124671

No. 124671

In the

Supreme Court of Illinois

CHANDRA JOINER and WILLIAM BLACKMOND,
Individually and on Behalf and Similarly Situated Persons,

Plaintiffs/Petitioners,

v.

SVM MANAGEMENT, LLC,

Defendant/Respondent.

From the Appellate Court of Illinois, First Judicial District, No. 1-17-2336
From the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 16 CH 16407
The Honorable Judge Pamela McLean Meyerson, Presiding

REPLY BRIEF

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Oral Argument Requested

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THIS COURT HAS THE AUTHORITY TO OVERULE *BALLARD*

Defendant's reliance on *Hope Clinic* is misplaced as the issue there was the constitutionality of a legislative act. That court found that facial constitutional invalidation is manifestly strong medicine that is sparingly used by the Courts of last resort. *Hope* was neither a class action nor a fee shifting case. Defendant also left out the remainder of its quoted text from that paragraph ¶ 79 being "No Federal court can interpret the meaning of our state constitutional provisions."

Likewise, defendant's reliance on *Hampton* fares no better and actually provides support for the plaintiff's position. First, *Hampton* was before the Court on a 308 Certified question and it was also not a class action nor a fee shifting case. "The U.S. Supreme Court's decision in *Arkansas Game and Fish Comm'n* could not overrule this court's decision regarding the Illinois Takings clause." So here, there is no issue concerning another states' constitutionality of their statute.

Hampton set forth three exceptions to State court's review of constitutional issues in relation to their reliance upon the U.S. Supreme Court's decision . One of the three includes whether if the state constitutional provision is similar to the Federal provision then Federal Authority controls. See ¶ 10 of that decision.

Here, however there is no question concerning the constitutionality of an Illinois statute. At best the Illinois statute for certifying class actions, Sections 801 and 802 are comparable to the Federal Civil Procedure Rule 23, both very similar rules for the court to consider whether to certify the case as class action.

STARE DECISIS DOES NOT LIMIT THIS COURT'S REVIEW OF BALLARD

Defendant's *stare decisis* discussion is not persuasive for a variety of factors. First, in light of plaintiffs' quote from Justice Frankfurter in their opening brief, that principle is fluid rather than static. Second, there are no strict limitations or litmus tests for deviations from previous decisions. Court's decisions are fluid as defendant argues on page 2 of their brief which is to bring past decisions "in line with experience and newly ascertained facts." Third, defendant's reliance of *People V. Suarez* is not supportive of their position. This court remanded that criminal case back to the trial court. *Suarez* concerned the post- conviction relief issue under Rule 651 for specific duties upon the criminal defendant's counsel. For instance, a review of their cited page 50 of that decision states otherwise than what they argued in their brief:

> The doctrine of *stare decisis* 'expresses the policy of the courts to stand by precedents and not to disturb settled points. This doctrine 'is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion. *Stare decisis* enables both the people and the bar of this state to rely upon [this courts] decisions with assurance that they will not be lightly overruled." [emphasis added]. That court went on to describe that "serious detriment is thereby likely to arise prejudicial to public interests" when overturning firm *stare decisis* rulings.

Thus, because the issues raised here is not a settled point, *stare decisis* certainly cannot be the fatal roadblock as argued by defendant.

THE CAMPBELL-EWALD ANALYSIS SUPPORTS REVERSAL

The U.S. Supreme Court's decision in *Campbell-Ewald* however predicated their decision upon common law rules of contract and did not conduct an analysis of Rule 23 or a comparison to Illinois's Code Sections 801 or 802.

Defendant's brief however ignores *Ballard's* discussion. This court has noted that "[i]t is settled that we may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure." *Ballard RN Center, Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 40, 48 N.E.3d 1060. The *Ballard* court engaged in an extended discussion of Seventh Circuit precedents, so as to ensure that its conclusion was "consistent with the approach taken in the Seventh Circuit Court of Appeals." 2015 IL 118644, ¶ 40.

Defendant's argument that the U.S. Supreme Court was careful in limiting the case to its facts is not entirely accurate. Respected commentators after the *Campbell-Ewald* decision presented a slew of other factual scenarios that would possibly invoke a different ruling from the Court. For instance, if the defendants actually opened a bank account in the plaintiff's name and deposited the tendered check in that bank account for the full amount of the suit with the court also entering a judgment for the plaintiff could have possibly presented a different decision than what took place in *Campbell-Ewald.* See *Leading Case: II Federal Jurisdiction and Procedure: Justiciability—Class Action Mootness- Campbell -*

Ewald Co. V. Gomez 130 Har. L Rev. 427, 432 (2016). That case note also pointed out that "Several lower courts have weighed in on the issue with some holding that the class action survives if the alleged mooting occurs after the plaintiff files a motion for class certification and others going as far as holding that the class action survives even if the alleged mooting occurs before then assuming the plaintiff does not unduly delay filing the motion. The later approach adopted by several circuits, is premised on the idea that to hold otherwise would undercut the viability of the class action procedure and frustrate the objectives of this procedural mechanism for aggregating small claims." Id at 434,435

The most obvious point here is the flexibility argument that the lower Courts should maintain control over the class cases. "[B]ecause of the inherent tension between the class action form and mootness, as one scholar has put it, 'if an individual litigant's claims are moot yet she desires to keep litigating, what she essentially wants to do is litigate other peoples claims- that of course is the definition of a class action'". Id at 435-436. But here, the lower court stayed discovery prohibiting plaintiffs the opportunity from going forward to prosecute their class action claims. Under *Barber* and *Ballard*, putative class plaintiffs are forced to accept an individual settlement *against their will*, even where they are seeking class-wide relief. This placed class plaintiffs in the position of filing a shell motion for class certification prior to conducting discovery – a practice decried in *Ballard* - or *not* filing such a motion and being forced to accept a so-called "settlement" on Defendants' terms having no class-wide relief at all. Thus, the lower court's handling of their class action docket was handcuffed by the *Ballard* decision.

Another commentator called it common sense. In *Cynthia Chen, Predicated on a Misconception: Analyzing the problems with the Mootness by Unaccepted Offer Theory,*

48 Colum J.L. & Soc Probs 501 (2015) Professor Chen states the obvious "what happens if a plaintiff rejects a defendant's settlement offer? Common sense seems to dictate that the case continues." Further defendants can use the pick off strategy in small cases to make settlement offers which would be a cheap way to resolve the cases, then "defendants can ensure that no class action survives and in so doing frustrate plaintiff' right s to employ the class action device and other policy goals of class actions." Id at 510. The forced settlement that took place in this case, notwithstanding that the defendant still has possession of the "tender check" and neither a judgment nor a hearing was set on the issue of attorney fees in this fee-shifting case. decreased the viability of collective action mechanisms. In other words, since this lower court followed *Ballard* and this court does not overrule *Ballard* then it's clear that defendants can pick off plaintiffs in class cases without even paying the settlement amount nor paying any attorney fees in fee shifting cases. This will certainly either end or chill the class action mechanism in Illinois.

"Settlement and decreasing access to trial on the merits implicates problems of inequality between parties. Anything that contributes to the vanishing trial phenomenon is harmful because the Constitution the ideal that parties should have their day in Court and the Federal Rules of Civil Procedure all recognize that adjudication by trial has some inherent value and is an essential right." Id at 527.

Other commentators have also expressed the difficulty of allowing the mootness doctrine to take effect in fee shifting cases when there has not been a hearing or a payment or any guarantee of the payment of the attorney fees. See *Lyuba Shamailova, How a class Action Plaintiff's Request for Attorney's fees can prevent Mootness Despite a Defendant's tender of Damages. 39 Cardozo L. Rev. 345 (2017)*

At the very least, Courts have a duty to compel defendants to pay the monies or for the monies to be held in escrow or with the court thereby ensuring the sincerity of the defendant's position and offer. Putting the money in the plaintiff's bank account, entering judgment for the plaintiff and then holding a hearing on the attorney fees and entering judgment for the plaintiff on the attorney fees would then be the complete relief for the plaintiff. However, here no such events took place.

Here the lower court let the defendant walk away with their money and no judgment against them for the offered but not accepted monies and no judgment on the attorney fees. The lower court's decision has the affect of chilling class actions and harming consumers, and it also deprives the named *plaintiffs themselves* of any recovery

Defendant never requested a hearing on attorney fees, nor did the court set one.

Plaintiffs respectfully request this Honorable Court reverse the judgment of the Circuit Court of Cook County and this First Appellate District in its entirety, and remand for further proceedings.

Respectfully submitted,

CHANDRA JOINER and
WILLIAM BLACKMOND,
on behalf of themselves and
all others similarly situated,

/ s / *Berton N. Ring*
By one of their Attorneys,
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RULE 341(C) CERTIFICATION

The undersigned, an attorney, certifies that, to the best of his ability, this brief conforms to the requirements of Rule 341(a) and (b). The length of this reply brief is 7 pages, excluding the pages contained in the Rule 341(d) cover, the Rule 341 (h)(l) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to appended to the brief under Rule 342(a).

BY:

/s/ Berton N. Ring,
Attorney for Plaintiffs-Petitioners,
Berton N. Ring, P.C.

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NOTICE OF FILING

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Please take notice that on November 7, 2019, the undersigned electronically filed **PLAINTIFFS'/APPELLANTS' REPLY BRIEF** with the Supreme Court of Illinois.

/s/ Berton N. Ring

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned, Berton Ring, certifies that the statements set forth in this certificate of service are true and correct, and that he served the above-listed document on the above-listed attorney by emailing it to the above attorney before the hour of 5:00 p.m. on November 7, 2019.

/s/ Berton N. Ring