

**GARY CYGANEK and GEORGE GREENWOOD, Appellants v. A.J.'s WRECKER
SERVICE OF DALLAS, INC., VRC, LLC d/b/a VRC TOWING, LLC, VRC
MANAGEMENT, LLC, VEHICLE REMOVAL CORP., VSC, LLC d/b/a VSC
STORAGE, LLC, VSC MANAGEMENT, LLC, ANTONIO G. CARBONI,
INDIVIDUALLY, and LARRY WHITE, INDIVIDUALLY, Appellees**

No. 05-08-01346-CV

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

July 8, 2009, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication July 8, 2009.

PRIOR HISTORY: [*1]

On Appeal from the 193rd Judicial District Court, Dallas County, Texas. Trial Court Cause No. 05-03771.

COUNSEL: For APPELLANT: Margaret M. Mead, Levi G. McCathern, Dallas, TX.

For APPELLEE: Antonio Carboni, Seagoville, TX; James C. Mosser, Mosser Mallers PLLC, Dallas, TX; James C. Mosser, Mosser Hill PLLC Lawyers, Dallas, TX; Alexis Katz, Mosser PLLC Lawyers, Dallas, TX.

JUDGES: Before Justices FitzGerald, Lang, and Smith. ¹ Opinion By Justice Smith.

¹ The Honorable Bea Ann Smith, Justice, Court of Appeals, Third District of Texas at Austin, Retired, sitting by assignment.

OPINION BY: BEA ANN SMITH

OPINION

MEMORANDUM OPINION

Opinion By Justice Smith

This is an interlocutory appeal from an order denying appellants' motion for class certification. Concluding that appellants have not shown an abuse of discretion, we affirm.

I. BACKGROUND

Appellants Gary Cyganek and George Greenwood filed their original class action petition against several defendants in April 2005. They asserted that the defendants charged excessive and unlawful fees in connection with the towing of vehicles without the owners' consent. Greenwood alleged that A.J.'s Wrecker Service of Dallas, Inc. illegally towed and stored his car

without his consent in April 2003 and charged him fees in excess of legal limits. Cyganek alleged that VRC and VSC towed and stored his car without his consent in October 2003 and charged him fees in excess of legal limits. Cyganek and Greenwood filed a motion for class certification in January [*2] 2007, which the trial court denied.

In August 2008, Cyganek and Greenwood filed both a fifth amended class action petition and a second motion for class certification. In their fifth amended class action petition, Cyganek and Greenwood asserted claims for violations of the Texas Deceptive Trade Practices--Consumer Protection Act, negligence per se for violations of the Dallas City Code and Texas Occupations Code, conversion, fraud, negligent misrepresentation, civil conspiracy, and money had and received. The trial court denied class certification.

Cyganek and Greenwood timely filed their notice of interlocutory appeal.

II. STANDARD OF REVIEW

We review the trial court's denial of a motion for class certification for abuse of discretion. *Vincent v. Bank of Am., N.A.*, 109 S.W.3d 856, 864 (Tex. App.--Dallas 2003, pet. denied). The trial court may certify a class action if the plaintiff satisfies all the prerequisites found in *Texas Rule of Civil Procedure 42(a)* and meets at least one requirement of *rule 42(b)*. But Texas law does not require certification even when *rule 42* has been satisfied. *Id.* The word "may" in *rule 42(a)* is permissive, not mandatory. Even if certification would have been [*3] proper, a denial still may not be an abuse of discretion. *Id.* Thus, Cyganek and Greenwood face a "formidable task." *Id.* They must demonstrate both that they satisfied all the *rule 42* requirements for certification and that the trial court's refusal to certify was arbitrary and unreasonable under the facts and circumstances of the case. *Id.*

III. ANALYSIS

Cyganek and Greenwood raise two issues on appeal. First, they argue that the trial court abused its discretion

in denying class certification because they established all the requirements for a class action under *rule 42(a)* and *42(b)(3)*. Second, they insist their motion for certification was not untimely, as the defendants asserted in the trial court.

A. Requirements of *rule 42*

To maintain a class action, a plaintiff must show all four requirements of *rule 42(a)* and at least one of the three requirements of *rule 42(b)*. *Doran v. ClubCorp USA, Inc.*, 174 S.W.3d 883, 887 (Tex. App.--Dallas 2005, no pet.). Under *rule 42(a)*, the plaintiff must show (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 [*4] of the claims or defenses of the class, and (4) the class representatives will fairly and adequately protect the interests of the class. *TEX. R. CIV. P. 42(a)(1)-(4)*.

In the trial court, Cyganek and Greenwood argued that they satisfied both *rule 42(b)(2)* and *rule 42(b)(3)*. On appeal, however, they contend only that they satisfied *rule 42(b)(3)*, so we limit our discussion to that rule. Under *rule 42(b)(3)*, the plaintiff must show that common questions of law or fact predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *TEX. R. CIV. P. 42(b)(3)*.

The rule identifies several factors that are pertinent to the *rule 42(b)(3)* analysis, specifically (1) the interest of the class members in individually controlling separate actions, (2) the extent and nature of any litigation concerning the controversy already commenced by or against class members, (3) the desirability or undesirability of concentrating the litigation in the particular forum, and (4) the difficulties likely to be encountered in the management of a class action. *TEX. R. CIV. P. 42(b)(3)(A)-(D)*. "Courts [*5] must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

Rule 42(b)(3)'s predominance requirement is one of the most stringent prerequisites to class certification. *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007). We determine if common issues predominate by identifying the substantive issues that will control the outcome of the litigation, assessing which issues will predominate, and determining if the predominating issues are, in fact, those common to the class. *Bernal*, 22 S.W.3d at 434. The test for predominance is not whether common issues outnumber individual issues, but whether common or individual issues will be the object of most of the efforts of the

litigants and the court. *Id.* "In effect, the exacting standards of the predominance inquiry act as a check on the flexible commonality test under *Rule 42(a)(2)*." *Id.* at 435. Courts often consider the predominance requirement first because it is such a stringent requirement. *See, e.g., id.* at 433.

The plaintiff bears the burden of showing that the requirements of *rule 42* [*6] are satisfied. *GMAC Commercial Mortgage Corp. v. Tex. Bay Oaks Ltd. P'ship*, No. 05-04-00899-CV, 2005 Tex. App. LEXIS 6857, 2005 WL 2031774, at *3 (Tex. App.--Dallas Aug. 24, 2005, no pet.) (mem. op.). Although a party seeking class certification is not required to make an extensive evidentiary showing, it cannot merely allege that the action meets the requirements of *rule 42*; it must show at least some facts to support certification. *Lebron v. Citicorp Vendor Fin., Inc.*, 99 S.W.3d 676, 679 (Tex. App.--Eastland 2003, no pet.).

B. Application of the rule to the facts

Cyganek and Greenwood proposed two separate subclasses in their second motion for class certification. The first subclass, represented by Cyganek, was defined as follows:

All persons or entities, excluding any member of the Plaintiffs counsel's law firm and any sitting member of the judiciary, that, during the period from April 19, 2001 until the present, had vehicles weighing not more than 10,000 pounds towed in the City of Dallas, Texas, without their consent, and were charged by VSC, LLC, VRC, LLC or Vehicle Removal Corp. one or more of the following fees: 1) towage fees in excess of \$ 95.00 as set forth in Dallas City Code Sec. 48A-43; or 2) any [*7] fee in addition to a towage fee authorized by the Dallas City Code, or a storage, impoundment, preservation or notification fee lawfully charged under the Vehicle Storage Facility Act. Excluded from this Class is any claim for property damage against Defendants resulting from the illegal towage and storage of their vehicles.

The Greenwood subclass was similarly defined, substituting A.J.'s Wrecker Service of Dallas, Inc. as defendant. Both subclasses claim DTPA violations, violations of the Dallas City Code and Texas Occupations Code, conversion, fraud, negligent misrepresentation, civil conspiracy, and money had and received.

We begin our analysis with the predominance requirement of *rule 42(b)(3)* because it is dispositive in this case. To determine whether common or individual issues predominate, we identify the common questions of law or fact. Appellants argue that this case presents ten common questions of law or fact:

1. whether appellees charged class members excessive and unlawful fees;
2. what fees are permissible by law;
3. whether appellees breached an agreement with the class to charge only lawful fees;
4. whether appellees conspired to charge excessive and unlawful fees;
5. whether [*8] appellees have been unjustly enriched by charging the class members excessive and unlawful fees;
6. whether appellees hold money that in equity, justice, or law rightfully belongs to the class members;
7. whether appellees committed fraud by charging the class members unlawful fees;
8. whether appellees committed negligent misrepresentation by charging the class members unlawful fees;
9. whether appellees committed negligence per se by charging the class members unlawful fees; and
10. whether the class members have suffered damages.

We conclude, however, that most of these issues are not truly common issues, i.e., issues subject to generalized, class-wide proof. The principal common question is the second item: how much appellees could legally charge the class members for towing, storage, and any other services rendered. The trial court reasonably could have concluded that this common question will not be the object of most of the efforts of the litigants and the court. Indeed, the question appears to be fairly straightforward, and the record does not show any disagreement among the parties on this question.

All the other questions, with the possible exception of whether there was a conspiracy [*9] among the appellees, require individualized proof. The question of how much each class member actually paid in towing and other fees is necessarily an individualized question. Appellants' own evidence tends to show that some of the

defendants charged different motorists different towing fees, ranging from \$ 100 to \$ 450. Appellees have also pointed out that some of their defenses will require individualized consideration by the jury. They argue that some of the class members may have consented, whether expressly or implicitly, to having their vehicles towed, and that consent would negate the applicability of the Dallas City Code's limitations on the amount of towing fees. Determination of whether a class member implicitly consented to a tow would require individualized consideration by the jury.

Appellees suggest that some class members may have recovered their damages already by invoking a streamlined judicial procedure provided by the occupations code. This, too, would be a defense requiring individualized consideration by the jury. Finally, the trial court reasonably could have concluded that appellants introduced still more individualized issues when they pleaded claims such as [*10] fraud and money had and received. *See Stonebridge Life Ins. Co., 236 S.W.3d at 207* (observing that some authorities hold claims for money had and received are inherently uncertifiable because they necessitate individualized inquiries); *Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 693-94 (Tex. 2002)* (holding that plaintiffs failed to show how they could prove reliance element of fraud on class-wide basis instead of individualized basis).

The *Bernal* case is instructive. *Bernal* was a mass-tort case. After a single explosion at a refinery in Corpus Christi, over 900 claimants attempted to bring a class action against Southwestern Refining Company for their resulting personal injuries. *22 S.W.3d at 428-29*. The trial court certified the case as a class action, the court of appeals modified the certification order and affirmed as modified; the supreme court reversed because common issues did not predominate over individual issues. *Id. at 428*. The supreme court acknowledged that the claimants presented some common issues, such as whether Southwestern was legally responsible for the explosion and whether the materials released by the explosion were capable of causing the injuries claimed. [*11] *Id. at 436*. But these common issues were outweighed by the necessity of individualized proof of other issues, such as whether each class member was exposed to released materials, whether the exposure proximately caused harm to each class member, what other factors caused the alleged harm to each class member, and what each class member's damages were. *Id. at 436-37*.

The instant case presents an even weaker case for predominance than *Bernal* because the class members' alleged damages were not caused by a single event that can be assessed on a class-wide basis for liability purposes. Instead, the alleged damages were caused by a multiplicity of separate and distinct acts by multiple appellees. Accordingly, the trial judge reasonably could

have concluded that the common issues presented in this case were minimal and were outweighed by the individual issues.

Additionally, the trial court may not have been persuaded that a class action was a superior method for resolving this controversy. Appellants insist that a class action is necessary to achieve justice because the small value of the individual class members' claims makes it unlikely that they will press their claims and thereby deter [*12] appellees from charging illegal and excessive fees. They also contend that it would be inefficient to require the class members to proceed individually because the cost to the judicial system of separately adjudicating each claim would be substantial. In response, the appellees note that the legislature has provided a streamlined procedure for aggrieved motorists to challenge the charging of excessive fees in justice court. See *TEX. OCC. CODE ANN. §§ 2308.451 - .460* (Vernon Supp. 2008). The trial court reasonably could have concluded that this procedure was at least as fair and efficient as a class action would be. Moreover, appellants do not cite any place in the record where they propose a trial plan demonstrating how this class action could be fairly and efficiently tried. "Although the proponent of class certification is not obligated to submit a proposed trial plan, in the absence of such a plan it is difficult to conclude the trial court's refusal to certify was legally unreasonable in light of the facts and circumstances of the case." *Doran, 174 S.W.3d at 889 n.1* (internal quotations and citation omitted).

Appellants rely on *Loneragan v. A.J.'s Wrecker Service of Dallas, Inc., No. 3:97CV1311D, 1999 U.S. Dist. LEXIS 11190, 1999 WL 527728 (N.D. Tex. July 8, 1999) [*13]*, *aff'd, 200 F.3d 816 (5th Cir. 1999)*, an unpublished opinion in which a federal district court certified a class in a similar lawsuit against several towing companies. *Loneragan* does not turn the tide in appellants' favor. Because we review an order denying class certification under an abuse-of-discretion standard, a decision *granting* class certification has only limited persuasive value. That is, the question presented is not whether the trial court reasonably could have granted certification on this record, but whether it acted arbitrarily and unreasonably by failing to do so. We conclude that the trial court reasonably could have resolved the predominance issue contrary to the *Loneragan* decision.

The *Loneragan* court concluded that "whether the

fees that the Towing Defendants charged in fact exceeded the amount permitted by law" was a "common question of fact" that predominated over the individual determinations of how much injury each class member suffered. *1999 U.S. Dist. LEXIS 11190, 1999 WL 527728, at *3, 7*. But, as discussed above, the only truly common question is the legal issue of how much appellees could legally charge for their services. The factual [*14] question of how much each class member was charged is an individual question. In *Loneragan*, the trial court found that individualized proof "will not necessarily be difficult or lengthy." *1999 U.S. Dist. LEXIS 11190, [WL] at *6*. On this record, the trial court reasonably could have concluded that litigating individual defenses and individual charges would consume more effort and more judicial resources than the common question of how much appellees were legally permitted to charge. Also, the *Loneragan* court did not analyze the specifics of the various state causes of action and whether particular elements, such as reliance, could raise additional individualized issues. Finally, although *Loneragan* considered the device of a class action to be superior to litigation of individual claims "in a low-jurisdiction forum like a Texas justice court," *1999 U.S. Dist. LEXIS 11190, [WL] at *7*, we conclude that the trial court in this case reasonably could have weighed the balance differently.

C. Conclusion

The trial court reasonably could have concluded that appellants did not adequately demonstrate predominance and superiority as required by *rule 42(b)(3)*. Accordingly, we conclude that the trial court did not abuse its discretion by denying appellants' second [*15] motion for class certification. Because we overrule appellants' first issue on appeal, we need not address the timeliness of their second motion for class certification.

IV. DISPOSITION

For the foregoing reasons, we affirm the trial court's order denying appellants' second motion for class certification.

BEA ANN SMITH

JUSTICE, ASSIGNED