

Reversed and Remanded and Opinion filed November 9, 2000.



In The

Fourteenth Court of Appeals

NO. 14-00-00014-CV

**TEXAS DEPARTMENT OF TRANSPORTATION,
HARRIS COUNTY FLOOD CONTROL DISTRICT,
BRAZORIA DRAINAGE DISTRICT NO. 4,
BERNARD JOHNSON INCORPORATED,
BERNARD JOHNSON, INC., and
BERNARD JOHNSON ENVIRONMENTAL, INC.,
Appellants**

V.

**HERB BARRIER and CYNTHIA DELEON,
as Representatives of a Class of Individuals
and/or Entities Similarly Situated, Appellees**

**On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 95G2299**

OPINION

In this interlocutory appeal, appellants challenge the trial court's certification of this case as a class action. We reverse the certification as to the claims against appellants and remand.

Background

Appellees are representatives of two classes of residential property owners in Harris and Brazoria Counties whose properties were allegedly damaged by a flood in 1994. Appellants, Texas Department of Transportation, Brazoria Drainage District No. 4, and Harris County Flood Control District (collectively, the “governmental appellants”) were allegedly involved in the design and/or construction of the relevant portion of Beltway 8 and its drainage system.¹ Appellants Bernard Johnson Incorporated, Bernard Johnson, Inc., and Bernard Johnson Environmental, Inc. (collectively, “BJI”) were allegedly involved in the development of certain residential subdivisions in the relevant area (the “subdivisions”).

Appellees filed a class action against appellants claiming that the manner in which the governmental appellants designed and constructed Beltway 8 and in which BJI developed the subdivisions caused more severe flooding to properties owned by the proposed class members than would have otherwise occurred.² After holding hearings on appellees’ motion to certify a single, larger class, the trial court instead certified two subclasses representing considerably fewer property owners and a smaller aggregate area than appellees had proposed.³ In addition, this certification was “as to liability issues only.” Appellants appeal this certification on the ground that the lawsuit is not suitable to be conducted as a class action at all.⁴

Preservation of Error

¹ For purposes of this opinion, Beltway 8 and its drainage system will simply be referred to as “Beltway 8.”

² In particular, appellees allege that the construction of Beltway 8 and the subdivisions blocked the natural runoff of rainwater across the flood plain, increasing the volume and velocity of rainwater flowing into Clear Creek.

³ Although not material to our disposition, the certified subclasses are also more restrictive than the proposed class in including only residential property that had suffered structural flooding damage but had not previously suffered internal flooding since at least 1970.

⁴ The briefs reflect that the following parties were also defendants in this lawsuit but did not appeal the trial court’s certification order: General Homes Corporation, Brown & Root, Inc., J.D. Abrams, Inc., Pulte Home Corporation of Texas, James T. Lynch, Inc., U.S. Home Corporation, Mastermark Homebuilders, Inc., Lennar Homes, Coenco, Inc., and Hometown Concepts, Inc. d/b/a Hampton Homes. Because the jurisdiction of this court has not been invoked with regard to the portion of the trial court’s certification order pertaining to these defendants, we express no opinion on it.

As a preliminary matter, appellees contend that appellants waived their complaint because they did not make a post-ruling objection to the trial court's class certification. Appellees contend that because the trial court's ruling diverged from certifying the single, larger class that they had proposed, appellants' response to appellees' certification motion did not address the trial court's ruling, and thus a further objection was required to preserve error on the ruling.

Had appellants' response to the class certification motion merely opposed the manner in which appellees sought to *define* the class, appellees' argument would be more persuasive. However, because appellants' joint response to appellees' motion instead opposed class certification in this case altogether, the fact that the trial court's ruling differed in the manner in which the classes were constituted did not necessitate a further objection to preserve that complaint. Accordingly, we overrule appellees' challenge to appellants' preservation of error and turn to the merits of the appeal.

Class Certification

Standard of Review

A trial court's ruling on class certification is reviewed for abuse of discretion. *See Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 439 (Tex. 2000) (holding that class certification was an abuse of discretion). Class certification is governed by Texas Rule of Civil Procedure 42. *See id.* at 433. Certification of a lawsuit as a class action requires satisfaction of all four of the conditions of Rule 42(a)⁵ and at least one of the conditions of Rule 42(b). *See* TEX. R. CIV. P. 42(b). As to the Rule 42(b) conditions in this case, the trial court found that appellees satisfied: (i) Rule 42(b)(1)(A) in that the prosecution of separate actions would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the parties opposing the class; and (ii) Rule 42(b)(4) in that the questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication

⁵ The Rule 42(a) conditions are that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact which are 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. *See* TEX. R. CIV. P. 42(a).

of the controversy. *See id.* Because we conclude that neither Rule 42(b) condition was met in this case, as discussed below, we confine our review to those conditions.

The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. *See Bernal*, 22 S.W.3d at 437. Ideally, a judgment in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim. *See id.* at 434.

The predominance requirement is intended to prevent class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party's ability to present viable claims or defenses. *See id.* Courts determine if common issues predominate by identifying the substantive issues of the case that will control the outcome of the litigation, assessing which issues will predominate, and determining if the predominating issues are, in fact, those common to the class. *See id.* The test for predominance is not whether common issues outnumber uncommon issues but whether common or individual issues will be the object of most of the efforts of the litigants and the court. *See id.*⁶ If, after common issues are resolved, presenting and resolving individual issues is likely to be an overwhelming or unmanageable task for a single jury, then common issues do not predominate. *See id.*

Courts must perform a rigorous analysis *before* ruling on class certification to determine whether all prerequisites to certification have been met. *See id.* at 435. Although it may not be an abuse of discretion to certify a class that could later fail, it is improper to certify a class without indicating in the certification order how the claims will likely be tried so that conformance with Rule 42 can be meaningfully evaluated. *See id.*

In *Bernal*, Southwestern was sued by over 900 claimants for personal injuries resulting from an explosion, fire, and release of toxic substances at Southwestern's refinery. *See id.* at 428-29. The trial

⁶ The nonexhaustive list of factors to consider in determining if (b)(4) certification is appropriate includes: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability of concentrating the litigation in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. *See* TEX. R. CIV. P. 42(b)(4).

court certified the case as a class action and ordered the trial to be conducted in phases whereby the issue of Southwestern's liability for the explosion would be tried separately from the issues of causation and damage to each individual plaintiff. *See id.* at 429. Even though Southwestern was the only defendant alleged to be responsible for the explosion and injuries, and the common-issues phase would establish whether it was legally responsible for the explosion and whether the released materials were capable of causing the alleged harm, the Texas Supreme Court concluded that common issues did not predominate because their resolution would not establish, among other things, the extent to which: (a) each class member was exposed or harmed by the exposure, or (b) other factors also contributed to the alleged harm. *See id.* at 436-37.⁷

Satisfaction of a Rule 42(b) Condition

In this case, other than stating that the certification was “as to liability issues only,” the certification order does not specify which issues would be submitted to the jury in the class action phase and which would be submitted in the individual phase(s) or whether the respective phases would be decided by a single jury or multiple juries.⁸ Appellees envision that this case would be submitted in “two phases of causation” whereby the jury in the class action phase would determine whether each appellant caused or aggravated flooding conditions generally, *i.e.*, by causing more water to flow into Clear Creek, and then the jury(s) in the individual phase(s) would determine the comparative causation and damages for each claimant.

However, the flood is alleged to have been caused or aggravated by multiple defendants doing different things at different locations along the channel and floodplain of Clear Creek. The evidence does not indicate that appellants' collective conduct affected each member of each class uniformly, but, rather, that various factors contributed to the flooding in varying degrees from property to property within each

⁷ The Court further concluded that, in light of the individualistic variables, such as class members' dosage, location, activity, age, and medical history, a class action proceeding could not efficiently allow Southwestern to challenge causation and damages for each individual claim. *See Bernal*, 22 S.W.3d at 436-37.

⁸ However, *Bernal* had not been decided when the trial court's certification order was entered in this case.

class. Therefore, under appellees' approach, any class action finding that any appellants were generally responsible for causing flooding would not establish whether, or to what extent, they caused flooding on any individual property (but, at most, only whether they should be subjected to the individual phase of trial). To the extent the individual phase for any claimant is not tried to the same jury as the class action phase, it is not apparent how a claimant would be able to prove which appellant(s) caused the flooding on his particular property without re-introducing the evidence that was required to establish liability in the class action phase of the case. Under these circumstances, and particularly without a description in the certification order of specifically how the claims will likely be tried, the evidence presented in this case does not demonstrate that the predominating issues are, in fact, those common to the class. *See Bernal*, 22 S.W.3d at 434.⁹ Similarly, because of the varying degree in which the various factors contributed to the flooding from property to property within each class, prosecution of separate actions would not create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for appellants.¹⁰ Because the record does not therefore reflect that a condition of Rule 42(b) was satisfied with regard to the claims against appellants, class certification was not warranted in this case as to those claims. Accordingly, the judgment of the trial court is reversed to that extent, and the case is remanded to the trial court for further proceedings.¹¹

⁹ Other decisions have similarly denied class certification of claims arising from floods. *See Cook v. Highland Water & Sewer Authority*, 530 A.2d 499 (Pa. Commw. Ct. 1987); *Saba v. County of Barnes*, 307 N.W.2d 590 (N.D. 1981) (“If the defendants were determined to be liable because they negligently caused an increase in the rain [by seeding clouds], the issue of whether or not that negligence was the proximate cause of the damage to each member of the class would remain to be determined Insofar as the issue of proximate cause would need to be determined on a member-by-member basis, . . . the lawsuits would be individualized.”); *Eaton v. Ventura Port Dist.*, 45 Cal. App. 3d 862 (Cal. Ct. App. 1975).

¹⁰ *See, e.g., Simer v. Rios*, 661 F.2d 655, 669 n.24 (7th Cir. 1981).

¹¹ *See supra*, note 4.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).