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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re CHEVRON FIRE CASES. [Two coordinated cases.]*	A096946, A097317 (JCCP No. 4103)

I. INTRODUCTION

This action arose from an explosion and fire at Chevron's Richmond Refinery on the afternoon of March 25, 1999. For several hours, thousands of people in the area were instructed to stay inside, behind closed windows and doors, to avoid the toxic smoke and fumes emanating from the refinery. A number of individuals who lived in Richmond, or who were in the area at the time of the explosion, brought suit against Chevron Corporation, Chevron USA, Inc., and Chevron Products Company (collectively, Chevron), asserting various tort claims. The individual plaintiffs sought to represent two plaintiff classes: a shelter-in-place class and a punitive damages class. The trial court denied the initial request for class certification as well as a renewed request for certification. Plaintiffs challenged both decisions.

We filed our original opinion in this case on February 25, 2003. On March 3, 2003, the Supreme Court published its opinion in *Lockheed Martin Corporation v. Superior Court* (2003) 29 Cal.4th 1096 (*Lockheed)*, which bears on the issues in this

* Belinda Van Tonder et al. v. Chevron Corporation et al. (City & County of S.F. Super. Ct. No. 306908), Audie Aaron et al. v. Chevron Corp., Inc. (C-99-01641), Ruby Judge v. Chevron, Inc. (C99-01199), David Jones v. Chevron U.S.A., Inc. (C99-01767), Wesley VanTonder et al. v. Chevron U.S.A.,

case. Accordingly, we granted defendants' petition for rehearing and heard further argument. We now file this opinion reversing the trial court's orders and remanding the case for further consideration.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their complaint against Chevron for equitable relief, negligence, battery, negligence per se, private nuisance, public nuisance, trespass, strict liability for ultra-hazardous activity, intentional infliction of emotional distress, and unfair business practices. They requested compensatory and punitive damages. The complaint alleged that as a result of an explosion and fire at Chevron's Richmond Refinery, residents, workers and students in the surrounding area were instructed to shelter in place for a period of approximately three hours. Plaintiffs sought to represent two classes—a shelter-in-place class and a punitive damages class. Plaintiffs explained that these classes would "not seek adjudication of personal injuries, emotional distress, or property damages on a class-wide basis."

The complaint described the shelter-in-place class as consisting of "all persons and entities who were in the vicinity of Chevron's Richmond Refinery and who . . . sheltered in place . . . as a result of the March 25, 1999 explosion . . . for which this Complaint alleges annoyance, inconvenience, and the loss of enjoyment of legal rights . . . ." The complaint described the punitive damages class as consisting of "all persons present in and around the area of the Chevron Refinery in Richmond who were proximately damaged or harmed as a result of the March 25, 1999 explosion . . . . The Punitive Damages Class includes all persons who suffered personal injuries and/or emotional distress, who were forced to remain sheltered in place, or who suffered any other cognizable injury as a result of Defendants' conduct." In addition to seeking to represent these classes, plaintiffs also sought damages for their own personal injuries.

Inc. (C99-01103), Lovie Cole et al. v. Chevron U.S.A., Inc. (C99-01158), and John Brosnan v. Chevron Corporation (C99-03240).

Chevron's petition requesting coordination of the San Francisco action with actions filed in Contra Costa County Superior Court was granted, and the cases were coordinated in San Francisco Superior Court. Judge Stuart R. Pollak was initially assigned as the coordination trial judge, but the assignment was later transferred to Judge Carlos Bea.

On June 8, 2001, plaintiffs moved for class certification. They described the "shelter-in-place" class as those individuals who had sheltered in place in "Zones 1, 2, and/or 5" or in Richmond, North Richmond, El Cerrito, San Pablo, El Sobrante or Pinole and who "completed a plaintiff Questionnaire within a time to be specified by the Court." The "punitive damages" class was described as "consist[ing] of all persons who are members of the Shelter-in-Place class, and/or who suffered personal injuries as a result of the March 25, 1999 explosion, fire, and toxic release."

As to each of these classes, plaintiffs again specified that they did "not seek adjudication of claims for personal injuries, emotional distress, or property damages on a class-wide basis." Moreover, as to the shelter-in-place class, the plaintiffs' motion argued that they sought essentially uniform damages that were to be based upon all the members of the class having suffered a defined period of inconvenience, disruption and restriction of movement or activities. The plaintiffs argued that differences between individual damages for such claims would be minimal. Chevron opposed the motion.

At the hearing on plaintiffs' motion for class certification, plaintiffs' counsel explained that "[t]he shelter-in-place class . . . would address the claims of 90 percent of the people who do limit their claims to those for the inconvenience and emotional distress associated with sheltering in place to avoid toxic exposure." At several points during the hearing, the trial court also described the shelter-in-place class as seeking "emotional distress" damages. At that hearing, plaintiffs' argument did not distinguish the damages being sought from damages for emotional distress.

On August 30, 2001, the court denied plaintiffs' request for class certification. The court explained that although the "plaintiffs tailor their damage claims to exclude items of bodily injury and property damage. Plaintiffs seek to claim and to represent

claimants only for the claimed emotional distress experienced as a result of obeying the 'Take Shelter' orders of the local authorities, issued upon their learning of the refinery fire." In its order, the court observed that emotional distress claims depend on different degrees of susceptibility and emotional reaction and concluded, "unfortunately for plaintiffs," that the type of damages sought here are "practically identical" to those sought in *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408 (*Fuhrman*), [disapproved on other grounds by *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212].

The trial court reasoned that, in both *Fuhrman* and in this case, the emotional distress was "made up of annoyance, inconvenience, anxiety and just plain bother" and stated that the holding in *Fuhrman* categorically precludes class action status because of the inherent diversity of emotional distress damages. The court concluded as follows: "The procedural setting in which the *Fuhrman* decision was made is significant. An affirmance of judgment dismissing the class action allegations of a complaint for emotional distress damages is an appellate decision that *an emotional distress claim cannot be the subject of a class action as a matter of law. To this court, it means that consideration of the facts upon which the motion to certify the class was made is superfluous.* [¶] This court finds itself without jurisdiction to depart from the rule of law stated in *Fuhrman*: actions for emotional distress damages cannot be the subject of class action proceedings. [Citations.]" (Italics added.)

The trial judge explained, apparently sua sponte, that *Fuhrman* would not permit him to use a technique that he had used in a previous case involving cremated human remains. In that case, the trial court had accepted statistical evidence that the range of damages could be represented with 95 percent accuracy if a random selection of 54 cases were tried. The court tried 54 cases, the damages were averaged and an award based upon that average was made to all the members of the class. Although the trial judge apparently viewed this as a method which might have been utilized in this case, he nevertheless denied certification because "so long as *Fuhrman* remains the law of California, it must be followed by this court."

Plaintiffs filed a renewed motion for class certification. In this second motion, plaintiffs argued that the trial court's decision denying class certification had been based on the erroneous premise that the shelter-in-place class would be seeking emotional distress damages when, in fact, the class would be seeking damages only for "annoyance, inconvenience and discomfort" (hereafter, collectively, "inconvenience"). At the second hearing, plaintiffs' counsel conceded that he had previously confused the distinction between emotional distress and "inconvenience" damages as follows: "[C]ertainly some of the comments that I made at that time could be construed, and were fairly construed by the court, as including some aspect of emotional distress in the claim." Plaintiffs also pointed out that the trial court's initial decision had not addressed the request for certification of a distinct punitive damages class.

On October 29, 2001, plaintiffs filed their notice of appeal from the trial court's initial denial of the certification motion. On the same day, the trial court denied the renewed motion for class certification. In the later order, the court first concluded that plaintiffs' renewed motion was actually an untimely motion for reconsideration. Secondly, the court stated that there was "no legally compensable interest for plaintiffs in 'inconvenience' violated by the acts and omissions of defendant Chevron." Third, the court stated that even if inconvenience could be distinguished from emotional distress, the holding in *Fuhrman* would also bar a class action because proof of individual damages for inconvenience would vary just as much as those for emotional distress. Finally, the court concluded that it could not certify a punitive damages class because punitive damages depend upon a right to compensatory damages, and plaintiffs could not recover compensatory damages for "inconvenience."

On November 30, 2001, plaintiffs filed a second notice of appeal from the trial court's order denying their renewed motion for class certification. In their second notice of appeal, the plaintiffs also contest the trial court's denial of their renewed motion on the grounds that the motion was an untimely motion for reconsideration under Code of Civil Procedure section 1008. We need not reach the question of whether the motion was timely because we have concluded that the motion was a renewed request for class

certification, and is therefore appealable for the same reasons applicable to the denial of an initial motion for class certification. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).) We consolidated the two appeals for purposes of briefing, oral argument and the following decision.

III. DISCUSSION

The denial of class certification is ordinarily within the ambit of the discretion reserved to the trial court. The result of the Supreme Court's recent opinion in *Lockheed* reminded us that even though "'. . . trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, [and] are afforded great discretion in granting or denying certification,'" we must nevertheless examine the trial court's reasoning in denying certification. (*Lockheed, supra,* 29 Cal.4th at p. 1106; see also *Linder*, supra, 23 Cal.4th at p. 435; and *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 914.) "'Our task on appeal is not to determine in the first instance whether the requested class is appropriate but rather whether the trial court has abused its discretion in denying certification.' [Citation.] [¶] . . . '"[S]o long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld." [Citations.]' [Citations.]" (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1233.)

However, we independently review errors of law, and "[u]nder this standard an order based upon improper criteria or incorrect assumptions calls for reversal '"even though there may be substantial evidence to support the court's order."' [Citation.]" (*Linder*, *supra,* 23 Cal.4th at pp. 435-436.) Therefore, even though any "'valid pertinent reason'" (*id.* at p. 436) can be sufficient to uphold the trial court's orders, legally invalid reasons will not suffice. While the record in this case is open to some interpretation, the two orders under review, and various comments by the trial court, suggest that the court concluded that emotional distress damages are never recoverable in class actions.

The authority explicitly relied upon by the trial court does not so hold; and it is unmistakable that there is no categorical legal bar to the types of claims asserted in this case. In its recent decision in *Lockheed*, the Supreme Court was unanimous in the

portion of the opinion that refused to recognize the existence of any "per se or categorical bar" (*Lockheed*, *supra,* 29 Cal.4th at p. 1105) to any type of claim that might otherwise be considered "susceptible to common proof" (*id*. at p. 1107) in an appropriate class action. The majority described the criteria to be applied in such cases and reiterated that "'[t]he ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Id*. at pp. 1104-1105, quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238; see also *Linder*, supra, 23 Cal.4th at p. 435.)

The *Lockheed* case involved the alleged exposure of the proposed class to 12 different toxic chemicals over a period of more than 40 years; and the plaintiffs sought to require 7 different defendants to provide medical monitoring of over 40 different medical conditions in 50,000 to 100,000 class members. Having unanimously found no per se legal bar to the type of class judgment sought, a majority of the court nevertheless went on to hold that the trial court had abused its discretion by certifying the class, because there was no substantial evidence that the plaintiffs would be "able to prove causation and damages by common evidence." Therefore, the majority concluded: "[t]he questions respecting each individual class member's right to recover that would remain following any class judgment appear so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants. [Citation.]" (*Lockheed, supra,* 29 Cal.4th at p. 1111.)

The Supreme Court reiterated that: "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] 'The community of interest requirement [for class certification] embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' [Citation.]" (*Lockheed, supra,* 29 Cal.4th at p. 1104; see

also *Linder, supra* 23 Cal.4th at pp. 439-440; and *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

In this case, the trial court's orders and comments do not demonstrate that the trial court answered the question, posed by the Supreme Court, of whether "'. . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.'" (*Lockheed, supra,* 29 Cal.4th at pp. 1104-1105.) Rather, the record suggests that the court's orders may have been based on the incorrect legal premise that these damage claims are of a type that can never, as a matter of law, be recoverable in a class action. This premise would be incorrect whether or not the court's ultimate refusal to certify any class was based on the further conclusion that any "annoyance, inconvenience and discomfort" suffered by the plaintiffs cannot be legally distinguished from emotional distress. Because there is no categorical bar limiting the types of damages recoverable in class actions, we therefore reverse the orders denying class certification, because the reasoning stated by the trial court in the record may have been based on application of the wrong criteria.

The trial court also denied the request to certify a punitive damages class, because it had already concluded there could be no recovery of compensatory damages. The court stated that the "[p]laintiffs urged the court to certify a class entitled to punitive damages based simply on a multiple of compensatory damages. To do so would ignore the requirement that a punitive damage award bear a 'reasonable relation' to the compensatory damages and that the result be sufficient to punish and deter the defendant. [Citation.]" Given our conclusion that the trial court's denial of class certification should be reconsidered in light of the principles reiterated in *Lockheed,* the decision regarding the punitive damage class is likewise remanded for further consideration. For the same reason, we need not consider the plaintiffs' contention that their claims for injunctive and declaratory relief should have been certified.

DISPOSITION

The orders denying certification of shelter-in-place and punitive damage classes are reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

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Lambden, J.

We concur:

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Kline, P. J.

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Haerle, J.