IN THE SUPREME COURT OF OHIO

SHANELL GOREE	)	**APPEAL NO. 2020-0963**
	)	
Plaintiff/Appellee,	)	**On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District**
	)	
vs.	)	
	)	**Court of Appeals Case No. CA-19-108881**
NORTHLAND AUTO ENTERPRISES, INC., et al.,	)	
	)	
Defendants/Appellants.	)	

MERIT BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS NORTHLAND AUTO ENTERPRISES, INC., NORTH COAST AUTO SALES, INC., AL LENTSCH, JOE ZAWATSKI, AND LTO FINANCIAL, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is an association of Ohio attorneys and corporate and governmental managers who devote a substantial portion of their time to the defense of civil lawsuits. For over 50 years, OACTA has promoted fairness, excellence, and integrity in the civil justice system by providing resources and education to attorneys and others dedicated to the defense of civil actions.

The issues in this appeal are of great importance to OACTA and its mission of promoting fairness and integrity in the civil justice system. Class action litigation inevitably involves significant stakes for both plaintiffs and defendants. Properly used, class actions allow plaintiffs to aggregate small claims and vindicate rights that would be difficult to pursue individually. *See, e.g., Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Improperly certified, class actions can have in terrorem effects that force expensive settlements of even meritless claims. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *Blair v. Equifax Check Servs*., 181 F.3d 832, 834 (7th Cir. 1999) (the "grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere."). As a result, a decision on class certification often is outcome determinative. *See, e.g.,* Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."). Clear standards for class certification and consistent enforcement of the rigorous analysis required to certify a class are

crucial to a fair civil system.

The two propositions of law at issue impact both the clarity and fairness of the class certification decision. First, misled by certain language in *Cope v. Metro. Life Ins. Co*., 82 Ohio St.3d 426, 696 N.E.2d 1001 (1998), the Eighth District Court of Appeals applied a "presumption" of reliance to certify a common law and consumer fraud class. *Goree v. Northland Auto Enterprises Inc*., 8th Dist. Cuyahoga No. 108881, 2020-Ohio-3457. This holding conflicts with extensive precedent and is contrary to the burden of proof this Court has established for class certification.

Second, the Eighth District improperly limited its consideration of individualized issues impacting liability and damages. In doing so, it misunderstood language concerning the burden of proof to certify a class, and this misunderstanding resulted in it failing to address individualized factual issues that both federal and Ohio courts have held must be resolved to properly certify a class.

This appeal provides an opportunity to clarify these issues and maintain consistency between Ohio and federal class certification standards. For the reasons set forth below, the Court should adopt Appellants' propositions of law and reverse the Eighth District's decision affirming class certification.

II. STATEMENT OF THE FACTS AND CASE

Given the lengthy procedural history of this case and the extensive factual record, in the interest of brevity OACTA adopts Appellants' statement of the facts and case.

III. LAW AND ARGUMENT

A. PROPOSITION OF LAW II: INDUCEMENT AND RELIANCE ARE ESSENTIAL ELEMENTS OF ANY FRAUD CLAIM AND MAY ONLY BE PRESUMED ON A CLASS-WIDE BASIS WHERE LEGALLY MANDATED WRITTEN DISCLOSURES ARE SHOWN TO HAVE BEEN INTENTIONALLY AND UNIFORMLY OMITTED ON A CLASS-WIDE BASIS.

The Eighth District repeatedly referred to a presumption of reliance in affirming class certification. *Goree*, at ¶ 71-77. By relying on a presumption, the Eighth District misread this Court's precedent, disregarded contrary authority, and improperly shifted the burden of proving class certification is proper.

The Eighth District rested its presumption on language in *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 83, 694 N.E.2d 442 (1998), and *Cope*, 82 Ohio St.3d at 435, that proof of reliance "in this case may be sufficiently established by inference or presumption."[1] But both decisions involved the uniform omission of required disclosures in written contracts where there were no oral communications between the parties that could have corrected the alleged omission. *Cope*, at 432-33; *Hamilton*, at 82-83. In other words, the critical language in both decisions was that reliance could be presumed "in this case"—the general "presumption" applied by the Eighth District improperly lifts that word out of context.[2]

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[1] *Baughman v. State Farm Mut. Auto. Ins. Co*., 88 Ohio St.3d 480, 490, 727 N.E.2d 1265 (2000), also discusses a presumption of reliance. However, it cites for that proposition *Basic Inc. v. Levinson*, 485 U.S. 224, 248–49, 108 S. Ct. 978, L. Ed.2d 194, (1988), which involved a fraud-on-the-market theory in the context of federal securities litigation. As discussed below, the presumption recognized in *Levinson* is not applicable outside the securities context.

[2] Courts that reject *Cope* do so based on a reading that it established a legal "presumption." *See, e.g.*, *Garcia v. Medved Chevrolet, Inc*., 240 P.3d 371, 380–81 (Colo. App.2009), aff'd, 263 P.3d 92 (Colo.2011) (rejecting Cope to the extent it presumed reliance); *Sikes v. Teleline, Inc*., 281 F.3d 1350, 1363-64 (11th Cir. 2002) (same); *Siemer v. Assocs. First Cap. Corp.*, D. Az. No. 97-281, 2000 U.S. Dist. LEXIS 21244, *57-59 (Dec. 14, 2000) (same). Other courts correctly apply *Cope* by recognizing that the plaintiffs in that case had carried their burden that common

The Eighth District's misreading of *Cope* and *Hamilton* created a presumption that consistently has been rejected in class action litigation. *See, e.g.,* 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:11 (16th ed. 2019) ("T]he overwhelming majority of courts have rejected efforts of presumed reliance to common law or statutory fraud cases."); 3 William B. Rubenstein, *Newberg on Class Actions* § 4.60 (5th ed. 2019) ("[M]ost courts asked to extend the fraud-on-the-market doctrine form the securities field to garden variety common law fraud claims have declined the invitation. Thus, although versions of the presumption approach exist beyond the securities field, the vast bulk of common law fraud claims still must satisfy the reliance requirement – and rarely are able to do so as a common issue."); 5 Moore, *Federal Practice* § 2345[5][b] (3d. Ed. 2020) ("No presumptions of reliance apply in consumer fraud cases.").

The conclusion of these commentators is based on a significant body of precedent. *See, e.g., CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1095 (10th Cir. 2014);[3] *McLaughlin v. Am. Tobacco Co*., 522 F.3d 215, 224 (2d Cir. 2008); *Gariety v. Grant Thornton,*

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issues of reliance predominated over individual issues, and holding plaintiffs to their burden to show predominance. *Cf. Cantlin v. Smythe Cramer Co.*, 8th Dist. Cuyahoga No. 10339, 2016-Ohio-3174, ¶ 27-37 (declining to apply presumption and distinguishing *Cope* where fraudulent conduct was not standardized); *Young v. FirstMerit Bank, N.A.,* 8th Dist. Cuyahoga No. 94913, 2011-Ohio-614, ¶ 28-32 (distinguishing *Cope* where despite use of form documents existence of oral communications and impact of representations varied); *Cannon v. Fid. Warranty Servs.*, 5th Dist. Muskingum No. CT2005-0029, 2006-Ohio-4995, ¶ 76-90 (in case involving sale of service contacts by auto dealership finding common issues of reliance did not predominate despite use of forms because circumstances of sales of contracts to customers carried and distinguishing *Cope*). The Eighth District, misled by the reference to a presumption of reliance, did not engage in the required analysis.

[3] Ohio courts have long recognized that federal authority is persuasive in interpreting the Ohio Rule. *See, e.g., Cullen v. State Farm Mut. Auto. Ins. Co*., 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 14; *Marks v. C.P. Chem. Co., Inc*., 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). Such consistency is important, as aligning state standards with federal law gives parties present in more than one jurisdiction needed clarity and reduces the risk of forum shopping between state and federal courts.

LLP, 368 F.3d 356, 368 (4th Cir. 2004); *Sikes*, 281 F.3d at 1363; *Gunnells v. HealthPlan Servs., Inc*., 348 F.3d 417, 434-37 (4th Cir. 2003); *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000); *Binder v. Gillespie*, 184 F.3d 1059, 1063-65 (9th Cir. 1999); *Heindel v. Pfizer Inc*., 381 F.Supp.2d 364, 380 (D.N.J. 2004); *State v. Minn. Sch. of Bus., Inc*., 935 N.W.2d 124, 142 (Minn. 2019) ("Federal and state courts have overwhelmingly rejected extending the 'fraud on the market theory,' and its reliance on presumptions, beyond the unique nature of securities markets."); *Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007).

The consistent rejection of a presumption of reliance in consumer fraud cases makes sense. Generally, "[p]resumptions arise when experience shows a fact to be so generally true that a court may take notice of its truth." 42 Ohio Jurisprudence 3d, Evidence and Witnesses Section 103 (2020), citing *Greer v. United States*, 245 U.S. 559, 38 S. Ct. 209, 62 L.Ed. 469 (1918). A presumption of reliance may make sense in economically efficient securities markets. But reliance cannot be assumed to be so generally true in the context of an individualized consumer transaction like buying a car. *Cf. McLaughlin*, 522 F.3d at 224 (explaining limitations of presumption of reliance).

In addition, because the plaintiff shoulders the burden of proving reliance in an individual case, a presumption of reliance would violate the principal that a class action is a procedural device that cannot alter the substantive rights of the parties. *See, e.g., United Food & Commer. Workers Unions & Emplrs. Midwest Health Bens. Fund v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42, 56, (1st Cir. 2018), citing *Tyson Foods, Inc. v. Bouaphakeo*, __ U.S. __, 136 S.Ct. 1036, 1048, 194 L.Ed. 124 (2016).

Finally, the Eighth District's reliance on a presumption is inconsistent with the evidentiary burden this Court has held a plaintiff must satisfy to certify a class. A plaintiff has must affirmatively her compliance with Civ.R. 23. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 10. A plaintiff has "the burden of demonstrating by a preponderance of the evidence that the proposed class meets each of the requirements set forth in the rule." *Id.*, at ¶ 15. A plaintiff "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." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 113 S.Ct. 2541, 180 L.Ed.2d 374 (2011). "[A]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). Presumptions, however, only exist in the absence of evidence. *See, e.g., In re Guardianship of Breece*, 173 Ohio St. 542, 555-56, 184 N.E.2d 386 (1962). In the context of class certification, where evidence is affirmatively requires, resort to a presumption of reliance is not only unneeded, it is improper.

The Eighth District's presumption of reliance is particularly troubling given the crucial nature of the reliance inquiry in a class action. "The reliance requirement is important because it ensures that the requisite casual connection between a defendant's misrepresentation and a plaintiff's injury exists as a predicate for liability. If each member of a class need prove that he or she individually relied on an alleged misrepresentation or omission, such individual inquiries may become the predominant issues in a fraud case, making aggregate litigation infeasible." 3 William B. Rubenstein, *Newberg on Class Actions* § 4.58 (5th ed. 2019). A class cannot be certified under Civ.R. 23(B)(3) unless injury can be established for the entire class. *See, e.g., Felix v. Ganley Chevrolet, Inc.,* 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 35.

The Eighth District's presumption of reliance was a legal error and fatally undermined its class certification analysis. As the Court has recognized, absent a presumption of reliance, individualized issues of reliance preclude class certification. *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 314, 473 N.E.2d 822 (1984). Once again, this a common principal recognized by commentators under the analogous federal rules. *See, e.g.,* William B. Rubenstein, 3 *Newberg on Class Act*ions § 4.58, 4.60 (5th ed. 2019) (noting that "courts often deny Rule 23(b)(3) class certification in basic fraud cases (and other reliance-related cases) on the grounds that the individualized nature of the reliance inquiry means the predominance test cannot be satisfied" and that "In sum, courts are hesitant to certify fraud cases under Rule 23(b)(3) because individual issues concerning the misrepresentations or omission, or reliance typically predominate over common issues. However, as misrepresentations or omissions are often common in that they are written, it is the reliance requirement that provides the most significant hurdle."). Indeed, this principal is so widely recognized that it appears in the Advisory Committee Notes to Fed.R.Civ.P. 23: "On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."

In short, even in a case involving form documents, the existence of predominant common issues of reliance cannot be assumed. It must be proven. The Eighth District did not hold Appellee to her burden, and its decision therefore must be reversed.

B. PROPOSITION OF LAW III: PART OF THE RIGOROUS ANALYSIS REQUIRED FOR CLASS CERTIFICATION IS ANALYSIS OF THE MERITS OF THE CLAIMS PRESENTED AS TO THE EXISTENCE OF INDIVIDUALIZED ESSENTIAL ELEMENTS OF THE CLAIMS AND INDIVIDUALIZED DAMAGES.

The need to probe behind the pleadings, make factual determinations and conduct a rigorous analysis of whether common issues predominate over individual ones before certifying a Civ.R. 23(B)(3) class is now beyond dispute. *Cullen,* supra. The Eighth District's decision recites that it conducted the required analysis. However, several portions of the opinion demonstrate that the Eighth District misunderstood the applicable legal standard and that its misunderstanding caused it to ignore individualized issues that should have prevented class certification.

The first such issue is the Eighth District's holding that "[t]he trial court is to resolve any doubts in favor of class certification." *Goree*, 2020-Ohio-3457, at ¶ 34. The Eighth District cited *Baughman,* 88 Ohio St.3d 480 at 487, for this statement of the applicable burden of proof.

But this is not what *Baughman* actually says. *Baughman* states that "any doubts about ***adequate representation, potential conflicts, or class affiliation*** should be resolved in favor of upholding the class, subject to the trial court's authority to amend or adjust its certification order as developing circumstances demand, including the augmentation or substitution of representative parties." *Id*. at 487 (emphasis added).[4] The statement that doubts about adequate representation are to be resolved in favor of certification is very different from a holding that all

[4] The authorities cited in *Baughman* all also relate to adequacy of representation or potential conflicts, rather the overall burden of proof. *See Levinson*, 485 U.S. 224, at 250; *In re Sumitomo Copper Litigation*, 182 F.R.D. 85, 88 (S.D.N.Y. 1998); *Barkman v. Wabash, Inc*., 674 F. Supp. 623 (D.C.Ill. 1987); *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 929 (3d Cir. 1986)*; Green v. Wolf Corp*., 406 F.2d 291, 298 (2d Cir. 1968).

doubts about any required element must be resolved in favor of certification.

This Court has clearly held that the party seeking class certification has the burden of proving that all factual and legal prerequisites to class certification have been satisfied by a preponderance of the evidence. *Cullen*, 137 Ohio St.3d 372, at ¶ 11, 15; *Warner v. Waste Mgmt., Inc.*, 36 Ohio St.3d 91, 94, 521 N.E.2d 1091 (1988). The proposition that any doubts are to be resolved in favor of class certification turns this burden of proof on its head. *Cf. Brown v. Electrolux Home Prods.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (holding that the "district court misstated the law when it said that it 'resolves doubts in favor of class certification in favor of certifying the class'" under identical federal burden of proof and explaining that "the entire point of a burden of proof is that if doubts remain about whether the burden of proof is satisfied, the party with the burden of proof loses.") (internal quotation omitted); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013) (holding that statement that doubts are resolved in favor of certification misstates burden of proof).

Unfortunately, *Goree* is not the only case to miscite *Baughman* for the overbroad proposition that all doubts must be resolved in favor of class certification. *See, e.g., Ritt v. Billy Blanks Enters*., 171 Ohio App.3d 204, 2007-Ohio-1695, 870 N.E.2d 212, ¶ 34 (8th Dist.); *Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc*., 148 Ohio App.3d 635, 2002-Ohio-2912, 775 N.E.2d 531, ¶ 17 (2d Dist.); *Helman v. EPL Prolong, Inc*., 7th Dist. Columbiana No. 2001 CO 43, 2002-Ohio-5249, ¶ 20. The frequent repetition of this error demonstrates the need for clarification by the Court.

Second, the Eighth District held that "the need for an individualized inquiry to determine the amount of damages does not destroy predominance." *Goree*, 2020-Ohio-3457, at ¶ 81. It is indeed beyond dispute that the need to calculate the amount of individual damages does not bar

certification of a Civ.R. 23(B)(3) class. *See, e.g., Felix.,* 145 Ohio St.3d 329, at ¶ 34.

However, it is equally beyond dispute that the existence of individualized damages issues, particularly complex ones, is relevant to the predominance inquiry and can prevent class certification. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34-36, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (reversing class certification based on inability to establish predominance because of difficulty in calculating damages). "To be sure, individualized damage determinations cut against class certification under Rule 23(b)(3)." *Ward v. Dixie Nat'l Life Ins. Co*., 595 F.3d 164, 180 (4th Cir. 2010). "[W]hile the fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification . . . it is nonetheless a factor we must consider in deciding whether issues susceptible to generalized proof outweigh individual issues." *McLaughlin*, 522 F.3d at 231 (internal citation and quotation omitted). By failing to consider whether and how both the fact and amount of damages could actually be calculated in this case, and whether those calculations would cause individualized inquires to predominate over common questions, the Eighth District missed a necessary step in the predominance analysis. *Goree*, at ¶ 80-84.

Finally, the Eighth District relied upon an earlier decision, *Cantlin v. Smythe Cramer Co*., 2018-Ohio-4607, 114 N.E.3d 1260, ¶ 19 (8th Dist.), to suggest that individual fact-finding only is relevant to the issue of an appropriate class definition. *Goree*, at ¶ 49. *Cantlin* stated that "[w]hile individualized fact-finding may defeat class certification, this is true only when the cause of the problem is plaintiff's overly broad class definition." 2018-Ohio 4607, at ¶ 19.

To the extent that *Goree* and *Cantlin* hold that individualized issues only go to the appropriateness of the class definition, they take a far too narrow view of the role of individualized questions in the class certification analysis. As this Court and the United States

Supreme Court have recognized, class litigation is an exception to the general rule that litigation is only conducted on behalf of named parties. *See, e.g., Cullen*, 137 Ohio St.3d 373, at ¶ 11; *Dukes*, 564 U.S. 338 at 348. "[W]hen individual rather than common issues predominate, the economy and efficiency of class-action treatment are lost and... the risk of confusion is magnified." 7AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1778, at 141 (3d ed. 2005). (footnote omitted). The existence of individualized issues goes to the crux of whether a class should be certified:

> The formulation of Rule 23 in terms of predominant common "questions" and generally applicable misconduct obscures the crucial line between dissimilarity and similarity within the class. The existence of common "questions" does not form the crux of the class certification inquiry, at least not literally, or else the first-generation case law would have been correct to regard the bare allegations of the class complaint as dispositive on the certification question. Any competently crafted class complaint literally raises common "questions." What matters to class certification, however, is not the raising of common "questions" - even in droves - but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Nagareda, 84 N.Y.U.L.Rev. at 122-23 (2009).

Thus, the need for individualized fact-finding is not only relevant to the existence of an unambiguous class definition, but also to the existence of common issues pursuant to Civ.R. 23(A)(2). *See, e.g., Dukes*, at 355-60 (holding that need for individualized fact-finding

concerning discriminatory practices precluded finding of commonality under Fed.R.Civ.P. 23(A)(2)).

The importance of individualized fact-finding to the predominance inquiry under Civ.R. 23(B)(3)(a) is apparent. One federal court has comprehensively detailed:

> The distinction between "individual" and "common" questions is thus central to the predominance analysis. As the Supreme Court has explained:
>
> > An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized class-wide proof."
>
> *Tyson Foods, Inc. v. Bouaphakeo*, _U.S. __, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016) (alteration omitted) (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50, at 196-97 (5th ed. 2012) (* * *)
>
> Where individualized questions permeate the litigation, those "fatal dissimilarit[ies]" among putative class members "make use of the class-action device inefficient or unfair." *Amgen*, 133 S. Ct. at 1197 (citation omitted) (* * *)
>
> The predominance inquiry mitigates this risk by "ask[ing] whether the common, aggregation-enabling, issues in the case are *more prevalent or important* than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045 (emphasis added) (quoting Rubenstein, *supra*, at 195-96); *see also id.* (The "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." (quoting *Amchem Prods.*, 521 U.S. at 623)). For this reason, the Supreme Court has emphasized district courts' "duty to take a 'close look' at whether

> common questions predominate over individual ones." *Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013) (quoting *Amchem Prods.*, 521 U.S. at 615); *see also Tyson Foods*, 136 S. Ct. at 1045 (2016) (The predominance requirement "calls upon courts to give *careful scrutiny* to the relation between common and individual questions in a case." (emphasis added)). This analysis is "more [] qualitative than quantitative," Rubenstein, *supra*, at 197 (footnote omitted), and must account for the nature and significance of the material common and individual issues in the case, *see Roach*, 778 F.3d at 405.

In re Petrobras Sec. Litig., 862 F.3d 250, 270-271 (2d Cir. 2017). *See also Cullen,* 137 Ohio St.3d 373, at ¶ 34 (holding that to satisfy Civ.R. 23 (B)(3) the plaintiff must establish and the trial court must find "that questions common to the class in fact predominate over individual ones.").

Finally, the need for individualized fact-finding impacts the superiority of a class action under Civ.R. 23(B)(3)(b), which requires a trial court to consider the whole range of practical issues that make it practical to manage a class action. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). This necessarily includes how individual issues would be resolved in managing the class. *See, e.g., Schmidt*, 15 Ohio St.3d 310, at 315 (holding that trial court did not abuse its discretion in holding that individual issues prevented a finding of superiority); *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 419 (5th Cir. 1998) (holding that "predominance of individual-specific issues" prevented finding of superiority); *Andrews v. AT&T*, 95 F.3d 1014, 1023 (11th Cir. 1996) (noting that large number of individualized determinations would create unmanageable burden on court); *Castano v. Am. Tobacco Co*., 84 F.3d 734, 745 n.19 (5th Cir. 1996) (holding that the greater the number of

individual issues the less likely superiority can be established). Limiting a trial court's ability to consider the need for individualized fact-finding to the issue of an appropriate class definition improperly handcuffs the trial court in determining whether a class action is superior to alternatives and can efficiently and fairly be managed.

Neither the Trial Court nor the Eighth District's decisions on class certification reference deposition testimony or any other evidence in the record. Instead, both repeatedly reference the Appellee's complaint and the documents attached to it. However, Civ.R. 23 does not establish a pleading standard and the allegations of a complaint are not sufficient to certify a class. *Cullen*, 137 Ohio St.3d 373 at ¶ 11, 15-16.

In relying on the complaint, the Trial Court and Eighth District did not address the significance of apparent testimony that Appellee did not read the contract documents at issue. *Cf. Johnston v. HBO Film Management*, 265 F.3d 178, 189 (3d Cir.2001) (holding that individual issues predominated where there was no evidence all class members read the form documents at issue). Nor did the Trial Court or the Eighth District comment on evidence apparently suggesting that there also were extensive oral discussions between the parties in addition to form documents. *Cf. Johnson*, at 189-191 (oral discussions in which form documents were discussed and potentially explained or additional information presented created individualized issues of reliance.). Finally, neither court addressed the numerous factors that go into the decision to purchase a vehicle, such as the ability to make a down payment, inability to obtain other forms of credit, or other considerations that could have impacted whether the class members relied on the alleged omissions. *Cf. Poulos v. Caesars World, Inc.,* 379 F.3d 654, 665-66 (9th Cir. 2004) (holding in case alleging that defendants misrepresented the odds of winning on electronic gambling machines that common issues did not predominate because class

members gambled for many reasons, and alleged common misrepresentation of the odds may not have impacted class members' decision to engage in gambling transaction). The misapplication of the legal standard and confusion concerning the role of individualized fact finding prevented the Trial Court and Eighth District from undertaking the rigorous analysis necessary to certify a class.

CONCLUSION

The crucial importance of class certification requires clear standards. Here, the Eighth District misinterpreted those standards in a way that creates confusion with this Court's prior precedents and analogous federal law. The Court should reverse the Eighth District's ruling.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae The Ohio Association of Civil Trial Attorneys has been electronically filed with Supreme Court of Ohio on March 8, 2021 and has been separately served by electronic mail upon the following:

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