IN THE SUPREME COURT OF MISSOURI

PEGGY GREEN, et al., INDIVIDUALLY and ON BEHALF OF THEMSELVES and ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs/Respondents,	)	SC88780
V.	)	
FRED WEBER, INC.	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court of the
City of St. Louis, Missouri
Cause No. 042-09188
The Honorable Thomas C. Grady

Transferred to the Supreme Court of Missouri
By Order of September 25, 2007

SUBSTITUTE BRIEF OF APPELLANT

HARTSTEIN LAW FIRM, P.C.
Lawrence F. Hartstein, #25638
130 S. Bemiston, Suite 608
Clayton, Missouri 63105
(314) 862-2220
(314) 862-2270 (FAX)
Attorney for Appellant
Fred Weber, Inc.

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JURISDICTIONAL STATEMENT

This cause of action was filed by Plaintiffs/Respondents Peggy Green, et al, Individually and on behalf of Themselves and All Others Similarly Situated against Defendant/Appellant Fred Weber, Inc. in the Circuit Court of the City of St. Louis, Missouri. Plaintiffs/Respondents seek to establish themselves and others as a Class for the purpose of obtaining damages from Defendant/Appellant claiming that blasting emanating from Defendant's/Appellant's quarry creates a private nuisance for which they are entitled to remuneration. A hearing was held before the Honorable Thomas C. Grady, Circuit Judge in the City of St. Louis, Division 2, on Plaintiffs'/Respondents' Motion for Class Certification. On January 2, 2007 the Honorable Thomas C. Grady entered an Order granting Plaintiffs'/Respondents' Motion for Class Certification.

Pursuant to Missouri Rule of Civil Procedure 84.035 Appellant filed a Petition for Permission to Appeal Judge Grady's Order. On February 5, 2007 the Missouri Court of Appeals, Eastern District granted Appellant permission to Appeal. A Notice of Appeal was filed with the Circuit Court of the City of St. Louis on February 15, 2007.

On July 17, 2007 the Missouri Court of Appeals, Eastern District entered its opinion reversing the judgment of the Trial Court. On July 27, 2007 Respondent filed in the Court of Appeals a Motion for Rehearing or in the Alternative Motion for Transfer which was denied on August 29, 2007.

On September 6, 2007 Respondent filed an Application for transfer in the Supreme Court which was sustained on September 25, 2007.

This appeal is properly before the Supreme Court of Missouri, pursuant to Missouri Rule of Civil Procedure 84.035 and 83.04.

STATEMENT OF FACTS

Note: The designation **(A)** throughout this Brief refers to the Appendix which is attached to this Brief. The designation **(LFA)** refers to the Appendix which was attached to the Supplemental Petition for Permission to Appeal which serves as the Legal File herein. A number following either of those designations will refer to the page number within that Appendix.

This cause of action was filed in the Circuit Court of the City of St. Louis. (LFA. 12) Plaintiffs therein, (respondents herein) are individuals who own residences in the City of O'Fallon Missouri. (LFA. 12) Fred Weber, Inc., defendant in the underlying suit (appellant herein) owns and operates a quarry located in O'Fallon, Missouri about one-third of a mile from the residences owned by the named plaintiffs/respondents. (LFA. 12, 69) The plaintiffs'/respondents' Third Amended Petition alleges that explosions at appellant's quarry "caused vibrations to travel through the earth, onto Plaintiffs' property, which substantially impairs Plaintiffs' use of the property, and has caused damage to their homes." (LFA. 12) Plaintiffs/Respondents further allege that the "use by the Defendant of its property is unreasonable, willful and wanton." (LFA. 13) Plaintiffs/Respondents do not seek injunctive relief to stop the operation of the quarry but seek only damages. (LFA. 14) Plaintiffs' Third Amended Petition seeks to maintain a class action on behalf of "all persons and entities that have a residence within two (2) miles of Defendant's quarry." (LFA. 13) Plaintiffs/Respondents further allege that "[d]efendant has created

this nuisance against all members of the class and therefore, the remedies sought in this action are applicable to all members of the class" and "[t]he prosecution of separate actions by the individual members of the class and the defense of separate actions against the individual members of the class . . . would create a strong risk of inconsistent and varying adjudications of the common questions of law and fact." (LFA. 14)

On September 11, 2006, a hearing was held before the Honorable Thomas C. Grady, Circuit Judge in the City of St. Louis, Division 2, on plaintiffs' Motion for Class Certification. A complete rendition of the relevant testimony from that hearing is hereinafter set forth.

Plaintiff Peggy Green, known as of the time of the hearing as Peggy Green Gianino (LFA. 66) owns property at 12 North Lang Drive, O'Fallon, Missouri. (LFA. 67) This property is south of Interstate 70 (LFA. 67) and the quarry of respondent Fred Weber Inc. is on the north side of Interstate 70 in St. Charles County. (LFA. 67) Ms. Gianino moved into the residence in August 1999. (LFA. 68) The residence is located in the O'Fallon Hills subdivision which contains approximately 410 homes. (LFA. 68) Adjacent to the O'Fallon Hills subdivision is a subdivision called Thornberry (LFA. 68) which has approximately 300 homes in it. (LFA. 69) Down the street on Bryan Road is a subdivision called Bryan Meadows. (LFA. 69) Ms. Gianino does not know how many homes are in Bryan Meadows. (LFA. 69) Ms. Gianino's home is directly across the highway from the quarry approximately one-third of a mile away from the quarry. (LFA. 69) When Ms. Gianino first moved into her residence she was not aware of explosions

that were occurring in the area because she worked full time during the day. (LFA. 69) When she changed jobs which allowed her to be home more during the day and early afternoon, she noted “something was going on”. (LFA. 69-70) She did not know what it was but at certain times of the day, she would feel her home shake and she could hear a noise. (LFA. 70) She described this as happening at least once a day, sometimes twice. (LFA. 70) She asked neighbors if they were aware of what was going on and they advised that there was a quarry across the highway where they blast for rock. (LFA. 70) This was approximately October 1999. (LFA. 70)

Ms. Gianino indicated that the blasting was very annoying. (LFA. 72) It would cause her to lose her balance. (LFA. 72) Once while taking a shower, she was thrown against the wall, and while being in her backyard, the ground would move underneath her feet. (LFA. 72) She would notice the explosions once or twice a day. (LFA. 17) Ms. Gianino began visiting the neighborhoods and knocking on doors. (LFA. 74) Not knowing how to deal with the problem, she went through O’Fallon City Hall because the quarry lies in O’Fallon. (LFA. 74) She started attending St. Charles County council meetings (LFA. 75) as well as O’Fallon Aldermen meetings. (LFA. 75) She made phone calls, got in touch with her State Representative and her Senator to bring the problem to their attention. (LFA. 75) At some point in time, she sent out notices of a meeting for people in the immediate area who might be affected by the blasting. (LFA. 75) The first meeting was attended by 50 to 60 people. (LFA. 76)

At the time of the hearing for class certification Ms. Gianino had moved from her residence in the O'Fallon Hills Subdivision and was living in Lake St. Louis. (LFA. 68, 78) She is not sure how far her present residence is from the quarry, maybe two miles. (LFA. 78) Ms. Gianino testified that the Petition defines the class as people with residences within two miles of the quarry (LFA. 81) but exclude businesses (LFA. 81) and schools (LFA. 81). She stated she picked the geographical area of two miles from the quarry because she "received phone calls from as far as two miles away", because Fizey Road is two miles away. (LFA. 82) Ms. Gianino indicated that she did not know how many residences were in the geographical area she defined but she knows that it is more than one thousand. (LFA. 83-84) Ms. Gianino does not know how many years of home ownership should be considered to be a member of the class. (LFA. 85) Ms. Gianino indicates that she has worked on changing the laws in St. Charles County regarding blasting. (LFA. 86) Ms. Gianino did not know, as of the date of the hearing, whether the blasting occurring at that time was sufficient to meet her standards. (LFA. 87) When she last lived near the quarry, the situation was much better than when she first moved in. (LFA. 87-88) Ms. Gianino stated she had no personal information as to how a blast would feel two miles to the south, east or west of the quarry at the time of a blast. (LFA. 88) Ms. Gianino stated that the blasting is not a nuisance to her at her current residence. (LFA. 90)

David Knieriem one of three of the attorneys of record representing the plaintiffs/respondents in the case also testified. (LFA. 94-111) In addition to himself, Mr.

Chris Goeke and Richard Fischer are attorneys for plaintiffs. (LFA. 95) He estimates that approximately 1,500 homes are in the geographical area of two miles from the defendant's quarry. (LFA. 95) He has attended a number of meetings involving both this quarry and other meetings where the quarry issues came up. (LFA. 96) He has attended meetings where upwards of 150 people were there and as a result, the present lawsuit was filed. (LFA. 96) Mr. Knieriem defined the class as "people who are homeowners or own residences within two miles of the quarry at the time the Petition was filed and five years previous." The five years was selected because that is the statute of limitations for a nuisance claim. (LFA. 96)

Mr. Knieriem indicated that the issue that would be presented to the Court with regard to each individual plaintiff was whether or not that particular individual suffered a nuisance as a result of the blasting. (LFA. 106) Mr. Knieriem, stated that proof of nuisance would be an individual issue (LFA. 106) and that the issue that would be presented to the Court with regard to each individual homeowner, as to whether or not that particular individual suffered a nuisance as a result of the blasting would be an individual issue. (LFA. 106) This determination would involve such individual questions as to the distance a person resided from the quarry, (LFA. 106) the ground underlying the property, (LFA. 106-107) the type of home, whether it was built on a slab or a basement and the type of construction. (LFA. 107)

Mr. Knieriem indicated that there were numerous common questions as follows: "All of the liability claims are common. The damages claims are all, in a sense, common,

because it is the same claim." (LFA. 108) He admitted that the case was brought as a private nuisance. (LFA. 108)

On January 2, 2007 the Honorable Thomas C. Grady entered an Order granting plaintiffs/respondents Motion for Class Certification. (A. 1) Appellant filed a Petition for Permission to Appeal that Order which was granted on February 5, 2007. (A. 12) Notice of Appeal was filed with the Circuit Court of the City of St. Louis on February 15, 2007. (A. 14)

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION UNDER RULE 52.08(b)(3) BY FINDING THAT THE QUESTIONS OF LAW OR FACT COMMON TO THE MEMBERS OF THE CLASS PREDOMINATE OVER QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS BECAUSE NO QUESTIONS OF LAW OR FACT "PREDOMINTATE" IN THAT THERE IS NO ISSUE, THE RESOLUTION OF WHICH WILL HAVE A PREDOMINATING EFFECT ON THE CLAIM OF THE CLASS AS A WHOLE.

CASES:

Craft v. Philip Morris Companies, 190 S.W.3d 368 (Mo. App. 2005)

In re "Agent Orange" Product Liability Litigation, 818 F. 2d 145 (2d Cir. 1987)

Wallace v. Grasso, 119 S.W.3d 567(Mo. App. 2003)

Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729 (Mo. banc 2004)

MISSOURI RULES OF CIVIL PROCEDURE

Rule 52.08

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II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION UNDER RULE 52.08(b)(3) BY FINDING THAT A CLASS ACTION IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY BECAUSE A CLASS ACTION IS NOT SUPERIOR TO OTHER AVAILABLE METHODS OF ADJUDICATION IN THAT THERE IS NO ISSUE, THE RESOLUTION OF WHICH WILL HAVE A PREDOMINATING EFFECT ON THE CLAIM AND NO ADVANTAGE OF ECONOMY OR EFFICENCY IS ACHIEVED.

CASES:

Barnes v. The American Tobacco Company, 176 F.R.D. 479 (E.D. Pa. 1997)

In re Ski Train Fire in Kaprun, Austria on November 11, 2000, 220 F.R.D. 195, (S.D. NY 2003).

State ex rel. American Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. banc 2003)

Waste Mgmt. Holdings, Inc. v Mowbray, 208 F.3d 288 (1st Cir. 2000)

MISSOURI RULES OF CIVIL PROCEDURE

Rule 52.08

III.

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION BECAUSE A FINDING THAT PLAINTIFFS/RESPONDENTS MET THEIR BURDEN OF PROOF REQUIRED BY 52.08(b)(1) IS AN ABUSE OF DISCRETIONS IN THAT THERE IS NO RISK THAT THE PROSECUTION OF SEPARATE ACTIONS BY INDIVIDUAL MEMBERS OF THE CLASS WOULD CREATE A RISK OF INCONSISTENT AND VARYING ADJUDICATIONS OR EVEN COULD RESULT IN INCONSISTENT ADJUDICATIONS OR THAT ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS WOULD AS A PRACTICAL MATTER BE DISPOSITIVE OF THE INTERESTS OF THE OTHER MEMBERS NOT PARTIES TO THE ADJUDICATIONS OR SUBSTANTIALLY IMPAIR OR IMPEDE THEIR ABILITY TO PROTECT THEIR INTERESTS.

CASES:

Kas v. Financial Gen. Bankshares, Inc., 105 F.R.D. 453 (D.D.C. 1985)

Texas Department of Transportation, et al. v Barrier, et. al.
40 S.W.3d 153, 159 (Tex. App. 2001)

MISSOURI RULES OF CIVIL PROCEDURE

Rule 52.08

IIII.

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION BECAUSE PLAINTIFFS/RESPONDENTS FAILED TO ESTABLISH A LOGICAL REASON FOR DEFINING THE GEOGRAPHICAL BOUNDARY OF THE CLASS IN THAT THE DISTANCE OF TWO (2) MILES FROM THE QUARRY IS NOT REASONABLY SUPPORTED BY THE EVIDENCE IN THE RECORD.

CASES:

Daigle v. Shell Oil Co., 133 F.R.D. 600 (D. Colo. 1990

Doyle, et. al. v Doe Run et. al., 199 S.W.3d 784 (Mo. App. 2006)

Harvell v. Goodyear Tire & Rubber Co., 2006 OK 24, No. 102, 128, 2006 WL 1073067 at *2 (Okla. Apr. 25, 2006)

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION UNDER RULE 52.08(b)(3) BY FINDING THAT THE QUESTIONS OF LAW OR FACT COMMON TO THE MEMBERS OF THE CLASS PREDOMINATE OVER QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS BECAUSE NO QUESTIONS OF LAW OR FACT "PREDOMINTATE" IN THAT THERE IS NO ISSUE, THE RESOLUTION OF WHICH WILL HAVE A PREDOMINATING EFFECT ON THE CLAIM OF THE CLASS AS A WHOLE.

A. The Standard of Review for Appeal of Class Certification

This Appeal is filed pursuant to Rule 52.08(f) and Rule 84.035 of the Missouri Rules of Civil Procedure. The determination of the class certification under Rule 52.08 lies within the sound discretion of the trial court. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 735 (Mo. banc 2004); State ex rel. American Family Ins. Co. v. Clark, 106 S.W.3d 483, 486 (Mo. banc 2003). This Court reviews an order granting or denying class certification for abuse of discretion. Union Planters Bank, 142 S.W.3d at 735, Koger v. Hartford Life Ins. Co., 28 S.W.3d 405, 410 (Mo. App. 2000). Because Rule 52.08 and Fed.R.Civ.P. 23 are identical, this Court may consider federal interpretations of

Rule 23 in interpreting Rule 52.08. Union Planters Bank, 142 S.W.3d at 735 n.5; Koehr v. Emmons, 55 S.W.3d 859, 864 n.7 (Mo. App. 2001).

Similarly stated in Dale v. DaimlerChrysler Corp., 204 S.W.3d 151, 163-164, (Mo. App. 2006);

> The determination of whether to certify a class action, under Rule 52.08 "ultimately rests within the sound discretion of the trial court." Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 735 (Mo. banc 2004); State ex rel. American Family Ins. Co. v. Clark, 106 S.W.3d 483, 486 (Mo. banc 2003). However, the court's certification, under Rule 52.08, **must be supported by the record.** Beatty v. Metro. St. Louis Sewer Dist., 914 S.W.2d 791, 795 (Mo. banc 1995). Hence, "[i]f the record does not demonstrate that the requisites for class action have been met, the trial court has abused its discretion." Harvell v. Goodyear Tire & Rubber Co., 2006 OK 24, No. 102, 128, 2006 WL 1073067 at *2 (Okla. Apr. 25, 2006). An abuse of discretion, in certifying a class, "occurs when a court bases its decision on an erroneous conclusion of law **or where there is no rational basis in [the] evidence for the ruling.**" Id. (emphasis added)

Federal cases (as well as the Missouri Supreme Court's Union Planters Bank and American Family Ins. cases referred to above) support review of an Order granting certification where doing so would avoid the cost from the unnecessary, inconvenient, and expensive litigation that would result if the trial court's Order was erroneous. The

federal cases support the proposition that immediate review of an order granting class certification is warranted for this reason, particularly if it appears that the trial court fully abused its discretion in certifying a class. See, e.g., Lienhart v. Dryvit Systems, Inc., 255 F.3d 138, 145 (4th Cir. 2001).

It bears to be repeated, as stated in Harvell, Id. "an abuse of discretion, in certifying a class, "occurs when a court bases its decision on an erroneous conclusion of law **or where there is no rational basis in [the] evidence for the ruling.**" (emphasis added)

B. Standard For Class Certification

Rule 52.08 (A. 11) sets forth the requirements for maintaining a class action in Missouri. To obtain class certification, Plaintiffs must first prove all of the four elements listed in Rule 52.08(a):

> (1) That the class is so numerous that joinder of all members is impracticable;
>
> (2) That there are questions of law or fact common to the class;
>
> (3) That the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) That the named plaintiffs will fairly and adequately protect the interests of the class.

Plaintiffs must also establish the requirements of one of the three subparts of Rule 52.08(b). The only allegation in Plaintiffs' Third Amended Petition (A. 12) which addresses Rule 52.08(b) is paragraph 8g of the Petition(A. 14) which states:

> The prosecution of separate actions by the individual members of the class and the defense of separate actions against the individual members of the class would create a strong risk of inconsistent and varying adjudications of the common question of law and fact.

Plaintiffs' Third Amended Petition (A. 12) appears to invoke only subpart 52.08(b)(1), however the trial court's Order relies most heavily on Rule 52.08(b)(3).

Rule 52.08(b)(3) requires Plaintiffs to prove that:

(1) Common questions of law or fact predominate over individual issues; and

(2) A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The requirements of Rule 52.08 are to be strictly enforced. See, e.g., Bishop v. Committee on Professional Ethics, 686 F.2d 1278, 1288 (8th Cir. 1982) (requirements for class certification are mandatory). Class certification is available only if the trial court is satisfied, after a rigorous analysis, that a plaintiff has pleaded and proven all the requirements in Rule 52.08. See Kas v. Financial Gen. Bankshares, Inc., 105 F.R.D. 453, 463 (D.D.C. 1985). In performing its rigorous analysis, a court looks at whether "common evidence could suffice to make out a prima facie case for the class." See Craft v. Philip

Morris Companies, 190 S.W.3d 368, 377 (Mo. App. 2005), (Motion for Rehearing and/or Transfer to Supreme Court Denied Sept. 22, 2005) (quoting Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)).

The party seeking class action certification bears the burden of proof. Coleman v Watt, 40 F.3d 255, 258 (8th Cir. 1994).

C. What are the Common Questions of Law or Fact as Related to the Elements of a Claim of Private Nuisance and do they Predominate?

As stated hereinabove, Rule 52.08 (A. 11) sets forth requirements for maintaining a class action in Missouri. In addition to meeting the prerequisites listed in Rule 52.08(a), the trial court, after a rigorous analysis of the evidence, must be convinced that the requirements of one of the subparts of Rule 52.08(b) have also been met. Kas, Id. at 463.

The trial court's Order finds that respondents' evidence was sufficient to met the requirements of Rule 52.08(b)(3). In light of the fact that the party seeking class action certification bears the burden of proof, Coleman v Watt, 40 F.3d 255, 258 (8th Cir. 1994), a review of the record will show that the Order of the trial court was an abuse of discretion.

In analyzing the issue of whether the class herein was properly certified, a review of the elements of the pleaded cause of action is essential. In order to evaluate the criteria set out in Rule 52.08, especially the criteria of 52.08(b)(3), it is necessary to identify and consider the relevant issues, which of course includes the elements of proof which will be required of the members of the putative class.

Respondents seek to recover only on the theory of private nuisance. (See paragraphs 8.c. and 8.h. of the Petition. (A. 13-14)) Respondents seek monetary damages

against appellant under this theory alleging appellant set off explosions at various time during normal business hours which caused vibrations to travel through the earth, entering respondents' properties thereby substantially impairing each class member's use of her/his property, and causing damage to their homes. (A. 12)

The elements of a private nuisance action are set out in MAI 22.06. Inserting the appropriate allegations from Respondents' Petition into those elements would result in the Respondents having to present proof on the following issues.

1. Plaintiff used his/her property as a residence, and

2. Defendant operated a quarry and conducted blasting at that quarry in close proximity to Plaintiff's residence; and,

3. The vibrations from the blasting at Defendant's quarry substantially impaired Plaintiff's use of his/her property; and,

4. **Such use** by the Defendant of its property was unreasonable. (emphasis added)

The trial court herein found that common questions predominate over individual issues. The trial court's predominance analysis consists of a single paragraph: (A. 8-9)

> The Court finds that common questions do predominate over individual issues. **The common issues involve whether Defendant's blasting activity caused noise and vibration to pass through the earth and through Plaintiffs' property, whether that blasting constituted an**

> **unreasonable, unusual, or unnatural use, whether that use substantially impaired Plaintiffs' right to peaceful enjoyment of their property, and whether Plaintiffs were damaged thereby.** While Defendants are correct that the determination and distribution of damages among class members will likely require some form of individualized determination, this alone is not a sufficient reason to deny class certification. See Clark, 106 S.W.3d at 488. "The need for inquiry as to individual damages does not preclude a finding of predominance." Id. (emphasis added)

The four common issues as set forth by the trial court very nearly mimic the elements of a cause of action for private nuisance.

An issue is common or individual depending on the nature of the evidence that must be adduced on that issue. As was stated in Craft at 382 "If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question."

Individual issues of causation are sufficient to preclude class certification. Barnes v The American Tobacco Company, 161 F.3d 127, 134 (3rd Cir. 1998). Citing the District Court in the same matter, Barnes v. The American Tobacco Company, 176 F.R.D. 479, 500 (E.D. Pa. 1997) states:

> To succeed on their products liability and negligence claims, Plaintiffs will also have to prove "causation," which the Court finds is not capable of determination on a class-wide basis in this case. Resolution of the "general causation" question of whether cigarettes are capable of being addictive "is not common under Rule 23(a)(2)." Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 677 (N.D. Ohio 1995). Unless it is proven that cigarettes always cause or never cause addiction "the resolution of the general causation question accomplishes nothing for any individual plaintiff." Id.; see also In re "Agent Orange" Product Liability Litigation, 818 F. 2d 145, 165 (2d Cir. 1987) (the "relevant question is not whether Agent Orange has the capacity to cause harm," but rather the "highly individualistic" question of whether "it *did* cause harm and to whom").

Following the reasoning from the above cases and applying it to the four elements of respondents' only pleaded theory of recovery clearly shows the fallacy in the trial courts findings.

The first element is "Plaintiff used his/her property as a residence." Obviously, this is an individual issue.

The second element is "Defendant operated a quarry and conducted blasting at that quarry in close proximity to Plaintiff's residence." This is a common issue, but as will be clearly explained herein, it is the only common issue and does not predominate.

The third element is "The vibrations from the blasting at Defendant's quarry substantially impaired Plaintiff's use of his/her property." This element actually requires two findings, both of which are individual. The first is the question of the amount of vibration, if any, which passes through any particular property. Proof on that element would contain numerous individual issues, including the location of the property, the makeup of the ground separating the quarry from plaintiff's property and the type of structure on plaintiff's property. The second question is whether that amount of vibration substantially impaired plaintiff's use of his/her property. Unless the vibration is the same everywhere and the makeup of the property is the same, each of those factors requires separate and individual proof. Any evidence which would be put forth by respondents as it relates to the nature, extent and frequency of the vibrations effecting any respondent's enjoyment of life, health and property would only relate to that particular individual. Respondents cannot begin to make out a prima facie case based on common evidence, as required by Craft v. Philip Morris Companies, 190 S.W.3d 368, 377 (Mo. App. 2005) but must individually adduce proof that their particular circumstances show an impairment of their use and enjoyment of their property. More importantly, resolution with regard to any particular property would not resolve the issue with regard to any other property. This issue is therefore individual and not common.

The fourth element is "**Such use** by the Defendant of its property was unreasonable." (emphasis added) It should initially be noted that this element does not say "**the use** by defendant of its property was unreasonable" but rather states "**such use**

by defendant of its property was unreasonable." Additionally, and further fortifying the importance of the selection of the word "**such**" is the fact that this element is listed fourth rather than third. Had it been listed third "such use" would be referring only to the use as described in paragraph second, that being that Defendant used the property as a quarry at which blasting was conducted. This clearly is not the intent. The focus of a nuisance claim is "on defendant's unreasonable interference with the use and enjoyment of plaintiff's land." Wallace v. Grasso, 119 S.W.3d at 567, 580; Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876, 880 (Mo. banc 1985).

The intent of "such use" includes not only the use as a quarry where blasting takes place, but in addition whether the vibrations caused by the blasting **substantially** impaired plaintiff's use of his/her property. Each Plaintiff, in this case, must prove **as to his property** that Defendant's use of its property was unreasonable. Accordingly, defendant's "unreasonable use" of its property must be measured by the interference that it causes to plaintiff's use and enjoyment of his/her property. This is an individual issue.

The reasonableness or unreasonableness of appellant's use of its property would not only be individual with regard to the location of each of the putative class member's property, but also very fact specific on that same issue with regard: (1) to the individual property owner's knowledge of the quarry at the time of the purchase of his property, (2) the length of time he owned the property, (3) the frequency of vibrations felt on the property, (4) the duration of the vibrations felt on the property, (5) the strength of the vibrations felt on the property, (6) the possibility that vibrations of those frequencies,

durations and strength could have caused any damage to the property based upon the type, manner of construction and age of the residence and (7) the nature of any other possible causes for damage to the property. Certainly the common issue that defendant operated a quarry within close proximity to plaintiff's property and the dates, times, and strength of the blasting do not "predominate" over the individual issues but are clearly dwarfed by the individual issues.

Mr. Knieriem, attorney for respondents, conceded during the hearing on the Motion for Certification that proof of nuisance would be individual and that the issue would be presented to the Court with regard to each individual homeowner, as to whether or not that particular individual suffered a nuisance as a result of the blasting. (A. 106, line 10 - 20) This determination would involve such individual questions as the distance a person resided from the quarry, (A. 106) the ground underlying the property, (A. 106-107) the type of home, whether it was built on a slab or a basement and the type of construction. (A. 107)

The above analysis of the elements which must be proven shows that 3 of the 4 elements are individual issues. The only common issue is defendant's actual use of the property for periodic controlled blasting. As will be further discussed later herein, this issue does not "predominate" as required by 52.08(b)(3). Accordingly, resort to a class action suit merely because of this one common issue achieves no economies or efficiencies, because each plaintiff will have to put on evidence of how and why the blasting unreasonably interferes with their own particular use and enjoyment of their

property. The class action vehicle will melt down into a series of individual "mini-cases" and trials with respect to the facts relating to each individual plaintiff's claim. The trial court's decision to certify the class was a clear abuse of discretion.

II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION UNDER RULE 52.08(b)(3) BY FINDING THAT A CLASS ACTION IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY BECAUSE A CLASS ACTION IS NOT SUPERIOR TO OTHER AVAILABLE METHODS OF ADJUDICATION IN THAT THERE IS NO ISSUE, THE RESOLUTION OF WHICH WILL HAVE A PREDOMINATING EFFECT ON THE CLAIM AND NO ADVANTAGE OF ECONOMY OR EFFICENCY IS ACHIEVED.

The Missouri Supreme Court has held that the purpose of a class action "is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without dilution of procedural safeguards for members of the class or the opposing party." State ex rel. American Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 489 (Mo. banc 2003). The trial court ignored this guiding principle.

Rule 52.08(b)(3)(2) requires a plaintiff to show that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The

trial court's Order addresses the requirement that a class action is a superior method of adjudicating this claim by stating:

> The Court further believes a class action is superior to other methods of adjudicating claims, including joinder of the claims of multiple property owner or separate trials of claims involving common issues of nuisance and causation. (A. 9)

Appellant does not dispute that the court has correctly set forth a statement of law, however such statement of law is not applicable to the facts in the present case.

As set forth in Argument Section I, three of the four elements of nuisance are individual issues. The common issue, (Defendant operated a quarry and conducted blasting at the quarry in close proximity to Plaintiff's residence) clearly does not predominate. Causation, in essence the third element of a private nuisance claim, (the vibrations from the blasting at Defendant's quarry substantially impaired Plaintiff's use of his/her property), has also been shown in Argument Section I to be an individual issue.

If this case were to proceed as a class action as ordered by the trial court (and nuisance and causation are treated and tried as common issues), appellant will be deprived of the opportunity to put on the best evidence in its defense, including but not limited to evidence that many individual property owners who reside within a two mile radius of the quarry have never experienced vibrations on their property, that others may have experienced only minimal vibrations that did not substantially impair the use of their property and yet as to others, the use of defendant's property is not unreasonable.

Further, the trial court's Order did not discuss affirmative defenses or comparative fault issues. The parties cannot litigate the various defenses that exist in this case with

common proof. In finding that common issues predominate, the trial court ignored the presence of individual defenses and comparative fault.

Affirmative defenses should be considered in making class certification decisions. Waste Mgmt. Holdings, Inc. v Mowbray, 208 F.3d 288, 295 (1st Cir. 2000) In re Ski Train Fire in Kaprun, Austria on November 11, 2000, 220 F.R.D. 195, (S.D. NY 2003). "A court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." Castano v American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996).

Barnes v. The American Tobacco Company, 176 F.R.D. 479, 502 (E.D. Pa. 1997) contains the following:

> Finally, the court found that affirmative defenses available to the defendant raised individual issues. [FN5] The court explained: "For example, the defense of assumption of risk requires this Court to examine whether each and every plaintiff was subjectively aware of the risk and/or danger.... In determining whether the statute of limitations precludes a plaintiff from suing on his claim, the Court necessarily would have to examine when plaintiff's injury accrued, and whether plaintiff knew or should have known of the injury and its cause. This is clearly an individual issue.... These issues clearly preclude certification."

Affirmative defenses and comparative fault issues in this case include, but are not limited to (1) statute of limitations, (2) coming to a nuisance, (3) priority of occupation,

and (4) failure to mitigate damages. These defenses all require individual inquiry, which includes: (a) when did the plaintiff purchase the property, (b) when did the plaintiff become aware of the existence of the quarry,

(c) when did the plaintiff first became aware that blasting was being done at the quarry, (d) when did the plaintiff first became aware of any damage to his or her property which was associated with the blasting, (e) when was the damage first capable of ascertainment, (f) what, if any actions were taken by plaintiff to mitigate damages, among others. Breedlove v. Ohio Dept. of Transportation, 598 N.E.2d 242, 253-54 (Ohio Ct. 1991) (finding that individual defenses such as statute of limitations, assumption of risk, and contributory negligence required case-by-case analysis in property damage cases).

This is not a case where only damages, or only certain affirmative defenses, require individual adjudication. Rather, most of the elements of the plaintiffs' prima facie case, plus the affirmative defenses, and comparative fault, can only be determined on a plaintiff-by-plaintiff basis. Whether a plaintiff's property experiences any vibrations, whether those vibrations impair plaintiff's use of the property or cause any property damage, as well as any defenses, and assessment of comparative fault are all individual issues which comprise virtually all of the significant issues in this case.

As a result a class action accomplishes nothing. Each so called mini-trial available to each plaintiff would require proof on every issue as previously described with the exception of the particulars relating to the dates, times and strengths of the blasts which

are a matter of record. A class action would in no way assist in the fair and efficient adjudication of the controversy.

The finding by the trial court that the respondents had met the requirement as set forth in Certification in Rule 52.08(b)(3)(2) is a clear abuse of discretion.

III.

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION BECAUSE A FINDING THAT PLAINTIFFS/RESPONDENTS MET THEIR BURDEN OF PROOF REQUIRED BY 52.08(b)(1) IS AN ABUSE OF DISCRETIONS IN THAT THERE IS NO RISK THAT THE PROSECUTION OF SEPARATE ACTIONS BY INDIVIDUAL MEMBERS OF THE CLASS WOULD CREATE A RISK OF INCONSISTENT AND VARYING ADJUDICATIONS OR EVEN COULD RESULT IN INCONSISTENT ADJUDICATIONS OR THAT ADJUDICATIONS WITH RESPECT TO INDIVIDUAL MEMBERS OF THE CLASS WOULD AS A PRACTICAL MATTER BE DISPOSITIVE OF THE INTERESTS OF THE OTHER MEMBERS NOT PARTIES TO THE ADJUDICATIONS OR SUBSTANTIALLY IMPAIR OR IMPEDE THEIR ABILITY TO PROTECT THEIR INTERESTS.

Respondents, having failed to meet the prerequisites of 52.08(b)(3) must therefore prove that they have met the standard set in section (b)(1)(A) or (b)(1)(B).

Rule 52.08(b)(1) states:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

The trial court's Order addresses respondents' proof relating to Rule 52.08(b)(1) as follows:

> Plaintiffs' petition alleges this class action is an appropriate method for litigating these claims because "the prosecution of separate actions by the individual members of the class and the defense of separate actions against the individual members of the class would create a strong risk of

inconsistent and varying adjudications of the common question of law in fact." If true, this would satisfy Rule 52.08(b)(1). (A. 8)

The trial court's Order appears to be stating that the only requirement of respondents to carry their burden of proof as it relates to Rule 52.08(b)(1) is to make an allegation that, if true, would satisfy the rule. As stated above, class certification is available only if the trial court is satisfied, after a rigorous analysis, that a plaintiff has pleaded **and proven** all the requirements in Rule 52.08. See Kas v. Financial Gen. Bankshares, Inc., 105 F.R.D. 453, 463 (D. D.C. 1985) The trial court's finding that respondents are only required to make allegations that if true would satisfy the rule is clearly an abuse of discretion.

The trial court's Order fails to address section 52.08(b)(1)(B). Respondents failed to present evidence to meet their burden relating to the contents of section 52.08(b)(1)(B).

Respondents allege a claim against appellant for private nuisance. (A. 12-14) Without reiterating the entire Argument Section I herein, suffice it to say that resolution of the nuisance issue will be very fact specific as to each plaintiff's property. Proof of, or failure of proof of a nuisance regarding any particular plaintiff, and/or any particular property would have no value as precedent as to any other plaintiff or property.

Separate suits would in no way unfairly affect each alleged class member because no significant fact determination relating to any individual class member would prevent other class members from proceeding with their case nor would it deny them the right to

submit proof on that same issue. Therefore it cannot be shown that prosecution of separate actions would create any risk of inconsistent or varying adjudications. Texas Department of Transportation, et al. v Barrier, et. al., 40 S.W.3d 153, 159 (Tex. App. 2001).

Further, the trial court cites nothing in the record other than the allegation in Plaintiffs' Petition to indicate that an adjudication of **any issue** with respect to an individual member of the class would as a practical matter be dispositive of any interests of any other member not a party to the adjudication or substantially impair or impede any other putative plaintiff's ability to protect his/her interests as required by Rule 52.08(b)(1)(B). Ruling that the respondents have put forth any proof that the elements of Rule 52.08(b)(1)(B) have been met is clearly an abuse of discretion.

As fully set forth in Argument I above, the only "common issue" in this private nuisance cause of action is the use to which appellant is putting the property, *i.e.* blasting. As all other issues are individual questions that can and will vary from individual plaintiff to individual plaintiff, there cannot be any risk of "inconsistent adjudications" since a finding on an individual issue is by definition particular to the facts of that individual's situation. Accordingly, as a matter of law, and using the same analysis set forth above, there cannot be any risk of inconsistent adjudications here. The finding that such a risk is present is an abuse of discretion.

IIII.

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING PLAINTIFFS'/RESPONDENTS' MOTION FOR CLASS CERTIFICATION BECAUSE PLAINTIFFS/RESPONDENTS FAILED TO ESTABLISH A LOGICAL REASON FOR DEFINING THE GEOGRAPHICAL BOUNDARY OF THE CLASS IN THAT THE DISTANCE OF TWO (2) MILES FROM THE QUARRY IS NOT REASONABLY SUPPORTED BY THE EVIDENCE IN THE RECORD.

Respondents must identify a logical reason relating to the appellant's activity for drawing the boundaries where they did in identifying the class. Daigle v. Shell Oil Co., 133 F.R.D. 600 (D. Colo. 1990). The class must consist of a discrete geographical group, readily identifiable and **reasonably related to the evidence of record.** Harvell, supra., Daigle Id., See also Doyle, et. al. v Doe Run et. al., 199 S.W.3d 784, 792, (Mo. App. 2006). Respondents have presented **no evidence** that there is any significance to, or rational basis for, selecting a geographical area of two miles from the quarry. Ms. Gianino testified that at the time of the hearing she lived in Lake St. Louis, "maybe two miles" from the quarry. (A. 78) She went on to state that while living in Lake St. Louis she experienced no problems at her residence and the blasting is not a nuisance where she presently resides. (A. 90) She further stated that she had never stood two miles to the north, south, east or west of the quarry at the time of a blast and has no personal information how a blast would feel at that distance. (A. 88)

The trial court's Order states;

> Plaintiff Green testified that the reason for limiting the class to homeowners within a two mile radius of the quarry was because over the several years she had been active in dealing with the issue she had been contacted by homeowners who considered the explosions a nuisance as far away as two miles from the quarry. The Court finds the class definition here bears a reasonable relationship to the evidence of record to date. (A. 4)

A review of the transcript does not support the finding that "she had been contacted by homeowners **who considered the explosions a nuisance as far away as two miles from the quarry**." (emphasis added) The testimony of Gianino was that she "received phone calls from as far away as two miles" (A. 82) and "because Fizey Road is two miles away." (A. 82) The content of those calls is not contained in the record. The record indicates that she spoke to hundreds of people, (A. 80) that she left fliers (A. 81) and for people to get a hold of her is as easy as calling Domino's to order a pizza. (A. 80) The content of her conversations with the people she spoke with, as well as the content of the fliers is not a part of the record. The fact that she received phone calls from "as far as two miles away" is not evidence that homeowners **as far away as two miles from the quarry considered the explosions a nuisance**. In fact the record is devoid of any such evidence.

The trial court's Order, in a footnote (A. 4) stated that "[I]n reaching its decision regarding class certification the Court did not rely on the affidavits submitted by

Plaintiffs in support of the motion." The trial court's Order is not based on any evidence that persons living in locations other than the immediate proximity of the named plaintiffs residences have experienced any vibrations on their property or that they considered the vibrations to be a nuisance. Additionally, respondents have presented no evidence to establish that persons living any distance to the **north, east or west** of the quarry have experienced any vibrations which traveled through the earth onto their property and substantially impair the use of the property and caused damage to their homes, or that persons living in any particular direction more than one third of a mile away from the quarry have experienced any vibrations which traveled through the earth onto their property and substantially impair the use of the property and caused damage to their homes.

Rigorous analysis clearly establishes that respondents' attempt to identify a logical reason relating to appellant's activity for drawing boundaries where they did in attempting to identify the class is **not reasonably supported by the evidence in the record**. Doyle, et. al. v Doe Run et. al., 199 S.W.3d 784, (Mo. App. 2006). The trial court abused its discretion in defining the class as it did in it Order.

CONCLUSION

For the foregoing reasons, appellant requests that the Court reverse the trial court's Order granting class certification as an abuse of discretion. Appellant further requests such other relief as this Court deems proper under the circumstances.

Respectfully submitted,

HARTSTEIN LAW FIRM, P.C.

_____
LAWRENCE F. HARTSTEIN, #25638
Attorney for Appellant/Defendant
130 South Bemiston Avenue, Suite 608
Clayton, MO 63105
(314) 862-2220
(314) 862-2270 (FAX)
hartsteinlaw.lfh@sbcglobal.net

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this Appellant's Brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 9,318 words, exclusive of the Sections exempted by Rule 84.06(b)(2) of the Missouri Rules of Civil Procedure based on the word count that is part of Microsoft Word. Additionally, the undersigned certifies that the diskette accompanying the brief has been scanned and is free of viruses.

HARTSTEIN LAW FIRM, P.C.

_____

LAWRENCE F. HARTSTEIN #25638
Attorney for Appellant
Fred Weber, Inc.
130 S. Bemiston, Suite 608
St. Louis, Missouri 63105
(314) 862-2220
(314) 862-2270 (FAX)

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing Appellant's Brief and one diskette were mailed, postage prepaid, this 29th day of October, 2007 to: Mr. Dave Knieriem, Mr. Christian J. Goeke and Mr. Richard Fischer, Attorneys for Respondents, 7711 Bonhomme Avenue, Suite 850, St. Louis, Missouri 63105.

HARTSTEIN LAW FIRM, P.C.

_____

LAWRENCE F. HARTSTEIN #25638
Attorney for Appellant
Fred Weber, Inc.
130 S. Bemiston, Suite 608
St. Louis, Missouri 63105
(314) 862-2220
(314) 862-2270 FAX

PEGGY GREEN, et al., individually and
On behalf of themselves and all others
Similarly situated,

Plaintiffs-Respondents

v.

FRED WEBER, INC.

Defendant-Appellant

APPENDIX OF APPELLANT
FRED WEBER, INC.

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