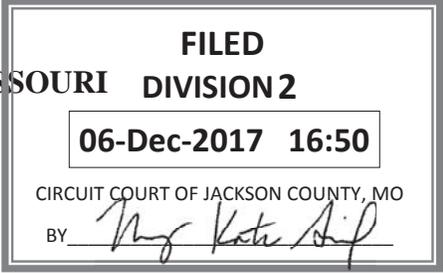


IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE



JACKSON COUNTY, MISSOURI,)
individually and on behalf of a class of)
others similarly situated,)
)
Plaintiff,)
)
vs.)
)
TRINITY INDUSTRIES, INC., and)
TRINITY HIGHWAY PRODUCTS, LLC,)
)
Defendants.)

Case No. 1516-CV23684

Division 2

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF CLASS CERTIFICATION**

This matter is before the Court on Plaintiff Jackson County, Missouri’s Motion for Class Certification. On January 23, 2017, Jackson County moved to certify this case as a class action pursuant to Missouri Supreme Court Rules 52.08(a) and 52.08(b)(3). On March 24, 2017, Defendants Trinity Industries, Inc., and Trinity Highway Products, LLC (hereinafter “Defendants”), filed their Suggestions in Opposition to Plaintiff’s Motion for Class Certification. Plaintiff filed its Reply Suggestions on May 11, 2017. The Court held a hearing on Jackson County’s motion on May 24, 2017, during which the Court heard evidence and arguments of counsel. Plaintiff and Defendant each submitted their Proposed Findings of Facts and Conclusions of Law on July 24, 2017 and filed their respective responses on August 7, 2017.

Having considered the record, including the pleadings and parties’ suggestions, the materials and exhibits attached hereto, and the arguments and evidence presented at the hearing, the Court finds that Jackson County has satisfied the requirements of Rule 52.08(a) and Rule 52.08(b)(3), and therefore **GRANTS** Plaintiff Jackson County’s Motion for Class Certification for the reasons set forth in the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff Jackson County, Missouri, (“Jackson County” or “Plaintiff”) is a body corporate and politic for the purposes of bringing or defending suit, and operates its affairs from its principal place of business located at 415 E. 12th Street, Kansas City, Missouri 64105. Pl. Pet. ¶ 5.

2. Plaintiff attempts to bring this action to redress economic harm to: Jackson County; all Missouri counties with populations of 10,000 or more persons are determined by the Missouri Census Data Center as of July 1, 2014, including the independent city, the City of St. Louis; and the State of Missouri’s transportation authority (collectively, “Class Members”), caused by Trinity’s guardrail end terminals installed on roadways that Class Members are charged with maintaining throughout the State of Missouri. Excluded from the Class are Defendants, including any parent, subsidiary, affiliate, or control persons of Defendants; Defendants’ officers, directors, agents, or employees; and the judicial officers assigned to this litigation, and members of their staffs and immediate families. Pl.’s Pet. ¶¶ 1, 41-42.

3. As defined, Plaintiff’s proposed Class seeks to represent more than forty (40) but fewer than one hundred (100) Class Members. Pl.’s Pet. ¶ 44.

4. Defendant Trinity Industries, Inc., (“Trinity Industries”) is a Delaware corporation with a principal place of business located at 2525 Stemmons Freeway, Dallas, Texas 75207.

5. Trinity Highway Products, LLC, (“Trinity Highway,” collectively with Trinity Industries, “Trinity” or “Defendants”) is a Delaware limited liability company with a principal place of business located at 2525 Stemmons Freeway, Dallas, Texas 75207.

6. Trinity Industries owns and controls Trinity Highway, which manufactures guardrail end terminals, including the “modified ET-Plus” end terminals, as alleged by Plaintiff, installed on roadways owned and maintained by the Class Members.

7. On November 5, 2015, Plaintiff sued Defendants alleging that Defendants’ ET-Plus guardrail end terminal systems with 4-inch guide channels are defective. Pl.’s Pet. ¶¶ 30-32.

8. As alleged in Plaintiff’s Petition, guardrails and end terminals are different devices. Guardrails are safety barriers intended to shield a motorist who has left the roadway and end terminals are attached to guardrails to prevent or reduce the risk of serious injury or death in the event of a collision with the end of the guardrail. Pl.’s Pet. ¶¶ 15-17.

9. According to Defendants at hearing, Defendants manufactured ET-Plus systems with 4-inch wide guide channels and ET-Plus systems with 5-inch wide guide channels. The ET-Plus system’s guide channels are components that help keep the ET-Plus extruder head aligned with the guardrail during a collision.

10. Plaintiff alleges that Defendant modified the ET-Plus system with 4-inch guide channels, rendering the ET-Plus system defective. Pl.’s Pet. ¶¶ 30-33.

11. Plaintiff further alleges that the modified ET-Plus end terminal is mounted on guardrails installed on roadways owned and maintained by Jackson County and the Class Members. Pl.’s Pet. ¶ 2.

12. Plaintiff avers that it removed and replaced the ET-Plus devices on its roadways but alleges some of its potential Class Members may have the systems remaining on their roadways. Pl.’s Pet. ¶ 63.

13. The Jackson County Counselor's office hired outside counsel who has entered its appearance on Jackson County's behalf to pursue individual and class claims against Defendants that pertain to the ET-Plus guardrail end terminals. Pl. Reply at Exh. B.

14. Plaintiff alleges three products liability causes of action: strict liability, negligence, and negligent supplying of a dangerous instrumentality. Pl.'s Pet. ¶¶ 41-73.

15. On January 23, 2017, Plaintiff moved for class certification under Mo. Sup. Ct. R. 52.08(b)(3).

16. On March 24, 2017, Defendants filed their response opposition brief and exhibits, including two expert reports.

17. The Court held an evidentiary hearing on Plaintiff's motion on May 24, 2017. Counsel for both parties presented argument and introduced exhibits, and Defendant presented expert testimony.

CONCLUSIONS OF LAW

Legal Standard for Class Certification

1. To obtain class certification, Plaintiff must satisfy the requirements of Missouri Rules of Civil Procedure 52.08(a) and 52.08(b). As applicable here, those prerequisites are as follows:

- a. The class is so numerous that joinder of all members is impracticable;
- b. There are questions of law or fact that are common to the class;
- c. The claims of the representative parties are typical of the class claims; and
- d. The representative party will fairly and adequately protect the interests of the class.

Rule 52.08(a).

Additionally, the questions of law or fact common to the members of the class must predominate over any questions affecting only individual members, and the class action must be superior to other available methods for the fair and efficient adjudication of the controversy. Rule 52.08(b)(3). Finally, it is required that the class exists which is capable of legal definition, and the representative party is a member of the proposed class. *Elesa v. U.S. Eng'g Co.*, 463 S.W.3d 409, 425 (Mo. Ct. App. 2015).

2. Class certification is a procedural matter in which the sole issue is whether Plaintiff met the requirements for class action under Missouri Rule of Civil Procedure 52.08. *See Elesa*, 463 S.W.3d at 416-17. The party seeking class certification has the burden of proof. *Dale v. Daimler-Chrysler Corp.*, 204 S.W.3d 151, 164 (Mo. Ct. App. 2006). The party seeking class certification satisfies its burden if there is evidence in the record, if taken as true, which would satisfy each requirement of Rule 52.08. *Elesa*, 463 S.W.3d at 417 (quoting *Hope v. Nissan N. Am. Inc.*, 353 S.W.3d 68, 74 (Mo. Ct. App. 2011)).

3. “In class certification, the named plaintiffs’ allegations are accepted as true.” *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 227 (Mo. Ct. App. 2007). The issue is not whether the plaintiff will prevail on the merits, but rather whether plaintiff has met the requirements for a class action. *Id.* at 222. Arguments that tend to negate allegations in the petition should be ignored. *Id.* at 227. The determination of class certification is based primarily upon allegations in the petition. *Elesa*, 463 S.W.3d at 414. While some evidence relating to the merits may be considered in determining whether the class certification prerequisites have been met, “the court must look only so far as to determine whether, given the factual setting of the case, if the plaintiff’s general allegations are true, common evidence could suffice to make out a prima facie case for the class.” *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 377 (Mo. Ct. App. 2005).

4. Rule 52.08 is procedural therefore the Court should refrain from analyzing the merits of plaintiff's case when determining whether class certification is proper. *Hale*, 231 S.W.3d at 222. However, the Court's analysis of the evidence and record submitted to determine class certification may somewhat overlap with the merits of plaintiff's alleged cause of action. *Hope*, 353 S.W.3d at 74. Such disputes may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case. *Craft*, 190 S.W.3d at 377.

5. There is a presumption in favor of certifying the class in class certification hearings "because class certification may be modified or even terminated before a decision on the merits." *Plubell v. Merck & Co.*, 289 S.W.3d 707, 715 (Mo. Ct. App. 2009). Rule 52.08(c)(1) provides the mechanism for the modification or outright decertification of the putative class. *Elsea*, 463 S.W.3d at 416. Because class certification is subject to later modification, a court should err in favor of, and not against, allowing maintenance of the class actions. *Hale*, 231 S.W.3d at 222. The rule's requirements are construed in light of its objectives, i.e., to provide for the expeditious handling of disputes. *Id.*

Rule 52.08(a)(1) – Numerosity

6. Rule 52.08(a) does not require that joinder be impossible, merely that it be impracticable. *Elsea*, 463 S.W.3d at 418. Joinder of all members is "impracticable when it would be inefficient, costly, time-consuming and probably confusing." *Dale*, 304 S.W.3d at 167. Missouri courts have upheld class certification when the class is comprised of "100 or even less" members. *Dale*, 204 S.W.3d at 168. Plaintiff need not specify an exact number of class members but must show that joinder is impracticable through evidence or reasonable estimate of the number

of purported class members, therefore the court may accept common sense assumptions to support a finding of numerosity. *Id.*

7. The Court finds that the proposed class meets the numerosity requirement of Rule 52.08(a). The allegations in Plaintiff’s Petition, which the Court must take as true, establish that the Class consists of more than 40, but fewer than 100 members, including all Missouri counties with populations of 10,000 or more persons as determined by the Missouri Census Data Center as of July 1, 2014, including the independent city, the City of St. Louis; and the State of Missouri’s transportation authority, which are geographically dispersed throughout the State of Missouri. Pl.’s Pet. at ¶¶ 12-13, 42-45. Based on review of the pleadings and argument during the class certification and, pursuant to *Hale* and *Craft* in presuming the allegations in Plaintiff’s Petition to be true, there is an adequate basis to support a common-sense assumption that many of the putative class members have at least one modified ET-Plus end terminal on roadways they own and maintain.

8. Having considered the evidence in the record and the allegations of the Petition, which assuming as true, the Court concludes that Jackson County satisfies the numerosity requirement of Rule 52.08(a)(1).

Rule 52.08(a)(2) – Commonality

9. Pursuant to Rule 52.08(a)(2), the common question may be of fact or of law, and need not be one of each. *Elsa*, 463 S.W.3d at 418. The fundamental question is whether the proposed class is seeking to remedy a common legal grievance. *Dale*, 204 S.W.3d at 175. “[I]f the same evidence will suffice for each member to make a prima facie showing as to a given question, then it is a common question.” *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577, 581 (Mo. Ct. App. 2010). A single common issue may be the overriding one in litigation,

despite that the suit also involves numerous individual questions. *Elesa*, 463 S.W.3d at 419. “[W]hat really matters in class certification is not the raising of common questions, but the ability of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.* (internal citation omitted). “Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557-58 (2011).

10. As alleged in Plaintiff’s Petition, at this stage in the litigation, there are questions of law and fact common to the putative class which include:

- a. Whether Trinity designed, modified, and/or manufactured the ET-Plus;
- b. Whether the modified ET-Plus was defectively designed or manufactured;
- c. Whether the modified ET-Plus is reasonably safe;
- d. Whether Defendants failed to exercise ordinary care to design or manufacture the modified ET-Plus to be reasonably safe;
- e. Whether Defendants knew, or in the exercise of ordinary care could have known, that the modified ET-Plus was defective and in a dangerous condition;
- f. Whether Defendants placed the modified ET-Plus into the market in an unreasonably unsafe condition;
- g. Whether the modified ET-Plus poses a substantial risk of harm to the general public;
- h. Whether Plaintiff and proposed Class Members used the modified ET-Plus in a manner reasonably anticipated; and
- i. The proper measure of damages sustained by Jackson County and members of the putative class.

11. Here, these questions and the answers to these questions provide a common overarching issue: did Defendants modify the ET-Plus system in a manner which, in the way it was designed, created an unreasonable risk of danger to the consumer or user when put to normal

use. Exposure to the potentially defective ET-Plus end system is the common and overriding issue in Plaintiff's case and because generating common answers to these common questions will drive the resolution of the litigation, the Court concludes that Plaintiff has met the commonality requirement of Rule 52.08(a)(2).

Rule 52.08(a)(3) – Typicality

12. “Typicality means that the class members share the same interest and suffer the same injury.” *Elsa*, 463 S.W.3d at 420 (quoting *Hale*, 231 S.W.3d at 223). Typicality is fairly met if:

Other class members have claims similar to the named Plaintiff. If the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory, factual variations in the individual claims will not normally preclude class certification.

Hale, 231 S.W.3d at 223 (citations omitted). Even when there is a difference in the underlying facts of the representative's claim and class members' claims, the typicality requirement is met as long as the claim arises from the same even or course of conduct of the Defendants as the class claims, the underlying facts are not significantly different and the conduct and facts give rise to the same legal or remedial theory. *Elsa*, 463 S.W.3d at 223 (citation omitted).

13. Based upon allegations made in the Petition and as referenced in paragraph 10, subsection (a) through (i), regarding the representative Plaintiff and putative class members who may or may not have Defendants allegedly defective product on their roadways, the Court concludes that Plaintiff has met the typicality requirement of Rule 52.08(a)(3).

Rule 52.08(a)(4) – Adequacy

14. The adequacy requirement of Rule 52.08 requires that the representative parties will fairly and adequately protect the interests of the class. Rule 52.08(a)(4); *see Dale*, 204 S.W.3d at 172. “[The adequacy] prerequisite applies both to the named class representatives and to class

counsel.” *Elsea*, 463 S.W.3d at 420-21 (quoting *Vandyne v. Allied Mortg. Capital Corp.*, 242 S.W.3d 695, 698 (Mo. banc 2008)). In considering whether adequacy has been met, the Court must consider whether the class representative “has, or may develop during the course of the litigation, any conflicts of interest that will adversely affect the interests of the class.” *Vandyne*, 242 S.W.3d at 698.

15. Defendants first argue that Jackson County is pursuing this case without proper legal authority because county leadership failed to approve retention of private counsel to represent Jackson County in this lawsuit. The Court rejects this argument. As a home rule charter government, the Jackson County Counselor is granted the authority to appoint or designate counsel. Art. V, § 6, Constitutional Home Rule Charter, Jackson County, Missouri (2010). Further, pursuant to Jackson County Code, the County Counselor’s power to execute personal services contracts under its charter authority is expressly referenced. § 241, Jackson County Code. The Court finds Jackson County properly retained counsel pursuant to these provisions. *See* Pet. ¶ 49; *see also* Affidavit of R. Travis Willingham.

16. Second, Defendants argue that an “impermissible opt-in” class would be created because the proposed class is comprised of government entities and Plaintiff has not shown that each entity has approved Plaintiff’s decision to retain private counsel. However, governmental entities and subdivisions can participate in a class action. *See State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589, 594-95; n.7 (Mo. 2012). Pursuant to Rule 52.02(c), individual notice must be given to all class members that “the court will exclude the member of the class if requested by a specified date” and that any member “who does not request exclusion may, if desired, enter an appearance through counsel.” Mo. R. Civ. P. 52.08(c)(2). Once the class is certified, members have a right to exclude themselves from the action and a right to be represented by their own

counsel. Defendants argument that the individual counties and Missouri’s transportation authority have not yet authorized the suit would effectively prohibit these parties from participating in a class action unless and until each individual authority gives its express permission. The ability to “opt-out” of the class, as contemplated by Rule 52.08(c)(2), allows these individual counties and authorities the opportunity to obtain approval from their governing bodies and either elect to carry on as a member of the class or opt-out of the litigation. Further, the Court has the ability to modify the class definition for any class member who does not satisfy the definition.

17. Finally, in regards to an argument regarding a member of Plaintiff’s counsel’s law firm formerly serving as Chairman of the Missouri Highways and Transportation Commission, Plaintiff’s counsels testified and provided an affidavit of said Counsel indicating his permanent recusal of all connection regarding this litigation, removal of his access to accessing any information related to the lawsuit and his voluntary waiver of personal receipt of any potential portion of fees or compensation stemming from this litigation.

18. Therefore, because Plaintiff has no interests in this matter which would be antagonistic to the interests of the putative class, the putative class members having the opportunity to opt-out of the litigation if the governing authority does not approve participation, the Court’s ability to modify or de-certify the class at any stage of the litigation, and because Plaintiff has retained competition counsel with experience in class action litigation, the Court finds that Plaintiff meets the adequacy requirement of Rule 52.08(a)(4).

Rule 52.08(b)(3) – Predominance

19. The predominance requirement of Rule 52.08(b)(3) tests whether “proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Elsea*, 463 S.W.3d at 422. Not every issue must be common to all class members. *Id.* Predominance can be satisfied “if there

is one single common issue that is the overriding issue in the litigation.” *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675, 688 (Mo. Ct. App. 2009) (citing *Dale*, 204 S.W.3d at 174). The single predominant issue “need not even be dispositive of the case.” *Id.* “[T]he fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance.” *Elsa*, 463 S.W.3d at 422 (citation omitted). When one or more of the central issues in the action are common to the class and can be said to predominate, the case may properly proceed as a class action, even though other important matters may have to be tried separately. *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 716 (Mo. 2007).

20. The standard for determining whether a question is common or individual turns on whether the evidence needed for each member to make a prima facie showing on the issue is common or individualized:

If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.

Dale, 204 S.W.3d at 175 (citation omitted).

21. Here, the misconduct alleged by Jackson County against Defendants is the same misconduct as to which they allege the putative class members’ rights of redress. Further, while the amount of damages may vary by class member, Plaintiff asserts that the calculation of damages is the same for all class members. *See, e.g., Moser v. Keller*, 303 S.W.2d 135, 151 (Mo. 1957) (fact that amount of damages may be different for each member depending on number of shares held not to preclude class certification). While Defendants may argue expert testimony as necessary for certifying the class, this Court finds that – as class certification is a procedural matter – the Court does not need to precisely establish what must be proven in order to recover. *See Meyer*, 220 S.W.3d at 718 n. 7. Additional discovery may determine if the classwide proceeding

can generate common answers or lead this Court to modify or decertify the class if it is determined that a class member is improperly included in the class and whether their individual issues predominate over alleged common issues or question. However, at this stage in the proceeding in accepting Plaintiff's allegations as true, the common issues predominate over the potential individual issues or questions.

22. For the foregoing reasons and at this stage in the litigation, the Court concludes that substantial common issues predominate over any individual issues and Plaintiff has met Rule 52.08(b)(3)'s predominance requirement.

Rule 52.08(b)(3) – Superiority

23. Rule 52.08(b)(3) requires a class action be “superior to other available methods for the fair and efficient adjudication of the controversy.” Rule 52.08(b)(3). The Court must balance, “in terms of fairness and efficiency, the merits of a class action in resolving the controversy against those of alternative available methods of adjudication.” *Elsea*, 463 S.W.3d at 423 (citation omitted). Manageability is a factor that may be considered with respect to superiority, however it generally may not be used to deny a class certification unless efficient management is “nearly impossible.” *Id.*

24. Here, the separate adjudication of claims between forty (40) and one hundred (100) individual class members throughout the state could lead to inconsistent results, potentially establishing incompatible standards of conduct for Defendants. Further, the financial burden on individual Class Members could make it impracticable for them to pursue claims individually against Defendants outside of the class. If, however, it is determined throughout further discovery during the course of litigation, the individual issues predominate over the common issues,

maintaining the proceeding as a class action may become issue and the Court is able to re-examine its finding regarding superiority.

25. Therefore, at this stage in the litigation, the Court finds that Rule 52.08(b)(3)'s superiority requirement is satisfied by Plaintiff.

Implied Requirements of Rule 52.08 – Class Definition

26. To certify a class, Missouri courts have two implied requirements as it relates to class definition: (1) that a class exists which is capable of legal definition, and (2) that the representative party is a member of the proposed class. *Elsea*, 463 S.W.3d at 425 (citation omitted). The class definition is sufficiently definite to justify class certification if the members of the class can be ascertained by reference to the objective criteria. *Id.*

27. A properly defined class facilitates the identification of individuals affected by the litigation from the outset of the case to provide notice and an opportunity to opt out of the class. *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 882 (Mo. 2008).

28. Further, this Court has discretion to modify the class definition. *See State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. 2008). A putative class may initially include members who could not have brought the underlying action in its own name, in which case the class definition may be modified pursuant to Rule 52.08 in order to remove the uninjured putative members. *Id.*

29. Here, allegations in the Petition and in the record are that Plaintiff and proposed class members removed and replaced a number of modified ET-Plus end terminals on roadways it owns and maintains. In consideration of the Petition, if taken as true, the evidence in the record is adequate to support a conclusion that joinder is impracticable, that the proposed definition is

capable of legal definition and Jackson County, as the representative party, is a member of the proposed class.

30. Thus, the Court hereby adopts Plaintiff Jackson County's proposed modified class definition as follows:

All Missouri counties with populations of 10,000 or more persons as determined by the Missouri Census Data Center as of July 1, 2014, including the independent city, the City of St. Louis, and the State of Missouri's transportation authority, that have or had ET-Plus guardrail end terminals with 4-inch wide feeder chutes installed on roadways they own and maintain.

33. Therefore, the Court appoints Plaintiff Jackson County as class representative, and the law firm of Miller Schirger, LLC, as class counsel.

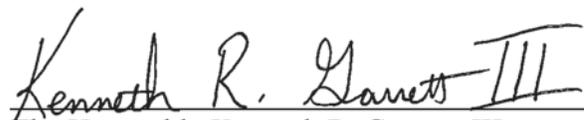
CONCLUSION

For the reasons cited above, the Court finds and concludes that Plaintiff Jackson County's Motion for Class Certification should be and is hereby **GRANTED**.

IT IS SO ORDERED.

IT IS FURTHER **ORDERED** that the Court certifies this matter for appeal under Mo. Sup. Ct. R. 74.01(b) as there is no just reason for delay in appealing this Court's Judgment and that issue should be appealed immediately under this rule.

December 6, 2017
Date


The Honorable Kenneth R. Garrett, III

I certify a copy of the above was sent this day to all parties of record via the e-Filing system:


Mary Kate Bird, Law Clerk, The Honorable Kenneth R. Garrett, III, Division 2