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WISCONSIN SUPREME COURT
APPEAL NO. 2019AP002423

Derrick J. Hammetter and Antoinette M. Vinkavich,

Plaintiffs-Respondents,

v.

Verisma Systems, Inc.,

Defendant-Appellant-Petitioner

Froedtert Memorial Lutheran Hospital, Inc.,

Defendant-Co-Appellant.

PLAINTIFFS-RESPONDENTS RESPONSE TO PETITIONS FOR REVIEW OF VERISMA SYSTEMS, INC. AND FROEDTERT MEMORIAL LUTERHAN HOSPITAL, INC.

Appeal from Decision and Order Granting Motion for Class Certification Entered December 10, 2019, in the Circuit Court for Waukesha County, Case No. 2017CV768, the Honorable Michael O. Bohren Presiding

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Plaintiffs-Respondents Derrick Hammetter and Antoinette Vinkavich actually agree with Verisma Systems, Inc. ("Verisma"), and Froedtert Memorial Lutheran Hospital, Inc. ("Froedtert"), that this Court should grant review of this matter.

This agreement *is not* based on any error committed by the court of appeals. To the contrary, the court of appeals properly affirmed the trial court's procedural order granting class certification against Verisma.[1]

Nor do Hammetter and Vinkavich agree with anything that Verisma and Froedtert have to say in their petitions about how and why the circuit court and court of appeals allegedly erred in certifying a class action. There are plenty of reasons to deny their petitions, with the most significant reason being that both Verisma and Froedtert are trying to turn the recently recreated class action statute, Wis. Stat. § 803.08, into something it is not.

Wisconsin Stat. § 803.08 was recreated with the expressed sentiment of aligning Wisconsin class action practice with Federal Rule of Civil Procedure 23. But Rule

[1] There is no class certification order against Froedtert. Instead, Froedtert is seeking review of a procedural order against Verisma, its release of information agent for purposes of Wis. Stat. § 146.83.

23 is not hostile to class actions, nor does it present an overly complicated standard that forces an aggregation of only identical claims. Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013 ("It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages."). Rather, Rule 23 "must be interpreted liberally. Its policy is to favor maintenance of class actions." King v. Kansas City Southern Indus., Inc., 519 F.2d 20, 25-26 (7th Cir. 1975). That is consistent with longstanding precedent in Wisconsin. Mercury Records Productions, Inc. v. Economic Consultants, Inc., 91 Wis.2d 482, 490, 283 N.W.2d 613 (Ct. App. 1979)

And while the recreated Wis. Stat. § 803.08 modified the legal elements a plaintiff must show at class certification, the modification was modest. The old class action statute required a plaintiff to show three statutory elements (numerosity, commonality, and adequate representation) and a fourth judicially created one (manageability), Cruz v. All Saints Healthcare System, Inc., 2001 WI App 67, ¶12, 242 Wis.2d 432, 625 N.W.2d 344.

The recreated class action statute added the element of "typicality," see Wis. Stat. § 803.08(1)(c), and swapped out the term "manageability" for "predominance" and "superiority." Compare Wis. Stat. § 803.08(2)(c)1; with Sisters of St. Mary v. AAER Insulation, 151 Wis.2d 708, 445, N.W.2d 723 (Ct. Ap. 1989) ("the concerns … focus on the basic question: is the proposed class action manageable? This is the same question federal courts are faced with in deciding class certification questions under Fed. R. Civ. P. 23(b)(3)….").

Class certification was and remains a discretionary determination for the trial courts, despite Verisma's desire that "de novo" review apply on appeal. Christensen v. Sullivan, 2009 WI 87, ¶82, 320 Wis.2d 76, 768 N.W.2d 798; Harwood v. Wheaton Franciscan Services, Inc., 2019 WI App 53, ¶41, 388 Wis.2d 546, 933 N.W.2d 654. And class certification never provides a stage to test the actual merits of the case, contrary to the double-teamed assertions of Verisma and Froedtert. Plaintiffs only bear the burden of demonstrating that all elements of Rule 23 have been met by a preponderance of the evidence, which is the "rigorous analysis" that is referred to by Verisma. See Bell v. PNC

Bank, Nat. Ass'n, 800 F.3d 360, 373 (7th Cir. 2015). This showing never has to be "to a degree of absolute certainty." Id. at 377. And while the merits of the case may be "peeked at," they may be viewed only to the extent of determining whether the Rule 23 prerequisites for class certification are met. Schleicher v. Wendt, 618 F.3d 679, 685 (7th Cir. 2010). Class certification is not a "dress rehearsal for the trial on the merits." Messner v. Northshore Univ. Health System, 669 F.3d 802, 811 (7th Cir. 2012).

Here, the circuit court properly exercised its discretion as it considered the undisputed facts actually contained in the record and walked through each element of Wis. Stat. § 803.08. As this Court directed the bench and bar to look to federal practice for guidance when interpreting § 803.08, the trial court's decision rests very comfortably within that jurisprudence. See, e.g., McCracken v. Verisma Systems, Inc., 2017 WL 3187365 (W.D. N.Y. 2017) (affirming separate class action against Verisma for violations of New York's medical record statute).

Why, then, do Hammetter and Vinkavich join in Froedtert's and Verisma's request that this Court accept review? With this Court having accepted the petition for review in another class action entitled Rave v. SVA, 2019AP2236, Hammetter and Vinkavich agree with Froedtert and Verisma that this Court should accept this case for review as well. Accepting this case will provide the Court with a more comprehensive opportunity to address the legal requirements for establishing numerosity, commonality, typicality, adequate representation, predominance, and superiority, which Verisma and Froedtert concede are partially at issue in Rave. (*Verisma Pet. for Review* at 9; *Froedtert Pet. for Review* at 15).

Dated at Brookfield, Wisconsin this 9th day of September, 2021.

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CERTIFICATION REQUIRED
BY WIS. STAT. § 809.19(8)(D)

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b), Wis. Stats. for a brief produced using the following font:

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Dated at Brookfield, Wisconsin this 9th day of September, 2021.

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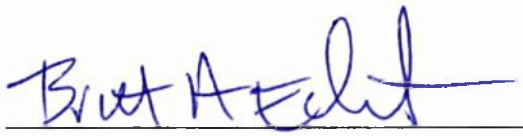
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I hereby certify that I have submitted an electronic copy of this response and that the text of the electronic copy of the response is identical to the text of the paper copy of the brief.

Dated at Brookfield, Wisconsin this 9th day of September, 2021.

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