THIRD DIVISION
JUNE 25, 2014

No. 1-13-1016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALBERT LAMB, et al.	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County.
	)	
v.	)	Nos. 00 L 6485, 00 L 6486,
	)	00 L 6487, 00 L 6488, 00 L 6489,
	)	00 L 6490, 00 L 6491, 00 L 6493,
	)	00 L 6495, and 01 L 4133
FEDERAL SIGNAL CORPORATION,	)	
	)	
Defendant-Appellant.	)	The Honorable
	)	William Haddad,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *HELD*: (1) The court had jurisdiction of an interlocutory appeal of a partial class certification in a class action brought in an amended complaint that was filed after the effective date of Illinois Supreme Court Rule 306(a)(8) (Ill. S. Ct. R. 306(a)(8) (eff. Jan.

1, 2003)) and (2) The partial class certification of Chicago firefighter plaintiffs on the issue of whether there was a design defect in a strict liability action against a manufacturer of sirens was reversed and remanded because the court's order found various common issues but failed to make a finding that the common issues predominated, and because there was no proper finding as to the adequacy of representation of the class by the representative plaintiffs where the court instead found that the plaintiffs' attorneys adequately represented the class.

¶ 2 BACKGROUND

¶ 3 This case is a consolidated case of ten lawsuits brought between 1999-2001 by some 500 Chicago firefighter plaintiffs who claim that various sirens manufactured by defendant, Federal Signal Corporation (Federal Signal), are defective because the sirens produce excessive sound in the cab of their fire trucks and engines, which resulted in hearing loss. Originally, 2,444 firefighters brought suit against Federal Signal across the United States. In Cook County, there are 550 firefighter plaintiffs. Since 2007, the circuit court has consolidated the firefighter plaintiffs in groups or "tracks" of up to 39 plaintiffs for jury trials. Juries have rendered verdicts for Federal Signal in three of four trials: the 2008 Track 1 trial involving 27 plaintiffs; the 2011 Track 4 trial involving eight plaintiffs; and the 2012 Track 5 trial involving one plaintiff. All 39 Track 2 plaintiffs voluntarily dismissed their claims on the eve of the 2008 Track 2 jury trial. Federal Signal obtained dismissals of the claims of more than 80 individual firefighters. Federal Signal appealed the verdict in favor of the nine plaintiffs in the Track 3 trials, but this court affirmed. A petition for leave to appeal to the Supreme Court is pending in that case.

¶ 4 In January 2012, after the Track 4 trial jury verdict in favor of Federal Signal, the circuit court entered an order *sua sponte* directing the parties to brief the certification of a class of the 550 Chicago firefighter plaintiffs on the issue of whether Federal Signal sirens are unreasonably

dangerous due to alleged defective design. On March 14, 2012, the court entered an written order and supporting memorandum "certifying a partial class action" of the Chicago firefighter plaintiffs in these cases for trial on the issue of whether Federal Signal's sirens are unreasonably dangerous. Federal Signal petitioned for leave to appeal the 2012 certification order under Illinois Supreme Court Rule 306(a)(8) (Ill. S. Ct. R. 306(a)(8) (eff. Jan. 1, 2003)), which this court granted on May 10, 2012. After we granted the petition for leave to appeal, plaintiffs filed a motion conceding that the class certification order "raised potential issues of procedural errors such that it should be vacated." We granted plaintiffs' motion and reversed the circuit court's 2012 certification order.

¶ 5 In January 2013, however, plaintiffs filed an amended complaint alleging strict product liability as a class action seeking certification of a nearly identical class of Chicago firefighter plaintiffs in the pending circuit court actions. Plaintiffs requested "limited issue" class certification, severance, and trial on the issue of whether Federal Signal's sirens were unreasonably dangerous.

¶ 6 At the hearing on March 11, 2013, the circuit court granted plaintiffs' motion for class certification, incorporating by reference the court's prior March 14, 2012 amended memorandum order for the prior certification which was reversed upon plaintiffs' motion. On March 15, 2013, the circuit court entered an order granting plaintiffs' "Motion for Certification of Class Status on Limited Issue and Request for Severance." The court set a jury trial for June 10, 2013 "on the single issue of whether Federal Signal sirens are unreasonably dangerous."

¶ 7 Federal Signal petitioned for leave to appeal the circuit court's order of March 15, 2013

granting class status pursuant to Illinois Supreme Court Rule 306(a)(8) (eff. Jan. 1, 2003), and on April 23, 2013, we entered an order granting its petition.

¶ 8 ANALYSIS

¶ 9 I. Jurisdiction

¶ 10 We first address plaintiffs' argument that we lack jurisdiction of this appeal because plaintiffs' actions were filed prior to the amendment to Illinois Supreme Court Rule 306(a)(8) (Ill. S. Ct. R. 306(a)(8) (eff. Jan. 1, 2003), allowing interlocutory appeals of orders denying or granting class certification. According to Federal Signal, the class in this 2003 refiled action excluded those plaintiffs who had originally filed their actions after January 1, 2003, Rule 306(a)(8)'s effective date. See Ill. S. Ct. R. 306(a)(8) (eff. Jan. 1, 2003). Federal Signal suggests that plaintiffs are engaging in gamesmanship with their amended complaint in redefining the class to include only plaintiffs who originally filed their individual actions prior to January 1, 2003, so as to attempt to avoid review under the new interlocutory appeal Supreme Court Rule for class certifications.

¶ 11 Rule 306(a)(8) governs appeals from orders granting or denying class certification after January 1, 2003. The explanatory note to the amendment makes clear that: "The amendment of Rule 306(a) to include paragraph (8) applies only to cases filed in the circuit court on or after the effective date of the amendment, i.e. January 1, 2003." Ill. S. Ct. R. 306(a)(8), Explanatory Note (eff. Jan. 1, 2003). The amended complaint in this case brought a new class action. Previously, the plaintiffs filed individual actions. Section 2-802 of the Illinois Code of Civil Procedure refers to the "commencement of an action brought as a class action." 735 ILCS 5/2-802(a) (West

2012). Plaintiffs did not "commence" a class action until the filing of their amended complaint. The amended complaint superseded and did not refer to or incorporate any previous complaints.

¶ 12 Here, the amended complaint asserted new strict product liability claims based on four additional Federal Signal siren models that were not alleged in the individual plaintiffs' previous complaints, as well as expanding the allegations of alleged exposure and injury up to and including "the present." The amended complaint asserting the class action for the first time was filed in 2013, well after the January 1, 2003 effective date of Rule 306(a)(8), and thus we have jurisdiction to review the class certification.

¶ 13 II. Class Certification

¶ 14 Turning to the merits of the class certification, in Illinois under section 2-801 of the Code of Civil Procedure, a class may be certified only if the proponent establishes the following four prerequisites: (1) the class is so numerous that a joinder of all members is impracticable, (2) there are questions of fact or law common to the class that predominate over any questions affecting only individual members, (3) the representative parties will fairly and adequately protect the interest of the class, and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801 (West 2012).

¶ 15 Defendants concede that the class is numerous so we will not address this first requirement. However, defendants argue that the remaining requirements have not been met in this case, and argue that: (A) individual issues of proximate cause and damages predominate over any questions of fact or law common to the putative class; (B) there is no showing the representative plaintiffs will fairly and adequately protect the interest of the class; and © a class

action is inappropriate in this case. We address each argument in turn.

¶ 16 A. Predominance

¶ 17 "The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court." *Smith v. Illinois Cent. R.R. Co.*, 223 Ill. 2d 441, 448-49 (2006) (citing *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000), citing *Central Power & Light Co. v. City of San Juan*, 962 S.W.2d 602 (Tex. App. 1998)). "Satisfaction of section 2-801's predominance requirement necessitates a showing that ' "successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." ' " *Smith*, 223 Ill. 2d at 449 (citing *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 128 (2005), quoting *Goetz v. Village of Hoffman Estates*, 62 Ill. App. 3d 233, 236 (1978)). In making this inquiry, the trial court must identify the outcome-determinative issues, assess which issues will predominate, and then make the final determination as to whether these issues are common to the class. *Bemis v. Safeco Ins. Co. of America*, 407 Ill. App. 3d 1164, 1167-68 (2011). The question is: will common or individual issues be the subject of the majority of the efforts of the litigants and the court? See *Bemis*, 407 Ill. App. 3d at 1168.

¶ 18 A circuit court's assessment of whether a proposed class meets the requirements of section 2-801 is reviewed deferentially. *Smith*, 223 Ill. 2d at 447. The decision whether these requirements are satisfied lies within the sound discretion of the trial court. Our review is not *de novo* but is limited to a review of the discretion exercised, and will be reversed on appeal only if the reviewing court determines that there was an abuse of discretion or that impermissible legal

criteria were employed. *Smith*, 223 Ill. 2d at 447 (citing *Avery*, 216 Ill. 2d 100).

¶ 19 Federal Signal first argues that class certification in this case is improper because the certification was for a "single issue," which, according to Federal Signal, Illinois does not allow. In support, Federal Signal cites to *Smith v. Illinois*, 223 Ill. 2d 441, 450 (2006), and *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 41. In *Smith*, a class action was brought against the defendant railroad arising out of a train derailment that exposed individuals and businesses to toxic chemicals. The circuit court certified a class of individuals and businesses affected by the derailment, but the Illinois Supreme Court held that certification of the class was not appropriate because common issues did not predominate. The supreme court found that "the vast majority of the damages flow not from the derailment itself, but from the exposure to the chemicals spilled" and that "[p]roof of proximate causation in this case will involve highly individualized variables, including whether and to what extent, and to which chemicals each member was exposed, location at the time of exposure, age, activity, medical history, and credibility." *Smith*, 223 Ill. 2d at 453-54. The court noted that "the class action device is unsuitable for mass tort personal injury cases such as the one before us." *Smith*, 223 Ill. 2d at 453. The court held that "individual issues of proximate causation and damages will consume the great bulk of the time at trial" and so, "[c]onsequently, the common issues do not predominate." *Smith*, 223 Ill. 2d at 454.

¶ 20 In *Mashal* a taxicab driver brought a class action against the city of Chicago, challenging city's alleged practice of issuing "fly-by" traffic citations, and the Illinois Supreme Court held that a partial summary judgment was not a decision on the merits that barred a later order decertifying the class. Federal Signal merely relies on the court's reiteration in *Mashal* of its general

recognition in *Smith* that personal injury actions "should not be certified as class actions because such actions would trigger an unworkable array of fact-intensive, claimant-specific questions that would result in numerous minitrials that defy class treatment." *Mashal*, 2012 IL 112341, ¶ 41 (citing *Smith*, 223 Ill. 2d at 445). The Illinois Supreme Court in *Mashal* made no holding concerning the appropriateness of the class certification in the first place, however, and so we do not deem *Mashal* to have any relevance to the issue in the appeal before us.

¶ 21 Federal Signal also relies on *Mele v. Howmedica, Inc.*, 348 Ill. App. 3d 1 (2004), *overruled in part*, *Calles v. Scripto–Tokai Corp.*, 224 Ill. 2d 247, 260 (2007), another mass tort case. In *Mele*, this court affirmed the trial court's denial of class certification in a mass tort case involving a medical implantation device. Federal Signal argues that *Mele* "rejected the circuit court's view that the Illinois class-action statute authorizes a 'single-issue' class like this one," citing *Mele*, 348 Ill. App. 3d at 21-22.

¶ 22 First, Federal Signal's argument against class certification of limited issues is squarely refuted by section 802(b) of the Illinois Code of Civil Procedure, which expressly allows class actions on limited issues and sub-classes.

> "(b) Class Action on Limited Issues and Sub-classes. When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly." 735 ILCS 5/2-802(b) (West 2012).

¶ 23 Second, *Mele* does not stand for the proposition urged by Federal Signal that so-called single-issue certification is not allowed. Rather, our analysis in *Mele* indicates that partial class

certification on limited issues is appropriate, and the question is only whether the commonality on *those* issues predominates. We stated that "[t]o maintain a class action in Illinois, the plaintiff must show that the *particular* common issues for which he seeks class certification under section 2-802(b) 'predominate over any questions affecting only individual members.' " (Emphasis added.) *Mele*, 348 Ill. App. 3d at 23 (citing 735 ILCS 5/2-801 (West 2000)). Thus, in keeping with section 2-802(b) we recognized even in *Mele* that class certification of particular issues is permitted. Under the facts in the actions in *Mele*, however, we found that individual issues in that case predominated because the issue was causation in a tort case involving a medical device implanted in the individual plaintiffs.

¶ 24 Thus, Federal Signal's argument that Illinois does not allow "single issue" class certification is squarely contradicted by section 2-802, and is also unsupported by its citations to *Smith* and *Mele*. On the contrary, Illinois allows certification of limited issues. See 735 ILCS 5/2-802(b) (West 2012) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class").

¶ 25 Nevertheless, class certification is improper even on limited issues or sub-classes if the common issues do not predominate over individual questions. Federal Signal argues that the following individualized issues predominate: each plaintiff's exposure to sirens; which siren each plaintiff was exposed to; each plaintiff's period of service and run history; hearing protection use; and emergency vehicle designs; whether each plaintiff sustained high-frequency hearing loss and the extent of that hearing loss; each individual plaintiff's proximate cause of that hearing loss;

other potential cause of hearing loss for each plaintiff; each plaintiff's medical history; each plaintiff's individual damages; and Federal Signal's affirmative defenses for each individual plaintiff's case.

¶ 26 In its order granting class certification, the court stated the following:

> "This court is faced with constitutional and statutory concerns about needless delay. Therefore, the court is certifying a partial class action in a bifurcated trial on the narrow issue of whether the product is unreasonabl[y] dangerous."
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> * * *
>
> "Unlike *Smith* and *Mele*, this court is not considering certification of a class on individualized decisions of causation and damages. Rather, a partial certification would pertain to the threshold issue of whether identifiable sirens made by the defendant share a common defect rendering them unreasonably dangerous to end users, over 550 Chicago firefighters, during an identifiable time period.
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> * * *
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> Partial certification would forgo individual factors such as causation, injury, and assumption of risk, but rather focus upon general product factors found in a typical risk-benefit analysis such as: an alternative feasible design at the time of manufacture, warnings, conformity with industry or governmental standards, the overall utility of the product to the user and the public, or the likelihood of injury and the seriousness or extent of harm. *Jablonski v. Ford*, *** 2011 IL 110096 (2011)"

¶ 27 Based on the foregoing findings, the court specified the class as follows:

"Under 735 ILCS 5/2-801 this court finds that the 550 Chicago firefighters compose of class [sic] which shares common questions of law on thresholds questions, including:

A. Whether the defendant manufactured certain identified Federal Signal sirens which were used by first responders in Chicago, Illinois during a specified period of time.

B. Whether these identified sirens were unreasonably dangerous products to ordinary end user-firefighters and first responders, and/or

C. Whether the product had inadequate design and/or warnings."

¶ 28 The court found that these were "common questions of law" for the class but failed to make the required finding of predominance. Curiously, in its order the court correctly restated the requirements for class certification and also accurately stated the test for predominance from *Smith*, but failed to make the actual required finding of predominance. The court focused on the "common" issues but did not make the finding that these common issues in fact predominate over the individual issues.

¶ 29 Even if the court had made the proper required predominance finding, the first common question stated by the court, whether Federal Signal manufactured certain sirens, is an easily provable limited fact which cannot be said to predominate over individual issues in this litigation. Also, the court's order stated "during a specified period of time" but did not specify the time period for the relevant sirens.

¶ 30 The second common issue stated by the court would also be insufficient for class certification, even if the court had made the proper required predominance finding. As Federal

Signal points out, there are nine different allegedly defective siren designs involved. To satisfy the predominance requirement, "a plaintiff must necessarily show that successful adjudication of the class representative's individual claim ' "will establish a right of recovery in other class members." ' " *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 33 (quoting *Smith*, 223 Ill.2d at 449, quoting *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 128 (2005)). In this case, given that there are nine different siren designs involved, plaintiffs have made no showing that a successful class representative's individual claim for defective design of one of the siren designs would also establish a right of recovery in other class members.

¶ 31 The same is true of the third common issue stated by the court in its order. Due to the fact that nine different designs are at issue in this litigation, whether each siren type had "inadequate design and/or warnings" would need to be determined for each type of design.

¶ 32 We must reverse class certification because of the failure to make the required finding that the common questions predominated over individual issues. We also note that the commonality requirement is not met where there are nine different designs at issue.

¶ 33 B. Adequacy of Representation of the Class

¶ 34 As Federal Signal argues, the court also erred in certifying the class without any identified class representatives or determination of their adequacy, as required by section 2-801. Federal Signal argues that due process requires that class representatives be identified and be sufficiently independent from class lawyers to advocate for the interests of the class, as opposed to its counsel.

¶ 35 Regarding the adequacy of class representation, the circuit court stated in its order that:

> "The attorneys for the consolidated plaintiffs are already entrusted with all litigation decisions for their individual clients. By certifying them as a class on this narrow issue, the plaintiffs would be assured of individual autonomy over their respective cases and could proceed in the future in a consolidated fashion for trial proceedings on other issues."

¶ 36 The circuit court found in its conclusion in its order:

> "That attorneys of record since 1999, have and will fairly and adequately protect the interests of the 2350 plaintiffs consolidated herein and, particularly, 550 Chicago firefighters and first responders set for partial certification."

¶ 37 The court, however, made no finding that certain named plaintiffs would adequately represent the class. There must be a finding that the representative "parties" will fairly and adequately protect the interest of the class, not the parties' attorneys. See 735 ILCS 5/2-801(3) (West 2012). In addition to the second requirement, the third requirement for class certification also was not met.

¶ 38 C. Efficiency

¶ 39 Finally, Federal Signal further argues that the fourth requirement for class certification is not met and that class certification would not be fair or efficient because, "[e]ven if plaintiffs were to prevail in a class-wide proceeding on defect, hundreds of additional individual trials would be necessary to resolve all the other issues raised by each plaintiff's claim." Due to our holding that the court's order did not contain the required findings regarding predominance and adequate representation of the class, we need not reach the final issue whether the class action is

an appropriate method for the fair and efficient adjudication of the controversy.

¶ 40 CONCLUSION

¶ 41 The filing of an amended complaint after the effective date of amended Supreme Court Rule 306(a)(8) alleging a class action for the first time was a newly filed class action, and thus this case is governed by amended Supreme Court Rule 306(a)(8) and we have jurisdiction for interlocutory review of the class certification.

¶ 42 We hold, however, that the circuit court did not make the required findings under Rule 306(a)(8) to support the certification of a class. First, while Rule 306(a)(8) allows certification of a limited issue or a sub-class, and the court found various "common" issues, the court did not made the required finding of predominance of these common issues. Second, the circuit court made no finding concerning the adequacy of representation of the class. For these reasons, we reverse the class certification and remand for further proceedings.

¶ 43 Reversed and remanded.