IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JOHN P. KENNEDY, *et al*., Individually, and on behalf of all others similarly situated,	:	DECEMBER TERM, 2002
	:	No. 1145
Plaintiff,	:	
v.	:	Commerce Program
CANNULI BROS., INC. d/b/a CANNULI HOUSE OF PORK,	:	Class Action
Defendant.	:	Control No. 062749

O R D E R

AND NOW, this 3rd day of October 2003, upon consideration of plaintiffs' Motion for Class Certification, defendant's response in opposition, the respective memoranda all other matters of record, after oral argument, and in accord with the contemporaneous Opinion being filed of record, it is hereby **ORDERED** that the Motion is **Denied.**

The case is listed for a status hearing on Monday, November 10, 2003 at 10:15 a.m. in courtroom 513, City Hall.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. …….…….. October 3, 2003

This Opinion addresses plaintiffs' Motion for Certification of a Class of certain persons who were taken ill after attending a party at the Creekside Swim Club in Wallingford, Pennsylvania (the "Club"). Upon consideration of the pleadings, motion papers, depositions, all other matters of record, and after oral argument, the court makes the following:

I. Findings of Fact

1. On July 20, 2002, the Club held a party, which was attended by members of the Club and their guests. Food was served at the party, including roast pork, which may have been provided by defendant, Cannuli Brothers, Inc. ("Cannuli), and crabs, green salad, pasta salad, and other items provided by third parties.

2. Named plaintiff Carey asserts that the only food she ate at the party was the pork, along with a Diet Coke. Named plaintiff Kennedy claims he ate crabs and pork, along with beer. Named plaintiff Crow claims he ate crabs, salad, and pork.

3. Several days after the party, named plaintiffs and a number of other party guests began to suffer gastrointestinal distress, and one of them was diagnosed by a medical professional with salmonella poisoning.

4. Due to the passage of time between the party and the onset of plaintiffs' symptoms, none of the food or drink from the party was tested or is now available for testing.

5. The evidence submitted by plaintiff shows that as many at 24 persons may have become ill within several days after the party. Those 24 persons include the eight (8) named plaintiffs, four (4) of whom wish to withdraw from this suit and two (2) of whom have failed to prosecute their claims. Therefore, the evidence shows that there are, at most, eighteen (18) potential class members of the proposed class.

6. For purposes of ruling on the issue of class certification, the proposed class is defined as "all members, their guests, and business invitees of the Club, who attended an event at the Club on July 20, 2002, ate or drank anything at that event, and felt ill within 5 days thereafter, and the successors in interest of any such persons."[1]

[1] Plaintiffs requested that the class be defined more broadly as "all members, their guests and business invitees of the Club, or their successors in interest." However, the court finds that definition to be overbroad because only those person who were at the party and became ill thereafter could have suffered damages similar to those claimed by plaintiffs.

II. Conclusions of Law

1. The class is not so numerous that joinder of all members is impracticable.

2. There are questions of law or fact common to the class, namely: whether defendant supplied the pork to the party, whether the pork or some other food at the party was tainted, and, if so, how it became tainted. However, there are far more individual questions of law and fact, such as: what physical symptoms each plaintiff suffered, whether each plaintiff's symptoms were caused by food poisoning alone, what other tainted foods each plaintiff ingested, what other causal factors each plaintiff encountered, before, during and after the party, and what damages each plaintiff suffered as a result of his/her symptoms.

3. The claims and defenses of the two representative plaintiffs, Carey and Crow, are typical of the class with respect to the common questions, but are not typical with respect to the individual questions.

4. Since the representative plaintiffs' claims are not typical of the class with respect to the majority of the questions of fact or law raised in this action, they will not be able fairly and adequately to assert and protect the interests of the class.

5. The class action does not in this case provide a fair and efficient method of adjudication of the controversy under the criteria set forth in Pa. R. Civ. P. 1708, because the individual questions of law and fact predominate significantly over the common questions.

III. Discussion

As a result of becoming ill, allegedly from ingesting spoiled pork products provided by Cannuli, plaintiffs have brought claims against Cannuli sounding in negligence, strict products liability, and breach of warranty. Plaintiffs seek to pursue such claims as a class. This court may certify this action as a class action only if the following requirements are met:

> (1) The class is so numerous that joinder of all members is impracticable;
>
> (2) There are questions of law or fact common to the class;
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) The representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
>
> (5) A class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa. R. Civ. P. 1702. Plaintiffs bear the burden of proving all five of these class certification requirements. Janicik v. Prudential Insurance Co. of America, 305 Pa. Super. 120, 128, 451 A.2d 451, 454 (1982). To meet their burden of proof, plaintiffs must establish sufficient underlying facts from which the court can conclude that each of the certification requirements are met. *Id*. 305 Pa. Super. at 130, 451 A.2d at 455. Plaintiffs have failed to offer sufficient proof to satisfy the numerosity and commonality requirements, and therefore they have also failed to satisfy the typicality, adequate representation, and fair and efficient method requirements.

A. The Numerosity Requirement

> Whether the number [of potential class members] is so large as to make joinder impracticable is dependent not upon an arbitrary limit, but rather upon the circumstances surrounding each case. In determining numerosity, the court should examine whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants.

Janicik, 305 Pa. Super. at 131, 451 A.2d at 456. Cannuli admits that plaintiffs have identified at least 24 potential class members, but points out that approximately six of them have failed to show any interest in proceeding in this action. Plaintiffs have not offered more than conclusory statements that the class is larger than those eighteen (18) persons, and plaintiff has not offered any evidence that all of the remaining eighteen (18) identified potential plaintiffs intend to take part in this action. Such a small number of plaintiffs can be dealt with through normal procedural mechanisms. *See* Faraci v. Regal Cruise Line, Inc., 1994 WL 573305 (S.D.N.Y. 1994) (in case brought by plaintiffs who claimed they suffered food poisoning on a cruise, numerosity requirement was not met where only 14-16 potential plaintiffs were identified as potential class members.) *See also* Cook v. Highland Water and Sewer Auth., 108 Pa. Commw. 222, 230, 530 A.2d 499, 503 (1987) (joinder of five additional plaintiffs with 10 named plaintiffs was not impracticable). Therefore, the proposed class does not satisfy the numerosity requirement for certification.

B. The Predominance of Common Questions Requirement

> Plaintiffs must establish that their claim presents questions of law or fact common to the class. The existence of individual questions essential to a class member's recovery is not necessarily fatal to the class…Common questions will generally exist if the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent.

Janicik, 305 Pa. Super. at 133, 451 A.2d at 457. "It is well established . . . that individual questions as to the amount of damages do not preclude a class action." *Id.*, 305 Pa. Super. at 142, 451 A.2d at 461. However, where causation of damages is an element of the tort claimed and therefore must be established in order to find liability, it is impossible to bifurcate the common issue of liability from the individual issues of causation and damages, and certification should be denied. *See* AM/PM Franchisee Assoc. v. ARCO, 25 Phila. Co. Rptr. 39, 49 (Phila Co. 1992).

In this case, plaintiffs have pled negligence and strict products liability claims, in addition to others. In order to succeed on either of those tort claims, plaintiffs must prove that defendant's actions or product caused their injuries. *See* Hamil v. Bashline, 481 Pa. 256, 265, 392 A.2d 1280, 1284 (1978) (negligence); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 93-4, 337 A.2d 893, 898 (1975) (strict liability)

Because of the need to prove causation as an element of the relevant tort claims, class actions are usually not appropriate vehicles by which to try mass tort claims. The main exceptions are cases involving airline crashes and cruise ship food poisonings where class certification as to liability only may be appropriate. *See, e.g.*, Bentkowski v. Mafuerza Compania Maritima, S.A., 70 F.R.D. 401, 402 (E.D. Pa. 1976) (in a case involving a cruise ship, "[t]he class was certified solely on the issue of the negligence of defendants in preparing or making available to the passengers . . . contaminated food and/or water); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fl. 1974), *aff'd*, 507 F.2d 1278 (5th Cir. 1975) (same). Such cases may be tried as class actions because the plaintiffs' contact with the defendant or its product is not spatially or temporally distant from the injury that the plaintiffs allegedly suffered, so the chance that the

plaintiffs' alleged damages were caused by other factors is very slight. *See* Floyd v. Philadelphia, 8 Pa. D&C 3d 380, 385-6 (Phila Co. 1978) (where chlorine gas leak caused persons in the neighborhood to seek immediate medical treatment, class certification on issue of liability was appropriate.) However, where, as here, "there exist various intervening and possibly superseding causes of the damage [claimed by the various class members], liability cannot be determined on a class wide basis." Cook, 108 Pa. Commw. at 233-4, 530 A.2d at 505. *See also* Hanson v. Federal Signal Corp., 451 Pa. Super. 260, 679 A.2d 785 (1996) (where questions of fact and law as to causation were unique to each class member, certification was not granted.)

In this case, the harm allegedly suffered by plaintiffs did not become apparent until several days after they attended the party at the Club, so it is possible that different events occurring subsequent to the party caused each person to get sick. It is even possible that their separate actions prior to the party will be relevant in determining what caused their alleged symptoms. In addition, at the party, each person ate different types of food, which came from different sources, any one or more of which could have been tainted, and none of which appear to have been preserved. Furthermore, each person's symptoms appear to have been different, so it is not a foregone conclusion that they all suffered the same problem from the same causal source. Finally, the losses incurred by each plaintiff as a result of his/her symptoms will obviously be different, in that each plaintiff's work time lost, if any, will have a unique monetary value. Therefore, plaintiffs have failed to show that there are sufficient common questions of fact and law to justify certifying their action as a class action.

CONCLUSION

For the reasons discussed, the plaintiffs' Motion for Class Certification is denied.

This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.