NO. 11-445

IN THE

Supreme Court of the United States

FARMERS INSURANCE COMPANY OF OREGON, *et al.*,

Petitioners,

v.

MARK STRAWN, on his own behalf and as representative of a class of similarly situated persons,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In this matter, the trial and both appellate courts concluded that the record evidence, including direct testimony from class members, was sufficient for a jury to find reliance on a contractual promise to pay reasonable medical expenses as statutorily required. Properly stated, the questions presented are:

1. Must reliance in a consumer-fraud class action be proven individually and require the testimony of every absent class member, or, in accordance with state law, may it be proven in appropriate cases on a classwide basis?

2. Where a trial judge explained why he rejected a challenge to the size of a punitive damage award on two separate, fully briefed independent grounds, signed an order within the deadline set by state law, and later detailed his justification in further written findings, is it the application of an "unprecedented procedural bar" when the state supreme court follows longstanding state law and finds that the defendant's failure to assign error to one of those two grounds moots the issue?

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondent Mark Strawn, on his own behalf and as representative of a class of similarly situated persons, respectfully requests this Court deny the petition for writ of certiorari, seeking review of the Oregon Supreme Court's decision in this case.

Petitioners Farmers Insurance Company of Oregon, Mid-Century Insurance Company, and Truck Insurance Exchange (collectively, "Farmers") were found liable after a jury trial for arbitrarily and fraudulently reducing the plaintiff-beneficiaries' statutorily mandated and contractually promised personal injury protection ("PIP") benefits, which required the payment of all reasonable and necessary medical expenses for eligible injuries.

Farmers now claims that it was denied due process in two separate ways. First, it asserts that Plaintiffs were relieved of having to prove reliance because every absent class member was not called to testify that each relied upon Farmers's promise to pay reasonable medical expenses.

Yet, reliance was proven at trial in accordance with Oregon law. Six class members testified that they had relied on Farmers's promise. Their testimony was bolstered by the clear statutory requirements, contract language, a former insurance commissioner's testimony concerning the importance of PIP in Oregon's regulatory scheme, and the fact that every member submitted claims pursuant to the policy provision, a process that reiterated to each claimant the promise to pay. The courts below uniformly found this evidence sufficient to present a

jury question and sustain a "permissible inference of reliance" by the jury. No contrary evidence was ever proffered, nor did Farmers preserve any objection to class certification. Pet. App. 37a n.13.

Second, Farmers attacked the punitive damages judgment as grossly excessive, despite its single-digit ratio, by asserting that Oregon adopted a novel procedural obstacle to deny its claim. Yet, there is nothing novel in an appellate ruling that an issue is moot where a party fails to assign error to one of two independent, alternate grounds upon which the award was upheld.

On this issue, Farmers asserts a tortured interpretation of a procedural limit on the trial court's authority to claim it did not have to appeal the trial court's finding of waiver. Despite the court's issuance of an effective order, Farmers inexplicably assigns itself the authority to determine which ground argued and briefed by the parties served to deny its motion. That is authority no prudent counsel would claim.

Farmers erroneously argues Oregon abandoned its own rules to avoid federal due-process requirements. If Farmers had assigned error to the trial court's finding of waiver, at least in the alternative, it would not find itself in its present conundrum, forced to accuse the Oregon Supreme Court, rather than itself, of fostering a novel interpretation of well-established rules.

Farmers unwarranted attack on the integrity of the Oregon Supreme Court and its attempt to portray that Court as a repeat offender of this Court's jurisprudence lacks merit and deserves

condemnation. Conjuring up accusations made against the Oregon Supreme Court in *Philip Morris USA v. Williams ("Williams III")*, 556 U.S. 178 (2009) (Mem.), Farmers ignores the fact that those accusations were found wanting. In *Williams III*, this Court granted certiorari to review whether Oregon's high court had acted in defiance of this Court after remand. After full briefing and oral argument, this Court dismissed the writ as improvidently granted. *Id*. Thus, if *Williams III* means anything, no defiance took place, and Farmers's characterization is utterly inaccurate.

This meritless *ad hominem* attack on the Oregon Supreme Court is unwarranted, inaccurate, and an obvious attempt to mask weaknesses in the Petition. Moreover, it is emblematic of a trend that portrays disappointing state-court decisions as flouting this Court's pronouncements. The Petition's misleading portrayal of the record and decisions below ill serves this Court and the parties' interests. Though this Court has denied petitions that severely mischaracterize the record, *see e.g., Wyeth LLC v. Scofield*, --- U.S. ----, 131 S. Ct. 3028 (2011) (Mem.); *Fortis Insurance Co. v. Mitchell,* --- U.S. ----, 130 S. Ct. 1896 (2010) (Mem.); and *Continental Carbon Co. v. Action Marine*, --- U.S. ----, 128 S. Ct. 2994 (2008) (Mem.), the continued frequency of the practice and the disrespect it displays to state judiciaries strongly suggests that it is time to put parties on notice that the practice will not be tolerated and will result in denial of the petition.

Farmers misrepresents this case. *See* Pet. App. 4a ("Farmers's argument proceeds from an incorrect understanding of our decision."). It rewrites the history of this case and Oregon law so as to

render it unrecognizable when compared to the record. Despite its contrary claims, Farmers was fully aware of the alternative grounds on which its arguments were denied at trial, agreed with the procedure adopted by the trial court, and had an unencumbered opportunity to assert "every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

The assembly of half-truths and outright inaccuracies in the Petition constitute more than an advocate's attempt to assemble the record in the light most favorable to a client. It is affirmatively misleading and lacks the candor owed this tribunal. Based on that erroneous portrayal of the record, as well as the Petition's failure to satisfy any of the criteria that merits the exercise of this Court's discretion, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Statutory Background.

For four decades, Oregon law has required all automobile liability insurance policies include no-fault personal injury protection ("PIP"). Or. Rev. Stat. § 742.520. PIP covers "[a]ll reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year" of the covered injury. *Id.* § 742.524(1)(a). Insurance coverage is mandatory for all drivers and, during the class period, had to include minimum PIP coverage of $10,000 (now $15,000). Pet. App. 13a n.2. The "obvious purpose" of the PIP requirement is "to provide, promptly and without regard to fault, reimbursement for some out-of-pocket losses resulting from motor vehicle

accidents." *Perez v. State Farm Mut. Auto. Ins. Co.*, 613 P.2d 32, 35 (Or. 1980).

The promise to pay all reasonable and necessary medical expenses is non-negotiable. Insurers must provide PIP coverage under Oregon's minimum financial responsibility law, and PIP policyholders and other PIP insureds are therefore assured of PIP benefits through each policy issued in Oregon.

The claimant-friendly governing statute creates a presumption that claims filed for medical expenses are "reasonable and necessary." Or. Rev. Stat. § 742.524(1)(a). The legislature required insurers questioning a charge to conduct "a reasonable investigation based on all available information," Or. Rev. Stat. § 746.230(1), and do so in good faith. *See Ivanov v. Farmers Ins. Co. of Or.*, 185 P.3d 417, 421 (Or. 2008) (en banc).

B. Underlying Facts.

Class representative Mark Strawn purchased an automobile liability insurance policy from Farmers. He subsequently suffered a serious head injury in a car collision on November 20, 1997. On November 26, 1997, pursuant to his PIP coverage, he submitted his medical bills. Farmers refused to pay $8.30 out of the $35 bill for the emergency room physician's examination of x-rays, $7.00 out of a $110 hospital bill for diagnosing his head injury, and $412.50 out of a $1,387.50 bill from a neuropsychologist for various tests. Strawn wrote Farmers to learn why these bills were not fully paid and was referred to Farmer's bill vendor, Medical Management Online ("MMO"). MMO responded that

it would only pay up to the 80th percentile of similar providers within two geographic regions. He subsequently received and paid bills for the difference from his medical providers.

Strawn began this class action lawsuit with claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and declaratory relief. The gist of the complaint was that Farmers had arbitrarily reduced PIP benefits by concealing from its insureds that it was not really reducing bills on the basis of an evaluation of reasonableness, but to secure greater profits.

Evidence established that, prior to 1998, Farmers processed requests for PIP benefits by reviewing each medical bill for whether it was both usual and customary, and thus reasonable. Pet. App. 14a. Because of significant losses resulting from payments Farmers made due to the 1994 Northridge, California earthquake, Farmers instituted a nationwide "Bring Back a Billion" campaign to increase its surpluses without raising premiums. *Id*. To that end, Farmers implemented a "non-rate action plan" in 1997 that instructed its Portland office to reduce payments of PIP benefits despite its own underwriting. *Id*. That plan was accomplished by contracting with MMO, who used "cost containment software" to sort medical expenses by various codes, geographic regions, and prices. Farmers selected the 80th percentile as the cutoff point, but subsequently responded to complaints and changed that to the 90th percentile. *Id*. at 16a-17a. In response to the statutory notice of intent to file a class action, Farmers changed it again, this time to the 99th percentile, subsequently deciding that this was the right approach "while the litigation was

pending." *Id.* at 17a. Each time it reduced a bill, Farmers falsely asserted that the medical provider's charge was "unreasonable" despite its knowledge that the charge was a "usual and customary" amount.

During the class period, Farmers "repriced" more than 60,000 individual bills for a total savings of $750,000. *Id.* at 16a. Ninety percent of those reductions cut bills by $25 or less; more than 25 percent involved cuts of $3 or less even though the total amount of the bill was statutorily presumed to be reasonable. *Id.* at 16a-17a. The cuts were so small that it was not cost-effective for either medical providers, or claimants who subsequently became responsible for the difference, to challenge them. *Id.* at 17a.

The plaintiff class certified in June 2000 consisted of all PIP beneficiaries whose payments were reduced from January 26, 1998 to July 21, 1999. *Id.* at 18a. After trial, the jury returned a verdict of approximately $1.5 million in compensatory damages, about half of which represented prejudgment interest. *Id.* at 19a. The compensatory damages represent liability for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. In addition, the jury awarded $8 million in punitive damages on the fraud claim. *Id.* at 20a. After a post-verdict administrative claims procedure in which many eligible class members failed to file any claim, the trial court reduced the compensatory damages to about $900,000. *Id.*

Farmers appealed. The Court of Appeals found both direct and circumstantial evidence supported liability for fraud, Pet. App. 90a, but ruled that the

punitive damages could not exceed four times the compensatory damages. It failed to address the trial court's finding that Farmers had waived remittitur of the punitive damages amount.

Both parties successfully sought review in the Oregon Supreme Court. Farmers presented three issues: whether Farmers was improperly precluded from rebutting the reasonableness of each medical expense claim; whether plaintiffs presented sufficient evidence of classwide reliance; and whether the punitive damages, as reduced by the Court of Appeals, was still excessive. Strawn's petition sought restoration of the punitive damages awarded by the trial court and pointed out again that Farmers appealed only one of two alternate grounds upon which the trial court sustained that award.

The Oregon Supreme Court first rejected Farmers's contention that Plaintiffs had to present individualized proof of *the reasonableness of each medical charge*.

Farmers's second issue was denial of its directed verdict motion asserting that plaintiffs failed to provide sufficient evidence of classwide reliance on the alleged fraud. *Id.* at 29a. Farmers argued that the Court of Appeals "indulged a 'presumption' of reliance" that relieved plaintiffs of their burden. The Oregon Supreme Court rejected that characterization, finding the evidence multifaceted and sufficient based on direct testimony of reliance, statutory requirements, insurance policies that promised to pay reasonable medical expenses, and the claims made by all class members for PIP benefits. *Id.* at 34a. Holding that

"individualized evidence of the class members' reliance was not necessary to create a jury question on that element of plaintiffs' fraud claim," the court rejected that assignment of error. *Id*. at 44a.

Justice Balmer, dissenting in part, "agree[d] with the majority's rejection of Farmers's argument that reliance, when it is an element of a class action claim, always must be established through direct evidence of each class member's individual reliance . . . [and instead] may be inferred from evidence common to the class." Pet. App. 57a n.1.

Farmers's third issue challenged the size of the punitive-damages judgment and overlapped with Plaintiffs' objection to the reduction of those damages by the court of appeals. Plaintiffs asserted that Farmers failed to assign error to the trial court's determination that Farmers had waived any objection to the size of the punitive damages because of a procedural default. Though Farmers understood that the trial judge had found its objections waived, *see, e.g.*, Pet. App. 213a, it argued that the trial court's written order was ineffective and *oral* justification meaningless because it had not been timely memorialized in writing. Instead, it claimed that its motion was "deemed denied" under Oregon Rule of Civil Procedure 64F(I), and thus only the merits was at issue. The Oregon Supreme Court found "no merit" in that novel contention, found the order effective, and held that Farmers "failed to preserve any challenge to the waiver" determination. Pet. App. 55a, 56a. As a result, any error in the size of the punitive damage award "was necessarily harmless." *Id*. at 56a. The dissent agreed with the majority on this issue. *Id*. at 57a n.1.

Subsequently, Farmers sought and received reconsideration. The Oregon Supreme Court rejected Farmers characterization that the court had changed state law in its decision or that it had created an "irrebuttable presumption" or, for that matter, any presumption at all. The court adhered to its earlier decision and held that Farmers's complaints proceeded "from an incorrect understanding of [the court's] decision." Pet. App. 4a.

C. Misstatements of Facts and Law in the Petition.

1. Farmers attempts to cast the Oregon Supreme Court as a repeat offender of this Court's due-process jurisprudence by misrepresenting the history of *Philip Morris USA v. Williams ("Williams II")*, 549 U.S. 346 (2007). It claims, in *Williams*, Oregon imposed a "novel and patently unreasonable procedural bar," Pet. 3, yet, when this Court received full briefing and argument on that issue, it apparently found no such evasion, and dismissed the petition making that allegation as improvidently granted. *Williams III*, 556 U.S. 178.

2. Farmers asserts "there was *no* evidence that any class member—much less *all* class members—relied on the alleged misrepresentation." Pet. 14 (emphasis in original). Yet, in its motion for a directed verdict, Farmers conceded that "[s]everal class members testified about their expectations and understanding of the insurance policy . . ." Pet. App. 32a. Farmers also admitted that all six members who testified understood their PIP benefits and relied upon them. Pet. App. 178a.

It was only during the appellate phase of the litigation that Farmers reworked its claim to say absent members of the class—in other words, every other class member—had to so testify on reliance. *See* Pet. App. 178a (complaining about a supposed lack of evidence common to the class and saying that individualized proof was then necessary). Moreover, Farmers asserts that some members of the class, injured beneficiaries who did not purchase the insurance policy, could not have relied on the promise of PIP coverage, Pet. 2, yet Farmers never challenged the inclusion of those beneficiaries as members of the class before reconsideration in the Oregon Supreme Court, which held that Farmers did not preserve any issue about certification. Pet. App. 37a, n.13. The claim is irrelevant as a collateral attack on certification was never properly made below.

3. Farmers's claims that the "Oregon Supreme Court relieved Plaintiffs of their burden of proving reliance, . . . [by holding reliance] "is 'inherent in the purchase' of such insurance." Pet. 2 (quoting Pet. App. 43a). The characterization of the Court's holding and the quotation is misleading and incomplete. First, the Oregon Supreme Court never denied that reliance needed to be proven to establish fraud. It did, however, hold that reliance could be proven though classwide evidence, Pet. App. 44a, a holding the dissent supported, Pet. App. 57a n.1. Moreover, the complete quotation cited by Farmers reads: "an insured's reliance on the PIP coverage that the policy provides is inherent in the purchase of the insurance, *or at least, a factfinder is entitled to infer as much." Id.* at 43a (emphasis added). Mandatory PIP coverage presented some evidence,

along with all the other evidence, upon which the jury could conclude that reliance was proven, thus upholding the trial court's denial of Farmers's directed-verdict motion. *Id*. at 44a-45a. Farmers never explained how evidence of reliance would differ among class members. *Id*. at 91a.

4. Farmers characterizes the trial court's decision to certify a class as being over "Farmers' objections that individualized issues would preclude class treatment." Pet. 5. Yet, those objections to certification, not assigned as an error on appeal, went not to individualized proof of reliance, but to whether every medical bill cut under the 80 percent program was reasonable. Pet. App. 22a-23a. At trial, Farmers asserted that it was the Plaintiffs' burden to prove the reasonableness of each individual bill, but the applicable Oregon statute established a presumption that each bill was reasonable and necessary. Or. Rev. Stat. § 742.524(1)(a). Farmers could have rebutted the presumption, *see* Pet. App. 28a, but chose instead to rely on its cost containment program alone as proof that it paid all reasonable medical expenses. The jury found otherwise.

5. Farmers claims it was "prevented from defending itself by presenting individualized evidence about reliance or injury to rebut Plaintiffs' class claims." Pet. 6. Farmers had a full opportunity to present *any* evidence it could muster on reliance, *see* Pet. App. 5a, but did not do so because its claim that reliance had to be proven individually did not materialize until the appellate process, and it rested its reliance defense at trial and initial appeal on whether the classwide proof was sufficient. *Id*. at 29a.

6. Farmers mischaracterizes the holding of the Oregon Supreme Court in this case in several important respects. First, that court did not "acknowledge[]" that prior caselaw "rejected the notion that classwide reliance could be shown based on common representations." Pet. 10. Instead, it said that prior caselaw plainly stated, as quoted by the court, that "[w]e do not hold that . . . the issue of reliance always requires individual determination." Pet. App. 36a (quoting *Newman v. Tualatin Dev. Co. Inc.*, 597 P.2d 800, 804 (Or. 1979). The *Newman* Court acknowledged classwide reliance could be demonstrated by common representations, but found classwide proof inapplicable on that case's "particular facts." Pet. App. 36a, 5a. Even the dissent agreed that the underlying caselaw permitted classwide proof of reliance. Pet. App. 57a. Thus, no member of the Oregon Supreme Court supported Farmers's construction of the law of reliance, let alone acknowledged its correctness, and no new Oregon law was made by this ruling.

Second, the Court did not establish an "irrebuttable presumption of reliance," as Farmers contends. Pet. 10. Farmers made such a claim on reconsideration, and the court flatly rejected it, stating that the court "held only that, from the evidence that plaintiffs presented, the jury *was permitted to infer* reliance on the part of individual class members." Pet. App. 4a (emphasis in original). In fact, the court rejected the characterization that its ruling invoked "a presumption at all, let alone one that Farmers was not entitled to rebut." Pet. App. 5a; *see also id*. at 43a-44a n.18.

In addition, Farmers gives the impression that the dissenting justice accused the majority of

devising "ever-changing procedural and substantive rules involving punitive damages." Pet. 11 (quoting Pet. App. 58a (Balmer, J., dissenting)). Yet, the dissent is plainly referring to changes the Oregon Legislature adopted in response to this Court's decisions (*e.g., Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *Williams II, supra*.) as well as to the parties' own tactical decisions. *Id.* (Balmer, J., dissenting) (stating that some of these "traps for the unwary" "may have been set by Farmers itself, either inadvertently or for reasons of trial strategy.").

Farmers also relates an exchange of emails between "Plaintiffs' counsel" and a justice of the Oregon Supreme Court the day before the decision was handed down. Pet. 12-13. Farmers fails to reveal that the so-called "Plaintiffs' counsel," a former law clerk to the justice, was also a former counsel in the case, Pet. App. 8a (and a former associate at that), that the exchange of emails occurred after the Court had announced it would issue the decision the following morning and was thus already complete, *id.*, and that the Oregon justice involved recused herself from that court's reconsideration. *Id.* at 2a n.**. The Petition presents no question related to the incident.

7. Farmers premises much of its second question presented on the fact that the trial judge signed a two-page order on the last day he could without elaborating *in writing* at that time on his reasons for denying Farmers's motions for remittitur or a new trial. The more elaborate findings of fact and conclusions of law followed nine days later. The Petition's charge that Oregon adopted a novel procedure to deny review of the punitive damages award is based on the "lateness" of the written

findings and a claim that Farmers's new trial motion was deemed denied by the failure to find waiver in a written order by the 55th day after the motion was made. Yet, as the record makes plain, Farmers understood that the trial judge found that Farmers had waived its right to challenge the punitive damages, the waiver ruling was dispositive, and the alternative excessiveness issue was reached in the event an appellate court reversed the waiver decision. Pet. App. 213a. Moreover, Farmers agreed to the procedure that allowed the trial judge to sign his abbreviated order on time with more detailed explanatory findings to follow, and Farmers's trial counsel assured the judge that he would inform appellate counsel that no error lay in this approach. Pet. App. 224a.

REASONS FOR DENYING THE PETITION

I. FARMERS NEVER ASSERTED AT TRIAL THAT INDIVIDUALIZED PROOF WAS NECESSARY AND WAIVED THE ISSUE.

Ordinarily, this "Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Similarly, a "principle that strikes very deep is that a new trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2d* § 2805, at 57-58 (2d ed. 1995).

In the federal system, Federal Rule of Civil Procedure 51 stands as a bulwark against such misuse of the system. The same uncompromising

approach is found in Oregon Rule of Appellate Procedure 5.45(1) ("No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court and is assigned as error in the opening brief in accordance with this rule.").

Here, Farmers never argued at trial that individualized proof of reliance was required. Instead, it accepted the propriety of classwide proof, and its reliance argument consisted of a single paragraph, arguing "there is no evidence common to the class which establishes that the absent class members relied upon any material representation or omission." Pet. App. 178a. The trial court rejected that assertion and the directed-verdict motion. *Id*. at 89a. The trial court never had the opportunity to consider Farmers's new argument that individualized proof of reliance was needed. Though Oregon law fully refutes that contention, it should not serve as a basis for insisting on a new trial even if it were correct.

Permitting a party after trial to "discover" new arguments undermines the orderly administration of justice, as well as fundamental precepts of fairness. A court properly looks askance at such a request to prevent parties from withholding objections at trial to preserve a ground for appeal. This Court should not countenance a petition premised on a claim concerning necessary proof never advanced at trial.

II. STATE COURTS ARE NOT ALTERING SUBSTANTIVE LAW TO ADJUDICATE INDIVIDUAL CLAIMS AS CLASS ACTIONS.

A. Oregon Law Has Not Required Individualized Proof of Reliance in Consumer Fraud Cases.

Farmers claims that this Court's involvement is needed to stop state courts from adjudicating inherently individual claims as class actions. It accuses the Oregon Supreme Court of perpetrating "one of the most egregious examples to date," when it allegedly "eliminated the longstanding requirement of individual reliance for plaintiffs claiming fraud." Pet. 14.

To make that argument, Farmers relies entirely on a single Oregon case, *Newman*, and misreads it.[1] By its own terms, *Newman* cannot support Farmers's argument, and no Oregon court has interpreted it as Farmers does.

Newman involved a challenge to the class certification of a warranty and negligence dispute. One question decided was what proof was needed to

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[1] Farmers's only other cited Oregon cases do not stand for the proposition that "Plaintiffs' fraud claims required individualized proof of reliance under Oregon law." Pet. 21, citing *Gardener v. Meiling*, 572 P.2d 1012 (Or. 1977), and *Kubeck v. Consol. Underwriters*, 517 P.2d 1039 (Or. 1974). Both cases were brought by individual plaintiffs and merely discussed reliance generally as an element of a fraud claim. There is no discussion of classwide proof versus individualized proof at all.

demonstrate reliance. 597 P.2d at 803. Based on the circumstances, the court held that "in the present case . . . individual determinations of reliance would be required." *Id*.

The court found that a warranty contained in a sales brochure given all purchasers "would not establish that every member of the class read, was aware of, and relied upon each of the representations in the brochure." *Id*. at 804. The representations concerning water pipes were "a relatively minor component" of the warranty. *Id*. Yet, even though classwide proof of reliance was rejected on those facts, the court stated:

> We do not hold that an express warranty is never an appropriate subject for a class action adjudication or that the issue of reliance always requires individual determination.

Id.

Farmers utterly ignores this statement to argue that Oregon has suddenly changed its law to permit classwide proof. The Oregon Supreme Court chided Farmers for maintaining that indefensible position in light of that quotation, Pet. App. 5a ("Neither did this court, in so holding, 'unexpectedly and radically' alter state law, despite Farmers's assertion to the contrary"), one that Farmers continues to propagate here.

The dissent also agreed with the majority, not Farmers, that Oregon law holds that, "in an appropriate class action case, classwide reliance may be inferred from evidence common to the class." Pet.

App. 57a (Balmer, J., dissenting). The dissent's dispute with the majority was merely "whether the evidence was sufficient here." *Id.* (Balmer, J., dissenting).

Thus, no Oregon justice agreed with Farmers's contention here that reliance could not be proven on the basis of classwide evidence. The accusation that Oregon changed the law to accommodate a class action cannot be maintained.

B. Plaintiffs In Fact Proved Reliance.

As the majority, appeals panel, and trial court found, the evidence was sufficient to survive a directed-verdict motion and be submitted to a jury, which, in fact, found reliance proven. The jury heard testimony from six class members, who, Farmers conceded, understood and relied on their PIP benefits. Pet. App. 178a.

In addition, the jury heard from a former state insurance commissioner about the core importance of PIP benefits as a mandatory feature of every automobile insurance policy. That testimony established that the statutorily mandated policy language involves no bargaining between insurer and policyholder and guarantees every PIP beneficiary identical benefits. The pervasive claimant-oriented statutory scheme, its mandatory nature, the lack of choice in purchasing PIP coverage, the specific allocation of a portion of each premium for required PIP coverage, and the dual promise to pay PIP benefits found in both the statute and the insurance contract led the Oregon Supreme Court to observe that "an insured's reliance on the PIP coverage that the policy provides is inherent in

the purchase of the insurance, or at least, a factfinder is entitled to infer as much." Pet. App. 43a (footnote omitted).

Still, even the testimony outlined above and the statutory scheme extensively recounted by the court, was not the end of the evidence in support of reliance. The promise to pay "was in a written and binding contract of insurance,"[2] Pet. App. 41a, was part of the form each claimant submitted to obtain PIP benefits, and was recited in the letter sent by Farmers confirming receipt of the claim. Knowledge of the promise was further demonstrated by the fact "[a]ll class members, after being involved in an accident, made a claim for the contractually promised PIP benefits." Pet. App. 34a. Farmers offered no evidence to rebut this evidence of reliance, and Farmers never explained how "evidence of reliance would differ from class member to class member." *Id*. at 91a.

C. Oregon Law Permitting Classwide Proof of Reliance Is Not *Sui Generis* and Is Consistent with Due Process.

The principle Farmers champions—that "parties' rights are not altered as a result of class treatment," Pet. 3, is not inconsistent with permitting classwide proof of reliance in appropriate cases, as Oregon does. Refusing to acknowledge or credit that type of contextual evaluation, Farmers offers no conflicting caselaw, but reiteration of the general principle stated above. As the Oregon Court

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[2] A party to a written contract is presumed to know its contents. *Pokorny v. Williams*, 260 P.2d 490, 498 (Or. 1953).

of Appeals observed and remains true of the Petition, "[w]e are not aware of, nor has Farmers cited, any case law that requires *direct* evidence of reliance in support of a fraud claim." Pet. App. 90a (emphasis in original). In fact, Oregon has long permitted circumstantial evidence to prove fraud. *Conzelman v. Nw. Poultry & Dairy Prods. Co.*, 225 P.2d 757, 765 (Or. 1950).

Texas is exemplary of states that adhere to Farmers's preferred principle, yet still approach class reliance as Oregon does. The Texas rules of civil procedure state that procedural devices shall "not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action." Tex. R. Civ. P. 815. The Texas Supreme Court also has held that a class action "'is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.'" *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002) (quoting *Sw. Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). Thus, Texas law is utterly consonant with what Farmers asks this Court to declare. Even so, *Stromboe* holds,

> This does not mean, of course, that reliance or other elements of their causes of action cannot be proved class-wide with evidence generally applicable to all class members; class-wide proof is possible when class-wide evidence exists.

Id. As *Stromboe* makes plain, the idea that class actions should not reduce substantive proof requirements is a separate issue from whether

classwide reliance is provable without individualized examination.

Other states similarly permit classwide proof of reliance. For example, in *Vasquez v. Superior Court*, 484 P.2d 964, 972 (Cal. 1971), the California Supreme Court recognized that the "rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence." Instead, reliance "may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." *Id*. (internal quotation marks omitted). *See also Weinberg v Hertz Corp.*, 499 N.Y.S.2d 693, 696 (N.Y. App. Div. 1986); *Miner v. Gillette Co.*, 428 N.E.2d 478 (Ill. 1981); *Riley v. New Rapids Carpet Ctr.*, 294 A.2d 7, 12 (N.J. 1972).

Farmers's cases do not establish a contrary principle, but merely distinguish cases in which factual allegations of fraud require individualized proof of reliance and those that are susceptible to classwide proof. To qualify for classwide proof in Oregon, the same misrepresentation without material variation must be made to all class members, who share the same understanding of the misrepresentation, and rely to the same degree and in the same way. Pet. App. 40a. There is no warrant for this Court to examine whether those standards were indeed met by the underlying trial record in this or any other case.

Because *individualized* proof of reliance is not a necessary element of a fraud claim, Farmers really

is asking this Court to establish a due-process categorical bar to class actions where fraud is alleged. Under Farmers's version of the Due Process Clause, every class action requires every absent class member to testify about reliance on a common representation. Because class actions involve parties too numerous to join, the approach is impracticable and would effectively prohibit consumer fraud class actions.

Nor is there support for creating a single class-action rule for every state. Indeed, this Court has repeatedly rejected the claim that Federal Rule of Civil Procedure 23 is the only method compatible with due process to prosecute a class action or that due process should "compel the [States'] adoption of the particular rules thought by this court to be appropriate for the federal courts." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

Just last term, in *Smith v. Bayer Corp.*, --- U.S. ---, 131 S. Ct. 2368 (2011), this Court recognized that even identically worded state rules do not require a lockstep approach with the federal rule. *Id.* at 2377-78. States remain "free to develop their own rules for protecting against . . . the piecemeal resolution of disputes," and only overstep this authority when they adopt "extreme applications" "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996). Farmers has neither attempted nor made any showing that proof of classwide reliance is an extreme application that implicates a fundamental right.

Moreover, the approach taken by the Oregon Supreme Court is similar to that taken in federal

court. The advisory committee on the civil rules specifically considered the applicability of Rule 23 to claims of misrepresentation and endorsed class actions for "a fraud perpetrated on numerous persons by the use of similar misrepresentations" as "appealing." Fed. R. Civ. P. 23(b)(3), Advisory Comm. Note (1966).

Thus, *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 338 (N.D. Ill. 1997), found that "[w]hen the fraud was perpetrated in a uniform manner against every member of the class, such as when all plaintiffs received virtually identical written materials from the defendants, courts typically hold that individual reliance questions do not predominate."

Applying that same principle, the Eleventh Circuit, in a case with strikingly similar allegations to those here, upheld classwide proof on allegations that a health insurer underpaid a class of physicians for medically necessary services using automated statistical and other criteria. *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 541 U.S. 1081 (2005). Though the court said "each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue.)." *Id.* at 1259 (parenthetical in original). Like the Oregon court, the Eleventh Circuit held that a "jury could quite reasonably infer" that the guarantee to pay medically necessary expenses was an essential element of the agreement, relied upon by those who made claims. *Id.*

The federal cases cited by Farmers do not hold differently. For example, Farmers cites *Sikes v.*

Teleline, Inc., 281 F.3d 1350 (11th Cir. 2002), *abrogated by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), and preceding *Klay*. *Sikes*, however, does not discuss individualized reliance, but instead states a general principle that presumptions cannot constitute a shortcut to deciding certain issues. *Id*. at 1366. The presumption at issue in *Sikes*, which required individualized proof, was the fact of injury, not reliance. Caselaw on presumptions are immaterial, however, because the Oregon courts did not apply a presumption to find reliance. Pet. App. 4a-5a; 43a-44a n.18.

Farmers also claims support from *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *abrogated by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). Pet. 23. *McLaughlin* held, contrary to *Bridge*, that reliance was an element of a civil RICO claim. *Id*. at 222. Even so, it did not adopt the categorical stance that Farmers ascribes to it. Instead, it found that in the context of a case alleging that tobacco companies fraudulently induced class members to smoke "light" cigarettes having marketed them as healthier than full-flavored cigarettes, it was not clear that all class members had chosen to smoke lights for that reason. Instead, the court found individualized proof necessary "to overcome the possibility that a member of the purported class purchased Lights for some [other] reason," such as taste. *Id*. at 223. In contrast, PIP coverage is purchased for a single reason.

While the court did say that "reliance on the misrepresentation, cannot be the subject of general proof," it also explained that holding was based on the facts of that case. *Id*. at 223, 224. In so doing, the court recognized that classwide proof of reliance

poses no problem in some cases. *Id.* at 224-25 (refusing to "go so far as to adopt [a] blanket rule that 'a fraud class action cannot be certified when individual reliance will be an issue,' as some fraud actions do appear within the contemplation of Rule 23's drafters.") (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996), and citing Fed. R. Civ. P. 23(b)(3) Advisory Comm. Notes.). In *McLaughlin*, reliance was "too individualized to admit of common proof." *Id.* at 225. Otherwise, such proof would have been acceptable.

Similarly, reliance on *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665-68 (9th Cir. 2004), is misplaced. In *Poulos*, the court found, "[*i*]*n this case,* individualized reliance issues related to plaintiffs' knowledge, motivations, and expectations bear heavily on the causation analysis." *Id.* at 665 (emphasis added). It did not find proof of classwide reliance sufficient "[d]ue to the unique nature of gambling transactions and the allegations underlying the class claims." *Id.*

Even *Castano*, cited as being categorical by *McLaughlin* and Farmers, Pet. 24, does not adopt a blanket rule. It states "a fraud class action cannot be certified *when individual reliance will be an issue*," 84 F.3d at 745 (emphasis added), at best a circular declaration. Still, *Castano* makes clear that the "problem with the district court's approach is that after the class trial, it might have decided that reliance must be proven in individual trials." *Id.* Obviously, if the district court did not find individual reliance trials necessary, then the Fifth Circuit's concerns about decertification, the waste of judicial resources, or continuation of a class action without the predominance requirement being met would not

exist. *See id*. Thus, none of Farmers's federal citations adopt its approach.

Farmers's asserted conflict between state and federal courts in its treatment of reliance simply does not exist and provides no basis for the exercise of this Court's discretion. No court has found that there is a categorical prohibition on classwide proof of reliance in support of a fraud claim, and due process does not require state courts to alter their law to make that so.

III. OREGON EMPLOYED NO NOVEL PROCEDURAL BAR TO DENY FARMERS'S APPEAL OF PUNITIVE DAMAGES.

Farmers attempts to revive its excessiveness challenge to punitive damages in this case by characterizing the decision below as imposing a novel procedural hurdle invented to deny Farmers's federal constitutional rights. The Oregon Supreme Court did no such thing; it held that Farmers failed to appeal one of two alternate grounds upon which the trial court denied its request for remittitur of the punitive damages found by the jury. Pet. App. 7a; 55a-56a.

The decision not to reach the punitive-damage appeal reflected established Oregon law that a party appealing a ruling "generally must take issue with all independent and alternative grounds on which it is based to obtain relief." Pet. App. 50a. Otherwise, the alternative ground, upon which review was not sought, remains unimpaired and relief cannot be afforded. *See, e.g., State ex rel. Juvenile Dep't of Multnomah Cnty. v. Charles*, 701 P.2d 1052, 1053 (Or. 1985) (en banc). This principle is a longstanding

feature of Oregon law. *See, e.g., Roop v. Parker Nw. Paving, Co.*, 94 P.3d 885, 895 (Or. Ct. App. 2004); *cf. Kelly v. Tracy*, 305 P.2d 411, 415-16 (Or. 1956).

It is also the law in most jurisdictions. *See, e.g., Britton v. Tex. Dep't of Criminal Justice*, 95 S.W.3d 676, 681 (Tex. App. 2002) ("an appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment.").

Farmers failed to appeal the trial court's ruling that it had waived its challenge to the punitive damages awarded. Pet. App. 7a; 56a. Farmers never denied that the trial court found waiver. Pet. App. 51a. Farmers attempts to excuse its failure by arguing that giving credit to the trial court's oral or later written reasons violated Oregon Rule of Civil Procedure 64F, which holds that when a trial court has not "heard and determined" a motion for a new trial within 55 days after entry of judgment, the motion is "deemed denied," and the trial court loses jurisdiction to enter any order on the motion. Pet. 28-29. Farmers charges that the Oregon Supreme Court "refused" to consider excessiveness on the basis of the untimely explanation issued by the trial court. Yet, the Oregon court ruled that the earlier, timely order denying Farmers's motion, signed in open court on the 55th day, was effective immediately, in accordance with longstanding Oregon practice, a holding from which there was no dissent. Pet. App. 52a, 57a n.1. As a result, Farmers's complaints about the court's failure to explain why the mandatory 55-day limit and its jurisdictional nature could be obviated are beside the point. The trial court met its mandatory obligation and, as a result, thus maintained jurisdiction to issue a later written explanation.

Farmers also argues that the court should not have considered the trial judge's oral or later written explanations—and that this was the minting of a new procedural rule. Pet. 30. Factually and legally, Farmers's argument is without merit.

The trial judge fully complied with Rule 64F. He received argument and proposed findings from the parties and convened a hearing on the 55th day. In open court, with a court reporter present, the judge signed an order denying Farmers's motion for remittitur of the punitive damages or a new trial. Pet. App. 222a. He also signed an "order of reporting by stenographic means," thereby making the transcript of the proceedings an official record of hearing and determination. *Id*. at 211a. He further indicated his agreement, with some changes, to the proposed findings of fact and conclusions of law submitted by Strawn and explained his reasoning orally, indicating that he would sign a revised draft of the findings of fact and conclusions of law. *Id*. at 222a. Farmers agreed to that procedure. *Id*. at 224a.

This Court has made clear that "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted). That statement acknowledges that this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on adequate and independent state grounds. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Only in a "limited category" of "exceptional cases," essentially when a court engages in an "exorbitant application of a generally sound rule," is the state bar inadequate. *Lee*, 534 U.S. at 376.

Here, it is not the Oregon court that has propagated an "exorbitant application" of a rule of civil procedure, but it is Farmers that has concocted a bizarre application of state procedure. Farmers's argument that signing an order without contemporaneous written rationale on the 55th day is insufficient and allows it to choose the grounds upon which it may appeal is farfetched and erroneous for three fundamental reasons.

First, the trial court only loses jurisdiction to enter an order on the motion if the motion is not "heard and determined" within 55 days. Or. R. Civ. P. 64F; *McCollum v. Kmart Corp.*, 226 P.3d 703, 708 (Or. 2010). Neither the rule nor caselaw requires a contemporaneous written rationale, a requirement Farmers seeks to add unilaterally to Oregon law. Second, Farmers agreed to the procedure followed in the trial court, so that, if Rule 64F does not permit the procedure, Farmers invited the error. Third, even if Farmers's motions were "deemed denied," Farmers is still obligated to appeal the denial on all grounds asserted by the prevailing party.

A. Rule 64F Was Satisfied by the Trial Court.

Here, the order denying Farmers's motions for remittitur or new trial was timely signed in open court. Pet. App. 222a. That action was sufficient to maintain the trial court's jurisdiction to issue more detailed findings later, a process Farmers's counsel found agreeable. *Id.* at 224a.

Oregon statutory law indicates that orders that are not signed in open court are effective upon entry in the register by the clerk, Or. Rev. Stat. §

3.070; *Ryerse v. Haddock*, 95 P.3d 1120, 1123 (Or. 2004). Conversely, as *Ryerse* demonstrates, a determination of the effective date of an order is necessary only when the order is signed "other than in open court." *Id.*

None of this casts doubt on longstanding Oregon practice that only when "a trial court fails to 'hear and determine[ ]' the motion within the 55-day period, any subsequent order granting the motion is 'null and void.'" *McCollum*, 226 P.3d at 705 (en banc) (quoting *Nendel v. Meyers*, 94 P.2d 680, 681 (Or. 1939)). The requirement was enacted to end the "the practice that once prevailed among some judges to keep motions for new trial under advisement for an unreasonable length of time." *Nendel*, 94 P.2d at 681. Under established rules, a mere oral denial is ineffective to meet the 55-day requirement, though a written order signed in open court is effective. *Barone v. Barone*, 294 P.2d 609, 611 (Or. 1956) (en banc). Here, the written order denying the motions was signed in open court and, before now, no one had challenged that as insufficient. Only Farmers contends this straightforward application of Rule 64F is "novel." See Pet. 13, quoting Oregon Supreme Court that Farmers's theory had not "been raised or resolved before." Pet. App. 6a-7a. Yet, the fact that Oregon lawyers have not raised the issue before because it was an ingrained part of practice does not make the procedural rule or this ruling novel or improper in any way. Unlike *Ford v. Georgia*, 498 U.S. 411 (1991), *cited in* Pet. 28, 31, where Georgia refused to take up an issue of improperly excusing jurors on the basis of race because it was formulated without sufficient clarity and this Court found it

sufficient, Farmers utterly failed to appeal the waiver ruling in any form.

Moreover, as pointed out on reconsideration, "the trial court's written explanation for the timely denial of Farmers's motion for a new trial did not bar Farmers's challenge to the amount of the punitive damages award." *Id.* at 7a. It was entered prior to Farmers's notice of appeal and merely reiterated what the judge declared in open court. Farmers was obligated to appeal both grounds. Its failure presents no issue worthy of this Court's attention.

B. If There Was Procedural Error, It Was Invited Error.

Oregon has long followed the invited-error doctrine. *See Anderson v. Oregon R.R. Co.*, 77 P. 119, 121 (Or. 1904). Under that doctrine, "a party who was actively instrumental in bringing about an alleged error cannot be heard to complain." *State v. Kammeyer*, 203 P.3d 274, 276 (Or. Ct. App.), *rev. denied*, 214 P.3d 822 (Or. 2009) (citation and internal quotation marks omitted). The doctrine applies "under circumstances that suggest that the party will be bound by the ruling or will not later seek a reversal on the basis of that ruling." *Id.* (citation omitted).

Here, Farmers agreed to the procedure by which the trial judge orally explained his reasons for denying their motions, signed a barebones order, and stated that he would issue findings of fact and conclusions of law later. In open court, the judge stated that he found Farmers had waived their objection to the size of the punitive damages, and "I intend to sign findings of fact and conclusions of law

and they take up waiver." Pet. App. 213a. Although the judge held that the "finding of waiver is actually dispositive," he also ruled against Farmers on independent, alternative grounds that the damages were not excessive in case "waiver is not found by an appellate court to be dispositive." *Id*.

At the end of a lengthy discussion of his reasoning, Plaintiff's counsel, Richard Yugler, reiterated his suggestion that an order be signed granting or denying Farmers motions and that findings of fact and conclusions of law could be issued "after the 55-day time period without doing any harm." Pet. App. 220a. When asked his reaction to that proposal, Farmers's counsel stated, "I think the procedure Mr. Yugler has suggested is the best course, that you ought to get your order, get the order signed and entered today." Pet. App. 221a. He added, "With respect to . . . documenting your findings of fact and conclusions of law thereafter, . . . we don't really have a position. That's up to Your Honor." *Id*. at 222a.

The judge told counsel: "At this time I'm signing the order denying Defendants' motions which I've already identified," and signed the document. *Id*. He then asked Strawn's counsel to prepare "new findings of fact and conclusions of law incorporating in a summary fashion what I've added orally today." *Id*. The judge then asked Farmers's counsel, "as I understand it, that procedure is satisfactory with you"? *Id*. at 224a. Farmers's counsel then responded, "It is, Your Honor." *Id*. Farmers's counsel further pledged, *"I will coordinate with appellate counsel and let him know that we've agreed to this procedure." Id*. (emphasis added).

In an abundance of caution, the trial judge then said that if the notice of appeal is filed tomorrow, which traditionally removes the trial court's jurisdiction, "I don't know if I could even, you know, finalize these findings of fact [because I might lose jurisdiction over the case.]" *Id*. at 224a-25a. Farmers's counsel then reassured him: "Well, by agreeing to this procedure I've agreed not to do that." *Id*. at 225a. Notice of appeal was filed after the written findings were issued.

Unlike *Ford*, where defense counsel repeatedly opposed the process suggested by the prosecutor, defense counsel here approved of it. Having participated in and agreed to the process described above, Farmers cannot now complain that a novel procedure deprived them of an opportunity to appeal both grounds upon which its motions were denied. Thus, Farmers complaint of being blindsided by a novel procedural bar simply does not lie.

C. Even If Its Motions Were "Deemed Denied," Farmers Was Still Obligated to Assign Error to Both Grounds Advanced By the Successful Party.

Strawn opposed Farmers's motions for remittitur of the punitive damages or a new trial on two grounds. First, Strawn asserted a procedural default by which Farmers waived the issue. Second, Strawn defended the size of the award under this Court's punitive-damages guidelines. Even if Farmers's motions were deemed denied by Rule 64F, rather than court order, Farmers had no authority to choose among the grounds upon which its motion was opposed. If a party was granted such broad and

unusual authority, Farmers could have equally chosen to appeal the waiver alone and ignore its substantive due-process argument.

It is black-letter law that a trial court's order that does not specify the ground upon which it ruled, must be challenged on all grounds asserted by the successful party. Thus, where the trial court's reasoning is unclear or unarticulated, and more than one ground was argued by the prevailing party, an appellate court must affirm "if either is sufficient." *Kinyon v. Cardon*, 686 P.2d 1048, 1050-51 (Or. Ct. App.), *rev. denied*, 693 P.2d 48 (Or. 1984).

That unassailable proposition that the losing party must assign error to all arguments made against its motion makes good sense because certainly all grounds asserted by the successful party are preserved to protect the decision below, as are grounds supporting the decision not asserted by a party. *Bevan v. Garrett*, 586 P.2d 1119, 1123 (Or. 1978).

Here, whether the order was effective, Farmers was under an obligation to appeal both grounds. It did not, and that is dispositive. While Farmers's attempt to cast the ruling below as imposing a novel procedural bar to the assertion of federal constitutional claims lacks merit, Farmers's inexplicable decision to appeal only one of two alternative and independent grounds for the ruling is fatal. No certworthy issue is advanced under these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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