

MS

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS

CASE NO. 270393

MARK BLUMENTHAL, et al.,)

Plaintiffs,)

vs)

MEDINA SUPPLY COMPANY,)

Defendant.)

**OPINION & ORDER ON
DEFENDANT'S MOTION TO
DECERTIFY CLASS**

Kathleen Ann Sutula, J.

This matter comes before the Court on Defendant's Motion to Decertify Class and Plaintiffs' Brief Opposing Motion to Decertify. In rendering its decision on the foregoing, this Court has also relied on several exhibits attached to Defendant's January 29, 1998 Motion for Sanctions and March 11, 1998 Reply Brief in Support of Motion for Sanctions due to the fact that said exhibits, as discussed in greater detail *infra*, are inextricably intertwined with the important issue before this Court, to wit: whether the class action conditionally certified at the inception of this litigation should properly continue to proceed as a class action, or alternatively, whether class decertification is necessary and proper.

Statement of Facts

On May 12, 1994, Plaintiffs filed a Class Action Complaint¹ and a Motion for Class Certification. In the five-count Complaint, Plaintiffs allege in pertinent part that:

1. "The concrete was defective and unmerchantable, and it has peeled, spalled, popped and otherwise disintegrated." See Complaint, Count One, Paragraph 14;

2. "The defects...resulted from the negligence of defendant Medina Supply Co." See *id.*, Count Two, Paragraph 17;

3. "The concrete supplied by defendant Medina Supply Co. was not fit for its intended purpose..." See *id.*, Count Three, Paragraph 19;

4. "Defendant Medina Supply Co. manufactured, marketed and/or sold this concrete in a manner which constitutes a deceptive sales practice under R.C. Section 1345.02, in that the concrete did not have the performance characteristics, benefits, standard and quality which it was represented to have." See *id.*, Count Four, Paragraph 24; and

5. "Defendant Medina Supply Co. intended said deceptive conduct or had actual knowledge of it." See *id.*, Count Five, Paragraph 27.

On May 24, 1994, prior to the commencement of any discovery, the trial court originally assigned to Case No. 270393 ("Trial Court") denied Defendant's Motion to Stay Ruling on Class Certification or for a Case Management Order and *conditionally* granted Plaintiffs' Motion for Class Certification pursuant to Civ.R.23(B)(3). The Trial Court entered a Conditional Certification Order specifying that the class would consist of "all persons, firms or entities who were supplied defective concrete since January 1, 1993 by Defendant Medina Supply Company

On or about May 24, 1994, Plaintiffs filed a "First Amended Class Action Complaint with Request for Money Damages, Declaratory and Other Relief" ("First Amended Complaint") that alleges the same five counts set forth in the original Complaint.

for residential installation". See v.1740, pp.534-36.²

On or about June 17, 1994, Defendant appealed the Trial Court's conditional grant of class certification. Said appeal was dismissed by the Cuyahoga County Court of Appeals on or about January 19, 1995. See *Blumenthal v. Medina Supply Co.* (1995), 100 Ohio App.3d 473³ (holding that "[a] grant of class certification is not a final, appealable order"⁴ and relying on *Polikoff* for the proposition that "[a]t any time during the proceedings the court can decertify part or all of the class" and that "at any time during trial of the certified class action the trial court may change its previous order"). Finally, on or about May 31, 1995, upon consideration of the jurisdictional memoranda filed, the Supreme Court of Ohio declined jurisdiction to hear this case.

Between June, 1995 and January, 1997, Plaintiffs and Defendant engaged in limited discovery and a plethora of discovery disputes before the Trial Court. On or about January 14, 1997, the Trial Court recused itself from the instant case, and it was thereafter reassigned to this Court's docket for further proceedings. See v.2037, p.219.

Thereafter, a Case Management Conference was scheduled for March 13, 1997, at which

Relying on *Davis v. Aveco Corp.*, 371 F.Supp. 782, 790 (N.D. Ohio 1974), *aff'd*, 739 F.2d 1057 (6th Cir.), *cert. demed.*, 472 U.S. 1012 (1975), the Trial Court further held that "the class facts alleged in the Complaint and verified by affidavit are true for the purpose of [the] Motion to Certify".

See also v.373, pp.769-774; v.1816, pp.993-998.

Cf. H.B.394 (amending Ohio Revised Code Section 2505.02 and providing that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed...when it is...[a]n order that determines that an action may or may not be maintained as a class action").

time this Court spent an entire afternoon attempting to resolve ongoing discovery disputes⁵ and to establish parameters for discovery.

On or about May 15, 1997, this Court conducted a hearing on several nonparties' Motions to Quash Subpoenas issued to them by Defendant.⁶ This Court held said motions in abeyance while counsel for Defendant and counsel for the foregoing nonparties resolved these discovery disputes without further court involvement.

On or about May 23, 1997, Plaintiffs filed a Motion for Order Regarding *Proposed Motion*

Even a cursory review of this Court's docket reveals the extent to which ongoing discovery disputes between parties and nonparties alike have precluded both the Trial Court and this Court from streamlining the discovery process and have prevented meaningful discovery into matters directly relevant to the pivotal issue before this Court, to wit: whether the instant case remains suitable for class action treatment. *See generally*, Plaintiffs' July 7, 1994 Motion to Compel Discovery and to Deny Protective Order, Defendant's August 8, 1994 Motion to Compel Inspection and Sampling, Plaintiffs' April 19, 1996 Motion to Compel, April 29, 1996 Renewed and Amended Motion for Leave to Propound Discovery and Motion for a Protective Order, Defendant's December 9, 1996 Motion to Compel Plaintiffs to Respond to Discovery Propounded in 1994, Defendant's December 9, 1996 Motion to Compel Plaintiffs to Respond to Discovery Propounded in March of 1996, Defendant's February 25, 1997 Motion to Compel Deposition of Thomas Wallen, several nonparties' April 7, 1997 Motions to Quash Subpoenas and/or Motions for Protective Order, Defendant's May 30, 1997 Second Motion to Compel Plaintiffs to Respond to Discovery Propounded in March 1996, Defendant's August 6, 1997 Motion to Compel Testimony and Production of Documents, Plaintiffs' October 6, 1997 Motion for Protective Order, Defendant's December 12, 1997 Fourth Motion to Compel Plaintiffs to Respond to Discovery, Defendant's January 29, 1998 Motion for Sanctions.

Defendant issued deposition subpoenas to several other cement manufacturers in the area, including Osborne Concrete, Westview Concrete, Collinwood Concrete, Allega Concrete, Carr Brothers, Consumer Builders, Tri-County and Mack Builders. The foregoing subpoenas requested the production of documents generally pertaining to (1) complaints and/or claimed problems with concrete supplied in 1993-1994, (2) test results from defective concrete, (3) copies of complaints related to allegedly defective concrete, and (4) representative batch records, delivery tickets and purchase orders for 1993-1994.

to Decertify. Mindful of the fact that a conditional certification order may be altered or amended before a decision on the merits,⁷ and based on this Court's policy against issuing advisory opinions, this Court denied said motion on or about June 23, 1997. See v.2100, p.356.

In order to further streamline and expedite the discovery process, as well as to resolve ongoing and additional discovery disputes, this Court conducted a Pretrial on or about June 10, 1997, at which time a "Stipulation Concerning Discovery" was memorialized by counsel for both parties. See v.2098, pp. 568-71. An "Additional Stipulation Concerning Discovery" was filed on or about July 7, 1997.

On or about February 3, 1998, after counsel filed briefs on the issue, this Court conducted a hearing on Defendant's Motion to Decertify Class. On the eve of the hearing, Defendant filed a Motion for Sanctions⁸ moving this Court for "the imposition of sanctions for the [Plaintiffs' alleged] protracted failure to comply with Court Orders to produce specified documents relating to the putative class and plaintiffs' expert, William Brewer". See Defendant's January 29, 1998 Motion for Sanctions, p.1. Plaintiff responded to said motion on February 2, 1998. On March 11,

See Civ.R.23(C)(1) ("[a]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits"); *Accord Blumenthal, supra* at v.373, p.772 & v.1816, p.996; *Deegan & McGarry v. Med-Cor* (Jan. 15, 1998), 1998 Ohio App. LEXIS 130, Cuy. App. Nos. 71588 & 71633, unreported, at *6-*7 ("the trial court may yet in its discretion decide that plaintiffs have not or no longer meet the criteria of a class under Civ.R.23 and decide to decertify the class...").

In issuing the instant "Opinion and Order on Defendant's Motion to Decertify Class", this Court would like to emphasize that it is not issuing a ruling on Defendant's Motion for Sanctions. This Court will conduct a separate hearing on said motion at the appropriate time and issue a separate ruling shortly thereafter.

1998, after this Court conducted the hearing on Defendant's Motion to Decertify, Defendant filed a Motion for Leave to File Reply Brief Instantly in Support of Motion for Sanctions⁹ alleging that (1) Plaintiffs made a partial production of documents on the eve of the class decertification hearing that would have supported their Motion to Decertify, and that (2) "despite detailed requests from Medina Supply, plaintiffs have failed to produce the other documents relating to the class, which presumably also would include information supporting decertification". See Defendant's March 11, 1998 Reply Brief Instantly in Support of Motion for Sanctions, pp. 1-2, Exhibits 1-25.

Due to an oversight by this Court, an order granting Defendant leave to file its Reply Brief in support of its Motion for Sanctions was inadvertently not entered. As a result of the foregoing, this Court entered a nunc pro tunc entry on November 5, 1998 granting Defendant leave to file said brief.

Analysis of Law

The Ohio Supreme Court recently reminded trial courts that they must "carefully apply the class action requirements [of Civ.R.23] and conduct a rigorous analysis into whether the prerequisites of Civ.R.23 have been satisfied" before deciding whether to certify a class action. *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, 70; *Accord Gen. Tel. Co. of the Southwest v. Falcon* (1982), 457 U.S. 147, 160-61; *Gulf Oil Co. v. Bernard* (1981), 452 U.S. 89, 100; *Sprague v. GMC* (6th Cir. 1998), 133 F.3d 388, 397 ("a district court may not certify any class without 'rigorous analysis' of the requirements of Rule 23"); *In re American Medical Systems, Inc.* (6th Cir. 1996), 75 F.3d 1069 (mandating that District Courts conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met);¹⁰ *Warner v. Waste Management, Inc.* (1988), 36 Ohio St.3d 91, syllabus (noting that a trial judge *must* make seven affirmative findings before a case may be certified as a class action); *Schmidt v. Avco Corp.* (1984), 15 Ohio App.3d 81, 83. Relying on the foregoing authorities, the Cuyahoga County Court of Appeals has likewise recently reminded trial judges that they must conduct a rigorous analysis into whether the prerequisites of Civ.R.23 have been satisfied. See *Cohen v. Bankers Life & Casualty Co.* (Oct. 15, 1998), 1998 Ohio App. LEXIS 4875, Cuy. App. No. 72549, unreported, quoting *Hamilton, supra*

It is this Court's opinion that a "rigorous analysis" of the propriety of maintaining the

Because Ohio Civil Rule 23 and Rule 23 Fed.R.Civ.P. are nearly identical, Ohio courts have traditionally looked to federal case law for interpretation of the Ohio rule. See *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, 201; *Schmidt v. Avco Corp.*, *infra* at 83.

instant case as a class action has not, until now, been conducted in accordance with the spirit and intent of Civ R.23 and well-established case law interpretations thereof. The Trial Court's Conditional Certification Order was entered prior to the commencement of any discovery and prior to Plaintiffs' and/or Defendant's ability to present any evidence regarding the suitability of class certification.¹¹ Recognizing this, the Trial Court made it clear in its Conditional Certification Order that it was only granting class certification on a *conditional* basis. Due to the fact that the Trial Court's conditional ruling was appealed, thereby removing the instant case from the Trial Court's docket for a significant period of time, as well as the fact that ongoing discovery disputes *before the Trial Court* thwarted meaningful discovery relevant to the related issues of class action suitability and/or class decertification, this Court notes that the Trial Court was prevented from conducting a "rigorous analysis" prior to its recusal as this Court now has the opportunity to do. It is this Court's opinion that the Trial Court's *conditional* certification was proper for discovery purposes and served as a necessary prerequisite to this Court's ability to ascertain "as soon as

See Memorandum in Support of Motion of Defendant Medina Supply Company to Decertify the Class, p.1; *Accord Warner, supra* at 98 (*quoting Walker v. World Tire Corp.* (C.A.8, 1977), 563 F.2d 918, 921) ("[W]here...the pleadings themselves do not conclusively show whether the Rule 23 requirements are met, the parties must be afforded the opportunity to discover and present documentary evidence on the issue"); *See also In re American Med. Systems* (6th Cir. 1996), 75 F.3d 1069, 1079, in which the Sixth Circuit held as follows:

"Mere repetition of the language of Rule 23(a) is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled. Maintainability may be determined by the court on the basis of the pleadings, if sufficient facts are set forth, but ordinarily the determination should be predicated on more information than the pleadings will provide...The parties should be afforded an opportunity to present evidence on the maintainability of the class action".

practicable" as contemplated by Civ.R.23(C),¹² and after the commencement of discovery and the resolution of countless ongoing discovery disputes *before this Court* involving parties and nonparties alike, whether or not the continued maintenance of a class action would be a proper, efficient and superior means of adjudication with respect to the instant case.

In *Hamilton*, the Ohio Supreme Court reiterated the requirements that *must* be satisfied before an action may be maintained as a class action pursuant to Civil Rule 23 as follows:

"The following seven requirements must [all] be satisfied before an action may be maintained as a class action under 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 impracticable; (4)there must be a question 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 met."¹¹

The *Hamilton* court also noted that courts determining the maintainability of a class action should, in addition to conducting a rigorous analysis regarding the desirability of maintaining a class action, make separate written findings as to each of the seven class action requirements set forth in Civ.R.23. More specifically, the *Hamilton* court observed that:

"[i]t is exceedingly difficult to apply an abuse-of-discretion standard to Civ.R.23 determinations where, as here, the trial court fails not only to articulate its

Civ.R.23(C)(1) explicitly provides that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits".

Hamilton, supra at 71; See also *Warner v. Waste Management, Inc.* (1988), 36 Ohio St.3d 91; Civ.R. 23(A) and (B).

rationale, but also fails to disclose which of the seven class action prerequisites it found to be lacking with respect to the various alleged claims for relief. Accordingly, we suggest that in determining the propriety of class certification under Civ.R.23, trial courts make separate written findings as to each of the seven class action requirements, and specify their reasoning as to each finding."¹⁴

This Court notes that, in arguing that decertification is proper, Defendant focuses on the Civ.R.23 requirements of commonality, typicality, predominance and superiority. *See generally* Memorandum in Support of Motion of Defendant Medina Supply Company to Decertify Class ("Motion to Decertify"). Despite Defendant's focus on these four factors, however, this Court will separately analyze, and make individualized written findings with respect to, each of the seven Civ.R.23 class action requirements in light of *Warner, Hamilton, Cohen* and progeny. In issuing the following findings, this Court is mindful that its task is not to ascertain the merits of the underlying case in determining whether or not to grant Defendant's Motion to Decertify.¹⁵

Identifiable Class

"The requirement that there be [an identifiable] class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member". *Hamilton, supra* at 71-72 (citing to 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2 Ed 1986) 120-21, Section 1760). The definition of a class must likewise be unambiguous and not

Hamilton, supra at 71; *Accord Cohen, supra* at *3; *Warner, supra* at syllabus, paragraph 1.

Accord Ojalvo v. Bd. of Trustees of Ohio State University (1984), 12 Ohio St.3d 230, 236; *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 798.

"too amorphous to permit identification within a reasonable effort". *Warner, supra* at 96. As noted by the *Hamilton* Court, "the focus at this stage is on how the class is defined...[and] 'the test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class'". *Hamilton, supra* at 73 (citing to *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 63).

With respect to the instant case, the Trial Court conditionally certified a class consisting of "all persons, firms or entities who were supplied defective concrete since January 1, 1993 by Defendant Medina Supply Company for residential installation". See v.1740, p.535. This Court is convinced, and Defendant does not argue to the contrary, that the Trial Court's designation of the foregoing class is sufficiently definite so as to make it administratively feasible to determine whether or not particular individuals are or are not members of the class. As such, it is this Court's opinion that the identifiable class requirement of Civ.R.23 remains satisfied.

Class Membership

In *Hamilton*, the Ohio Supreme Court noted that "the class membership prerequisite requires only that 'the representative have proper standing'", and that "[i]n order to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent". *Hamilton*, at 74 (citing to 5 Moore's Federal Practice (3 Ed, 1997), 23-57, Section 23.21[1]; 7A Wright, Miller & Kane, *supra*, at 137-141, 149-150, Section 1761).

In the case *sub judice*, Defendant does not directly challenge this particular Civ.R.23

requirement in its Motion to Decertify. While this Court notes that Defendant has, in motions filed subsequent to the hearing on said motion, argued that individual class representatives and/or members may have executed releases which may act as a release as to Defendant,¹⁶ this Court recognizes that there are several named class representatives,¹⁷ and nothing has been brought to this Court's attention that would demonstrate a lack of standing on the part of said representatives. Moreover, despite Defendant's allegations that there are differing factual and legal issues amongst members of the class which may or may not exclude certain individuals from class membership, this Court realizes that such issues "do not enter into the analysis until the court begins to consider the Civ.R.23(B)(3) requirement of predominance and superiority".¹⁸ Based on the foregoing analysis, the class membership requirement of Civ.R.23 remains satisfied.

Impracticality or Numerosity

Civ.R. 23(A) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all

See June 2, 1998 Motion of Defendant Medina Supply Co. for Summary Judgment against Plaintiff Joseph Demio

See Plaintiffs' May 24, 1994 First Amended Complaint, pp.1-2. Said Complaint lists the following persons as class representatives: Mark Blumenthal, Joseph and Maria Demio, Thomas and Rosemary Wallen, Darla Redli, Michael Nero, and Frank and Cathy Pokorny.

Hamilton, supra at 73 (citing to *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, 202). Accord *Cohen, supra* at *7.

members is impracticable...". Whereas courts have not explicitly set forth a numerical limit or "magic number" for the size of a maintainable class, a general rule of thumb has emerged as set forth in *Warner, supra* at 97, in which the Ohio Supreme Court observed that:

"[i]n construing Civ.R.23(A)(1), known as the numerosity requirement, courts have not specified numerical limits for the size of a class action. This determination must be made on a case-by-case basis. Professor Miller, however, has indicated: '[i]f the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule...'.¹⁹

At Paragraph four of Plaintiffs' Class Action Complaint and their First Amended Complaint, they contend that "[t]his class numbers in excess of one thousand (1,000) and is so numerous that joinder of all members is impracticable, and it is further impracticable to bring all such persons before this Court". After reviewing the evidence before it, this Court does not doubt, and nor does Defendant argue to the contrary, that joinder would be impracticable and/or that the numerosity requirement of Civ.R.23 continues to be satisfied.

Commonality

In *Hamilton*, the Supreme Court of Ohio noted as follows with respect to the commonality requirement:

"Civ.R.23(A)(2) requires the presence of 'questions of law or fact common to the class'. Courts generally give this requirement a permissive application. It is not necessary that all the questions of law or fact raised in the dispute be common to all the parties. If there is a common nucleus of operative facts, or a common liability issue, the rule is satisfied. [Citations omitted]. The issue of whether there are any additional questions affecting only individual class members does not enter

See 7A Wright, Miller & Kane, Federal Practice & Procedure (1986), Section 22.

the class certification analysis until the Civ.R.23(B)(3) requirement of predominance and superiority is applied. [Citations omitted]".²⁰

Regarding the commonality requirement, the Cuyahoga County Court of Appeals, relying on *Hamilton*, as well as *Portman v. Akron S & L Co.*,²¹ has recently voiced its opinion that said requirement is to be given a permissive application and that "Civ.R.23 is to be liberally construed in the early stages of the proceedings". *Cohen, supra* at *7.

Throughout Defendant's Motion to Decertify and at the hearing held by this Court on said motion, it has been Defendant's position that the commonality requirement of Civ.R.23 has not been satisfied, such that decertification is warranted. See Defendant's Motion to Decertify, pp. 12, 15. 17 To support its argument that no "common nucleus of operative fact" exists, Defendant relies on many factors, including but not limited to, (1)the OAG's failure to find a common cause for the driveway failures, (2)the fact that different mix designs with different compositions were

Hamilton, supra at 77.

¹⁷ Ohio App 2d 216 (1975). In *Portman*, the Summit County Court of Appeals cited with approval to a *Vasquez v. Superior Court of San Joaquin County* (1971), 4 Cal.3d 800, for the following proposition

"The requirement of a community of interest does not depend upon an identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper. The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in plaintiff's favor whatever questions were common to the class".

used on many of the failed driveways,²² and (3) alleged admissions from both parties' experts that driveway defects such as spalling, flaking, pitting, peeling and scaling are produced from distinct causes.²¹ Defendant also contends that "the occurrence and severity of each of the [different concrete problems] can be influenced not only by the quality of the concrete, but also by improper placing, improper finishing, improper curing, and unusually harsh surface conditions". Defendant's Motion to Decertify, pp.5-9, 17. Defendant further maintains that "the fact that no two driveways share the exact same manufacturing, placement or finishing characteristics means that, regardless of plaintiffs' attempt to oversimplify a complex issue and to ignore the role of the contractor in the placement process, there can be no 'common nucleus of operative facts' forming a common basis for liability". *Id.*, at pp.6-9, 15.

In response to Defendant's arguments, Plaintiffs contend that "scaling" is the common defect²⁴ in all of the driveways and that a common failure factor in every driveway is "excessive water". See Plaintiff's Brief Opposing Motion to Decertify, p.4; Transcript of Hearing on Defendant's Motion to Decertify ("Decertification Hearing Tr."), pp.39, 72, 81. Plaintiffs' primary argument is that excessive water in Defendant's design mixes constitutes a design defect. See

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See Defendant's Motion to Decertify, pp.3-5 and accompanying footnotes.

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See Brewer Tr. 142; Lankard Tr. 33, 106, 129-130; Perenchio Tr. 62-75, 162, 176-77.

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Even if "scaling" is the common defect, as Plaintiffs insist, it is worth noting that both parties' experts have listed a variety of factors that can cause or contribute to scaling. See Lankard Tr. 106, 115; Brewer Tr. 142, 145, 146-47; 153-54.

Plaintiffs' Brief Opposing Motion to Decertify, p.8.²⁵ More specifically, Plaintiffs claim that the water-to-cement ratio of Defendant's design mixes are in excess of industry standards before the cement is even placed in the cement truck for delivery. See Decertification Hearing Tr., pp.76-77.

Without addressing the merits of either parties' case, and based on changed facts and/or circumstances that have come to light via the discovery process and after the Trial Court's Conditional Certification Order, this Court notes that individualized issues, including but not limited to (1)the existence and use of many different design mixes composed of different ingredients, (2)the inherent variability of placing, finishing and curing procedures utilized by a large number of different contractors, (3)the numerous and distinct driveway defects involved in this case, and (4)each individual homeowners' post-placement actions, all lead this Court to rationally conclude that there does not exist a common nucleus of operative facts forming a common basis for liability against this Defendant.

While this Court acknowledges both that (1)the Civ.R.23 commonality requirement is generally given a permissive application and is to be liberally construed *at early stages of the proceedings*,²⁶ and that (2)individualized issues are properly analyzed pursuant to the

Without reaching the merits of this case, this Court observes that, despite Plaintiffs' reliance on their "design defect" theory, they simultaneously concede both that (1)Defendant's design mixes have been used continuously from 1988 until 1994, and that (2)between 1988-1992, there was not the "explosion" of driveway failures that there were during the 1993-1994 - a year in which, as Plaintiff acknowledges, "it was a more severe winter than we've had for 20 years". See Decertification Hearing Tr. pp.82-83. This Court will further examine the above facts and admissions when analyzing the Civ.R.23(B) requirements of predominance and superiority, *infra*.

See *Cohen*, *supra* at *7.

Civ.R.23(B)(3) requirements of predominance and superiority, the discovery process has revealed that there exists only a facially common issue in that many driveways failed, albeit for a variety of different reasons and as a result of numerous and inherently variable factors.

Even if this Court were to determine that the Civ.R.23(A)(2) requirement of commonality remains satisfied, decertification would nonetheless be warranted due to the fact that the Civ.R.23(B)(3) requirements of predominance and superiority are so lacking in the instant case, as discussed in greater detail *infra*.

Typicality

Civ.R.23(A)(3) expressly provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if...the claims or defenses of the representative parties are typical of the claims or defenses of the class". In *Hamilton*, the Supreme Court of Ohio held that "[t]he requirement of typicality is met where there is no express conflict between the class representatives and the class".²⁷ This Court is mindful that a representative's claim need not always involve the same facts or law to be typical, as long as there exists a common element of fact or law.²⁸

²⁷ *Hamilton, supra* at 77-78 (citing to *Warner, supra* at 98, and *Marks, supra* at 202-203).

²⁸ See *Thrope v. State of Ohio* (S.D. Ohio, 1997), 173 F.R.D. 483, ____; See also *Ilhardt, supra* at 618; *In re American Med. Systems, supra* at 1082 (quoting 1 Newburg on Class Actions, 3.13, at 3-75 and 3-76) (noting that "the typicality requirement ensures that the representative's interests will be aligned with those of the represented group and that the named plaintiff will also advance the interests of the class members", and that "a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if

With respect to typicality requirement, Defendant advances the following argument as to why this Court should find said requirement to be lacking:

"The representatives driveways here are not typical because, obviously, they do not contain the same concrete mixes and were not placed in the same community, on the same day, by the same contractors, using the same techniques as the driveways of other members of the class. Moreover, 'given the lack of commonality and highly individualized facts among proposed class members, no proposed [plaintiff] could be said to have claims typical of the entire class'. [Citation omitted]."

See Defendant's Motion to Decertify, pp.22-23.

In response to the foregoing argument(s), Plaintiffs contend that the typicality requirement remains satisfied due to the fact that "[t]he representative parties in this case are individual homeowners having no affiliation with the defendant". See Plaintiff's Brief Opposing Motion to Decertify, p.3 Plaintiff also maintains that "if there is no evidence in the record of conflict to contradict a typicality finding, 'the requirement should be deemed satisfied'". *Id. (citing to Warner, supra at 98)*.

It is this Court's opinion that Defendant's arguments against a finding of typicality are more appropriate for this Court to address when analyzing the Civ.R.23(B) requirements of predominance and superiority. Indeed, Defendant's "lack of typicality" arguments primarily focus on additional questions potentially affecting individual class members only. Neither in its Motion to Decertify, nor at the hearing conducted by this Court on said motion, has Defendant demonstrated either (1)an express conflict between the class representatives and the class, or (2)an interest on behalf of a class member or members that is antagonistic to the interests of other class

his or her claims are based on the same legal theory").

members.” Moreover, whereas Defendant repeatedly maintains that defenses unique to both the class representatives and the class members cut against a finding of typicality, the *Hamilton* court, as well as other courts to address this very issue, have held that “a unique defense will not destroy typicality or adequacy of representation unless it is ‘so central to the litigation that it threatens to preoccupy the class representative to the detriment of the other class members’”. *Hamilton, supra*, at 78 (citing to 5 Moore’s Federal Practice, *supra*, at 23-126, Section 23.25[4][b][iv], and at 23-98, Section 23.24[6]). Based on the foregoing analysis, this Court holds that the Civ.R.23 typicality requirement remains satisfied.

Adequacy of Representation

As for the adequacy requirement, Civ.R.23(A)(4) expressly provides that “[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if...the representative parties will fairly and adequately protect the interests of the class”. As noted in *Warner, supra* at 98, “[t]he analysis under this requirement is divided into a consideration of the adequacy of the representatives and the adequacy of counsel”.

A class representative is generally deemed adequate provided that his or her interest is not antagonistic to that of other class members. *Hamilton*, at 77-78; *Warner*, at 98; *Marks*, at 203.

While this Court is aware that Defendant has, in a Motion for Summary Judgment filed subsequent to this Court’s hearing on Defendant’s Motion to Decertify, argued that a named representative or representatives may have executed releases which in turn may act as a release as to Defendant, this Court notes that there are several named class representatives, and nothing has been brought to this Court’s attention that would demonstrate the existence of an “express conflict between [any of the] class representatives and the class” as that phrase is construed by *Warner, Hamilton* and progeny.

In accordance with the "typicality analysis" set forth *supra*, this Court likewise holds with respect to the first part of the Civ.R.23 adequacy requirement that said requirement continues to be satisfied. Indeed, although Defendant has raised issues and concerns which may be relevant to this Court's analysis of the Civ.R.23(B) predominance and superiority requirements, Defendant has failed to proffer evidence demonstrating an interest on the part of the named class representatives that is antagonistic to the interests of the remaining class members. The existence of any individualized defenses, as well as individualized facts and circumstances surrounding separate driveway installations, are clearly better suited for a more comprehensive analysis under Civ.R.23(B)(3).

With respect to the "adequacy of counsel" aspect of Civ.R.23(A)(4), the *Warner* court noted as follows:

"The issue of whether counsel is competent to handle the action can be the most difficult in the Rule 23 analysis. The fact that an attorney has been admitted to practice does not end the judicial inquiry. An attorney should be experienced in handling litigation of the type involved in the case before class certification is allowed. Close scrutiny should be given to the attorney's qualifications to handle the matter with which he is entrusted... Since crucial questions of due process are involved, the trial court should exercise great care in its determination of this element. Although this task may be the most unpleasant, it is one of the most vital." "

It is this Court's opinion, and Defendant does not argue to the contrary, that Plaintiffs' counsel are well-seasoned and well-versed in the realm of class action litigation. This Court entertains no doubt as to the qualifications, competency and expertise of Plaintiffs' counsel in the

Warner, supra at 98.

context of class action litigation, and nor does this Court doubt that Plaintiffs' counsel will do anything other than continuously represent Plaintiffs in a competent and zealous manner. In light of the foregoing, this Court finds that the second prong of the Civ.R.23(A)(4) adequacy requirement remains satisfied.

**Application of Civ.R.23(B)(3) Class Action Requirements:
Predominance & Superiority**

Pursuant to the Trial Court's Conditional Certification Order, the instant case was conditionally certified as a class pursuant to Civ.R.23(b)(3). See v.1740, p.534. In *Hamilton*, the Ohio Supreme Court noted as follows with respect to the application of Civ.R.23(B)(3):

"The Rule 23(B)(3) action is the so-called 'damages' action. [Citation Omitted]. It adds 'to the complex-litigation arsenal class actions for damages designed to secure judgments binding on all class members save those who affirmatively elected to be excluded.' *Amchem Prods., Inc. v. Windsor* (1997), 521 U.S. ____."31

Civ.R.23(B)(3) provides that an action may be maintained as a class action if, in addition to the prerequisites of subdivision (A), 'the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of the class action".

Hamilton, supra at 79-80.

Based on the plain meaning of the foregoing, in addition to the requirement of establishing the Civ.R. 23(A) prerequisites, Civ.R. 23(B)(3) requires this Court to analyze whether common questions predominate over individualized ones, *and* whether the class action procedure is superior to other available methods of adjudication. Whereas this court gave an exceedingly permissive application to the Civ.R. 23(A) requirements of commonality and typicality, it must, in a more stringent and focused manner, evaluate whether the Civ.R. 23(B)(3) requirements of predominance and superiority are satisfied in the instant case.¹²

Predominance

In order to satisfy the "predominance" requirement, Plaintiffs must show that the common questions of law and fact represent a *significant* aspect of the case and are capable of resolution for all members of the class in a single adjudication. See *Shaver v. Standard Oil Co.* (1990), 68 Ohio App.3d 783, 798-99; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313 (1984). In *Cope v. Metropolitan Life Insurance Company* (July 29, 1998), 1998 Ohio App. LEXIS 2125, S Ct No. 97-567, the Ohio Supreme Court recently noted as follows with respect to the "predominance" requirement:

"It is now well established that a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine

Accord Thrope v. State of Ohio (S.D. Ohio, 1997), 173 F.R.D. 483, _____ (citing to *In re American Medical Systems, supra* at 1084) ("Subdivision 23(b)(3) parallels subdivision (a)(2) insofar as they both require the existence of a common question; however, subdivision (b)(3) contains the more stringent requirement that common issues *predominate* over individual issues.")

each class member's individual position". *Lockwood Motors, Inc. v. Gen. Motors Corp.* (D.Minn. 1995), 162 F.R.D. 569, 580."

"As explained in the 1966 Advisory Committee Notes to Fed.R.Civ.P. 23(b)(3): [s]ubdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.... The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action... On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed".

After thoroughly reviewing the briefs submitted by counsel, the decertification hearing transcript, and the entire case file, it is this Court's opinion that there does not exist in this case the type of "generalized evidence" that will have the potential to prove or disprove Plaintiffs' claims on a simultaneous, class-wide basis. While acknowledging that "a wide variety of claims may be established by common proof in cases involving... the use of standardized procedures and practices",¹¹ this Court likewise notes that other claims are not suitable for resolution in the class action context, especially when resolution of the claims presented necessarily rely on significant individualized determinations.

In rendering this decision, this Court remains conscious of the fact that it is not called upon to ascertain the merits of the underlying case at this point in time. At the same time, however, this

¹¹ *Accord Cope, supra* at *11.

Court recognizes that performing a "rigorous analysis" of the Civ.R.23(B)(3) predominance requirement necessitates a scrutiny into the existence and intensity of "common" versus "individual" issues in order that a rational and informed judgment may be made.

Based on circumstances that have changed and facts that have come to light via the discovery process and subsequent to the Trial Court's conditional grant of class certification, it is obvious to this Court that individualized issues predominate over common issues. Although a facially common issue exists in that several driveways utilizing Defendant's concrete failed, albeit for a variety of potential reasons, this Court must balance the existence of this common fact with the greater number of particularized and fact-intensive questions affecting individual members of the class on a driveway-by-driveway basis. As even a cursory review of this Court's docket amply illustrates, these individualized issues have already prevented the Trial Court, this Court and the litigants from realizing the beneficial economies of time, effort and expense that are contemplated by Civ.R.23(B)(3). It is further the opinion of this Court that any economy that could be achieved by continued class treatment is substantially offset by the inefficiencies of time, effort and expense that will necessarily have to be spent litigating the numerous individualized issues which predominate.¹¹

The evidence before this Court demonstrates the extent to which it is necessary to scrutinize the facts and circumstances surrounding each individual and distinct driveway

¹¹ Accord *Ilhardt, supra* at ____ ("In complex cases where no one set of operative facts establishes liability where no single proximate cause applies to each potential class member and to each defendant, and where individual issues outnumber common issues...the district court should question the appropriateness of a class action for resolving the controversy").

installation process and resulting defect(s),³⁵ as well as individualized defenses that Defendants may have with respect to each individual class member.³⁶ Indeed, the driveways at issue in this case have faced a myriad of different problems, including but not limited to, flaking, spalling, peeling, and cracking. See Lankard Tr.27, 32-33, 106; Perenchio Tr.62-75, 162, 176-77; Brewer Tr.141-42; Defendant's Reply Brief in Support of Motion for Sanctions, Exhibits 4-8; 12.³⁷ Moreover, the method of installation and the conditions under which each driveway was installed and/or cured differs substantially on a driveway-by-driveway basis. *Id.*; See also Plaintiffs' Brief Opposing Motion to Decertify, pp.8-9 (acknowledging that "concrete is part of a multiset process involving manufacturing, installation and use").

³⁵ This would clearly necessitate an individualized scrutiny into numerous sub-issues, including but not limited to: (1)the weather conditions under which each driveway was poured, (2)the number and intensity of water additions made at each site by a significant number of different contractors, each of whom presumably engage in different "finishing" practices and procedures under different weather conditions, (3)the specific design mix of Defendant, of which Plaintiffs concede there are many, that was used on each driveway, and (4)the distinct problems, and varying intensities thereof, encountered in each individual Plaintiff's driveway [i.e., flaking, spalling, peeling, pitting, cracking, etc], and (5)the existence of contractual defenses potentially available to Defendant based on contracts executed by class members and various contractors. See Defendant's Reply Brief in Support of Motion for Sanctions, Exhibits 4-8; 12-21.

For example, as illustrated in Defendant's Motion for Summary Judgment against Joseph Demio, at least one class representative, and perhaps numerous additional class representatives and/or members, has executed what purports to be a release of all claims against the contractor who installed the driveway. Without commenting on the viability of said release as it relates to Defendant, it is worth noting that, if this case were to continue in the class action context, this Court would be called upon to interpret the viability and enforceability of many similar and yet distinct releases executed by a multitude of contractors.

See also *supra* at fn.24 and accompanying text.

Without delving into the merits of Plaintiffs' claims, this Court necessarily concludes that the claims of the entire class of Plaintiffs cannot be established without separately adjudicating the numerous individualized issues affecting the viability each class members' claim.³⁸ Due to the fact that individual, rather than common, issues predominate, this Court finds the Civ.R.23(B)(3) requirement of predominance to be lacking, such that the continued maintenance of the instant case as a class action is inappropriate.³⁹

Superiority

In addition to rigorously analyzing the predominance requirement, this Court must also determine whether a class action is the "superior" method of adjudication.⁴⁰ As the Supreme Court of Ohio noted in *Schmidt*:

"[t]o aid courts in determining whether there has been compliance with the

If "differing damages" was the only individualized issue before this Court, which it is not, this Court might have decided the predominance issue differently. Indeed, this Court is mindful that trial courts "should not dispose of a class certification solely on the basis of disparate damages". *Hamilton, supra* at 81 (citing to *Ojalvo, supra* at 232).

Accord Schmidt v. Aveco Corp. (1984), 15 Ohio St.3d 310, 316 ("[w]here individual rather than common issues predominate, the economics of time, effort and expense and the efficiency of class action treatment are lost, and the need for judicial supervision and the risk of confusion are magnified, and [u]nder such circumstances, a class action is clearly inappropriate"); *Ilhardt, supra* at fn. 3-4

See *Shaver, supra* at 799 (citing to *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* (C.A.9, 1982), 691 F.2d 1335 ("[i]f the court finds that common questions do predominate, it must still determine that a class action is the superior method to settle the controversy"))

Civ. R. 23(B)(3) requirements of predominance and superiority, i.e., requirements that demonstrate the utility and propriety of employing the class action device, the drafters listed four factors which they deemed to be particularly relevant: "(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of the class action"⁴¹

In addressing both the predominance and the superiority requirements embedded in Civ. R. 23(B)(3), a frequently cited commentator has repeatedly noted that "[t]he key should be whether the efficiency and economy of common adjudication outweigh the difficulties and complexity of individual treatment of class members' claims".⁴² This Court has already weighed the foregoing considerations in conjunction with the "predominance" analysis, *supra*, and has concluded that the high concentration of complex individualized issues undermine the continued suitability of the class action device. Indeed, the predominance of individualized issues significantly augment the difficulties that would likely be encountered in the event that the instant case continued to proceed in the class action context.⁴³

⁴¹ *Schmidt, supra* at 314.

⁴² Miller, *An Overview of Federal Class Actions: Past, Present and Future* (2 Ed. 1977), at 49; *Accord Warner, supra* at 96; *Shaver, supra* at 796.

⁴³ *Accord Schmidt, supra* at 315 ("[u]nder Civ. R. 23(B)(3), a class action must be superior to all other methods for adjudication of the controversy and one of the tests of superiority is the manageability of the action"); *Warner, supra* at 97 ("While we recognize the trial court's order was conditional, we entertain grave concern toward the potpourri of claims that could produce problems of manageability... We must keep in mind that the policy behind a class action lawsuit is to *simplify* the resolution of complex litigation, not *complicate* it").

Based on the foregoing analysis, this Court finds the superiority requirement to be lacking, such that decertification is warranted and justified.

Plaintiffs' Reliance on *Barliant* and progeny:

Plaintiffs' strongest argument as to why the status quo should not be disturbed is based on *Barliant v. Follett Corp.* (1978), 74 Ill.2d 226, a case which Plaintiffs insist establishes "the decertification standard" to be applied to the instant case. Relying on *Barliant*, Plaintiffs maintain that "decertification is not warranted as to the issues presented here, and it would be highly prejudicial" Plaintiffs' Brief Opposing Motion to Decertify, p.30.

In *Barliant*, a class action complaint was filed alleging breach of contract, fraud, and a deceptive trade practice pursuant to Illinois' version of the Uniform Deceptive Trade Practices Act. The trial judge originally assigned to the case entered an order certifying the class action, and after a series of reassignments of the case to other judges, a different judge vacated the earlier judge's certification order. The *Barliant* plaintiffs appealed the trial judge's ruling to no avail, and the Supreme Court of Illinois granted plaintiffs leave to appeal the appellate court's affirmance of the trial court. In reversing the appellate court's decision, the Supreme Court of Illinois held as follows:

"Both sides in an action would benefit from an early determination of the propriety of a class action. Allowing a judge to vacate a class action determination by another judge, three years later, is contrary to the objectives of the statute and fosters uncertainty in the litigation. *It may be beneficial to the orderly administration of justice for a second judge to set aside an earlier*

determination of a suitable class action if clearly changed circumstances, and not mere feelings of error, or more complete discovery warranted it. That is within the scope of section 57.3(a). But, that simply is not evident here."

"Federal case law, applying a virtually identical Federal provision (Fed.R.Civ.P.23), permits a revision of prior rulings but on the basis of changed facts. In *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.* (3d Cir. 1976), 530 F.2d 508, 512, for example, the court held that a second judge, who had replaced a prior judge in normal rotation, could reverse the prior judge on the basis of changed factual situation or fuller development of the facts."

Barbant, at 231-32.

It is this Court's position that changed factual circumstances and the development of the underlying facts warrant a reversal of the Trial Court's *Conditional Certification Order*, notwithstanding the passage of time. While this Court always favors certainty in any type of litigation to come before it, it is also cognizant of the fact that changed factual circumstances brought to light via the discovery process may, at times, justify the reversal of a prior ruling, conditional or otherwise. Indeed, *Barbant* and the authorities cited to therein clearly support the ability of courts to reverse prior rulings when necessitated by changed and/or more fully developed facts and circumstances.⁴⁴

Accord Manual for Complex Litigation Third (1995), Section 30.18 at 223 (Once a class is certified, it is true to a certain extent that "the parties can be expected to rely on it and conduct discovery, prepare for trial, and engage in settlement discussions on the assumption that in the normal course of events it will not be altered except for good cause... Sometimes, however, developments in the litigation, such as the discovery of new facts or changes in the parties or in the substantive or procedural law, will necessitate reconsideration of the earlier order and the granting or denial of certification..."); See also 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, Section 7.47 at 7-146 (3d ed. 1992) (noting that decertification is warranted where materially changed or clarified circumstances have been shown that would make the

The procedural history of this case, wrought with a myriad of discovery disputes between parties and non-parties alike, has prevented facts from coming to light in an expeditious manner which were necessary in order for this Court to properly and fairly conduct a rigorous analysis into the suitability of class action treatment as contemplated by Civ.R.23. It is readily apparent to this Court that the facts and circumstances of the instant case have been materially clarified since the early stage in this litigation when this case was *conditionally* certified.⁴⁵

In light of the foregoing analysis, *Barlant* does not preclude this Court from granting Defendant's Motion to Decertify at this juncture.

Plaintiffs' Reliance on Civ.R.23(B)(1):

Although Plaintiffs did not raise arguments concerning the applicability of Civ.R.23(B)(1) at the hearing on Defendant's Motion to Decertify, this Court finds it necessary to comment on Plaintiffs' explicit reliance on Civ.R.23(B)(1) in their First Amended Complaint, as well as their implicit reliance on Civ.R.23(B)(1) in their Brief Opposing Motion to Decertify.

Civ.R.23(B)(1) provides that "[a]n action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of:

continuation of the class action improper); *See also Gen'l Tel. Co. V. Falcon* (1982), 457 U.S. 147

See supra fn.11 and accompanying text.

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

At paragraphs Ten and Eleven of their First Amended Complaint, Plaintiffs track the language of Civ.R.23(B)(1)(a)-(b) by alleging as follows:

"10. "The prosecution of separate actions by each member of the class would create a substantial risk of inconsistent or varying adjudications with regard to individual members of the class which would establish incompatible standards for the defendant."

"11. Further, the prosecution of separate actions would also create a substantial risk of adjudication with respect to individual members of the class which, as a practical matter, would be dispositive of the interests of other members not party to the adjudication, thereby substantially impairing and impeding their ability to protect these interests."

In their Brief Opposing Motion to Decertify, Plaintiffs rely on Civ.R.23(B)(1) to support their argument that the Civ.R.23(B)(3) requirements of predominance and superiority have been satisfied. Plaintiffs' Brief Opposing Motion to Decertify, pp.27-28. More specifically, Plaintiffs maintain that "[t]he bringing of separate actions by each homeowner would create a serious risk of establishing differing standards for the defendant regarding the concrete". *Id.*, at 28.

Despite the foregoing, this Court notes that the Trial Court conditionally certified the class pursuant to Civ.R.23(B)(3), and not pursuant to Civ.R.23(B)(1). See v.1740, p.534. Moreover, as illustrated by the *Warner* court, neither subsection (B)(1)(a), nor subsection (B)(1)(b), are

applicable to the instant case. In *Warner*, the Ohio Supreme Court observed that:

"Subsection (B)(1)(a) does not lend itself to mass tort claims, such as the one before us. Pursuant to this subsection, certification is permissible if separate actions could lead to incompatible standards of *conduct*. The case at bar does not appear to involve a case which could result in differing standards of conduct if separate actions were pursued. Although it is possible that some plaintiffs could recover damages and others would not, such a situation is covered by subsection (B)(3) rather than (B)(1). Subsection (B)(1)(b) is equally inapplicable. Professor Arthur R. Miller likens this subsection to interpleader suits where only a limited amount of money is available and there is a risk that separate actions would deplete the fund before all deserving parties could make a claim. [Citation omitted]. A mass tort action is thus inappropriate for this subsection."⁴⁶

Pursuant to *Warner*, the possibility that some plaintiffs might recover damages while others might not is not an appropriate basis for certification pursuant to Civ.R.23(B)(1)(a). Moreover, this Court notes that Civ.R.23(B)(1)(b) "has been interpreted as protection for later litigants who may be deprived of recovery due to the success of earlier litigants."⁴⁷ *Marks, supra* at 203. The pivotal issue under this subsection is a defendant's possible insolvency, and this Court notes that Plaintiffs have offered no evidence either prior to or after the hearing on Defendant's Motion to Decertify that would raise concerns over Defendant Medina Supply's potential for insolvency. As such, certification under this subsection would be improper.⁴⁸

Based on the foregoing analysis, and even though Plaintiffs' did not explicitly petition this

⁴⁶ *Warner, supra* at 95.

⁴⁷ *Marks, supra* at 203.

⁴⁸ *Id.* (Holding that class certification pursuant to Civ.R.23(B)(1)(b) was properly denied due to the fact that plaintiffs failed to produce evidence regarding the likely insolvency of defendant).

Court to address the applicability of Civ.R.23(B)(1), this Court notes that class certification pursuant to Civ.R.23(B)(1) is not proper in the instant case.

Conclusion

After conducting a rigorous analysis as contemplated by Civ.R.23, and as required by well-established case law, this Court finds Defendant's Motion to Decertify to be well-taken. Even if it were to ignore the exhibits attached to Defendant's Motion for Sanctions and/or Reply Brief in Support of Motion for Sanctions, this Court would nevertheless find the Civ.R. 23(A)(2) requirement of commonality and the Civ.R.23(B)(3) requirements of predominance and superiority to be lacking, such that the continued maintenance of the class certified at the inception of this litigation would no longer be appropriate. Materials submitted to this Court after the hearing on Defendant's Motion to Decertify merely buttress this Court's determination that the commonality, predominance and superiority requirements of Civ.R.23 have not been satisfied. Defendant's Motion to Decertify Class is well-taken and is granted, there being no just reason for delay.

IT IS SO ORDERED.

DATE November 27, 1998

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BY Gerald E. [Signature]
Clerk

[Signature]
KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Opinion and Order on Defendant's Motion to Decertify Class has been sent by regular U.S. mail this 21st day of November, 1998 to:

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KATHLEEN ANN SUTULA, JUDGE