

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL


FIRST CIRCUIT

2013 CA 0011

Consolidated with

2013 CA 0012

NANEY¹ ABOUELAZM, et al
VERSUS

 TYRONNE JACKSON, STATE OF LOUISIANA THROUGH
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,
WARDEN MARIANA LEGER
AND

MARIA MORRIS, JOCELYN DOUGLAS AND
ALL OTHERS SIMILARLY SITUATED

VERSUS

TYRONNE JACKSON, STATE OF LOUISIANA THROUGH
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,
AND WARDEN MARIANA LEGER

Judgment Rendered: NOV 15 2013

APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF IBERVILLE
STATE OF LOUISIANA
DOCKET NUMBER 66,532, DIVISION "B"
CONSOLIDATED WITH DOCKET NUMBER 67,121 DIVISION "C"

HONORABLE J. ROBIN FREE, JUDGE

McClendon J. Cunniff

¹ The petitioner's name is variously spelled "Naney" and also "Nancy." We have chosen to use the version from the original petition.

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

Appellants/Defendants, Louisiana Department of Public Safety and Corrections, a warden, and a state maintenance worker, challenge a judgment in the Eighteenth Judicial District certifying a class action. For the following reasons, we reverse and remand.

On the evening of November 7, 2007, a natural gas leak occurred at the Leo cell block at Louisiana Correctional Institute for Women (LCIW) in Iberville Parish. Repairs were initiated by an employee of LCIW, Tyrone Jackson, who, believing the repair was successful, turned on the heaters and hot water heater. However, the following afternoon a smell of gas was again noticed. Jackson again attempted repair, and in the process, a valve blew off causing a high pressure release of natural gas. An employee of Iberville Gas came to assist in the repair. The inmates of the Leo cell block were evacuated to the Capricorn cell block, with the exception of one inmate who suffered from asthma and was brought to the prison infirmary, given inhalation therapy and released.

On May 20, 2008, a petition for damages was filed on behalf of Nancy Abouelazm and approximately 290 other prisoners. Defendants filed exceptions raising the objections of prematurity, insufficiency of service of process, and improper cumulation on October 23, 2008. On November 7, 2008, a hearing was held on defendants' exceptions and a judgment was signed on November 24, 2008, denying the exceptions of prematurity and improper cumulation. The defendants sought writs and a stay of court proceedings until action by the First Circuit Court of Appeal was ordered. On June 29, 2009, a panel of this court subsequently granted the writ, in part, as follows:

The district court erred in denying relator's exception of improper cumulation. La. R.S. 15:1184G. Accordingly, the application is granted insofar as the district court's November 24, 2008 judgment is reversed to the extent it denied that exception, and judgment is rendered in favor of Tyrone Jackson and the State of Louisiana

through the Department of Public Safety and Corrections, granting the exception of improper cumulation. The writ application is denied in all other respects.

Thereafter, by judgment dated July 9, 2009, the district court judge ordered that all claims made by all plaintiffs, other than the first named plaintiff, Naney Abouelazm, be dismissed without prejudice. Prior to this action, on October 29, 2008, plaintiffs filed a class action petition for damages entitled **Maria Morris, Jocelyn Douglas, and all others similarly situated v. Tyronne Jackson, et al.** A motion to certify class was filed on November 7, 2008. This motion was not heard until February 8, 2012.

The plaintiffs filed a motion to consolidate the Abouelazm and Morris cases, which was heard by the district court on August 12, 2009. The consolidation was granted, and judgment was signed on August 26, 2009.

As noted, the hearing on the certification of the class was on February 8, 2012. Plaintiffs sought class certification on the issue of liability only. After the hearing, the court granted certification of the class for the issue of liability. The defendants appeal this action asserting that the record does not contain any information regarding how many of the affected prisoners complied with the administrative procedures set forth in La. R.S. 15:1171 et seq., the Corrections Administrative Remedy Procedure (CARP).

Defendants note that, in order to preserve any potential tort claim, an inmate must first initiate and exhaust the two-step administrative procedure established by CARP. If a prisoner fails to pursue his claim administratively or exhaust his administrative remedies, he is deemed to have abandoned his claim and any subsequent lawsuit must be dismissed with prejudice. La. R.S. 15:1172(C).

Plaintiffs claim that these “exact same issues” were considered in a writ directed to this court in February 2009, appealing class certification and by the action responding to it on June 29, 2009, which is noted above. We do not agree

with plaintiffs' assessment. The district court had denied defendants' exceptions raising the objections of improper cumulation and prematurity/failure to exhaust administrative procedures by judgment signed November 24, 2008, from which defendants sought supervisory review by writ. The judgment was reversed, and the exception of improper cumulation was granted. In all other respects the writ was denied. See Mire v. EatelCorp, Inc., 2002-1705, 2002-0737 (La. App. 1 Cir. 5/9/03), 849 So.2d 608, **writ denied**, 2003-1590 (La.10/3/03), 855 So.2d 317.

The plaintiffs, allegedly numbering over 300, may be significantly reduced by the deletion of all inmates who have not exhausted their administrative remedy. Plaintiffs' counsel submitted two CDs showing plaintiffs' initiation of CARP. While this CD evidence includes CARP claims by Naney Abouelazm and Joycelyn Douglas, there was no evidence presented of a CARP claim by Maria Morris. The number of those inmates, who submitted claims as evidenced on the two CDs, was significantly less than one hundred. Louisiana Revised Statutes 15:1171(B) requires an offender within the custody of the Department of Public Safety and Corrections to exhaust administrative remedies before filing suit on any cause of action. See Dickens v. Louisiana Correctional Institute for Women, 2011-0176 (La. App. 1 Cir. 9/14/11), 77 So.3d 70, 74-75; Worachek v. Stalder, 2010-0059 (La. App. 1 Cir. 6/11/10) (unpublished), **writ denied**, 2010-1663 (La. 8/19/11), 67 So.3d 1242. The plaintiffs/appellees argue that CARP is inapplicable in tort or delictual claims. They could not be more wrong. They cite **Pope v. State**, 99-2559 (La. 6/29/01), 792 So.2d 713, and other cases that support this position. However, these other cases were all decided prior to 2002 when the legislature amended La. R.S. 15:1177(C) and 15:1172(B) in response to the decision in **Pope**. The pertinent language involves the review of prisoner claims after they have been denied in the CARP procedure. In tort claims, following the 2002 amendment, the district court does not act as a court of review (limited to a review of the CARP

record), but as a court of original jurisdiction. However, this does not relieve the prisoner of filing an administrative claim (CARP) first. See Jackson v. State, 2011-1716 (La. App. 1 Cir. 3/23/12), 92 So.3d 391, 396, **writ granted**, 2012-0912 (La. 6/22/12), 90 So.3d 1069 (remanded to trial court to determine availability of administrative remedy).

We also note that none of the cases cited apply to class actions. Neither party has questioned or explained if a class action procedure is applied differently in a prisoner suit in which the filing of a CARP is a prerequisite to the filing of suit. Before we decide how, or if, the issue we are considering harmonizes with a class action, it will be necessary for us to determine that the plaintiffs were properly certified as a class.

A class action is a nontraditional procedure that permits a representative to sue on behalf of, and stand in judgment for, a class of similarly situated persons with typical claims when the question is one of common interest to persons so numerous as to make it impracticable to bring them all before the court. **Ford v. Murphy Oil U.S.A., Inc.**, 96-2913 (La. 9/9/97), 703 So.2d 542, 544. Class certification is purely procedural; it is not necessary at this stage for the plaintiffs to prove the facts of the underlying cause of action. The issue is whether the class action is procedurally preferable. When reviewing the district court's ruling regarding class certification, we do not consider whether plaintiffs' claims state a cause of action or have substantive merit. **Oliver v. Orleans Parish School Bd.**, 2009-0489 (La. App. 4 Cir. 11/12/09), 25 So. 3d 189, 196, **writs denied**, 2009-2708, 2009-2721 (La. 3/5/10), 28 So.3d 1012, 1013.

The class action certification procedure is governed by Louisiana Code of Civil Procedure articles 591 – 597. The prerequisites for maintaining a class action are found in La. C.C.P. art. 591, and have generally been summarized as numerosity, commonality, typicality, the adequacy of the representative parties to

protect the interests of the class, and an objectively definable class. In addition to these five elements, the court must also consider the predominance of common issues, and the superiority of the class action procedure. **Oliver**, 25 So.3d at 196. The general rule that, if an error is to be made, it should be in favor of and not against the maintenance of the class action, does not obviate the requirement that the courts employ a rigorous analysis and take a close look at a case to determine if, in fact, the statutory requirements have been satisfied before accepting it as a class action. **Doe v. Southern Gyms, LLC**, 2012-1566, 2012-1572, 2012-1580 (La. 3/19/13), 112 So.3d 822, 832-833.

To satisfy the “numerosity” requirement for class certification, plaintiffs must establish that the members of the class are so numerous that joinder of those members would be impracticable. No set number of putative plaintiffs has been established in order to fulfill the numerosity requirement for a class action. **Oliver**, 25 So.3d at 198. In addition to the numbers of putative class members, numerosity is based on considerations of judicial economy in avoiding a multiplicity of lawsuits, financial resources of class members, and the size of individual claims. **Id.** We agree with the appellants that a determination of the number of claimants who have filed a CARP is imperative in satisfying the numerosity requirement. That determination was not done here.

A showing of commonality of questions of law and fact among the class is the second prerequisite in certifying the class. The test for “commonality” requires only that there be at least one issue the resolution of which will affect all or a significant number of putative class members. **Display South, Inc. v. Graphics House Sports Promotion, Inc.**, 2007-0925 (La. App. 1 Cir. 6/6/08), 992 So.2d 510, 518, **writ not considered**, 2008-1562 (La. 10/10/08), 993 So. 2d 1274.

The third prerequisite in certifying the class is typicality. The element of typicality requires that the claims of the class representative be a cross section of, or typical of, the claims of the class members. **Oliver**, 25 So.3d at 199.

The test for determining the existence of adequate representation in a class action consists of three elements: (1) the claims of the class representatives cannot be antagonistic or conflict with those of other class members; (2) the class representative must have a sufficient interest in the outcome to ensure vigorous advocacy; and (3) counsel must be competent, experienced, qualified, and generally able to conduct the litigation vigorously. **Boyd v. Allied Signal, Inc.**, 2003-1843, 2003-1841, 2003-1842, 2003-1843 (La. App. 1 Cir. 12/30/04), 898 So.2d 450, 465, **writ denied**, 2005-0191 (La. 4/1/05), 897 So.2d 606.

The determination of whether a class action meets the requirements imposed by law involves a rigorous analysis. The trial court “must evaluate, quantify and weigh [the relevant factors] to determine to what extent the class action would in each instance promote or detract from the goals of effectuating substantive law, judicial efficiency, and individual fairness.” **McCastle v. Rollins Environmental Services of Louisiana, Inc.**, 456 So.2d 612, 618 (La. 1984); **Brooks v. Union Pacific R. Co.**, 2008-2035 (La. 5/22/09), 13 So.3d 546, 554. In so doing, “the trial court must actively inquire into every aspect of the case and should not hesitate to require showings beyond the pleadings.” **Id.**

Our review of the transcript of the class certification hearing does not reveal a “rigorous analysis” by the trial court. Although plaintiffs’ counsel contends that evidence “of each factor was introduced or offered into evidence,” we have no evidence that the district court analyzed the five requisite factors. Arguably, the issue of numerosity was the only one briefly addressed by the court stating, “[A]lthough it’s a lot of people, do you have any ... serious injuries here?” Defendants’ counsel responded, “the injuries and damages are nausea, headaches,

dizziness.” To which the court responded, “But anyway, if we are going to handle it, it needs to be handled as a class in this matter to get rid of all of it.” Basically, that was the extent of the district court’s analysis. There was no analysis of, or even reference to, commonality, typicality, or adequate representation.

Plaintiffs maintain that the only issue before this court is numerosity, the first of the five prerequisites for maintaining a class action. However, the Louisiana Constitution gives us supervisory jurisdiction over cases that arise within our district. La. Const. art. 5, §10. Furthermore, we may notice errors *sua sponte*. In any event, we find the district court’s handling of the numerosity issue insufficient to satisfy its duty.

We are also mindful that the burden of proof in the certification of a class is on the person bringing the action, which in this case, are the plaintiffs. We find that the plaintiffs failed to meet their burden of proof.

The motion to supplement the record filed by plaintiffs is denied as moot. The record we reviewed established that the certification could not be maintained, even with the supplement.

After reviewing the record, evidence, and jurisprudence, we find that the class certification hearing was not legally or factually sufficient to establish a class. We reverse the district court’s decision and remand for further proceedings in accordance with this opinion. Costs of this appeal are assessed against plaintiffs/appellees.

REVERSED AND REMANDED.