

FILED
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MARTIN CIRCUIT & DISTRICT COURT

COMMONWEALTH OF KENTUCKY
MARTIN CIRCUIT COURT
CIVIL ACTION NO. 00-CI-00249

VERNON FLETCHER, et al.

PLAINTIFF

v.

MARTIN COUNTY COAL
CORPORATION, et al.

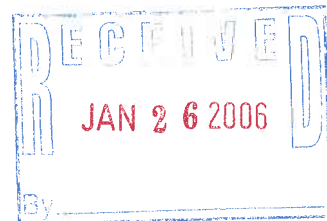
DEFENDANT

OPINION AND ORDER DENYING CLASS CERTIFICATION

This matter having come before the Court on Plaintiffs' Motion for Class Certification, and the Court, having duly considered the pleadings, the memoranda in support and in opposition, and the submission of evidence by the parties, now hereby finds, concludes and orders as follows:

1. A matter may be certified as a class action only if the prerequisites of CR 23.01 and the elements enumerated in CR 23.02 are met. It is the Plaintiffs' burden to demonstrate that all requirements are met. See Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), cert. denied, 429 U.S. 870, 97 S. Ct. 182, 50 L. Ed. 2d 150 (1976); Sowers v. Atkins, Ky., 646 S.W.2d 344 (1983).

2. Plaintiffs have failed to meet the numerosity requirement of CR 23.01(a). There is no adequate showing that there is anything impracticable about joinder and resolution of individual claims. Hundreds of claims have already been asserted, and most of them have been resolved, either by adjustment without litigation, or by counsel following commencement of litigation. This Court has entered Orders of Dismissal following settlements in the following actions in this Court:



Billy Adkins, et al v. Martin County Coal Corp, et al, 02-CI-210;
Samuel Lee Dials, et ux v. Martin County Coal Corp., 01-CI-006;
Virginia Dye, et al v. Martin County Coal Corp., 00-CI-245;
Lee Gauze, et al v. Martin County Coal Corp., 00-CI-244;
S. A. Hardin, et al v. Martin County Coal Corp., 03-CI-166;
Willis Moore, et al v. Martin County Coal Corp. et al, 03-CI-106;
Lorenz Preece, et al v. Martin County Coal Corp., 00-CI-233;
Michael Walker v. Martin County Coal Corp. et al, 01-CI-179;
Kay Ward, et al v. Martin County Coal Corp., 03-CI-176.

In addition, the Federal District Court case of *Tom Kirk Jr., et al v. Martin County Coal Corp. et al*, 7:00-CV-438, was dismissed and consolidated into the above referenced *Dye* case, wherein it was settled and dismissed.

There is no indication that there exist any remaining unrepresented claims needful of class representation. The history of proceedings regarding the spill event demonstrates that the class is not so numerous so as to make individual joinder of claims impractical. Approximately 490 of the claims joined already have been resolved, without requirement of a single trial to date.

3. There is no showing that the party Plaintiffs have claims typical of class claims, as required by CR 23.01(c). In fact, there has been no showing of who the prospective class members are. It is the movants' burden to demonstrate the typicality of their claims, and they have failed to do so here. Moreover, the proposed class representatives are not even located on Coldwater or Wolf Creeks, the only two watersheds affected by the spill.

4. The Plaintiffs have failed to prove that the party representatives will adequately protect the interests of the class, as required by CR 23.01(d). Like the typicality element, they have offered no meaningful proof on the subject. The Court notes that one required element is demonstration that the class representatives will vigorously prosecute. The record herein raises substantial doubt regarding that element, and movants have not overcome the record in that regard.

5. Since there has been no showing of the prerequisites required by CR 23.01, it is not necessary for the Court to reach the criteria of CR 23.02. Nonetheless, the Court has reviewed those issues, and notes that the elements of subsections (a), (b), and (c) of CR 23.02 have not been met either.

6. Plaintiffs have offered no showing of a risk of inconsistent or varying adjudications that would support an application of CR 23.02(a)(i). All claims pursued in litigation have been filed in, or transferred to, this division of this Court. Opportunity for inconsistent adjudications is minimized, if not eliminated.

7. There is no indication of a limited fund condition that would support a CR 23.02(a)(ii) application. Plaintiffs here have offered no proof of a limited fund, and in their briefs candidly acknowledge that they have none. Resolution of numerous other like claims in this Court have not suggested a limited fund.

8. There is no claim for injunctive relief that would support application of CR 23.02(b). At a scheduled hearing on this matter, Plaintiffs stipulated they were not pursuing any claim for injunctive relief.

9. There has been no showing of the conditions necessary to support a CR 23.02(c) class. More specifically, there is no demonstration that common issues predominate, or that a class action would be superior to other adjudication methods. In this regard, the Court find as follows: class members have primary interest in individual control of the prosecution of their own separate actions; the number and extent of slurry damage claims which have already commenced -- and been completed -- all in this same forum indicate the sufficiency of separate actions; difficulties are likely to be encountered in the management of a class, particularly given the fact that for nearly five years counsel have controlled and prosecuted their own individual actions; and that each claim and property is different, as the fact and extent of damages are the only real issues with respect to each claim.

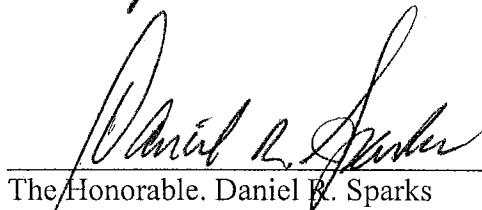
10. The Court finds that remaining claims would be more manageable on an individual case-by-case basis, with consolidation for resolution of any common issues as has already occurred with respect to most of the adjudicated and pending cases, and that the interest of judicial economy would not be served by forcing a combining of such claims into a class action.

11. There is no basis for movants' argument that a mandatory punitive damages class should be established. The Court has recently determined by summary judgment in a companion case (*Kay Ward et al v. Martin County Coal Co. et al*, No. 03-CI-00176) that there were no genuine issues of material fact to support submission of punitive damages to a jury. In addition, in the nearly 500 claims resolved to date, there is no indication that the threat of punitive damages was an impairment to settlement.

Finally, a mandatory punitive damages class may be maintained only under CR 23.02(a) or 23.02(b), and, as noted above, there is no showing to support either.

12. For the foregoing reasons, the Plaintiffs' Motion for Class Certification is hereby DENIED.

This the 24th day of January, 2006.



The Honorable. Daniel R. Sparks
Judge, Martin Circuit Court

CLERK'S CERTIFICATE OF SERVICE

The undersigned Clerk hereby certifies that a copy of the foregoing was served by U.S. Mail upon each of the following on this 25 day of January, 2006:

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