ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 12-0535

MICHAEL E. CULLEN,
Plaintiff-Appellee,

-vs-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO, CASE NO. 95925

MEMORANDUM OPPOSING JURISDICTION OF PLAINTIFF-APPELLEES, MICHAEL E. CULLEN

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STATEMENT OF ISSUES PUBLIC AND GREAT GENERAL IMPORTANCE

This is an interlocutory appeal that has been brought under R.C. §2505.02(B)(5), which allows immediate review of the single question of whether the trial judge abused his discretion in granting class certification. The merits of the claims for relief that have been brought by Plaintiff-Appellee, Michael E. Cullen, have not yet been reached, and substantial discovery still needs to be concluded upon remand. Thus far in the common pleas court proceedings, two separate Motions to Compel have been granted that had been filed by Plaintiff, and discovery sanctions were imposed against Defendant-Appellee, State Farm Mutual Insurance Company ("State Farm"). By all appearances, the insurer has been unfazed by these rebukes. Thousands of pages of records still need to be produced, and a Second Motion for Discovery Sanctions was pending when this appeal was commenced.

The seven Propositions of Law that had been devised by State Farm all suffer from the same fundamental flaw. Each of the novel contentions attacks a contrived theory of liability that had never been pursued throughout these proceedings. Not once has Plaintiff argued merely that he was entitled to a payment under his policy even though his windshield was repaired. *Defendant-Appellant's Memorandum in Support of Jurisdiction ("Defendant's Memorandum"), p. 4.* Furthermore, the debate over whether the glass patches were capable of restoring the vehicles to their pre-loss conditions is just one of several disputes on the merits, and hardly dispositive. *Id.*

As properly recognized by the trial judge and appellate court below, Plaintiff's claims for relief are founded upon the unique features of the State Farm comprehensive collision coverage that was in force in Ohio during the relevant period. In contrast to traditional collision coverages, the State Farm policies did not allow the insurer to arrange for damaged vehicles to be repaired at its expense. Instead, each policyholder who successfully submitted a claim was entitled to a payment for the covered portion of

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the loss, less the applicable deductible (if any). Former National Glass Manager David Williams ("Williams") confirmed that "the insured is entitled to get the check for the cost of repair, and they have no obligation to perform those repairs[.]" *R. 125, Plaintiff's Reply Class Cert. Exhibit Q, pp. 114-115.* State Farm Agent Brian Karol testified that:

> Q. State Farm's obligation isn't to repair my car, it's to pay me for the cost of repairing my car, correct?
>
> A. Yes. [emphasis added]

R. 31 & 79, Brian Karol Deposition, p. 37.

The present action is further restricted to claims that were approved by the insurer and involved only windshield damage. The discovery that Plaintiffs have completed thus far has confirmed that a program had been developed by State Farm that was designed to ensure that the cracked or chipped glass was "repaired" with a short-lived chemical compound, which cost the insurer as little as $19.00. An administrative agent, Lynx Services ("Lynx"), provided Customer Service Representatives ("CSR's") who were trained to follow scripts and sell the purported benefits of the "repairs." There is no dispute that the policyholders were never told that they were actually entitled to a payment equal to the cost of replacing the windshield (referred to as "cash out"), which would have averaged $342.00 even after the deductibles were applied. The two primary issues that will need to be resolved on a class wide basis thus are: (1)whether the standardized insuring agreements did entitle the policyholders to a "cash out" payment consistent with management's acknowledgements; and (2) whether the practice of furnishing the cheap glass fillers instead violated the terms of the policies, the responsibilities imposed by the Ohio Department of Insurance, and the fiduciary obligations that are owed under Ohio law.

Since the overwhelming majority of motor vehicle insurance policies allow the insurer - not the insured - to elect between a repair or cash payment, the overly-dramatic concerns that have been expressed by Defendant's *amici* are misplaced. State

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Farm Director Wendy Rogers ("Rogers") had explained that pure indemnity coverage was being afforded and her company was not in the "repair business." *Deposition of Wendy S. Rogers taken December 11, 2009, p. 110.* Because of the distinctive features of State Farm's comprehensive collision coverage and the remarkably aggressive repair campaign that had been established, the decisions that were rendered below are confined to their facts and possess little precedential value.

Once discovery has been concluded upon remand, the merits have been adjudicated, and a final order has been issued by the trial court, the losing party will have every right to a direct appeal on the merits. No issues of public and great general important are therefore at stake at this stage in the proceedings.

STATEMENT OF THE CASE AND FACTS

Plaintiff is seeking in this litigation, on behalf of himself and all similarly situated policyholders, to recover insurance benefits that should have been paid by State Farm once a valid claim had been made and approved for cracked or chipped motor vehicle windshields. There is actually no meaningful dispute over whether the repair campaign could be reconciled with the legal and contractual responsibilities that were owed to the claimants. Even State Farm Director Rogers appreciated the inappropriateness of trying to steer an insured by "selling" anything to them. *R. 113, Plaintiff's Supp. Class Cert., Exhibit H, p. 81.* Doing anything more than explaining that which the policy offers would be improper in her view. *Id., pp. 86-87.* Senior Glass Manager Williams was in full agreement. *Id., Exhibit G, pp. 108-109.* Team Manager Steven Burk ("Burk") also acknowledged that attempting to influence a claimant to accept less in benefits was improper. *Id., Exhibit I, pp. 50-51.* Estimatic Section Manager Anthony N. Ferrara understood that knowingly making misrepresentations to claimants violated the Unfair Claims Settlement Practices Act. *Id., Exhibit J, p. 81.* He conceded during his deposition that:

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> Q. And the script that went out the door and down to LYNX that they were to follow is one that met your approval, correct?
>
> A. Yes, sir.
>
> Q. You expected them to follow it, correct?
>
> A. Yes, sir.
>
> Q. *** Now, you personally knew that it would be inappropriate to tell LYNX to sell the repair, correct? That's -- that violates the philosophy you had been trained in, correct?
>
> A. I guess you could say that, yes.

Id., pp. 85-86. Not to be left out, State Farm Agent Karol recognized that trying "to talk someone into a choice without disclosing [to] them the full facts" was "misleading" and "inappropriate." *Id., Exhibit D, p. 19.*

As previously noted, the trial court was forced to grant not just one, but two, motions to compel that had been filed by Plaintiffs. *See Journal Entries dated April 26, 2006 and April 25, 2008.* While vigorously opposing the second application, State Farm had assured the trial judge that: "In response to that first set of discovery, defendant produced every document having anything to do with Plaintiff or his insurance claim." *R. 65, Defendant's Brief in Opposition and Motion to Strike dated December 6, 2007, p. 6.* Deposition questioning thereafter revealed that thousands of pages of records that had been specifically sought had been withheld from production. Even after discovery sanctions were imposed, requested materials were slowly released to Plaintiffs only when no other options remained. *See Journal Entry dated July 27, 2009.* The trial court was unable to rule upon Plaintiff's Second Motion for Discovery Sanctions before State Farm commenced the instant appeal on October 27, 2010. *Brief of Plaintiff-Appellees, pp. 5-10.*

After conducting a day-long hearing during which deposition testimony and numerous exhibits were evaluated, the trial judge issued a comprehensive opinion

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thoroughly analyzing each and every requirement for class certification. *Defendant's Memorandum, Exhibit D.* In rejecting State Farm's ensuing appeal of the order, the Eighth District furnished a well-reasoned opinion that faithfully adhered to the controlling precedents. *Id., Exhibit A.* State Farm's unrelenting castigations of these rulings were reviewed again when the Application for Reconsideration and Consideration *En Banc* was submitted. Not one of the twelve jurists on the court (including the dissenting judge) found any need to disturb the unerring holdings. *Id., Exhibits B & C.*

ARGUMENT

With few exceptions, each of the spurious contentions set forth in Defendant's Memorandum have been addressed and refuted in both the trial court's decision and the appellate court's opinion. *Defendant's Memorandum, Exhibits A & D.* There is little that Plaintiff can now add to that sound analysis. The remainder of this Memorandum will therefore be devoted to raising a few additional points in response to the seven Propositions of Law that had been fashioned in an effort to pique this Court's interest in this otherwise unremarkable interlocutory appeal.

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.

Even if this Court were to adopt the first Proposition of Law, State Farm would hardly be entitled to a reversal. As is evident from the trial judge's comprehensive Memorandum of Opinion and Order, he had dutifully considered the underlying facts while remaining mindful that State Farm had yet to fulfill its discovery obligations. *Defendant's Memorandum, Exhibit D, pp. 1-7.* For example, he evaluated the evidence that had been produced in support of the Named Plaintiff's individual claim and analyzed the applicable terms of the State Farm collision coverage, including the amendments. *Id., pp. 1-3.* The State Farm "repair campaign" was also considered,

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which had been established through the depositions that had been taken of several high-ranking officials and the internal records that the insurer had been willing to produce. *Id., pp. 4-7.* The insinuation that the trial judge simply adopted unsubstantiated allegations is completely baseless, and is particularly insulting given that he had conducted a lengthy hearing during which both parties were freely allowed to contest each other's evidentiary submissions.

State Farm has neglected to mention that its attorneys had successfully convinced the trial judge early in the proceedings to entertain dispositive motions before class certification was broached. *See Journal Entry dated August 26, 2005.* Following the presentation of deposition transcripts, affidavits, expert reports, and hundreds of pages of records, the court denied State Farm's Motion for Summary Judgment *in toto*. *See Journal Entry dated March 29, 2007.* The evidentiary sufficiency of Plaintiff's claims for relief had thus been thoroughly tested before class certification was addressed.

Defendant's belief that the trial judge should have done still more before class certification was granted is irreconcilable with Civ. R. 23(C)(1), which requires certifiability to be resolved "[a]s soon as practicable after the commencement of [the] action[.]" Upon examination of the corresponding federal provision, the United States Supreme Court declared that:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action ***' [emphasis added]

Eisen v. Carlisle and Jacquelin (1974), 417 U.S. 156, 177-178, 94 S.Ct. 2140, 2152, 40

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L.Ed.2d 732; see also, *American Pipe & Const. Co. v. Utah* (1974), 414 U.S. 538, 547, 94 S.Ct. 756, 763, 38 L.Ed.2d 713; *Bedford v. Cleveland* (April 3, 1975), 8th Dist. No. 33787, 1975 W.L. 182695. Ohio courts have long recognized that the merits of the action may not be adjudicated during class certification proceedings. *Ojalvo v. Board of Trustees* (1984), 12 Ohio St. 3d 230, 233 466 N.E. 2d 875; *Nagel v. Huntington Natl. Bank* (8th Dist. 2008), 179 Ohio App. 3d 126, 132, 2008-Ohio-5741, 900 N.E. 2d 1060, 1064; *Dubin v. Security Union Title Ins. Co.* (8th Dist. 2005), 162 Ohio App.3d 97, 2005-Ohio-3482, 832 N.E.2d 815 ¶ 21-25.

If the trial court can be criticized for anything, it is that the entry of class certification was delayed for several years while State Farm contested the merits through its unsuccessful motion for summary judgment. This first Proposition of Law is thus not only contrary to Civ. R. 23(C)(1), and the great weight of legal authority, but also fails to justify a reversal of the trial court's ruling.

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.

This Proposition of Law is apparently predicated upon the Motion to Exclude the Testimony and Reports of Craig Carmody and Gary Derian and Motion to Exclude Testimony and Report of Peter J. Hildebrand that had been filed by State Farm on February 24, 2010. Plaintiff had timely opposed both applications. As was developed in that Memorandum, Craig Carmody, P.E. and Gary A. Derian, P.E. were both mechanical engineers who had confirmed that the glass patching process always leaves a blemish in the windshield, always deteriorates over time, and is always incapable of restoring the vehicle to its pre-loss condition. Peter J. Hildebrand was a former claims manager and insurance industry expert who had been retained to address whether State Farm's internal practices were consistent with industry regulations and the insurer's own

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policies.

In the entry of class certification, the only expert who was cited by the trial judge had actually been retained and presented by State Farm. *Defendant's Memorandum, Exhibit D, p. 4, paragraph 12.* Consequently, State Farm never argued in the forty page brief that was submitted to the Eighth District that the trial judge had somehow erred by failing to grant its "*Daubert* Motions." This Proposition of Law is therefore not just legally incorrect, and not just irrelevant to the decision on appeal, but is also being asserted for the first time in these proceedings.

PROPOSITION OF LAW NO. III: A CLASS DEFINITION MAY NOT CONDITION CLASS MEMBERSHIP ON DISPUTED, INDIVIDUAL ELEMENTS OF LIABILITY.

The third Proposition of Law does not seek to establish some new legal principle or resolve a conflict amongst the appellate courts. This Court is being asked instead to re-examine the evidence and analysis that was furnished during the class certification proceedings and "correct" the lower courts' determination that common issues of law and fact predominate. *Defendant's Memorandum, pp. 11-12.* But Class action status cannot be defeated simply by identifying some differences in the particularized fact patterns, as this Court has explained that:

> The mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification where there are facts common to the class members.

In re Consolidated Mortgage Satisfaction Cases, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556 ¶ 10. Although the recovery due each class member will not be identical, varying amounts of damages is not an adequate ground for finding that a class action would be unmanageable. *Carder Buick-Olds Co. v. Reynolds & Reynolds, Inc.* (2nd Dist. 2002), 148 Ohio App. 3d 635, 650, *2002-Ohio-2912, 775 N.E.2d 531 ¶62 ("****

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[T]he overwhelming weight of authority has held that 'a trial court should not dispose of a class certification solely on the basis of disparate damages.'" quoting *Hamilton* v. *Ohio Sav. Bank*, 82 Ohio St.3d 67, 81, 1998-Ohio-365, 694 N.E.2d 442).

In anticipation of the class certification hearing, an affidavit was submitted from Autobody Repair Shop Owner Thomas Uhl ("Uhl"). *R. 125, Plaintiff's Reply in Support of Motion for Class Certification dated February 26, 2010, Exhibit N.* Uhl's testimony established the cost of Plaintiff's replacement windshield on the date of loss, based upon available pricing sources (including Mitchell's and NAGS, which are routinely used by State Farm and the industry). The trial court could therefore find that the cost of windshield replacement at the time of the Named Plaintiff's claim in 2003 was well above his $250 deductible amount ($435.71 for an original equipment manufacturer (OEM) replacement and $329.89 for an after-market windshield). *Id.* There is thus no merit to the notion that State Farm should be allowed to keep the benefits that remain due to the policyholders because calculating the amount that is owed would simply be too difficult to even attempt.

Earlier in this appeal, State Farm had furnished assurances that the company remains ready, willing, and able "to provide windshield replacement (with payment of deductible) if a policyholder is unhappy with a repair." *Defendant's Court of Appeals Brief, p. 37* (citation omitted). The insurer has thus created a dilemma for itself. If every potential class member can still receive a windshield replacement, provided that they somehow appreciate the availability of this option, then State Farm must be capable of precisely calculating the amount that must be paid to the contractors to provide the glass and perform the work. In other words, if the replacement costs can be determined for any vehicle for purposes of the purported "warranty" program then they can be determined for purposes of this class action. The only difference is that under the latter approach the payments will be issued directly to the policyholders (*i.e.* cash-

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out) as required by the policies instead of to the contractors. The cost to State Farm will be the same.

Because a classwide injury is both identifiable and readily calculable, State Farm's reliance upon *Hoang v. E*Trade Group, Inc.* (8th Dist. 2003), 151 Ohio App. 3d 363, 2003-Ohio-301, 784 N.E. 2d 151, and *Linn v. Roto Rooter, Inc.*, 8th Dist. No. 82657, 2004-Ohio-2559, 2004 W.L. 1119619, is misplaced. In both cases, complicated classes had been proposed that would have included substantial numbers of members who had suffered no damages at all. A class-wide injury did not exist in either instance. That cannot be a concern in the case *sub judice*, because the trial judge has defined the class in a manner that will eliminate the prospects for "undamaged" members. *Defendant's Memorandum, Exhibit D, p. 8.* This Court should therefore refuse to consider this Proposition of Law, which seeks nothing more than a re-evaluation of a discretionary determination.

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.

As with the prior Propositions of Law, this one simply criticizes the lower courts' evaluation of the testimony and exhibits that had been available during the class certification proceedings. Once again, there is no truth to the notion that the courts' findings were drawn out of thin air. As long required by Ohio Admin. Code 3901-1-54(D)(1) & (2), all of the information needed to identify the class members and locate them has been securely maintained in State Farm's databases. All were, and many still are, State Farm policyholders who were required to submit their names, addresses, vehicle make, model, year, VIN number, and other personal information in order to obtain coverage. Through the VIN number alone, the precise vehicle model and options, including the type of windshield installed, can be readily identified. State Farm Director

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Rogers confirmed that her company has maintained all this rudimentary claim data for the last twenty-five years. *Deposition of Wendy Rogers, p. 165.*

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. One would have thought that this information would have been quickly produced years ago if the materials supported the newly devised position that no practical method exists for identifying the class members and determining the replacement costs payments that remain due to them. The evidentiary record is already decidedly to the contrary. But even in that unlikely event, the trial judge can either adjust or even decertify the class. "A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in a litigation of class actions." *North Shore Auto Fin., Inc. v. Block* (July 24, 2003), 8th Dist. No. 82226, 2003-Ohio-3964, 2003 W.L. 21714583, p. *3. For that reason, all doubts should be resolved in favor of certification, particularly before discovery is complete. *Baughman vs. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 487, 2000-Ohio-397 727 N.E.2d 1265; see also *Ritt v. Bill Blanks Ents.* (8th Dist. 2007), 171 Ohio App. 3d 204, 212, 2007-Ohio-1695, 870 N.E. 2d 212, 218 ¶ 34; *In re Rogers Litigation*, 6th Dist. No. S-02-042, 2003-Ohio-5976, 2003 W.L. 22533670 ¶ 36; *Helman v. EPL Prolong*, 7th Dist. No. 2001 CO 43, 2002-Ohio-5249, 2002 W.L. 31170363 ¶ 20. No sound justification therefore exists for this Court to "correct" the trial judge's discretionary decision through this Proposition of 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.

In yet another case-specific Proposition of Law, State Farm is asking this Court to

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accept the unsubstantiated assertions of its loyal officials and managers as true and find an abuse of discretion. For strategic purposes, Defendant's attorneys had conceded the "commonality" requirement during the class certification hearing. *Defendant's Memorandum, Exhibit D, p. 9, paragraph 7.* Oddly, the dissenting Judge nevertheless criticized the trial court for failing to deny certification on this uncontested basis. *Id., Exhibit A, pp. 23-26.* Seemingly unconcerned that this requirement was waived in open court, Defendant is now attempting to resurrect the commonality defense.

When he was deposed, the Lynx Vice President, Peter Cole, conceded that the CSRs were not supposed to ad-lib anything during their conversations with State Farm windshield damage claimants. *Deposition of Peter Cole taken February 10, 2006, p. 66.* They were expected to adhere to the scripts that had been approved by State Farm, and were monitored and graded on their performance. *Id., p. 66.* There has never been any evidence that the policyholders were ever advised, even by a "Maverick" CSR, that the policy provided a "cash-out" option. Even though half a dozen company officials and managers have testified to the contrary, State Farm's attorneys continue to insist that no such right actually exists under the policies. *Defendant's Court of Appeals Brief, pp. 14 & 20-22.* The contractual dispute is thus common to each class member and is ripe for a class-wide resolution.

Given the voluminous evidentiary record, little of which has been acknowledged in Defendant's Memorandum, the trial judge was under no obligation to find that there had been any meaningful "individual" treatment of the class members. With the assistance of its administrative agent, Lynx, State Farm pursued an established policy of promoting the chemical-patch "repairs" while the cash-out option was being deliberately suppressed. The "Overview" to the Leader's Guide instructed the CSRs as follows:

> *** The more repairs that LYNX dispatches, the greater cost savings to State Farm. **Be proactive in qualifying windshield damage to ensure that each and every opportunity to qualify damage is pursued to its**

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fullest extent. [emphasis original]

R. 34, Plaintiff's Appendix to Memorandum in Opposition to Motion for Summary Judgment, Exhibit 3, p. 2. Rather than being encouraged just to provide critical information, the CSRs were exhorted to:

Sell! Sell! Sell!

Id., p. 4 (emphasis original). They were even furnished with "**Selling Tips**," such as varying their voice tone and stressing "key points" while talking to the policyholders. *Id., p. 5 (emphasis original).* The CSRs were expected to use a "sense of enthusiasm regarding a qualified repair and trying to have the policyholder understand the benefits of a repair." *R. 113, Plaintiff's Supp. Class Cert., Exhibit C, p. 75.* The "sell, sell, sell" directive had been promulgated by State Farm and not Lynx. *Id., p. 76.*

Vice President Cole explained that the "repair ratios" were important to his company. *R. 113, Plaintiff's Supp. Class Cert., Exhibit C, pp. 119-120.* A higher ratio "lowers the overall cost of indemnity" to the insurer. *Id., p. 120.* Not surprisingly Lynx's objective, based upon State Farm's instructions, was to maximize the repair ratios. *Id., pp. 120-121.* The Participant Guide specifically directed that:

> Each CSR is required to adhere to the qualifying process and make every effort to keep the "repair ratio" at a high level. Team leaders will receive a daily report on the team's repair statistics.

R. 34, Plaintiff's Appendix filed November 6, 2006, Exhibit 5, p. 8.

Apart from the availability of the cash-out indemnity payments, the insurer also concealed the formidable disadvantages to the quick-fix repairs. While in possession of studies and reports warning that the chemical patches were short-lived and incapable of restoring full optical clarity, the carrier designed and implemented a script extolling the purported "benefits" of the "repairs." *R. 35, Plaintiffs' Memo. in Opp. Summary Judgment, pp. 6-8; R. 113, Plaintiff's Supp. Class Cert., Exhibit B, p. 127 & 140.* Director Rogers conceded that part of the sales pitch included advising the policyholders

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that their damaged windshields could not be recycled, even though she knew that was untrue. *Wendy Rogers Depo., pp. 87-88.* No issues of public and great general importance are therefore implicated by this ill-conceived Proposition of Law.

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.

This baffling Proposition of Law is supported by just four sentences of "analysis" and a citation to a decision that was issued by this Court in another class-action proceeding just two years ago. *Defendant's Memorandum, pp. 14-15.* That case reaffirmed the fundamental principle that the "the trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St. 3d 91, 95, 2010-Ohio-1042, 926 N.E. 2d 292, 296, ¶12, citing *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St. 3d 200, 201, 509 N.E. 2d 1249. The Named Plaintiff, Michael E. Cullen, had been a State Farm policyholder for approximately eighteen years and is ideally positioned to represent every potential class member. *Plaintiff's Memorandum, Exhibit D, p. 9.* Any concerns that State Farm may still harbor with regard to the subclasses therefore should be addressed to the trial judge upon remand. There is no plausible reason for re-exploring the settled legal issue that has been raised in this cryptic Proposition of Law.

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.

The final Proposition of Law takes issue with the common pleas court's determination that certification is warranted under Civ. R. 23(B)(2), in addition to (B)(3), because injunctive and declaratory relief are "potentially available remedies which can be issued on a class-wide basis in the event that [Plaintiff] prevails upon the

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merits of his claim." *Defendant's Memorandum, Exhibit D, p. 10, paragraph 10.* This subsection permits class certification for purposes of injunctive or declaratory relief when each of the claimants has been victimized by the same policy or practice. *Gottlieb v. South Euclid* (8th Dist. 2004), 157 Ohio App.3d 250, 257-258, 2004-Ohio-2705, 810 N.E.2d 970.

Once again, State Farm is attempting to force a premature ruling upon the merits by insisting that such recoveries are unavailable under its own contrived version of the facts. *Defendant's Memorandum, p. 15.* None of these contentions have been adjudicated by any court thus far in these proceedings, and the trial judge had simply concluded that there could "potentially" be an injunctive or declaratory recovery. Given that State Farm will still be afforded a full and fair opportunity upon remand to contest the merits of Plaintiffs' claims once discovery has been completed, and any adverse rulings can certainly be appealed, no issues of public and great general importance have been established that merit further Supreme Court review.

CONCLUSION

Because the Common Pleas Court's and Eighth District's sound rulings do not implicate any issues of public or great general importance, this Court should decline to exercise jurisdiction over the question of whether an abuse of discretion was committed when class certification was granted.

Respectfully Submitted,

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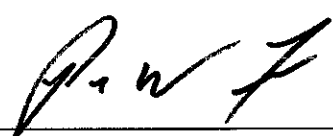

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