Case No. 17-4125

United States Court Of Appeals
FOR THE SIXTH CIRCUIT

WALID JAMMAL, ET AL.,

Plaintiffs-Appellees

v.

AMERICAN FAMILY INSURANCE COMPANY, ET AL.,

Defendants-Appellants

On Appeal from the United States District Court for the Northern District of Ohio, No. 1:13-cv-00437-DCN

REPLY BRIEF OF DEFENDANTS-APPELLANTS, AMERICAN FAMILY INSURANCE COMPANY, ET AL.

Gregory V. Mersol
Gilbert Brosky
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114-1214
Telephone: (216) 621-0200
Fax: (216) 696-0740
gmersol@bakerlaw.com

Pierre H. Bergeron
Lauren S. Kuley
Scott W. Coyle
Colter Paulson
SQUIRE PATTON BOGGS (US) LLP
221 E. Fourth Street
Suite 2900
Cincinnati, Ohio 45202
Telephone: (513) 361-1200
Fax: (513) 361-1201
pierre.bergeron@squirepb.com

Attorneys for Appellants

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INTRODUCTION

This case presents the legal question of whether the district court misinterpreted and misapplied the test set forth in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). *Every* single insurance case cited by Plaintiffs or American Family applying *Darden* held that insurance agents are properly classified as independent contractors. Fundamentally reshaping the *Darden* test, the district court broke ranks with this authority and reached the opposite result.

In its prior insurance cases, this Court emphasized the same *Darden* factors that support independent contractor classification in this case: professionally-licensed agents selling regulated insurance products on commission, pursuant to independent contractor agreements that make them responsible for their own benefits, self-employment taxes, offices, equipment, and staff. Plaintiffs concede, as they must, that the five "structural" *Darden* factors, as well as the contract factor, support independent contractor status. And as this Court has previously acknowledged, those same factors assume added significance in the ERISA context, where courts consider whether the company intended to undertake responsibility for pension benefits. Plaintiffs in this case seek the very ERISA benefits that they contractually agreed to forego in exchange for commission payments. The structural factors, coupled with *Darden*'s predictability mandate, tip the scales in favor of independent contractor classification.

Plaintiffs try to marginalize these factors by summoning the "right to control" as some sort of transcendent consideration. But most of what Plaintiffs present as "control" in their brief involves setting sales goals, measuring performance, and driving agent production. This Court, like many others, has squarely held that such "control" over goals and objectives is "not the type of control that establishes an employer/employee relationship." *Weary v. Cochran*, 377 F.3d 522, 526 (6th Cir. 2004). This Court instead uses "right to control" as a shorthand for the entire *Darden* test—which is not the kind of "control" Plaintiffs envision.

Plaintiffs also insist that this case is factually unique because there was "no evidence" in prior insurance cases that the company retained any "right to control" its agents. *See* Pl. Br. 37. But the very cases upon which they rely refute this charge. This Court has not hesitated to find independent contractor status in cases involving more "control" than that identified by the court below, including cases imposing "highly detailed and specific" company rules governing the agent's "daily operations," lifetime non-solicitation provisions, and corporate approval of the layout and location of agents' offices. American Family's relationship with its agents is not aberrational, nor is it materially different from those previously addressed by this Court.

Aside from the "control" issue, Plaintiffs largely avoid discussing the legal issues raised by American Family on the other factors, and altogether fail to defend

the district court's analysis of the "when and how long to work" factor. Their avoidance of the legal debate further undermines the court's precarious "employee" determination, which hinged on its foundational acknowledgement that the *Darden* factors were "almost evenly split." R.320, Opinion, PageID20981.

Finally, Plaintiffs dispute the notion that the district court invoked "representative" evidence, even though the court relied extensively on (often disputed) testimonial evidence from individual agents. The Supreme Court and this Court have explained that, in the class context, such evidence must be fairly representative of the class as a whole (confirmed by, for example, statistical analysis) to establish class-wide liability. The district court here made no such findings, nor could it on this record.

This Court should reverse.

ARGUMENT

I. American Family's Challenges To The District Court's Legal Conclusions Are Subject To *De Novo* Review.

Lost in the haze of Plaintiffs' discussion about factual findings is their concession on standard of review: they admit that the district court's conclusions on the *Darden* classification issue are subject to *de novo* review. *See* Pl. Br. 30-31 (acknowledging that the district court's "ultimate conclusion [on employee-independent contractor issue] is a question of law" and this Court "reviews *de novo* whether the district court applied the correct legal standard").

That concession renders large portions of Plaintiffs' brief irrelevant, as they fundamentally mischaracterize American Family's arguments as challenges to the district court's factual findings. *See* Pl. Br. 3, 30-32 (claiming that American Family "disputes the findings of fact" and seeks to "relitigate factual issues"). For purposes of this appeal, American Family accepts the district court's factual findings, but challenges the legal standards applied to those findings and the court's ultimate "employee" conclusion under *Darden*. As the cases featured by Plaintiffs confirm, such issues present questions of law subject to *de novo* review. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 521-22 (6th Cir. 2011); *Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989); *see also* Pl. Br. 30-32.

Plaintiffs' depiction of American Family's challenge to the district court's "control" analysis illustrates their portrayal of legal questions as "factual disputes." *See* Pl. Br. 31-32. In its opening brief, American Family explained that the district court misconstrued the "control" factor by conflating control over the "manner and means" of selling insurance with control over the agents' performance "goals and objectives." *See* Def. Br. 31. Rather than defend the district court's legal analysis, Plaintiffs respond by asserting that the court found—as a matter of "fact"—that American Family controlled the manner and means of production. Pl. Br. 42-43. But to make this point, Plaintiffs cite the district court's ultimate conclusion on the "control" factor, which simply begs the question. American Family's challenge to

the district court's interpretation of the "control" factor warrants *de novo* review, as it requires this Court to consider whether the trial court "properly applied" the "correct legal standard." *Solis*, 642 F.3d at 521.

Moreover, despite their insistence that the district court's "factual" findings must be treated as sacrosanct on appeal, Plaintiffs take liberties with those findings in their brief. Plaintiffs claim, for example, the district court found that the "facts favoring employee status *far outweighed* those facts favoring independent contractor status." Pl. Br. 6 (emphasis added). To the contrary, the court recognized, "[t]he *Darden* factors are almost evenly split." R.320, Opinion, PageID20981. Similarly, in an attempt to rebut a point from American Family's brief, Plaintiffs claim that there were "no findings of fact" that "American Family limited its control to struggling agents." Pl. Br. 43. The district court expressly found, however, that "control was not exercised" over agents who successfully employed American Family's standards and techniques. R.320, Opinion, PageID20982.

Plaintiffs' myopic focus on the factual record betrays their inability to defend the district court's legal analysis, as deference to any factual findings cannot paper over the flaws in the court's legal analysis.

II. The Core Structural Factors Of The Relationship Demonstrate That American Family Correctly Classified Its Agents As Independent Contractors.

A. Plaintiffs Concede That Many Of The *Darden* Factors Support Independent Contractor Classification.

All of the factors that address the structure of the parties' relationship, including their financial relationship, favor independent contractor status. This should make classification straightforward because *Darden*'s purpose is to allow for "categorical judgments about the 'employee' status of claimants with similar job descriptions." *Darden*, 503 U.S. at 327. Plaintiffs *admit* that four of the *Darden* factors (method of payment, tax treatment, instrumentalities and tools, and work location) favor independent contractor status for all agents. Pl. Br. 53-54. And they tacitly concede a fifth *Darden* factor (the benefits provided), as they fail to contest the district court's holding on that point. *Id*.

Plaintiffs also concede that the contract between the parties constitutes another *Darden* factor under *Weary*, 377 F.3d at 525-26, and that it points in favor of independent contractor status. Pl. Br. 36, 54 (assuming that the "contractual factors favor American Family"); *see also* Def. Br. 19-21. Plaintiffs attempt to blunt the force of the contract by claiming that it does not reflect "reality." Pl. Br. 2, 4, 13-14, 27, 35-36. But Plaintiffs do not dispute that each of the "contractual factors" plays out exactly as the contract ordains: agents are paid by commission, classified as independent contractors for tax purposes, do not receive benefits, and are

responsible for their own office locations and equipment. The contract therefore mirrors the structure of the parties' relationship in "reality" as well.

Plaintiffs' concessions alone account for a majority of the *Darden* factors—and include most of the critical factors that define the parties' financial relationship, as described more fully below.

B. This Court And Others Rely Upon The Same Factors That Plaintiffs Concede To Find Independent Contractor Status.

Although *Darden* lists nearly a dozen factors to consider, this Court has long recognized that "[t]he degree of importance of each factor [will vary] depending on the occupation and the factual context in which the services are performed." *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 354 (6th Cir. 2011); *see also Alberty-Velez v. Corp. de P.R.*, 361 F.3d 1, 9 (6th Cir. 2004) (the *Darden* factors "must be considered in light of the work performed and the industry at issue"). *Darden* requires a court to consider "*all* of the incidents of the employment relationship," but "certain factors may deserve added weight in some contexts." *Ware v. United States*, 67 F.3d 574, 578 (6th Cir. 1995); *see also Hi-Tech Video Prods. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1096-97 (6th Cir. 1995) (explaining that not all *Darden* factors "are equally important" in every case). Factors that may be particularly important in one context may be "less helpful . . . *when a different type of work or statute is at issue*." *Marie v. American Red Cross*,

771 F.3d 344, 354 (6th Cir. 2014) (noting the factors relevant to volunteers) (emphasis added).

In the insurance context, this Court and others emphasize the practical reality that the factors American Family calls "structural" (the parties' contract, method of payment, tax treatment, benefits, and responsibility for office location, equipment, and staffing, *see* Def. Br. 26-27) dictate the nature of the relationship between insurance agent and company. Whatever label one uses, courts look to those factors to hold "that insurance agents are independent contractors, rather than employees, in a variety of contexts." *Weary*, 377 F.3d at 524-28 (relying upon the parties' contract, payment by commission, tax treatment, and responsibility for office location and equipment); *see also Ware*, 67 F.3d at 580 (emphasizing that agent was paid by commission, paid most of his own expenses, and was free "to invest accordingly in additional office help, equipment and advertising for his own benefit"); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989) (relying upon facts that agent was paid by commission, owned his own office, paid his own expenses, did not receive benefits, and was classified as self-employed for tax purposes); *Plazzo v. Nationwide Mut. Ins. Co.*, 892 F.2d 79, *7-8 (6th Cir. 1989) (unpublished) (emphasizing that agent was paid on commission, paid his own employment taxes, and owned and equipped his own office); *Nationwide Mut. Ins. Co. v. Mortensen*, 606 F.3d 22, 32 (2d Cir. 2010) (emphasizing that agents paid their own employment

taxes, were responsible for office expenses, and did not receive benefits); *Schwieger v. Farm Bureau Ins. Co.*, 207 F.3d 480, 487 (8th Cir. 1999) (focusing on facts that agent was paid by commission, was responsible for her own taxes, and rented her own office space); *Birchem v. Knights of Columbus*, 116 F.3d 310, 313 (8th Cir. 1997) ("the parties' financial relationship strongly suggests [the agent] was an independent contractor").

The same factors assume prominence in the ERISA context. *See Ware*, 67 F.3d at 578 ("the relative weight given each factor may differ depending upon the legal context of the determination"). As this Court has explained, factors focusing on "control" and "supervision" are "less important in an ERISA context, where a court is determining whether an employer has assumed responsibility for a person's pension status." *Id.* A court "might properly emphasize how an employer treated a party with respect to other pension and fringe benefits" and "disregard" other factors. *Id.* When classifying insurance agents for ERISA purposes, this Court has therefore found it "particularly telling" that an insurance agent "owned and maintained his own office," "was responsible for most of his expenses," "paid his own insurance," "worked for commission," and reported "self-employed income, as well as his business expenses, to the IRS." *Id.* (discussing this Court's decision in *Wolcott*, 884 F.2d at 251).

Context is critical in this case, in which licensed agents sell a highly-regulated product on commission while paying for their own offices, tools, and staff. Those agents are suing under ERISA for welfare, health, and pension benefits *that they contractually agreed not to receive*. R.320, Order, PageID20945, 20952. Yet the district court held, in essence, that American Family has to pay those benefits retrospectively even though Plaintiffs acknowledge that they never intended to be "employees." Def. Br. 21. The only logical approach, and the only way to fulfill *Darden*'s mandate of "furnish[ing] predictable results," 503 U.S. at 326-27, is to follow this Court's approach in other insurance cases: examine the structure of the parties' financial relationship to determine whether the hiring party "assumed responsibility for a person's pension status." *Ware*, 67 F.3d at 578.

C. Plaintiffs Perpetuate The District Court's Misunderstanding Of "Control."

Rather than contesting the district court's conclusions on the structural factors, Plaintiffs attempt to minimize their importance by elevating the "right to control" (as they define it) to some type of transcendent factor. Pl. Br. 35. According to Plaintiffs, this Court's prior insurance cases held that agents constituted independent contractors because "in every case, it concluded that there was *no evidence* that the insurance company retained a right to control the agent's judgment on how to solicit insurance and service customers." *Id.* at 37 (emphasis added). But Plaintiffs' interpretation of "control" is misplaced, for three reasons.

1. Plaintiffs Misconstrue The "Right To Control" Under *Darden*.

First, although Plaintiffs claim that the generic "right to control" is the chief *Darden* factor, the cases upon which they rely repudiate their argument. In *Weary*, for example, this Court explained that the "right to control" refers to the whole *Darden* test, encapsulating "a broad consideration that is embodied in many of the specific factors articulated in *Darden*" and that *all* factors relate to "this core issue of control." 377 F.3d at 525. This Court used the same shorthand in *Trs. of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.*, 395 F.3d 244, 249 (6th Cir. 2005), recognizing that the *Darden* factors are used to "assess the amount of control." The "right to control" is not something that a company can "relinquish" (*see* Pl. Br. 26), but rather is the conclusion after analyzing all the *Darden* factors. *See Speen v. Crown Clothing Corp.*, 102 F.3d 625, 632–34 (1st Cir. 1996) (rejecting treating the "right of control as if it were a predominant factor that is considered before and above others" because it "runs counter to" *Darden*).

This Court's use of the phrase "right to control" in this manner makes sense, as most of the *Darden* factors speak to the parties' respective "rights to control" how the work is accomplished. Payment via commission, for example, grants the agents control over the amount of their paychecks, which depends upon their success in selling and servicing insurance products. *See Weary*, 377 F.3d at 526 (noting payment by commission gave agents control over their "own profit and loss").

Agents who purchase and furnish their own offices exercise "control" over their work environment in a manner that employees seldom enjoy. These and other considerations affect the "manner and means" by which agents sell insurance: they sell from their offices, using their own tools, motivated by their own ability to increase their income by earning additional commissions. This Court's use of the phrase "right to control" reinforces, rather than marginalizes, the significance of these factors.

2. Plaintiffs Continue To Conflate Control Over "Manner And Means" With Control Over "Goals and Objectives."

Second, Plaintiffs perpetuate the district court's error of conflating control over the "manner and means" of selling insurance with control over the goals and objectives established by American Family. While Plaintiffs insist that the district court "rejected" the idea that American Family's control was focused on "goals and objectives," Pl. Br. 3, nearly all of the findings cited by Plaintiffs reflect generic conclusions about "control," not findings about specific activities that were controlled. Pl. Br. 26-27, 31-32, 35.

Indeed, the "control" featured in Plaintiffs' brief largely revolves around achieving sales goals, measuring performance, and driving agent production. *See* Pl. Br. 9-10 (arguing that manuals taught managers how to "achieve and exceed agent, district, state, and corporate *goals*," "to drive agent *production*," and "to increase agent *sales*"); Pl. Br. 16 (managers evaluated on how well they drive agents

to "meet those sales *goals*") (all emphases added). This is exactly the kind of "limited authority" that this Court has held is "not the type of control that establishes an employer/employee relationship," *Weary*, 377 F.3d at 526, as it is "less indicative of heavy-handed control over agents' businesses than of [the company's] willingness to help its agents succeed," *Schwieger*, 207 F.3d at 485. Moreover, American Family's control over goals and standards for its agents is typical (and necessary) of companies operating in the highly-regulated insurance market. Amicus Br., Doc. 29 at 11-12.

Nor do Plaintiffs' handful of other instances of "control" bolster their argument. For example, though Plaintiffs emphasize a "coaching continuum" chart from a training manual, Pl. Br. 10 (citing PageID24667), the district court did not mention "coaching" or cite that chart anywhere in its opinion. And the control suggested by the manual (used generally when "moving toward disciplinary action") speaks to helping agents meet their production goals—not the granular control that employees receive. *See* R.332-7, Manual, PageID24667, 24659.

Equally important, Plaintiffs do not dispute that *Weary* and other cases recognize that standards and performance goals comport with independent contractor status. *See* Def. Br. 29-31. The Eighth Circuit, in fact, "emphatically reject[s]" the idea that control through standards and supervision is a "primary consideration" under *Darden* because of the inevitable fact that "[w]ork by

independent contractors is often, if not typically, performed to the exacting specifications of the hiring party." *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 490 (8th Cir. 2003). The Third Circuit similarly holds that "disproportionate consideration" should not be given to performance standards because "it resembles the 'control of the product' test rejected by the Supreme Court." *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1551-52 (3d Cir. 1992). These courts warn against the very error committed by the district court and perpetuated by Plaintiffs in their discussion of the types of "control" found by the district court.

3. The "Control" Exercised By American Family Is The Same Type Of "Control" Previously Permitted By This Court.

Finally, while Plaintiffs acknowledge that *Weary*, *Ware*, and *Wolcott* all upheld independent contractor classification for insurance agents, they explain away those decisions by insisting that there was "no evidence" that the insurance companies involved exercised any "right to control." Pl. Br. 37-40.

A close reading of this Court's precedent reveals just the opposite. The level of "control" retained by insurance companies in prior cases exceeds the evidence of "control" identified by the district court below. In *Weary*, for example, the agent was bound by "highly detailed and specific" company rules, the agent's "record-keeping and submitting of insurance applications were subject to review," and the company could "require Plaintiff to surrender 'all records.'" 377 F.3d at 530-32 (Clay, J., dissenting). Dutifully following the "Northwestern Mutual Way," the

agent received direction "critiquing [his] file-keeping and advising him of procedures that he was expected to make," and company manuals called agents "part of [the] company." *Id*. at 529-30 (dissent). Under his contract, the agent had to obtain "written permission" to engage in any "outside business activity…including activities unrelated to the insurance business." *Id*. at 531-32 (dissent). The company forced the agent to attend "compliance meetings and sales meetings and to meet minimum selling standards," and required him "to hire and maintain a secretary." *Id*. at 527. These and other rules "governed [the agent's] daily operations." *Id*. at 530 (dissent). But despite all of this evidence of "control," the majority in *Weary* held that a company's "limited authority" to control aspects of an insurance agent's business is "*not the type of control that establishes an employer/employee relationship*." *Id.* at 526 (emphasis added).

Similarly, in *Ware*, 67 F.3d at 576, this Court upheld independent contractor status even though the company approved the layout and location of the agent's office, paid for phone service and regulated advertisements, supplied forms and required compliance with guidelines, and provided training meetings and seminars. The agent in *Ware* was also forced to hire all staff through the company, comply with office hour requirements, and use the company's computer system to write and submit policies. *Id.*; *see also Schwieger*, 207 F.3d at 484-87 (upholding independent contractor status when agent had to "submit weekly and monthly production

reports," meet "goals and sales quotas," accept "performance evaluations and other feedback on such things as profitability, dress, and 'attitude,'" and "notify her manager of vacations"); *Wolcott*, 884 F.2d at 246-47 (same holding even though agent "was authorized to write policies only for Nationwide unless he received the express prior approval of Nationwide," and was subject to a non-compete agreement and a *lifetime* non-solicitation provision); *Mortensen*, 606 F.3d at 31-32 (same holding even though company "assert[ed] ownership over" all customer information and forced agents to lease and use corporate computer system). Greater evidence of "control" was present in *Weary* and *Ware* than here, but the Court nonetheless found such evidence insufficient to transform the agents into "employees" under *Darden*.

Against this authority, Plaintiffs offer *Am. Family Mut. Ins. Co. v. Hollander*, 705 F.3d 339 (8th Cir. 2013), to prop up their "control" analysis. *Hollander* deemed the agent an "employee" under Iowa Code Ann. § 91A.2, which defines the term to include any "commissioned salesperson." *Id*. at 349, 352. *Hollander* never mentions the words "independent contractor" (nor does it apply *Darden*), but it does rely on *Jeanes v. Allied Life Ins. Co*., 300 F.3d 938, 944 (8th Cir. 2002). In turn, *Jeanes* explains that the Iowa legislature apparently decided "that commission salespersons have the same need for the protections of the statute as wage-earning employees, *even if the commission salespersons are technically independent contractors*." *Id*. (emphasis added). Plaintiffs' description of *Hollander* overlooks

this distinction between Iowa law and *Darden*, which renders it inapposite to the *Darden* inquiry.[1] Pl. Br. 41.

While Plaintiffs claim that courts "regularly" recategorize workers as employees, Pl. Br. 4, every case cited by the parties applying *Darden* in the insurance agent context refused that result. Companies like American Family should be able to rely on these opinions as they structure their relationship with their agents.

III. Plaintiffs Fail To Defend The District Court's Legal Interpretation Of Four *Darden* Factors.

In its brief, American Family challenged the district court's interpretation of four specific *Darden* factors, which departed from the historic interpretation of those factors by this Court and others. *See* Def. Br. 36-49. In response, Plaintiffs largely stand silent, going so far as to decline to defend one of the factors. With respect to the others, Plaintiffs generally fail to engage in the legal debate, instead recycling various facts in an attempt to obscure the legal errors committed by the court. But given the district court's determination that the factors were "almost evenly split," R.320, Opinion, PageID20981, any misapplication of these *Darden* factors would undermine the court's balancing exercise and its ultimate conclusion.

[1] Further attenuated is the decades-old IRS letter featured by Plaintiffs, which does not undertake a *Darden* analysis or anything comparable. Pl. Br. 40-41. Not only did the IRS later reverse its position, R.36-1, Letter, PageID1498, but the letter predated *Darden* by years, thus offering nothing instructive on the *Darden* analysis.

A. Plaintiffs Decline To Defend The "When And How Long To Work" Factor.

This Court's task is rendered easier by virtue of Plaintiffs' failure to defend *Darden*'s "when and how long to work" factor. American Family explained in its brief how the district court misinterpreted this factor. *See* Def. Br. 41-42. The most Plaintiffs offer in response is mentioning the name of that factor in a heading lumped together with the "additional duties" factor. *See* Pl. Br. 47. Beyond that, Plaintiffs offer no substantive defense of the district court's analysis, no discussion of "when" and "how long" agents had to work, and have thus conceded error. *Brenay v. Schartow*, 709 F. App'x 331, 337 (6th Cir. 2017) ("[I]t is not for the court to search the record and construct arguments. Parties must do that for themselves."); *Michael v. Futhey*, 2009 U.S. App. LEXIS 23589, at 11-14 (6th Cir. Oct. 23, 2009) (rejecting argument that was not developed in appellate brief). Kicking that leg out of the wobbly *Darden* stool built by the district court sends the whole thing crashing down.

B. Plaintiffs Fail To Discuss The District Court's Erroneous Reasoning Regarding The *Darden* "Skill" Factor.

This Court has long held that "the sale of insurance is a highly specialized field" that requires "considerable training, education and skill." *Weary*, 377 F.3d at 526-27; *see also Wolcott*, 884 F.2d at 251 (working as insurance agent requires the "exercise [of] managerial skill in the operation of [the agent's] business"). Other circuits are in accord. *See, e.g.*, *Schwieger*, 207 F.3d at 485 (skill factor weighed

"heavily" in favor of independent contractor status because insurance agent was licensed and "subject to code of professional ethics").

Instead of confronting this precedent, Plaintiffs point to cases involving skills like secretarial tasks and driving garbage trucks. *See Worth v. Tyer*, 276 F.3d 249, 263 (7th Cir. 2001) (secretarial tasks); *Rumpke v. Rumpke Container Serv.*, 240 F. Supp. 2d 768, 772 (S.D. Ohio 2002) (garbage truck driver); *Janette v. Am. Fid. Grp., Ltd.*, 298 F. App'x 467, 468-69 (6th Cir. 2008) (accounting tasks). Tellingly, Plaintiffs fail to offer a single case, from any jurisdiction, holding that insurance agents are unskilled workers.

Nor do they defend the district court's reasons for holding that American Family agents are not skilled. The court's reasoning hearkened back to the dissent's analysis in *Weary*, claiming that when and where the agents learned their skills mattered. R.320, Opinion, PageID20982; *see also Weary*, 377 F.3d at 532 (Clay, J., dissenting). Proving the point, Plaintiffs actually cite the *Weary* dissent as they frame their standard. Pl. Br. 46. But even the dissent in *Weary* did not go as far as Plaintiffs invite, ultimately acknowledging that "the majority may be correct in its conclusion that this factor favors independent contractor status" because selling insurance is a general "skill." 377 F.3d at 532 (Clay, J., dissenting); *see also* Def.

Br. 39-40. The district court thus misapplied the "skill" factor in concluding that it favored employee status.[2]

C. "Additional Projects" Means Projects That Are Not Associated With The Sale Of Insurance.

The district court erred in interpreting this factor because the "additional" tasks it identified relate to the agents' core mission of selling and servicing insurance policies. R.320, Opinion, PageID20976; *see* Def. Br. 43-44. Home visits, telephone calls, personal insurance reviews and activity reports are prototypical ways to sell insurance. *Id*. Such "additional" tasks therefore do not support employee status. *See* Def. Br. 44; *Schwieger*, 207 F.3d at 484-85 (requirement to "submit weekly and monthly production reports" did not detract from independent contractor status); *Speen*, 102 F.3d at 633 (requirement to "phone [hiring party] daily and report his sales and the calls he had made" was "equally compatible with the status of either an independent contractor or employee"). Plaintiffs concede that nearly all of these purportedly "additional" tasks "related to selling insurance," and they fail to address the proper legal standard in their analysis. Pl. Br. 47-50.

But even if these tasks sat far afield from normal insurance activities, *Darden* describes the factor as "whether the hiring party has the *right* to assign additional

[2] Even if this Court wanted the analysis to hinge on when the agent developed her skills, the district court recognized that *each* of the named plaintiffs obtained insurance skills *before* affiliating with American Family. R.320, Opinion, PageID20951.

projects to the hired party." *Darden*, 503 U.S. at 323 (quoting *Cmty. for Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)) (emphasis added); *see also Janette*, 298 F. App'x at 475 (distinguishing the "right" to assign additional projects from mere requests). The district court found that the insurance agents here had a contractual right to reject tasks unrelated to the sale of insurance (even if they felt uncomfortable in doing so). R.320, Opinion, PageID20952, 20976. In the absence of a "right" to assign additional projects, the court erred by finding that this factor "weighs slightly in favor of employee status." *Id*. at 20976.

D. The "Hiring And Paying Assistants" Factor Does Not Require Absolute Control To Favor Independent Contractor Status.

This Court should hold that the "hiring and paying assistants" factor favors independent contractor status. The district court found that "[a]gents testified that they hired their own staff, paid the staff's wages, and decided whether to offer employee benefits to their staff." R.320, Opinion, PageID20957. It also found that agents had "primary authority" to hire and fire, "sole discretion" on compensation, and "sole responsibility" on taxes. *Id*. at 20979. These findings dictate the legal conclusion that this factor favors independent contractor status. *See* Def. Br. 45-49.

In response, Plaintiffs echo the district court's error, effectively asserting that anything other than total and complete agent control over assistants renders this factor neutral. Pl. Br. 52-53. This misunderstands the legal standard. *Darden* focuses on *the hired party's role* in hiring and paying assistants, *see* 503 U.S. at 323-

24, and American Family cited several cases demonstrating that this factor supports independent contractor status even when the company imposes basic hiring criteria. *See* Def. Br. 48-49; *Ware*, 67 F.3d at 576. Plaintiffs do not respond to these cases or offer any authority substantiating their vision of how this factor should work.

The two cases they do cite illustrate how far Plaintiffs must stretch to defend the district court's reasoning. *Schwieger* held the factor neutral because the insurance agent "had *no say* in setting the amount, method, or timing of pay for her own employees." 207 F.3d at 486 (emphasis added). Similarly, the plaintiff in *Absolute Roofing & Constr. v. Sec'y of Labor* "had *no authority* to hire or fire anyone." 580 F. App'x 357, 363 (6th Cir. 2014) (emphasis added). Those cases bear no resemblance to this case, in which the district court itself acknowledged that Plaintiffs had "primary authority" over hiring and firing decisions and "sole discretion in staff compensation matters." R.320, Opinion, PageID20979-80.

E. The Other Factors Cited By Plaintiffs Cannot Stave Off Reversal.

While *Darden's* "duration" and "business" factors favor employee status, they add "little weight" to the *Darden* determination. *Janette*, 298 F. App'x at 474. Plaintiffs try to instill them with greater prominence by claiming they provide the company with "leverage," Pl. Br. 50-52, but these factors have not received significant consideration in any *Darden* insurance case cited by the parties. The Court should not break new ground and imbue them with special importance.

Going further, Plaintiffs inject an "intent" factor that the district court did not consider. Pl. Br. 45. But if intent is part of the *Darden* inquiry, it points decisively in the other direction. The contract explains that "the intent of the parties" is that each agent is "not an employee of the Company for any purpose, but [is] an independent contractor for all purposes," R.320, Opinion, PageID20952, 20972, and the named Plaintiffs confirmed their intent to be independent contractors. Def. Br. 6. Any "intent" factor would therefore tip the scales further in the direction of independent contractor status.

IV. Plaintiffs Concede The District Court Failed To Find That The Individual Testimony Offered At Trial Was "Representative" Of The Class As A Whole.

Rather than defend the district court's use of "representative" testimony, Plaintiffs concede the point. A court cannot wield individual testimony to establish *class-wide* liability unless it first determines that the testimony is fairly representative of the class as a whole. *See Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1046-49 (2016); *Monroe v. FTS USA LLC*, 860 F.3d 389, 407-11 (6th Cir. 2017), *cert. denied*, 2018 U.S. LEXIS 1175 (Feb. 20, 2018). The district court skipped that step in this case; the opinion below contains no analysis of whether the trial testimony of individual agents fairly represented the nationwide class.

Nor could it. Plaintiffs' case rested largely on isolated examples of agents claiming to be subject to overbearing managers. That is why their brief stands silent

and does not identify any portion of the district court's opinion analyzing whether the individual testimony offered at trial fairly represented the class as a whole. *See* Pl. Br. 55-58. Plaintiffs do not dispute that the small, non-random "sample" of agents and managers fell well below the range "commonly accepted by the courts" to achieve statistical significance, *see* Def. Br. 52-53, nor do they present any other "objective criteria" (*e.g.*, geographic diversity) demonstrating that the testifying agents were fairly representative of the thousands of agents who did not testify at trial, *id.* at 53. Rather, Plaintiffs urge this Court to excuse the absence of any representative findings for three reasons, all of which highlight the illusory foundation of the court's ultimate liability determination.

First, Plaintiffs insist that American Family cannot challenge this issue because this Court previously declined to review the district court's class decertification ruling. Pl. Br. 55. But there is a fundamental distinction between the requirements for class certification and the standards for establishing liability at trial, notwithstanding Plaintiffs' conflation of the two concepts. *See Monroe*, 860 F.3d at 401-11 (separately analyzing class certification and class-wide proof of liability); *id.* at 419-22 (Sutton, J., concurring in part and dissenting in part). Moreover, errors committed at the certification stage may "so infect[] the proceedings" as to render the district court's rulings unreliable "at every stage of trial." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). By permitting

Plaintiffs to "piece[] together" a "perfect plaintiff" from a collection of "disparate individuals" who were not subject to a common policy, the trial court forced American Family "to defend against a fictional composite" that was "much stronger than any plaintiff's individual action would be." *Id.* at 344-45. This Court's discretionary decision to deny interlocutory review of the decertification ruling does not absolve Plaintiffs of their responsibility to defend the district court's class-wide liability determination in this appeal.

Second, Plaintiffs claim that the court "never relied on so-called representative evidence as proof of a company-wide policy to retain the right to control." Pl. Br. 55. But the record tells another story. The district court's opinion contains over 200 separate references to the trial testimony of individual American Family agents and managers, and thus Plaintiffs cannot pretend that the court did not rely on *any* of this evidence to reach its conclusions. Pl. Br. 55-56.

Instead, Plaintiffs posit that they "proved the American Family policy primarily through American Family's internal documents, other documents, and corroborating testimony by Company and other witnesses." *Id.* at 56. But that is not what the district court based its decision upon. To be sure, the court did cite some such documents, but in page after page of its opinion, the district court relied on the testimony of individual agents and managers, which simply confirms the

obvious: the trial court assumed (without properly determining) that such testimony was "representative" of the class a whole.

Moreover, if Plaintiffs were correct that the district court "never relied on so-called representative evidence," then the opinion below would lack support for several of the district court's class-wide conclusions. With respect to the "when and how long to work" factor, for example, the district court relied solely on the individual testimony of agents and managers, who offered conflicting accounts on this point. R.320, Opinion, PageID20963-64, 20976-77. The opinion below does not cite any "internal" or "other document" evincing a uniform American Family policy controlling agents' hours. If the district court did not assume that the testimony of individual agents and managers was "representative" of the class as a whole, nothing remains to support a class-wide finding on this factor.

Third, Plaintiffs deem any differences in the treatment of individual agents irrelevant because "[i]t is the right to control, not its exercise, that determines an employee relationship." Pl. Br. 57. In Plaintiffs' view, testimony that American Family exercised control over a single agent suffices to prove that it retained "the right" to control all of its agents—even if 7,000 other agents would have testified that American Family never actually exercised that "right." Pl. Br. 57-58. By the same twisted logic, Plaintiffs sweep aside conflicting testimony regarding the experiences of individual class members, asserting that the company exercises

"actual control" over some agents and not others—but retains the "right" to control everyone. *Id*.

For all the weight that Plaintiffs place on American Family's amorphous "right" to control its agents, however, they never explain the origins of this "right." If the "right" emanates from the parties' legal relationship with one another (the way most "rights" do), the district court's opinion squarely forecloses any such argument. As the court noted, the party's agreement provides that agents retain "full control of [their] activities and the right to exercise independent judgment as to time, place, and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement." R.320, Opinion, PageID20952. American Family therefore does not retain any contractual "right" to control the manner and means of its agents' performance.

If the "right" emanates from the parties' practices "in reality," however, then Plaintiffs' argument becomes circular. To determine whether American Family retains the "right" to control its agents, the court would have to examine the experiences of individual agents to assess whether those experiences were sufficiently similar to evince a common, overarching policy applicable to all class members. But that is the very inquiry that the trial court failed to undertake.

As the Supreme Court emphasized in *Tyson Foods*, the requirement that a trial court determine whether individual testimony is "representative" of the class as a

whole is designed to prevent precisely the type of unsupported speculation espoused by Plaintiffs in this case. A court can draw "just and reasonable" inferences from individual testimony only after first determining that such testimony is not "statistically inadequate or based on implausible assumptions." 136 S. Ct. 1048-49. The district court made no such determination in this case, thus providing additional grounds for reversal.

CONCLUSION

This Court should reverse the order of the district court and remand for entry of judgment in favor of American Family.

Respectfully submitted,

/s/ Pierre H. Bergeron

Pierre H. Bergeron
Lauren S. Kuley
Scott W. Coyle
Colter Paulson
SQUIRE PATTON BOGGS (US) LLP
221 E. Fourth Street
Suite 2900
Cincinnati, Ohio 45202
Telephone: (513) 361-1200
Fax: (513) 361-1201
pierre.bergeron@squirepb.com

Attorneys for Appellants

Gregory V. Mersol
Gilbert Brosky
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
Telephone: (216) 621-0200
Fax: (216) 696-0740
gmersol@bakerlaw.com

ADDITIONAL DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Record Number	Date Filed	PageID	Description
36-1	June 24, 2013	1498	Letter
320	August 1, 2017	20945	Order
332-7	January 18, 2018	24667	Manual

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(B)(i). The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 6,465.

/s/ Pierre H. Bergeron
Pierre H. Bergeron

CERTIFICATE OF SERVICE

It is hereby certified that on April 13, 2018 the foregoing was electronically filed with the Clerk of the Court via the Court's ECF system. Counsel for Plaintiffs will be served by the ECF system.

/s/ Pierre H. Bergeron
Pierre H. Bergeron