IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, *et al.*, Appellees/Cross-Appellants, v. KISLING, NESTICO & REDICK, LLC, *et al.*, Appellants/Cross-Appellees.	Case Nos. CA-31007 and CA-31008 On Appeal from Common Pleas Case No. CV-2016-09-3928 **Cross-Appellant's Reply Brief** **ORAL ARGUMENT REQUESTED**

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Introduction

Defendants' objections to Plaintiffs' cross-appeal stem from the flawed premise that this Court, in two prior appeals, ruled that Plaintiffs' proposed Class A, the "price-gouging class," could ***not*** be certified under Rule 23. This Court did no such thing. Instead, in *Williams I*, this Court merely found that the trial court "failed to undertake a rigorous analysis of the requirements of Civ.R. 23(B) with respect to the price-gouging class" and remanded the matter "for the trial court to undertake that analysis in the first instance." (R. 5335, Decision and Journal Entry, ¶ 37.) The Court in *Williams I* even specifically stated that it "takes no position as to whether the trial court should ultimately certify the proposed class. (*Id.*) In *Williams II*, the Court found that the trial court "did not follow the prior mandate of this Court" and again remanded the matter with instructions that "the trial court must perform a rigorous analysis of the requirements of Civ.R. 23(B), as this Court previously ordered in *Williams I*...." (R. 5522, Decision and Journal Entry, ¶¶ 10–11.) Neither of these orders foreclosed the certifiability of the "price-gouging" class under Civ.R. 23, as Defendants suggest. If anything, the "appellate mandate rule" cited by Defendants requires that Plaintiffs' cross-appeal be sustained because the trial court *again* failed to perform the rigorous analysis twice mandated by this Court.

Rather than remand the case for a third time, however, this Court should provide guidance to the trial court regarding the appropriateness of certifying the price-gouging class in full and address the contentious "injury-in-fact" issue, which apparently has paralyzed the trial court's ability to perform the rigorous analysis required by Civ.R. 23(B) and this Court's prior mandates. More specifically, this Court should affirm the appropriateness of applying the well-reasoned and well-developed body of law establishing that so-called "discounts" or "offsets" given to victims of price-gouging or price-fixing schemes do not undo the "injury-in-fact" arising from having been subject to the scheme in the first place, and therefore do not defeat class-certification. That is specifically what Plaintiffs' cross-appeal requests here.

Fearing that this Court may agree with Plaintiffs and affirm the appropriateness of certifying the price-gouging class in full, Defendants predictably ask this Court to place additional arbitrary and needless limitations on the trial court's ability to adjudicate Plaintiffs' compelling fraud claims as a class. To that end, Defendants offer a number of weak procedural arguments; however, Defendants' interpretations of waiver, the invited error doctrine, and the appellate mandate rule, are flawed and misapplied.

First, Plaintiffs have never waived argument regarding the proper constitution of their proposed price-gouging class. On the contrary, Plaintiffs have consistently and emphatically argued to this Court and the trial court that differences in putative class members' health insurance and amounts of so-called "discounts" applied to their bills after Defendants had subjected them to their price-gouging scheme do not predominate over the existence of a common, fraudulent price-gouging scheme whereby Defendants conspired to overcharge KNR clients exorbitant and unconscionable rates for suspect medical services by Defendant Ghoubrial. Plaintiffs have also consistently argued that their proposed price-gouging class should be certified in full because every member of the class suffered an injury-in-fact by having been overcharged by Defendants as part of this scheme, regardless of whether any so-called "discount" was applied after the fact. Plaintiffs made these same arguments in *Williams II*, and never acquiesced to any limitation of their proposed price-gouging class but instead always reserved the right to seek amendment to the certified class, as allowed by Civ.R. 23(C)(1)(c), following this Court's resolution of these disputed issues; however, this Court did not address these questions in *Williams II* and simply remanded the matter without further guidance to the trial court. Now that the case has been appealed a third time, Plaintiffs,

through their cross-appeal, seek to put those issues squarely before this Court in order to finally end the string of appeals arising from certification of the price-gouging class.

Second, Julie Ghoubrial's deposition testimony in her divorce from Defendant Sam Ghoubrial is plainly relevant to the predominance inquiry under Civ.R. 23(B) in this case in that it both quantitively and qualitatively affects the weight of the common issues to be considered in this case's class-certification question. In order to exclude this highly relevant evidence from the trial court's consideration, Defendants suggest that the trial court's hands are tied by various procedural doctrines. However, Plaintiffs never waived argument over the relevance of Julie's transcript to the class-certification question since they only recently obtained a copy of the transcript, long after the appeals in *Williams I* and *Williams II* were concluded. Nor did they "invite" the trial court to sit on Julie's transcript for over 4 years without taking any action on it; Plaintiffs merely acquiesced to the trial court's erroneous decision. And nothing in this Court's prior mandates limits what evidence the trial court may consider as part of its rigorous analysis under Civ.R. 23(B).

Reply and Argument

I. *Felix* does not support Defendants' proposition that subsequent efforts to remedy a prior injury make the original injury "inchoate."

Plaintiffs have already offered extensive argument in their Cross-Appellants' Brief as well as their Appellees' Brief for why *Felix v. Ganley Chevrolet* does not preclude certification of the entirety of their proposed price-gouging class based on the same class-wide "injury in fact," and those arguments are incorporated herein by reference.

In response, Defendants offer a frankly absurd interpretation of *Felix*, equating victims who were never injured in the first place with victims who received an injury that was later remedied, if only partially. According to Defendants' interpretation of *Felix*, "putative class members who received charge-reductions likely have injuries that are merely 'inchoate,' rather than 'in fact,' even if they *were* overbilled on the top line." (Ghoubrial Cross-Appellee Br., p. 11.) There is nothing "inchoate" about an injury that a wrongdoer attempts to remedy, especially where, as here, that remedy only addresses a fraction of the harm. (*See* calculations at pp. 19–21 of Appellees' Brief.) And there is nothing in *Felix* that demands that an injury-in-fact analysis consider only a putative class member's "***net*** outcome" or "***net*** overpayment."

Furthermore, the putative Class A members here were not merely "exposed" to a common fraud. Class A members were ***subjected*** to the fraud; signed medical liens and letters of protection; received settlement statements with false top-line charges; and had money taken out of their settlements.[1] This is completely distinct from the putative class members in *Felix* who merely purchased a vehicle through a contract that contained an offensive arbitration clause that was unlikely to have any impact at all on all but a tiny fraction of the class-members.

II. Plaintiffs' decision to not bring a cross-appeal in *Williams II* does not constitute a waiver of argument over the proper definition of Class A because Civ.R. 23(C)(1)(c) allows for altering or amending a certified class any time prior to final judgment.

Plaintiffs have consistently and emphatically argued to this Court and below that their proposed Class A, the price-gouging class, should be

[1] Defendant Ghoubrial also argues that "For no period of time were such patients made to believe that they actually owed the top-line "overcharge." (Ghoubrial Br. 14.) Yet those amounts were listed on the patients' settlement statements. Clearly, someone was meant to believe that the top-line amounts were valid charges, and the performative act of applying a "discount" to a charge that never really existed is itself a form of fraud in that it caused KNR clients to believe that their "skilled" attorneys were able to negotiate down their medical bills.

certified in full because differences in putative class members' health insurance and amounts of so-called "discounts" applied to their bills do not predominate over the common issues, namely the existence of a common, fraudulent price-gouging scheme whereby Defendants conspired to overcharge KNR clients exorbitant and unconscionable rates for suspect medical services by Defendant Ghoubrial. Plaintiffs made this same argument in *Williams II*, even though it also opposed Defendants' attempts to de-certify Class A.

Arguing in support of maintaining certification of the class, in any form, is not the same as supporting the trial court's definition of the class. This is especially true where, as here, the Civil Rules empower the trial court to alter or amend a class at any time prior to final judgment. *See* Civ.R. 23(C)(1)(c). However, even if there was some ability or expectation for Plaintiffs to have brought a cross-appeal in *Williams II*, the decision to not raise an issue in a prior appeal does not constitute waiver when the trial court has continuing jurisdiction to correct any error. *See*, *e.g.*, *State v. Price*, 4th Dist. Athens Nos. 19CA14, 19CA16, 19CA18, 2020-Ohio-6702, ¶ 19 ("[J]ail-time credit errors are not limited to correction on direct appeal, but … may also be corrected through the filing of a motion with the court pursuant to R.C. 2929.19(B)(2)(g)(iii)… Accordingly, despite Price's failure

to raise this issue in his prior appeal, it has not been waived.").

The application of this doctrine—and the meritless of Defendants' waiver argument—is especially clear as to class-action cases. *See Estate of Mikulski v. Centerior Energy Corp.*, 2019-Ohio-983, 133 N.E.3d 899, ¶ 37-38 (8th Dist.) ("We find nothing in the doctrine of the law of the case that would preclude a court from revisiting the class certification requirements with regard to a modified or revised class definition. … The only thing that language [in previous court of appeals order] 'mandated' was for the trial court to further consider the predominance requirement. … [W]e did not state that the trial court could not reconsider a newly proposed class of plaintiffs."); *Williams v. Pillpack* LLC, 343 F.R.D. 201, 206-207 (W.D.Wash.2022), quoting *Fair Hous. for Child. Coal., Inc. v. Pornchai Int'l*, 890 F.2d 420 at *1 (9th Cir. 1989) (unpublished) ("The law of the case doctrine applies only sparingly in class certification proceedings, for Rule 23(c) invests broad authority in the district court to alter and amend orders until entry of judgment."); *Diaz v. State*, 371 Mont. 214, 2013 MT 219, 308 P.3d 38, ¶ 32-33 ("Our direction to the District Court to certify the class on remand did not remove that court's discretion to alter or amend the class certification order—including the class definition—as the case proceeded. M. R. Civ. P. 23(c)(1)(C)."). *See also Kuhn v. 21st Century Ins. Co.*, 5th Dist.

Stark No. 2011 CA 00232, 2012-Ohio-2598, ¶ 19 ("[I]n Ohio appellate jurisprudence, the waiver doctrine is not absolute. … Because waiver is a discretionary doctrine, an appellate court may decline to apply it in the interests of justice."), citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St. 3d 274, 279, 1993 Ohio 119, 617 N.E.2d 1075; *State v. Ruby*, 149 Ohio App.3d 541, 778 N.E.2d 101, 2002 Ohio 5381, ¶ 86).

Notwithstanding any actions taken or not taken in *Williams II*, Plaintiffs never acquiesced to any limitation of their proposed price-gouging class but instead always reserved the right to seek amendment to the certified class, as allowed by Civ.R. 23(C)(1)(c), following this Court's resolution of these disputed issues. Because those issues have to date not been addressed by this Court, which has resulted in many years of delay and multiple appeals, Plaintiffs now bring this cross-appeal to conclusively determine the issue, even though they would not otherwise be required to. Defendants' framing of these circumstances as a form of "waiver" is without merit.

III. Julie Ghoubrial's Oct. 12, 2018 deposition transcript is relevant to Civ.R. 23(B)'s predominance inquiry in that it not only introduces additional common issues for consideration but also amplifies the egregiousness of Defendants' self-dealing such that it further confirms the appropriateness of disgorgement as a remedy, and thus further confirms that evidence of Defendants' common scheme predominates over individual issues.

Contrary to Defendants' arguments, Julie Ghoubrial's October 12, 2018 deposition is plainly relevant to not only the merits of the underlying case but also the class certification analysis itself, specifically Civ.R 23(B)'s predominance requirement. A rigorous analysis of Rule Civ.R. 23(B)'s requirements demands not only a routine comparison of the amount evidence that is common to the class versus individualized issues but also a consideration of the importance of the issues. Here, Julie's deposition adds weight to the "common issues" side of the scale on both counts. First, just as with the price-gouging facet of Defendants' scheme, evidence showing that the scheme was also an illegal cash kickback scheme is also common to all putative members of the class. But more importantly, the cash kickback element of the scheme amplifies the *significance* of this issue such that certification would further the equitable purpose of the class action. *Estate of Mikulski v. Centier Energy Corp.*, 8th Dist. Cuyahoga No. 94536, 2011-Ohio-696 ¶ 16 ("Predominance is a qualitative inquiry, not a quantitative one."). In particular, this evidence demonstrating such a blatant violation of

KNR's and Ghoubrial's respective professional duties to their clients is especially significant to the determination of whether disgorgement of any fees earned from any such clients subjected to Defendants' fraudulent scheme is an appropriate remedy in this case, as supported by countless well-reasoned cases from Ohio and nationwide. (*See* Cross-Appellants' Merit Brief at p. 27–29, fn. 4 (citing cases)).

IV. Plaintiffs did not waive argument over the trial court's error in failing to consider Julie Ghoubrial's deposition transcript as part of its certification analysis when it only recently obtained the transcript to confirm its contents, nor did Plaintiff invite the trial court's error by merely acquiescing to the trial court's erroneous decision.

Notwithstanding the plain relevance of Julie's transcript to the class-certification question, Defendants seek to exclude consideration of it, based on misguided interpretations of the waiver and invited error doctrines.

First, as stated above, waiver is the voluntary relinquishment of a known right. The transcript of Julie's deposition was not actually disclosed to Plaintiffs until long after *Williams I* and *Williams II* were adjudicated. Therefore, Plaintiff's "failure" to make an issue of a transcript whose contents were not actually known cannot constitute a knowing waiver of arguments related to those contents. Although Plaintiffs had reason to believe they knew what was contained in the transcript, they could not be sure of this until they could actually possess the transcript and know for

themselves. Moreover, the fact that the trial court did have a copy of the transcript and knew its contents yet nevertheless failed to take any action on it and determined to postpone review of it, gave Plaintiffs reason to doubt their belief as to what it actually contained. It was only after a copy of the transcript was actually provided that Plaintiffs could make a legitimate argument based on its contents.

Second, the invited error doctrine also does not preclude Plaintiffs from challenging the trial court's error in failing to consider Julie's transcript as part of its certification analysis. "The application of the doctrine depends upon the nature of a party's role in the court's erroneous decision-making; that is, whether it was an active or passive one." *In re E.L.*, 9th Dist. Medina No. 18CA0060-M, 2019-Ohio-1490, ¶ 11 (citing *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000 Ohio 183, 738 N.E.2d 1178 (2000)). If the party "mere[ly] 'acquiesc[ed] in the trial judge's erroneous conclusion,'" the invited error doctrine will not bar him or her from challenging the court's ruling on appeal. *Id.* (quoting *Carrothers v. Hunter*, 23 Ohio St.2d 99, 103, 262 N.E.2d 867 (1970)). Plaintiffs worked diligently to obtain a copy of Julie's transcript early in the case, but after the trial court obtained a copy for *in camera* review and determined that it would hold off review until after a class was certified, Plaintiffs simply acquiesced

in the trial court's decision. In expressing their subjective belief that the remaining evidence in the record supports certification of Class A (which they still believe is true), Plaintiffs did not ask or invite the Court to take any action vis-à-vis Julie's transcript. It would indeed be an absurd result to bar this shocking evidence of kickbacks and self-dealing from coming to bear on this lawsuit under the circumstances at issue here.

V. The prior mandates of this Court only require the trial court to perform a rigorous analysis of the requirements of Civ.R. 23(B) and include no limitation as to what evidence the trial court may consider or the constitution of the certified class.

In *Williams I* this Court specifically "t[ook] no position as to whether the trial court should ultimately certify the proposed class." (R. 5335, Decision and Journal Entry, ¶ 37.) Notwithstanding this Court's clear pronouncement, the KNR Defendants argue that this Court "rejected" Plaintiffs' arguments for why the price-gouging class should be certified in full. (KNR Cross-Appellee Brief, p. 12.) And in *Williams II*, this Court confirmed that merely removing members from a proposed class is not an adequate substitute for the rigorous analysis required by Civ.R. 23(B). (R. 5522, Decision and Journal Entry, ¶ 10.) In both cases, the only mandate given by this Court was for the trial court to perform the rigorous analysis required by Civ.R. 23(B), and nothing in *Williams I* or *Williams II* limits how the trial court is to perform its rigorous analysis or what

evidence it may consider. Defendants now attempt to extend or vary that mandate to include various limitations on the trial court's ability to certify the entirety of Class A, including limiting what additional evidence (*i.e.* Julie Ghobrial's deposition transcript) it may consider. Thus, it is Defendants, not Plaintiffs, who are contravening the appellate mandate rule, which by no means precludes Plaintiffs from arguing that the trial court's rigorous analysis should include consideration of all evidence in the record and that Plaintiffs' proposed definition of Class A should not be limited. (*See Section II, above, quoting Estate of Mikulski, Williams, Diaz.*)

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Certificate of Compliance

I certify that this Brief complies with the word-count provision set forth in Ninth District Local Rule 19(B)(2). This Brief is printed using Times New Roman or Georgia 14-point typeface using Microsoft Word word processing software and contains 2,981 words.

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Certificate of Service

The foregoing document was filed on October 11, 2024, using the Court's electronic-filing system, which will serve copies on all necessary parties.

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