

No. 23-1940

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DENNIS SPEERLY, ET AL.,

Plaintiffs-Appellees,

v.

GENERAL MOTORS, LLC,

Defendant-Appellant.

Appeal from the United States District Court
Eastern District of Michigan

Hon. David M. Lawson.

Nos. 2:19-cv-11044, -11802, -118082, -11875, -1237

**BRIEF *AMICUS CURIAE* OF THE
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
IN SUPPORT OF APPELLANT GENERAL MOTORS, LLC**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The International Association of Defense Counsel (IADC) has been serving a distinguished membership of corporate and insurance defense attorneys and insurance executives since 1920. Its activities benefit the approximately 2,500 invitation-only, peer-reviewed members and their clients, as well as the civil justice system and the legal profession. Moreover, the IADC takes a leadership role in many areas of legal reform and professional development. The IADC and its members have a strong interest in the sound development of class action law. All parties to this case have consented to the filing of this brief.¹

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

This Court’s recent decision in *In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239 (6th Cir. 2024), adopted a “reasonable jury” standard for distinguishing between common and individual issues in class actions. Under that standard, if a “reasonable jury” could answer “yes” to a question for some class members and “no” for others, “the question does not represent a ‘common’ one within the meaning of Rule 23.” *Id.* Only if a jury would have to resolve a question the same way for all class members can an issue be common. *See id.* at 246-47.

This brief elaborates upon the reasonable jury standard and applies it to this case. It begins by urging this Court to reaffirm its decision in *In re Nissan*: The reasonable jury standard is the correct approach to identifying common and individual issues under Rule 23 because it is the only approach that accords with the Rules Enabling Act and the Seventh Amendment right to a jury trial. The brief then identifies some relevant legal principles that follow from understanding that common and individual issues are defined by what a reasonable jury could do. Finally, the brief suggests how these principles should apply to this case, recognizing that the decision below was written without the benefit of *In re Nissan*.

ARGUMENT

A. This Court Applies a “Reasonable Jury” Standard for Distinguishing Between Common and Individual Issues Under Rule 23.

Under Rule 23, no class action may be certified unless the case presents at least one question “of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2); *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). In addition, no class action seeking damages may be certified unless “the questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). Before one can ask whether common questions exist or predominate, one must first decide what a common question is. The distinction between “common” and “individual” questions is thus central to the Rule 23 analysis.

In re Nissan framed this central inquiry by asking what a reasonable jury could do. “To be common, the question must ‘allow a decisionmaker to reach a yes-or-no answer for the class in ‘one stroke.’” 122 F. 4th at 247 (quoting *Doster v. Kendall*, 54 F.4th 398, 430–31 (6th Cir. 2022)). That, in turn, requires asking whether a “reasonable jury” could answer “yes” to the question for some class members and “no” to the question for others. *Id.* at 252; *see id.* at 247. If a reasonable jury could resolve an issue differently for different class members, “no commonality exists.” *Id.* at 247.

Of course, “not every question with a common answer meets Civil Rule 23(a). It’s only ‘central’ issues that matter.” *Id.* at 248 (quoting *Dukes*, 564 U.S. at 350). And the “only way to determine whether an issue is central is to deal with the material

elements of each claim.” *Id.*; see *Fox v. Saginaw Cnty.*, 67 F.4th 284, 301 (6th Cir. 2023) (explaining that a court must describe the elements of each claim and “explain which could be proved across the board for the entire class”).

In sum, “[a]n *individual issue* is an issue that a reasonable jury could resolve differently for different members of the proposed class because it could find legally material, factual differences among them. A *common issue*, conversely, is an issue that a reasonable jury would have to resolve the same for all members of the proposed class because it could not find any legally material, factual differences among them. The facts that are legally material in a given case are determined by the elements of the substantive claims and defenses at issue.” Aaron D. Van Oort & John L. Rockenbach, *Defining Common and Individual Issues in Class Actions: What A Reasonable Jury Could Do*, 109 Minn. L. Rev. Headnotes 1, 1–2 (2024) (hereinafter “*What a Reasonable Jury Could Do*”).

B. The Reasonable Jury Standard Is the Correct Approach to Rule 23 Because Only that Standard Accords with the Rules Enabling Act and the Seventh Amendment.

Defining common and individual issues this way “follows directly from the proper role of procedural rules.” *Id.* at 8. The Seventh Amendment to the U.S. Constitution guarantees parties the right to a jury trial, U.S. Const. amend. VII, and the Rules Enabling Act prohibits procedural rules from abridging that, or any other, substantive right. 28 U.S.C. §2072(a), (b).

In a series of decisions, the Supreme Court has applied these limitations to Civil Rules 56 and 50, governing when a court may take issues away from a jury by granting

summary judgment and judgment as a matter of law at trial. See *What a Reasonable Jury Could Do* at 8. Those decisions explain that the Seventh Amendment protects “the substance of the common law right of trial by jury,” *Colgrove v. Battin*, 413 U.S. 149, 156 (1973), and that a procedural rule respects that right only when its use is limited to situations where a party’s evidence is legally insufficient to support a jury verdict, see, e.g., *Galloway v. United States*, 319 U.S. 372, 388–96 (1943). “If, however, the law and evidence would allow a reasonable jury to find for a party, courts agree that taking the issue away from the jury” through a procedural rule “infringes on the Seventh Amendment.” *What a Reasonable Jury Could Do* at 9.

By now, the application of these principles to motions for summary judgment under Rule 56 is well understood. A court must determine whether “there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To apply this standard, the court must draw all reasonable inferences in favor of the nonmoving party, then decide whether the evidence could support a finding for that party on the challenged claim or element. *Scott v. Harris*, 550 U.S. 372, 378 (2007). In the end, the court asks whether a “reasonable jury” could rule for the nonmoving party. *Anderson*, 477 U.S. at 248.

The very same “reasonable jury” standard that courts know so well from Rule 56 “applies equally to Rule 23.” *What a Reasonable Jury Could Do* at 9. After all, the Rules Enabling Act and the Seventh Amendment apply to Rule 23 just as they do to other

procedural rules. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) (“Rule 23’s requirements must be interpreted in keeping ... with the Rules Enabling Act.”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (“[N]o reading of the Rule [23] can ignore the [Rules Enabling] Act’s mandate”); *Ross v. Bernhard*, 396 U.S. 531, 533–41 (1970) (“[C]lass action plaintiffs may obtain a jury trial on any legal [claims] they present.”). Thus, if Rule 23 gave “plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action,” it would violate the Rules Enabling Act. *Tyson Foods v. Bouaphakeo*, 577 U.S. 442, 459 (2016).

Like summary judgment, class certification implicates the Seventh Amendment because it may take issues away from the jury’s consideration. *See Ortiz*, 527 U.S. at 845–46; *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319 (5th Cir. 1998). Once “a claim or issue is certified for class treatment, the jury is prohibited from reaching different conclusions for different” class members. *What a Reasonable Jury Could Do* at 10. This “does not present a Seventh Amendment problem if a reasonable jury could not distinguish between individual class members.” *Id.* But if the claims of individual class members could be reasonably distinguished, then someone’s substantive rights will be violated by an order certifying a class for those claims, regardless of the outcome. “Either some class members who would otherwise lose will receive a windfall and the defendant’s rights will be violated (if the jury reaches a plaintiff verdict), or some class members who would otherwise win will be denied recovery and their rights will be violated (if the jury reaches a defense verdict).” *What a Reasonable Jury Could Do* at 10; *see*

Cimino, 151 F.3d at 319 (reversing class judgment because causation was submitted for class determination when it was an individual issue and “the Seventh Amendment gives the right to a jury trial to make that determination”); *In re NCAA I-A Walk-On Football Players Litig.*, 2006 WL 1207915, at *13 (W.D. Wash. May 3, 2006) (denying class certification where individual issues on injury and damages predominated and “Plaintiffs suggest no way to deal with each purported class member’s Seventh Amendment right to have his damages determined by a jury”). “The reasonable-jury standard prevents that impermissible outcome by barring class-wide resolution of issues whenever a jury could reasonably reach a different decision for some class members versus others.” *What a Reasonable Jury Could Do* at 10.

C. Understanding the Reasonable Jury Standard Crystallizes Other Relevant Principles of Class Action Law.

Adopting the reasonable jury standard yields several other principles of class action law, many of which prove relevant to this case.

First, the portion of the commonality inquiry that asks whether a reasonable jury could resolve an issue differently for different class members presents a question of law that should be reviewed *de novo*. “[T]he classic summary judgment question—could a reasonable jury rule for the plaintiff on this record as construed in his favor?—raises a ‘legal’ question, even though it is intertwined with the facts, which is why appellate courts traditionally give fresh review to district court decisions in this area.” *Romo v. Largen*, 723 F.3d 670, 681 (6th Cir. 2013) (Sutton, J., concurring in part and concurring

in the judgment). Whether a reasonable jury could distinguish among the claims of class members likewise raises a legal question that calls for fresh review.

Second, an issue's classification as common or individual should depend only on evidence that will be admissible. *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005); *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 905 (3d Cir. 2022) (Porter, J., concurring); *accord In re Nissan*, 122 F.4th at 253 (holding that expert testimony inadmissible under Rule 702 cannot support class certification). Evidence that the jury will never see can play no part in affecting what the jury reasonably could do. *What a Reasonable Jury Could Do* at 16–17.

Third, an issue's classification depends on the evidence that both sides will introduce, not just the plaintiffs' evidence. What a reasonable jury could do depends on the entire record before it, not just the plaintiffs' evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Just as each side of a summary judgment dispute may identify record evidence supporting its position, so too may each side of a certification dispute. *What a Reasonable Jury Could Do* at 15.

Fourth, the decision to certify some issues for class treatment does not convert all issues into common issues, and hence it does not eliminate the need to adjudicate the individual issues individually. The character of questions as common or individual flows from the substantive law governing the claims, the facts of the case, and the limitations of the Rules Enabling Act and Seventh Amendment. A class certification ruling changes none of these inputs, so it cannot change the character of the issues. As

long as a reasonable jury could distinguish between class members on a certain issue, it must be allowed to do so. Individual issues remain individual—and must be adjudicated individually, outside a class—regardless of whether the court certifies a class to address other issues in the case that are common. *Id.* at 18.

Fifth, courts must keep this feature of individual issues in mind when determining whether common issues predominate over individual issues under Rule 23(b)(3). Where a class action presents both individual and common issues, the district court must establish a mechanism for adjudicating the individual issues that is “‘administratively feasible’ and ‘protective of defendants’ Seventh Amendment and due process rights.” *Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81, 89 (1st Cir. 2021) (quoting *In re Asacol Antitrust Litig.*, 907 F.3d 42, 52 (1st Cir. 2018)). And it must explain this mechanism *at the certification stage*, which is when a district court “must forecast how the parties will conduct the litigation from the certification stage through the trial to the final judgment.” *Fox*, 67 F.4th at 302. To make the predominance determination, then, courts should ask: “Is a class proceeding on the common issues practicable, permissible, and worthwhile, knowing that the individual issues will have to be adjudicated individually after the class trial is finished?” *What a Reasonable Jury Could Do* at 19.

D. Working Without this Court’s Recent Decision Adopting the Reasonable Jury Standard, the District Court Misapplied Some of These Principles.

Even without the benefit of this Court’s decision in *In re Nissan*, the district court grasped some of these principles. For example, it acknowledged the need to “identify

the elements of each pleaded cause so that the Court can weigh the balance of common and individualized issues.” *Speerly v. Gen. Motors, LLC*, 343 F.R.D. 493, 508, 524 (E.D. Mich. 2023). It considered expert testimony only after confirming that it would be admissible under Rule 702. *Won v. Gen. Motors*, 2022 WL 3010886, at *2–19 (E.D. Mich. July 28, 2022). And it recognized that, under the Rules Enabling Act “federal rules of procedure, such as Rule 23, cannot be used to ‘abridge, enlarge, or modify any substantive right.’” *Speerly*, 343 F.R.D. at 524.

Ultimately, however, the district court fell short of what *In re Nissan* and the reasonable jury standard require.

First, the district court failed to properly apply the element-by-element assessment necessary to determine whether common issues exist and predominate. In a multi-state, multi-claim case like this one, the “district court must examine each cause of action, identify the relevant elements,” *In re Nissan*, 122 F.4th at 248, and classify each element as common or individual, *What a Reasonable Jury Could Do* at 14. It then must “add up” all the common and individual issues to “qualitatively evaluate which side ‘predominates’ over the other.” *Fox*, 67 F.4th at 300. “And it must repeat this analysis for all ... classes,” *In re Nissan*, 122 F.4th at 248, here twenty-six of them.

Although it acknowledged the need to perform this analysis, the district court fell into the common trap of identifying generic issues—here, whether a defect existed, whether GM knew about it, and whether it posed a safety risk—without explaining how each issue “matches with, or does not match with, each state law claim.” *Id.* at 249.

Second, the district court applied the wrong legal standard for distinguishing between common and individual issues within a claim. It asked whether a “jury reasonably could” rule the same way for all class members on the issues it identified as common. *Speerly*, 343 F.R.D. at 512. The question is not whether a reasonable jury *could* resolve an issue the same way for each proposed class member but whether it *must* do so. Only in the latter case do the Rules Enabling Act and the Seventh Amendment justify removing the choice from the jury’s hands. Just as a party does not earn summary judgment simply by showing that a reasonable jury could rule in its favor, a party does not earn class certification simply by showing that a reasonable jury could rule the same way for all plaintiffs. By “incorrectly framing the legal standard,” the district court “abuse[d] its discretion.” *United States v. Gissantaner*, 990 F.3d 457, 468 (6th Cir. 2021).

Third, committing a related error, the district court did not address GM’s evidence when assessing each issue. When addressing whether the existence of a defect presented a common question, for example, it considered the “evidence ... in the record from which a jury reasonably could” rule the same way for all class members, without addressing the evidence in the record from which a reasonable jury could find differently for different class members. *Speerly*, 343 F.R.D. at 512. This led it to consider roughly four categories of evidence, each presented by the plaintiffs: the internal correspondence plaintiffs obtained in discovery, testimony from two of plaintiff’s experts, and testimony from some of the named plaintiffs. *Id.* at 512–17. It did not address the evidence GM presented showing that the “alleged defects were reported

with widely varying frequencies in different states and for different vehicles.” GM Supp. Br. at 11–12. Because determining what a reasonable jury could do requires considering each side’s evidence at certification, “Rule 23 demands that the district court grapple with evidence of material changes” to an allegedly defective product and material variations among products, *In re Nissan*, 122 F.4th at 247; *In Re Ford Motor Co.*, 86 F.4th 723, 728 (6th Cir. 2023), no matter who presents that evidence.

Fourth, the district court failed to address predominance in light of the reality that individual issues remain individual even after a class is certified. It recognized that certain elements of the plaintiffs’ claims might present individual issues, including whether the alleged defect manifested for each owner and whether each owner presented his or her vehicle for repair. *Speerly*, 343 F.R.D. at 522. But it did not explain how these individual issues could be adjudicated in a way that would both respect the defendants’ rights and remain administratively manageable.

Regarding manifestation, the district court reasoned that “the appropriate opportunity to address claims of absent class members whose vehicles never have manifested any defect is a Rule 56 motion for summary judgment.” *Id.* at 522. If it meant that GM could file 800,000 motions for summary judgment, that would not be practical. If it meant that GM could file one motion for each class, that would not respect either side’s right to have individual issues litigated individually.

Regarding presentment, the district court stated that this “merits issue” was “irrelevant at this stage.” *Id.* at 525. It also suggested that GM’s own warranty data could

“suffice to identify and cull at the merits phase—or during claims administration for a settlement class—any claimants who ... never sought repairs.” *Id.* at 523. In doing so, however, it failed to explain how this culling process would respect GM’s right to a jury trial and to cross examination.

The time to “cull” a class—to confirm that it truly complies with Rule 23—is at certification. That project cannot be left for another day.

CONCLUSION

This Court should reverse the order granting class certification.

Dated: January 30, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(g) because it does not exceed half the length (12.5 pages) of the party's *en banc* briefing limit (25 pages). *See* Fed. R. App. P. 29(a)(5), 32(a)(7); *see also* Briefing Letter, Doc. 88 (Dec. 19, 2024).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Office 365 ProPlus version of Word in 14-point Garamond.

Dated: January 30, 2025

s/ Aaron D. Van Oort

Aaron D. Van Oort

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2025, a copy of the foregoing document was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will cause a notice of electronic filing to be served on all registered counsel of record.

s/ Aaron D. Van Oort

Aaron D. Van Oort