IN THE SUPREME COURT OF MISSOURI

PEGGY GREEN, et al.,	)	
	)	
Respondents,	)	
	)	
vs.	)	Appeal No. SC88780
	)	
FRED WEBER,	)	
	)	
Appellant.	)	

SUBSTITUTE BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

Note: Consistent with Appellant's brief, "LFA" will refer to the Appendix which was attached to the Supplemental Petition for Permission to Appeal. The "Appendix" is the material attached to the Appendix to this brief. This Appendix consists either of material that was attached to the Response to the Petition for Permission to Appeal, or exhibits to the evidentiary hearing that were not included by the Appellant.

Defendant/Appellant Fred Weber ("Weber") presented NO evidence to the trial court at the class hearing or any other time, despite sending subpoenas out to numerous class members. See LFA at 110. It put on no witnesses, presented no affidavits, and offered no exhibits.

By contrast, in addition to the testimony of the witnesses at the evidentiary hearing, the Plaintiff/Respondent Class ("the class") presented several affidavits, including one from an individual who lived more than a mile and a half from the quarry who indicated his problems with the quarry. See Appendix at 12. In addition, the map of the class presented as an exhibit at the evidentiary hearing indicated the vast majority of homes, and hence class members, were to the south of the quarry. See Appendix at 1.

In regards to the testimony by Mr. Knieriem on individual versus common questions, the actual testimony accurately reflects what the testimony was:

Q. So the key to this class action lawsuit is nuisance?

A. The lawsuit is filed as a nuisance.

Q. Nuisance would be individuals for each individually?

A. Yeah.

Q. So the issue that would be presented to the court with regard to each individual plaintiff, so to speak, was whether or not that particular individual suffered a nuisance as a result of the blasting?

A. Yes.

Q. And each one of those individuals would live a different distance from the quarry?

A. No doubt.

Q Depending on the underlying ground under them, they would have more or less shaking than someone else?

A. I doubt it.

Q. And for type of home they have would – could make a difference whether they were on a slab or a basement? Absolutely the type of construction would be different?

A. Absolutely.

Q. So each fact relates to each individual's damage would be distinct from the facts to their neighbor to the left or the right or two miles away?

A. That is incorrect.

Q. Why is that?

A. A nuisance claim is involved. It's almost like a personal injury claim in a way; but in a way it's not. You can assign a number and a jury can assign a number.

* * * * * * * * *

Q. What's the common question?

A. There are a whole lot of common questions. All of the liability claims are common. The damages claims are all, in a sense, common, because it's the same claim. Now the evidence that would indicate the damage for each claim, that may be different. But in terms of liability, in terms of whether or not a nuisance was suffered at all, that's all common claim.

LFA 106-8.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING CLASS CERTIFICATION UNDER RULE 52.08(b)(3) BECAUSE COMMON ISSUES PREDOMINATE THIS CASE

A. Standard of Review

Appellant Fred Weber ("Weber") is correct in its assertion that the appropriate standard of review is abuse of discretion. This means the ruling "must be clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Campise v. Borcherding*, 224 S.W.3d 91, 94 (Mo. App. 2007). Appellate courts will presume a decision granting class certification is correct, as the court can always change its mind later. *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 787-8 (Mo. App. 2006). As a result, here, the trial court is presumed to be correct, and that presumption can only be overcome if the trial court's decision shocks this court's sense of justice.

Weber seems to focus on two phrases: 1. that the certification must be supported by the record, and 2. there must be a rational basis for the ruling. A close examination of the three cases referred to by Weber demonstrates other court's reluctance to interfere with the decision of a trial court.

Dale v. DaimlerChrysler Corp., 204 S.W.3d 151 (Mo. App. 2006), involved a certification of the class by the trial court that was affirmed on appeal. The court held that proof for certification is satisfied if evidence exists <u>at all</u> to

support the certification. *Id.* at 164-5. The trial court did not certify a class in *Beatty v. Metro. St. Louis Sewer District*, 914 S.W.2d 791 (Mo. banc 1995), because the plaintiff never bothered to ask for a class action in any papers filed with the court. In *Harvell v. Goodyear Tire & Rubber Co.*, 2006 WL 1073067 (Okla. April 25, 2006), the court's sole concern was that the class attempted to pull in members from 37 different states. Such a class, the court noted, because of jurisdictional and legal standard concerns, would almost always be rejected.

B**. Standards for class certification**

Respondent class members ("the class") initially note that Weber never quarrels with the trial court's finding that the class met the requirements of Rule 52.08(a) in allowing a class action.

Turning to the Rule 52.08(b) issues, Weber errs in asserting that Plaintiffs' Petition was limited to class certification under Rule 52.08(b)(1). This was never asserted by the class at any time in front of any tribunal. Moreover, the language in the Plaintiffs' Third Amended Petition indicates that relief was sought under both 52.08(b)(1) and 52.08(b)(3). The relevant paragraph references two reasons: inconsistent adjudications and common questions of law and fact.

In addition, paragraph 8(c) of the Third Amended Petition specifically identifies common questions of law and fact for consideration. Evidence was adduced at the class certification hearing on the (b)(3) issue without objection. The trial court specifically found in its order of January 2, 2007 that the claim was

also brought under (b)(3). The trial court clearly did not err in considering the standards of both 52.08(b)(1) and (b)(3).

Citing federal trial courts, Weber asserts that the trial court must perform a "rigorous analysis" for class certification. That simply is not the standard in Missouri for appellate review of the trial court's decision. This is not to suggest the trial court should not carefully weigh the evidence; however, as courts have repeatedly noted, appellate courts should err on the side of allowing certification, as it is an order that can always be revisited by the trial court. *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 787-8 (Mo. App. 2006).

C. Common Questions

Weber, both here and throughout its Brief, attempts to argue the underlying merits of the case. The parties are simply not at that stage. The sole issue for this Court is procedural: whether the trial court abused its discretion in certifying the class. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007)

There is no doubt that this case, like many class action cases, could potentially have individual issues. That, however, is not the analysis that needs to be performed by this Court. Instead, this Court should examine whether the trial court abused its discretion in finding the common issues predominate – or even are sufficient – to allow a class action.

As appellate courts have noted, it is not this Court's job to tally the issues and see whether there are more common issues than individual issues. *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 789 (Mo. App. 2006). Instead, "even if other

important matters will need to be tried separately, a case may proceed as a class action if one or more of the central issues are common to the class and can be said to predominate." *Id.* at 790.

This case is relatively simple. The Defendant operates a quarry. "Operating" means they set off explosions during the day that shake the ground both nearby and at a substantial distance from the quarry. This occurs in an area that is now residential; in fact, the quarry is in the middle of the seventh largest city in Missouri. There will be two issues to decide in this case: is it reasonable for the defendant to set off these blasts in the middle of a residential area? If not, how much damage is that causing to the nearby residents?

Specifically, the trial court identified a number of common issues present in this case that, not coincidentally, track the elements of a private nuisance claim.[1] Weber's response in general is that these issues are "clearly" individual issues. The trial court disagreed. Each will be dealt with in turn.

The first element of a nuisance claim is whether the property was used as a residence. This was resolved by the definition of the class.

The second element is whether blasting occurred in close proximity to plaintiff's property. Weber has conceded this is a common issue. The issue therefore becomes whether Weber's blasting activity caused vibration ("noise" is also a technical term in blasting – the vibrations are measured by frequency and volume, just like sound) to pass through the earth on to the class property. The

[1] See MAI 22.06

class has alleged, and evidence was put forth, to say it was. Did the class introduce evidence that every single spot had vibration? Not only would that be impossible, but it is not necessary. *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 792 (Mo. App. 2006). Moreover, Weber put on NO evidence that would indicate that was not true.

The third element is whether Weber's use of its property as a quarry substantially impairs the class member's right to use their property. Weber's argument misses the mark on this element, as the issue is not "how much" blasting impairs the use of the property, which is an individual issue, but whether blasting substantially impairs the use of the property at all. "How much" is an element of damage, not liability. This third element of a nuisance claim is to avoid the *de minimis* inconveniences that are not meant for nuisance claims. Of interest is that the only evidence presented to the trial court is by affidavit, in which all affiants indicated more than a *de minimis* claim; and the testimony of Peggy Green, who indicated substantial problems with the blasting. If Weber wanted to introduce evidence on this issue, they could have; they did not. Plaintiff is not required to introduce evidence for every single class member.

The common nature of this issue is demonstrated by the case of *Sofka v. Thal*, 662 S.W.2d 502 (Mo. banc 1983). This Court, in analyzing the issue of substantial impairment, was not concerned with whether the Plaintiff was bothered. In fact, this Court specifically rejected Plaintiff's disturbance as a concern. "Rights and privileges as to the use and enjoyment of land are based on

the general standards of normal persons in the community and not on the standards of the individuals who happen to be there at the time." 662 S.W.2d at 508.

The fourth element is whether the blasting constituted an unreasonable use. Weber's analysis of this element misunderstands a nuisance claim. The issue here is not one of causation, nor of whether the use is unreasonable on the class member's property, as alleged by Weber. Instead, the issue is whether it is unreasonable on Weber's property. In fact, this will likely be the central issue in the case: whether it is reasonable to continue to blast in a quarry located in a densely populated area. Contrary to Weber's assertion, "the crux . . . of a nuisance case is unreasonable land use." *Tichenor v. Vore*, 953 S.W.2d 171, 176 (Mo. App. 1997).

The two cases Weber advances to support its position do not aid Weber. The first, *Wallace v. Grasso*, 119 S.W.3d 567 (Mo. App. 2003), involved claims for nuisance determined by an ordinance. The quote by Weber in its Brief from this case was *dicta*. But the case the *Wallace* court used as the source for that quote, and the case cited by Weber in its Brief, *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876 (Mo. banc 1985), bears the close attention of this Court. It is without question the seminal case in Missouri on nuisance law.

In fact, the dissent in that case highlights why the parties here are struggling with the elements of a nuisance claim, as such claims are described as a "legal garbage can," an "impenetrable jungle," and a "weasel word used as a substitute for reasoning" by various legal scholars. 687 S.W.2d at 885 (Welliver, J.,

dissenting). The majority, however, disagreed, and laid out a comprehensive map for nuisance claims in Missouri.

This Court proclaimed for the first time that in Missouri, the "crux of a nuisance case is unreasonable land use." 687 S.W.2d at 880. It then broke out two quasi-categories of nuisance, nuisance *per se* and nuisance-in-fact. In a way, the class asserts this case falls in the former category, while Weber asserts that a nuisance claim may only be brought in the latter category. In the nuisance *per se* category, this Court noted *Clutter v. Blankenship*, 144 S.W.2d 119 (Mo. banc 1940), which found "a funeral home in a residential neighborhood was held to be a nuisance," 687 S.W.2d at 880, a claim that is remarkably familiar. Whether a nuisance is brought as a nuisance *per se* or nuisance-in-fact, the *Frank* court made the specific point that the jury instruction in Missouri for nuisance is broad enough to encompass both types of claims. 687 S.W.2d at 882.

As a result, Weber's argument that one must only consider the effect on each class member's property is too narrow an interpretation of nuisance law in Missouri. While Weber could certainly find examples of cases that do this, no case has ever held that is the exclusive method of proof for a nuisance claim in Missouri. In fact, as noted above, this Court has held the opposite.

The court in *Doyle v. Fluor Corp.*, 199 S.W.3d 784 (Mo. App. 2006), also held just the opposite. In *Doyle*, the Court of Appeals confronted the same issue as the parties presented in the instant action: whether the "predominance" requirement of class actions – whether common issues predominate – was satisfied

in a private nuisance claim. In *Doyle*, the defendant made similar arguments as were presented by Defendant Weber in the instant case. The *Doyle* court discussed, and in footnote 1 of the opinion specifically rejected, the argument that issues such as presented here are, as a matter of law, individual issues. The lead smelter contamination in *Doyle* is no different than the blasting done here by Weber.

This is consistent with other states which have found that common issues prevail in class action settings such as are presented by the instant certification. In *Warner v. Waste Management, Inc*., 521 N.E.2d 1091 (Ohio 1988), the court addressed the issue of whether a dump site near a number of homes could constitute a private nuisance. The court held that in that case it would defer to the trial court's findings of predominance. In *Oakwood Homeowners Ass'n v. Ford Motor Co.*, 258 N.W.2d 475 (Mich App. 1977), the court faced an air pollution class action brought as a private nuisance suit. The court specifically held the issue of whether the air pollution had an impact on adjacent property was a common question. *Id.* at 479-80. This highlights the distinction made regarding the predominance requirement for nuisance claims – it is not "how much" the nuisance caused problems, but "whether" it caused problems. There is no requirement that every single home has problems to certify a class action. The evidence before the trial court identified a number of people who did have problems. Under the law, that is enough to affirm a class certification.

Contrary to Weber's assertion in its Brief, class counsel never conceded that these are all individual issue at the hearing. The quotes from LFA 106, lines 13-20 were merely agreeing that there were individual issues. The entire claim for nuisance – specifically, some of the issues relating to damages – will inevitably involve individual adjudications. But Weber's interpretation of that exchange was not only incorrect – it was never conceded that individual issues preclude class certification – but also directly contradicted when the entire exchange is taken into account. That entire exchange indicates just what the class argues here: the test is not whether the *entire* claim might have individual issues – inevitably, some plaintiffs will seek damages that are individual to their property – but rather whether common issues predominate. As the entire exchange showed, all the liability claims would be common, and would be predominate in this case.

The final issue is damages. While there will be individual issues of damage concerning vibration-induced cracking to some of the homes in the neighborhood, these are special damages. The general damages – those just of tolerating the nuisance – are not individual claims. There is nothing to prevent a jury here from assessing general damages to each class member for the physical discomfort of the members of the class as a common award.

The bottom line is that, as opposed to resolving the question of whether the land use is reasonable fifteen hundred times, it would be much easier to resolve it once. Consistently in its brief, Weber wants to try the underlying case at a phase in the case that is simply procedural. The sole issue here is whether the class

members met the requirements specified in the rule, not whether the class will ultimately prevail. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140 (1974).

This Court should bear in mind that ALL the federal cases cited by Weber were trial courts explaining why they chose NOT to certify a class action, or an appeals court agreeing with that decision. These courts acted within their discretion, and set forth reasons why they felt individual fact issues predominated within their unique factual contexts. The trial court here, despite Weber's extensive brief to the contrary (though a complete lack of actual *evidence)* elected to certify the class. Every Missouri case in the briefs presented to this Court essentially AFFIRMED the decision of the trial court. In fact, absent jurisdictional concerns, no Missouri court has ever found that a trial court abused its discretion in certifying a class. This Court should not act differently.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY FINDING THAT THE COMMON QUESTIONS WERE SUFFICIENT TO CERTIFY THE CLASS BECAUSE COMMON QUESTIONS WILL PROMOTE ECONOMY AND EFFICIENCY IN THIS CASE

Weber's Brief leads off with the complaint that as a result of the class certification, Weber would be deprived of an opportunity to present its "best" evidence: that there are people within the class who have never experienced vibrations. The class is at a loss as to how Weber would be prevented from

presenting that evidence. Again, the issue is whether the land use in this area is reasonable. The class fully expects that Weber will argue that the blasting is so mild that nobody should be bothered. The class is unclear how Weber would be barred from presenting this evidence.

Weber also asserts a number of defenses would be raised that are individual issues; thus, individual issues would overwhelm the common issues. First, in Missouri, as opposed to the federal decisions cited by Weber, individual affirmative defenses do not alone preclude class certification. *Craft v. Philip Morris Cos.*, 190 S.W.3d 368, 383 (Mo. App. 2005). Second, all the affirmative defenses are red herrings. The statute of limitations defense is precluded by the definition of the class. Coming to a nuisance and priority of occupation are actually the same thing; neither is a defense that is allowed in Missouri; instead, they are allowed as evidence of whether the use of the property was reasonable in equitable suits seeking an injunction. *See Edmunds v. Sigma Chapter*, 87 S.W.3d 21, 29 (Mo. App. 2002). In suits for damages, such as the instant suit, "coming to the nuisance" evidence is irrelevant. *Kellogg v. Village of Viola*, 227 N.W.2d 55, 57-8 (Wis. 1975). Finally, the failure to mitigate defense is just another way to argue individualized damages may exist in this case.

III. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY FINDING THE REQUIREMENTS OF 52.08(b)(1) WERE SATISFIED

Weber's only attack here focuses on Rule 52.08(b)(1)(B), which is the "limited fund" class action. This particular provision was never invoked anywhere in this suit; in fact, it would be improper to find this class action proper under that provision. Instead, the trial court discussed whether the class action was proper under 52.08(b)(1)(A).

The class notes that as a practical matter, though, as the trial court required notice pursuant to Rule 52.08(c)(2), the trial court found the class proper under 52.08(b)(3).

Weber's argument here can be boiled down to its claim that there is no showing of the risk of inconsistent or varying adjudications, citing *Texas Department of Transportation, et al. v. Barrier, et al.*, 40 S.W.3d 153 (Tex. App. 2001). However, the whole point of this nuisance claim is that the blasting is an unreasonable use of the property by Weber. Suppose 1500 lawsuits were filed, with half finding that blasting at the quarry was a reasonable use of the property, and half finding it was not. This supposition alone satisfies the (b)(1) requirement.

Texas Department of Transportation can be easily distinguished. The court's only stated concern in that case was the varying causes of flooding by multiple defendants. Here, there is only one cause, and one defendant, so *Texas Department of Transportation* does not apply. Interestingly, the Texas Court of Appeals remanded the case back to the trial court in light of a Texas Supreme Court decision imposing standards that do not exist in Missouri.

IV. THE CLASS GEOGRAPHIC AREA HAS A REASONABLE BASIS

First, Weber misunderstands the evidence needed to certify a class action. An evidentiary hearing is not even necessary; the trial court could have, if it so chose, certified the class simply on the pleadings and affidavits submitted. *Senn v. Manchester Bank of St. Louis,* 583 S.W.2d 119 (Mo. banc 1979). While the trial court may not have chosen to consider them, the class did both plead and submit affidavits indicating the problems in a wide area, including an affidavit from an individual who did reside almost two miles from the quarry. Appendix at 12. Requiring evidence by testimony, and the repeated mantra of "rigorous analysis," as Weber wishes this Court to solely consider, simply is not the law.

Second, it does not matter anyway, as the inquiry in defining the class is not to establish liability, but to determine whether it can be properly identified. *Craft v. Philip Morris Cos.,* 190 S.W.3d 368, 387 (Mo. App. 2005). As the Court also noted in *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 792 (Mo. App. 2006), it is not important that all, or even most, of the class members have claims. In the instant suit, there was evidence submitted to the court both by testimony and numerous affidavits as to why two miles was chosen. The trial court chose to accept the testimony, and there is therefore no abuse of discretion.

Third, it is ironic that Weber argues "the content of the calls is not contained in the record;" Weber's Brief at 37. The reason is that Weber's attorney

repeatedly objected to these statements as hearsay, which was sustained by the trial court. LFA 74.

Finally, Weber complains that there was little evidence concerning those areas to the north of the quarry. The simple reason for this is that there are few homes, and therefore few class members, to the north of the quarry.

CONCLUSION

The class therefore respectfully requests this Court affirm the trial court's decision.

APPENDIX

CERTIFICATE OF COMPLIANCE

David Knieriem, the undersigned attorney for Respondent, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Respondent's Brief:

1. Complies with Missouri Supreme Court Rule 55.03,
2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b),
3. Contains 4710 words, and 455 lines, excluding the cover page, according to the word count toll contained in Microsoft Word software with which it was prepared,
4. Contains zero lines of monospaced type in the brief (including Points Relied On, footnotes, signature blocks and cover page),
5. The disk accompanying this Respondent's Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free

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