No. 16-1840

IN THE

# SUPREME COURT OF OHIO

CHARLES CRANFIELD, Individually and on behalf of
all other Ohio residents similarly situated,
*Respondent*,

v.

STATE FARM FIRE & CASUALTY COMPANY,
*Petitioner*.

ON A CERTIFIED QUESTION OF STATE LAW FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION
CASE NO. 1:16CV1273

## PRELIMINARY MEMORANDUM OF *AMICUS CURIAE* OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF ACCEPTANCE OF CERTIFIED QUESTION

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## INTRODUCTION

This case involves the interpretation of a homeowners insurance policy like many homeowners insurance policies issued by insurers not only in Ohio but throughout the United States over the past fifty years. The homeowners insurance policy at issue here – one which was sold by Petitioner State Farm Fire & Casualty Company ("State Farm") – sets forth a two-step process for payment of claims for property damage: (1) the insured initially may receive an "actual cash value," or "ACV," payment, calculated as the estimated cost to repair or replace the damaged property, minus depreciation; and (2) once repairs are completed, the insured may submit a claim for a supplemental payment to cover the difference between the depreciated ACV amount and the full amount actually and necessarily spent for the repairs, known as the "replacement cost."

The Respondent Charles Cranfield, who is the Plaintiff in the class action case pending in the United States District Court of Ohio, challenges the manner in which State Farm calculates and pays the ACV of the damaged portion of an insured structure when a covered loss has occurred. In accordance with the homeowners insurance policy, State Farm determined Respondent's ACV payment by estimating the cost to repair the damaged portions of the property and then applying depreciation. While there appears to be no dispute between Respondent and State Farm that "actual cash value" may be calculated as "replacement cost less depreciation," Respondent contends that insurers like State Farm must calculate ACV by first estimating the cost to repair or replace the damaged property, and then applying depreciation *only to the estimated cost for the materials* needed for the repair, but not to the cost of labor necessitated for the repairs.

In the complaint initiating these proceedings, Respondent has alleged that calculating ACV by depreciating the cost of repair or replacement by including the labor costs – as State Farm and other insurers do – violates Ohio law. Not so. The longstanding practice by many insurers of

including labor costs in the depreciation of the estimated cost to repair or replace damaged property when calculating ACV is in accord with Ohio law. OACTA submits this preliminary memorandum pursuant to S.Ct.Prac.R. 9.05(A)(2) in support of this Court acceptance and resolution of the Certified Question so that, by answering the Certified Question, stability, predictability and consistency can be achieved and maintained in the case law and jurisprudence regarding the interpretation of homeowners insurance policies sold by insurers in the State of Ohio.

The propriety of including labor costs can be found in the Ohio Administrative Code which requires that ACV be calculated by applying depreciation to the estimated repair costs, and that regulation contains no exclusion for labor costs. *See*, Ohio Admin. Code 3901-1-54(I). To interpret that section of the Ohio Administrative Code to exclude labor costs from the calculation of depreciation would require a rewriting of the code.

Further support that *both material and labor costs* should be included when calculating depreciation is found in the Ohio appellate case of *Helfrich v. Helfrich*, 10th Dist. Franklin No. 97APF08-975, 1998 Ohio App. LEXIS 520, at *3 (Feb. 10, 1998). However, the class action claims presented by Respondent's complaint have never been explicitly addressed by this Court. If it is permissible to apply depreciation to the total cost of repair or replacement, the claims of Respondent and other class plaintiffs will fail as a matter of law. On the other hand, if only the materials component of replacement cost may be depreciated in calculating ACV, then the parties in this case as well as insurance companies and the general public will benefit from having a definitive answer and a clear state law framework for resolving the question presented by this case.

The need and urgency for this Court to accept and address the Certified Question now is demonstrated by not just this case but also by the five very similar proposed class actions filed and pending against other insurers challenging their alleged labor depreciation practices. *See*, *Perry v.*

*Allstate Indem. Co.*, N.D. Ohio No. 1:16CVl522, cert. question pend., Oh. Sup. Crt. No. 2016-1835[1]; *Parker v. American Family Ins. Co.*, Cuyahoga C.P. No. CV-16-865773; *Hancy v. Pike Mut. Ins. Co.*, Cuyahoga C.P. No. CV-16-862739; *Condon v. Erie Ins. Co.*, Lake C.P. No. 16CV000842; *Ingram v. Liberty Ins. Corp.*, Franklin C.P. No. 16CV005538. The sooner insurers and insureds in Ohio have certainty regarding the permissible method for applying depreciation in structural damage claims handling, the more quickly all insurers and insureds can be assured that property damage and loss claims are paid promptly and correctly.

If the Certified Question is not addressed by this Court, the intervening uncertainty and potential for inconsistent determinations and holdings by different courts as to the rule of law regarding the proper calculation of ACV depreciation under homeowners insurance policies runs the risk that a "Pandora's Box" would open. *See*, *Selander v. Erie Ins. Group*, 85 Ohio St.3d 541, 548, 709 N.E.2d 1161 (1999) (Lundberg Stratton, J., dissenting). It was not all that long ago that the insurance industry in Ohio struggled with uncertainty, instability and unpredictability regarding the scope and interpretation of insurance law brought on by a sudden, drastic and unprecedented expansion of liability coverage for losses under insurance policies sold by insurers in the State of Ohio. *See*, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 710 N.E.2d 1116 (1999); *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 86 Ohio St.3d 557, 715 N.E.2d 1142 (1999).

Here, in addition to his own individual claim, Respondent seeks to represent a class consisting of all persons insured under a State Farm homeowners policy who received an ACV

[1] The certified question in *Perry* differs slightly from the Certified Question in the case *sub judice* which focuses on the inclusion of labor costs in the depreciation of damages to property. In *Perry*, the district court asks this Court whether "Ohio law require[s] that the insurer exclude *contractor overhead and profit* from the calculation of depreciation in order to arrive at the ACV amount?" (Emphasis added). This nuance aside, the legal issues and principles involved are going to be the same in both cases.

payment from State Farm for physical loss or damage to their residence or other structure located in Ohio in which the cost of labor was depreciated in calculating the payment for the period stretching back almost a decade, from April 22, 2008 to the date of trial. One can only imagine how many thousands of property damage claims have been made during that period of time and paid by State Farm in connection with homeowners insurance policies issued in the State of Ohio where the depreciation component included labor costs as well as the cost of materials. Such an unprecedented expansion of property casualty coverage under homeowners insurance policies issued in Ohio, like the one sold by State Farm, could also threaten to completely upset the Ohio insurance market by suddenly forcing insurers, like State Farm and the other insurers sued in the five other labor depreciation cases, to absorb property damage claim exposures for which no commensurate premium was collected or even contemplated.

OACTA seeks this Court's definitive articulation of Ohio law on the question of depreciating the labor component of estimated replacement cost in order to avoid the kind of absurd results and consequences that happened in the wake of the *Scott-Pontzer* opinion which this Court cautioned against in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

This Court has, in the past, found questions of insurance policy interpretation to be appropriate for certification from the federal courts. *See*, *e.g.*, *Delli Bovi v. Pac. Indemn. Co.*, 85 Ohio St. 3d 343, 708 N.E.2d 693 (1999) (accepting question of whether helicopter was a "motor vehicle" under uninsured motorist statute); *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St. 3d 476, 2012-Ohio-4712, 979 N.E.2d 269 (accepting question of whether defective workmanship claims were covered by commercial general liability policy); *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St. 3d 471, 2009-Ohio-5934, 918 N.E.2d 135 (accepting question in

putative class action regarding enforceability of non-duplication clauses in insurance policies).

Therefore, OACTA respectfully urges this Court to accept the Certified Question in this case and, in doing so, to answer the question in the negative.

## CERTIFIED QUESTION OF LAW

> Where a homeowner's insurance policy provides for payment of the actual cash value ("ACV") at the time of the loss of the damaged part of the insured property, and the Ohio insurance regulation (Ohio Admin. Code 3901-1-54(1)) provides that an "insurer shall determine actual cash value by determining the replacement cost of property at the time of loss less any depreciation," does Ohio law require that the insurer exclude labor costs from the calculation of depreciation in order to arrive at the ACV amount?

## INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations and governmental entities. OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient.

OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability and consistency in Ohio's case law and jurisprudence. On issues of importance to its members, OACTA has filed amicus curiae briefs in significant cases before federal and state courts in Ohio advocating and promoting public policy and sharing its perspective with the judiciary on matters

that will shape and develop Ohio law.

OACTA's appearance as amicus in this case and its submission of this preliminary memorandum pursuant to S.Ct.Prac.R. 9.05(A)(2) is premised upon the recognition that there is a glaring need for the Court to provide clear, consistent and reasoned guidance to Ohio courts regarding the permissible method for applying depreciation in handling and adjusting structural property damage claims. This Court should accept the Certified Question of law from the United States District Court and confirm that Ohio law permits an insurer to include labor costs in the calculation of depreciation in order to arrive at the ACV amount at the time of the loss of the damaged part of the insured property under a homeowners insurance policy.

## STATEMENT OF THE CASE AND FACTS

OACTA adopts the statement of case and facts from the preliminary memorandum in support of acceptance of the certified question filed by State Farm.

## ARGUMENT IN SUPPORT OF THE CERTIFIED QUESTION

### I. This Court Should Accept The Certified Question Because The Resolution Of The Question Is Determinative Of How Insurers in Ohio Are To Calculate ACV And There Is No Controlling Ohio Supreme Court Precedent On The Issue

When there is a question of Ohio law that may be determinative of a federal court proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, the case is properly certified to the Supreme Court for review and final determination. S.Ct.Prac.R. 9.01(A). This case clearly satisfies both criteria for certification and review of the Certified Question.

In this amicus brief, OACTA will provide a perspective and insight which will support acceptance by this Court of the Certified Question leading to a decision confirming that Ohio law

permits an insurer to include labor costs in the calculation of depreciation in order to arrive at the ACV at the time of the loss or damage to the insured property under a homeowners insurance policy. By contrast, Respondent is advocating for determining the "actual cash value" of real property by calculating replacement cost less depreciation using only the cost of materials and ignoring labor costs. Respondent's proposal should not be recognized by any Ohio court, state or federal, as a method of valuing property in Ohio when damage or loss occurs to insured property under a homeowners policy. Upon review and inspection, Respondent's method is shown to be nothing more than a nuanced rewriting of an unambiguous insurance policy and the well-established definition of "actual cash value."

For more than a century, courts throughout the United States have maintained that the phrase "actual cash value" in insurance parlance means exactly that – the actual value, in cash, of the damaged property. *See*, *e.g.*, *Birmingham Fire Ins. Co. v. Pulver*, 18 N.E. 804, 807 (Ill. 1888); *Aetna Ins. Co. v. Johnson*, 74 Ky. 587, 591 (1874); *McAnarney v. Newark Fire Ins. Co.*, 159 N.E. 902, 903 (N.Y. 1928). More recently, courts have continued to recognize that "actual cash value" relates to the economic value of the property, which is said to be an amount "one could receive for his or her property." *Erin Rancho Motels, Inc. v. United States Fid. & Guar. Co.*, 218 Neb. 9, 14 (1984). And, it is observed that "actual cash value" is "the economic value of the building as distinguished from its replacement value." *American States Ins. Co. v. Mo-Lex, Inc.*, 427 S.W.2d 236, 237 (Ky. 1968). Further, "actual cash value" means what a piece of property is worth in monetary terms, allowing for depreciation. *Patriotic Order Sons of Am. Hall Ass'n v. Hartford Fire Ins. Co.*, 157 A. 259, 260 (Pa. 1931). Courts today continue to observe that the plain and ordinary meaning of the words "actual cash value" is "expressed in terms of money." *Tyler v. Shelter Mut. Ins. Co.*, 184 P.3d 496, 501 (Okla. 2008).

Applying depreciation only to the cost of materials, as Respondent advocates in the case at bar, is contrary to both the well-settled meaning of "actual cash value" and longstanding precedent on measuring "actual cash value." This is so because deducting depreciation from the replacement cost of damaged or destroyed property is one of the methods used to estimate "actual cash value." When that method is used, depreciation is properly applied to the full cost of repair or replacement of damaged property, not merely to one component of value such as the cost of the materials but not labor. *See*, *e.g.*, *Commercial Fire Ins. Co. v. Allen*, 1 So. 202, 208 (Ala. 1886) where the Alabama Supreme Court cogently instructed that "[i]f property had been destroyed which, from use or otherwise, had become less valuable than when new, then the cost of repairing it, less the percentage of depreciation of the destroyed article by such use, will determine the extent of the damages."

The issue raised herein is not unique to Ohio. In recent years, at least four state supreme courts have accepted and resolved or have pending for resolution certified questions from federal courts regarding the methodology for calculating actual cash value. *See*, *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017 (Okla. 2002) (answering question certified by Western District of Oklahoma); *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675 (Ark. 2013) (answering question certified by Western District of Arkansas); *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780 (Minn. 2016) (answering question certified by District of Minnesota); *Henn v. Am. Family Mut. Ins. Co.*, Neb. Sup. Crt. Case No. S-16-597 (accepting question certified sua sponte by federal district court of whether insurer may depreciate labor in ACV payments).

Until now, the occasion to examine the issue raised by the Certified Question has evaded this Court's review. However, it has become a recurring issue in Ohio and is ripe for resolution. The time has come for the Supreme Court of Ohio to weigh-in on the issue. This case and the

Certified Question from the district court present the Court with the best opportunity and a vehicle to do so.

### *A. The resolution of the Certified Question will be determinative of ongoing and recurring uncertainty in the insurance industry over the issue of ACV calculation*

There can be no serious doubt that this Court's resolution of the Certified Question will resolve and be determinative of ongoing and recurring uncertainty in the Ohio insurance industry over the issue of ACV calculation. As previously stated herein, in addition to the case at bar, there are five other proposed class actions filed and pending against other insurers challenging those insurers' labor depreciation practices. *See*, *Perry v. Allstate Indem. Co.*, *supra*; *Parker v. American Family Ins. Co.*, *supra*; *Hancy v. Pike Mut. Ins. Co.*, *supra*; *Condon v. Erie Ins. Co.*, *supra*; and *Ingram v. Liberty Ins. Corp.*, *supra*.

The calculation of actual cash value is a claim adjustment practice performed daily in Ohio by State Farm's adjusters and by other insurers. This Court's acceptance of the Certified Question will allow the Court to decide definitively, and thereby provide much needed guidance on, an issue that impacts many of Ohio's residents with homeowners insurance policies, as well as insurance companies operating in Ohio. It is common for homeowners insurance policies to employ a two-step loss settlement approach. Like State Farm, other insurers appropriately include both materials and labor when calculating depreciation to arrive at the amount owed for an ACV payment.

Given the growing number of labor depreciation class action cases pending in Ohio's state and federal courts, it only makes sense and serves judicial economy for this Court to accept the Certified Question. *See*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) ("Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" (quoting *Lehman Bros. v. Schein*,

416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974)).

### *B. There is no controlling precedent in the decisions of this Court*

There is Ohio law that supports State Farm's arguments as to the propriety of depreciating all elements of replacement cost when making ACV payments, including labor. However, there is no disputing that the Supreme Court of Ohio has not directly addressed the Certified Question as to whether the cost of labor needed to repair a damaged structure must be paid in full, rather than depreciated along with the cost of materials needed for such repairs, when an insurer calculates actual cash value. There also can be no dispute that under Ohio law, an insurer may appropriately calculate ACV by estimating the cost to repair or replace the damaged property, then applying depreciation to that amount. *See*, *e.g.*, *Parker v. State Farm & Cas. Co.*, N.D. Ohio No. C87-2683, 1988 U.S. Dist. LEXIS 19521, at *2 (Nov. 4, 1988) ("Under Ohio law, proof of actual cash value of the property loss requires either a showing of the market value of the property at the time of loss, or in the alternative, evidence of the costs of repair and reproduction less depreciation for age and condition of the-premises."); *Asmaro v. Jefferson Ins. Co. of New York*, 62 Ohio App.3d 110, 115, 574 N.E.2d 1118 (6th Dist. 1989) ("Actual cash value is established by one of two methods in Ohio: market value of the property at the time of loss, or the cost of repairs minus depreciation, if any.").

The Ohio Department of Insurance has enacted a regulation specifically requiring that insurers apply depreciation to arrive at the proper ACV amount and this regulation does not indicate that labor should be excluded from the calculation of depreciation. *See*, Ohio Admin. Code 3901-1-54(I) ("The insurer shall determine actual cash value by determining the replacement cost of property at the time of loss, including sales tax, less any depreciation."). To interpret that section of the Ohio Administrative Code to exclude labor costs from the calculation of depreciation would

require a rewriting of the ODI regulation. As this Court cautioned similarly in *State ex rel. Cunningham v. Indus. Comm.*, 30 Ohio St.3d 73, 77, 506 N.E.2d 1179 (1987), to adopt Respondent's claim that labor costs are not included in depreciation "is not an attempt to construe the rule; rather, it is an attempt to rewrite it." Courts have the obligation to give effect to the words used and not to delete words or to insert words not used in an Ohio Administrative Code section. *Rowe v. Dir., Ohio Dep't of Job & Family Servs.*, 7th Dist. Mahoning App. No. 2015MA00150, 2016-Ohio-3017, ¶23.

Further, *Helfrich v. Helfrich*, 10th Dist. Franklin No. 97APF08-975, 1998 Ohio App. LEXIS 520, at *3 (Feb. 10, 1998) has held that *both material and labor costs* should be included when calculating depreciation recognizing that it would be "fundamentally unsound" to include one without the other:

> More importantly, appellant's attempt to separate the labor costs from the material costs of repair items is fundamentally unsound. As noted above, the trial court reasonably found that the replacement concrete was "replacement business equipment." Both labor and materials were both necessary to replace the concrete, and the costs of both are reflected in the long-term economic value of such improvements. Thus, the total cost of replacing the concrete, whether designated as labor or materials, should be subject to depreciation deductions. As a result, the trial court did not abuse its discretion in including the labor component of the concrete replacement into the amount to be depreciated as "replacement business equipment."

Although these authorities unquestionably indicate that Ohio law authorizes the depreciation of labor costs to determine the amount of the actual cash value payment, the Supreme Court of Ohio has not addressed the specific question presented here regarding the depreciation of labor costs for repairs when the depreciated value of property is determined using a "replacement cost less depreciation" approach. There is no controlling precedent in the Supreme Court of Ohio, and the second reason for certification is thus satisfied. Acceptance of the Certified Question will allow this Court to resolve the pending controversy and uncertainty over the labor depreciation

issue that has given rise to this case and the other five Ohio labor depreciation cases cited herein.

## II. This Court Should Answer The Certified Question In The Negative

As established herein, the historical treatment of "actual cash value" along with other well-reasoned authority and case law recognizing that labor costs are to be included in depreciation when determining ACV, OACTA submits that the Court should answer the Certified Question in the negative and hold that Ohio law permits an insurer to include labor costs in the calculation of depreciation in order to arrive at the ACV amount at the time of the loss of the damaged part of the insured property under a homeowners insurance policy.

## CONCLUSION

For all of these reasons, the Ohio Association of Civil Trial Attorneys respectfully urges this Court, as the final arbiter of Ohio law, to accept the Certified Question and answer that question in the negative holding that Ohio law permits an insurer to include labor costs in the calculation of depreciation in order to arrive at the ACV amount at the time of the loss of the damaged part of the insured property under a homeowner's insurance policy.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing ***Preliminary Memorandum of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Acceptance of Certified Question*** was sent by ordinary U.S. Mail, postage prepaid, this 3rd day of January, 2017 to:

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