ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. ROBERT MERRILL, TRUSTEE *et al.*,	:	
Plaintiffs/Appellees,	:	Case No. 14-0796
and	:	
HOMER S. TAFT, *et al.*,	:	Appeal from the Eleventh District Court of Appeals Cast No. 2012-L-113
Intervening Plaintiffs/Appellees	:	
v.	:	Lake County Court of Common Pleas Case No. 04 CV 001080
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, *et al.*,	:	
Defendants/Appellants,	:	
and	:	
NATIONAL WILDLIFE FEDERATION, *et al.*,	:	
Intervening Defendants/Appellants.	:	

MEMORANDUM OF DEFENDANTS/APPELLANTS, STATE OF OHIO, OHIO DEPARTMENT OF NATURAL RESOURCES AND THE DIRECTOR OF OHIO DEPARTMENT OF NATURAL RESOURCES, IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

This appeal presents two propositions of law, the resolution of which will have profound and far-reaching implications for the procedural and substantive law governing class certification in Ohio under Civ.R. 23. As such, it impacts all current and putative class action litigants. The outcome of this appeal also will have substantial consequences for thousands of Ohio property owners, courts throughout Ohio, and ultimately for every Ohio taxpayer. The class certification decision reached by the Eleventh District Court of Appeals in the instant matter is directly at odds with this Court's own recent decisions and will leave unresolved a split of authority between two appellate districts on an important question of law: the scope of Civ.R. 23(B)(2). This Court should accept jurisdiction on both Propositions of Law presented.

I. The Separate "Rigorous Analysis" Required under Civ.R. 23 With Respect to Each Claim for Which Class Certification Is Sought is of Great Public Interest Because It Affects All Putative and Existing Class Action Litigants in Ohio

This Court should make clear to Ohio's lower courts what it means to conduct a "rigorous analysis" of the prerequisites to class certification prior to rendering a class certification decision under Civ.R. 23. More specifically, this Court should apprise Ohio's trial and appellate courts that the "rigorous analysis," which this Court and Ohio Civ.R. 23 require, *applies to each and every claim for which certification is sought.* Here, the trial court certified a new class, under Civ.R. 23(B)(2), without a motion to certify, briefing on class certification, or a hearing, and the Eleventh District affirmed. The Eleventh District's decision, if allowed to stand, permits a trial court to satisfy its obligation to conduct a "rigorous analysis" on the question of certification by simply rubber-stamping the conclusion that certification of one claim means certification is proper with respect to a second, completely different claim. Apart from being at odds with this Court's decisions in *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d

231, 2013-Ohio-3019, 994 N.E.2d 408 and *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, the Eleventh District's decision encourages trial courts to skip the rigorous analysis that this Court established as a prerequisite to class certification.

Resolution of the First Proposition of Law is of great public and general interest because it will have profound implications on the way certification decisions are made and memorialized in Ohio's trial courts. The Eleventh District's decision encourages trial courts to abandon or, at best, short-circuit the "rigorous analysis" requirement by allowing certification on a single claim to extend to all other claims for which certification is sought in the same proceeding. The Eleventh District's decision ignored the mandates of Civ.R. 23(C)(4), which requires certification analysis as to each claim, and eviscerates the instructions this Court recently gave to Ohio's lower courts in *Stammco* and *Cullen*. In addition, the Eleventh District's decision encourages class plaintiffs to assert multiple claims solely for the purpose of obtaining a favorable certification decision on one claim that can then be "cross-applied" to the other claims, regardless of the degree to which further certification is actually appropriate.

Second, if the Eleventh District's decision stands, it will greatly undercut parties' willingness to stipulate regarding certification of particular claims or issues. The efficiencies gained by stipulating as to certain issues on certification will be sacrificed if every putative class action defendant is faced with the possibility that a stipulation will later be extended beyond its intended scope to additional claims (or classes) to that defendant's detriment. The Eleventh District's decision dramatically discourages the use of this important procedural mechanism, particularly in the context of Civ. R. 23(C)(4). The decision effectively forces every defendant to resist certification at every turn unless the defendant is prepared to stipulate to certification for

every claim and every class asserted not only at the time of the stipulation, but also for claims and classes that may be subsequently added through later proceedings.

Third, the Eleventh District relied, at least in part, on this Court's observation in *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442, that "formal findings" are not required by Rule 23. In effect, the Eleventh District declared an exception to the "rigorous analysis" requirement by holding that a rigorous analysis for any claim in a case can extend to every claim presently raised. The Eleventh District also misapplied *Hamilton* to conclude that since no formal findings are required, simply incorporating the initial rigorous analysis for one claim is sufficient as to all claims, no matter how distinct or unrelated. This Court should make clear that Ohio law does not allow for such an exception to a trial court's "rigorous analysis" obligation and should clarify its decision in *Hamilton* so Ohio's lower courts know what is expected of them in ruling on class certification motions.

II. The Scope of Civ.R. 23(B)(2) Is of Great Public Interest

The Second Proposition of Law involves the scope of Civ.R. 23(B)(2). This Court should resolve the conflict between the Tenth and Eleventh Appellate Districts on the question of whether an action in mandamus may be maintained as a Civ.R. 23(B)(2) class action. The Tenth District's decisions in *State ex rel. Dorris v. Wilkins*, 10th Dist. Franklin No. 80AP-876, 1981 Ohio App. LEXIS 12915, *3-4 (June 16, 1981) and *State ex rel. Ash v. Aggrey*, 10th Dist. Franklin No. 77AP-61 (September 20, 1977) state unequivocally that "Civ.R. 23(B)(2) by its very nature and language can have no application to actions in mandamus." This is in direct conflict with the Eleventh District's holding in this case that certification under Civ.R. 23(B)(2) for Count II, an action in mandamus seeking to compel appropriation proceedings, was permissible. *State ex rel. Merrill v. State of Ohio*, 11th Dist. Lake No. 2012-L-113, 2014-Ohio-1343, ¶ 18 ("*Opinion*").

First, the decision of the Eleventh District highlights a split in authority in Ohio's appellate district courts on the issue of whether a class action seeking mandamus relief can be certified under Civ.R. 23(B), which expressly applies only to declaratory judgment and injunction actions. While this is a case of first impression in this Court, mandamus actions are fairly common. Resolution by this Court is necessary to bring clarity to Ohio law, to establish a definitive understanding of the Civil Rules and their governance of class action practice and procedure in Ohio's state courts, and to give trial courts guidance on how litigation of mandamus actions involving the state should be managed when class certification is sought.

Second, the costs to taxpayers and burden on Ohio's courts will be significant if mandamus actions can be maintained as class actions under Civ.R. 23(B)(2). If the plaintiffs prevail on Count II as certified, the State would be required to file thousands of individual appropriation cases.[1] Such a result defeats the purpose of class litigation by multiplying rather than reducing the number of lawsuits. The cost to taxpayers and burden on courts forced to manage the excessive number of proceedings would be significant and would needlessly embroil thousands of property owners in litigation who have no belief that they ever suffered a taking and, thus, have no desire to spend their time, money or energy in litigation with the State. But, because members of a (B)(2) class have no ability to opt-out, they would have no choice.

Third, the Eleventh District's decision casts doubt on this Court's decision in *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, on the issue of whether incidental monetary relief may be the subject of a properly certified Civ. R.23(B)(2) class. Indeed, even if some mandamus actions are permitted under Civ.R. 23(B)(2), those requesting an award of damages ought not be. A mandamus action seeking to compel

[1] *See* June 9, 2006 Certification Order referencing 14,000 parcels of littoral property.

appropriation proceedings exists for the express purpose of facilitating an award of *damages* as compensation for the alleged taking. A decision declining jurisdiction would send the message to Ohio courts that Civ.R. 23(B)(2) certification may be appropriate even when monetary relief is a central objective of the action, despite this Court's clear indication in *Cullen* and Rule 23(C)'s plain language to the contrary.

STATEMENT OF THE CASE AND RELEVANT FACTS

In 2004, the Ohio Lakefront Group ("OLG") and several individual owners of real property along Lake Erie filed a First Amended Complaint ("Amended Complaint") against the State of Ohio ("State"), the Ohio Department of Natural Resources and its Director (collectively "ODNR"). The Amended Complaint asserted a putative class action and included three counts, but only Counts I and II are relevant here.[2] Generally:

- Count I sought a declaratory judgment that the State's ownership of Lake Erie did not extend beyond Lake Erie's waters and, as a result, that any ODNR-mandated lease that included shore lands of Lake Erie was invalid to the extent it included privately-owned lands.

- Count II asserted a mandamus claim to compel the State to commence appropriation proceedings to determine the amount of compensation due, if any, for the State's alleged temporary taking of property resulting from its claim of ownership to the "original high water mark."

In June 2006, the parties entered into a joint stipulation that the declaratory judgment claim (Count I) be certified as a class action upon the common questions of law stipulated therein. The joint stipulation expressly stated that it applied only to Count I and expressly bifurcated Count II and Count III. *See* Notice of Joint Stipulation to Class Certification on Count One of the First Amended Complaint, filed June 8, 2006.

[2] Count III is moot. *Opinion*, ¶ 3, n.1.

Pursuant to the joint stipulation, the trial court certified a class for the declaratory judgment claim in Count I. *See State ex rel. Merrill v. Ohio Department of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, ¶9 ("*Merrill I*"). "The trial court stayed the mandamus claims pending resolution of the declaratory judgment claim." *Id.*

After this Court resolved the declaratory judgment issue, it remanded to the trial court "for further proceedings on pending claims consistent with this opinion." *Id.*, ¶ 65. On June 19, 2012, the trial court issued a scheduling order which imposed a deadline of September 17, 2012 for Defendants to brief Counts II and III regarding class certification. Then, on July 26, 2012, the trial court issued an Order to Brief Class Issues, asking the parties to file briefs within seven days responding to several questions, including: "[W]ill a certified class be sought to be maintained as to Counts Two and/or three of the First Amended Complaint?" The State and ODNR timely responded stating they would not seek certification of a class on Counts II and III and "will oppose any request for such certification."

Then, before the deadline set by the trial court to brief class certification and without the benefit of an evidentiary hearing, the trial court certified a class for Count II and the Eleventh District affirmed.

ARGUMENT

I. **Appellants' Proposition Of Law No. 1:** A trial court must undertake a separate rigorous analysis with respect to each claim for which class certification is sought in determining whether the plaintiff has satisfied the prerequisites of Civ.R. 23.

The particular claim for which class certification is sought, along with the class definition itself, determines whether certification is appropriate. As a result, it is a logical corollary of this Court's holdings in *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408 and *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-

Ohio-4733, 999 N.E.2d 614, that a trial court must undertake a separate "rigorous analysis" at the certification stage of a class action *with respect to each claim* for which a plaintiff seeks certification. This is because the "rigorous analysis" required by *Stammco* and *Cullen* "requires the court to consider what will have to be proved at trial and whether those matters can be presented by common proof." *Cullen* at ¶ 17; *Stammco* at ¶¶ 30, 44 ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."). Permitting a trial court, as the Eleventh District did, to merely "incorporate its former findings" on certification of one claim as a substitute for the "rigorous analysis" of certification regarding a wholly different claim, is to permit a complete abrogation of that duty.[3]

Importantly, the obligation to conduct a separate, "rigorous analysis" as to each claim for which certification is sought does not require a trial court to re-make factual findings or to resolve already determined questions of law for a second or third time. A trial court simply must rigorously *analyze* whether those findings of fact and/or conclusions of law demonstrate that the requirements of Civ.R. 23 have been met with respect to the specific claim under consideration. While this Court declared in *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442 (1998) that "there is no explicit requirement in Civ.R. 23" that a trial court make "formal findings to support its decision" on class certification, that statement in no way absolves a trial court of the obligation to conduct a "rigorous analysis" in the first place, no matter how it decides to memorialize its decision. *See Cullen* at ¶ 23 ("*Hamilton* does not allow a court to

[3] The same holds true concerning the rigorous analysis required for certification with respect to different *classes*. *See, e.g., M.D. v. Perry*, 675 F.3d 832, 848 (5th Cir. 2012) ("Although we take no position regarding whether the district court should certify subclasses on remand, we note that if the district court decides to do so, it should (1) perform a rigorous analysis regarding whether the class claims of *each of the subclasses* meets the requirements of Rule 23..." (emphasis added)).

dispense with the more rigorous analysis of whether a class should be certified."). This Court need not revisit *Hamilton*'s language regarding "formal findings" in order to recognize that when, as here, a trial court merely incorporates its prior conclusions on certification concerning an entirely different claim for relief, it has failed to conduct the requisite "rigorous analysis" for the new claim.

In this case, the parties stipulated to class certification on only Count I. The trial court's extension of its Count I certification decision in this case was particularly inappropriate, because it utilized the parties' stipulations on certification solely with respect to Count I in a manner inconsistent with the stipulations themselves and the parties' stated intent. In fact, the trial court conducted no rigorous analysis preceding certification on Count I. Instead, the "rigorous analysis" preceding certification of Count I was, in fact, nothing more than the parties' stipulations restated in the trial court's certification order. *See* Order Certifying Class Action on Count One of the First Amended Complaint in Case No. 04-CV-001080, June 9, 2006 (the "Count I Certification Order"). Without an independent, "rigorous analysis" as to the application of the parties' stipulations concerning each Rule 23 prerequisite as applied to Count II itself, the trial court abrogated its responsibility when it arbitrarily extended the parties' Count I stipulations beyond their stated and intended scope. *See, e.g., Unifund CCR Partners v. Young*, 7th Dist. Mahoning No. 11-MA-113, 2013-Ohio-4322, ¶¶ 49-50 (Sept. 27, 2013) (rejecting the attempt of a putative class plaintiff to extend the defendant's stipulations concerning particular class issues beyond the scope of the parties' agreement in order to obtain certification). *See also*, Civ.R. 23(C)(4)(a) (allowing for certification with respect to particular issues only).

Unless the class definition, the elements of the claims themselves, and the relief sought are identical in every respect, the justifications for certification with respect to one claim cannot

possibly constitute a "rigorous analysis" as to each Rule 23 prerequisite for another claim. *See Stammco* at ¶ 19. The trial court's errant certification decision as to Count II, itself further evidence of the trial court's failure to undertake the requisite "rigorous analysis," is the direct result of its arbitrary extension of the parties' inapplicable stipulations to a new claim.

For example, even a cursory analysis would have revealed that the class definition with respect to Count II is overbroad. *See Stammco* at ¶ 53 ("If * * * a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification"). Count I sought a declaratory judgment concerning the precise landward boundary of the State of Ohio's title to Lake Erie and all of the parties' respective rights below that boundary. By contrast, Count II seeks a writ of mandamus requiring the State to initiate appropriation actions against every littoral owner for the alleged "taking" of their property. *See* Amended Complaint. While the determination of whether a taking occurred will depend in part upon where the property line lies, the essence of a taking is a "direct encroachment upon land" that "excludes or restricts the dominion and control of the owner over it . . ." *Kermetz v. Cook-Johnson Realty Corp.*, 54 Ohio App. 2d 220, 226, 376 N.E.2d 1357 (10th Dist. 1977). In fact, the plaintiffs themselves do not even allege that every lakefront property owner actually suffered a cognizable loss of "dominion and control." *See* Amended Complaint, ¶¶ 11-13 (referring only to "some littoral owners").

Importantly, the overbreadth of the class definition is prejudicial not only to the State, but to many of the class members themselves as well. If the class definition stands and the State prevails, as it should, on the defense that "something more than the mere assertion of title is required" to constitute a taking, (*see Central Pines Land Co. v. United States*, 107 Fed. Cl. 310,

325 (Fed. Cl. 2010)), then all class members will be bound by the adverse judgment—including those who did, in fact, apply for and enter into submerged land leases under R.C. 1506.11 or who otherwise may have actually lost the exercise of dominion and control over a portion of their property. And if the class definition were narrowed to cure this overbreadth problem, it would eliminate the class representatives as members of their own class, which also would preclude certification. *See, e.g., Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 97, 521 N.E.2d 1091 (1988). This is because whether class certification is appropriate depends in large part on the elements of the underlying claim, in this case, whether a taking has even occurred. *See Stammco* at ¶ 44; *State ex rel. Morris v. City of Chillicothe*, 4th Dist. Ross No. 1720, 1991 Ohio App. LEXIS 4807, *8 (Oct. 2, 1991). Any meaningful analysis at all, let alone the required "rigorous analysis," would have revealed to the trial court that the plaintiffs cannot satisfy the first and/or second Rule 23 requirements for certification of Count II.

Further, the trial court could not have found common questions of law or fact with respect to Count II. *See Stammco* at ¶ 19. The only common questions that the stipulations and prior certification order recognized were the very questions that the resolution of Count I already determined concerning the location of the State's title boundary line on the shore of Lake Erie. *See Merrill I*, 130 Ohio St.3d 30, 2011-Ohio-4612, ¶¶ 46-62, 65, 955 N.E.2d 935. Thus, either there are no common questions left to resolve with respect to Count II, or the trial court failed to identify what new common questions, unique to Count II, could justify its adjudication as a class action. But in either case, merely incorporating the prior stipulations and findings as to Count I's common questions could not have satisfied the trial court's "rigorous analysis" obligation as to Count II. Even more, as noted above, the essence of a cognizable taking of private property (the exercise of "dominion and control") shows that no common questions are likely to remain

because the determination of whether a taking occurred will almost always be a highly individualized fact inquiry. *Kermetz v. Cook-Johnson Realty Corp.,*, 54 Ohio App. 2d 220, 226. Thus, the fourth prerequisite under Rule 23 was not met either.

Third, the Rule 23 prerequisites of typicality and adequacy could not have been satisfied because, even if the class definition holds, the named plaintiffs do not have claims typical of all class members. The named plaintiffs' only claim is for a taking premised upon the alleged "assertion of ownership" over their property by the State. While a small percentage of class members could conceivably assert a retroactive claim of a taking based on having been required to pay for submerged land leases (if a portion of that leased land is now determined to be outside the State's "natural shoreline" boundary), none of the named plaintiffs have such leases. Typicality is satisfied "where there is no express conflict between the representatives and the class," while adequacy of representation also hinges on whether the representative's "interest is [ ] antagonistic to that of other class members." *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 98, 521 N.E.2d 1051 (1988). Either the named plaintiffs are not proper members of their own class, as noted above, or they are purporting to represent a class when their own claims are not typical or representative of some of the members they seek to represent. In either case, a rigorous analysis would have revealed certification to be improper.

Finally, if the trial court had done a "rigorous analysis" of Rule 23(B)(2)'s requirements, it would have denied certification, because a mandamus action, particularly one to compel appropriation proceedings for a taking of private property, cannot be maintained as a (B)(2) class.

II. **Appellants' Proposition Of Law No. 2:** A claim seeking a writ of mandamus to compel appropriation proceedings for an involuntary taking of private property cannot be maintained as a class action under Civ.R. 23(B)(2).

The Tenth District has recognized that no action in mandamus may be maintained as a class action under Civ.R. 23(B)(2). *See State ex rel. Dorris v. Wilkins*, 10th Dist. Franklin No. 80AP-876, 1981 Ohio App. LEXIS 12915, *3-4 (June 16, 1981). Indeed, the language of Rule 23(B)(2), the well-established distinction between injunctive relief and mandamus relief, and the decisions of the Tenth District all must be completely ignored in order to sustain the trial court's certification decision with respect to Count II.

Ohio's Civ.R. 23(B)(2) specifically provides that "[a]n action may be maintained as a class action if * * * 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..." (emphasis added). As the Tenth District observed, "Civ.R. 23(B)(2)...does not refer to, or include, actions in mandamus," and as a result "Civ.R. 23(B)(2) by its very nature and language can have no application to actions in mandamus...." *Wilkins* at *3-4 (quoting *State ex rel. Ash v. Aggrey*, 10th Dist. Franklin No. 77AP-61 (September 20, 1977)). Had the legislature wished to make Civ.R. 23(B)(2) available for mandamus actions, it easily could have done so. It did not.

This recognition of the limits of Rule 23(B)(2) does not elevate form over substance. Contrary to the trial court's assertion that "a writ of mandamus is in the nature of an injunction" (Count II Certification Order, ¶ 114), Ohio law is clear that relief in mandamus is not a subset of injunctive relief. *See, e.g., State ex rel. Pressley v. Indus. Comm'n*, 11 Ohio St.2d 141, 154-155, 228 N.E.2d 631 (1967) (distinguishing between mandamus, which is to "compel the performance of a clear legal duty" and mandatory injunction, which is "to prevent an action" in the future);

State ex rel. Act One, Inc. v. Juvenile Court of Columbiana County, 7th Dist. Columbiana No. 2004 CO 14, 2004-Ohio-3215, ¶¶ 4-5 (observing that mandamus and injunctive relief are "distinct, and in some ways, mutually exclusive").

Moreover, the Eleventh District's suggestion that the Tenth District did not, in fact, conclude that mandamus actions are not maintainable as (B)(2) class actions is simply untenable. While it is true that *Wilkins'* holding was based on an appellate court's lack of original jurisdiction over injunctive or declaratory actions, *Wilkins'* conclusion was required precisely because of the distinction between the types of actions that may be maintained as Civ. R. 23(B)(2) classes and those, like mandamus actions, which may not. *See Wilkins* at *3-4. To suggest that *Wilkins* was only about the scope of the original jurisdiction of appellate courts is to disregard its clear statements to the contrary concerning the propriety of class certification, the reasoning behind the decision itself, and the unequivocal authority of *State ex rel. Ash v. Aggrey*, 10th Dist. Franklin No. 77AP-61 (September 20, 1977) on which *Wilkins* relied (a decision the Eleventh District completely ignored). Thus, at a minimum, the Eleventh District's decision is in direct conflict with the law of the Tenth District on this specific proposition. This disagreement alone justifies review by this Court. Regardless of whether this conflict among appellate district courts has been certified, it exists and, as a result, the lower courts need guidance as to whether to allow or disallow class actions under Civ.R. 23(B)(2) seeking mandamus relief.

Whether or not mandamus actions in general may be maintained as class actions under Civ.R. 23(B)(2), *Cullen* holds that claims "that merely lay a foundation for subsequent determinations regarding liability or that facilitate an award of damages do not meet the requirement for certification as set forth in Civ.R. 23(B)(2)." 137 Ohio St.3d at 382. There is no question that the express purpose of an action in mandamus seeking to compel appropriation

proceedings for an involuntary taking of private property is to "facilitate an award of damages," and that the relief of compelling an appropriation proceeding does not constitute the "final" relief contemplated, as "required by Rule 23(B)(2)." *See Cullen* at ¶ 27. *See also, Kermetz v. Cook-Johnson Realty Corp.*, 54 Ohio App. 2d 220, 228, (10th Dist. 1977) (in takings mandamus actions, a showing of the state's clear legal duty to commence appropriation proceedings "in the first instance...would permit the property owner to have the damages for the taking assessed by a jury in the appropriation proceeding"). Thus, at a minimum, this Court should make clear that Ohio law does not allow certification under Civ.R. 23(B)(2) of actions in mandamus that seek to compel the State to commence appropriation proceedings for private property takings.

Indeed, this Court's decision in *Cullen*, following the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2560, 180 L.Ed.2d 374 (2011), suggested that monetary relief that is "incidental to requested injunctive or declaratory relief" may prevent an action from being maintained as a class action pursuant to Civ.R. 23(B)(2). *Cullen* at ¶¶ 26-27. In this case, the ultimately compensatory nature of the relief sought is made explicit in the Amended Complaint. *See* Amended Complaint, ¶¶ 36-37, Prayer for Relief, ¶ 3 (seeking mandamus for the purposes of determining the "compensation due").

Further, now that the legal rights of the parties have been declared under Count I, both the State and the littoral owners can only claim title to "the natural shoreline, which is the line at which the water usually stands when free from disturbing causes," as dispositively determined by this Court. *Merrill I*, at ¶¶ 59, 62. As a result, the nature of the relief sought can only be for retrospective compensation, which is diametrically opposed to the prospective prevention of future harm that injunctive relief provides. *See, e.g., State ex rel. Pressley v. Indus, Comm'n*, 11 Ohio St.2d 141, 154-155. This only further illustrates precisely why the distinction between

injunctive relief and relief in mandamus is essential to a faithful application of Civ.R. 23(B)(2). *See also*, R.C. § 2731.11 (providing for recovery of damages as part of mandamus relief).

Importantly, recognizing that a Civ.R. 23(B)(2) class may not be maintained for claims sounding in mandamus does not deprive property owners of the opportunity to utilize the class action procedure should it be warranted in a particular case. As the Tenth District observed, putative class plaintiffs bringing claims in mandamus simply have to meet the requirements of Civ.R. 23(B)(1) or (B)(3) instead. *See Wilkins* at *3-4.

CONCLUSION

For the above reasons, Appellants respectfully request that the Court accept jurisdiction over this appeal on both Propositions of Law presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following, first-class U.S. Mail, postage pre-paid, on May 15, 2014:

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APPENDIX A

Opinion of the Eleventh District Court of Appeals (March 31, 2014)

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2012-L-113**
HOMER S. TAFT, et al.,	:	
Intervening Plaintiffs-Appellees,	:	
- vs -	:	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants-Appellants,	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
Intervening Defendants.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 04 CV 001080.

Judgment: Affirmed.

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TIMOTHY P. CANNON, P.J.

{¶1} Appellants, the state of Ohio and the state of Ohio Department of Natural Resources ("ODNR"), appeal from the trial court's August 27, 2012 judgment entry. In that judgment, the trial court issued an "Order: (1) Establishing the Natural Shoreline; (2) Granting Additional Relief on Count I; (3) Extending Class Certification to Count II; and (4) Declaring Prevailing Party." Pursuant to this court's entry of March 18, 2013, the instant appeal relates only to class certification issues. Based on the following, we affirm the trial court's order granting class certification as to Count II. We decline, however, to address appellant's remaining assignments of error for want of jurisdiction.

{¶2} For a complete factual history of this case, see *State ex rel. Merrill v. Ohio Dept. Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612. In June 2006, pursuant to a joint stipulation of all parties in *Merrill*, the trial court certified a class action as to the declaratory-judgment count ("Count I") of the *Merrill* complaint, with the class consisting of owners of Ohio property bordering Lake Erie. Specifically, the court identified the class as the following:

> [A]ll persons, as defined in R.C. 1506.01(D), excepting the State of Ohio and any state agency as defined in R.C. 1.60, who are owners of littoral property bordering Lake Erie (including Sandusky Bay and other estuaries previously determined to be a part of Lake Erie under Ohio law) within the territorial boundaries of the State of Ohio.

The court stayed the mandamus claims ("Count II") pending resolution of the declaratory-judgment claim.

{¶3} After remand from the Ohio Supreme Court, the trial court, inter alia, issued an Order to Brief Class Issues, which directed the parties to file briefs relating to

the certification of a class for Counts II and/or Count III.[1] The trial court issued an order relating to various issues, including a determination that class certification should be extended to the issues claimed in Count II.

{¶4} From that order, the state filed a notice of appeal. This court issued an order directing that the instant appeal proceed only on the following issues:

> The portion of the trial court's order extending class certification to Count II is a final order pursuant to R.C. 2505.02(B)(5), including whether 'additional' members who have claims or issues concerning submerged land leases have been properly included. Additionally, the portion of the trial court's order that appellants contend includes 'additional' certified members to Count I is also a final, appealable order.

{¶5} On appeal, appellants assert the following assignments of error:

> [1.] The Trial Court erred and abused its discretion in determining that this action may be maintained as a class action for Count II of the Amended Complaint.
>
> [2.] The Trial Court erred and abused its discretion in certifying a class and ordering relief in regards to the validity of submerged-land leases and claims for the return of payments made under those leases.
>
> [3.] The Trial Court erred and abused its discretion in determining that Plaintiff/Appellee Ohio Lakefront Group is a prevailing party for the purpose of its application for attorney fees under R.C. 2335.39.
>
> [4.] The Trial Court erred and abused its discretion in determining the location of the boundary of the territory of Lake Erie held in trust by the State of Ohio.

As this appeal is limited to issues related only to class certification, we need not address appellants' third and fourth assignments of error.

{¶6} Further, our review of the second assignment of error reveals that it is beyond the scope of this court's jurisdiction due to lack of a final, appealable order.

1. Count III is now moot.

Under the second assignment of error, appellants appear to assert that the trial court, in ordering that "ODNR shall return all submerged land lease fees between [ordinary high water mark] and the natural shoreline paid between 1998 and the present," implicitly certified an additional class. The record does not support this position. As stated below, the trial court ordered class certification for Count II. By granting relief under Count I in the form of the disgorgement of collected "submerged land lease fees," it was providing the plaintiffs with an equitable remedy that was sought in their complaint. Any errors related to the trial court's grant of additional relief under Count I, i.e., the disgorgement of submerged land lease fees, is beyond the scope of this court's jurisdiction in this appeal. Therefore, appellants' first assignment of error, relating to the granting of class certification for Count II, is the only issue before this court.

{¶7} The standard of review in a class certification appeal is well established: "[a] trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion." *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 2000 (1987), syllabus.

{¶8} Under the first assignment of error, appellants first argue the trial court erred by certifying the class sua sponte. Appellants maintain that they did not receive notice and the opportunity to be heard regarding certification of a class for Count II. In support of the trial court's obligation to hold a hearing prior to certifying a class, appellants cite to the Ohio Supreme Court in *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91 (1988). In *Warner*, the Court held: "Where a named defendant is denied notice of a class certification hearing, subsequent certification is not effective against that defendant until a proper hearing is provided for that defendant." *Id.* at 98. We conclude *Warner* is inapplicable to this case.

{¶9} Despite appellants' argument, the trial court did not sua sponte certify a class for Count II. The trial court, in its July 26, 2012 judgment, ordered the parties to brief the issues relating to class certification, in particular with respect to Count II. Specifically, the trial court ordered the parties to brief whether class certification would be sought regarding Counts II and III, and if so, "how will it be certified, potential members notified, maintained, and/or members subclassified, and the issues common to the class and individual to the members adjudicated?"

{¶10} Appellants responded that they were not seeking certification of a class as to Counts II and III and would oppose any such request for certification. Appellants did not, however, provide any reasons for opposing certification or why certification was not legally appropriate as to Counts II and III. In turn, Ohio Lakefront Group, Inc., appellee, filed its response indicating it intended to seek certification of the class for Count II. Appellee represented that the previous analysis employed by the trial court for class certification of Count I would suffice to certify the class for Count II. Appellants did not file a memorandum in response or in opposition to appellee's notification that it was pursuing class certification, nor did appellants provide any argument contra to appellee's rationale for seeking certification. Additionally, the trial court did not issue its judgment entry certifying the class for Count II until three weeks later, which provided appellants with ample time to file a response.

{¶11} Appellants were on notice and had an opportunity to be heard on the issue of class certification on Count II prior to the trial court filing its judgment certifying the class. The trial court's judgment was premised on the same analysis employed in certifying the class for Count I. We therefore conclude that, under these circumstances,

an evidentiary hearing was not required prior to the trial court granting class certification as to Count II.

{¶12} Similarly, appellants also argue the trial court erred in certifying a class with respect to Count II without considering whether the representatives presented a claim for relief under that count. Appellants contend that the trial court erred by failing to hold a hearing to inquire whether any of the individuals under the Count II certification were subject to the relief sought. As previously discussed, appellants were on notice and had the opportunity to brief whether class certification under Count II was appropriate. Although there is an assertion that appellants contested class certification under Count II, appellants failed to provide any basis or justification for the challenge. Once the request for class certification was made, appellants had an additional opportunity to respond but failed to do so. The trial court required the parties to brief the issues relating to class certification under Count II. We decline to hold that the trial court erred in failing to hold a hearing on an issue that appellants failed to address in spite of the trial court's direction to do so.

{¶13} Next, appellants maintain the trial court erred in failing to conduct a rigorous analysis of the seven requisite factors for class certification. Those factors are enumerated under Civ.R. 23 and must be satisfied before a court may certify a case as a class action:

> (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.

Cullen v. State Farm Mut. Auto Ins., 137 Ohio St.3d 373, 2013-Ohio-4733, ¶12.

{¶14} At the outset, we recognize that a trial court is not required to "make formal findings to support its decision on a motion for class certification." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70 (1998). Although the Ohio Supreme Court acknowledged "there are compelling policy reasons for doing so," such as ease of appellate review, "there is no explicit requirement in Civ.R. 23." *Id.*

{¶15} Nevertheless, in its order extending class certification to Count II, the trial court noted that the class to be certified for resolution of Count II "would have the exact same members as the class currently certified for Count I, i.e., all littoral property owners bordering Lake Erie. Thus, the class certified for Count I could be maintained through the conclusion of Count II of the First Amended Complaint." The trial court then noted that the relief sought in Count II "does not change the analysis" and "thus is subject to certification on a class-wide basis under Civ.R. 23(B)(2)." Additionally, the trial court noted that the question presented in Count II "can be adjudicated on a class-wide basis."

{¶16} We also note that in drawing its conclusion with respect to Count II, the trial court's judgment incorporated its former findings when certifying Count I. That former judgment, dated June 9, 2006, explicitly outlined and analyzed each of the above enumerated factors. Therefore, we determine that the previous judgment provides an adequate basis upon which this court can determine whether the trial court exercised its discretion within the framework of Civ.R. 23. We hold the trial court did not abuse its discretion in certifying a class under Count II.

{¶17} Next, appellants contend the trial court erred in certifying the class under Count II because mandamus relief under Civ.R. 23(B)(2) is not permitted. In support, they cite *State ex rel. Dorris v. Wilkins*, 10th Dist. Franklin No. 80AP-876, 1981 Ohio App. LEXIS 12915. In that case, the relator filed a motion requesting the appellate court to certify an original action in mandamus as a class action, pursuant to Civ.R. 23(A) and (B)(2). Civ.R. 23(B)(2) relates to cases where injunctive and declaratory relief is sought. In denying the writ, the Tenth District observed that an appellate court has no jurisdiction to grant injunctive or declaratory relief. *Id.* at *2. The court determined an original action in mandamus could not be maintained in an appellate court where certification is sought, in part, pursuant to Civ.R. 23(B)(2). *Id.*

{¶18} *Wilkins* stands for the principle that a petition for a writ of mandamus, seeking injunctive or declaratory relief, is beyond the original jurisdiction of an appellate court. This does not, however, imply such an action is beyond the jurisdiction of the trial court. We find no authority to support this proposition. We therefore hold, to the extent a party has satisfied all requisite aspects of Civ.R. 23, a trial court is empowered to certify a class for an action in mandamus.

{¶19} Appellants' first assignment of error is without merit.

{¶20} To the extent indicated, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.

APPENDIX B

Judgment Entry of the Eleventh District Court of Appeals (March 31, 2014)

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	)SS.	
COUNTY OF LAKE	)	**ELEVENTH DISTRICT**

VOL 0088 PAGE 0936

STATE ex rel. ROBERT MERRILL, TRUSTEE, et al.,

Plaintiffs-Appellees,

HOMER S. TAFT, et al.,

Intervening Plaintiffs-Appellees,

- vs -

STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants-Appellants,

NATIONAL WILDLIFE FEDERATION, et al.,

Intervening Defendants.

JUDGMENT ENTRY

CASE NO. 2012-L-113

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

Costs to be taxed against appellants.

PRESIDING JUDGE TIMOTHY P. CANNON

FOR THE COURT