[Cite as *Rimedio v. SummaCare, Inc.* , 2004-Ohio-4971.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

NICHOLAS V. RIMEDIO, D. O.	C.A. No. 21828
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SUMMACARE, INC., et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 2001 11 5536

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curium

{¶1} Appellants, SummaCare Inc., and Akron City Health System, Inc., appeal the decision of the Summit County Court of Common Pleas granting certification of a class action. For the reasons that follow, this Court reverses the decision of the trial court and remands.

I

{¶2} Appellee, Nicholas V. Rimedio, D.O., is a primary care physician who entered into a written Member Physician Agreement with Appellant, Akron City Health City System ("ACHS"), to provide medical services to enrollees in the insurance program formed by Appellant, SummaCare, Inc. ("SummaCare"). In

November of 1995, Appellee signed an employment agreement with Northeast Ohio Primary Care Physicians, Inc. ("NEOPCP"). Under that contract, Appellee had a guaranteed salary in exchange for his assignment of all of the revenue that was generated by his services to NEOPCP. In 1995, Appellee also signed a participation agreement with ACHS as an employee of NEOPCP. The agreement contained a withhold provision which allowed withholds of all or part of a physician's fee upon the threat of insolvency of ACHS or SummaCare. The agreement provided, in pertinent part:

> "Physician agrees that ACHS may withhold all or part of the fee amounts otherwise due in the event of the threatened insolvency of either ACHS or any Sponsor that is a health maintenance organization ("HMO Sponsor") for so long as necessary to prevent the threatened insolvency from maturing into actual insolvency, when required by state or federal law, or by the Ohio Department of Insurance, or by the ACHS or HMO Sponsor board of directors."

{¶3} On June 23, 1998, the ACHS Board of Trustees determined that its financial condition had been deteriorating, and that a 10% withhold on all payments to ACHS member physicians was necessary. This was communicated to all of the member physicians by letter dated June 30, 1998, informing them that a 10% withhold was being implemented effective July 1, 1998. The withhold program was in effect until April 1, 2001.

{¶4} The withhold program affected in some way around 1,400 ACHS member physicians. Some physicians were personally subject to the withhold, while others, like Appellee, continued to receive a set salary from their employer

(in Appellee's case, NEOPCP) while the employer was subject to the 10% withhold. In late 1999, Appellee and NEOPCP agreed to terminate Appellee's employment with NEOPCP. The contract between Appellee and ACHS remained in effect. Thus, Appellee, at that point, was personally subject to the 10% withholds until they were terminated in 2001.

{¶5} This action was brought by Appellee on behalf of himself and other physicians similarly situated, against Appellants to challenge the 10% withhold of fees earned by the physicians for services provided to enrollees of SummaCare. Appellee alleges that the withholds instituted were improper since ACHS was not threatened by insolvency.

{¶6} Appellee filed his complaint for class action, breach of contract, fraud, conversion, unjust enrichment/quantum meruit on November 8, 2001. On May 15, 2002, Appellee filed a motion to certify class, which Appellants opposed. The trial court conducted on-the-record hearings on July 11 and October 2, 2003. On November 7, 2003, the trial court issued its Opinions and Order granting class certification to a class of more than 1,400 physicians represented by Appellee. In addition, the trial court withdrew the leave it had previously granted to allow Appellants to amend their answer and assert certain defenses against the unnamed class members.

{¶7} Appellants appeal the trial court's decisions granting class certification and withdrawing leave to file an amended answer, asserting three

assignments of error. For the ease of discussion, the assignments of error will be addressed out of order.

II

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN WITHDRAWING THE LEAVE TO AMEND THE DEFENDANTS' ANSWER THAT IT HAD PREVIOUSLY GRANTED ON JULY 11, 2003."

{¶8} In their third assignment of error, Appellants maintain that the trial court erred in revoking the leave it had previously granted to amend their answer. This Court finds that the trial court abused its discretion by withdrawing its leave to amend, thus preventing Appellants from asserting new defenses for the newly identified class members.

{¶9} Some of the ACHS member physician agreements contained arbitration provisions. Appellants elected to waive the arbitration clause with respect to Appellee, Dr. Rimedio, who is the only named plaintiff at this time. However, Appellants maintain that they did not elect to waive the arbitration clause as it may have applied to any of the other unnamed class members. Appellants claim that they are entitled to file their amended complaint and assert their arbitration defense.

{¶10} At the first class certification hearing, on July 11, 2003, the trial court granted Appellants leave to amend their complaint. Based on that leave, Appellants filed their amended answer on August 6, raising defenses that they had

with respect to the claims of the unnamed class members, including the arbitration clause defense. At the second hearing, on October 3, the trial court acknowledged that it had granted leave to file the amended answer. Despite this ruling, in its November 7 Opinion and Order, the court changed its mind and withdrew the leave to amend. The trial court vacated its authority to grant leave to Appellants to file an amended answer, finding its previous order to be an abuse of discretion. The trial court then determined that Appellants had waived their arbitration defense with respect to the unnamed class members.

{¶11} Under Civ.R. 15(A), a motion for leave to amend a pleading should be granted freely when justice so requires. *Turner v. Cent. Local School Dist.* (1999), 85 Ohio St.3d 95, 99. "[T]he language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6.

{¶12} An appellate court reviews a trial court's decision on a motion for leave to file an amended pleading under an abuse of discretion standard. *Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 122. In *Peterson v. Theodosio* (1973), 34 Ohio St.2d 161, 175, the Supreme Court held that where an amendment is tendered timely, in good faith, and there is no good reason why leave should be denied, denial of leave to file the amended pleading is an abuse of discretion. In this case, the trial court granted leave to

Appellants to file their amended answer. Presumably, in so granting the leave, the trial court found that the amendment was tendered timely and in good faith. This Court finds that, in later revoking the leave it had granted and striking one of the affirmative defenses Appellants raised in their amended answer, the trial court abused its discretion.

{¶13} This Court finds that Appellants did not waive the arbitration defense with respect to the unnamed class members and that the trial court erred in striking their affirmative defense. Appellee bears a heavy burden of proof in trying to establish that Appellees waived their right to assert their arbitration clause defense. See *Manos v. Vizar* (July 9, 1997), 9th Dist. No. 96 CA 2581-M, at 5. "[W]hile waiver has been recognized by Ohio courts as a defense to the enforcement of an arbitration agreement, doubt as to the existence of a waiver is resolved against the party asserting it." Id.

{¶14} Appellants waived their right to assert their arbitration defense as to Dr. Rimedio, but not as to the other, unnamed physicians, who had arbitration clauses in their contracts. Further, those physicians have an equal right to invoke the arbitration clause; Appellants could not have waived the right to assert the arbitration cause against the unnamed class members. See *Manos*, supra, at 5. The trial court abused its discretion in revoking the leave it granted to Appellants to file an amended complaint after Appellants had relied upon such leave and filed their amended answer. The trial court further erred in finding that Appellants had

waived their right to assert their arbitration clause defense and striking the defense from their amended answer.

{¶15} We vacate the trial court's order revoking permission to amend. Thus, the trial court's first order granting Appellants permission to amend their answer remains in effect. Appellants' third assignment of error is sustained.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN GRANTING CLASS CERTIFICATION."

{¶16} Appellants argue that the trial court wrongly granted class certification. Specifically, Appellants maintain that class certification was inappropriate because there is no identifiable class, the class representative's claim is not typical of the claim of the other class members, and the class does meet the requirements of Civ.R. 23(B)(1), (2) or (3). We agree.

{¶17} A trial judge is given broad discretion when deciding whether to certify a class action. *Marks v. C.P. Chem. Co.* (1987), 31 Ohio St.3d 200, syllabus. The decision of the trial judge as to class certification should be affirmed absent a showing of an abuse of discretion. *Baughman v. State Farm Mut. Auto Ins. Co.* (2000), 88 Ohio St.3d 480, 483. However, "the trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded and must be exercised within the framework of Civ.R. 23." *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St. 3d 67, 70.

{¶18} Before a trial court grants class certification, it must find that the requirements of Civ.R. 23(A) have been met and that the class fits within one of the Civ.R. 23(B) categories. *Planned Parenthood Assn of Cincinnati v. Project Jericho*, (1990), 52 Ohio St.3d 56, 63. Under subsection (A) of Civ.R. 23, the court must find that two implicit and four explicit requirements have been met for a class action to be maintained: (1) An identifiable class must exist and the definition of the class must be unambiguous; (2) The named representatives must be members of the class; (3) The class must be so numerous that joinder of all members is impracticable; (4) There must be questions of law or fact common to the class; (5) The claims and defenses of the representative parties must be typical of the claims or defenses of the class; (6) The representative parties must fairly and adequately protect the interests of the class. *Warner v. Waste Mgmt., Inc*. (1988), 36 Ohio St. 3d 91, 96-98. Additionally, the trial court must find that one of the three Civ.R. 23(B) category requirements have been met before certifying a class. Id at 94.

{¶19} Appellants assert that certification of the class was improper under Civ.R. 23(A) because the class members are not identifiable. Civ.R. 23(A) impliedly requires that the description of a proposed class be adequately definite so that it is administratively possible for the court to conclude whether a particular individual is a member. *Hamilton*, 82 Ohio St.3d at 71-72. "[T]he class definition must be precise enough 'to permit identification within a reasonable effort.'" Id.

at 72, quoting *Warner*, 36 Ohio St.3d at 96. The trial court described the class to which it granted certification as: "[A]ll primary care and specialist physicians who were participating providers in SummaCare who were subjected to a ten percent withhold of service fees for the inclusive periods July 1, 1998 to April 1, 2001."

{¶20} Appellants produced a document which actually identified some 1,400 physicians who suffered a withhold. The document identified the original date that the physician signed the agreement with ACHS, when each physician signed a new or amended agreement, and how much money was withheld from each physician or his employer during the withhold period. The class of physicians that the trial court certified is precise. It is easily ascertainable which physician suffered a withhold.

{¶21} Appellants claim that the class is not identifiable because some of the physicians were solo practitioners, while some were working for partnerships. Some of the physicians were personally subject to the withholds, while others continued to receive their set salary while their employers were subject to the withholds. Appellants also maintain that the class is not identifiable because not all of the physicians signed their contracts at the same time; some knew of the withholds before signing, while others did not. This Court does not find these arguments persuasive.

{¶22} The court need only look at the list provided by Appellants to identify the members of the class. The definition of the class is precise enough so

that it is administratively feasible to determine who the class members are. See *Warner*, 36 Ohio St.3d, at 96. Therefore, the class is properly identifiable and meets the requirements of Civ.R. 23(A).

{¶23} Appellants next assert that the trial court erred in certifying the class because Appellee's claims are not typical of the class he seeks to represent. Typicality is one of the four express requirements that must be met if a class is to be maintained under Civ.R. 23(A). *Baughman,* 88 Ohio St.3d at 484. The typicality requirement "is met where there is no express conflict between the class representatives and the class." *Hamilton*, 82 Ohio St.3d at 77. A class representative's claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Washington v. Spitzer Mgmt,* 8th Dist. No. 81612, 2003-Ohio-1735, at ¶ 24, quoting *Baughman,* 88 Ohio St.3d at 485.

{¶24} Appellants argue that Appellee's claim is not typical of the class he seeks to represent because he had assigned a large portion of his right to directly collect fees during the withhold period. For part of the withhold period Appellee was receiving a set salary and his employer was subject to the withhold. However, during another part of the withhold period, Appellee himself was subject to the withhold. The withholds that Appellee was actually subject to personally may affect the damages that he may be entitled to recover, but it does not affect

typicality. In *Vinci v. American Can Co.* (1984), 9 Ohio St.3d 98, 100-101, the Supreme Court of Ohio found that class certification was proper where the injury complained of was common to the class despite the fact that each class member may be entitled to different damages.

{¶25} Appellants next argue that there are unique issues and defenses that render Appellee's claim atypical. This Court agrees. About 700 of the 1,400 or so class members have contracts with arbitration clauses, the others do not. Appellee waived his right to assert his arbitration claim, but the other physicians whose contracts included arbitrations clauses did not. This Court finds that Appellee does not have sufficient incentive to argue all of the defenses or claims of the rest of the class. Since he waived his right to request arbitration, he cannot adequately represent the interests of the physicians who do have the right to arbitrate.

{¶26} Civ.R. 23(A) provides that "one or more members of a class may sue or be sued as representative parties on behalf of all only if *** (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" In this case, about 700 physicians in the class have a right to arbitrate, and the Appellants can assert the defense of arbitration against those physicians. The same is not true with Appellee. He is not subject to the same defense and he has waived his right to arbitrate. Therefore, his claims are not typical of all 1,400 or so physicians in the class he sought to certify.

{¶27} To meet the typicality requirement under Civ.R. 23(A)(4), the class representative must "fairly and adequately protect the interests of the class." In this case, Appellee does not have any interest in protecting the interest of the class members with arbitration clauses who may desire to pursue arbitration. Appellee, as the sole class representative does not meet the typicality requirement. The trial court incorrectly found that the typicality requirement of Civ.R. 23(A)(3) had been met.

{¶28} Appellants next argue that class certification was inappropriate because the class is not certifiable under any of the Civ.R. 23(B) categories. A trial court may properly certify a class if it finds that the class meets the Civ.R. 23(A) requirements, i.e. identifiability, class membership, commonality, typicality, numerocity, adequacy of representation, and the requirements of one of the three Civ.R. 23(B) categories. *Hamilton*, 82 Ohio St.3d at 71. In this case, the prerequisites of Civ.R. 23(A) were not met; Appellee does not meet the typicality requirement. Therefore, the class is not properly certifiable. The trial court abused its discretion in certifying this class. The Appellants' first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN CERTIFYING A CLASS WITHOUT IDENTIFYING WHETHER THE CLASS WAS TO BE A 23(B)(1) CLASS, A 23(B)(2) CLASS, OR A 23(B)(3) CLASS."

{¶29} In their second assignment of error, Appellants maintain that the trial court erred by finding that the class could be certified under all three 23(B) categories. Specifically, Appellants argue that the trial court improperly certified the class under all three 23(B) subcategories because the class did not meet the prerequisites of all three, and the court did not specify under which category the case would proceed. Given our disposition of Appellants' first assignment of error, we need not address this particular argument. See App.R. 12 (A)(1)(c).

{¶30} To conclude, Appellants' first and third assignments of error are sustained. The trial court abused its discretion in the revoking leave it had previously granted to Appellants to assert new defenses against unnamed class members. This Court finds that the Appellants did not waive their right to assert their arbitration defense and thus, the order revoking the leave to amend is vacated. As a class representative, Appellee fails to meet the requirements of Civ.R. 23 and, therefore, the trial court abused its discretion in granting class certification.

Judgment reversed
and remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

BETH WHITMORE
FOR THE COURT

WHITMORE, J.
BOYLE, J.
CONCURS

CARR, P. J.
DISSENTS, SAYING:

{¶31} I dissent from the majority opinion as I feel that the trial court did not abuse its discretion in revoking the leave it had previously granted allowing Appellants' amendment. Pursuant to Civ.R. 54(B), interlocutory orders "are 'subject to revision at any time before the entry of judgment adjudicating the claims and the rights and liabilities of all the parties.'" *Drillex, Inc. v. Lake Cty. Bd. Of Commrs*. (2001), 145 Ohio App.3d 384, 389, quoting *Pitts v. Dept. of Transp*. (1981), 67 Ohio St.2d 378, 379, fn.1.

{¶32} Moreover, this Court has held that "the denial of a motion to stay proceedings and refer a matter to arbitration is subject to review only for an abuse of discretion." *Jones v. Fred Martin Motor Co*., 9th Dist No. 20631, 2002-Ohio-716 at ¶7, citing *Harsco Corp. v. Crane Carrier Co*. (1997), 122 Ohio App.3d 406, 410.

> "An abuse of discretion connotes more than an error of law or judgment, but implies that the judgment can be characterized as unreasonable, arbitrary or unconscionable. When applying the abuse of discretion standard, an appellate court may not substitute its judgment of that of the trial court." (Citations omitted.) *Jones*, 2002-Ohio-716, at ¶7.

{¶33} In *MGM Landscaping Contractors, Inc. v. Berry* (Mar. 22, 2000), 9th Dist. No. 19426, this Court explained a party's ability to waive its right to arbitration:

> "The law of Ohio favors arbitration as an alternative method of dispute resolution.
>
> "Pursuant to R.C. 2711.02, a court may stay trial of an action 'on application of one of the parties' if (1) the action is brought upon any

> issue referable to arbitration under a written agreement for arbitration, and (2) the court is satisfied the issue is referable to arbitration under the written agreement. When a party does not properly raise the arbitration provision of a contract before the trial court, he is deemed to have waived arbitration.
>
> "[A] plaintiff's waiver may be effected by filing suit. When the opposite party, the potential defendant, is confronted with a filed lawsuit, the right to arbitrate can be saved by seeking enforcement of the arbitration clause. This is done under R.C. 2711.02 by application to stay the legal proceedings pending the arbitration. Failure to move for a stay, coupled with responsive pleadings, will constitute a defendant's waiver." (Citations omitted.) Id. at 4-5.

{¶34} The trial court's decision here was interlocutory in nature and appellants had waited almost two years after the initial suit was filed to bring up their affirmative defense regarding the arbitration provisions. Appellants were aware that appellees were trying to have the class certified and waited almost two years to raise their affirmative defense. Under these circumstances, Appellants clearly waived the defense of arbitration. Therefore, I find that Dr. Rimedio is a proper class representative and meets the requirements of Civ.R. 23(A).

{¶35} I would, however, reverse on appellant's second assignment of error, which was not discussed above. In their second assignment of error, appellants maintain that the trial court erred by finding that the class could be certified under all three Civ.R. 23(B) categories. Appellants argue that the trial court improperly certified the class under all three Civ.R. 23(B) subcategories because the class did not meet the prerequisites of all three, the court did not specify under which

category the case would proceed, and because the three are procedurally inconsistent.

{¶36} In its November 7 Opinion and Order, the trial court determined that appellants satisfied all the requirements for certification under all three of the 23(B) subcategories. The trial court certified the class under Civ.R. 23(B)(1), (B)(2), and (B)(3).

{¶37} To certify a class, a trial court must first find that the six prerequisites of Civ.R. 23(A) have been met, i.e., identifiable class, class membership, numerocity, commonality, typicality, and adequacy of representation. *Warner*, 36 Ohio St.3d at 96-98. Upon finding that the Civ.R. 23(A) requirements have been met, the court must find that the class meets the requirements of one of the three Civ.R. 23(B) categories. See *Warner*, 36 Ohio St.3d at 94. The trial court correctly found that the class met the requirements of Civ.R. 23(A), but improperly certified it under all three Civ.R. 23(B) categories. The class was properly certifiable under Civ.R. 23(B)(3), but it was in error for the trial court to certify it under Civ.R. 23(B)(1) and (B)(2).

{¶38} Civ.R. 23(B)(1)(a) permits class certification if separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standard of conduct for the party opposing the class[.]" Further, a class may only be certified under Civ.R. 23(B)(1)(a) when proven that "separate actions could lead to

incompatible standard of conduct" for the appellants. (Empahsis omitted.) *Warner*, 36 Ohio St.3d at 95. "Thus, merely demonstrating that there is a risk of inconsistent or varying adjudication is insufficient as one must show that the defendant will have to adhere to differing standards of conduct." *Hall v. Jack Walker Pontiac Toyota, Inc*. (2000), 143 Ohio App.3d 678, 685, citing *Warner*, 36 Ohio St.3d at 95.

{¶39} Appellee has not proven that differing standards of conduct would result if separate actions were pursued. It is possible that certain class members could recover greater damages than others, however, *Warner* states that "such a situation is covered by subsection (B)(3) rather than (B)(1)." *Warner*, 36 Ohio St.3d at 95. Therefore, this action is not certifiable under Civ.R. 23(B)(1)(a).

{¶40} Subdivision (B)(1)(b) is usually used in cases in which claims are made by numerous persons against funds insufficient to satisfy all claims. *Warner*, 36 Ohio St.3d at 95. Civ.R. (B)(1)(b) applies in situations "where only a limited amount of money is available and there is a risk that separate actions would deplete the fund before all deserving parties could make a claim." *Warner*, 36 Ohio St.3d at 95. The instant case does not involve a limited fund. To certify a class action under Civ.R. 23(B)(1)(b), the appellee must establish, by specific evidence, that "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. *Ortiz v. Fibreboard Corp*. (1999),

527 U.S. 815, 838, 144 L.Ed.2d 715. In this case, appellee did not establish that there was a limited fund, neither did he offer evidence of the amount of such fund.

{¶41} Appellee did not establish that there would be a risk of inconsistent conduct if separate actions were pursued, therefore the class is not certifiable under Civ.R. 23(B)(1)(a). Further, the case is not certifiable under Civ.R. 23(B)(1)(b) because appellee did not even allege that there was a limited fund and that fund may be insufficient to satisfy all claims. Therefore, the trial court abused its discretion by certifying the proposed class pursuant to Civ.R. 23(B)(1).

{¶42} It was also improper for the trial court to certify the instant class under Civ.R. 23(B)(2). Civ.R. 23(B)(2) is used when injunctive or declaratory relief is sought. *Planned Parenthood Assn.*, 52 Ohio St.3d at 66. Civ.R. 23(B)(2) makes provisions for class actions where:

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This category will not apply if the primary relief sought by the plaintiffs is damages. *Marks*, 31 Ohio St.3d at 203, citations omitted.

{¶43} In the instant case, appellee did request a declaratory judgment, however, his primary request for relief is damages resulting from the breach of contract. Even in his case designation sheet appellee designated this case as a breach of contract, not a declaratory judgment, case. Since the primary request for relief is damages and not a declaratory judgment, this cause cannot be categorized under Civ.R. 23(B)(2), and the trial court abused its discretion in certifying the

case as such. See *Hamilton*, 82 Ohio St.3d at 86; *Warner*, 36 Ohio St.3d at 95, *Marks*, 31 Ohio St.3d at 203.

{¶44} The class is certifiable, however, under Civ.R. 23(B)(3). Civ.R. 23(B)(3) applies when the primary request is for damages, as is the case here. *Warner*, 36 Ohio St.3d at 96. The trial court found that the Civ.R. 23(B)(3) requirements of predominance and superiority were met. Accordingly, the class may proceed as a whole only as a Civ.R. 23(B)(3) class.

{¶45} I would reverse the trial court's decision granting class certification on all three Civ.R. 23(B) subsections and remand for class certification under Civ.R. 23(B)(3).

APPEARANCES:

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