

**MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY**

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| LUNG GREEN, Plaintiff, vs MONTANA MUNICIPAL INTERLOCAL AUTHORITY, Defendants. | Cause No. BDV-14-503(c) ORDER DENYING CLASS CERTIFICATION |
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¶ 1 A Great Falls sewer line backed up into Ms. Green’s residence. She orally made a claim with MMIA, an interlocal agency that insures and adjusts claims against the City of Great Falls and other municipalities. MMIA denied the claim in writing, alleging she could not prove any negligent act or omission by the City. MMIA’s denial letter did not reveal or analyze the law of inverse condemnation. She filed an inverse condemnation case against the City about three months later, which she has now dismissed. CR154.

¶ 2 Ms. Green says MMIA’s failure to apply or tell her about the inverse condemnation rights she invoked in her lawsuit three months later violated the Montana Constitution. She has identified 342 other instances in which MMIA sent what she calls “no fault/no negligence” letters to persons claiming damage from MMIA member-owned water, sewage, or storm water systems. CR110, p.3 & Ex. 4. She proposes to advance any claims these people have as a class action.

¶ 3 The Court is contemporaneously issuing a separate order finding that Ms. Green’s own claim against MMIA fails. The Court denies class certification for the reasons that follow.

¶ 4 Logically, summary judgment against Ms. Green’s own claim *should* moot class certification. It would be incongruous to entertain class claims when the representative named plaintiff has no claim herself. But neither side has presented such authority. The Court accordingly deems it prudent to analyze the merits.

¶ 5 Class certification is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Sangwin v. State*, 2013 MT 373, ¶ 12, 373 Mont. 131, 315 P.3d 279. Plaintiffs who seek it must meet all four elements of Rule 23(a) and then show one of the disjunctive branches of Rule 23(b). M.R.Civ.P. 23; *Sangwin*, ¶ 15. The necessary “rigorous” analysis under Rule 23 may “overlap” with some consideration of the merits because Rule 23 issues are often “enmeshed” with the merits. *Sangwin*, ¶ 15 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)).

¶ 6 Rule 23(a) permits class certification if

- (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; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

M.R.Civ.P. 23(a). These requirements are conjunctive.

Sangwin, ¶ 15. The class proponent must prove all of them. *Id.*; see also *Byorth v USAA Cas. Ins. C.*, 2016 MT 302, ¶ 15, 385 Mont. 396, 384 P.3d 455.

A. Evidentiary Basis

¶ 7 The Court cannot simply take Ms. Green’s class-certification pleadings at face value:

the trial court must have some *evidentiary basis* for determining each Rule 23 requirement is satisfied . . . “Rule 23 does not set forth a mere pleading standard.” Thus, a district court may not simply rely on the allegations of the parties’ pleadings.

Byorth, ¶ 17 (emphasis in original, internal citations omitted). Mr. Green has provided such evidence in the form of Ex. 4 to her counsel’s affidavit. In this order the Court assumes the accuracy of her description of that exhibit.

B. Class Definition Issues

¶ 8 Ms. Green proposes the following class definition:

All persons whose private property has been taken or damaged through inverse condemnation due to the creation, maintenance, or use of MMIA Member Entities’ public utilities, public works projects, public improvements, or public developments, but whose inverse condemnation claims were denied by MMIA based on tort principles or other non-inverse condemnation standards of proof, in violation of Art. II, § 29 of the Montana Constitution.

CR1, ¶ 32.

¶ 9 MMIA says this is “astonishingly broad.” CR117, p.2. But this definition purportedly brackets a putative class of just 342 people. CR110, p.7. The putative class at issue in *Wal-Mart v. Dukes*, *supra*, contained 1.5 million people. The definition reflects what Ms. Green presented as the central legal issue in her own claim against the City of Great Falls – that state, local, and governments are in effect automatically liable for all damages resulting from publicly owned utilities and improvements. Nothing about proposing a class of other people she thinks have similar claims is truly “astonishing.”

¶ 10 Leaving MMIA’s implausible “astonishment” aside, however, the Court does note some imprecision in the proposed class definition. First, it foreshortens the elements of a proper inverse condemnation claim by assuming that anyone damaged by an MMIA-insured water, sewer, or storm drain system accordingly had a viable inverse condemnation claim. It then compounds this by asserting that any communication any such person had with MMIA about that damage was in fact the same as making an “inverse condemnation claim.” Proposed Class Definition presented at CR1, ¶ 32.

¶ 11 This Court’s December 6, 2019 summary judgment order concludes that the required causation analysis is more subtle than this. CR102, pp. 17-19. The proposed class definition does not capture all of the necessary causation subtlety. It additionally and problematically assumes that regardless of what each of these people actually told MMIA about their claim, MMIA knew or should have known it was really an inverse condemnation claim.

¶ 12 But a court presented with a class definition need not deal with it on a take it or leave it basis, and can instead revise it to more precisely state the true common question. *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶¶ 16 & 17, 371 Mont. 393, 310 P.3d 452 (approving Judge Sandefur’s reformulation of plaintiff’s proposed class definition). This Court accordingly doubts these necessary but missing tweaks to Ms. Green’s class definition are fatal to the certification motion and therefore does not rely upon them.

C. No Dispute About Numerosity

¶ 13 MMIA does not contest this element. CR117, p.10, footnote 2.

D. Commonality

¶ 14 Ms. Green sees this case as similar to the unrepresented claimant program at issue in *Jacobsen, supra*. In *Jacobsen*, Allstate was programmatically discriminating against unrepresented claimants. Here, Ms. Green says MMIA was programmatically shirking what she says was its constitutional duty to assist in developing and expanding the law of inverse condemnation.

¶ 15 Ms. Green says it has been clear since 1977 that an inverse condemnation claim does not require proof of negligence. *Rauser v. Toston Irrigation Dist.*, 172 Mont. 530, 538, 565 P.2d 632, 637 (1977); *see also Deschner v. State*, 2017 MT 37, ¶ 17, 386 Mont. 342, 390 P.3d 152. But recognizing that inverse condemnation requires no proof of negligence does not establish that *every* claim the government receives is an inverse condemnation claim rather than a negligence claim. The Greens, for example, did not label their claim as a negligence claim, an inverse condemnation claim, or any other kind of claim. They simply made a claim.

¶ 16 Ms. Green seeks to establish what she sees as MMIA's legal duty to realize that every claim it gets for government-caused property damage is really an inverse condemnation claim because that is the best, most advantageous, and most difficult-to-defend-against claim an attorney would make for such a client. Whether she is right about the *existence* of such a legal duty is not the point. The point is that *if such a duty exists*, it applied to all other claimants in the putative class and is therefore "common" to all of their claims within the meaning of Rule 23, *Jacobsen*, and *Wal-Mart*.

¶ 17 Obviously, the fact situations of the putative class members are not identical. Some might not prove their damage resulted from a risk “inevitabl[y]” or “inherent[ly]” associated with the improvement at issue. *Dechsner, supra; City of Oroville v. Superior Court*, 446 P.3d 304, 311-312 (Ca. 2019). Some might not rule out their own conduct. *Oroville, supra*, at 315-316. Some, like Ms. Green herself, may not have been dissuaded by MMIA and may have timely sued MMIA’s member, thereby breaking any causal link between MMIA’s conduct and legally cognizable misrepresentation damages.

¶ 18 *Jacobsen* rejects this kind of quibbling about the specifics. *Jacobsen*, ¶¶ 40-48. Those paragraphs in *Jacobsen* establish that one common legal question is enough, and that individual causation and damages questions can be resolved in subsequent follow-on litigation. It probably bears repeating that under *Jacobsen* the issue is not whether Ms. Green is substantively right on the legal *answer* but rather whether the purported class claims implicate the same common legal *question*. The Court accordingly concludes that Ms. Green’s proposed class would satisfy the commonality requirement.

E. Typicality

¶ 19 In *Jacobsen*, the Supreme Court said “[t]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.” *Jacobsen*, ¶ 51 (quoting *Arlington Video Prods v. Fifth Third Bancorp*, 515 Fed. Appx. 426 (6th Cir 2013)). The Court has found that Ms. Green has no viable claim against MMIA. If the typicality element was really this simple, this order would end here.

¶ 20 But it turns out not to be that simple. This requirement “tend[s] to merge” with the commonality element the Court has already found Ms. Green probably satisfies. *Jacobsen*, ¶ 51. Its purpose is to prevent “plaintiffs from bringing a class action against defendants with whom they have not had any dealings.” *Id.* It is undisputed that Ms. Green had dealings with MMIA. There is no serious dispute that the other 342 putative class members also had dealings with MMIA. In *Jacobsen*, it was enough that each putative class member was “subjected to the same unlawful conduct generally.” *Jacobsen*, ¶ 52.

¶ 21 Ms. Green’s own complaint is typical of what she says MMIA did to the other 342 class members. In each case, she says, MMIA elided and failed to disclose the more claimant-friendly law of inverse condemnation. Just as this asserted legal duty is common to the class claims, her invocation of it in her own case is typical of the class claims. Here, as with the commonality analysis, it apparently does not matter whether she is substantively right on the law. Here, as was true of the commonality analysis, the specific factual nuances of Ms. Green’s claim apparently do not preclude its being “typical” of the class claims. The Court accordingly concludes that Ms. Green’s proposed class would satisfy the typicality element.

F. No Dispute About Adequate Representation

¶ 22 MMIA does not contest this element. CR117, p.10, footnote 2.

G. Rule 23(b)(1) Not At Issue

¶ 23 Ms. Green does not assert that the proposed class fits Rule 23(b)(1). CR110, pp. 11-15.

H. The Class Probably Satisfies Rule 23(b)(2)

¶ 24 This branch of Rule 23 asks whether “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” M.R.Civ.P. 23(b)(2).

¶ 25 Ms. Green alleges that MMIA unconstitutionally applied negligence rather than inverse condemnation principles to its analysis of and refusal to pay the putative class members’ claims. Setting aside the fundamental concern about whether she is substantively right about the law, she has identified plausibly similar claim-denial action on a purported legal ground that appears to “apply generally to the class.” And she seeks, as the plaintiff in *Jacobsen* sought, a declaration that this was illegal coupled with an injunction requiring the defendant to re-open and re-adjust the class members’ claims. It does not appear that Rule 23(b)(2) requires more than this.

I. Rule 23(b)(3) Not Satisfied

¶ 26 This branch of Rule 23(b) asks whether the questions of law or fact common to the class members predominate over any questions affecting only individual members, and [whether] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. M.R.Civ.P. 23(b)(3). It directs courts to consider

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Id.

¶ 27 While the Court has found that the proposed class would likely meet each of the previously discussed *other* Rule 23 requirements, it reaches the opposite conclusion here. MMIA's concerns about the details of each individual claim do not necessarily preclude the necessary commonality and typicality. But this branch of Rule 23(b) requires finding that the issue or issues common to and typical of the entire class "predominate" over the individual factual nuances and that class litigation would be "superior" to individual litigation.

¶ 28 The record here permits no such conclusion. Some class members may not have been able to meet the causation requirement. Some may not have been dissuaded by MMIA's purported misrepresentations. Class litigation *could* address these specifics, but Ms. Green has not persuasively established this would be *superior* to individual litigation by those who decide to litigate.

¶ 29 The Court accordingly concludes that Ms. Green does not satisfy Rule 23(b)(3). But this is not fatal, because Rule 23(b) – unlike Rule 23(a) – is disjunctive and the Court has already concluded that she satisfies Rule 23(b)(2).

J. The Substantive Ruling Against the Named Representative Plaintiff Means Class Certification Would be Improvident.

¶ 30 The Court has engaged in the foregoing analysis, despite ruling against Ms. Green *individually* on the merits of her own claim, because of the possibility if not likelihood of an appeal. Certifying a class at this point would accomplish nothing beyond requiring 342 additional plaintiffs to piggyback onto the appeal Ms. Green would have to file to keep pursuing her own claim. If the Supreme Court then affirmed, that adverse ruling would appear to be the law of the case as to the whole class. On the other hand, *not* requiring these 342 additional people to piggyback onto the appeal would not bind them to any adverse appellate result, and would appear *not* to foreclose subsequent revisitation of class certification if the Supreme Court reverses. Additionally, not certifying the requested class after ruling against the named plaintiff on the merits is consistent with *Vulles v. Thies & Talle Mgmt. Inc.*, 2021 MT 279, ¶ 12, 406 Mont. 169, ___P.3d.____.

¶ 31 The Court accordingly **DENIES** Ms. Green's *Motion for Class Certification*.

John A. Kutzman
District Court Judge

cc: Ben Graybill and Larry Anderson, Attorneys for Plaintiff
Oliver Goe, Attorney for Defendant