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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MANUEL MARIN et al., Plaintiffs and Appellants, v. BRUSH WELLMAN, INC., Defendant and Respondent.	B208202 (Los Angeles County Super. Ct. No. BC 299055)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victoria Chaney, Judge. Affirmed.

Metzger Law Group, Raphael Metzger and Gregory A. Coolidge for Plaintiffs and Appellants.

LaMontagne & Terhar, Ralph S. LaMontagne, Jr.; Law Offices of Sheldon J. Warren, Sheldon J. Warren; Law Offices of Peter J. Nova and Peter J. Nova for Defendant and Respondent Brush Wellman, Inc.

No appearance for Defendant and Respondent Appanaitis Enterprises, Inc.

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Appellants[1] brought an action against respondents Brush Wellman, Inc. (Wellman), and Appanaitis Enterprises, Inc.,[2] based upon their exposure to beryllium. Appellants sought class action certification but the trial court denied their motion. They appeal from that order, which we affirm.

THE PARTIES

Six of the named plaintiffs are either current or past employees of the Boeing Company. These persons are collectively referred to as the "Worker Plaintiffs." Two of the remaining named plaintiffs are spouses of the Worker Plaintiffs; these are referred to as the "Spouse Plaintiffs."

The proposed class consists of between 38 and 40 current and former employees of Boeing and its predecessors who worked at various facilities since 1963. There is also a proposed class for spouses of these employees.

Wellman is a manufacturer of various products used by Boeing. These products contain beryllium.

BERYLLIUM

The occupational exposure limit for beryllium was established by the Atomic Energy Commission in 1949. The limit is two micrograms of beryllium per cubic meter of air. This is referred to as the "OSHA limit."

Exposure to beryllium can cause serious disease, i.e., cancer and death. Only approximately 15-20 percent of the population is immunologically susceptible to beryllium; the remainder of the population is not. "Beryllium sensitization" or BeS is the condition of someone who is susceptible to beryllium, who has been exposed to beryllium, and who will respond negatively to this substance more readily than someone who does not fit this description. BeS is an indicator of the likelihood of acquiring chronic beryllium disease (CBD), which is a fatal illness.

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[1] They are Manuel Marin, Lisa Marin, Garfield Perry, Susan Perry, Robert Thomas, Darnell White, Leonard Joffrion, James Jones and John Kesselring.

[2] There is no appearance on appeal by this party.

The test for BeS is the beryllium lymphocyte proliferation test (BeLPT). This test is quite intricate; it is not necessary to detail it here. There is a disagreement about the number of times BeLPT must be administered before a conclusion can be drawn about the presence of BeS in the tested person. Appellants contend that one positive BeLPT suffices to establish BeS, while Wellman contends that there should be at least two positive BeLPT's before concluding that the tested person has BeS.

In the proposed class of Worker Plaintiffs, two had positive BeLPT results twice and 28 had a positive BeLPT once. The trial court surmised that those who tested positive only once had a later BeLPT that was negative.

WELLMAN AND BERYLLIUM

Appellants' operative pleading sets forth 13 causes of action and is 93 pages long. We agree with the trial court that this complaint is "confusingly arranged" but for our purposes it is not necessary to sift through the confusion. As might be expected, the causes of action are for negligence, strict liability, fraudulent concealment, breach of implied warranties and loss of consortium.

Reduced to its essentials, appellants' case against Wellman is that Wellman intentionally or recklessly misrepresented that two micrograms per cubic meter is a permissible degree of exposure while the truth is that one microgram is the permissible limit. According to appellants, Wellman also falsely assured its customers that only 1 percent of the population is susceptible to BeS while the truth is that between 15-20 percent of the population is susceptible.

In addition to general, special and punitive damages, appellants also seek damages for medical monitoring of their condition.

THE APPLICABLE CRITERIA

"Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with

claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) "The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.' [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions." (*Ibid.*)

THE TRIAL COURT'S ORDER

The trial court's order, 20 pages in length, is thorough and exhaustive in its analysis of the applicable criteria.

Numerosity. The trial court found that a class of 38 to 40 individuals is not such a high number as to make joinder impracticable; the "court has several cases on its docket that have more plaintiffs."

Ascertainability of the class. The court found that the class can be readily ascertained from Boeing's BeLPT records.

Common questions of law or fact. The court concluded that "individual issues pertaining to exposure would predominate substantially over common issues in terms of time and effort spent in inquiry." This was the principal reason that the court denied class action certification.

We set forth only the salient reasons for the trial court's conclusion.

The trial court noted that the six named Worker Plaintiffs worked at six different facilities, some of which had multiple buildings, over differing periods covering up to 40 years.[3] The trial court also found that Boeing's air monitoring and industrial hygiene records showed sporadic testing and nonuniform results. Sometimes the records showed

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[3] As an example, Marin worked in four different building in the Canoga facility beginning in 1981; Perry worked in two buildings at the El Segundo facility from 1982 to 1987 and 1989 to 1993 and at the Canoga, Palmdale and Anaheim facilities thereafter.

that the OSHA[4] level was exceeded and sometimes the levels were below one microgram per cubic foot. All this came down to the conclusion on the part of the trial court that there was no "uniform measure of a pertinent level of exposure." In other words, the levels of exposure varied widely among the facilities over time, and even within a single facility.

Appellants contended that the level of exposure did not matter since 28 of the putative class had at least one positive BeLPT. The court rejected this argument. The court reasoned that the issues in the case were (1) whether class members were exposed to *Wellman's* beryllium (2) at concentrations greater than one microgram per cubic foot. A positive BeLPT throws no light on these issues as this test result "does not establish the dosage of exposure or even that exposure occurred in the workplace, much less that the exposure was to [Wellman's] beryllium." The court noted that only purchase and use evidence could be used to trace the beryllium to Wellman and other suppliers of this substance and that this type of inquiry is necessarily an individualized inquiry, not a common one.

Appellants claimed that all they had to show was that they were exposed to beryllium in amounts that were simply more than "theoretical or infinitesimal." The trial court disagreed. The court cited the holding of *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982, that, in a toxic tort case, the plaintiff must first establish some threshold exposure to the defendant's defective, toxic products and must also establish to a reasonable medical probability that a particular exposure or series of exposures was a legal cause of his injury, i.e., a substantial factor in bringing about the injury. This requires expert testimony about the level of exposure that is unsafe, and expert testimony that exposure above a certain level will cause injury or disease. The significance of this is that since individual claimants differ both in their makeup and in the amount of their exposure to beryllium, the evidence of their injuries will differ from individual to individual.

Typicality. The court found that appellants' claims were typical of the class.

Adequacy of representation. The court found that this requirement was satisfied.

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[4] Occupational Safety and Health Administration.

Superiority of the class action vehicle. Given the absence of a community of interest and the relatively small number of persons in the class, the court concluded that no substantial benefits would be derived from proceeding in a class action format. We think that this conclusion is eminently sound. The best way to proceed with these essentially idiosyncratic claims is for each claimant to prove his or her own claim.

DISCUSSION

1. The Trial Court's Order Is Supported by Substantial Evidence

The essence of the matter is that the levels of beryllium exposure varied widely among the Boeing facilities, both in terms of time and locations, *and* that the source of beryllium at these facilities is subject to individualized proof by way of purchase and use data. Thus, each of the claimants will have to show *where* he worked, *when* he worked at each location or facility, what the *beryllium levels* were at these locations, and *how much* of the beryllium was Wellman's. It is patent that each such package of facts will be largely unique to each claimant. It is also obvious that this package of facts is foundational only and that each claimant will also have to show that he has sustained BeS and therefore faces the danger of contracting CBD. While there is more, these facts constitute substantial evidence that supports the trial court's order.

2. Appellants' Contentions Are Without Merit

Appellants contend that the trial court determined "that the proposed class was not numerous enough to be certified." This was not the court's finding. The trial court found that a class of 38 to 40 persons is not numerous enough to make joinder impracticable. A balanced interpretation of the court's order is that the court viewed numerosity as a neutral factor. Thus, had the court found that common questions of fact predominated, it would have certified the class even with a relatively low number of class members.

Appellants contend that as the damages based on the cost of medical monitoring are relatively modest, there is no incentive to seek such damages if there is no class action. During oral argument, appellants' counsel explained that the proposed class was only for those who required medical monitoring. Those persons who actually contracted CBD

would be excluded from the class as their claims would be necessarily unique and individualized.

It is not entirely clear whether the trial court was presented with the concept that the class would be limited to those requiring medical monitoring; there is certainly no trace of this theory in the trial court's analysis and ruling. For the purpose of resolving the matter of class certification by means of this opinion, we will assume it was raised in the trial court.

Certifying a class of persons requiring medical monitoring and, *in addition to such a class*, allowing the more serious cases to proceed individually and separately is an invitation to a litigation disaster. For one, there is the specter of inconsistent verdicts. There is also the fact that the defendants would be forced to defend a multiplicity of suits. In other words, recourse to a class would do nothing to streamline this litigation but would most probably convert it into a nightmare. Given that the proposed class would be even smaller than presently projected, there is simply no reason why the action cannot go forward as a single action with 30 or so plaintiffs. Importantly, it would be one and not a multiplicity of actions.

There is also the fact that limiting the class to persons requiring medical monitoring is a concession that the matter of damages precludes recourse to the class action device. Given that there is simply no reason to split this litigation into a class for medical monitoring and individual cases for CBD, it is evident that damages would be very disparate with some recovering for catastrophic injuries and others recovering far more modest damages. Although the trial court did not address the issue of the management of damages, it is evident that this factor strongly supports the trial court's order.

Appellants also claim that it is only in a class action that they would learn the identities of the other Boeing employees with BeS. We do not agree. This information is clearly discoverable.

Appellants contend that the exposure of former Boeing employees to beryllium will be proven by a predominantly common body of facts because all of the proposed class members have had at least one positive BeLPT and this shows they were exposed "to a sufficient amount of beryllium to cause the resulting immunologic reaction which

manifested itself as a positive BeLPT result." This argument begs the question. The issue is not whether there has been one positive BeLPT result but whether the claimant has BeS, i.e., whether the claimant is in danger of acquiring CBD. In other words, the question is whether the claimant has been injured. And that, as we have seen, requires the resolution of facts that are largely unique to each claimant.

Appellants also criticize the trial court's reliance on *Rutherford v. Owens-Illinois, Inc.*, *supra*, 16 Cal.4th 953, 982. Specifically, appellants claim that the trial court erroneously concluded, based on this decision, that appellants were required to quantify the threshold amount of "beryllium to which each proposed class member was exposed." Appellants misinterpret the court's ruling. The court cited *Rutherford* for the self-evident proposition that, as plaintiffs, appellants have to show that Wellman's product was the cause of their injuries. The court did not rule that appellants had to quantify the exposure to beryllium of each potential class member.

Finally, appellants point to 10 and 12 objections, respectively, that they made to Dr. Repsher's and Dr. Van Ert's declarations. Appellants contend that the trial court erred in overruling these objections. As Wellman points out in reply to this contention, it is incumbent on appellants to state, *with reasons given*, which of these 22 objections should have been sustained. Broad, sweeping indictments (e.g., Dr. Repsher made unsupported assertions and Dr. Van Ert's declaration "is riddled with inconsistencies") are not enough. While it is true, as Wellman points out, that we will not search the record for error (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768), the failure here is more along the lines of not having supported a contention with cogent legal argument. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) We therefore disregard this contention.

3. There Was No Abuse of Discretion

As noted, a certification order generally will not be disturbed on appeal unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. We find that the order is supported by substantial evidence, that the trial court considered the correct criteria and that it based its decision on governing

legal principles. There was therefore no abuse of discretion, which means that we must affirm the order.

4. The Request for Judicial Notice Is Denied

Appellants request that we take judicial notice of six documents for the purpose of showing that Wellman was the sole source of beryllium from 1980 onward. The trial court sustained objections to two of these six documents; the remaining four are new to the case. Wellman objects to the request for judicial notice.

"It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.'" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) We decline to enlarge the record with materials that were not considered by the trial court, especially on a factual issue that is disputed. The request for judicial notice is denied.

Wellman moves to strike a portion of appellants' reply brief in which reference is made to the documents that are the subject of the request for judicial notice. We disregard the indicated portion of the reply brief and deny the motion to strike.

DISPOSITION

The order is affirmed. Respondent is to recover its costs on appeal.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

BENDIX, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.