for review, it did so because the class action issues it presents are of public or great general interest. As the Nationwide amici stated in their opening brief, the issue of what standards a trial court should apply in deciding a motion for class certification, especially under Ohio Civil Rule 23(A) and this Court's precedent, is both timely and important. The issue is timely, given the recent *Wal-Mart Stores, Inc. v. Dukes* decision under comparable Federal Rule of Civil Procedure 23, addressing many of the same issues. See *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). The issue is important, because—as seen in appellee's brief in this appeal—parties, trial courts, and courts of appeal often express varying and inconsistent views on whether and to what extent a rigorous examination of the class certification prerequisites and criteria under Ohio Civil Rule 23 may or must include a review of the merits.

In this case, appellee tries to have it both ways. Each page of appellee's brief seemingly takes a different position on the question of whether it is appropriate for the trial court to probe the merits of a case to determine, as an initial matter, whether the Ohio Civil Rule 23 prerequisites and criteria are met. This Court should carefully examine the way that appellee vacillates on the issue of a merits evaluation at the class certification stage. That is because appellee's brief is emblematic of the kind of shifting sands that litigants currently face in Ohio's lower courts on the important merits inquiry issue, depending on the lower court involved and

the case law it cites. Appellee's stated view on the propriety of a merits determination at the class certification stage is all over the map, as set forth below.

- On page 24 of his brief, appellee praises the trial court below for "carefully assessing the testimony and exhibits that had been furnished by both parties during the lengthy class action proceedings." Appellee's Brief at 24 (emphasis in the original). So far, the parties and amici appear in agreement.

- But, turning a page, by page 25 of his brief, appellee reverts to citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 (1974) and its "no preliminary inquiry into the merits" language that was discredited in subsequent U.S. Supreme Court cases, and officially retired in *Wal-Mart Stores, Inc v. Dukes*. Compounding the mistake (since *Eisen* is not good law for the proposition for which plaintiff cites it), on a portion of page 26, plaintiff cites to a series of what he contends are Ohio cases embracing the "no merits" view of *Eisen*. Appellee argues these cases represent good law, and completely ignores this Court's direction in *Hamilton v. Ohio Savings Bank*, 82 Ohio St. 3d 67, 694 N.E.2d 442 (1998) that the trial court must conduct a "rigorous examination" of whether class certification prerequisites and criteria are, in fact, met.

- Further down page 26 of his brief, appellee then acknowledges *Wal-Mart Stores, Inc. v. Dukes*, which expressly and categorically rejected the no-merits language of *Eisen*. Here, appellee shifts course, admits the trial court is not prevented from "probing into the factual underpinnings for the claims" after all, and then proclaims that "Ohio law has never been to the contrary." Appellee's Brief at 26. But in the same breath that appellee makes that important admission, he undercuts it by citing *Ojalvo v. Bd. Of Trustees, Ohio State University*, 12 Ohio. St. 3d 230, 466 N.E.2d 875 (1984). *Ojalvo* is the case so often mis-cited in Ohio (just like *Eisen*

was so often mis-cited under Federal Rule 23) for the erroneous proposition that a trial court is precluded from any review of the merits of a claim when deciding class certification. Thus, in the span of a few sentences, appellee has argued that *Eisen* is good law, *Eisen* is overturned by *Wal-Mart Stores, Inc. v. Dukes*, Ohio law is in accord with *Eisen* through *Ojalvo*, and *Ojalvo* is somehow in accord with *Wal-Mart Stores, Inc. v. Dukes* and *Eisen*. This cannot be.

- In the course of promoting *Ojalvo* on page 26 of his brief, appellee then curiously claims that the real standard for class certification is simply to ask whether the plaintiff presented a “colorable” claim. See Appellee’s Brief at 26. That has never been the standard for class certification. None of this Court’s precedent suggests that the appropriate Ohio Civil Rule 23 inquiry is merely whether the plaintiff presents a “colorable” claim. In fact, the “colorable” language comes from the dissent in *Howland v. Purdue Pharma L.P.*, 104 Ohio St. 3d 584, 595, 2004-Ohio-65552, 821 N.E. 2d 141, ¶54, a standard that was rejected by the majority of this Court when it decided that the *Howland* plaintiff had not met its burden under the Ohio Civil Rule 23 criteria, and that it was an abuse of discretion for the trial court to have certified a class.

- On page 27 of his brief, appellee ultimately equivocates on whether a “merits determination” is appropriate at the class certification stage, claiming that the courts cannot reach that question here because of State Farm’s alleged discovery deficiencies. In effect, on page 27, appellee takes no position on the applicable Ohio Civil Rule 23 standard, and apparently urges the Court to take no position. See Appellee’s Brief at 27 (arguing “[t]he full-blown merits determination that State Farm seems to be seeking would have been appropriate, if at all, only if the insurer had complied with its discovery obligations in a timely fashion.”) (emphasis added). Appellee does not want this Court to offer any clarification on the applicable standards for class certification. But that runs counter to the Court’s decision to accept this

appeal. Taking a position and providing clarification on class action standards is of public and great general interest.

The four pages of appellee's brief just cited are an example of the kind of vacillation, equivocation, and inconsistency that are found throughout appellee's brief on the crucial question of what review the trial court must conduct in deciding whether the prerequisites for class certification are or are not met under Ohio Civil Rule 23. The fact that appellee can make so many contrary arguments, at once, is precisely why this Court needs to clarify the applicable standards. In doing so, it should follow the lead of the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*. That decision explained that the Court's precedent did embrace and require an examination of the merits in deciding class certification, and that parties and lower courts are wrong to cite *Eisen* for some contrary proposition. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2552 (confirming that "[f]requently, [the required] 'rigorous analysis' will entail some overlap with the merits of plaintiff's underlying claims," and, in footnote 6, calling the "no merits" language of *Eisen* "the purest dictum" which is "contradicted by our other cases.").

This Court should do the same, and explain that it has long required trial courts to "carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ. R. 23 have been satisfied." *Hamilton*, 82 Ohio St. 3d at 70. This Court should clarify that parties and lower courts are mistaken when they rely on *Ojalvo* for any contrary proposition. *Ojalvo* is Ohio's *Eisen*: a case that never stood for the proposition for which it is often cited, but which—despite ample subsequent precedent from the highest court—continues to provide refuge for certain lower courts and class action plaintiffs who want to avoid any judicial evaluation of the merits of a plaintiff's claim in deciding class certification. This Court should take the opportunity to "retire" the no-merits language of *Ojalvo*, so often mis-cited

in Ohio, including by plaintiff in the trial court below. Such a step is in keeping with equivalent developments under the Federal Rules of Civil Procedure, and will prevent the kind of legal standard for class certification confusion evident in Ohio's lower courts, and appellee's own brief.

B. This Court Should Reject Appellee's Misreading Of The Ohio Administrative Code That Comprises Part Of His "Merits" Discussion, And Should Apply Kincaid v. Erie.

Within the portion of his brief directed at Proposition of Law I, appellee makes several legal contentions that were previously rejected by this Court (when made by appellee's same counsel) in *Kincaid v. Erie Insurance Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207.

The argument made by appellee's counsel in *Kincaid v. Erie*, rejected by this Court, and now repeated by appellee in this case, is as follows. In both cases, plaintiffs have argued that Ohio Administrative Code § 3901-1-54(E) and *Cope v. Metropolitan Life Ins. Co.* (1998), 82 Ohio St. 3d 426, 696 N.E.2d 1001, combine to create a private right of action for plaintiffs rooted in that section of the Administrative Code. That is not so. Ohio Administrative Code § 3901-1-54 expressly states that it does not create a private right of action. *See* OAC § 3901-1-54(B) ("Nothing in this rule shall be construed to create or imply a private cause of action for violation of this rule."). And *Cope* did not involve Ohio Administrative Code § 3901-1-54, let alone create or recognize a private right of action under it. *See Cope v. Metropolitan Life Ins. Co.*, 82 Ohio St.3d at 433-34 (discussing OAC § 3901-1-36, now numbered OAC § 3901-6-05(E), an entirely different Administrative Code provision regarding life insurance agents that contains no language regarding or foreclosing private causes of action).

This Court considered the appellee's arguments in *Kincaid v. Erie* that OAC § 3901-1-54 and *Cope* somehow combine to excuse an insurance policyholder from reading his or her policy. See June 1, 2010 Merit Brief of Plaintiff-Appellee, Don B. Kincaid, Jr., in Case No. 09-1936, at pp. 23-26. This Court specifically rejected those arguments. See *Kincaid v. Erie*, 128 Ohio St. 3d at ¶ 16 (“The insurer provides each policyholder with a copy of the written insurance policy that expressly discloses the potential availability of benefits....The insured has a duty to examine the coverage provided and is charged with knowledge of the contents of the policy.”). The same arguments, now repeated by appellee in this case on pages 30-33 of his brief, should fare no better here than when they were asserted in *Kincaid v. Erie*. The Nationwide amici write on this point because they were also amici in the *Kincaid v. Erie* case, when this Court recently rejected the same arguments appellee makes here.

In addition, for the reasons stated in their opening brief, the Nationwide amici respectfully urge this Court to evaluate the claims made in this case through the standing lens of *Kincaid v. Erie*. This Court held in *Kincaid v. Erie* that where the plaintiff's theory of the case is constructed around a series of hypothetical historical events that did not actually occur (e.g., here, imagined historical demands for windshield replacement on the part of class members) and imagined controversies and injuries that did not actually arise (e.g., here, imagined dissatisfaction with windshield repairs never actually expressed by class members), the plaintiff and the proposed class lack standing, and no class action is possible. This is especially so where, as here, appellee's claim is founded on a demand for additional policy benefits that was never made by appellee, nor denied by the insurance company, as would be required under *Kincaid v. Erie*. Appellee failed to address any of these important issues in his brief. *Kincaid v. Erie* is not even acknowledged in appellee's brief, much less discussed. It should have been.

Reply On Proposition of Law III: A Class Definition May Not Condition Class Membership On Disputed, Individual Elements Of Liability.

And

Reply On Proposition of Law IV: Appellee'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.

With respect to the third proposition of law, appellee confuses two separate issues in an effort to avoid the problems inherent in identifying and ascertaining the class certified by the lower courts.

Appellee's chief argument as to this proposition of law is that mere differences in the amount of damages potentially awarded to class members after judgment should not preclude class certification. That argument does not address the issue actually presented in Proposition of Law III. The issue actually presented in Proposition of Law III is how the parties and the trial court will go about identifying and ascertaining class members in the first place, in order to determine who will get class notice, who is in or out of the class, and who will be bound by the ultimate outcome of the *Cullen* case. The issue is not about damages; it is about who is in or out of the class as a threshold matter.

But for the instant appeal, the next step in the *Cullen* case would have been for the trial court to direct class notice to absent putative class members, informing them of their due process right to opt out of the class if they so choose. To whom will class notice be mailed?

To answer this question, one must look to the class definition. The class definition states in relevant part that the following are class members:

All persons and business entities covered under an Ohio motor vehicle insurance policy issued by [State Farm] who made a 'Glass Only' physical damage comprehensive coverage claim on or after January 1, 1991 for cracked, chipped or damaged windshields and received a chemical filler or patch repair, or payment

thereof, instead of a higher amount for actual cash value or replacement cost of the windshield. The lesser of the amount of the actual cash value or the replacement cost of the windshield for each claim must exceed the insured's applicable deductible.

Cullen v. State Farm Mut. Auto. Ins. Co., 2011-Ohio-6691, 970 N.E. 2d 1043, ¶8 (8th Dist.)

(reciting class definition). The class definition approved by the trial court, and modified and approved by the Eighth District Court of Appeals, has embedded within it multiple disputed individual fact questions that would have to be answered for each absent potential class member to know if he or she falls within the class definition or not.

For each potential class member, the parties and the court are going to have to know, among other things, the “actual cash value or the replacement cost” for each person’s specific windshield for his or her specific year, make, and model vehicle in the specific year in which the accident occurred; what the repairs would have cost the person had he or she elected independent repairs instead of replacement; what each person’s specific deductible was at the time of the windshield claim; what windshield each glass shop had available to install; and how the deductible compared from a dollar perspective to the “actual cash value or the replacement cost” of the specific windshield in question.

Appellee, for his part, has argued that the litigants and trial court will be able to use “company records” and “databases” to identify class members and answer these questions. But simply typing those words does not make it so. Under this Court’s precedent, it was appellee’s burden to demonstrate that it is administratively feasible to identify class members with reasonable effort:

‘The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.’ Wright, Miller & Kane, *Federal Practice and Procedure*, Section 1760, at 120-121 (2 Ed. 1986).

Thus, the class definition must be precise enough 'to permit identification with reasonable effort.' *Warner*, 36 Ohio St. 3d at 96, 521 N.E.2d 1091

Hamilton, 82 Ohio St. 3d at 71-72.

In fact, however, appellee has never adequately explained how people who meet the class definition in this case will be identified. The class definition does not involve merely assembling all people who received a windshield repair. Both lower courts recognized that such a class definition would be overly broad, and wrongly include many people with no injury so as to permit standing. Appellee agrees this narrowing of the class was required. *See* Appellee's Brief at 45 (noting approvingly that "the trial judge has defined the class in a manner that will eliminate the prospects for 'undamaged' members.>"). Instead, determining class membership requires individualized research and calculations related to the specific vehicles of each absent class member in each of the various class years.

According to appellee below, to perform the exercise of determining his own class definition eligibility, appellee had to resort to multiple steps of extrinsic research. He first had to retain a purported body shop expert to investigate and opine on potential windshield replacements values for a 2001 Jetta in 2003, and the purported expert had to use one or more proprietary market guidebooks to form his opinion. Appellee's purported body shop expert then opined on a range of values for a 2001 Jetta windshield in 2003, depending on whether original equipment manufacturer or aftermarket windshields were to be used. With this range of values in hand, appellee then applied his own particular deductible to the class definition formula (while admitting the deductible varies for each class member and affects eligibility to be part of the class, depending on how a person's specific deductible compares to his or her specific windshield value). Thus, through his own example, appellee admitted that adhering to the certified class definition to determine class eligibility requires individualized research as to the

specific vehicle, third-party purported expert testimony, extrinsic research aids, and application of varying deductibles that can be as high as \$2000. This is not for purposes of calculating each person's damages at the end of a class action trial. This is to ascertain the appropriate list of persons who must receive class notice in the very beginning of the class action phase of the lawsuit, when absent putative class members are accorded their Constitutional, due process rights to opt out or remain in the lawsuit as they see fit.

As set forth in the Nationwide amici's opening brief, where the very act of coming up with a list of class members to receive class notice involves inquiries this complex and fact intensive, requiring individualized determinations as to each potential absent member, this Court's requirements of identifiability and ascertainability cannot be met. The task of issuing class notice is not "administratively feasible" in a case such as this, and requires far more than "reasonable effort." The standards of *Hamilton* therefore are not met. This Court should clarify for the lower courts that identifiability and ascertainability are meaningful class action prerequisites under Ohio Civil Rule 23(A) that cannot be glossed over with vague assurances that unspecified "records" and "databases" will somehow generate a list of class members. Lower courts should be encouraged to think about the practical task of generating a list of class members to receive class notice. Where generating such a list will require the kind of fact-intensive, individualized research that is required here for each and every absent class member, class certification should be denied. Appellee was mistaken to dismiss all of these important front-end, class action prerequisite issues as mere back-end, damages calculations issues. These issues go to the fundamental prerequisites for any class action under Ohio Civil Rule 23(A) and this Court's precedent, and appellee should respect their threshold nature.

Proposition of Law IV implicates many of the same concerns. Instead of offering any meaningful description of how, as an actual, practical task, a list of class members will be generated in this case to determine who must receive class notice, appellee repeatedly has argued that “databases” will solve the problem. Appellee expresses confidence that the necessary “databases” will allegedly be available in State Farm’s records on remand, after further discovery. He contends that because as a generic matter, State Farm maintains “claims data,” this somehow will mean that State Farm will have all of the information necessary in its records to establish each absent putative class member’s class eligibility. That cannot be the case, however, as evidenced by appellee’s own conduct. When appellee purported to demonstrate he suffered actual injury so as to justify his claims, he did not go to anything in State Farm’s records or his own claims file. He instead retained a purported body shop expert to do the research and opine on a range of values using proprietary valuation guidebooks that did not come from State Farm’s records. Appellee has not offered any evidence on where one would go in State Farm’s records to determine each person’s potential class eligibility. He has only offered speculation and conjecture about what State Farm’s records might show on these issues if he is given further discovery.

More fundamentally, the question before this Court on an interlocutory appeal of a grant of class certification is not what later discovery might show if class certification is affirmed and the case is remanded. Rather, the question before this Court is whether appellee met his burden of demonstrating through existing record evidence that the prerequisites of class certification were in place at the time the class was certified. In this respect, appellee procedurally is completely out of order. In effect, he argues that the courts should certify a class, and then permit post-certification discovery on how to ascertain and identify absent class members so as

to generate a list of who will receive class notice. But identifiability and ascertainability are prerequisites to class certification on which the plaintiff bears the burden of proof in moving for class certification. See, e.g., *Hamilton*, 82 Ohio St. 3d at 71 (citing *Warner v. Waste Mgmt., Inc.*, 36 Ohio St. 3d 91, 521 N.E.2d 1091 (1988)). “The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class.” *Planned Parenthood Ass’n. of Cincinnati v. Project Jericho*, 52 Ohio St.3d 56, 63, 556 N.E.2d 157 (1990).

If appellee did not have record evidence in hand and properly before the trial court on ascertainability and identifiability at the time he moved for class certification, his motion for class certification should have been summarily denied. As it stands, appellee has not and cannot direct this Court to any record evidence demonstrating that the information needed to determine each person’s eligibility for class membership is contained in State Farm’s existing records or is otherwise readily available through administratively feasible and reasonable means. Without adequate record evidence as to identifiability and ascertainability, class certification should have been denied, and this Court should reverse the lower courts’ class certification decisions.

CONCLUSION

This Court should take the opportunity to address the class certification in *Cullen*, reverse the lower courts’ class certification rulings in *Cullen*, and in the process, clarify that:

1. The courts may and should consider evidence regarding whether the prerequisites of class certification are met, even where such evidence touches on or implicates the merits of the parties’ respective positions (instead of merely accepting the plaintiff’s complaint allegations as true);

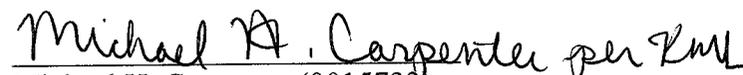
2. Where the existence of an identifiable class is disputed, the courts should specify the actual means through which class members will be identified given the particular record evidence in the case (instead of leaving the parties to guess how such identification is to be practically accomplished, and instead of generally referencing that identification will be possible through unknown “records,” “databases,” “computers,” or “algorithms”);

3. Where individualized, multi-step, multi-record fact determinations are necessary on a person-by-person basis in order to determine whether each person is in or out of the class, the “identifiable class” prerequisite to class certification is not met; and

4. Where a plaintiff’s theory of the case is constructed around a series of hypothetical historical events that did not actually occur and imagined controversies and injuries that did not actually arise, the plaintiff and the proposed class lack standing, and no class action is possible (especially where, as here, plaintiff’s claim is founded on a demand for additional policy benefits that was never made by the plaintiff, nor denied by the insurance company, as would be required under *Kincaid v. Erie*).

The Nationwide amici for the reasons set forth herein and in its opening brief respectfully urge reversal of the class certification decisions below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum Of Amici Curiae Nationwide Property And Casualty Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, Nationwide Insurance Company Of America, Nationwide Assurance Company, And Nationwide General Insurance Company In Support Of Appellant State Farm Mutual Automobile Insurance Company has been served upon the following via ordinary U.S. mail, postage prepaid, this 19th day of November, 2012:

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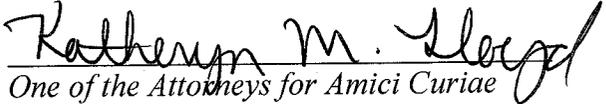
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