



GRIGGS v. NEW DOMINION

2022 OK CIV APP 42

Case Number: 119185

Decided: 10/26/2022

Mandate Issued: 12/29/2022

DIVISION II

THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION II



Cite as: 2022 OK CIV APP 42, ___ P.3d ___

LISA GRIGGS and APRIL MARLER, on behalf of themselves and other Oklahoma citizens similarly situated,
Plaintiffs/Appellants,

v.

NEW DOMINION, LLC; KIRKPATRICK OIL COMPANY, INC.; RAINBO SERVICE CO.; D&B OPERATING LLC; MID-CON ENERGY OPERATING, LLC; ORCA OPERATING CO., LLC; TERRITORY RESOURCES, LLC; DEVON ENERGY PRODUCTION COMPANY, L.P.; TNT OPERATING COMPANY, INC.; WHITE OPERATING COMPANY; DRYES CORNER, LLC; WHITE STAR PETROLEUM, LLC; EQUAL ENERGY US INC.; M M ENERGY, INC.; and WICKLUND PETROLEUM CORPORATION, Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF
LOGAN COUNTY, OKLAHOMA

HONORABLE PHILLIP C. CORLEY, TRIAL JUDGE

AFFIRMED AND REMANDED

Scott Poynter, POYNTER LAW GROUP, PLLC, Little Rock, Arkansas and
Michael M. Blue, BLUE LAW, Oklahoma City, Oklahoma, for Plaintiffs/Appellants

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Defendant/Appellee New Dominion, LLC

Kerry R. Lewis, Lindsey E. Albers, RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC, Tulsa, Oklahoma, for
Defendant/Appellee Kirkpatrick Oil Company, Inc.

K.D. Lackey, Jr., Oklahoma City, Oklahoma, for Defendant/Appellee Rainbo Service Co.

Thomas P. Goresen, J. Todd Woolery, Patrick L. Stein, Mackenzie L. Smith, McAFEE & TAFT, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma, for Defendants/Appellees D&B Operating LLC, Mid-Con Energy Operating, LCC, Orca Operating Co., LLC, and Territory Resources, LLC

John J. Griffin, Jr., L. Mark Walker, CROWE & DUNLEVY, A PROFESSIONAL CORPORATION, Oklahoma City, Oklahoma, for Defendant/Appellee Devon Energy Production Company, L.P.

E. Edd Pritchett, Jr., Katherine T. Loy, Glen Mullins, Joshua L. Young, DURBIN, LARIMORE & BIALICK, Oklahoma City, Oklahoma, for Defendants/Appellees TNT Operating Company, Inc., White Operating Company, Dryes Corner, LLC, White Star Petroleum, LLC, and Equal Energy US Inc.

J. Chris Horton, J. CHRIS HORTON, P.C., El Reno, Oklahoma, for Defendant/Appellee M M Energy, Inc.

¶1 Plaintiffs Lisa Griggs and April Marler, on behalf of themselves and other Oklahoma citizens similarly situated, appeal the trial court order granting the motions to strike the class allegations in Plaintiffs' class action petition, motions which were filed by Defendants New Dominion LLC, Kirkpatrick Oil Company, Inc., Rainbo Service Co., D&B Operating LLC, Mid-Con Energy Operating, LLC, Orca Operating Co., LLC, Territory Resources, LLC, Devon Energy Production Company, L.P., TNT Operating Company, Inc., White Operating Company, Dryes Corner, LLC, White Star Petroleum, LLC, Equal Energy US Inc., M M Energy, Inc., and Wicklund Petroleum Corporation. After a comprehensive review of the record and relevant law, we affirm the trial court's decision. We also direct the trial court on remand to address Plaintiffs' request for an order allowing the class members to file their individual claims as to the nine areas of seismicity consistent with Oklahoma law.

FACTS AND PROCEDURAL BACKGROUND

¶2 Plaintiffs brought this class action lawsuit alleging Defendants' disposal of wastewater from fracking operations triggered several earthquakes resulting in extensive damage to real and personal property across the areas in question. Plaintiffs' first amended class action petition filed October 24, 2017, seeks certification of a plaintiff class comprised "of a class of Oklahoma citizens owning properties within Logan, Payne, Lincoln, Creek, Oklahoma, Canadian, Kingfisher, Garfield, and Noble counties during the dates of the induced seismicity between March 30, 2014 to present." Plaintiffs identify nine groups of earthquakes clustered according to location which they allege were induced by wastewater disposal injection into Oklahoma's Arbuckle formation and which have caused physical and emotional damage to the plaintiff class.

¶3 Among other motions and pleadings over the course of the litigation, a number of Defendants filed motions to strike the class allegations in Plaintiffs' first amended petition which are the motions addressed in the order being appealed. These Defendants argued the class allegations should be stricken for failure to meet the requirements delineated in 12 O.S. § 2023. They also asserted that class certification is usually inappropriate in environmental mass tort cases because common issues can be overshadowed by individual issues making it especially difficult to meet § 2023's commonality and predominance requirements. Plaintiffs responded, and on November 16, 2018, the trial court entertained arguments on these motions. During the hearing, the trial court expressed its intention to grant the motions stating:

We have 26 defendants in this matter with a whole bunch of different earthquakes and a whole bunch of different clusters. The Court believes, based upon the petition on its face, that there's no way this Court believes that the plaintiffs can show commonality, as it relates to a class certification.

I'm going to go ahead, at this time, and sustain that motion to strike class certification. I will certify it interlocutory, so we can get that issue before the Supreme Court or the appellate courts and get that ruled on to proceed on further. I think that's the difference that we have here. While Judge Walkley's case is similar as it relates to earthquakes, it's not similar as it relates to parties. I think that they're completely different entities.

¶4 Because no written order was entered by the trial court as a result of this hearing, Plaintiffs eventually filed a motion for appropriate relief in July 2020 asking the trial court either to enter an order adjudicating Defendants' motions to strike or to allow Plaintiffs to re-brief the class certification issue based on more recent appellate court decisions.

¶5 Defendants responded to what they characterize as Plaintiffs' "motion to reconsider" the trial court's denial of class certification. Defendants argued that the appellate cases Plaintiffs cite are distinguishable and do not resolve the inability to establish the commonality element for class certification. ¹

¶6 During the hearing on Plaintiffs' motion for appropriate relief on September 18, 2020, the trial court concluded:

I'm going to stand on my previous ruling and deny the Motion for Appropriate Relief, and I will approve the journal entry so it can be appealed to address that issue. Kind of thrown out some new things that have not been presented before on how you might certify a class. They may bring it back down to allow you to do that, but the way it was pled and the way it was presented previously was the multiple defendants with multiple earthquakes. The Court believed that was not sufficient commonality, and that is why I ruled the way I did. So I am going to stand on that at this time.

The trial court stated in its order memorializing this hearing and decision:

The Motion for Appropriate Relief was heard on September 18, 2020. Having considered all matters before the Court on the Motions to Strike, the Motion for Appropriate Relief, and having heard arguments of counsel on November 16, 2018 and September 18, 2020, the Court hereby grants the Motions to Strike and grants that portion of the Motion for Appropriate Relief requesting entry of an Order regarding the Motions to Strike. The Court grants the Motions to Strike because of the number of Defendants named in the Petition, and for the reasons stated at pp. 25-27 of the Transcript of November 16, [2018] and the reasons stated during the hearing held September 18, 2020, which will be reflected in the hearing's transcript. The Court enters this Order pursuant to 12 O.S. [§ 2023(C)(1)]. . . .

Plaintiffs appeal the portion of the trial court's order granting Defendants' motions to strike Plaintiffs' first amended class action petition.

STANDARD OF REVIEW

¶7 A trial court order certifying a class action "shall be subject to a de novo standard of review by an appellate court reviewing the order." 12 O.S. Supp. 2020 § 2023(C)(2); see also *Marshall Cty. v. Homesales, Inc.*, 2014 OK 88, ¶ 8, 339 P.3d 878 (" [T]he district court's disposition of the class action issue does not ultimately determine any issues of fact. As a result, class certification resolves only a question of law and the de novo standard required by Title 12 O.S. Supp. 2013 § 2023(C)(2) is appropriate for appellate review of class certification orders.").

ANALYSIS

¶8 Plaintiffs primarily argue on appeal that the trial court improperly granted Defendants' motions to strike their first amended class action petition. In its ruling, the trial court clearly decided that the principal missing prerequisite is commonality as required by 12 O.S. Supp. 2020 § 2023(A)(2).² We will address this issue first.

¶9 Oklahoma class actions are governed by 12 O.S. § 2023 which states in part:

A. PREREQUISITES TO A CLASS ACTION. 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.

12 O.S. Supp. 2020 § 2023(A). "The requirements of subsection A are generally referred to as numerosity, commonality, typicality, and adequacy of representation." *Whisenant v. Strat Land Expl., Co.*, 2018 OK CIV APP 65, ¶ 9, 429 P.3d 703. "A party seeking certification of a class action has the burden of satisfying all four requirements of subsection A, as well as one of the additional requirements contained in § 2023(B)." *Id.* Thus, class certification "is appropriate 'only if' the proposed class representatives demonstrate that the requested class satisfies each of the four requirements of section 2023(A)." *Gentry v. Cotton Elec. Co-op., Inc.*, 2011 OK CIV APP 24, ¶ 11, 268 P.3d 534. Before reaching the § 2023(B) requirements, Plaintiffs "must first show that it can satisfy the requirements of" § 2023(A). *Marshall Cty.*, 2014 OK 88, ¶ 13.

¶10 The main issue before us is whether the trial court correctly determined Plaintiffs failed to show the existence of questions of law or fact common to the class. Although common issues of law and fact stated in § 2023(A)(2) is a prerequisite, it "is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)(quoted citation omitted); see also *Marshall Cty.*, 2014 OK 88, ¶ 13 (quoting *Wal-Mart*, 564 U.S. at 349). "Commonality requires the plaintiff to demonstrate that the class

members "have suffered the same injury." *Marshall Cty.*, 2014 OK 88, ¶ 13 (quoting *Wal-Mart Stores, Inc.*, 564 U.S. at 350).³
"The common contention must be of such nature that 'it is capable of classwide resolution . . . in one stroke.'" *Id.* The United States Supreme Court in *Wal-Mart Stores, Inc.*, 564 U.S. at 350, further held:

"What matters to class certification . . . is not the raising of common 'questions'--even in droves--but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Id. (quoted citation omitted).

This essentially means that Plaintiffs must show that they and the purported class of persons who have suffered the same injury will share answers to common questions of law or fact. This, Plaintiffs cannot do.

¶11 In their first amended class action petition and in their appellate brief, Plaintiffs set out the following nine questions of law and fact asserted as common to class members pursuant to § 2023(A)(2):

[1] whether Defendants' disposal operations within the Class Area caused the earthquakes in the Class Area; (2) whether the induced earthquakes caused damage to the personal and real property of the Plaintiffs and members of the Class; (3) whether Defendants owed a duty to Plaintiffs and members of the Class; (4) whether Defendants' conduct amounted to a nuisance; (5) whether Defendants' conduct is an ultra-hazardous activity; (6) whether Defendants' operations were negligently performed; (7) whether Defendants[] caused a trespass; (8) whether Plaintiffs and members of the Class have suffered damages proximately caused by Defendants' wastewater disposal operations; and (9) whether a judgment for actual and punitive damages against the Defendants is appropriate.

(Footnote omitted.) We agree with the trial court that Plaintiffs' stated common questions of law and fact are not sufficient to "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 564 U.S. at 350 (quoted citation omitted) (finding the plaintiffs failed to meet Federal Rule of Civil Procedure 23(a)(2)).

¶12 Defendants rely on a similar case from the Western District of Oklahoma--*West v. Chapparral Energy, LLC*, 2018 WL 8264338 (2018)--in which the federal district court denied plaintiffs' request to certify a class action primarily because the commonality requirement was not met pursuant to Rule 23. In *West*, plaintiffs similarly alleged "defendants' injection of wastewater into the Arbuckle formation has caused earthquakes occurring in and around central and western Oklahoma." *Id.* at *1. The plaintiffs also categorized the earthquakes into four "swarms" by location, which they alleged were "primarily caused by defendants." *Id.* The plaintiffs there alleged similar common questions as Plaintiffs here.

¶13 After determining the commonality requirement could not be met pursuant to Rule 23(a), the district court held:

These alleged common questions, the court concludes, are not sufficient to generate common answers apt to drive resolution of this litigation. . . . Although plaintiffs, in their briefing, now seek to screen earthquakes by magnitude for class certification purposes (4.5 magnitude and above for property damage, sought under negligence, abnormally dangerous activity and trespass theories of liability, and 3.0 magnitude and above for nuisance theory of liability), the second amended complaint makes clear that not all earthquakes were primarily caused by all defendants. Most of the named defendants are alleged to have primarily caused one earthquake swarm. Only one named defendant, White Star Petroleum, is alleged to have been responsible for three of the four operative swarms. . . . And, according to the second amended complaint, the named plaintiffs did not all experience or suffer damage from all the earthquake swarms. Causation is an indispensable element of each claim of each plaintiff or class member. See, *Valley View Angus Ranch, Inc. v. Duke Energy Field Services, Inc.*, 497 F.3d 1096, 1107 n. 17 (10th Cir. 2007)(nuisance and trespass); *Jennings v. Badgett*, 230 P.3d 861, 865 (Okla. 2010)(negligence); and *Davis v. City of Tulsa*, 87 P.3d 1106, 1109 (Okla. Civ. App. 2004)(abnormally dangerous activity). To establish causation, "there must be 'some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.'" *Steed v. Bain-Holloway*, 356 P.3d 62, 68 (Okla. Civ. App. 2015) (quoting *State of Oklahoma ex rel. Oklahoma Department of Public Safety v. Gurich*, 238 P.3d 1, 4 (Okla. 2010)). The fact that one defendant may have caused a 4.5 magnitude earthquake or a 3.0 magnitude earthquake will not establish that the defendant caused any damage to a plaintiff. The court concludes that the dissimilarities within the proposed plaintiff class and proposed defendant class will, for all practical purposes (practicality being the touchstone under Rule 23), preclude the generation of common answers to plaintiffs' alleged common questions.

Id. at *5. The federal district court's reasoning applies equally to this case.

¶14 The present trial court similarly determined the commonality element could not be met and assessed: "We have 26 defendants in this matter with a whole bunch of different earthquakes and a whole bunch of different clusters." More specifically, each class member must show that a defendant's actions caused an earthquake which resulted in property damage to that member. If a defendant's actions caused an earthquake, damage by that defendant to a class member does not necessarily follow. Violation of one's duty does not automatically result in injuries or damages. The evidence needed to prove each Defendant's contribution to causing an earthquake will differ, as Plaintiffs will have to connect a given disposal well to causing a given earthquake and causing Plaintiffs' injuries or damages from that earthquake. With so many Defendants and nine clusters of earthquakes occurring from 2014 through 2017 in nine counties causing different injuries and damages, the proposed class questions cannot generate answers common to the class.

¶15 As Defendants' appellate brief observes, "different groupings of different Defendants allegedly contributed to different earthquakes at different times and to different degrees." As a result, no single set of facts will resolve whether any Defendant caused a given earthquake or resolve the putative class's claims against any Defendant. Plaintiffs claims arise from 28 earthquakes between March 2014 and August 2017. And although Plaintiffs group these 28 earthquakes into nine clusters, some of the clustered quakes occurred three years apart. According to Plaintiffs' amended petition, each cluster was caused by unique groupings of Defendants, unique groupings of water disposal wells, and unique volumes of wastewater disposal.

¶16 Without meeting the commonality requirement of § 2023(A)(2), Plaintiffs cannot maintain their proposed class, and if Plaintiffs cannot satisfy the requirements of § 2023(A), they cannot get to the § 2023(B) requirements. *Marshall Cty. v. Homesales, Inc.*, 2014 OK 88, ¶ 13, 339 P.3d 878 (before considering the § 2023(B) requirements, plaintiff must "first show that it can satisfy the requirements of" § 2023(A)).

¶17 Plaintiffs cite two cases to support their contention that the trial court should have granted class certification--*Cooper v. New Dominion*, Case No. 117, 281 (November 15, 2019) and *Gentry v. Cotton Elec. Coop., Inc.*, 2011 OK CIV APP 24, 268 P.3d 534. These cases do not persuade us to certify this class.

¶18 As explained by Defendants, the plaintiffs in *Cooper* asserted that *one* defendant caused three earthquakes "that occurred in a single location and during a three-day period in 2011." Defendants further described the *Cooper* case this way:

The *Cooper* plaintiffs sought to represent a class of Oklahomans who allegedly suffered damages as a result of those specific earthquakes. (*Id.* at 2-3). The trial court certified a limited "issue class" under 12 O.S. § 2023(C)(6) to determine whether the defendant's "wastewater operations caused the earthquakes in question, and if so, whether it is liable for the damages caused by the earthquakes." (*Id.* at 11.) In an unpublished opinion, the Court of Civil Appeals affirmed the district court's order certifying the class and noted that the common issue of causation would predominate the proceedings. Importantly, the *Cooper* court noted that the defendant raised objections to class treatment because the *amount* of each class member's damages would differ across the class. (*Id.* at 12.) However, the issue of damages was not certified for classwide treatment. (*Id.*)

¶19 Plaintiffs did not assert claims against one defendant regarding earthquakes occurring over a three-day period in approximately the same location, as the *Cooper* plaintiffs did. Rather, Plaintiffs assert claims against 23 defendants addressing nine clusters of earthquakes occurring over parts of four years with seismic activity occurring in numerous Oklahoma locations. The facts in *Cooper* fundamentally distinguish it from this case as they pertain to the class certification requirement of commonality.

¶20 In *Gentry v. Cotton Electric Cooperative, Inc.*, 2011 OK CIV APP 24, 268 P.3d 534, a property owner brought a class action against the electric cooperative alleging its defective transmission line caused a fire that destroyed 48 residences. The Court stated the pivotal question was straightforward: "[T]he cause of the fire is the central issue. If CEC was not responsible for the fire, that is the end of the matter. If CEC did cause the fire, what remains to be determined is the amount of each class member's damages." *Id.* ¶ 12. As stated by Defendants here in their appellate brief: "Where it would have been a simple matter to determine whether any of the 48 class properties . . . suffered damage as a result of the fire, determining whether any putative class member's alleged property damage or emotional distress arose from one or more of the 28 earthquakes at issue in this case would be far from simple." Unlike *Gentry*, the damages alleged in this case stem from several earthquakes occurring at different locations during different time periods caused by different combinations of Defendants. These cases simply do not support Plaintiffs' assertions that this case must or should proceed as a class action.

¶21 Plaintiffs also assert the trial court erred by striking their class allegations before having the opportunity to conduct class discovery. Section 2023(C)(1) states, "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." 12 O.S. Supp. 2013 § 2023(C)(1). And pursuant to its federal corollary in Rule 23(c)(1)(A)⁴ of the Federal Rules of Civil Procedure, the district courts have determined they have "authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained." *West v. Chapparral Energy, LLC*, 2018 WL 8264338, at *4 (2018). Because we may look to federal authority for guidance regarding the interpretation of § 2023, we conclude the trial court had the authority to consider Plaintiffs' class action allegations on the face of the first amended petition and to strike class allegations prior to discovery if the petition "demonstrates that a class action cannot be maintained." *Id.* at *7. We conclude, as did the trial court, that Plaintiffs' first amended petition fails to demonstrate class certification is appropriate.

CONCLUSION

¶22 This is not to downplay the seriousness and magnitude of the events giving rise to Plaintiffs' claims for class treatment. Plaintiffs' inability to establish the commonality requirement of 12 O.S. § 2023(A) necessary to certify a class for class action requires affirmance of the trial court's decision.

¶23 As a final matter, Plaintiffs alternatively request, in the event the trial court's decision is affirmed, that we enter an order "allowing the members of the class to file their individual claims as to the alleged nine areas of seismicity" consistent with Oklahoma law. We decline to address this issue for the first time on appeal,⁵ and we remand this issue to the trial court for its determination in the first instance.

¶24 **AFFIRMED AND REMANDED.**

BLACKWELL, J., and FISCHER, C.J. (sitting by designation), concur.

FOOTNOTES

JANE P. WISEMAN, PRESIDING JUDGE:

¹ We note it does not appear from the record that Defendant Wicklund Petroleum Corporation filed a response to Plaintiffs' motion for appropriate relief. It also does not appear Defendant Wicklund filed a motion to strike.

² Although we cite the 2020 supplement, this statute has not changed or been amended since September 10, 2013.

³ "Oklahoma's class action statute, § 2023, closely parallels Rule 23 of the Federal Rules of Civil Procedure. The Court may therefore look to federal authority for guidance regarding the interpretation of § 2023." *Cactus Petroleum Corp. v. Chesapeake Operating, Inc.*, 2009 OK 67, n. 8, 222 P.3d 12; see also *Marshall Cty. v. Homesales, Inc.*, 2014 OK 88, n. 6, 339 P.3d 878.

⁴ Federal Rule of Civil Procedure 23(c)(1)(A) provides: "Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."

⁵ "Nothing tendered here warrants a deviation from the general rule that bars from review issues raised for the first time by appeal." *Jernigan v. Jernigan*, 2006 OK 22, ¶ 26, 138 P.3d 539.

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Oklahoma Court of Civil Appeals Cases

Cite	Name	Level
<u>2004 OK CIV APP 28</u> , <u>87 P.3d 1106</u> ,	<u>DAVIS v. THE CITY OF TULSA</u>	Cited
<u>2011 OK CIV APP 24</u> , <u>268 P.3d 534</u> ,	<u>GENTRY v. COTTON ELECTRIC COOPERATIVE, INC.</u>	Discussed at Length
<u>2015 OK CIV APP 68</u> , <u>356 P.3d 62</u> ,	<u>STEED v. BAIN-HOLLOWAY</u>	Cited
<u>2018 OK CIV APP 65</u> , <u>429 P.3d 703</u> ,	<u>WHISENANT v. STRAT LAND EXPLORATION CO.</u>	Discussed

Oklahoma Supreme Court Cases

Cite	Name	Level
<u>2006 OK 22</u> , <u>138 P.3d 539</u> ,	<u>JERNIGAN v. JERNIGAN</u>	Discussed
<u>2009 OK 67</u> , <u>222 P.3d 12</u> ,	<u>CACTUS PETROLEUM CORP. v. CHESAPEAKE OPERATING, INC.</u>	Discussed
<u>2010 OK 7</u> , <u>230 P.3d 861</u> ,	<u>JENNINGS v. BADGETT</u>	Cited
<u>2010 OK 56</u> , <u>238 P.3d 1</u> ,	<u>STATE ex rel. OKLAHOMA DEPT. OF PUBLIC SAFETY v. GURICH</u>	Cited
<u>2014 OK 88</u> , <u>339 P.3d 878</u> ,	<u>MARSHALL COUNTY v. HOMESALES, INC.</u>	Discussed at Length

Title 12. Civil Procedure

Cite	Name	Level
<u>12 O.S. 2023</u> ,	<u>Class Actions</u>	Discussed at Length

