

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN	:	Case No. 12-0535
	:	
Plaintiff-Appellee	:	
	:	On Appeal From the
v.	:	Cuyahoga County Court
	:	of Appeals, Eighth
STATE FARM MUTUAL	:	Appellate District,
AUTOMOBILE INSURANCE	:	Case No. 10-095925
COMPANY	:	
	:	
Defendant-Appellant	:	

**APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S
MEMORANDUM IN RESPONSE TO APPELLEE'S MOTION FOR
RECONSIDERATION**

<p>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</p> <p>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</p> <p>Counsel for Appellant State Farm Mutual Automobile Insurance Company</p>	<p>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</p> <p>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</p> <p>John P. Hurst (0010569) Terminal Tower, 35th Floor 50 Public Square Cleveland, Ohio 44113 T 216.771.3239 F 216.781.5876</p> <p>Counsel for Appellee Michael E. Cullen</p>
---	---

FILED

NOV 25 2013

CLERK OF COURT
SUPREME COURT OF OHIO

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
T 614.227.2300
F 614.227.2390
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

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
Assurance Company, and Nationwide General
Insurance Company

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. THE SCOPE OF THE COURT’S REMAND IS CLEAR	1
II. PLAINTIFF’S ARGUMENTS REGARDING DISCOVERY ARE IMPERMISSIBLE ATTEMPTS TO REARGUE ISSUES ALREADY PRESENTED TO AND REJECTED BY THIS COURT	3
III. THE COURT’S HOLDING REGARDING THE PREPONDERANCE OF THE EVIDENCE STANDARD FOR CLASS CERTIFICATION DOES NOT WARRANT GIVING PLAINTIFF MORE DISCOVERY AND ANOTHER CHANCE AT CLASS CERTIFICATION	8
CONCLUSION.....	10

TABLE OF AUTHORITIES

Page

Cases

American Chemical Society v. Leadscope, Inc.,
133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 8329

Avery v. State Farm Mutual Automobile Insurance Co.,
216 Ill.2d 100, 835 N.E.2d 801 (2005)5

Cullen v. State Farm Mutual Automobile Insurance Co.,
8th Dist. No. 95925, 2011-Ohio-6621, 970 N.E.2d 1043 (8th Dist.)6

Cullen v. State Farm Mutual Automobile Insurance Co.,
___ Ohio St.3d ___, 2013-Ohio-4733..... *passim*

Kohus v. Hartford Insurance Co.,
8th Dist. No. 83071, 2004-Ohio-23110

Nolan v. Nolan,
11 Ohio St.3d 1, 462 N.E.2d 410 (1984)2

Peerless Electric Co. v. Bowers,
164 Ohio St. 209, 129 N.E.2d 467 (1964)10

Wal-Mart Stores, Inc. v. Dukes,
131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)9

Warner v. Waste Management, Inc.,
36 Ohio St.3d 91, 521 N.E.2d 1091 (1998)1, 8

Welsh v. Estate of Cavin,
10th Dist. No. 02AP-1328, 2004-Ohio-62.....8

Statutes and Rules

Civ.R. 23(B)(2)2, 9

Civ.R. 23(B)(3)1, 2, 9

S.Ct.Prac.R. 18.02(B) *passim*

Defendant-Appellant State Farm Mutual Automobile Insurance Company ("State Farm") respectfully submits this memorandum in response to Plaintiff-Appellee's Motion for Reconsideration ("Pl. Mot.").

Plaintiff's motion asks this Court to "clarify" the scope of its remand to the trial court. No clarification is needed. *See* Pl. Mot. at 2. In its opinion, this Court definitively ruled that the requirements for class certification are not met in this case. Consistent with the Court's opinion, Plaintiff is not entitled to further discovery and another bite at the apple on class certification. Plaintiff attempts to justify a second chance at class certification by incorrectly asserting that this Court applied a new legal standard in holding that a party seeking class certification must show by a preponderance of the evidence that the Rule 23 requirements are met. *See id.* at 3. To the contrary, in noting the applicability of the preponderance of the evidence standard, this Court cited and followed its opinion in *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 94, 521 N.E.2d 1091 (1998). There is no unfairness or surprise to Plaintiff in the Court's application of a standard that has been the law of Ohio for at least fifteen years.

Moreover, although Plaintiff asserts that he is not seeking to reargue this case, the issues raised by Plaintiff, including his claimed entitlement to further discovery, were raised and argued in Plaintiff's brief on the merits and rejected by this Court. Accordingly, Plaintiff's motion constitutes an impermissible reargument of the case and should be denied in its entirety. *See* S.Ct.Prac.R. 18.02(B).

I. THE SCOPE OF THE COURT'S REMAND IS CLEAR

This Court's opinion leaves no doubt about the scope of the trial court's authority on remand, and no clarification is needed. This Court has definitively held that Plaintiff cannot pursue his claims as a class action. In reversing certification under Civ.R. 23(B)(3), this Court

stated unequivocally that its "review of the record reveals that individual issues overwhelm the questions common to the class, and the trial court therefore abused its discretion in certifying the class action." *Cullen v. State Farm Mut. Auto. Ins. Co.*, ___ Ohio St.3d ___, 2013-Ohio-4733, ¶ 36.

Thus, the Court ruled that

[i]n sum, the determination of preloss and postrepair condition, the preloss value and the costs to repair or replace a particular windshield, and the individual knowledge and consent of each class claimant entail inspection of tens of thousands of automobiles and an individualized assessment of the damages each class member sustained, if any. *For these reasons, this action does not satisfy the predominance requirement of Civ.R. 23(B)(3).*

(Emphasis added.) *Id.* at ¶ 50; *see also id.* at ¶ 52 ("[T]he trial court abused its discretion in granting class certification pursuant to Civ.R. 23(B)(3), because a rigorous analysis of the evidence presented by the parties demonstrates that individual questions predominate over issues common to the class."). The Court also held that "this action does not satisfy the requirements for class certification pursuant to Civ.R. 23(B)(2), because the declaratory relief sought is at best only incidental to an award of monetary damages * * * ." *Id.* at ¶ 52. The Court expressly declined to "remand this matter to the court of appeals to consider these issues." *Id.* at ¶ 36.

This Court's determination "that individual issues overwhelm the questions common to the class, and the trial court therefore abused its discretion in certifying the class action" is the law of the case and does not permit Plaintiff to return to the trial court to seek a different result. *See Nolan v. Nolan*, 11 Ohio St.3d 1, 3-4, 462 N.E.2d 410 (1984) (the doctrine of law of the case provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels" and "functions to compel trial courts to follow the mandates of reviewing courts").

Accordingly, contrary to Plaintiff's contentions in his motion for reconsideration, there can be *no* "logical import" from the Court's opinion that Plaintiff is to be permitted further

discovery or that the trial court is authorized to reexamine the issue of class certification. *See* Pl. Mot. at 3. Rather, the Court's remand to the trial court "for further proceedings consistent with [its] opinion" (*Cullen*, 2013-Ohio-4733, at ¶ 53) leaves only one course open to the trial court, namely, to vacate its order certifying the class and have the case proceed as an individual action.

II. PLAINTIFF'S ARGUMENTS REGARDING DISCOVERY ARE IMPERMISSIBLE ATTEMPTS TO REARGUE ISSUES ALREADY PRESENTED TO AND REJECTED BY THIS COURT

In moving for reconsideration, Plaintiff relies heavily on the argument that he is entitled to pursue more discovery in the trial court and then another chance to seek class certification. Plaintiff, however, fully presented his contentions regarding discovery to this Court in his brief on the merits. *See* Pl. Merits Br. at 2, 5-10, 26-28, 42, 45-46, 50. He may not reargue those contentions in a motion for reconsideration.¹ *See* S.Ct.Prac.R. 18.02(B).

Furthermore, at the same time that Plaintiff argued to this Court that further discovery was needed, Plaintiff also made other arguments in his merits brief that contradicted the purported need for further discovery. For example, Plaintiff claimed that in granting class certification the trial court "carefully assess[ed] the testimony and exhibits that had been furnished by both parties during the lengthy class action proceedings," that the trial court had previously been presented with "deposition transcripts, affidavits, expert reports and hundreds of pages of records," and that the "evidentiary sufficiency of Plaintiff's claims for relief had thus been thoroughly tested before class certification was even broached." (Emphasis sic.) Pl. Merits Br. at 24. At oral argument before this Court, Plaintiff's counsel acknowledged that there is "a

¹ Plaintiff attached to his motion a copy of his second sanctions motion filed in the trial court. Plaintiff inaccurately states that this motion remains pending in the trial court. *See* Pl. Mot. at 4. While the motion had not been ruled upon at the time the notice of appeal was filed, the trial court subsequently issued an entry rendering all pending motions moot, including Plaintiff's second motion for sanctions. *See Cullen v. State Farm Mut. Auto. Ins. Co.*, Cuyahoga County C.P. No. CV-555183 (December 16, 2010 Entry).

well-developed evidentiary record" in this case.²

In concluding that class certification was improper in this case, this Court conducted its own "rigorous analysis of the evidence presented by the parties." *Cullen*, 2013-Ohio-4733, at ¶ 52. If the record had been insufficiently developed, leaving unanswered questions about the propriety of class certification, this Court's rigorous analysis would have revealed that lack of evidentiary development. But this Court did not merely find that Plaintiff had failed to support his motion for class certification with sufficient evidence. Rather, the Court's rigorous review of the record affirmatively "reveal[ed] that individual issues overwhelm the questions common to the class." *Id.* at ¶ 36; *see also* Point I *supra*.

In the guise of seeking a remand for further discovery, Plaintiff extensively rehashes arguments already presented to this Court and disagrees with this Court's evaluation of the evidence. For example, Plaintiff reargues the evidence regarding the nature and character of the communications between policyholders and individual State Farm agents, repair shop personnel and Lynx representatives. *See* Pl. Mot. at 5. The parties' merits briefs thoroughly discussed the issue as to whether the evidence showed that communications with policyholders were individual or common. *Compare* Pl. Merits Br. at 46 (arguing that Lynx operators "were expected to adhere to the scripts") *with* Pl. Mot. at 5 ("the insurer's representatives were expected to adhere closely to their scripts"); *see also* State Farm ("SF") Merits Br. at 43-45; SF Merits Reply Br. at 17-18. This Court, based on its own review of the extensive factual record, correctly decided that resolving Plaintiff's claims would require an individualized inquiry into the content of these

² 2/26/13 Oral Argument before Ohio Supreme Court at 21:35, available at <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=138271>. Likewise, at the class certification hearing before the trial court, Plaintiff's counsel referred to the "[e]xtensive discovery in this case * * * ." Transcript of 4/14/10 Class Certification Hearing at p. 13, *Cullen v. State Farm Mut. Auto. Ins. Co.*, Cuyahoga County C.P. No. CV-555183.

communications. *Cullen*, 2013-Ohio-4733, at ¶ 37. Plaintiff's argument on this point is simply impermissible reargument of issues already presented to and decided by the Court.

Likewise, Plaintiff improperly takes issue with this Court's discussion of the individual issues raised by Plaintiff's claims that insureds were contractually entitled to have their windshields returned to preloss condition. *See* Pl. Mot. at 7-8. In its analysis, this Court discussed extensively how the opinions of Plaintiff's own experts demonstrated the overwhelmingly individual nature of issues of preloss condition. *Cullen*, 2013-Ohio-4733, at ¶¶ 42-48. As the Court noted, Plaintiff's experts acknowledged the "'huge variation that occurs in any repair, even in controlled conditions,'" variations in transparency achieved by windshield repairs, the lack of reports and statistics on windshield repairs causing delamination and spalling of glass, the fact that there is "'no strong data' showing that the strength of repaired glass does not equal the original strength of laminated glass," and so on. *See id.* Accordingly, citing *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 138, 835 N.E.2d 801 (2005), this Court held that Plaintiff's expert testimony "raises more individual questions than it resolves, and deciding whether State Farm breached any duty to restore policyholders' windshields to preloss condition will require an individual inspection of each class member's windshield to determine the preloss and postrepair conditions, and these individualized issues necessarily predominate over any questions common to the class." *Cullen*, 2013-Ohio-4733, at ¶¶ 48-49.

In his motion for reconsideration, Plaintiff does not explain how further discovery from State Farm is going to change this result, based as it is on Plaintiff's own experts' testimony. Rather, Plaintiff makes the startling and erroneous assertion that his experts' testimony "was not essential to the claims that had been raised, and was introduced solely to rebut State Farm's theory that the repairs were indistinguishable from windshield replacements." (Emphasis sic.)

Pl. Mot. at 7. In fact, Plaintiff asserted a breach of contract claim based on the allegation that windshield repair does not return a car to its preloss condition, and relied on his experts in an attempt to support that claim. *See Cullen v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. No. 95925, 2011-Ohio-6621, 970 N.E.2d 1043, ¶ 33 (8th Dist.) (discussing Plaintiff's contract claim that "he needs to show only that State Farm had an obligation to restore the claimant's vehicle to preloss condition" and his purported offer of "expert testimony to show that a windshield can never be repaired to restore it to preloss condition"); *see also id.* at ¶ 56; Pl. Merits Br. at 36-39. This Court's discussion of Plaintiff's experts' testimony directly addresses whether predominance is satisfied with regard to that claim, and correctly held that it is not.

Plaintiff also claims that he is entitled to further discovery regarding replacement costs. Pl. Mot. at 5-6. In his merits brief, Plaintiff made the same argument, contending that "[a] substantial portion of the internal records that State Farm will be disclosing upon remand are expected to bear directly upon the insurer's record retention practices, replacement cost databases, and cash-out payment procedures." Pl. Merits Br. at 45. Thus, that argument was presented to the Court and may not be reargued. *See S.Ct.Prac.R. 18.02(B)*. In any case, it is evident from the record that Plaintiff was provided with voluminous discovery of State Farm documents and had ample opportunity to depose State Farm employees. As State Farm pointed out in its reply brief, Plaintiff vainly "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" – despite the fact that State Farm had presented uncontradicted evidence that it does not determine the hypothetical cost to replace a windshield that is going to be repaired and that it does not maintain such information in its files or databases. *See SF Merits Reply Br.* at 17.

In his present motion (*see* Pl. Mot. at 5), Plaintiff also directly attacks this Court's conclusion, in its predominance analysis, that significant individual questions existed as to "the costs of repairing or replacing [a windshield], and the amount of the deductible in establishing State Farm's liability to any given class member." *See Cullen*, 2013-Ohio-4733, at ¶ 38; *see also id.* at ¶¶ 40-41. In his motion, Plaintiff attempts to reargue the Court's evaluation of the evidence on this point, faulting the Court's purported reliance upon the testimony of State Farm employee Shawn Kobel³ and claiming that "Plaintiff's own expert, Thomas Uhl, had detailed in his own affidavit how the Vehicle Identification Numbers (VIN) and databases such as the NAGS Catalog are available to accurately determine the cost of replacing any windshield in any modern vehicle." (Emphasis sic.) Pl. Mot. at 5. Plaintiff's contentions are an impermissible attempt to reargue points already presented to the Court regarding Mr. Uhl's affidavit and VIN numbers. *See* Pl. Merits Br. at 44-46. Furthermore, Mr. Uhl's affidavit, which discussed two potential replacement windshields for Plaintiff's car, simply illustrates the fact that (as this Court ruled) multiple replacement windshields at different prices would be available for many cars, creating individual fact questions for each class member. *See Cullen*, 2013-Ohio-4733, at ¶ 41; SF Merits Reply Br. at 14-15. Plaintiff also reasserts his incorrect argument that, because State Farm provides windshield replacements under its warranty program, it must also be able to determine their price for purposes of ascertaining the class members' damages, Pl. Mot. at 5-6, despite the fact that the replacement price at the time and place of the original repair is the relevant figure for damages, not the price paid later by State Farm under its warranty program. Again, this point was already argued in Plaintiff's merits brief, *see* Pl. Merits Br. at 41, and cannot be raised in a

³ Plaintiff mistakenly identifies Shawn Kobel (whose first name Plaintiff misspells as "Sean") as State Farm's expert. *See* Pl. Mot. at 5. Mr. Kobel is a State Farm employee with experience and knowledge as to, *inter alia*, State Farm's methods of pricing replacement windshields. *See* Affidavit of Shawn Kobel at ¶ 1, SF Supplement II at p. 361.

motion for reconsideration. *See* S.Ct.Prac.R. 18.02(B).

In short, Plaintiff has not shown that more discovery or evidence would change the character of the extensive evidence that was reviewed and evaluated by the Court in reversing class certification. Moreover, Plaintiff's arguments regarding discovery are repeated from his merits brief and constitute improper reargument that is prohibited by Supreme Court Rule 18.02(B). Accordingly, Plaintiff has provided no basis for this Court to reconsider its opinion or to order a remand for more discovery on class issues.

III. THE COURT'S HOLDING REGARDING THE PREPONDERANCE OF THE EVIDENCE STANDARD FOR CLASS CERTIFICATION DOES NOT WARRANT GIVING PLAINTIFF MORE DISCOVERY AND ANOTHER CHANCE AT CLASS CERTIFICATION

Plaintiff also erroneously contends that reconsideration is warranted because the Court supposedly adopted a "new" preponderance of the evidence standard for class certification, and that Plaintiff therefore should be permitted a further opportunity to gather still more evidence and move again for class certification. *See* Pl. Mot. at 3, 8.

In fact, as this Court stated in its opinion, this Court has long held that a party seeking class certification pursuant to Civ. R. 23 "bears the burden of demonstrating by a preponderance of the evidence that the proposed class meets each of the requirements set forth in the rule." *Cullen*, 2013-Ohio-4733, at ¶ 15 (citing *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 94, 521 N.E.2d 1091 (1998)). Indeed, the preponderance standard is the "typical" standard, not a heightened standard, and it is the standard that is "assume[d]" to apply "[i]n the absence of authority to the contrary." *Welsh v. Estate of Cavin*, 10th Dist. No. 02AP-1328, 2004-Ohio-62, ¶ 24.⁴ Accordingly, there is no unfairness or surprise in holding Plaintiff to the preponderance of

⁴ Even if the Court had adopted a new legal standard, the Court has recognized the propriety of applying a new legal standard in deciding the merits of an appeal, without the need for remand to permit the trial court or appellate court to reexamine the issues. *See Am. Chem. Soc'y v.*

the evidence standard.

Moreover, State Farm has consistently argued throughout this case that it was Plaintiff's burden to *prove* that the Rule 23 requirements were met. *See* Def.'s Mem. in Opp. to Pl. Mot. for Class Certification, filed 2/2/2010 ("Def.'s Trial Ct. Mem.") at 28 ("Rule 23(B)(3) requires plaintiff to *prove* that: (i) common issues of fact and law 'predominate over' any individual issues, **and** (ii) a class action would be superior to all other methods of resolving the disputes raised in the complaint and is 'manageable.'") (Italics added.); *see also id.* at 60 ("Plaintiff's rule 23(B)(2) class requires *proof* that State Farm 'has acted or refused to act on grounds generally applicable to the class * * * .'") (Emphasis added.). Likewise, Plaintiff is incorrect in asserting that "State Farm ha[s] never gone so far as to argue that a resolution of disputed issues of fact was necessary." Pl. Mot. at 2. Contrary to Plaintiffs' assertion, State Farm has also consistently argued that a court as part of its Civ.R. 23 analysis may appropriately resolve disputed issues not only of law but also of fact. *See* Def.'s Trial Ct. Mem. at 29-30 (arguing that "a court should 'resolve *factual* and legal disputes that strongly influence the wisdom of class treatment' even if such issues 'overlap the merits'") (Emphasis added.) (Citation omitted.); *id.* at 30 (arguing that "in conducting its analysis of whether the prerequisites for class certification are met, a court 'has the power to test disputed premises,' legal or factual, that implicate the claim's amenability to class action treatment") (Citations and internal quotation marks omitted.). ⁵

Leadscope, Inc., 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 74.

⁵ Plaintiff also repeats his incorrect assertion that State Farm argued only for a standard that Plaintiff's claims "must be at least 'colorable.'" *See* Pl. Mot. at 3. As State Farm pointed out in its Reply Brief (at 1-2), State Farm's primary argument was for the application of a standard like that set forth in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), and State Farm did not waive that argument by also contending that Plaintiff's claims were not colorable. In any case, Plaintiff's arguments regarding State Farm's supposed espousal of a "colorability" standard were made in Plaintiff's merits brief and cannot be reargued now. *See* Pl. Merits Br. at 25-26; *see also* SF Merits Reply Br. at 1-2.

Thus, contrary to Plaintiff's contentions (Pl. Mot. at 2-3), State Farm's position in its briefing to this Court that Plaintiff had to make an evidentiary showing *proving* that the requirements for class certification were met was not new to Plaintiff. Indeed, Plaintiff argued to this Court that the trial court had correctly and carefully evaluated the evidence in granting class certification (*see* Pl. Merits Br. at 24-25) – an argument with which this Court did not agree.

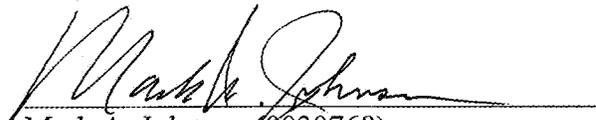
Moreover, this Court's interpretation of the law in Ohio, including the standard that must be met for relief under the Civil Rules, normally applies retrospectively, even beyond the case at hand, as though that law had always applied. *See Kohus v. Hartford Ins. Co.*, 8th Dist. No. 83071, 2004-Ohio-231, ¶ 4, citing *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 210, 129 N.E.2d 467 (1964). Thus, even if the preponderance of the evidence standard were new (which it is not), the adoption of that standard would still not provide a basis for permitting further discovery and a renewed motion for class certification in this case.

Accordingly, there was nothing unfair or inappropriate in this Court's application of a preponderance of the evidence standard in evaluating the propriety of class certification, and Plaintiff is not entitled to return to the trial court and relitigate issues of class certification.

CONCLUSION

For all the foregoing reasons, State Farm respectfully submits that the Court should deny Plaintiff's motion for reconsideration in its entirety.

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 Memorandum in Response to Appellee's Motion for Reconsideration was served upon the following by electronic and first class U. S. mail, this 25th day of November, 2013:

<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>
--	--

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

Robert N. Webner
Robert J. Krummen
Vorys, Sater, Seymour & Peace LLP
52 East Gay Street
Columbus, OH 43215
RNWebner@vorys.com
RJKrummen@vorys.com

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

Elizabeth Wright
Brian Troyer
Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114
Elizabeth.Wright@thompsonhine.com
Brian.Troyer@thompsonhine.com

Stephanie Chmiel
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-6101
Stephanie.Chmiel@thompsonhine.com

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

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

Of Counsel for Ohio Alliance for Civil Justice

Michael H. Carpenter
Katheryn M. Lloyd
Carpenter, Lipps & Leeland, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
carpenter@carpenterlipps.com

Counsel for Amici Curiae Nationwide
Property and Casualty Insurance Company,
Nationwide Mutual Fire Insurance Company,
Nationwide Insurance Company of America,
Nationwide Assurance Company, and
Nationwide General Insurance Company



Robert J. Tucker (0082205)