[Cite as *Black v. Dutiel*, 2010-Ohio-4626.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
LORI BLACK, et al.,	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiffs-Appellants	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 10-CA-3
	:	
	:	
DONALD L. DUTIEL, et al.,	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Perry County Court of Common Pleas Case No. 09CV-00170
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 24, 2010
APPEARANCES:	
For Plaintiffs-Appellants	For Defendants-Appellees
JOHN BELL 2700 E. Main Street, Suite 207 Columbus, Ohio 43209	L. JACKSON HENNIGER 150 N. Market Street Logan, Ohio 43138

Edwards, P.J.

{¶1} Plaintiffs-appellants, Lori Black, et al., appeal from the December 10, 2009, Entry of the Perry County Court of Common Pleas denying their Motion for Class Certification.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 17, 2009, appellants Lori Black, Devan Bartholomew, Carl and Sheryl Wise, Lenora Smith, Julie Holland and Terra Young filed a complaint for preliminary and permanent injunctive relief, money damages and other relief against Donald Dutiel, Louella Dutiel and Elizabeth Singleton, all of whom appellants alleged were doing business as the Wagon Wheel Ranch. Appellants, in their complaint, alleged that the Wagon Wheel Ranch was a puppy mill and that the animals sold to them by the same were extremely unhealthy and sometimes died shortly after they were purchased or acquired. Appellants also filed a Motion for Class Certification on April 17, 2009, pursuant to Civ.R. 23(A) and Civ.R. 23(B)(2) and (3). Appellants asked the trial court to certify a class defined as "all person on or after April 17, 2007, who did or will purchase or acquire, or who did or will contract for the purchase or acquisition, of animals" from appellees. An amended complaint was filed on May 6, 2009.

{¶3} On September 11, 2009, appellees filed a "Motion to Deny Plaintiffs' Request for Classification as Class Action." In response, appellants, on September 21, 2009, filed a memorandum in further support of their Motion for Class Certification and in response to appellees' motion. Attached to the same were affidavits from appellants Julie Holland, Devan Bartholomew, Lori Black, Sheryl Wise and Terra Young, all whom, with the exception of appellant Black, had purchased a puppy or puppies from the

Wagon Wheel Ranch. Appellant Lori Black, who is the mother of appellant, Devan Bartholomew, was only a witness and did not herself purchase a puppy. The affidavits of eight other individuals,[1] who had either purchased or acquired puppies from the Wagon Wheel Ranch and four (4) individuals who had not purchased pets from the Wagon Wheel Ranch, but had observed the conditions at the same, were also attached to appellants' memorandum. Appellants, in their memorandum, also indicated that their counsel had received inquiries from forty-nine (49) individuals who had heard of the litigation and that their counsel had received completed litigation questionnaires from over half of those contacts. Appellants further noted that their counsel had compiled postings from internet discussion groups and message boards 'that strongly suggest many more potential class members but do not contain sufficient identifying information to enable counsel to contact the posters."

{¶4} The trial court, in an Entry filed on September 24, 2009, stated, in relevant part, as follows:

{¶5} "[A] Motion to Deny Plaintiffs' Request for Classification as Class Action was filed with this Court on September 11, 2009 with Plaintiffs' Memorandum in Further Support having been filed with this Court on September 21, 2009. After having reviewed the same, this Court finds that the Plaintiff alludes to having 'received inquires with forty-nine individuals who have heard of the litigation, and has already received completed questionnaires from more than half of these contacts.' Plaintiff has provided this Court with seventeen Affidavits from individuals claiming injury at the hands of the actions of the Defendants. As to the experiences of the other forty-nine individuals, this Court is without necessary information to make a reasonable decision regarding Class

[1] One of these individuals responded to an ad for free black lab puppies.

Certification." The court ordered appellants to provide the court with any additional affidavits within thirty (30) days.

{¶6} In response to the trial court's September 24, 2009, Entry, appellants, on October 19, 2009, filed a supplemental memorandum in support of their Motion for Class Certification. Appellants, in the same, stated that not all of the persons who had contacted their counsel had submitted affidavits, questionnaires or statements. Appellants submitted four (4) additional affidavits and fifteen (15) unsworn litigation questionnaires. One of the affidavits was from a named plaintiff while two were from individuals who had not purchased a puppy or puppies from the Wagon Wheel Ranch. All but one of the questionnaires were received from people who had acquired at least one animal from the Wagon Wheel Ranch which had health problems within the first two (2) weeks of ownership. These individuals indicated that they would sign a sworn written statement, or affidavit, of the facts contained in their questionnaire.

{¶7} As memorialized in an Entry filed on October 26, 2009, the trial court ordered appellants to provide "any and all additional Affidavits secured by them to be filed within thirty (30) days from date of this Entry." In response, appellants, on November 20, 2009, filed a "Notice of Matters Admitted by Defendants for Failure to Deny or Otherwise Respond to Plaintiffs' Requests for Admissions" and also an index of all the exhibits that had been submitted by them in support of their Motion for Class Certification.

{¶8} Pursuant to an Entry filed on December 10, 2009, the trial court denied appellants' Motion for Class Certification, finding that appellants had failed to meet the "numerosity requirement" of Civ.R. 23.

{¶9} Appellants now raise the following assignments of error on appeal:

{¶10} "I. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFFS-APPELLANTS WHEN IT OVERRULED THEIR MOTION FOR CLASS CERTIFICATION DESPITE RECEIVING AFFIDAVITS AND OTHER EVIDENTIARY MATERIAL WHICH IDENTIFIED MORE THAN THIRTY (30) INDIVIDUAL VICTIMS OF THE DEFENDANTS' OPERATIONS AND DEMONSTRATED THE EXISTENCE OF DOZENS MORE.

{¶11} "II. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFFS-APPELLANTS WHEN IT OVERRULED THEIR MOTION FOR CLASS CERTIFICATION WITHOUT ORAL OR EVIDENTIARY HEARING.

{¶12} "III. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFFS-APPELLANTS WHEN IT OVERRULED THEIR MOTION FOR CLASS CERTIFICATION WITHOUT ADDRESSING ANY OF THE FACTORS FOR CLASS CERTIFICATION IN RULE 23 EXCEPT 'NUMEROSITY.'"

I, II,

{¶13} Appellants, in their second assignment of error, argue that the trial court erred in denying their Motion for Class Certification without holding a hearing on the same. In their first assignment of error, appellants maintain that the trial court erred in denying their Motion for Class Certification on the basis that appellants had failed to satisfy the "numerosity" requirement. We disagree.

{¶14} An order determining class certification constitutes a final, appealable order pursuant to R.C. 2505.02(B)(5). See, e.g., *Blumenthal v. Medina Supply Co.* (2000), 139 Ohio App.3d 283, 743 N.E.2d 923. Civ.R. 23 provides the framework for the

prosecution of class actions lawsuits in Ohio courts. In order for a case to be certified as a class action, the trial court must make seven affirmative findings as to the requirements of Civ.R. 23. *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091, paragraph one of the syllabus. The following seven requirements must be 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 must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met. Civ.R. 23(A) and (B). See also *Warner*, supra.

{¶15} A 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. *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 70, 694 N.E.2d 442. The Ohio Supreme Court in *Hamilton* suggested, but did not mandate, that trial courts make separate written findings as to each of the seven class action requirements under Civ.R. 23, and specify their reasoning as to each finding. *Id.* at 71. However, a trial court has broad discretion in determining whether a class action may be maintained. *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 62, 556 N.E.2d 157. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or

unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶16} To have a class action certified, the plaintiff must show that all of the seven requirements of Civ.R. 23(A) and (B) are met, and the failure of any one of those seven requirements will result in the denial of certification. *Bardes v. Todd* (2000), 139 Ohio App.3d 938, 943, 746 N.E.2d 229.

{¶17} As an initial matter, we note that appellants, in their second assignment of error, argue that the trial court erred in failing to hold a hearing on their motion. As noted by the court in *Shaver v. Standard Ohio Co.* (1990), 68 Ohio App.3d 783, 792, 589 N.E.2d 1348 '"Civ.R. 23 is silent as to whether a hearing must be held on the issue of class certification. However, in *Warner, supra*, 36 Ohio St.3d at 98, 521 N.E.2d at 1098, fn. 9, the Supreme Court of Ohio recognized that an evidentiary hearing is not required in all cases. See, also, *Franks v. Kroger Co.* (C.A.6, 1981), 649 F.2d 1216, 1223 (interpreting Fed.R.Civ.P. 23 to not require an evidentiary hearing on class certification). An evidentiary hearing need not be held in cases where the pleadings in a class action are so clear that a trial court may find by a preponderance of the evidence that certification is or is not proper. *Warner,* supra." Moreover, we note that while appellees, in their Motion to Deny appellants' request for class certification, asked that a hearing be scheduled, appellants, in their September 21, 2009, response to such motion, indicated that a hearing was not required or needed. Finally, we find that there was sufficient evidence in the record for the trial court to rule on appellant's Motion for Class Certification without a hearing.

{¶18} While appellants argue that the trial court mistakenly believed, as evidenced by its September 14, 2009, Entry, that appellants had received completed litigation questionnaires from 49 individuals,[2] when, in fact, appellants had received such questionnaires from only fifteen (15) people, we note that appellants, in their November 20, 2009, Index to Exhibits, laid out all of the evidence that they had produced in support of their Motion for Class Certification. Thus, the trial court had all of the evidence before it when it ruled on appellants' motion.

{¶19} In the case sub judice, the trial court denied appellants' Motion for Class Certification on the basis that appellants had failed to satisfy the "numerosity" requirement. We find that the trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶20} A court may properly certify a class only if it finds, by a preponderance of the evidence, that the class meets the numerosity criteria of Civ.R. 23(A). See *Warner,* supra at 97. The Ohio Supreme Court, in *Warner,* noted that "courts have not specified numerical limits for the size of a class action. This determination must be made on a case-by-case basis." *Warner*, supra, at 97. However, " '(i)f the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity is probably lacking; if the class has between twenty-five and forty, there is no automatic rule (* * *).'" Id*.,* quoting from Miller, *An Overview of Federal Class Actions: Past, Present and Future* (2 Ed.1977) at 22. No matter the number, plaintiffs must still show under Civ.R. 23(A)(1) that "the class is so numerous that joinder of all members is impracticable." "The mere 'possibility' that members of a class exist is insufficient.

[2] Appellants, in their brief, indicated that, during a pretrial conference, their counsel commented that his office had received 49 inquires.

Rather, the movant must provide evidence that a number of people have been harmed by the nonmovant's actions." (Internal Citations omitted.) *Mundell v. Landstyles* (Sept. 6, 2001), Cuyahoga App. No. 78829, 2001 WL 1035281 at 3.

{¶21} The representatives in a class action are not required to identify the exact number of members in the proposed class. However, they are required to produce some evidence or a reasonable estimate of the number of class members. *Williams v. Countrywide Home Loans, Inc.,* Lucas App. No. L-06-1120, 2007-Ohio-5353, ¶ 19, citing *Cervantes v. Sugar Creek Packing Co., Inc.* (S.D.Ohio 2002), 210 F.R.D. 611, 621. A court is, however, permitted to make common sense assumptions in determining whether the numerosity requirement is satisfied. *Id.* at ¶ 20, citing *Evans v. U.S. Pipe & Foundry Co.* (C.A.11, 1983), 696 F.2d 925, 930.

{¶22} Appellants, in their brief, contend that they identified thirty (30) prospective class members. Of the thirty prospective class members, seven (7) were the representative plaintiffs,[3] nine (9) were other individuals who submitted affidavits and fourteen (14) were persons who responded to a litigation questionnaire. Appellants further contend that, in addition to identifying such thirty (30), they "demonstrated the existence of dozens more." In support of such contention, appellants note that they submitted a compilation of postings to several message boards made by other victims to the Wagon Wheel Ranch and witnesses to the conditions there and argue that the postings "demonstrate there are dozens, perhaps hundreds, of victims of the Wagon Wheel that have not yet been indentified."

{¶23} Appellants claim to have submitted a total of 21 affidavits to the trial court. We find that, at best, appellants have identified fifteen (14) prospective class members

[3] We note that, while there is an affidavit from Sheryl Wise, there is not affidavit from Carl Wise.

by a preponderance of the evidence. We note that appellant Lori Black, appellant Devan Batholomew's mother, was not herself a victim, but rather was a witness to what happened to the puppy that her daughter purchased Six of the affidavits were from individuals who themselves were not victims, but who were witnesses to the conditions at the Wagon Wheel Ranch. We further note that while appellants submitted litigation questionnaires from fourteen individuals, the same were not sworn and that although appellants were given additional time to do so, appellants did not obtain affidavits from the individuals who submitted the unsworn questionnaires.

{¶24} Even if we counted the fourteen individuals who responded to the litigation questionnaires, appellants proposed class would only consist of 28 members.

{¶25} Based on the foregoing, we find that the trial court did not err in denying appellants' Motion for Class Certification. We find that appellants' proposed class was not so numerous that joinder of individual plaintiffs was impractical. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶26} Appellant's first and second assignments of error are, therefore, overruled.

III

{¶27} Appellants, in their third assignment of error, argue that the trial court erred when it overruled appellants' Motion or Class Certification without addressing any of the factors for class certification contained in Civ.R. 23 except for numerosity.

{¶28} However, as is stated above, failure of <u>any</u> one of the seven requirements for class certification will result in the denial of certification. *Bardes v. Todd* (2000), 139 Ohio App.3d 938, 943, 746 N.E.2d 229. Based on our finding that the trial court did not

err in denying appellant's Motion for Class Certification based on the numerosity requirement, the trial court did not need to address the remaining requirements.

{¶29} Appellants' third assignment of error is overruled.

{¶30} Accordingly, the judgment of the Perry County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Gwin, J. and

Farmer, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES

JAE/d0512

[Cite as *Black v. Dutiel*, 2010-Ohio-4626.]

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

LORI BLACK, et al.,	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
DONALD L. DUTIEL, et al.,	:	
Defendants-Appellees	:	CASE NO. 10-CA-3

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Perry County Court of Common Pleas is affirmed. Costs assessed to appellants.

s/Julie A. Edwards

s/W. Scott Gwin

s/Sheila G. Farmer

JUDGES