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SOUTHWESTERN REFINING V. BERNAL

WEATHERED: One thing we know about class action litigation in general is that there is an inverse correlation between predominance and superiority. The more individual issues predominate given litigation, the less likely it is that class action will be a superior device for managing and resolving that litigation. That is the explicit lesson of the 5th circuit's decision in *Castano*. And we learned that by example in the *Jenkins v. Raymark*, and *Cimino* line of asbestosis decisions.

What that means in the context of personal injury litigation is that because individual issues like proximate causation and actual damages will invariably predominate the litigation. It does not matter how you dice it or how you splice it. Those issues will predominate and because they predominate class action is not a superior device for managing and resolving the litigation.

HANKINSON: Is a class action device never superior in dealing with personal injury claims? Are you saying that as an absolute?

WEATHERED: I have given this a great deal of thought. And in all candor, I cannot think of a personal injury case which is truly a superior device for managing that litigation. But if there is such a case it has to be a mature tort instead of an immature tort. This is a distinction which this court recognized in *In re Ethyl* and *In re Bristol Meyers*. And interestingly if you read the drafter's comments to the 1995 proposed amendments to rule 23, the federal class action rule, those comments indicate that based upon interviews with experienced class action trial lawyers throughout the country men and women who have been doing this for a living for a number of years, the consensus of opinion according to the drafters is that to the extent that you might be able to certify any kind of a mass tort, you should not certify mass torts until they are mature. And the case at bar is a classic example of an immature tort. It has never happened before this way. If true, it was a single event. And we submit that because it was a single event and because none of these claims have been tried, none of these theories have been tested, there have been no appeals, it is a classic immature tort.

HANKINSON: In *Shell* out of the Louisiana DC, that involved another aspect of it - a single event that gives rise to the injury - that court indicated was another circumstance in which personal injury claims could be appropriately dealt with because you were not dealing with a series of separate events that allegedly caused injury to the members of the class. In what way was the federal DC wrong in *Shell* in concluding that under rule 23, you could bring a class action if you had one event? In that case I believe it was an explosion.

WEATHERED: Because whether you have one event, two events, or a thousand events, it does not matter how you slice it or how you dice it *Castano* teaches us that you cannot manufacture

predominance through the nimble use of the partial class certification provision in federal rule 23, which is the counterpart to our rule 42(d)(1). And there are two reasons for that, and this ties in with the bifurcation issue and the case at bar because I'm going to tell the court this morning that even if you can bifurcate in Texas, even if this court were to overturn *Iley v. Hughes*, bifurcation does not get us down the road. And here's why: 1) if a TC can manufacture predominance of common issues through in effect bifurcating them out and putting them into their own phases of trial, that eviscerates the predominance requirement under the rule. Because in any case where you have common issues by definition if you put them in to their own phases they will predominate those phases. But *Castano* teaches us that you have to look at the case as a whole and determine predominance and superiority first. To create predominance through bifurcation is to put the cart before the horse.

Now why is that important? It is important because, and this is what we learn from the line which started with the promise of *Jenkins v. Raymark*, and ended up with the failure of *Cimino v. Raymark* after the bifurcation, after the creative attempts to divide the case out and segregate the common issues, Judge Parker realized at the end that this is not going to work. "I cannot try 2,000 TO 3,000 mini trials of proximate causation and actual damages." It is an unmanageable mess which the TC is left on its hands even if the common issues are tried in their own phase of trial. So it doesn't get you down the road and that's where *In re Shell* went wrong. And I think it is important to note the writ history on *In re* Shell because that case was granted en banc review and then settled. And this points out the very important problem with class certification. These cases I've seen cited not just in the briefs in this case, but in briefs in other class certification appeals and you see it cited in Texas decisions that when in doubt certify, because you can always de-certify down the road.

Well besides being in direct contradiction to this court's statement in *Bloyed*, that if you're not certain you shouldn't certify, that's what this court held in *Bloyed*. The antidotal evidence is that once these cases are certified, they do not become decertified. And they also don't get tried. What happens is they settle. And why do they settle? They settle because as Judge Posner originally held in _____ and as the 5th circuit agreed in *Castano,* it is judicial blackmail. The only case I am aware of which has been tried is *Cimino*. And look what happened to *Cimino*. It was reversed by the 5th circuit because the trial judge, and I credit Judge Parker for being hardworking and inventive and was faced with a serious problem in the eastern district of Texas, and he tried his best, but after he tried the common issues assuming it was okay to bifurcate those issues out, he realized what a mess he had on his hands and he changed his plan and he collectivized proximate causation and actual damages. And the 5th circuit rightly noted in *Cimino v. Raymark* that that is not allowed under Texas substantive law. These issues have to be determined on an individual basis. And unless this court is willing to begin a paradigm shift in the way we practice tort law in this state, I submit that class action litigation is not superior. I cannot conceive of it being superior in a personal injury cases. But if it is, it has to be a mature tort.

This brings me to why there are realistic alternatives in this case, and this is an important point. This court has recognized in *In re Ethyl* and *In re Bristol Meyers* and in *In re*

Colonial Pipeline just last summer, that the TC's of this state are encouraged to creatively manage their dockets and within discretion to group test plaintiffs for bench mark trials. Now why is that superior in a case like ours? First of all, if you go to a bellwether trial, a mass joinder with a bellwether trial, you are not required to split issues, the court doesn't even need to reach the *Iley v. Hughes* issue, you don't have to do damage to that jurisprudence, you don't have to worry about having more than one jury because one jury can handle a bellwether trial, there can be an appeal after the bellwether trial to test error that might have occurred during the bellwether trial to help mature the tort.

OWEN: Would you concede that after that bellwether trial if you lost it you would be collaterally estopped from relitigating negligence?

WEATHERED: That's a good question, and I 've thought about that. In fact the last case I argued up here was a collateral estoppel case, and I lost it because the court found that the issue was not fully and fairly litigated in the original proceeding. That got me to thinking. The short answer is it depends. In the bellwether trial depending upon how the issues are submitted to the jury, whatever issues we lose on if they are fully and fairly litigated then under this court's jurisprudence you would have a good argument for issue preclusion in that kind of a case. And I can at least see negligence being fully and fairly litigated in a bellwether trial. I don't see it being fully and fairly litigated in phase 1 of the current trial plan because you are splitting negligence from proximate cause and from damages, which is a violation of *Iley* for a good reason. It's a violation because these are core elements of a tort. Core elements of a negligence tort. And I would remind the court that negligence is not the only theory under which the class is seeking recovery in this case. We don't agree that those other theories are available, but I think the plaintiffs have to live with them now at this juncture.

They are also suing us for an unreasonably dangerous activity under strict liability, toxic trespass, and nuisance. And it defies me to figure out a way that you can separate for a jury the question of whether for instance we have engaged in an unreasonably dangerous activity if you don't also allow that jury to consider what resulted from it. Or nuisance. How do you determine an unreasonable interference with a person assuming that that's available without knowing what happened to who. Is it a nuisance as to the guy who was 10 miles away at the Corpus Christi naval air station? Is it an unreasonably dangerous activity as to the man who was in prison in Beaumont, or was it negligence with respect to the lady in the house on Ebony street a few blocks away?

OWEN: Why wouldn't you have that same problem assuming you had a bellwether trial and you lost it and you fully and fairly litigated unreasonably dangerous issues, all of these issues, and you lost on all of them, wouldn't that be the same problem when the subsequent trials came along?

WEATHERED: All I can say is that it might be, because I can see an argument that even in a bellwether trial while it might have been fully and fairly litigated with respect to the bellwether plaintiffs, for the reasons I just cited it might not be fully and fairly litigated with respect to the guy at the naval air station 10 miles away. But let's put this in context. That is not an argument for having a class action because if that's a problem with bellwether trials as well as class action, that has nothing to do with the other aspects of the bellwether trial which make it superior to a class action. My point being, there are consequences to allowing class certification of personal injury litigation. Dominos begin to fall and I want to make sure that the court understands what those consequences are.

PHILLIPS: Texas is I think the only state that has the *Iley v. Hughes* doctrine or it's close to the only state. Are you contending that in the other states there is simply no way to get a fair adjudication for a finder of fact to make a meaningful determination of an appropriate result?

WEATHERED: No, I'm not making that argument. In this democracy of ours it's a great experiment and there are different ways to do things. But the fact remains for all of these years, *Iley* was decided in the mid 50's, it has been the policy of this court and the policy of this state to not segregate core elements of a personal injury case. Now this court has the power to undo *Iley* if it wants to. But why should it? Because class action is not necessary. We can get down the road, we can move the ball down the field with realistic alternatives that don't require this court to revisit *Iley*, to deal with the successive jury problem, to deal with the problem of how do you settle these cases. For instance, we pointed out in our brief that we are locked in to a class action format now, and I invite the court to look at this from the perspective of the plaintiffs and the defendants. We suspect that most of these claims lack merit. There might be a few that have merit. Shouldn't we be allowed to settle those cases that have merit without it being an all or nothing proposition where we have to somehow realize a "aggregate value" for 904 claims most of which probably don't have merit.

HANKINSON: You started to tell us about realistic alternatives. Would you quickly run down your list and give us what the pieces of that realistic alternative list are?

WEATHERED: I think what you would do is the plaintiffs and defendants if they could not agree would go to the TC and the TC would select a representative grouping of test plaintiffs for a bellwether trial at which you would try top to bottom, backwards and forwards all of the issues for that group. Everything from negligence through punitive damages if that was called for. At the end of that trial if there were errors, or the issues of whether toxic trespass even applies, is it a recognized theory of recovery, we would then be allowed to appeal, to test, or the plaintiffs could appeal and test, mature the tort at which time I predict that the writing would start to be on the wall for both sides and probably the cases would settle on a reasonable basis not on an aggregate basis. To the extent they did not settle, then you could try another group and possibly even another group. But it's difficult for me to believe that this would make it past 2 or 3 test cases. And what that does for you is that it allows you to get around the one jury problem - one jury can do this - you don't have to split the issues, settlement can proceed on an individual basis, you give maturity and contour to the tort,

the parties begin to understand what we're talking about here: Is there a value? What is the value? And start settling these cases. I submit that that is far superior to locking us in to a class action procedure that was not intended for this kind of litigation, and would require this court to change the law not only with respect to *Iley v. Hughes*, but successive juries and questions like that.

ABBOTT: And you believe that to be true regardless of the size of the individual personal injury damages? In other words, with regard to an asbestos claim or some other claim where some damages could be in excess of a $1 million, others could be in the hundreds of thousands of dollars. What if individual damages claims are less than a couple of hundred dollars, maybe even some around $100, would a bellwether trial be meaningful and even if it pointed out that each individual claim is worth $250 are we to have groupings of 5 cases, then the aggregate damages would be less than $2000 and then try all 900 of them?

WEATHERED: On the end of the spectrum you began with if you had large damages, I think history shows those folks are going to opt out of a class action probably, because they don't want to be lumped in.

ABBOTT: What about the small damages? In other words, the point I'm trying to make is, your scenario seems pretty interesting unless of course we're dealing with minuscule damages in which case it would be fairly meaningless scenario.

WEATHERED: That's a distinction that I want to draw for the court. There is a distinction between valid claims that happen to be small: your classic class action scenario; consumer ripoffs and things like that where you've got culpable conduct, no question about it, valid claims but happen to be small. That's a good case for a class action assuming the damages are amenable to a formula based distribution maker. But when you talk about personal injury damages there's a distinction between damages that are valid but small and damages that are underneath the radar screen because they are not valid in the first place. And that's why class action is not superior because the defendants can't look at these claims individually. We can't separate the invalid claims from the valid claims. That's where their negative value argument falls down because they are locking us in to an aggregate settlement which does nothing but amount to judicial blackmail. This is all in the process of picking representative plaintiffs for these test cases. That's the TC's discretion, that's the TC's call within his discretion to pick the appropriate plaintiffs for the bellwether cases.

I have no problem with telling this court that there are certain claims that our tort system was not intended to compensate. They are not valid claims that happen to be small. They are claims that are small or nothing because they are not valid. And you can't use a class action procedure to make invalid claims valid. And that's one of the serious problems with class certification in personal injury cases. Because those damages differ so much from individual to individual and you can't get around that no matter how you slice it, no matter how you dice it.

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CARRERA: The law is where public policy and history intersect with the problems of real people. The law is also where society formulates rules for the fair and efficient administration of justice and for the adjudication of controversies.

In this case there are two fundamental overriding issues: 1) whether rule 42 should be limited and restricted in such a fashion so as to prevent Texas TC's from having the ability to certify mass action cases where a personal injury has occurred; and 2) whether §D of rule 42 should be eviscerated so as to prevent Texas TC's from having the ability to properly manage their dockets and to properly choose to certify certain issues and not certify other issues.

I would respectfully submit to the court that the answer to these two overriding and fundamental issues should be no for two reasons: both based on the state of the law as it is today, and also practical considerations. And sometimes those two things are the same and that's true in this case as well.

I would like to address the jurisdictional issue in this case. It is respondent's position that this matter should not be before this court at this time. And that this court in fact lacks jurisdiction over this case at this time. The petitioner's base jurisdiction in this matter on Tex. Gov't Code §§22.001(a)(2) and 22.225(c). And they claim that this court has jurisdiction over this matter because the CA's decision in this case is in conflict with the CA's decision from Dallas in the *RSR* case. Nothing could be further from the truth. And it's clear from the *Coastal Corporation v. Garza* that this case does not conflict with *RSR*.

In *Coastal Corp. v. Garza*, Justice Enoch writing for the majority found three reasons why the *Garza* case did not conflict with *RSR*. The second of those reasons was that in the *Garza* case there was a complex subclass structure. And by the mere fact of that complex subclass structure, that case was legally distinct from the *RSR* case and could not be found to conflict with it. In this case, you have a complex subclass structure. You have a TC which has created a 3-phase trial plan and has separated the case into various classes and has classified certain issues and not classified other issues.

HECHT: Not the members of the class?

CARRERA: No. The members of the class have not been placed into various subclasses.

HECHT: As in *Coastal*?

CARRERA: As in Coastal. But it does contain a classification of certain issues and not a classification of other issues of the individualized damage issues. So based on the Garza case, I

don't think that this court has jurisdiction because of a conflict with another CA.

ENOCH: You don't think the CA that certified a class involving personal injuries is not in conflict with the CA in Dallas that didn't certify because it involved personal injury?

CARRERA: Y'all have this exhibit handout that I brought today. I would like to refer the court to Tab 3 of these exhibits. While I agree with Justice Enoch's majority opinion in *Coastal Corp. v. Garza*, I also think that Justice Hecht had it right where he said, No fair reading of *RSR* can conclude that the class certification was reversed because plaintiff's asserted personal injury claims. I don't think that the reason that *RSR* was not upheld or that the class was not upheld by the CA was because it was a personal injury case. I think it's clear ...

HECHT: You notice that was in the dissent.

CARRERA: Yeah, it was in the dissent. The certification was a not overturned because it was a personal injury case. In fact, Justice Hecht, you point out that personal injury issues were only addressed in one short paragraph after the court had decided that the case did not meet the prerequisites for class certification. So I don't think that you can say that these cases conflict because they involve personal injury.

The other ground that the petitioner cites as a basis for jurisdiction before this court is the conflict between the decision from the CA in Corpus Christi and this court's opinions in *Iley* and *Moriel* and some of their sister cases.

I would like to discuss a little bit of why I think that there is a very practical reason that this case should not be before the court at this time. The class action rule and both federal and state precedence clearly discusses this is a very fluid rule. It's a rule which allows the TC to decertify. It allows the TC to modify for certification. It allows the TC to subclassify. And I think that there should be the right to one interlocutory appeal to the CA to make a determination initially as to whether or not the fundamental aspects of the class certification rule had been fulfilled. But once it reaches that level it should not come to this court because the TC could change its mind.

HECHT: You don't think there's a direct conflict between trying punitive damages before actual damages in *Moriel*?

CARRERA: That's not what is occurring in this case. I think that what's occurring in the trial plan in this case is that the trial judge is going to allow the jury to make a finding of whether or not gross negligence has occurred. If you will look at Tab 10 of the handout, you will notice that in phase 1 the jury is to determine whether or not gross negligence occurred. Now that does not mean that there's going to be a determination as to whether there were punitive damages just whether or not there was malice or the standard for gross negligence constructed in *Moriel* has been achieved. And then in phase 2, the jury will determine whether or not there was actual damages which were

incurred by the class representatives and only after actual damages had been determined for the class representatives so that the jury can link punitives with actual, which is the precedence in Texas will the jury have the ability to make a determination as to the level of punitive damages. And that is in complete compliance with *Moriel* because the reasoning behind *Moriel* was that 1) you have to link punitive damages with actual damages; and 2) you cannot put in evidence as to the net worth of a company prior to a determination...

ABBOTT: But what about this problem, and that is, one of the elements of negligence is that it must approximately cause damage.

CARRERA: That's correct.

ABBOTT: But you're divorcing or segregating that element out in phase 1. You're saying in phase 1 they are going to determine negligence. How can they do that without hitting that other aspect?

CARRERA: The proximate cause aspect of negligence will be determined for the class representatives in phase 2.

ABBOTT: But you're saying they will determine negligence in phase 1. With proximate cause of damages being an element of negligence how can they determine negligence without hitting all the elements of the cause of action?

CARRERA: They can determine negligence because what they are determining is whether or not Southwestern Refinery and the other defendants in this case engaged in conduct which reaches the level of liable conduct. They are not making that determination in the first phase and so it's not negligence as a whole. It's a determination of liability of the defendants and you will not have negligence so as to allow a recovery until the jury makes the determination as to proximate causation and damages in the second phase of the trial.

OWEN: Why shouldn't you have a bellwether trial to try all the issues and then see where you are? You've got collateral estoppel if you prevail.

CARRERA: I don't think you do have collateral estoppel. I think that the defendants are never going to concede that the bellwether trial is binding. They will find a reason to argue that collateral estoppel does not apply because...

OWEN: On what basis?

CARRERA: They can argue on the same basis for the case that was cited by petitioner that the underlying facts for a particular class member are different than for another class member, and therefore, collateral estoppel should not apply.

OWEN: What's that got to do with the liability issues? That may touch proximate cause. What's that got to do with the liability issues? Why wouldn't they be _____?

CARRERA: I think when you are looking at the superiority of the class action device, not only do you have to look at whether or not there are other available means for trying the case, but I think you also need to look at whether or not you have what is called the negative value suit.

OWEN: How long is the class action the way you structured it going to take to get that trial done?

CARRERA: I can't give you an approximation of the time, but I think it can be done for 1 jury. I have no idea how long it would take. But I imagine you could do it within 6-8 weeks.

HECHT: 904 claims of causation in 6-8 weeks?

CARRERA: Well we presented to the trial judge the possibility of reviewing the individual damages through what are called damage brochures or other manners in which to present the information in a very succinct format so that the jury can get through it quickly.

HANKINSON: Do you then disagree with the 5th circuit in *Cimino* that Texas law requires individualized determinations, meaning individualized trials of proximate cause and damages as to each individual plaintiff?

CARRERA: No, I do not.

HANKINSON: So in fact, you are going to have to have 903 individualized determinations by a jury as to proximate cause and damages where you have to fully meet all the usual proof requirements under Texas law?

CARRERA: That's correct. But why should we also have 903 determinations as to whether or not Southwestern Refinery was negligent in the manner it maintained this refinery or whether ir properly trained the individuals who were maintaining the refinery.

HANKINSON: Why doesn't a bellwether trial help you get that done?

CARRERA: Because a bellwether trial is not contemplated under the rules of procedure of Texas and there's no...

OWEN: We do them all the time.

CARRERA: But there is no requirement that it's going to bind the defendants.

OWEN: We've got collateral estoppel on the books. I'm kind of surprised to hear you saying it doesn't apply.

CARRERA: I just think it gives them some wiggle room.

OWEN: Well take it up on appeal and we'll see if they wiggle or not. And assuming it applies what's wrong with that?

CARRERA: But the class doesn't have that problem. That's why we have class actions. We have class actions to resolve issues once that are are common to the class. And if you fulfill the requirements of Rule 42, if you fulfill the requirement of numerosity, typicality, commonality, adequacy representation, and then you fulfill one of the ____ requirements...

ENOCH: What case could not be subject to a class action if you're permitted to segregate discrete issues? Why wouldn't every accident be eligible for a class action?

CARRERA: We're not doing that exactly in this case. We are trying the individualized damage issues to one jury, to the same jury that makes the determination as to the liability issues. But I think that the answer to your question is that if those cases fit within the requirements of rule 42 and evidence presented to the TC judge and a motion is made to certify this class, then certainly if it fits within the requirements of rule 42 and the TC judge properly applies that evidence to those elements, then it can be a class.

ENOCH: That was my point back to you. Following your view every accident is eligible for class action status because you could discretely declare one event it meets all the criteria of 42, because this one does, and therefore, it's eligible for class action status.

CARRERA: If the elements of rule 42 have been met. In those cases where it is not appropriate that a trial court judge should carefully analyze the facts of an individual case to determine whether or not the elements of rule 42 have been met and then that can be appealed to the CA to make a determination as to whether or not it was proper. I think that you need to look at the individual facts of each case and make a determination as to whether or not it fulfills the requirements of rule 42.

OWEN: If these were very serious injuries would you be here arguing that this should be certified as a class?

CARRERA: No.

OWEN: Why not?

CARRERA: Because this is a negative value suit where the level of injuries is minor. Here

we have injuries which probably do not exceed for any of the plaintiffs on an individual basis of $1,000. And if they are not allowed to pursue this case as a class action that's outcome determinative. They are not going to be able to pursue it on an individual basis.

OWEN: Why can't they pursue it on an individual basis? They were all joined in the same lawsuit.

CARRERA: The reasoning given by *Boyed* at Tab 4 is that when you have cases where it's not economically feasible to obtain relief within the traditional framework of multiplicity of small individual suits for damages, then you are getting close to meeting the superiority requirement under 42(b). And then that is based on the *Constano* case which is the next Tab that says, The most compelling rationale for finding superiority in a class action is the existence of a negative value suit. And what that means is that these individuals will not be able to retain counsel, they would not be able to pursue and develop the case in a manner in which they would have to develop it unless they could do it as a group because the value of the case just does not exist on its own.

OWEN: But they did join as a group didn't they - all of them in the same lawsuit, they had the same counsel?

CARRERA: They did join individually into the case but it would not be possible to handle the case as a consolidated case unless it was done through the class action context.

OWEN: So if we were to say no, you can't certify this, are you going to dismiss the case?

CARRERA: It's likely that a large number of the claims may be dismissed. Yes.

HANKINSON: You have referred repeatedly to the fact that the requirements of rule 42 are met, but in the answers to your questions, looking at the predominance requirement, I've heard you identify one issue that is common, and that has to do with the fault piece or the breach of the duty piece of negligence. And the individual issues I've heard you mention include the fact and amount of damages, causation, and we haven't talked about it but there are also certain defenses I understand in this case like limitations, perhaps some comparative fault, whatever. How do you claim that the predominance requirement of rule 42 is met in the face of all of these individual issues?

CARRERA: I think that you can't line up on one side one issue and then a whole bunch of issues on the other side. I think what you need to do is look at what is going to be dispositive in the case. If in this case it's determined that Southwestern Refinery is not liable during the liability phase, the case will be over. That will be dispositive of the case. And because it will be dispositive, and I think that this is cited in the Ford Paint case, in the CA decision, because the issue will be dispositive, that makes it a predominant issue. Even if you have a series of other individualized issues it's not a counting match to see how many there are on one side and how many there are on

the other side. It's looking at the issues and determining what's going to be dispositive. Here if in phase 1 the TC or the jury determines that there was no gross negligence none of the other courts alleged occurred, then the case is over. And, therefore, those issues predominate over the other issues in the case.

HANKINSON: But if you win phase 1 on the negligence and the jury determines there is a breach of the duty, then we are flooded in order to take care of actually disposing of all of these claims 900 individual determinations of causation, fact and amount of damage, defenses, so how can you say in the face of that in order to really dispose of the case you've got to look at all the elements of the cause of action that must be proved, that the one issue that you got first in your phased trial plan predominates over the other issues? Under the case law don't we have to look at the case as a whole?

CARRERA: I don't think so because I think that 42(d) provides you with the ability to subclassify and to divide the case into different parts.

HANKINSON: Once the requirements of rule 42 for certification are met?

CARRERA: Right. And I think that the predominance _____ goes to whether or not an issue is going to be dispositive or not and if that issue is dispositive, then it may predominate and that's what the TC found in this instance.

HANKINSON: What case law do you have to support that interpretation of the predominance requirement?

CARRERA: I think that that is discussed in the *Ford Motors v. Sheldon* case as a basis for predominance. And I think that in that case there were citations to other cases.

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REBUTTAL

WEATHERED: Respondents conceded in response to your question Justice Hankinson that you first have to meet the requirements of 42 before you can start carving things up in order to do your class action, in order to manage it. And that's exactly what *Castano* teaches us is that 42(d)(1) is a housekeeping provision of rule 42 which allows the court to carve out the common issues once the court has determined that predominance and superiority are already satisfied. They have conceded that point. *Sheldon* reasoned, and I couldn't disagree more, that bifurcation is good because what if Ford Motor Co wins phase 1, then it's all over with.

Does this court want to enunciate _____ which justifies certification of cases based upon a gamble, based upon a guess, based upon speculation about who's going to win and who's going to lose and hope after you toss the dice that it's going to all turn out

alright. I don't think that's a sound rule. I don't think the policy supports that kind of a rule.

We don't know who is going to win phase 1. I would hope that we do, and if we did under this current trial plan, I guess the case would go away. But what if we don't? Then you've got an unmanageable mess on your hands, which brings me to jurisdiction. Number 1, *RSR v. Hayes*. This court held in *Coastal v. Garza* that *RSR v. Hayes* is primarily a personal injury case. That's the explanation for what it did, because it stands for the following legal principle. Individual issues of causation and damages invariably are going to predominate this kind of litigation. The CA in the case at bar has held the other way. The CA in the case at bar has bought in to the argument that you can get around this predominance problem by slicing the case and dicing it. And that is a conflict with *RSR*. If it's not, I genuinely do not understand what this court meant in *Coastal v. Garza*.

Number 2, there is a blatant conflict with *Iley v. Hughes* on the issue of separating out, splitting causes of action into their constituent elements for different trials.

It is incredulous to me that respondents would tell this court with a straight face that this case can be tried to one jury. I can't fathom how this case could be tried to one jury. So even if you accept the argument that *Iley v. Hughes* is a 2-jury or a successive jury case and doesn't apply to one jury, we're not going to be able to use one jury in this case. And so you've got a conflict with *Iley* on that basis alone. But we submit that *Iley* also applies to the one jury situation, that's the way we read the *Moriel* decision. And quite frankly I don't understand how you can ask a jury to decide negligence and proximate cause and damages at different phases of the trial. That opens up a whole can of worms for instance with respect to broad form submission. It opens up a can of worms with respect to rule 292 of the Rules of Civil Procedure that the same 10 jurors have to agree on everything. I don't understand how that works or how it's supposed to work. And that is a conflict between *Iley* and this case.

Finally, there's a conflict between *Moriel* in this case in the way punitive damages are going to be tried.