

[Cite as *Wilson v. Brush Wellman, Inc.*, 2002-Ohio-5566.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80985

JOHN WILSON, ET AL.	:	
	:	JOURNAL ENTRY
Plaintiffs-Appellants	:	
	:	and
-vs-	:	
	:	OPINION
BRUSH WELLMAN, INC.	:	
	:	
Defendant-Appellee	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	<u>OCTOBER 17, 2002</u>
--------------------------------------	-------------------------

CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-401890
--------------------------	---

JUDGMENT:	Reversed and Remanded.
-----------	------------------------

DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiffs-Appellants:	ANDREW S. LIPTON 909 Front Street Toledo, Ohio 43605-2120
----------------------------	---

GEORGE GERKEN
Mohler Law office
444 Spitzer Building
Toledo, Ohio 43604

For Defendant-Appellee:	JEFFERY D. UBERSAX BRIAN A. TROYER Jones, Day, Reavis & Pogue 901 Lakeside Ave., North Point Cleveland, Ohio 44114-1190
-------------------------	---

For Appellants:

STANLEY M. CHESLEY
LOUISE M. ROSELLE
Waite, Schneider, Bayless
& Chesley
1513 Central Trust Tower
One West Fourth Street
Cincinnati, Ohio 45202

PATRICIA ANN BLACKMON, J.:

{¶1} Plaintiffs-appellants appeal from the decision of the Court of Common Pleas denying their motion to certify a class in their lawsuit against Brush Wellman, Inc. (Brush) seeking monetary damages as well as medical monitoring and surveillance of former employees potentially exposed to beryllium, a toxin which may cause severe illness or death. Brush assigns the following as error for our review:

{¶2} *"The trial court abused its discretion when it denied the plaintiffs-appellants' motion to certify the litigation as a class action."*

{¶3} Having reviewed the record and pertinent law, we reverse the decision of the trial court; we remand this matter for proceedings consistent with this opinion. The apposite facts follow.

{¶4} Plaintiffs-appellants are seven former workers at Brush's Elmore, Ohio plant. During the course of their employment, these employees were exposed to various levels of beryllium dust and fumes. On February 2, 2000, plaintiffs-appellants filed their

complaint asserting Brush failed to warn them about the dangers of beryllium, failed to warn them of the levels of beryllium, failed to provide them with a safe place of employment, and refused to provide them with an ongoing program of medical monitoring.

{¶5} The plaintiffs-appellants seek class certification of "all persons who were members of local unions that comprise the Northwestern Ohio Building and Construction Trades Council and who worked at Defendant's Elmore Plant for any period of time between its opening in 1953 and December 31, 1999."

{¶6} The trial court denied class certification finding the complaint failed to satisfy all requirements of Civ.R. 23. This appeal followed.

{¶7} Our standard of review is in *Marks v. C.P. Chemical Co., Inc.*¹ in which the Ohio Supreme Court held "[a] trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent * * * an abuse of discretion."² Application of the abuse of discretion standard "is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket."³ Nonetheless, as the term "abuse of discretion" implies, the trial court's decision whether to certify a class action is not

¹(1987), 31 Ohio St.3d 200.

²*Id.* at the syllabus.

³*Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67,70, citing *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200.

unbridled. The trial court must "carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied."⁴

{¶8} "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing [***] considerations. In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias."⁵

{¶9} A trial judge may certify a class action under Civ.R. 23 only if the following criteria are satisfied: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class is so numerous that joinder of all members is impracticable; (4) there are questions of law or fact common to the class; (5) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (6) the representative parties will fairly and adequately protect the interests of the class; and (7) at least one of three Civ.R. 23(B) requirements are met.⁶

⁴*Hamilton* at 70. (Citations omitted).

⁵*Nakoff v. Fairview General Hospital* (1996), 75 Ohio St.3d 254, 256-257.

⁶Civ.R. 23(A) and (B); *Hamilton*, citing *Warner v. Waste Mgt., Inc.* (1998), 36 Ohio St.3d 91.

{¶10} Here, the trial court found the plaintiffs-appellants' case satisfied all criteria except the last. Thus, our analysis centers on whether the trial court abused its discretion by holding that the Civ.R. 23(B) requirements were not met.

{¶11} We start, and end, our analysis with Civ.R. 23(B)(2) as we determine the trial court erred by finding this criteria absent.

{¶12} Civ.R. 23(B)(2) provides for class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The primary application of Civ.R. 23(B)(2) is where injunctive or declaratory relief is sought.⁷ In *Zinser v. Accufix Research Institute, Inc.*, the U.S. Court of Appeals for the Ninth Circuit decided that a plaintiff seeking "the establishment of a reserve fund for past and future damages, compensation for future medical treatment, plus other compensatory and punitive damages" did not satisfy Fed.R.Civ.P. 23(b).⁸ The court held, "Although the complaint also seeks 'full and proper research into alternative methodologies for remedying the condition of each patient/class member,' this

⁷*Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001).

⁸Fed.R.Civ.P. 23(b) is identical in wording to Ohio's Civ.R. 23(B).

injunctive relief is merely incidental to the primary claim for money damages.”⁹

{¶13} “Courts have split on whether medical monitoring relief is primarily compensatory or injunctive.”¹⁰ Thus, the dispositive question in resolving whether Civ.R. 23(B)(2) certification is appropriate is: what type of relief do the plaintiffs primarily seek?¹¹

{¶14} Here, plaintiffs-appellants seek “to compel Defendant by compensatory relief or injunctive or other equitable relief to establish a fund for medical surveillance and screening.”

While plaintiffs-appellants also seek monetary damages, their primary interest in establishing a fund to provide class members

⁹Zinser at 1196.

¹⁰Id. citing *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995) (although certification of medical monitoring class under Rule 23(b)(2) is legally permissible, district court did not abuse its discretion in refusing to certify such a class where the relief sought was primarily money damages); *Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473, 479-80 (D. Colo. 1998) (even where relief sought was diagnostic testing and medical screening necessary to facilitate early detection and treatment of disease, rather than damages for past, present, or future injury, such relief was primarily a suit for damages); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 483-85 (E.D. Pa. 1997) (Rule 23(b)(2) certification inappropriate where plaintiffs' medical monitoring program included not only periodic examinations but also a fund for treatment because the “request for treatment drastically alters the nature of the relief requested by plaintiffs ...[making it] identical to a traditional damage claim for personal injury”); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 657 (N.D. Cal. 1996) (Rule 23(b)(2) certification improper for class seeking medical monitoring program and damages because medical monitoring, while not incidental to action for monetary damages, was not primary goal). Compare *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 708, 712 (D. Ariz. 1993) (certifying class for court-supervised medical monitoring program to detect disease when damages sought were for medical monitoring costs incurred, rather than other compensatory and punitive damages); *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 406 (M.D. Tenn. 1996) (noting authority supporting proposition that “medical monitoring, if properly framed, can be a form of injunctive relief.”).

¹¹Zinser at 1195.

with necessary medical surveillance and screening for beryllium exposure is injunctive in nature. According to plaintiffs-appellants, Brush established a program to medically monitor its current employees for beryllium exposure. Plaintiffs-appellants simply request the establishment of a similar program for their proposed class. Their request for monetary damages is merely incidental to their primary claim for injunctive relief.

{¶15} Further, "If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2). Those aspects of the case not falling within Rule 23(b)(2) should be treated as incidental."¹² Here, plaintiffs-appellants' claim for damages is incidental to their primary claim for injunctive relief, and, as the trial court held, plaintiffs-appellants satisfied all elements of Civ.R. 23(A). Accordingly, the class may be certified under Civ.R. 23(B)(2), and plaintiffs-appellants' assigned error has merit.

{¶16} We reverse the trial court's judgment and remand this cause to the trial court for proceedings consistent with this opinion.

Judgment reversed and remanded.

This cause is reversed and remanded.

¹²*Hamilton* at 87, quoting Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure (2 Ed. 1986) 470, Section 1775. (Referring to the analogous Fed.R. Civ.P 23(a) and (b)).

It is, therefore, considered that said appellants recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, J., CONCUR;

MICHAEL J. CORRIGAN, P.J., DISSENTS;
(SEE ATTACHED DISSENTING OPINION.)

PATRICIA ANN BLACKMON
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

MICHAEL J. CORRIGAN, P.J., DISSENTING:

I.

{¶17} While I agree with the majority that class certification is not necessarily precluded by the "fact that money damages are also sought in addition to injunctive relief[,] "*Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 87, I disagree with the majority's conclusion that the plaintiffs' request for a medical monitoring *fund* is injunctive in nature. Simply put, an award establishing a medical monitoring fund for past harms allegedly suffered is monetary in nature and not injunctive. An injunction constitutes an order by a court to do or not do something and is a preventive remedy, not a redress for wrongs already suffered. Therefore, I believe the trial court properly found that the plaintiffs did not meet the class certification requirements of Civ.R. 23(B)(2). I therefore respectfully dissent.

II.

{¶18} Under Civ.R. 23(B)(2), class action certification should be rejected if the relief sought is primarily monetary. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91. Here, the relief sought is *only* monetary. Plaintiffs do not seek to enjoin Brush from using beryllium, nor even to prevent Brush from liquidating an existing fund. Plaintiffs seek the *establishment of a fund*. In other words, they seek an award of money damages to be applied towards the cost of medical screening to discover whether

former independent contractors were exposed in the past to dangerous levels of beryllium.

{¶19} The plaintiffs' designation of the requested relief as injunctive notwithstanding,¹³ the relief sought fits squarely within the definition of an injunction, which is "a command to do or refrain from doing a particular act." 56 Ohio Jurisprudence 3d (2000), Injunctions, Section 1. While, broadly speaking, a "command" (or order) requiring Brush to pay for a fund could fit within this definition, so could an order that Brush pay restitution costs to those whom it tortiously injured. In other words, all judgments include some kind of order. The question is what is the nature of the order or remedy. Here, because the plaintiffs seek in essence a monetary award, the nature of the proposed remedy is compensatory, not injunctive.

{¶20} Further, "the main purpose of injunctive process is the prevention of threatened, rather than the cure of consummated, injuries." 56 Ohio Jurisprudence 3d (2000), Injunctions, Section 20 (citation omitted). "Injunction is essentially a preventive

¹³See, e.g., *McCarley v. O.O McIntyre Park Dist.* (Feb. 11, 2000), Gallia App. No. 99 CA 07, at *28-29: "Whether an action invokes the court's equitable jurisdiction depends upon the nature of the action as shown by the pleadings; it does not depend upon the understanding of the parties or the form of the trial court's judgment. *Raymond*, supra, at paragraph three of the syllabus; see, also, *Reed v. Reed* (1874), 25 Ohio St. 422, paragraph one of the syllabus. Thus, in order to determine whether a plaintiff invoked the equitable jurisdiction of the trial court, we must examine the pleadings and ascertain the primary relief sought. See *Bradford v. Micklethwaite* (1954), 99 Ohio App. 119, 123, 131 N.E.2d 685. Even if a complaint seeks equitable relief, an action may still be considered one at law if the equitable relief is merely ancillary to the primary relief sought at law. See *Raymond*, 57 Ohio St. at 287. Conversely, when a complaint seeks equitable relief and requests incidental relief obtainable at law, the action is considered equitable in nature. *Bradford*, 99 Ohio App. at 123."

remedy, designed to guard against future injury rather than to afford redress for wrongs already suffered. Generally speaking, it cannot be applied correctively to remove an injury already done; since equity cannot enjoin that which has been accomplished." *Id.*, Section 5 (citation omitted).

{¶21} The injury complained of here, tortious exposure to beryllium, happened (if at all) before the year 2000.¹⁴ Therefore, the plaintiffs do not seek to guard against future injury. They seek money to determine whether or not any injuries occurred in the past.

III.

{¶22} I have limited my dissent to respond only to the majority's opinion, but I quickly mention here that a class action designation would be inappropriate here for a number of reasons. Suffice it to say here that a proposed class that encompasses independent contractors who worked at various times over the years 1953 to 1999 at various jobs in various capacities with the potential of drastically different levels of exposure to beryllium creates individual issues of liability that can only be determined on individual bases.

{¶23} In any event, because the plaintiffs seek essentially a monetary award and because they seek the redress of past wrongs rather than prevention of future harm, I would hold that the trial court did not abuse its discretion in finding that

¹⁴ The plaintiffs seek to establish a class of those who worked at the plant from 1953 until 1999.

the plaintiffs have not met the requirements for class actions found in Civ.R. 23. I respectfully dissent.