No. 23-1940

In The

United States Court of Appeals

for the

Sixth Circuit

DENNIS SPEERLY, ET AL.,
Plaintiffs-Appellees,
v.
GENERAL MOTORS LLC,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Michigan
Case No. 2:19-cv-11044

SUPPLEMENTAL BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF DEFENDANT GENERAL MOTORS LLC AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Product Liability Advisory Council, Inc. and the National Association of Manufacturers state that they are nonprofit organizations with no parent corporations and no stockholders.

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IDENTITY AND INTEREST OF AMICI CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] PLAC's members seek to contribute to the improvement and reform of law in the United States and elsewhere, with an emphasis on the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in multiple facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (nonvoting) members of PLAC.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.91 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of private sector research and development in the nation. The NAM is the voice for the manufacturing community and the leading advocate for a

[1] A complete list of PLAC's current membership is available at: https://plac.com/PLAC/Membership/Corporate_Membership.aspx (last visited January 26, 2025).

policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amici's members are consistently the subject of class action litigation, which gives them experience in class action certification standards and an interest in courts articulating and applying those standards correctly.[2]

ARGUMENT

I. THE COMMONALITY STANDARD AND ITS COROLLARIES.

General Motors LLC ("GM") raises a number of important issues, but this brief will focus on one: the standard for determining whether a question of fact is "common to the class" within the meaning of Fed. R. Civ. P. 23(a)(2). The district court in this case applied the wrong standard and mistakenly characterized critical issues as common when, applying the correct standard, they are individual. This fundamental error alone requires reversal. *See In re Nissan N. Am. Inc.*, 122 F.4th 239, 248 (6th Cir. 2024).

"Commonality drives the initial Rule 23 inquiry" and it "either establishes the first building block of a proposed class action or exposes an inadequate foundation."

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[2] No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except *amici curiae* themselves contributed money intended to fund the preparation or submission of this brief.

Id. at 246. Further, "to evaluate predominance [under Rule 23(b)(3)], '[a] court must first characterize the issues in the case as common or individual and then weigh which predominate.'" *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018) (citation omitted), *quoting Newberg on Class Actions* § 4:50 (5th ed. 2010). "[H]ow else could it know whether any common questions predominate over any individualized questions?" *Nissan*, 122 F.4th at 246. The balancing required by the predominance analysis "works only if the district court properly identified at least one common (non-individualized) issue." *Id.* Errors in the commonality analysis "taint the predominance inquiry from the get-go." *Id.* at 252.

Thus, "[t]he distinction between common and individual issues is the single most important concept in the modern class action." Aaron D. Van Oort, John L. Rockenbach, *Defining Common and Individual Issues in Class Actions: What A Reasonable Jury Could Do*, 109 Minn. L. Rev. Headnotes 1 (2024). It is also "the one that most bedevils courts in practice." *Id.* But after this Court's decisions in *Nissan*, *In re Ford Motor Co.*, 86 F.4th 723 (6th Cir. 2023), and *Doster v. Kendall*, 54 F.4th 398, 430-431 (6th Cir. 2022), *vacated as moot*, 217 L. Ed. 2d 248 (2023), there is no need for courts in this circuit to be bedeviled.

In *Doster*, this Court identified a two-prong test for commonality. First, the question must be "central" to the class's claims. 54 F.4th at 430, *quoting Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Second "[t]he question must allow a decisionmaker to reach a yes-or-no answer for the class in 'one stroke.'" *Doster*, 54 F.4th at 430-31, *quoting Dukes*, 564 U.S. at 350. "It will fall short if the decisionmaker could answer 'yes' for some members and 'no' for others." *Doster*, 54 F.4th at 430-31; *accord Nissan*, 122 F.4th at 246-247 (reaffirming *Doster*)*; Ford* 86 F.4th at 727-729 (relying on *Doster)*.

Several corollaries logically follow from this test. First, Plaintiffs cannot meet their burden of proving that a question of fact is common to the class just by showing that a jury, viewing the evidence in the light most favorable to them, *could* answer "Yes" as to all class members. At least one court has explicitly recognized that it is error for courts to view the evidence in the light most favorable to the plaintiffs in deciding a class certification motion. *Brown v. Electrolux Home Prods.*, 817 F.3d 1225, 1234 (11th Cir. 2016) (the district court "misstated the law when it said that it … 'draws all inferences and presents all evidence in the light most favorable to Plaintiffs.'"); *accord Ford*, 86 F.4th at 729 (citing *Electrolux* with approval). In fact, looking at the evidence in the light most favorable to Plaintiffs would preclude consideration of the very evidence that makes class certification inappropriate.

Second, district courts must "grapple with" evidence that could lead a reasonable jury to answer "No" with respect to some class members, even if it might

answer "Yes" as to others. *Nissan*, 122 F.4th at 247; *Ford*, 86 F.4th at 728. District courts cannot limit their analysis to evidence that would support a "Yes" answer for all class members. Indeed, this Court has rejected an approach to class certification that fails to consider the specifics that could cause a jury to answer "No" for some class members. *See Ford*, 86 F.4th at 728; *Nissan*, 122 F.4th at 251-252.

Third, logic requires that the district court should construe the evidence in the light most favorable to the defendant. To decide if a question is common, the district court must determine whether a reasonable jury *could* answer a question favorably to the defendant as to some class members. It follows that the district court must look at the evidence in the light most favorable to the defendant—as a jury could.

While it appears that no court has explicitly recognized this last point, it is consistent with the accepted principle that a court deciding class certification must consider all evidence, whether presented by the plaintiff or the defendant. *See, e.g.*, *Nissan*, 122 F.4th at 251-252; *Ford*, 86 F.4th at 728; *Sandusky Wellness Ctr., Ltd. Liab. Co. v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 469 (6th Cir. 2017). And the proposition that the court should view the evidence in the light most favorable to the defendant is also consistent with what many courts do in practice, *i.e.*, deny class certification based on evidence presented by the defendant. *See, e.g.*, *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839, 844-45 (7th Cir. 2022); *accord, e.g.*,

Simmons v. Ford Motor Co., 592 F. Supp. 3d 1262, 1288-89 (S.D. Fla. 2022); *Johnson v. Harley-Davidson Motor Co.*, 285 F.R.D. 573 (E.D. Cal. 2012); *Lloyd v. Gen. Motors Corp.*, 266 F.R.D. 98 (D. Md. 2010).

In sum, a question of fact is common to the class only if (i) the question is central to the claim and (ii) viewing the evidence in the light most favorable to the party opposing class certification, a jury could not reasonably decide the question differently for some members of the putative class than it does for others.

II. THE DISTRICT COURT MISAPPLIED THE COMMONALITY STANDARD.

Considering the proper commonality test, the district court erred in multiple respects: it looked exclusively for evidence that would support a "Yes" answer as to all class members; it disregarded completely evidence that would support "No" answers as to some putative class members; and it evaluated the evidence in the light most favorable to Plaintiffs. As a result, it characterized several critical issues, including product defect, GM's knowledge, and materiality, as common when the evidence demonstrated that they are individual.

The district court's application of the incorrect standard is evident from its discussion of "Common Proofs for the Existence of a Defect":

> There is ample evidence already in the record from which *a jury reasonably could find* that (1) the alleged defects are inherent in universal aspects of the design of the 8L transmissions, (2) the defendant identified the "root causes" of the defects early in the lifespan of the class models — and according to some

> accounts even before the earliest models were sold — along with known solutions to cure the problematic shifting behavior, and (3) the defect poses a significant safety risk to drivers of the class vehicles.

(Opinion and Order ("Op.") at 51-52, R. 284, PageID.20419-20420) (emphasis added). Thus, the district court found that the question of defect was common to the class because "a jury reasonably could find" a "universal design flaw" in all of the many transmissions at issue.

The district court further erred in failing to consider any of the evidence presented by GM showing that a jury could answer "No" with respect to some of those transmissions. The court devoted about ten pages of its 60-page slip opinion to summarizing the expert opinions proffered by two of Plaintiffs' experts, Ms. Wachs and Dr. McVea. (Op., R. 284, PageID.20420-20428, 20429-20430.) And yet the district court never mentioned the opinions of Defendant's expert Robert Kuhn, who explained in detail why "Dr. McVea's inspection and evaluation of the plaintiff vehicles does not support his claim of a common defect occurring among the vehicles." (Kuhn Report, R. 178-15 at 4, PageID.7884.) GM's other expert, Robert Lange, submitted a 203-page report (with multiple appendices) explaining in detail how shudder and shift quality rates varied widely based both on model and model year, differences in performance attributable to differences in vehicle transmission calibration and architecture, and GM's engineering changes to the transmissions

over time. (*See* GM's Opposition to Class Certification, R. 245, PageID.16932-16933; Lange Rpt, R. 220-3, PageID.14480-14573.) Despite this, the district court relied on only one sentence from Lange's lengthy report, which it interpreted to support Plaintiffs' claims. (Op. at 9, R. 284, PageID.20403.) And even this one sentence was lifted, with only minor modifications, from Plaintiffs' Motion for Class Certification. (*See* Motion for Class Certification, R. 223, PageID.15441-2.). Clearly, the district court was improperly looking for evidence that would support a "Yes" answer to the defect question as to the entire class when it should have been looking for evidence that would support a "No" answer as to some class members.

The district court's analysis of other critical issues in the case reflects the same error. For example, it concluded that materiality was a common issue because it "turns on consideration of the mindset of an objectively reasonable consumer." (Op. at 41, R. 284, PageID.20435.) But as GM noted in its initial opening brief, the complaint rate is "highly variable, depending significantly on (1) model (*e.g.*, Corvettes 4% (shift) or 22% (shudder) vs. Escalades 30% (shift) or 22% (shudder)) and (2) model year (*e.g.*, 36-month shift quality warranty rates dropped from 10.6% for 2015 Corvettes to 1% for the 2019 Corvette)." (Opening Brief of Appellant at 10.) An objectively reasonable consumer shopping for a Corvette might well have different views about performance than an objectively reasonable buyer of an

Escalade. So too, an objectively reasonable consumer might well have a different mindset depending, for example, on whether the failure rate is 4% or 30%, and yet the district court paid no attention to these possibilities.

The district court also found that GM's knowledge of the alleged defect or defects was common because "there is substantial evidence in the record that GM had knowledge of the defect from even before the class models were launched." (Op. at 52, PageID.20447.) The district court disregarded entirely evidence from which a jury would almost certainly conclude that GM's knowledge varied over time because (for example) the company made various improvements designed to improve shift quality and minimize shudder. (*See* GM Opposition to Class Certification, R. 245, PageID.16928-16930, 16956-16597.) If a jury *could* find that GM knew of the alleged defects at some times but not others, or that its knowledge changed over time as to any particular vehicle, knowledge is an individual issue, not a common one. *See, e.g.*, *Nissan*, 122 F.4th at 252 (Nissan "could reasonably believe that each software update fixed, or at least ameliorated, any defect for some plaintiffs").

III. THE DISTRICT COURT FAILED TO CONSIDER HOW THE ISSUES WOULD BE PRESENTED TO THE JURY.

To certify a class action, "a district court must forecast how the parties will conduct the litigation from the certification stage through the trial to the final judgment." *Fox v. Saginaw Cnty.*, 67 F.4th 284, 302 (6th Cir. 2023); *see also* Fed.

R. Civ P. 23, Advisory Committee notes to the 2003 amendments ("[a] critical need is to determine how the case will be tried.") Properly characterizing factual issues as common or individual is essential for this purpose; "how [else] could a court know precisely which common factual questions—which elements of the cause of action—it could submit to the jury?" *Nissan,* 122 F.4th at 246. And yet, the trial court in this case failed to consider the many ways in which a trial conducted consistent with its class certification threatens to violate the rights of both GM and absent class members under the Rules Enabling Act, 28 U.S.C. § 2072(b), and under Seventh Amendment. *See generally Defining Common and Individual Issues,* 109 Minn. L. Rev. Headnotes at 8-13.

Consider, for example, the question of defect and how, under the district court's approach, it could be submitted to the jury. Unless the jury is asked to make a separate determination for each of the 44 different make/model/model year combinations at issue—an approach inconsistent with the district court's conclusion that the defect question is common to all of these different vehicles—there are only two possibilities. First, the jury could be asked to decide whether *any* of the class vehicles are defective. Basing a judgment against GM and in favor of the entire class on a "Yes" answer to this question would potentially violate the Rules Enabling Act by holding GM liable to class members who have no valid claim because a jury, if

allowed, could have found their vehicles were not defective.

Alternatively, the jury could be asked to decide whether *all* class vehicles are defective. This would at least be consistent with the theory on which Plaintiffs sought and obtained class certification; they elected to claim that all class vehicles are defective and they should be held to prove that claim. This would also be consistent with the way the question of defective washers was submitted to the jury in the *Whirlpool* litigation, after this Court affirmed class certification. *Glazer v. Whirlpool Corp.*, No. 1:08-WP-65000, at ECF 427 & 485-1 at 22, 28 (N.D. Ohio Oct. 6 and 29, 2014). The jury in that case answered "No," finding that not all of the washers were defective. Based on that finding, judgment was entered in Whirlpool's favor against the entire class—even though a jury, if allowed, might have found some of those washers defective. *Id*. at ECF 490, 491.

Applying this approach here would mean that the entire class would lose if a jury finds that *any one* of the 44 different make/model/year combinations at issue is not defective. In other words, the claims of class members with the strongest evidence of defect would stand or fall based on the claims of those class members with the weakest evidence. A judgment against all absent class members based on such a verdict would violate the Seventh Amendment because it would deny a jury trial to those class members with the strongest claims, and it would potentially

violate the Rules Enabling Act by denying recovery to those class members who might prevail in a trial in which they could present their strongest evidence. Thus, an overbroad class threatens the constitutional and statutory rights of both defendants and absent class members—serious problems that the district court failed entirely to acknowledge because it never considered how an actual trial could proceed consistent with its certification decision.

IV. THE PROPER COMMONALITY STANDARD LIMITS CLASS ACTION LITIGATION TO ITS PROPER SPHERE.

The commonality standard recognized and applied by this Court in *Nissan*, *Ford,* and *Doster* limits class action litigation to its proper sphere: cases where the claims of the absent class members can fairly stand or fall with the claims of the class representative. If the district court properly identifies a central question and finds that a reasonable jury could not answer that question differently for different class members, a "Yes" or "No" answer with respect to the class representative can fairly bind both the defendant and absent class members. If the defendant is found liable in such a case, the effect is the same as holding it collaterally estopped from relitigating that question in subsequent litigation brought by class members. As long as the issues are identical—*i.e.*, as long as a jury could not reasonably answer "Yes" in the first case and "No" in later cases—precluding such relitigation does not violate the Seventh Amendment. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 333-

337 (1979). If the defendant prevails in such a case, there is no potential violation of the Rules Enabling Act, because no class members recover who are not determined by a jury to be entitled to recover, and there is no violation of the Seventh Amendment because absent class members were given the opportunity to opt out and preserve their right to a jury trial.[3]

CONCLUSION

The order granting class certification should be reversed.

[3] If a judgment against absent class members under these circumstances violates the Seventh Amendment, all judgments against absent class members would violate the Seventh Amendment. And yet, the entire point of class actions is to bind absent class members without trying their claims individually.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE, AND TYPE STYLE REQUIREMENTS

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in the proportionally spaced typeface using Microsoft Word for Office 365 with 14-point Times New Roman font.

The length of this brief, at 12 ½ pages, is also consistent with the length requirements set forth in Fed. R. App. 29(a)(5), as it is "one-half the maximum length authorized" by the Court for the parties' supplemental briefs.

Dated: January 30, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2025 I electronically filed the foregoing document with the Clerk of the Court using the ECF system.

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