**Opinion issued April 23, 2020**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-18-01049-CV**

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**MOSAIC BAYBROOK ONE, L.P AND MOSAIC BAYBROOK TWO, L.P., Appellants**

**V.**

**PAUL SIMIEN, Appellee**

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**On Appeal from the 133rd District Court**
**Harris County, Texas**
**Trial Court Case No. 2017-08379**

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## MEMORANDUM OPINION

This case is an interlocutory appeal from an order certifying a class of tenants based on a claim brought under section 13.505 of the Texas Water Code for a landlord's alleged violation of a Public Utility Commission of Texas (PUC) rule prohibiting overcharges for water and sewer service. On appeal, the landlord

contends that the trial court abused its discretion in certifying the class because it relied on misunderstandings of the applicable substantive law and because the tenant approved to represent the class is inadequate. We affirm.

## Background

Paul Simien leased an apartment at Baybrook Village in Webster from July 1, 2016 through July 31, 2017. Under the lease, Simien agreed to be responsible for water and wastewater charges. During the relevant period, Mosaic Baybrook One, L.P. and Mosaic Baybrook Two, L.P. owned separate portions of the apartments, and Mosaic Residential, Inc. served as the management company for the apartments. Mosaic Residential sent monthly itemized bills to the tenants, including Simien. Among the items billed was one entitled "water/sewer base fee." As an illustration, the items listed in Simien's July 2016 billing appear below:

| | |
|---|---|
| *Scheduled Property Charges Due* | $903.00 |
| **Billed Charges** | |
| Water/Sewer (7/1/2016 – 7/30/2016) | |
| # Bdrms: 2 Factor: 280 Rate: 5.7814677 | $15.65 |
| Pest Control (7/1/2016 – 7/30/2016) | $3.50 |
| Flat Amt: 3.5000000 | |
| Trash (7/1/2016 – 7/30/2016 | |
| Flat Amt: 7.0700000 | $6.83 |
| *Billed Charges* | $61.47 |

Simien regularly paid the billed charges. The Mosaic parties (collectively, Mosaic) have admitted that the "water/sewer base fee" line item included more than water

and sewer charges—it also incorporated additional fees for law enforcement, fire protection, and emergency medical service.

In February 2017, Simien brought the underlying suit on behalf of "himself and all others similarly situated." He contends that by bundling unrelated charges into the water/sewer base fee, Mosaic violated Public Utility Commission (PUC) rules, which forbid residential landlords from bundling fees that are unrelated to water or sewer service and passing them on to tenants as water or sewer charges. The applicable rule provides:

> Charges billed to tenants for . . . allocated utility service may only include bills for water or wastewater from the retail public utility and must not include any fees billed to the owner by the retail public utility for any deposit, disconnect, reconnect, late payment, or other similar fees.

16 TEX. ADMIN. CODE § 24.281(a).

The Texas Water Code provides a statutory remedy for tenants who have paid charges assessed in knowing violation of PUC rules. TEX. WATER CODE § 13.505. When this suit was filed, that section provided:

> [I]f an apartment house owner . . . violates a rule of the utility commission regarding . . . nonsubmetered master metered utility costs, the tenant may recover three times the amount of any overcharge, a civil penalty equal to one month's rent, reasonable attorney's fees, and court costs from the owner or condominium manager. However, an owner of an apartment house . . . is not liable for a civil penalty if the owner . . . proves the violation was a good faith, unintentional mistake.

*Id.*

Several months after Simien filed suit, the legislature amended section 13.505, removing the penalty provisions for three times the amount of any overcharge, the one-month rent penalty, and attorney's fees, and conferring exclusive jurisdiction over section 13.505 claims to the PUC. In specially excepting to Simien's petition, Mosaic contended that the amendment applied retroactively. It asked the trial court to strike Simien's request for imposition of penalties and attorney's fees and to dismiss his section 13.505 claim for lack of jurisdiction. The trial court overruled the special exceptions and denied the motion to dismiss.

Before requesting certification, Simien moved for partial summary judgment, asking for the trial court to conclude that Mosaic "violated the Texas Water Code and [PUC] rules as a matter of law." Simien relied in part on Mosaic's admission, in an interrogatory response, that the "Water/Sewer Base Fee" charged in the monthly tenant billing "is actually a combination of comprised charges from the Harris County MUD No. 55, including a monthly service charge, monthly fire protection rate, monthly emergency medical service rate, and monthly law enforcement rate."

The trial court granted Simien's summary-judgment motion. It certified Mosaic's request for a permissive interlocutory appeal, which this court denied.[1]

[1] Mosaic Baybrook One, L.P. & Mosaic Baybrook Two, L.P. v. Simien, No. 01-18-00995-CV (Feb. 5, 2019), *motion for en banc reconsideration denied* (Feb. 21, 2019).

Simien next moved for class certification. The evidence accompanying the motion supports the trial court's findings in certifying the class on the following elements:

- *Ascertainability* - Mosaic's records could be used to identify tenants within the class and the charges they paid;
- *Numerosity* - Hundreds of tenants were charged the "water/sewer base fee";
- *Commonality* - Every tenant was charged the same "water/sewer base fee" every month, and all will win or lose together;
- *Typicality* - Like class members, Simien's claim arises out of the same contested "water/sewer base fee" item "uniformly charged to all Class members, and his claim is based on the same legal theory and subject to the same defenses as the claim of the Class";
- *Adequacy* - Simien's counsel has significant experience with class actions, and Simien's interests align with those of the class;
- *Predominance* - Every class member "was affected in the same way" by Mosaic's billing practices, so the lawfulness of the charges controls Mosaic's liability across the class; and
- *Superiority* - Individual claims are cost-prohibitive, and no other section 13.505 lawsuits against Mosaic exist.

The trial court defined the class as follows:

> All Texas residents who, during the Class Period, (i) are or were tenants at Baybrook Village apartment house in Harris County, Texas, and (ii) were charged and paid a "Water/Sewer Base Fee" in excess of $20.
>
> for the period from June 1, 2015 —September 03, 2017

The claim certified is a

> [s]tatutory claim for violation of the Texas Water Code and PUC Rules resulting from imposition and collection of a "Water/Sewer Base Fee" that includes non-water and non-wastewater charges for Fire, EMS, and Law Enforcement. The rules state that owners must not pass along charges that are not actually assessed by the public utility. 16 TEX. ADMIN. CODE § 24.124(a). ("Charges billed to tenants for . . . allocated utility service may only include bills for water or wastewater from the retail public utility . . . ."). A private cause of action for violation of a PUC rule is permitted by way of Tex. Water Code § 13.505, which provides that if a violation of a rule of the utility commission occurs, the tenant may recover the amount of any overcharge.

**Class Certification**

Mosaic contends that the trial court abused its discretion in certifying the class because it relied on two significant misunderstandings of law, namely (1) its partial-summary-judgment ruling that fees for fire, EMS, and law-enforcement services violated PUC rules relating solely to water and sewer service; and (2) its conclusion that amendments to section 13.505 that eliminated the tenant remedy sought here do not apply retroactively.

Mosaic further contends that, by failing to expressly address the elements of its defenses to Simien's section 13.505 claim, the trial court failed to conduct the rigorous analysis necessary to "determine whether all prerequisites to certification have been met." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000).

Mosaic also challenges the trial court's conclusion that Simien is an adequate class representative, claiming that he lacks personal integrity, as evidenced by his

false declaration and deposition testimony, as well as his failure to demonstrate his independent familiarity with the litigation.

## A. Applicable law and standard of review

All classes seeking certification must satisfy all four requirements of Rule 42(a) and at least one of the requirements of Rule 42(b). TEX. R. CIV. P. 42; *Bernal*, 22 S.W.3d at 433. Rule 42(a) prescribes the following prerequisites for a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 42(b)(3) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (4) the questions of law or fact common to the members of the class predominate over any 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. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the

> particular forum; (D) the difficulties likely to be encountered in the management of a class action.

TEX. R. CIV. P. 42(b)(3); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 692 (Tex. 2003).

A proper analysis of the Rule 42 factors requires the court to go beyond the pleadings in order to understand "the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 72 (Tex. 2003) (quoting *Bernal*, 22 S.W.3d at 435). "Because class determinations generally involve considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the trial court must be able to make a reasoned determination of the certification issues." *Exxon Mobil Corp. v. Gill*, 299 S.W.3d 124, 126 (Tex. 2009) (per curiam) (quoting *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398, 404 (Tex. 2000)).

Rule 42 does not require the trial court to adjudicate the merits of the plaintiffs' claims before certifying a class. The substantive-law analysis for class-certification purposes is "far less searching than in a trial on the merits." *Hankins*, 111 S.W.3d at 72; *see also Gill*, 299 S.W.3d at 126 ("deciding the merits of the suit in order to determine . . . its maintainability as a class action is not appropriate"); *Bliss & Glennon Inc. v. Ashley*, 420 S.W.3d 379, 387 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (same). Nevertheless, because the applicable substantive law

bears some relation to the issues of commonality, typicality, superiority, and predominance, it "must be taken into consideration in determining whether the purported class can meet the certification prerequisites under Rule 42." *Hankins*, 111 S.W.3d at 72–73.

Our review of an interlocutory appeal from a class certification order is limited to determining whether the trial court abused its discretion. *Bliss & Glennon*, 420 S.W.3d at 387; *see Schein*, 102 S.W.3d at 690–91. Under this standard of review, the appellate court typically indulges every presumption favorable to the trial court's ruling. *See Graebel/Houston Movers, Inc. v. Chastain*, 26 S.W.3d 24, 29 (Tex. App.—Houston [1st Dist.] 2000, pet dism'd w.o.j.). On certification issues, however, the appellate court is not bound by this presumption and must independently determine whether the requirements of rule 42 have been fully satisfied. *See Ford Motor Co. v. Ocanas*, 138 S.W.3d 447, 451 (Tex. App.—Corpus Christi 2004, no pet.); *see also Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) ("Actual conformance with Rule 42 is indispensable, and compliance with the rule must be demonstrated, not presumed."); *Bernal*, 22 S.W.3d at 435 (actual compliance with rule 42 "must be demonstrated; it cannot be presumed").

## B. Substantive-law challenges

Mosaic first challenges the trial court's rulings as to the substantive law governing the class claims, specifically, "an erroneous partial summary-judgment ruling on liability" on the section 13.505 claim and an order overruling Mosaic's special exceptions arguing that the June 1, 2017 amendment to section 13.505 rendered the claims inviable. We lack the authority to review the merits of these rulings.

Appellate review of interlocutory orders is only allowed "when explicitly permitted by statute." *Caress v. Fortier*, 576 S.W.3d 778, 780 (Tex. App.—Houston [1st Dist.] 2019, pet. denied); *see Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012). Mosaic's notice of appeal relies on section 51.014(a)(3) of the Civil Practice and Remedies Code, which permits appeal from "an interlocutory order of a district court … that … certifies or refuses to certify a class in a suit brought under Rule 42." Mosaic identifies no authority allowing for appellate review of the trial court's orders granting partial summary judgment and overruling its special exceptions. The lack of authority, however, does not mean that we must ignore these rulings entirely. If they reflect a mistaken understanding of how the claims will be tried or whether the certified class meets Rule 42's requirements, they inform our consideration of whether the trial court acted within its discretion in granting class certification.

In seeking review of these interlocutory rulings on their merits, Mosaic misplaces its reliance on *Gill*. There, the Supreme Court vacated the certification order and remanded the case to the trial court not because the plaintiffs failed to state a viable cause of action, but because the trial court had certified the class based on a breach of contract cause of action that was not alleged in the pleadings. 299 S.W.3d at 128. The Court acknowledged that this error apparently resulted from an effort distinguish the class claim from one based on a legal theory that the Court had rejected in *Shell Oil Co. v. HRN*, 144 S.W.3d 429 (Tex. 2004). The Court observed that absent the distinction, the class claim likely was inviable, but the decision does not turn on that observation; the Court left that issue for the trial court to address on remand. 299 S.W.3d at 128.

No analogous circumstance exists here. Mosaic's arguments on the merits concerning the trial court's partial summary judgment ruling on liability and the retroactivity argument it raised by way of special exceptions do not point to any theory unmoored from the pleadings. Nor do they undermine the trial court's finding that the class claim satisfies Rule 42's typicality and commonality requirements; whether the class prevails or not, the claim of all class members is based on the same legal theory; an answer as to one is an answer as to all. Mosaic's disagreement with the trial court's substantive-law rulings does not show that the trial court abused its discretion in granting certification.

Mosaic next complains that the trial court abused its discretion in certifying the class because its trial plan fails to expressly address the elements of its defenses to Simien's section 13.505 claim. The motion for class certification identifies "common defense questions," including whether Mosaic made a "good faith, unintentional mistake" and whether the tenants contractually agreed to the charges. In their original answers, the Mosaic defendants raised defenses challenging Simien's standing as well as that of the class members; the validity of the section 13.505 claim; and lack of jurisdiction.[2] These defenses are addressed in the trial court's partial-summary-judgment and special-exception rulings. Mosaic does not argue that the trial court failed to consider the defenses, and the class-certification order recites that it considered "the motion for class certification, the response, the reply, all supplements, the exhibits admitted into evidence, and the court's file." Because the record reflects that the trial court considered the defenses in deciding whether to certify the class, we hold that, under these circumstances, the failure to mention defenses in the trial plan does not constitute an abuse of discretion.

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[2] Mosaic has moved for partial dismissal of Simien's section 13.505 claim for lack of subject-matter jurisdiction, contending that certain remedies are no longer available to Simien because the legislature has since repealed the version of section 13.505 on which Simien bases his claim. The question of whether Simien is entitled to recover under the version of the statute in effect when he filed suit is a merits question that is not before us and does not affect our jurisdiction over this class-certification appeal.

### C. Adequacy of class representative

Mosaic contends that Simien is not an adequate class representative because of his false declaration and deposition testimony and his failure to demonstrate that he is independently familiar with the litigation without blindly relying on counsel. This contention, however, is fatally flawed. "A trial court has discretion to rule on class certification issues, and some of its determinations—like those based on its assessment of the credibility of witnesses, for example—must be given the benefit of the doubt." *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 924 (Tex. 2010) (quoting *Schein*, 102 S.W.3d at 691).

Mosaic's argument assumes that Simien's declaration is false, but it fails to acknowledge that we give the trial court's credibility determination as to Simien's testimony at the class certification hearing the benefit of the doubt. This deference is particularly due when, as here, the defendant chose not to cross-examine the witness at the hearing.

"Adequacy of representation is a question of fact based on the individual circumstances of the case." *Supportkids, Inc. v. Morris*, 167 S.W.3d 422, 426 (Tex. App.—Houston [14th Dist.] 2005, pet. dism'd w.o.j.)). "This requirement has two components: (1) an absence of antagonism between the class representatives and the class members, and (2) an assurance the representative parties will vigorously prosecute the class claims and defenses." *Id.* (citing *Slack v. Shell Oil Co.*, 969

S.W.2d 565, 568 (Tex. App.—Austin 1998, no pet.). Texas courts have considered the following factors in determining whether the class representative adequately represents the class:

- the adequacy of counsel;
- potential conflicts of interest;
- the personal integrity of the plaintiffs;
- the representative's familiarity with the litigation and their belief in the legitimacy of the grievance;
- whether the class is manageable based on geographical limitations; and
- whether the plaintiff can afford to finance the class action.

*Forsyth v. Lake LBJ Inv. Corp.*, 903 S.W.2d 146, 150 (Tex. App.—Austin 1995, writ dism'd w.o.j.), *cited in Supportkids*, 167 S.W.3d at 426.

Mosaic first faults Simien for erroneously stating that he satisfied the originally proposed class definition, which was amended before the trial court certified the class. The error resulted from Simien's failure to account for his 2016 bankruptcy filing and discharge, which occurred while Simien was living in Louisiana. Because Simien became a Baybrook Village tenant after his bankruptcy discharge, the past bankruptcy did not affect his claim, but he did not come within the proposed class definition as it was then drafted because it excluded all individuals who had filed for bankruptcy during the class period. In his sworn declaration,

however, Simien attested that he had thought he satisfied the originally proposed class definition because of his mistaken belief that he was discharged from bankruptcy in 2015.

Before his deposition, Simien discovered his error. He signed an amended declaration, and class counsel amended the proposed class definition to include any class members who, like Simien, had filed and been discharged from bankruptcy before becoming Baybrook Village tenants.

Defense counsel cross-examined Simien on this issue during his deposition. After some equivocation, Simien admitted that he made a mistake in the original declaration by attesting that he satisfied the originally proposed class definition.

At the class-certification hearing, the trial court had an opportunity to listen to Simien's testimony and view his demeanor. In addressing the issue, Simien affirmed that he received a discharge in bankruptcy before he signed the Baybrook Village lease and has not filed another bankruptcy since then. He explained how he discovered his mistake in recalling the year his bankruptcy proceedings took place and stated that he did not intentionally make a false declaration.

Mosaic also complains that Simien lacked the knowledge necessary to adequately represent the class, noting that Simien confirmed that he had read the motion for class certification, but at the hearing did not recognize or know the

purpose of the PUC rule or Water Code section when opposing counsel handed copies of the rule and statute to him during his deposition.

Simien's failure to recognize the language of the specific laws involved in his claim do not disqualify him from serving as class representative. "[C]lass representatives need not be legal scholars." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 483 (5th Cir. 2001). The record shows that Simien is an informed layperson. In testifying about the water/sewer billing charges, he recalled that he noticed that the charge "didn't look right." He confirmed his understanding that the suit was filed on his behalf and that of the other Baybrook Village tenants. He explained that as a class representative, he understood that he "should stand up and try and be a voice for . . . everybody." Simien confirmed that he is committed to represent the other tenants and that he understood that the court would decide whether he was qualified do that. Mosaic did not cross-examine Simien.

The trial court found "that Mr. Simien is credible and is adequate to serve as class representative." It "specifically reviewed [Mosaic's] objections raised and "reject[ed] those arguments." It further found that Simien "is obviously willing to represent this class, is sufficiently knowledgeable regarding the claim," and that "he will adequately and properly serve as a class representative."

Simien's testimony, as well as his amended declaration, support the trial court's exercise of discretion in finding that he is sufficiently familiar with the

lawsuit. We hold that the trial court acted within its discretion in concluding that Simien is an adequate class representative.

## Conclusion

We affirm the trial court's class-certification order. We grant Mosaic's motion to substitute counsel and deny its motion for partial dismissal of Simien's claim. All other motions are dismissed as moot.

Gordon Goodman
Justice

Panel consists of Justices Lloyd, Goodman, and Landau.