NOT DESIGNATED FOR PUBLICATION

WAYNE VINNETT, INDIVIDUALLY AND AS A REPRESENTATIVE OF A CLASS OF THOSE SIMILARLY SITUATED

VERSUS

ST. CHARLES PARISH DEPARTMENT OF WATER WORKS, DISTRICT NUMBER 1 AND XYZ INSURANCE COMPANY

NO. 02-CA-383

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

COURT OF APPEAL
FIFTH CIRCUIT

FILED OCT 16 2002

CONSOLIDATED WITH

DEAN GAUTREAUX, AND HIS WIFE, KAREN CRAWFORD GAUTREAUX

VERSUS

PARISH OF ST. CHARLES, ET AL

NO. 02-CA-384

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

CONSOLIDATED WITH

SHELANE SEARS, ET AL

VERSUS

ST. CHARLES PARISH DEPARTMENT OF WATER WORKS DISTRICT 1 EAST BACK, ST. CHARLES PARISH WATER WORKS AND PARISH OF ST. CHARLES

NO. 02-CA-385

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE 29TH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 39,787 c/w 41,016 c/w 40,258, DIVISION "E"
HONORABLE ROBERT A. CHAISSON, JUDGE

OCTOBER 16, 2002

THOMAS F. DALEY
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
Thomas F. Daley, and Clarence E. McManus

HARRY T. WIDMANN
Two Lakeway Center, Suite 590
3850 North Causeway Boulevard
Metairie, Louisiana 70002
ATTORNEY FOR PLAINTIFFS/APPELLANTS,
Wayne Vinnett, et al

ALAN A. ZAUNBRECHER
BRETT M. BOLLINGER
3850 N. Causeway Boulevard
Lakeway II - Suite 1070
Metairie, Louisiana 70002
ATTORNEYS FOR DEFENDANTS/APPELLEES,
St. Charles Parish Department of Waterworks

IRWIN, FRITCHIE, URQUHART,
& MOORE, L.L.C.
GUS A. FRITCHIE III
BENNETT H. H. BIEVER
400 Poydras Street, Suite 2700
New Orleans, Louisiana 70130
ATTORNEYS FOR DEFENDANTS/APPELLEES,
International Insurance Company

RICHARD P. IEYOUB, ATTORNEY GENERAL
HENRY S. PROVOSTY, T.A.,
WALTER R. WELLENREITER,
SPECIAL ASSISTANT ATTORNEYS GENERAL
OATS & HUDSON
530 Natchez Street, Suite 200
New Orleans, Louisiana 70130
ATTORNEYS FOR DEFENDANT/APPELLEE,
State of Louisiana through the Department
of Health and Hospitals, Office of Public Health

AFFIRMED

On April 19, 1992 employees of the St. Charles Parish Water Department (St. Charles) drew water samples from 26 locations on the Eastbank of the Parish's portable water system. Sixteen of the samples were from sites between the water treatment plant and the Jefferson Parish boundary. Five of those sixteen samples were positive for total coliform. This constituted a violation of the maximum contamination level (MCL) for drinking water set by the Environmental Protection Agency (EPA). Accordingly, the Louisiana Office of Public Health required St. Charles to publish a public notice of the water contamination.

The present class action matter was filed on behalf of residents and non-residents who suffered injury or illness as a result of coliform contamination of the drinking water. Named as defendants were St. Charles Parish, its insurer, International Insurance Company, and the State of Louisiana through the Department of Health and Hospitals, Office of Public Health (OPH). OPH runs the State lab for testing drinking

water and is charged with overseeing the performance of parish water systems. A hearing for class action certification was held on July 2, 2001. The trial court "Denied" the Motion to Certify the Class.

Plaintiffs appeal, assigning several Assignments of Error:

1) The trial court failed to perform its gatekeeper function by qualifying Rodney Vincent as an expert in "production, treatment, and distribution of drinking water" despite an absence of proof of his competency to testify as to those matters;

2) The trial court committed an error of law by allowing Dr. Mary Ford to testify, in that her expertise was limited to "drinking water microbiology laboratory inspector," which was not relevant to the case;

3) The court erred as a matter of law by allowing Rodney Vincent and Dr. Mary Ford to render opinions beyond the scope of their alleged expertise;

4) The trial court erroneously found a lack of commonality in the claims, based upon its misinterpretation of the very same scientific proof it cited as the foundation for its ruling, resulting in the Court drawing a conclusion utterly unsupported by scientific evidence; and

5) The court clearly abused its discretion by denying class certification.

Plaintiffs assign as the first error that "the trial court failed to perform its gatekeeper function by qualifying Rodney Vincent as an expert in 'production, treatment, and distribution of drinking water' despite an absence of proof of his competency to testify as to those matters." Though the plaintiffs' brief does not mention the case by name, their use of the term "gatekeeper" suggests that the court failed to evaluate the testimony of Rodney Vincent under the standards prescribed by the U.S. Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). We note that the plaintiffs never challenged Vincent as an expert in any pre-hearing motions. They did not ask for a Daubert hearing prior to Mr. Vincent's testimony qualification as an expert. Plaintiffs

objected to Mr. Vincent's qualification as an expert following his voir dire on the grounds that he held no certification. The trial court accepted Mr. Vincent as an expert in the field of production, treatment, and distribution of drinking water, but subject to plaintiffs' continuing objection to any opinion he might offer.

This court stated in State v. Ledet, 00-11 (La. App. 5 Cir. 7/30/01), 792 So.2d 160:

> The general rule for admissibility of expert testimony is set out in LSA-C.E. art. 702, which provides:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> The decision whether to reject or accept the person as an expert falls to the great discretion of the trial court, whose rulings will not be disturbed absent an abuse of that discretion. (cites omitted.)
>
> In State v. Foret, 628 So.2d 1116, 1121-1131 (La.1993), the Louisiana Supreme Court examined and adopted the United States Supreme Court's established standard for the admission of scientific evidence in Daubert, supra. In Daubert, the Supreme Court held that Federal Rules of Evidence 702, rather than the "general acceptance" standard established by Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C.Cir.1923), controls the admissibility of expert scientific evidence in federal court. Under this standard, the trial court is required to act in a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable." Id.
>
> Scientific evidence should be admitted whenever the court's balance of the probative value and the prejudicial effect results in a determination that the evidence is reliable and helpful to the triers of fact. Admission of the scientific evidence is within the discretion of the trial judge. (cite omitted.)

After testifying as to his education and work experience Mr. Vincent was accepted by the trial court as an expert in the "production, treatment, and distribution of drinking water. His testimony established that he has been awarded a degree in Civil Engineering and has been employed with the State Department of Health and Hospitals

for 26 years. He currently is the Chief Engineer for the State of Louisiana, Office of Public Health. Previously, until 1992, he had been deputy Chief Engineer for the New Orleans district, responsible for all field administration involving administration of the Safe Drinking Water Program. In that position, he was involved day-to-day with the water distribution systems of 11 parishes. Though his current role is more policy, guidance, regulations, and personnel, his office oversees production, treatment, and distribution of drinking water for the State. He had also been involved in water quality testing during his tenure with the Department.

On cross, Vincent stated that he is not an operator of a water treatment plant, nor has he been certified as one, though he is a licensed civil engineer. He felt that his status as a registered professional engineer qualified him to design and certify the design of production facilities, treatment facilities, and distribution systems for drinking water systems. He was not involved in the laboratory.

We find that Mr. Vincent was qualified to render opinion testimony regarding the production, treatment, and distribution of drinking water, under LSA-C.E. art. 702, based on his education and his job experience. Therefore, the trial court did not err in qualifying him as an expert nor in admitting his testimony.

In their second assignment, plaintiffs claim "the trial court committed an error of law by allowing Dr. Mary Ford to testify, in that her expertise was limited to 'drinking water microbiology laboratory inspector,' which was not relevant to the case." Plaintiffs argue that the certification issue did not require the expertise of a laboratory inspector, nor did Dr. Ford have the expertise to know *why* a laboratory sample might be positive, and finally, that Dr. Ford did not have any expertise or knowledge upon which to testify regarding whether the presence of five positive

samples from the twenty-six samples taken meant that the entire distribution system was contaminated.

Dr. Mary Ford testified that she was the Assistant Director of the Laboratory Services Division for the State of Louisiana, Office of Public Health. She held a Ph.D. in microbiology. She was certified by the Environmental Protection Agency (EPA) as a Microbiological Drinking Water Laboratory Certification Officer. Since 1969, she'd been employed involving water quality and water testing. In her current position, she testified she was responsible for all technical procedures in all testing of water in the State public health laboratories. She testified that she is familiar with the current procedures for testing potable water, as well as the procedures that were in place in 1992 at the time of this incident. She is also familiar with all the EPA and State regulations for water testing. Dr. Ford testified regarding the tests performed on the samples at issue, though she did not participate in the actual testing on these particular samples. Five of sixteen water samples tested positive for total coliforms, which were described by various experts at the hearing as "sentinel" organisms, meaning that their presence could mean that the water was contaminated by coliforms and other organisms. Because the total coliform test was positive on five samples, those samples were retested for "fecal" coliforms, which were described as coliform bacteria from the feces of humans or animals. The fecal coliform tests on the five samples were negative. Dr. Ford testified that her laboratory's testing methods are all EPA approved. She believed that the samples were contaminated themselves, but not the water distribution system, because if the coliform were present in the water system in April of 1992, it would not simply disappear on its own. She felt that if the contamination were in the distribution system, the map would have revealed a cluster of positive sample locations rather than the scattered locations of the positive samples.

She also cited the fact that further follow-up testing of the distribution system revealed no other total coliform contamination of the new samples. She felt it was possible that the collector contaminated the samples, though she could not prove that. A fact in dispute in this case is the meaning and interpretation of the five positive samples. Based on Dr. Ford's education, expertise, and experience in water testing, we find that the court did not err in qualifying Dr. Ford as an expert and admitting her testimony.

Plaintiffs argue that the court erred as a matter of law by allowing Rodney Vincent and Dr. Mary Ford to render opinions beyond the scope of their alleged expertise. Specifically, Mr. Vincent was asked questions concerning the interpretation of the five positive samples and the impact on water quality throughout the St. Charles system. He was asked about the possible source of the contamination. Plaintiffs' counsel objected that this was a microbiological question beyond his expertise, but Mr. Vincent disagreed, claiming it was a distribution question. His job was to make sure that no mechanical problems or failures were the source of the contamination. He found none in the system and stated that he had no idea what caused five samples to be positive nor what that source might be, having ruled out mechanical problems or failures. We find that Mr. Vincent's testimony in this regard did not exceed the scope of his expertise.

Dr. Ford was asked, by the court, whether the presence of five positive samples meant the entire distribution system was contaminated. We find that Dr. Ford's expertise in testing water samples qualified her to render an opinion on this question. Dr. Ford noted that the positive samples occurred in random locations, rather than a cluster, which led to her conclusion that contamination was not system-wide, and she further noted that all follow up testing from the same sixteen locations was negative, which she wouldn't have expected since coliform does not disappear from the water

system spontaneously. Plaintiffs' main objection seems to be that her opinion directly contradicted the opinion of plaintiffs' expert, Dr. Charles Stratton.

Next, plaintiffs argue that the trial court erroneously found a lack of commonality in the claims. Specifically, the trial court stated in its Reasons for Judgment that not every distribution point contained contamination, and that each claimant would have to prove that the water at the distribution point into his home was contaminated, noting that water contamination is different from air contamination. Plaintiffs argue that the trial court took fragments of Dr. Stratton's scientific explanation and erroneously recast it. Plaintiffs also argue that the only scientific explanations for the five positive samples were the opinions of Dr. Stratton and Mr. James Huerkamp, another plaintiff expert.[1]

The trial court, as trier of fact, has great discretion to accept or reject testimony of experts like any other witness, and is not bound by expert testimony. Rather, expert testimony must be weighed just as any other evidence. Trice v. Isaac, 99-839 (La. App. 5 Cir. 2/16/00), 759 So.2d 843. There is no indication that the trial court gave undue weight to the testimony of any expert. We note that the only expert even mentioned in the Reasons for Judgment was Dr. Stratton, plaintiffs' expert. The trial court apparently did not accept as uncontroverted plaintiffs' position, which assumes that the contamination at every point downriver from the treatment plant has been proved. We find that the trial court's reasons are supported by scientific evidence. Plaintiffs are incorrect when they state that the only scientific opinions offered were the ones by their expert.

Finally, plaintiffs argue that the trial court clearly erred in denying class certification. The trial court held that "Clearly individual causation and liabilities [sic]

---

[1]Mr. Huerkamp was the Chief of Operations employed by the New Orleans Sewerage and Water Board, overseeing New Orleans' water purification and sewerage treatment.

issues as to each potential class member will predominate over common issues; therefore, class certification is not appropriate in this case."

In Clement v. Occidental Chemical Corp., 97-246 (La. App. 5 Cir. 9/17/97), 699 So.2d 1110, this court held:

> In determining whether to certify an action as a class action under Louisiana law, the following requirements are necessary:
>
> 1. A class so numerous that joinder is impracticable, and
>
> 2. The joinder as parties to the suit one or more persons who are
>
> (a) members of the class, and
>
> (b) so situated as to provide adequate representation for absent members of the class, and
>
> 3. A "common character" among the rights of the representatives of the class and the absent members of the class. (Cites omitted.)
>
> * * * *
>
> All three of the elements must be met for a class action to be appropriate and it is well settled that it is plaintiffs' burden to prove each element, by a preponderance of the evidence. Dumas v. Angus Chemical Co., 25, 632 (La. App.2d Cir. 3/30/94), 635 So.2d 446, writ denied 640 So.2d 1349 (La.1994).

In Graver v. Monsanto Co., Inc., 97-799 (La. App. 5 Cir. 6/30/98), 716 So.2d 435, this court explained the common character requirement:

> The third requirement is whether the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. Clement, supra. The mere fact that varying degrees of damages may result from the same factual transaction and same legal relationship does not defeat a class action. Clement, supra (citing State ex rel. Guste v. Gen. Motors Corp., 370 So.2d 477 (La.1978) (on rehearing)).

A trial court has great discretion in deciding whether to certify a class and its decision will not be overturned absent manifest error. Richardson v. American Cyanamid Co., 99-675 (La. App. 5 Cir. 2/29/00), 757 So.2d 135.

The plaintiffs who testified had very divergent experiences with the water (smells, tastes, and appearances) and very divergent symptoms. Wayne Vinnett testified that he experienced immediate fatigue upon drinking the water. He experienced severe cramps and diarrhea, coughed up blood, and had rhinitis, all of which he associated with drinking the water. At the time of his deposition in 1994, he reported experiencing the same symptoms if he drank the water in St. Rose. He testified at the certification hearing that he experiences the same symptoms currently if he drinks the water. He did not recall the water having a smell or a strange color. Vinnett's water was cut off shortly after his "exposure" in 1992 because he didn't pay his bill. At the time of the hearing, he had not reinstated his water service.

Mary Abate testified that she drank the water in Destrehan. Her water was cloudy and yellowish-brown with a mildew odor or a sewerage odor. She reported having nausea, vomiting, and diarrhea, for which she received anti-nausea drugs at a local hospital emergency room. Eight months later, she went to the Family Medical Center in connection with her claim in this case. She reported experiencing the same diarrhea on and off until that time, and testified that she still experiences it every six months or so.

Evelyn Anderson testified that she lived in St. Rose during April to May of 1992. She was very ill from April 26-28, throwing up and having diarrhea. She had no other explanation for her illness other than drinking her water, because it came on very suddenly. She did not see a doctor because she did not have insurance, but took paregoric that she had at home. She did not notice the water having a smell. She thought she had a virus until seeing the public notice.

The depositions of three other potential class members were offered into evidence. Ethyl Douglas testified by deposition that she resided at 825 East McAdoo

Street in Destrehan. She testified that she could see something in the water, that the water was contaminated and would come out a dark color, and that she had an upset stomach. She was ill for approximately three weeks with nausea, vomiting, headache, and dizziness. She did not seek medical attention, but took over the counter medications.

Earline Lee testified by deposition that she resided at 771 Perrice Street in Destrehan. She testified that the water smelled like rotten eggs, that it continues, up until the time of her deposition, to smell bad. She testified that the water was foggy and you could see little particles in the water. She said that she and her whole family took sick. She suffered by diarrhea and vomiting. She testified that she was ill for approximately two weeks. As a result of this experience she does not drink the tap water any longer, but buys Kentwood water.

Jessie Mae Maxon who resides at 849 Apple Street in Norco also testified by deposition. Ms. Maxon claimed that her whole family was sick for about a week with bad cramps and nausea. She testified that the water looked foggy. After initially suggesting that she was sick as a result of drinking water at Norco, she testified that she was at a friends house in St. Rose where she must of had contaminated water. There was no explanation given for how her family became ill or how they were exposed to the contaminated water, but the evidence suggest no contaminated water entered the water system in Norco. Ms. Maxon claims that she got sick the same day that there was a spill at GTX. Her chronological recollection does not comply with the alleged St. Charles Parish water test failures The trial judge in his reasons for judgment found that he could not conclude based on the evidence that a class of people were uniformly exposed to contaminated water. He concluded based on the evidence that, "not every distribution point contained the contamination." Further, the

trial judge concluded that, "each claimant would need to prove that the water at the distribution point into his home was contaminated." The trial judge concluded that there could be other reasons for the symptom allegedly suffered by 2,300 people in the distribution area. The trial court and this Court will not ignore the fact that in mass tort class actions punitive class members sometimes sign claim forms not due to injury, but rather simply to be included in the distribution of settlement funds.

> In order to satisfy the "common character" requirement, the mover must establish that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. Cotton v. Gaylord Container, 96-1958, p. 18 (La. App. 1 Cir. 3/27/97), 691 So.2d 760, 771, writ denied, 97-0800 (La.4/8/97), 693 So.2d 147. The common character element encompasses more than the simple existence of law and fact common to the class. It restricts the class action to those cases in which it would achieve the economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness bringing about other undesirable results. Id. at p. 19, 691 So.2d at 771. When the superiority of a class action is disputed, a court must inquire into the facts and circumstances of a case in order to determine whether the goals of a class action would be better served by another adjudicatory method. Elliott v. State, 619 So.2d 137, 139 (La. App. 1st Cir.), writ denied, 625 So.2d 1034 (La.1993).

Simeon v. Colley Homes Inc., 2000-2183 (La. App. 1 Cir. 11/14/01), 2001 WL 1418395.

Our review of the testimony of punitive class members indicates that they suffered a variety of physical systems. Plaintiffs argue that the difference in symptoms does not argue against commonality, because this evidence would go to the amount of damages, not against the fact of exposure to the contaminants in the water. The trial court found, however, that there was insufficient proof of contamination throughout the down river portion of the system, and that, moreover, given the evidence of only 5 positive samples with no positive resamples, an individual was more likely to have no contamination at his distribution point rather than contamination. Further, the judge found that the fact 2300 people in the area signed up reporting illness during this time

period was not a "fact" upon which plaintiffs could rely upon proving the contamination. He also found that other explanations could exist for explaining their illness.

After reviewing all of the evidence in the hearing, we cannot say that the trial court abused its great discretion in finding that the plaintiffs failed in their burden of proof to certify this case as a class action. The claims of the proposed class members whose testimony was presented are sufficiently different that the economies of time, effort, and expense would not be achieved in a class action lawsuit. Moreover, the evidence was not conclusive that contamination existed at all the sites where plaintiffs claimed to have drunk the allegedly contaminated water. Since all potential class members would be required to testify regarding causation and damages, this case appears more appropriate for mass joinder rather than class action.

AFFIRMED

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

SOL GOTHARD
JAMES L. CANNELLA
THOMAS F. DALEY
MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD

JUDGES

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY OCTOBER 16, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR.
CLERK OF COURT

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Mr. Bennett H.H. Biever
Mr. Gus A. Britchie, III
Attorneys at Law
400 Poydras St., Suite 2700
New Orleans, LA 70130

Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Sent To
Street, Apt. No.; or PO Box No. 02-CA-383 c/w 384 c/w 385
City, State, ZIP+ 4

PS Form 3800, January 2001 See Reverse for Instructions

7001 0360 0002 7642 3384

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Mr. Harry T. Widmann
Attorney at Law
3850 N. Causeway Blvd., Ste. 590
Metairie, LA 70002

Total Postage & Fees $

Sent To
Street, Apt. No.; or PO Box No. 02-CA-383 c/w 384 c/w 385
City, State, ZIP+ 4

PS Form 3800, January 2001 See Reverse for Instructions

7001 0360 0002 7642 3391

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Mr. Alan Zaunbrecher
Mr. Brett M. Bollinger
Attorneys at Law
3850 N. Causeway Blvd.
Lakeway II, Suite 1070
Metairie, LA 70002

Total Postage & Fees $

Sent To
Street, Apt. No.; or PO Box No. 02-CA-383 c/w 384 c/w 385
City, State, ZIP+ 4

PS Form 3800, January 2001 See Reverse for Instructions

7001 0360 0002 7642 3414

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Mr. Henry Provosty
Attorney at Law
530 Natchez St. Suite 200
New Orleans, LA 70130

Total Postage & Fees $

Sent To
Street, Apt. No.; or PO Box No. 02-CA-383 c/w 384 c/w 385
City, State, ZIP+ 4

PS Form 3800, January 2001 See Reverse for Instructions