

IN THE SUPREME COURT OF TEXAS

=====
No. 98-0154
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SOUTHWESTERN REFINING COMPANY, INC., KERR-McGEE CORPORATION, AND
SHERWOOD BREAUX, PETITIONERS

v.

JULIA BERNAL, ET AL., RESPONDENTS

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
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Argued April 7, 1999

JUSTICE GONZALES delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE OWEN, JUSTICE BAKER, JUSTICE ABBOTT and JUSTICE O'NEILL joined.

JUSTICE BAKER filed a concurring opinion, in which JUSTICE HECHT joined.

JUSTICE ENOCH filed a dissenting opinion, in which CHIEF JUSTICE PHILLIPS and JUSTICE HANKINSON joined.

The principal issue in this interlocutory appeal is the propriety of certifying a class action of 904 plaintiffs against Southwest Refining Company for alleged personal injuries arising from a refinery tank fire in Corpus Christi, Texas. The trial court certified the class and directed that the class proceed in three phases: the first to determine general liability and gross negligence; the second to determine punitive damages; and the third to determine causation and actual damages. The court

of appeals modified the certification order to require determination of the class representatives' actual damages before punitive damages may be assessed for the whole class. 960 S.W.2d 293. Southwest filed this petition for review, contending that this Court has conflicts jurisdiction and that the common issues do not predominate over the individual issues. We agree with both of Southwest's contentions. Therefore, we reverse the court of appeals' judgment and remand this cause to the trial court for further proceedings consistent with this opinion.

I

On January 26, 1994, at about 7:30 a.m., a slop tank at a Southwest refinery in Corpus Christi exploded. Julia Bernal, Mary De La Garza, Anita Barrerra and Josephine Suarez, four Corpus Christi residents, sued Southwest and four other defendants for extreme fear and mental anguish caused by the sight and sound of the explosion and for personal injuries and property damages caused by toxic exposure. They allege that the explosion and ensuing fire sent a plume of toxic smoke into the air and that soot and ashes from the smoke descended on their homes in the surrounding neighborhoods. Plaintiffs claim that because of the explosion, they suffered respiratory difficulties, skin irritation, eye irritation, headaches, and nausea, and their lawns, foliage, and pets died.

After an additional 900 claimants joined the lawsuit, plaintiffs moved to certify the personal injury claims as a class action consisting of all of the claimants. The trial court granted the motion, certifying the class with nineteen class representatives under Rule 42(b)(4) of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 42(b)(4). And as the plaintiffs requested, the court excluded from the class all claims for property or diminution-in-value damages. The court's order granting the

motion provided for a three-phase trial:

Phase I will address the alleged liability of defendants to the named class representatives on the issues of negligence, strict liability, toxic trespass, nuisance and gross negligence. Phase I will establish whether defendants are liable for the explosion and whether the released materials were capable of causing the harm alleged by the class.

If during Phase I there is a finding of gross negligence, Phase II of the trial will determine the amount to be recovered by the class as punitive damage[s].

Phase III will determine whether the individual class members can show sufficient specific injuries or damages and whether they were proximately caused by the release due to the tank explosion. The amount of punitive damages, awarded in Phase II, if any, will be proportionately reduced by the number of individuals who can not make the requisite showing of actual damages and proximate cause in Phase III, if any.

The order does not indicate whether the trial court envisioned a single jury deciding all three phases, including the 904 individual damage claims.

Southwest brought an interlocutory appeal seeking to reverse the certification order. It argued that the prerequisites to class certification, most notably the requirement that common issues predominate over individual ones, were not met. It also argued that the trial court erred by splitting the trial into different phases, in which fault and punitive damages would be determined before causation and actual damages.

The court of appeals held that the class certification satisfied the class action prerequisites. While it acknowledged that “individual issues may predominate in determination of causation and damages,” it reasoned that the class was maintainable because the modified trial plan called for the individual issues to be litigated separately from the common issues. 960 S.W.2d at 299. The court suggested that these issues would not necessarily overwhelm the jury because “[i]t remains to be

seen” whether “the issues of causation and damages may be proven [expeditiously] by the use of models, formulas, and damage brochures.” *Id.* at 297. In any event, the court suggested, separate juries could be summoned to resolve the individual issues. *See id.*

However, in response to Southwest’s arguments, the court of appeals modified the trial plan to require proof of actual damages by the nineteen class representatives before the jury may resolve punitive damages for the entire class. Under the modified trial plan, phase I remained as the trial court originally ordered, phase II would determine proximate cause and actual damages for the nineteen class representatives, phase III would determine punitive damages for the entire class, and phase IV would determine proximate cause and actual damages for the remaining 885 class members. Southwest petitions for review from this decision, arguing that the trial court’s certification order was an abuse of discretion. Southwest contends that the class action is not maintainable because individual issues will predominate over common questions of law and fact. Southwest also objects to the class action as being an inferior and unmanageable method of adjudicating the controversy. Moreover, Southwest argues that liability and damage issues cannot be tried in separate phases and that punitive damages for the entire class cannot be tried until the jury determines actual damages for the entire class. Finally, Southwest maintains that the class is not so numerous that joinder is impracticable, that class counsel have a conflict of interest because they are also counsel for those members who must decide whether to opt out, and that class notice was deficient.

II

As a preliminary matter, we must determine if we have jurisdiction to consider this

interlocutory appeal. Jurisdiction over interlocutory appeals is generally final in the courts of appeals. See TEX. GOV'T CODE § 22.225(b) (“Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a writ of error is not allowed from the supreme court, in the following civil cases: . . . (3) an appeal from an interlocutory order appointing a receiver or trustee or from other interlocutory appeals that are allowed by law; . . .”). But this Court has jurisdiction over interlocutory appeals when the court of appeals' decision conflicts with a prior decision of another court of appeals or this Court on a question of law material to the decision of the case. See *id.* §§ 22.225(c); 22.001(a)(2). As we recently observed, the standard for conflicts jurisdiction is whether the rulings in two cases are “so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other.” *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998) (quoting *Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex. 1995)). Stating it another way:

[f]or jurisdiction to attach on the basis of conflict[,] “[t]he conflict must be on the very question of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court.”

Coastal, 979 S.W.2d at 319-20 (quoting *Christy v. Williams*, 298 S.W.2d 565, 567 (Tex. 1957)).

Southwest contends that the court of appeals' opinion in this case conflicts with: (1) *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), regarding whether punitive damages can be tried before proximate causation and actual damages; (2) *RSR Corp. v. Hayes*, 673 S.W.2d 928 (Tex. App.—Dallas 1984, writ dismissed), regarding the propriety of class certification of personal injury claims, and (3) *Iley v. Hughes*, 311 S.W.2d 648 (Tex. 1958), regarding whether

different elements of a personal injury claim can be tried in separate phases by separate juries.

We begin our conflicts analysis with *Moriel*. In *Moriel*, we held that upon a party's request, a trial court must bifurcate the trial and obtain jury findings on liability and actual damages *before* allowing evidence — including evidence of a defendant's net worth — on the amount of punitive damages:

Under this approach, the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages (e.g., gross negligence), and then returns findings on these issues. If the jury answers the punitive damages liability question in the plaintiff's favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.

879 S.W.2d at 30. The court of appeals acknowledged the tension between the trial court's certification order and the rule in *Moriel* that a jury must decide liability and actual damages issues before it considers punitive damages. 960 S.W.2d at 298. The court of appeals' solution was to modify the certification order by adding another phase, prior to the punitive damages phase, to determine the class representatives' actual damages. Thus, the order of proof in the court of appeals' modified order is (1) duty, breach of duty, and gross negligence issues; (2) the nineteen class representatives' proximate cause and actual damages issues; (3) punitive damages for the entire class; and (4) the 885 remaining plaintiffs' proximate cause and actual damages issues.

Southwest contends that the multi-phase trial plan, as modified by the court of appeals, still conflicts with *Moriel*. Under the modified trial plan, evidence related to punitive damages, including net worth, will be introduced before the jury is asked to decide causation and actual damages for the 885 nonrepresentative members of the class. Also, the plan will require the jury to decide punitive

damages before “the totality of the evidence,” including causation and the amount of actual damages for the 885 nonrepresentative class members, is presented. Plaintiffs argue that the modified trial plan does not conflict with *Moriel* because this case, unlike *Moriel*, is a class action, and that the different procedural context legitimately distinguishes the cases.

We disagree. Conflicts jurisdiction does not require that the two cases be identical either on the facts underlying the causes of action nor on the procedural facts. As we noted in *Coastal*:

In short, cases do not conflict if a material factual difference legitimately distinguishes their holdings. On the other hand, immaterial factual variations do not preclude a finding of jurisdictional conflict. A conflict could arise on very different underlying facts if those facts are not important to the legal principle being announced.

Coastal, 979 S.W.2d at 320. In *Coastal* the Court reviewed the conflict that conferred jurisdiction on our Court in *Newman v. Obersteller*, 960 S.W.2d 621 (Tex. 1997). We observed that in *Newman*, three cases conflicted on a question of statutory construction, giving us jurisdiction, even though the legal question arose in each case in different factual circumstances. See *Coastal*, 979 S.W.2d at 320 (discussing *Newman v. Obersteller*). The cases discussed in *Newman* were different not only in the facts relating to the cause of action but also in their procedural facts: two were appealed from denial of summary judgments, and the third was appealed from a directed verdict after a trial on the merits. Compare *Newman v. Obersteller*, 915 S.W.2d 198 (Tex. App.—Corpus Christi 1996), *rev'd*, 960 S.W.2d 621 and *City of Galveston v. Whitman*, 919 S.W.2d 929 (Tex. App.—Houston [14th Dist.] 1996, writ denied) with *Davis v. Mathis*, 846 S.W.2d 84 (Tex. App.—Dallas 1992, no writ). As *Coastal* and *Newman* illustrate, our jurisdictional analysis must focus on whether differences in the

facts, including procedural facts, prevent the holding in one case from controlling in another. Conversely, if the form of the proceeding is not important to whether the substantive legal principles we announced in *Moriel* would control the decision in this case, then we have jurisdiction to resolve the conflict.

Here, the form of the lawsuit as a class action is not important to the substantive legal principles we announced in *Moriel* because of the breadth of our holding in that case. Our decision in *Moriel* is striking because it is stated as a categorical imperative. We did not limit our holding to the particular facts of the case, nor did we state the principle as a general rule, thereby implying that there may be exceptions. Instead, we said that the *Moriel* standards “apply to all punitive damage cases tried in the future.” 879 S.W.2d at 26. We made no exception for class actions.

Moreover, our procedural rules do not permit the form of the proceeding to determine whether substantive legal principles will control. The dissent argues, in effect, that *Moriel* does not conflict because class actions are just different from ordinary litigation. But class actions do not exist in some sort of alternative universe outside our normal jurisprudence. Our procedural rules provide otherwise: the form of an action under the rules must not “enlarge or diminish any substantive rights or obligations of any parties to any civil action.” TEX. R. CIV. P. 815. Thus the form of this lawsuit, per se, is not a material factual difference that distinguishes the principles we announced in *Moriel*.

In summary, we held in *Moriel* that in all punitive damages cases, a jury must return findings on liability and actual damages issues before it hears any evidence on punitive damages. In this punitive damages case, the court of appeals held that the plaintiffs may present evidence of punitive

damages and obtain a finding before deciding most plaintiffs' actual damages. If *Moriel* is good law, the court of appeals' holding cannot be sustained. Conversely, we can uphold the court of appeals' holding only by overruling *Moriel* to the extent it applies to class actions. The ruling in one is necessarily conclusive in the other on a question of law material to the decision in the case.

Accordingly, we conclude that the court of appeals' decision would overrule *Moriel* had both been issued by the same court and we determine that the rulings in *Moriel* and in the court of appeals' decision are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other." *Coastal*, 979 S.W.2d at 319. This case conflicts with *Moriel*, and we therefore have jurisdiction here. Because we conclude that the court of appeals' decision in this case conflicts with *Moriel* we need not conduct a conflicts analysis of *RSR* and *Iley*. Moreover, once a conflict confers jurisdiction on our Court, the case is before us for all purposes. See *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 643-44 (Tex. 1995); *Stafford v. Stafford*, 726 S.W.2d 14, 15 (Tex. 1987). Thus, we turn to Southwest's complaints in this interlocutory appeal.

III

We consider first the issue raised by the jurisdictional question, whether we should reconsider *Moriel* and exempt class actions from its pronouncement about the order of proof in punitive damages cases. The court of appeals reasoned that its modified order would solve the order-of-proof problem:

This plan still allows the jury to resolve the common issue of punitive damages relatively early in the litigation, but also allows the jury to have an understanding of the extent of actual damages suffered by the class before assessing punitive damages.

960 S.W.2d at 299. Plaintiffs contend that the court of appeals complied with *Moriel* by requiring the jury to decide actual damages for the class representatives before deciding exemplary damages. Moreover, plaintiffs argue that the plan guards against the prejudicial evidentiary concerns that led to bifurcation in *Moriel* by ordering a reduction of exemplary damages for any class member who is unable to prove actual damages.

The considerations that go into the decision to award punitive damages do not depend on whether the case was brought as a class action. In *Moriel* we were concerned that existing procedures failed to ensure that punitive damage awards “are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.” *Moriel*, 879 S.W.2d at 29 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)). To achieve such proportionality, under *Moriel*, a jury must decide the amount of punitive damages based on the totality of the evidence from the liability phase as well as the punitive damages stage. Here, deciding the nineteen class representatives’ actual damages first does not satisfy the concerns underpinning the legal principles announced in *Moriel*. Under the court of appeals’ modified order, the jury would decide punitive damages for the entire class without knowing the severity of the offense or the extent of compensatory damages, if any, for each of the 885 plaintiffs. The certification order’s provision to eliminate punitive damages for plaintiffs who are not able to prove actual damages may limit the harm to Southwest. But the modified trial plan is nevertheless prejudicial because it fails to ensure that punitive damages have some understandable relationship to compensatory damages and are not grossly out of proportion to the severity of the offense for each of the 885 plaintiffs. The concerns this Court articulated in *Moriel* apply equally in class action

cases. Accordingly, we see no reason to except class actions from the rule articulated in *Moriel*. We now turn to the class certification issues.

IV

Southwest argues that the trial court abused its discretion by certifying this case as a class action. Rule 42 of the Texas Rules of Civil Procedure governs class certification. TEX. R. CIV. P. 42. The rule is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority. *See RSR Corp. v. Hayes*, 673 S.W.2d 928, 931-32 (Tex. App.—Dallas 1984, writ dismissed). All class actions must satisfy four threshold requirements: (1) numerosity (“the class is so numerous that joinder of all members is impracticable”); (2) commonality (“there are questions of law or fact common to the class”); (3) typicality (“the claims or defenses of the representative parties are typical of the claims or defenses of the class”); and (4) adequacy of representation (“the representative parties will fairly and adequately protect the interests of the class”). *See* TEX. R. CIV. P. 42(a). In addition to these prerequisites, class actions must satisfy at least one of four subdivisions of Rule 42(b). Plaintiffs assert this class action satisfies Rule 42(b)(4), which requires common questions of law or fact to predominate over questions affecting only individual members and class treatment to be “superior to other available methods for the fair and efficient adjudication of the controversy.” TEX. R. CIV. P. 42(b)(4); *see also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (discussing the kinds of class actions that can be maintained under federal rule 23(b)); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976) (observing that certification under federal rule 23(b)(1)(A), the federal counterpart to Texas's Rule 42(b)(1)(A), will ordinarily be

inappropriate in an action for damages).

We consider Rule 42(b)(4)'s predominance requirement first because it is one of the most stringent prerequisites to class certification. To aid a court in determining if (b)(4) certification is appropriate, the rule establishes a list of nonexhaustive factors to consider:

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

TEX. R. CIV. P. 42(b)(4).

Courts determine if common issues predominate by identifying the substantive issues of the case that will control the outcome of the litigation, assessing which issues will predominate, and determining if the predominating issues are, in fact, those common to the class. *See Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 839 (Tex. App.—Houston [14th Dist.] 1996, no writ); *Amoco Prod. Co. v. Hardy*, 628 S.W.2d 813, 816 (Tex. App.—Corpus Christi 1981, writ dismissed). The test for predominance is not whether common issues outnumber uncommon issues but, as one court stated, “whether common or individual issues will be the object of most of the efforts of the litigants and the court.” *Central Power & Light Co. v. City of San Juan*, 962 S.W.2d 602, 610 (Tex. App.—Corpus Christi 1998, writ dismissed w.o.j.); *see also Glassell v. Ellis*, 956 S.W.2d 676, 686 (Tex. App.—Texarkana 1997, writ dismissed w.o.j.); *Adams v. Reagan*, 791 S.W.2d 284, 289 (Tex. App.—Fort Worth 1990, no writ). If, after common issues are resolved, presenting and resolving individual issues is likely to be an overwhelming or unmanageable task for a single jury, then common issues do not predominate. Ideally, “a judgment in favor of the class members should

decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim.” *Life Ins. Co. of the Southwest v. Brister*, 722 S.W.2d 764, 772 (Tex. App.—Fort Worth 1986, no writ); *accord Sun Coast Resources Inc. v. Cooper*, 967 S.W.2d 525, 533-34 (Tex. App.—Houston [1st Dist.] 1998, pet. dism’d w.o.j.); *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 611 (Tex. App.—Texarkana 1995, writ dism'd). Before we determine whether individual issues predominate over common ones in this class, we consider how to properly apply the predominance requirement.

V

The predominance requirement is intended to prevent class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party's ability to present viable claims or defenses. But the predominance requirement has not always been so rigorously applied. When presented with significant individual issues, some courts have simply remarked that creative means may be designed to deal with them, without identifying those means or considering whether they would vitiate the parties' ability to present viable claims or defenses. *See, e.g., Amerada Hess Corp. v. Garza*, 973 S.W.2d 667, 680 (Tex. App.—Corpus Christi 1996), *writ dism'd w.o.j.*, 979 S.W.2d 318 (Tex. 1998); *Franklin v. Donoho*, 774 S.W.2d 308, 313 (Tex. App.—Austin 1989, no writ) (both expressing faith that, but not suggesting how, the trial court can creatively deal with significant individual issues in a manner that will be both fair and efficient). Other courts have indulged every presumption in favor of the trial court's ruling, viewed the evidence in the light most favorable to that ruling, and frankly acknowledged that if they erred, it would be in favor of certification. *See, e.g., Health & Tennis*

Corp. of Am. v. Jackson, 928 S.W.2d 583, 587 (Tex. App.—San Antonio 1996, writ dismissed w.o.j.); *Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 839, 843 (Tex. App.—Houston [14th Dist.] 1996, no writ). Still others have postulated that because a settlement or a verdict for the defendant on the common issues could end the litigation before any individual issues would be raised, predominance need not be evaluated until later. See, e.g., *Ford Motor Co. v. Sheldon*, 965 S.W.2d 65, 72 (Tex. App.—Austin 1998), *rev'd*, ___ Tex. S. Ct. J. ___ (Tex. 2000); *Union Pac. Resources Co. v. Chilek*, 966 S.W.2d 117, 123 (Tex. App.—Austin 1998, pet. dismissed w.o.j.). Other courts have suggested that the predominance requirement is not really a preliminary requirement at all because a class can always later be decertified if individual issues are not ultimately resolved. See *National Gypsum Co. v. Kirbyville Indep. Sch. Dist.*, 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, writ dismissed w.o.j.) (“There can be no danger in this proceeding to Appellant for the trial court recognized in his order that individual issues would have to be addressed, and stated, ‘This certification, of course, may be altered, amended or withdrawn at any time before final judgment.’”); *Life Ins. Co. v. Brister*, 722 S.W.2d 764, 775 (Tex. App.—Fort Worth 1986, no writ) (suggesting that when predominance is in doubt, “the most efficient approach for the trial court is to allow class certification at the present time subject to a motion by the defendants after the case has developed to dissolve the class on the grounds that common questions are not predominant at trial.”).

We reject this approach of certify now and worry later. In *Amchem Products Inc. v. Windsor*, the United States Supreme Court reemphasized the importance of vigorously applying the predominance requirement in a class-action certification that sought global settlement of current and future asbestos-related claims. There the Supreme Court emphasized the importance of carefully

scrutinizing the predominance standard to ensure that the proposed class is “sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods. Inc.*, 521 U.S. at 623. Noting that “the predominance criterion is far more demanding” than the commonality requirement, the Court determined that the plaintiffs’ shared experience of asbestos exposure might meet the commonality requirement, but failed to predominate over individual issues. *Amchem Prods. Inc.*, 521 U.S. at 623. In effect, the exacting standards of the predominance inquiry act as a check on the flexible commonality test under Rule 42(a)(2).

Courts must perform a “rigorous analysis” before ruling on class certification to determine whether all prerequisites to certification have been met. *See General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *see also In re American Medical Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996). Although it may not be an abuse of discretion to certify a class that could later fail, we conclude that a cautious approach to class certification is essential. The “flexibility” of Rule 42 “enhances the usefulness of the class-action device, [but] actual, not presumed, conformance with [the Rule] remains . . . indispensable.” *Falcon*, 457 U.S. at 160. As the Supreme Court stressed in *Amchem*: “[C]ourts must be mindful that the rule as now composed sets the requirements they are bound to enforce. . . . The text of a rule . . . limits judicial inventiveness.” *Amchem Prods. Inc.*, 521 U.S. at 620; *see also General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996)(emphasizing “the importance of the trial court’s obligation to determine that the protective requirements of Texas Rule 42 are met”).

Thus it is improper to certify a class without knowing how the claims can and will likely be tried. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). A trial court’s

certification order must indicate how the claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated. “Given the plaintiffs' burden, a court cannot rely on [mere] assurances of counsel that any problems with predominance or superiority can be overcome.” *Castano*, 84 F.3d at 742. To make a proper analysis, “[g]oing beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.” *Castano*, 84 F.3d at 744. Any proposal to expedite resolving individual issues must not unduly restrict a party from presenting viable claims or defenses without that party's consent. *See* TEX. R. CIV. P. 815; TEX. GOV'T CODE § 22.004(a) (stating that Texas's procedural “rules may not abridge, enlarge, or modify the substantive rights of a litigant”). If it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 959 (Tex. 1996) (“[T]he trial court [found] that 'there is uncertainty as to whether a class action could be properly certified and maintained through trial because there are potentially substantial individual questions of fact and law and obstacles to the manageability of the action on a class basis.' If the trial court believed this to be the case, it should not have certified the class . . .”).

We turn to the application of the class-action device generally in personal injury cases and determine whether individual issues predominate over common ones in this class.

VI

Personal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve. *See generally Amchem Prods.*

Inc. 521 U.S. 591. Thus, the class action will rarely be an appropriate device for resolving them. The drafters of Federal Rule 23(b)(3), the counterpart to our Rule 42(b)(4), recognized this when they observed that personal injury claims are generally inappropriate for class certification:

A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

39 F.R.D. 69, 103 (1966).

Here the causation and damages issues are uniquely individual to each class member. The proximity of the explosion to the residents’ homes varied from less than one-half of a mile to almost nine miles. There is evidence that prevailing winds blew the smoke away from the residents’ homes. When the tank explosion occurred, class members were scattered in locations that varied from less than one mile from the explosion to as far away as Beaumont. Some were inside their homes, others were outside; some were walking, others were driving. One representative, in fact, admitted that he did not think he was exposed to anything from the tank fire and explosion. Another representative did not even know who he was suing or what he was suing over. In his deposition, he expressed his belief that this lawsuit represented claims relating to a 1993 benzene release from a Coastal Corporation plant. Plaintiffs’ counsel concede that there are class members who were not or who do not think they were exposed. One of the class members, for example, was in a Beaumont prison when the explosion occurred. Another was in California. Nevertheless, plaintiff’s counsel insist that class members who were not or who do not think they were exposed need to be included and represented within the class so that the class can cover the whole spectrum of “less severe cases,

medium cases and really good cases.”

We conclude that individual issues predominate over common ones in this class. The common-issues phase will establish whether Southwest is legally responsible for the explosion and whether the released materials were capable of causing the harm some members of the class allege. The answers to these questions are necessary in considering Southwest’s liability, but they will not establish whether and to what extent each class member was exposed, whether that exposure was the proximate cause of harm to each class member, whether and to what extent other factors contributed to the alleged harm, and the damage amount that should compensate each class member’s harm. As for these latter issues, highly individualistic variables including each class member’s dosage, location, activity, age, medical history, sensitivity, and credibility will all be essential to establishing causation and damages.

Rule 42(b)(4) requires class treatment to be superior for the fair and efficient adjudication of the controversy. *See* TEX. R. CIV. P. 42(b)(4). Here Southwest is entitled to a fair opportunity to individual determinations of causation and damages for each of the 904 plaintiffs — a difficult undertaking for any jury. Plaintiffs argue that under the trial plan a single jury in a single lawsuit can and will consider the individual issues fairly and efficiently. Plaintiffs assert that they can present their entire case — all four phases of it — in six to eight weeks. First, they plan to offer evidence on most elements of damages using medical records, summaries, and expert testimony. Second, they plan to submit a charge to the jury with damages and proximate cause issues using a matrix format. Plaintiffs urge that this strategy, coupled with the use of models, formulas, and damage brochures, will allow them to litigate phase IV expeditiously and enable the jury to sort through and deliberate

each personal injury claim.

With the help of models, formulas, extrapolation, and damage brochures, plaintiffs may indeed be able to present their case in an expeditious manner. Likewise, Southwest may choose to present a timely and efficient defense, making arguments and presenting evidence on only a generalized, class-wide basis. But, while Southwest may not be entitled to separate trials, it is entitled to challenge the credibility of and its responsibility for each personal injury claim individually. *See generally In re Colonial Pipeline*, 968 S.W.2d 938, 942 (Tex. 1998); *Able Supply Co. v. Moye*, 898 S.W.2d 766 (Tex. 1995) (both vindicating defendants' rights, in mass tort cases, to case-by-case discovery on basic medical and causal information).

The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort. Procedural devices may "not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action." TEX. R. CIV. P. 815; *see also* TEX. GOV'T CODE § 22.004(a); *In re Ethyl Corp.*, 975 S.W.2d 606, 613 (Tex. 1998) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to justice, and we must take care that each individual plaintiff's — and defendant's — cause not be lost in the shadow of a towering mass litigation.") (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)). Although a goal of our system is to resolve lawsuits with "great expedition and dispatch and at the least expense," the supreme objective of the courts is "to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." TEX. R. CIV. P. 1. This means

that “convenience and economy must yield to a paramount concern for a fair and impartial trial.” *In re Ethyl Corp.*, 975 S.W.2d at 613. And basic to the right to a fair trial — indeed, basic to the very essence of the adversarial process — is that each party have the opportunity to adequately and vigorously present any material claims and defenses. If Southwest chooses to challenge the credibility of and its responsibility for each personal injury claim individually, then what may nominally be a class action initially would degenerate in practice into multiple lawsuits separately tried. We therefore conclude that Rule 42(b)(4)’s requirement that class treatment be superior to other available methods for a fair and efficient adjudication has not been satisfied.

Some commentators have urged that courts relax their commitment to individualized treatment of causation and damages in the mass tort context. *See, e.g.*, David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 INDIANA L. J. 561, 567 (1987) (arguing that “bureaucratic justice implemented through class actions provides better opportunities for achieving individual justice than does the tort system’s private law, disaggregative processes”); Samuel Issacharoff, *Administering Damage Awards in Mass-Tort Litigation*, 10 REV. LITIG. 463, 493 (1991) (“The legal system is now beginning to confront the conflict between idealized forms of case-by-case adjudication and the reality of injured parties’ regularly dying before the litigation of their claims. Against this backdrop of justice routinely denied, proposals for rough-cut justice dispensed on a mass scale must be taken seriously.”). Indeed, under intense pressure to manage their mass-tort dockets, some trial courts have dispensed with proof requirements for certain elements and sharply limited defendants’ rights to contest plaintiffs’ claims, only to be reversed on appeal. *See* Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV.

69, 84-85 (illustrating how mass trials create incentives for improper behavior and decisions by trial judges). For example, in *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 304 (5th Cir. 1998), the trial court certified a class of 2,298 asbestos cases and implemented a trial plan in which the trial court planned to award damages for 2,128 cases based on an extrapolation of jury awards for 160 sample cases. Moreover, the trial court refused to allow defendants to contest exposure or causation for the 160 sample cases. *See Cimino*, 151 F.3d at 304-05 & n.16. Instead, the trial court instructed the jury to assume that each plaintiff had sufficient exposure to be a producing cause of an asbestos-related injury. *See Cimino*, 151 F.3d at 304-05 & n.16. In short, defendants were not permitted to contest individual exposure or causation issues for any of the 2,288 nonrepresentative class members and the 160 sample cases. On an appeal from a judgment rendered in 159 of the cases, the Fifth Circuit reversed, holding that the trial plan violated defendants' Seventh Amendment rights and violated Texas's substantive law. *See Cimino*, 151 F.3d at 311-321; *see also Leverage v. PFS Corp.*, 532 N.W.2d 735, 739-40 (Wis. 1995) (reversing judgment in which trial court, over defendants' objections, used aggregative procedures on issues of cause, contributory negligence, and damages in place of individualized jury determination).

Aggregating claims can dramatically alter substantive tort jurisprudence. Under the traditional tort model, recovery is conditioned on defendant responsibility. The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. By removing individual considerations from the adversarial process, the tort system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, “[c]lass certification magnifies and strengthens the number of unmeritorious claims.” *Castano*, 84 F.3d at 746; *see also* John A.

Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1010-11 (1995); Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1023-24 (1995) (both observing that mass tort cases have a tendency to attract many unmeritorious claims). If claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm.

Finally, plaintiffs contend that denial of class treatment is, in reality, the complete denial of legal redress for many of the 904 plaintiffs, because many of their claims are simply too small to justify the cost of individual litigation. At oral argument, plaintiffs' counsel stated that “we have injuries that probably do not exceed, for any of the plaintiffs on an individual basis, a thousand dollars.” Plaintiffs urge that the most compelling reason to certify a class action is the existence of a “negative value” suit, in which the cost of litigating each individual claim would surpass any potential recovery. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).

We do not second-guess plaintiffs' contention that, from a financial perspective, some claims may not be worth pursuing if class-action treatment is denied. But proceeding as a class action may very well cost more in the long run, if, as can be expected here, the class must ultimately be dissolved because there is no manageable way, fair to both parties, to resolve the individual issues. And “there is no right to litigate a claim as a class action. Rather, Rule 42 provides only that the court may certify a class action if the plaintiff satisfies the requirements of the rule.” *Sun Coast Resources, Inc. v. Cooper*, 967 S.W.2d 525, 529 (Tex. App.—Houston [1st Dist.] 1998, pet. dismissed w.o.j.); *accord Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 647 (Tex. App.—Houston [14th

Dist.] 1995, writ dismiss'd w.o.j.); *Vinson v. Texas Commerce Bank-Houston N.A.*, 880 S.W.2d 820, 825 (Tex. App.—Dallas 1994, no writ). This class certification does not satisfy those requirements.

VII

When properly applied the class action device is unquestionably a valuable tool in protecting the rights of our citizens. As the United States Supreme Court has stated:

the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). But fairness and justice to all concerned require adherence to certification standards before a court may allow a case to proceed as a class action. See *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996).

We hold that the trial court's certification order was an abuse of discretion because common issues do not predominate. Because of this conclusion we need not consider Southwest's other objections to the class action or trial plan. We reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

Alberto R. Gonzales
Justice

Opinion delivered: May 11, 2000