

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Stammco, LLC, d.b.a. The Pop Shop, et al.

Court of Appeals No. F-11-003

Appellants

Trial Court No. 05CV000150

v.

United Telephone Company of Ohio,
d.b.a. United Telephone Co., et al.

DECISION AND JUDGMENT

Appellee

Decided: December 16, 2011

* * * * *

Dennis E. Murray, Sr. and Donna Jean A. Evans, for appellants.

Michael K. Farrell, Karl Fanter, John B. Lewis and Ruth E. Hartman,
for appellees.

SINGER, J.

{¶ 1} Appellants appeal the order of the Fulton County Court of Common Pleas denying class certification following remand from the Supreme Court of Ohio. For the reasons that follow, we reverse.

{¶ 2} The facts of this matter have been more fully explained in the previous consideration of this court, *Stammco, L.L.C. v. United Tel. of Ohio*, 6th Dist. No. F-07-024, 2008-Ohio-3845, and that of the Supreme Court of Ohio, *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042. In 2005, appellants, Stammco, L.L.C., dba The Pop Shop, and its owners, Kent and Carrie Stamm, sued their local telephone company, appellee, United Telephone Company of Ohio, alleging that they and others similarly situated had been damaged by appellee's negligent billing practices which facilitated a practice known as "cramming." *Stammco*, 1042-Ohio-1042, ¶ 2.

{¶ 3} "Cramming" is the practice of placing unauthorized charges on a customer's telephone bill. *Id.* "Crammers" take advantage of the aggregation of third party tolls or services that may be billed to end users by the user's local telephone company. The present case provides an example. At the time preceding this suit, appellee was a wholly owned subsidiary of Sprint Corporation.¹ Sprint entered into a number of contracts with other entities to include on its local telephone billings amounts due from third parties. Sprint purchased these receivables and was compensated for each transaction associated with a given receivable.

{¶ 4} In 2004, appellant Kent Stamm noticed an unauthorized \$87.98 charge by OAN Services, Inc. for "Bizopia" on his local telephone bill for The Pop Shop. Stamm

¹Appellee's ownership has since been through a number of incarnations. Sprint became Sprint-Nextel, then Embarq Corporation, which merged with CenturyTel, Inc. d.b.a. CenturyLink. Even though, according to appellants, since 2006 United Telephone of Ohio has had no corporate affiliation with Sprint, for simplicity, we shall refer to its corporate structure as it existed when this suit was instituted.

called Sprint where a representative told him to call OAN, where he was told to call Bizopia. After numerous telephone calls, emails, a substantial amount of time and a \$10 late payment fee, Stamm successfully persuaded Sprint to remove the charge. Stamm also asked that third party charges to his bill be blocked, but was advised that this service was not available to appellee's customers in Ohio. During this dispute, Kent Stamm also discovered numerous other unauthorized third party charges on both his home and business telephone statements, some of which he had paid in error.

{¶ 5} Appellants sued, asserting that appellee had a duty to provide accurate statements to its customers and to insure that the amounts collected in payment of those bills were indeed for products and services authorized and received by appellee's more than one million Ohio customers. Appellants asked for class certification and sought to enjoin appellee from billing further unauthorized charges and for compensatory damages from the prior practice.

{¶ 6} The trial court certified the class and named appellants class representatives. The trial court approved the class as being:

{¶ 7} "All individuals, businesses or other entities in the State of Ohio who are or who were within the past four years, subscribers to telephone service from United Telephone Company of Ohio d.b.a. Sprint and who were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission. Excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, and any other entity or its affiliate which has a controlling

interest), their current, former, and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors." *Stammco*, 2008-Ohio-3845, ¶ 4.

{¶ 8} Appellee appealed the class certification to this court and we affirmed. *Id.* at ¶ 65. Appellee pursued a discretionary appeal to the Supreme Court of Ohio, which eventually accepted the case. *Stammco L.L.C. v. United Tel. Co. of Ohio*, 121 Ohio St.3d 1430, 2009-Ohio-1296. On review, the Ohio Supreme Court found the class definition that was certified to be ambiguous. According to the court:

{¶ 9} "The class definition includes customers who 'were billed for charges on their local telephone bills by Sprint on behalf of third parties without their permission.' This definition does not specify whether the customers were expected to give Sprint or the third parties authorization for billing, or whether the third parties were expected to obtain authorization from the customers for charges on the bill. In addition, in the phrase 'their permission' in the class definition, it is unclear who the word 'their' refers to. While one might assume that the word 'their' refers to customers, it could be read to refer to either customers or third parties. Nor is it clear how authorization was to be accomplished—that is, whether written, verbal, or any other form of permission was necessary to authorize billing, and to whom it should be given, whether directly to Sprint or to the third party."

{¶ 10} *Stammco*, 2010-Ohio-1042, ¶ 10. The court sent the case back to the trial court, "* * * to redefine the class on remand." *Id.* at ¶ 12.

{¶ 11} On remand, appellants moved to amend their class definition to comply with the Supreme Court's mandate. The revised definition was:

{¶ 12} "All individuals, businesses or other entities in the State of Ohio who are or who were within the period four years prior to the initiation of this lawsuit, subscribers to local telephone service from United Telephone Company of Ohio d.b.a. Sprint and/or any successor company providing the same service, and who were billed for third party charges as to which Sprint had no prior authorization from the customer in writing or by a method acceptable to Sprint sufficient for Sprint to verify that the customer had agreed to such charge. Excluded from the class are those customers who subscribed to and provided authorization for long distance services from a provider of toll services that were billed on the customers' local telephone bills. Also excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, former and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors)."

{¶ 13} The trial court, although sympathetic to appellants' frustration, on remand refused to certify the amended class. The court found that (1) the class definition submitted was a prohibited "fail-safe" class, (2) appellants brought their action against a local carrier, "rather than the culprit 'third party provider'" and (3) the suit proposes to impose a duty on appellee not required by "current legislation and case law." It is from the judgment denying certification of a class that appellants now bring this appeal.

Appellants set forth six assignments of error:

{¶ 14} "First Assignment of Error: The trial court erred, on remand, by issuing the December 22, 2010 judgment entry decertifying the class and thereby failing to follow the mandate of the Supreme Court.

{¶ 15} "Second Assignment of Error: The trial court erred in its December 22, 2010 judgment entry, by re-examining and overruling the previous determination after having correctly concluded that the case was properly certified as a class action.

{¶ 16} "Third Assignment of Error: The December 22, 2010 judgment entry of the trial court, reversing its prior ruling on class certification, was based upon an impermissible evaluation of the merits of the underlying causes of action.

{¶ 17} "Fourth Assignment of Error: The December 22, 2010 determination of the trial court that a class action is not feasible was based on a misconception and an inaccurate comprehension of the class definition.

{¶ 18} "Fifth Assignment of Error: The trial court erred in its December 22, 2010 judgment entry when it entered a final judgment, dismissing plaintiffs' complaint in its entirety.

{¶ 19} "Sixth Assignment of Error: The trial court's dismissal of the entire case when deciding the sufficiency of the class definition under Rule 23 upon remand, did not address the prayer for injunctive relief or the claims for individual damages."

I. Action on Remand

{¶ 20} In their first assignment of error, appellants insist that the trial court exceeded the instructions of the Ohio Supreme Court on remand. The only issue on

which the Ohio Supreme Court actually ruled was the sufficiency of the class definition, which that court found impermissibly ambiguous. *Stammco*, 2010-Ohio-1042, ¶ 11. The court stated:

{¶ 21} "We hold that the class certified by the trial court as presently defined does not permit its members to be identified with a reasonable effort. We therefore reverse the judgment and remand the cause to the trial court so that it may clarify the class definition in a manner consistent with this opinion." *Id.* at ¶ 14.

{¶ 22} Appellants argue that the only matter to be resolved on remand was the language of the class definition. Any other issues, including whether the class was legally sufficient pursuant to Civ.R. 23, were raised and affirmed by this court on appeal. Since that affirmance was not disturbed by the Ohio Supreme Court, those legal conclusions become the law of the case for subsequent trial and appellate proceedings, according to appellants.

{¶ 23} Appellee responds that reversal of the class definition nullifies the entire trial court judgment and puts the case in the position it would have been in had there never been a judgment. On remand, the case then resumes at that point where the first error was committed. That point, appellee insists, is prior to class certification. Since this leaves no existing class to decertify or any class definition to amend, the trial court is obligated to begin anew in the class certification process, appellee insists.

{¶ 24} Alternatively, appellee argues, even if we conclude that the class certification stands, a trial court in a class action has a continuing obligation to assure that

the class remains viable in light of subsequent developments. If the changed posture of the case no longer satisfies the requirements of Civ.R. 23, the trial court has not only the ability, but the obligation to decertify the class.

{¶ 25} As we stated in our original consideration of this matter:

{¶ 26} "A decision to certify an action as a class action is not a decision on the merits of a claim. 'In determining whether to certify a class, the trial court must not consider the merits of the case except as necessary to determine whether the Civ.R. 23 requirements have been met. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233' *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-1473, 2002-Ohio-5499, ¶ 24. * * *" *Stammco*, 2008-Ohio-3835, ¶ 12

{¶ 27} "Seven prerequisites must be met before a court may certify a case as a class action pursuant to Civ.R. 23: (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 impractical; (4) there must be questions of law or fact common to the class; (5) the claims or 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; and (7) one of the three Civ.R. 23(B) requirements must be satisfied. *Warner v. Waste Mgmt., Inc.* (1988), 36 Ohio St.3d 91, 96-98." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, ¶ 6.

{¶ 28} A decision on whether to certify a class action is to be affirmed on review absent an abuse of discretion. *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, syllabus; *In re Consol. Mtge. Satisfaction Cases*, ¶ 5. An "abuse of discretion" is more than a mistake of judgment or an error in law, the term connotes a judgment that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 29} Initially, the trial court certified the class and we affirmed, finding that the requirements of Civ.R. 23(A) and (B)(3) were satisfied. *Stammco*, 2008-Ohio-3845, ¶ 60. Although the Ohio Supreme Court first declined to hear a further appeal, *Stammco L.L.C. v. United Tel. Co. of Ohio*, 120 Ohio St.3d 1448, 2009-Ohio-278, on reconsideration, the court accepted jurisdiction on two propositions of law: "A plaintiff cannot define the class to include only individuals who were actually harmed[,]" and "A class action cannot be maintained when only some class members have been injured." *Stammco*, 126 Ohio St.3d 91, 2010-Ohio-1042, ¶ 5.

{¶ 30} Under these propositions, appellee argued, "* * * that the class is a fail-safe class, that individualized issues predominate the class, that the class is unmanageable, and that a class action is not suitable for the issues present in this case." *Id.* at ¶ 13. Nevertheless, on its conclusion that the class definition was ambiguous, the court expressly declined to assess these arguments, remanding the matter to the trial court to redefine the class. *Id.* Interestingly, the late Chief Justice Moyer dissented on the ground the court should have reached appellee's propositions of law. *Id.* at ¶ 16, Moyer, C.J.,

concurring in part and dissenting in part. The Chief Justice then proceeded to do so, concluding, "* * * the class in this case was ambiguously defined, but was not otherwise improper." *Id.* at ¶ 17.

{¶ 31} "The law of the case is a longstanding doctrine in Ohio jurisprudence. "The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, ¶ 14, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. "[T]he rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Nolan* at 3, citing *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32. "Thus, * * * following remand [when] a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law." *Id.*

{¶ 32} In this matter, the trial court initially certified the class and this court affirmed that certification. *Stammco*, 2008-Ohio-3845, ¶ 69. On further review, the Ohio Supreme Court found that a class action could not be maintained using the ambiguous class definition that had been accepted. *Stammco*, 2010-Ohio-1042, ¶ 11. The court then stated:

{¶ 33} "Rather than attempt to redefine the class ourselves, we remand the case to the trial court to do so, for two reasons. First, the parties did not have the opportunity to

present and argue the merits of alternative class definitions in their briefs before us. Second, the trial judge who conducts the class action and manages the case must be allowed to craft the definition with the parties. See *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 201, 31 OBR 398, 509 N.E.2d 1249 ('A trial court which routinely handles case-management problems is in the best position to analyze the difficulties which can be anticipated in litigation of class actions. It is at the trial level that decisions as to class definition and the scope of questions to be treated as class issues should be made')." *Id.* at ¶ 12. This was the mandate of the court. The court expressly did not reach appellee's other arguments. *Id.* at ¶ 13.

{¶ 34} Although the Ohio Supreme Court did not reach most of the matters discussed in this court's decision, it nonetheless reversed that decision. *Id.* at ¶ 14. The effect of that reversal is a vacation of our judgment so that the only decision of a reviewing court remaining is that of the Ohio Supreme Court. That decision was that one of the Civ.R. 23 prerequisite elements for class certification, an unambiguous class definition, had not been established. At a minimum, on remand, the trial court must approve a class definition that satisfies the dictates of the remanding decision before a class may be certified.

{¶ 35} What to make of the court's decision not to address the substantive issues raised is not clear. The court neither accepted nor rejected the analysis of this court nor the one offered by the chief justice. It would appear, however, that neither analysis is binding on the trial court. Thus, while we would consider it the better practice to revisit

class certification only to the extent that the new language in the class definition warrants, we do not believe that the doctrine of law of the case demands it. Accordingly, appellants' first assignment of error is not well-taken.

II. Reevaluation of Class Certification

{¶ 36} In their second, third and fourth assignments of error, appellants maintain that the trial court improperly reversed itself in determining that the modified class definition created a "fail-safe" class, that it impermissibly evaluated the merits of the claim and the trial court misconceived the nature of the suit when considering feasibility.

{¶ 37} As a preliminary matter, we look to the "amended" class definition put forth by appellants on remand to see if the concerns voiced by the Ohio Supreme Court were adequately addressed. The court found ambiguity in the definition because (1) it did not specify to whom customers were expected to give permission for charges on the bill, (2) it was not clear whether the "their" in "without their permission" at the end of the first sentence referred to customers or third parties, and (3) it failed to specify by what manner and to whom permission should be given. *Stammco*, 2010-Ohio-1042, ¶ 10. The court also stated concerns that it might be difficult to identify customers who received unauthorized charges, "* * * without expending more than a reasonable effort." *Id.* at ¶ 11.

{¶ 38} To address these concerns, appellants amended the language of the class definition so that included were defined customers "* * * who were billed for third party charges as to which Sprint had no prior authorization from the customer in writing or by a

method acceptable to Sprint sufficient for Sprint to verify that the customer agreed to the charge." Appellants also added a class exclusion for customer subscribed long distance toll services.

{¶ 39} The addition of the toll subscription exclusion only serves to limit the class more and does not seem to add any ambiguity. The amended class now defines to whom permission is to be granted: appellee, whose permission was required: the customer, and the manner the permission was to be granted: in writing or an alternative method by which appellee could verify agreement. The amended definition deletes any reference to customers who receive unauthorized charges. In our view, the amended language satisfies the specific concerns of the court in its mandate for remand. Moreover, the amended definition comports the Chief Justice Moyer's analysis in his concurrence:

{¶ 40} "In this case, class definition provided means to determine the class, which would have sufficed, were it not for the ambiguity. In order to determine class membership, the trial court would need to determine whether a putative class member (1) received a bill from United Telephone, (2) was assessed for third-party charges on that bill, (3) did not give appropriate authorization for the placement of those charges on that bill, and (4) is not among the exempted entities. The ambiguity lies in the phrase 'without their permission'; the trial court lacks a method to determine the form and manner that the permission should have taken. But once that method is clarified, the trial court will possess sufficient means for determining class membership from the class definition." *Id.* at ¶ 26.

{¶ 41} Having concluded that the proposed amended class definition satisfied the concerns of the Ohio Supreme Court with respect to ambiguity, we turn now to the reasons offered by the trial court to nonetheless deny class certification.

A. Fail-Safe

{¶ 42} The trial court found that the class definition offered created an improper fail-safe class.

{¶ 43} "A fail safe class is created when a court is required to hold 'mini-hearings' on the merits of each individual claim in order to determine the members of the class. *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 177. In order to decide whether a proposed class includes merit determinations, a trial court must decide whether that class 'rests upon a paramount liability question.' *Dale v. Daimler Chrysler Corp.* (2006), 204 S.W.3d 151, 179, citing *Intratex Gas Co. v. Beeson* (Tex. 2000), 22 S.W.3d 398, 404. In such a case, the class would only be bound by a judgment that is favorable to the class but not a judgment favorable to the defendant. *Id.*; *Dafforn v. Rousseau v. Russell Associates, Inc.* (N.D.Ind.1996), 1976-2 Trade Cases P61, 219. Therefore, to determine whether a class definition includes a merit determination, a court must decide whether the class would still exist if the defendant in the class action prevails at trial. *Dale v. Daimler Chrysler Corp.*, 204 S.W.3d at 179-180, citing *Intratex Gas Co. v. Beeson*, 22 S.W.3d at 405." *Miller v. Volkswagen of Am., Inc.*, 6th Dist. No. E-08-047, 2008-Ohio-4736, ¶ 28.

{¶ 44} Chief Justice Moyer would have rejected an assertion that the defined class was a "fail-safe" even as it was previously worded. He explained:

{¶ 45} " * * * Here, the class definition contains the phrase 'individuals * * * who were * * * billed for charges on their local telephone bills * * * on behalf of third parties without their permission.' [United] contend that this phrase prohibits class certification because class membership cannot be determined until a finding on the issue of liability has been made. In so contending, [United] appear[s] to concede that the lack of permission equates automatically with liability, but this is not the case. Defining the class in this way does not require a determination on the issue of liability or the merits of the underlying causes, because finding a class of customers who were assessed charges that they had not authorized does not require a determination that appellants are liable to the customers." *Stammco*, 2010-Ohio-1042, ¶ 43, Moyer, C.J. concurring and dissenting. (Footnote omitted.)

{¶ 46} Assuming that appellee was not found liable in the present case, the class would still exist because the determination of the class members does not rest on a determination of the merits. The class would still exist for: (1) customers of United Telephone of Ohio who, during the relevant period, (2) were billed for third party charges, (3) without prior authorization, (4) in writing or by an acceptable alternative. This is not a fail-safe class.

B. Misconception of Class

{¶ 47} Appellants complain that, in the decision under review, the trial court lost its way, resulting in rationale for denying class certification that reflects little of the proper posture of the case. Appellants suggest that the trial court has somehow

concluded that appellee is some sort of neutral pass-through entity taken advantage of by crammers, who are the real "culprit." From this erroneous assumption, appellants maintain, the court concluded that they have sued the wrong party. It is the crammers who should be the real target. Moreover, appellants assert, the trial court's conclusion that appellee, by "current legislation and case law," has no duty to appellants to police the charges it places on appellants' bills was an improper excursion in to the merits of the case.

{¶ 48} When enmeshed in the sometimes deliberate complexity of litigation, it is frequently difficult to sort out the immediate task at hand. Where this case is now is in the class certification phase. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 178, quoting *Miller v. Mackey Internal.*, (CA 5, 1971), 452 F.2d 424, 427. "Class action certification does *not* go to the merits of the action." *Ojalvo v. Bd. of Trustees, Ohio St. Univ.*, *supra*, at 233. (Emphasis in original.)

{¶ 49} The trial court does not articulate how its forays into misplaced blame or questionable duty relate to its determination that the requirements of Civ.R. 23, which it once had determined were satisfied, which this court concluded were satisfied, and which the two justices of the Ohio Supreme Court who addressed the issue concluded were satisfied, are now found wanting. In our view, both rationales are improper incursions into the merits of the case.

{¶ 50} Since two of the three reasons the trial court articulated for denying the class are improper considerations of the merits and the third reason is inapplicable as a matter of law, we must conclude that the trial court abused its discretion in denying class certification. See *Ojalvo*, supra, syllabus. Appellants' second, third, fourth, and sixth assignments of error are found well-taken. The remaining assignment of error is moot.

{¶ 51} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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