

**IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA**

**GORDON and JUDY MOST, WILLIAM  
and CONNIE ELLIOTT, STAN DANEKAS,  
HOWARD and DELORES WRIGHT,  
CHARLES WRIGHT, NANCY WRIGHT,  
HELLBAR LTD, and ALL OTHERS  
SIMILARLY SITUATED,**

Plaintiffs,

vs.

**WESTINGHOUSE ELECTRIC COMPANY  
LLC, WESTINGHOUSE ELECTRIC  
CORPORATION, A.B.B. POWER T AND D  
COMPANY, INC., A.B.B. PROTECTIVE  
EQUIPMENT, a division of Power  
Transmission and Distribution,  
WESTINGHOUSE ELECTRIC SUPPLY  
COMPANY, CUTLER HAMMER, INC.,  
COLUMBIA BROADCASTING SYSTEM,  
INC. aka CBS, INC., ABB, a corporation,  
and CUSTER PUBLIC POWER DISTRICT,  
and JOHN DOE 1-10, REAL NAMES  
UNKNOWN,**

Defendants.

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**DWAYNE and NADINE ANDERSEN, OLE  
OLSON, JULIE OLSON, individually and  
as parents and next friend of their minor  
children, EUGENE JAMES, DOROTHY  
JAMES, and ALL OTHERS SIMILARLY  
SITUATED,**

Plaintiffs,

vs.

Cases Nos. CI00-9 and CI00-10

**ORDER ON MOTIONS**

**WESTINGHOUSE ELECTRIC COMPANY  
LLC, WESTINGHOUSE ELECTRIC  
CORPORATION, A.B.B. POWER T AND D  
COMPANY, INC., A.B.B. PROTECTIVE  
EQUIPMENT, a division of Power  
Transmission and Distribution,  
WESTINGHOUSE ELECTRIC SUPPLY  
COMPANY, CUTLER HAMMER, INC.,  
COLUMBIA BROADCASTING SYSTEM,  
INC. aka CBS, INC., ABB, a corporation,  
and CUSTER PUBLIC POWER DISTRICT,  
and JOHN DOE 1-10, REAL NAMES  
UNKNOWN,**

Defendants.

**DATE OF HEARING:** January 26, 2001.

**DATE OF RENDITION:** April 12, 2001.

**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).

**TYPE OF HEARING:** Open court.

**APPEARANCES:**

For plaintiffs:

Robert G. Pahlke, of The Van Steenberg Firm, and Warren R. Arganbright.

For defendants:

W.E.C. LLC:

No appearance.

Custer PPD:

Steven E Guenzel, of Johnson, Flodman, Guenzel & Widger.

Cutler Hammer:

James C. Zalewski, of DeMars, Gordon, Olson & Shively.

All others:

Fredric H. Kaufmann, and on brief, Andrea D. Snowden, of Cline, Williams, Wright, Johnson & Oldfather LLP.

**SUBJECT OF ORDER:**

(1) motion of defendant Custer PPD for partial summary judgment; (2) motion of defendants CBS Corp. et al. for partial summary judgment; and, (3) motion of plaintiffs to add Pat Wright and Eateringer Cattle Company, Inc. as additional named plaintiffs.

**PROCEEDINGS:**

See journal entry filed January 29, 2001.

**FINDINGS:**

The court finds and concludes that:

1. Various defendants seek partial summary judgment regarding class action status of these consolidated cases.

2. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, \_\_\_ N.W.2d \_\_\_ (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

3. The right of a party to sue as representative of a class may be raised by a motion for summary judgment. *Blankenship v. Omaha Pub. Power Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976).

4. NEB. REV. STAT. § 25-319 (Reissue 1995) authorizes class actions, stating: “When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” In *Blankenship*, the court recognized that this statute represents an application of the

equitable doctrine of virtual representation and makes the doctrine applicable in appropriate circumstances to law actions. The *Blankenship* court also recognized that the policy underlying the Nebraska statute appears to be the same as that underlying Rule 23 of the Federal Rules of Civil Procedure.

5. The statute first requires “commonality.” The moving defendants argue that damage from a common cause to separate tracts of real estate, because of the uniqueness of each tract of real estate, precludes class action status. This court rejects that per se argument. On the other hand, the plaintiffs appear to argue that a single common issue, no matter how many and varied the other issues, is sufficient to support a determination of commonality. The court also rejects that argument. In *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994), the Supreme Court noted its previous statement that an action may not be maintained as a class action by a plaintiff on behalf of himself or herself and others unless he or she has the power as a member of the class to satisfy a judgment on behalf of all members of the class. The Supreme Court also recognized the articulation of the standard as including a determination whether the questions of law and fact were common to all and predominated over individual interests. *Id.*

6. The latter articulation closely resembles a principal determination under Rule 23 of the Federal Rules of Civil Procedure and similar rules adopted by various states modeled on the federal rule. Class actions have had limited application in federal mass accident litigation, partially due to the recommendation of the Advisory Committee on Rules. In its 1966 revision of Rule 23, the Advisory Committee noted that “mass accident” cases are ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present. 28 U.S.C.A. Rule 23, Notes of Advisory Committee on Rules, 1966 Amendment.

7. In the present case, similar to the situation in *Markiewicz v. Salt River Valley Water Users’ Assoc.*, 118 Ariz. 329, 576 P.2d 517 (App. 1978), this court determines that while there are questions of law and fact which are common to the class, they do not predominate over the individual questions. Here, as in *Markiewicz*, there are difficult issues of proximate cause. It is possible that some proposed class members are so far removed from the foreseeable zone of danger that the defendants breached no duty to them. There are, conceivably, affirmative defenses applicable to some members of the class. Moreover, the plaintiffs’ petitions allege both damages to property and personal injuries. The evidence shows one death of a person resulting from the fire. Real and substantial differences of damages

among the class exist. This case is not one of the rare mass tort cases where class action status is appropriate. Rather, it falls within the large group of mass accident cases which should not be prosecuted as a class action. See *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500 (E.D.N.Y. 1975); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974). See also *Harrell v. Hess Oil and Chem. Corp.*, 287 So.2d 291 (Fla. 1973).

8. In order to justify class status treatment, the plaintiffs' claim must meet both statutory requirements of commonality and numerosity. *Hoiengs v. County of Adams, supra*; *Berkshire & Andersen v. Douglas Cty. Bd. of Equalization*, 200 Neb. 113, 262 N.W.2d 449 (1978). Although the court's commonality determination above precludes class status, the court also concludes that present case fails to meet the numerosity test.

9. In *Hoiengs*, the Supreme Court observed that there is no mechanical test for determining whether in a particular case the class is so numerous that the requirement of numerosity has been satisfied. Here, the particular properties affected have been previously identified. The properties affected include 36 or 37 ranches totaling 74,840 acres. Identification of the owners or tenants may slightly increase the number of persons to be joined or who may assert their own actions over the number of properties, but it is not unmanageable or impractical. The identifiable area of impact in a compact region, coupled with the readily determinable nature of affected real estate, makes these claims readily capable of processing through the normal mechanisms of venue transfer and consolidation. As the Advisory Committee contemplated, in the present circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

10. Class action status would entail costly and time consuming notice procedures and record keeping on those who would wish to "opt out." *Hoiengs v. County of Adams, supra*; *Yandle v. PPG Industries, Inc., supra*. The class action is not the superior method for adjudicating the claims presented here.

11. The court is not satisfied that the undisputed facts demonstrate the potentiality of conflict of interests between the represented, or some of them, and the interests which the plaintiffs assert. However, as the class status is precluded by other considerations, the court need not further address that matter.

12. The plaintiffs' argument regarding potential assertion of the statute of repose attempts to insert a broad statutory criterion of impracticability separate and apart from the numerosity requirement. The plaintiffs effectively argue that the statute of repose renders individual assertions of claims impracticable. The statute, however, considers only whether the numerosity of claimants makes individual actions impracticable. The existence or nonexistence of a statute of repose defense fails to affect the numerosity analysis.

13. The court finds that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving parties are entitled to judgment as a matter of law on the issue of class action status. The motions for partial summary judgment denying class action status should be granted.

14. The plaintiffs' motion to add additional named parties plaintiff was not resisted and should be granted.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The motion of defendant Custer Public Power District for partial summary judgment is granted.

2. The motion of defendants CBS Corp. et al. for partial summary judgment is granted.

3. Partial summary judgment is hereby entered denying class action status in both of these consolidated cases.

4. The motion of plaintiffs to add additional named parties plaintiff is granted, and the additional named parties are deemed as added as additional parties plaintiff in Case No. CI00-10. The plaintiffs are allowed 15 days from the date of entry of this order to file a second amended petition in Case No. CI00-10 joining such parties and adding such allegations with respect thereto as may be appropriate. The remaining defendants are allowed 15 days thereafter to answer or otherwise plead to the second amended petition, or upon failure to do so, shall be deemed to have elected to have the most recently filed answer stand as the answer of such defendants.

5. This order is interlocutory in character and does not constitute a final order or judgment. The court declines to make the express determinations contemplated by NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000).

Signed in chambers at Ainsworth, Nebraska, on April 12, 2001.  
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- ⋮ Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- ⋮ Note the decision on the trial docket as: [date of filing] Signed "Order on Motions" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge