Reversed and Remanded and Opinion filed October 26, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-00-00230-CV

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TRACKER MARINE, L.P., Appellant

V.

KEN OGLE AND RANDY BACCUS, Appellees

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 99-22169

O P I N I O N

This is an interlocutory appeal from an order certifying a class action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon Supp. 2000). Because the trial court's order of class certification does not meet the requirements recently articulated by the Texas Supreme Court, we reverse and remand to the trial court. *See Southwestern Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

I. PROCEDURAL BACKGROUND

In their capacity as class representatives, appellees/plaintiffs Ken Ogle and Randy Baccus brought suit against appellant/defendant Tracker Marine, L.P., alleging violations of Missouri's Merchandising Practices Act,[1] and seeking to recover economic losses they claim to have suffered as a result of purchasing pontoon boats manufactured by Tracker. They contend that Tracker failed to disclose an alleged propensity of the plywood used in Tracker boats to rot when used on the water and that Tracker otherwise misrepresented the plywood's suitability for use in a marine environment.

Plaintiffs/appellees moved to certify a nationwide class based solely on Tracker's alleged violations of the Missouri statute.[2] The trial court certified a class comprised of "all persons . . . who bought, primarily for personal, family, or household purposes, a new Tracker pontoon boat that was constructed in whole, or in part, using wood, during the period from 1987 to 1998." The class is estimated to encompass more than 74,000 consumers across the United States. Tracker appeals the class certification order, claiming in four points of error that the trial court abused its discretion in certifying a nationwide class because there is neither predominance of common issues nor typicality of claims.[3]

II. STANDARD OF REVIEW

Trial courts enjoy broad discretion in determining whether a lawsuit should be maintained as a class action. *See Spera v. Fleming*, 4 S.W.3d 805, 810 (Tex. App.—Houston [14th Dist.] 1999, no pet.

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[1] MO. REV. STAT. §§ 407.010, et seq.

[2] Plaintiffs claim Tracker violated the statute by using deception, fraud, false pretense, false promise, misrepresentation (including failure to reveal facts material to the transaction), and unfair practices in connection with the sale and advertisement of pontoon boats in trade or commerce.

[3] In four points of error, plaintiffs claim the trial court abused its discretion in certifying a class because (1) there is not a predominance of common issues given that the Missouri statute requires each class member to prove, on an individual basis, an ascertainable loss caused by Tracker's alleged misrepresentations; (2) there is not a predominance of common issues because each class member must prove, on an individual basis, that the discovery rule, if applicable, tolled the limitations period, (3) there is no typicality because the Missouri statute does not apply to claims or injuries based on transactions occurring outside of Missouri by the Texas and Tennessee residents named as class representatives or the non-Missouri class members, and (4) the class representatives are not typical of, and cannot adequately represent, the class because the majority of the class period, 1992 to 1998, involves vastly different representations and products than occurred during the period in which the representatives bought their boats.

h.). The appellate court's review of the trial court's certification decision is limited to determining whether the court abused its discretion. *See id*. There is an abuse of discretion if the record clearly shows that (1) the trial court misapplied the law to the established facts, (2) the material in the record does not reasonably support the findings, or (3) the trial court acted arbitrarily or unreasonably. *See Spera*, 4 S.W.3d at 810; *TCI Cablevision of Dallas, Inc.*, 8 S.W.3d at 842.

A trial court does not abuse its discretion when it bases its decision on conflicting evidence. *See Spera*, 4. S.W.3d at 810. That the trial court, in the opinion of the appellate court, made an error in judgment, does not alone demonstrate an abuse of discretion. *See id*. Simply stated, the appellate court may "not substitute [its] judgment for that of the trial court." *See id*. (citing *Chevron U.S.A. Inc. v. Kennedy*, 808 S.W.2d 159, 161 (Tex. App.—El Paso 1991, writ dism'd w.o.j.)); *Wiggins v. Enserch Exploration, Inc.*, 743 S.W.2d 332, 334 (Tex. App.—Dallas 1987, writ dism'd w.o.j.). In reviewing the trial court's ruling on certification, an appellate court is required to view the evidence in a light most favorable to the trial court's action and indulge every presumption in favor of the trial court's ruling. *See Spera*, 4 S.W.3d at 810.

III. CLASS CERTIFICATION

Texas Rule of Civil Procedure 42(a), entitled, "Prerequisites to a Class Action," states in part:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

TEX. R. CIV. P. 42(a). To merit certification, the class action must satisfy each of the four threshold requirements of Rule 42(a) and at least one of the subsections of Rule 42(b). *See Bernal*, 22 S.W.3d at 433. The trial court found the plaintiffs/appellees not only met the four threshold requirements for class certification under Rule 42(a), i.e. (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation, but also satisfied the requirements of Rule 42 (b)(4), i.e., that questions of fact and law

common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for fair and efficient adjudication of the controversy.

After the trial court entered the order certifying the class, and just before submission of the case for appellate review, the Texas Supreme Court issued its opinion in *Bernal*, articulating a brand new approach to class certification. Rejecting what it described as a "certify now and worry later" approach to class certification,[4] the Texas Supreme Court instructed that before ruling on class certification, trial courts must perform a "rigorous analysis" to determine whether all prerequisites to certification were actually met and not merely presumed. *See id.* at 435. It is clear from this holding that trial courts must now take specific steps to address the methodology of trying class claims before certifying a class. According to the Texas Supreme Court,

> [I]t is improper to certify a class without knowing how the claims can and will likely be tried. *The trial court's certification order must indicate how the claims will likely be tried* so that conformance with Rule 42 may be meaningfully evaluated.

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[4] Some courts affirmed certification orders, stating that creative means may be designed to address them, without identifying what those means would be "or considering whether they would vitiate the parties' ability to present viable claims or defenses." *Bernal*, 22 S.W.3d at 434 (citing *Amerada Hess Corp. v. Garza*, 973 S.W.2d 667, 680 (Tex. App.—Corpus Christi 1996, writ dism'd w.o.j.); *Franklin v. Donoho*, 774 S.W.2d 308, 313 (Tex. App.—Austin 1989, no writ)). "Other courts have indulged every presumption in favor of the trial court's ruling, viewed the evidence in the light most favorable to that ruling, and frankly acknowledged that if they erred, it would be in favor of certification." *Id.* (citing *Health & Tennis Corp. of Am. v. Jackson*, 928 S.W.2d 583, 587 (Tex. App.—San Antonio 1996, writ dism'd w.o.j.); *Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 839, 843 (Tex. App.—Houston [14th Dist.] 1996, no writ)). Still others have affirmed certification orders, stating that predominance need not be evaluated at this stage of the proceedings because a settlement or a verdict for the defendant on the common issues could end the litigation before any individual issues would be raised. *See id.* (citing *Ford Motor Co. v. Sheldon*, 965 S.W.2d 65, 72 (Tex. App.—Austin 1998), *rev'd*, 22 S.W.3d 444 (Tex. 2000); *Union Pac. Res. Co. v. Chilek*, 966 S.W.2d 117, 123 (Tex. App.—Austin 1998, pet. dism'd w.o.j.)). "Other courts have suggested that the predominance requirement is not really a preliminary requirement at all because a class can always later be decertified if individual issues are not ultimately resolved." *Id.* (citing *National Gypsum Co. v. Kirbyville Indep. Sch. Dist.*, 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, writ dism'd w.o.j.); *Life Ins. Co. v. Brister of S.W.*, 722 S.W.2d 764, 775 (Tex. App.—Fort Worth 1986, no writ)).

Id. (emphasis added). The trial court, acting before the Texas Supreme Court made this pronouncement, did not indicate in its certification order how the class claims in this case are likely to be tried.[5] This deficit leaves us without an effective means of evaluating how the trial court intends to try the class claims and whether its plan, if any, is sufficient to comport with Rule 42's requirements. However, at oral argument and/or in post-submission briefing, plaintiffs/appellees have advanced two arguments in an effort to avoid the effects of this deficit in the certification order. First, they argue Tracker waived the complaint by not voicing a specific objection in the court below. Second, they contend the Texas Supreme Court's ruling was not dispositive in *Bernal* and, thus, the new rule pronounced was mere dictum and not binding on this court. For reasons explained below, we reject both of these arguments.

A. Waiver Argument

Plaintiffs/appellees contend that by not objecting to the form of the certification order in the trial court, Tracker waived any complaint based on the mandate in *Bernal* that a "trial court's certification order must indicate how the claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated." While Tracker did not voice an objection to the lack of a trial plan or other indication of "how the claims would likely be tried" in the certification order, it clearly and repeatedly objected to certification on the ground that plaintiffs/appellees had failed to satisfy the mandates of Rule 42. It was not until after the parties had framed the issues for appeal that the *Bernal* opinion issued. The notion that a party waives a complaint due to lack of specificity under these circumstances is belied by case law. In *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 798-99 (Tex. 1994), the Texas Supreme Court confronted a similar situation when considering its then-recent holding in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex.1994), that a court of appeals' opinion must explain why the evidence supports or does not support punitive damages. *See Keever*, 888 S.W.2d at 798 (citing *Moriel*, 879 S.W.2d at 28, 31). Interestingly, in both *Moriel* and *Bernal*, the Texas Supreme Court

[5] Likewise, the parties, who submitted their appellate briefs before the Texas Supreme Court issued *Bernal*, understandably, did not address the new requirement.

announced new requirements that the trial courts and courts of appeals, respectively, include specific explanations in written rulings to ensure meaningful appellate review. In *Keever*, the court of appeals had issued its opinion after the Texas Supreme Court announced the *Moriel* requirement, and that opinion failed to meet the newly announced requirement. Here, the timing is similar in that the Texas Supreme Court announced the new requirement for class certification orders in *Bernal* after the trial court issued its non-complying order. In *Keever*, the Texas Supreme Court found no waiver, holding that *Moriel's* new procedural requirements would apply to the court of appeals' opinion in that case, and that error was preserved simply by complaining below that the lower court had ruled improperly on the issue. *See Keever*, 888 S.W.2d at 799. The *Keever* court explained its rationale, stating:

> Although *Moriel* was decided after the court of appeals' decision in this case, its holding should be applied to a pending case in which a party has preserved the complaint that the court of appeals failed to properly scrutinize a punitive damage award... [I]n its motion for rehearing *en banc* in the court of appeals, the Bank presented a point of error complaining that "the court of appeals erred in failing to order a remittitur of punitive damage award was "patently unreasonable" and "so excessive as to indicate passion or prejudice on the part of the jury." *Although the Bank did not specifically refer to the Kraus factors in the motion for rehearing, it adequately preserved this issue below under our practice of "construing liberally points of error in order to obtain a just, fair and equitable adjudication of the rights of litigants."*

Id. (quoting in part from *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)) (emphasis added).

Thus, even though the petitioner in *Keever* did not specifically object to the contents of the court of appeals' opinion, its general complaint that punitive damages were unreasonable was sufficient to preserve the procedural error, i.e., that the opinion failed to include the specific explanation of the evidence required by *Moriel*. Just as in *Keever*, plaintiffs/appellees argue Tracker failed to preserve error by not making the specific objection below that the certification order failed to include the *Bernal* explanation of how the class claims will likely be tried. Like the petitioner in *Keever*, Tracker clearly raised its complaint that the trial court could not properly scrutinize the class certification issue and still conclude that the claims could be tried as a class action. Just as we do not fault the learned trial judge for a lack of clairvoyance in crafting the certification order to comply with a rule not yet pronounced, we do not find waiver on appeal

based on Tracker's failure to lodge a *specific* objection to the court's lack of compliance with that rule. Following the *Keever* rationale and adhering to the practice of construing appellate issues liberally to ensure fair adjudication of the rights of the parties, we find Tracker adequately preserved this issue for review. Accordingly, we reject plaintiffs/appellees' waiver argument.

B. Dictum Argument

At oral argument, plaintiffs/appellees also asserted that the Texas Supreme Court's statements in *Bernal*, requiring an indication of "how the claims will likely be tried" were not necessary to the holding in that case and thus were merely dictum. "Dictum is an observation or remark made concerning some rule, principle, or application of law suggested in a particular case, which observation or remark is not necessary to the determination of the case." *Edwards v. Kay*, 9 S.W.3d 310, 314 (Tex. App.—Houston [14th Dist.] 1999, pet. filed) (citing BLACK'S LAW DICTIONARY 409 5th ed. (1979)). Generally, dictum is not binding as precedent under *stare decisis*. *See id.*; *Lester v. First Am. Bank, Bryan Tex.*, 866 S.W.2d 361, 363 (Tex. App.—Waco 1993, writ denied). As this court has previously noted, however, dictum has precedential value when it is classified as judicial dictum. *See id.*; *see also Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773 (Tex. 1964) (discussing distinction between obiter dictum and judicial dictum); *Parker v. Bailey*, 15 S.W.2d 1033, 1035 (Tex. Comm. App. 1929, holding approved); *Carpet Servs., Inc. v. George A. Fuller Co. of Tex., Inc.*, 802 S.W.2d 343, 349 (Tex. App.—Dallas 1991) (Baker, J., dissenting) (noting that where "the pronouncement is "'judicial dictum,' rather than obiter dictum, . . . this Court must follow it."), *aff'd*, 823 S.W.2d 603 (Tex. 1992); *Thomas v. Meyer*, 168 S.W.2d 681, 685 (Tex. Civ. App.—San Antonio 1943, no writ). Judicial dictum is "a statement by the supreme court made very deliberately after mature consideration and for future guidance in the conduct of litigation." An intermediate appellate court is not free to disregard judicial dictum. *See Valmont Plantations v. State*, 163 Tex. 381, 355 S.W.2d 502, 503 (1962); *see also Edwards*, 9 S.W.3d at 314. We find the Texas Supreme Court's statements in *Bernal* to have been deliberately made for the guidance of the bench and the bar in applying Rule 42. Inasmuch as our state's highest civil court

has pronounced a ruling requiring a trial court's class certification order to "indicate how the claims will likely be tried," this requirement is binding on all, regardless of the lack of dispositive effect in the *Bernal* case.

IV. CONCLUSION

The trial court's order certifying the class did not "indicate how the claims will likely be tried." Absent a trial plan or other indication in the certification order describing how the class claims against Tracker will likely be tried, this court cannot perform a meaningful evaluation to ensure that Rule 42's requirements have been satisfied. Because it is improper to certify a class without including this information in the certification order, we must reverse and remand the trial court's order of class certification for compliance with the Texas Supreme Court's newly articulated requirements.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Fowler, Frost, and Sondock.[6]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[6] Senior Justice Ruby K. Sondock sitting by assignment.