NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CW 0356

CHARLES E. BLANK, JOLENE L. GOMEZ, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, L.D.G., IRMA JO LOUBIERE, RILEY SPURLOCK, JOHNNIE MAE SPURLOCK, PAUL D. KLEINPETER, EVA G. KLEINPETER, JOE L. FARLEY, LINDA F. FARLEY, AND MS. LEE B. ALLEMOND

VERSUS

SID RICHARDSON CARBON AND GASOLINE COMPANY, ET AL.

Judgment rendered SEP 0 1 2006

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On Writ of Certiorari from the
18th Judicial District Court
in and for the Parish of West Baton Rouge, Louisiana
Trial Court No. 25,219
Honorable William Dupont, Judge

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BEFORE: KUHN, GUIDRY, AND PETTIGREW, JJ.

Guidry, J. concurs in the result.
Kuhn, J. concurs & assigns reasons

PETTIGREW, J.

This court granted a writ of certiorari to determine whether the trial court properly granted plaintiffs permission to re-urge their motion for class certification.

FACTS

Plaintiffs initiated the instant action on July 26, 1993, individually and on behalf of a class, alleging that they suffered property damage as a result of carbon black emissions from the Sid Richardson Carbon & Gasoline Company ("Sid Richardson") facility located near their homes in Addis, Louisiana.[1] In August 1996, the trial court granted class certification. On appeal, this court reversed certification of the class and remanded the matter to the trial court, noting as follows:

> [A] combination of factors leads us to find the proposed class lacks a "common character," at this time: a continuous tort over a period of many years without specific dates, and in the absence of identifiable accidents, the presence of multiple sources of black carbonaceous soot in the area, and the possibility of subjective nuisance damages or mere inconvenience. As the need for individual testimony or evidence increases, commonality decreases. For these reasons, the trial court committed manifest error in certifying the class.
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> Of course, if the plaintiffs are able to resolve the issues of multiple sources and individualized, subjective damages, the class action may be appropriate. The trial court could subsequently grant or modify a requested class, if the legal requisites were met. *See* La. C.C.P. art. 593.1B (1996) (renumbered by Acts 1997, No. 839, §1, as article 592A(3)(c)).

Blank v. Sid Richardson Carbon and Gasoline Co., 97-0872, p. 5 (La. App. 1 Cir. 5/15/98), 712 So.2d 630, 633.

Thereafter, on January 21, 1999, Sid Richardson filed a motion for summary judgment, alleging that there was no evidence that any emission from its facility caused any damage to plaintiffs' properties. Plaintiffs submitted the expert affidavit of Dr. Stephen Rice in opposition to Sid Richardson's motion for summary judgment. Sid Richardson responded by challenging the legitimacy of the methodology utilized by plaintiffs' expert. On June 3, 1999, the trial court denied the motion. On writs, this court

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[1] Originally, plaintiffs alleged that the emissions occurred on various dates in 1993. By virtue of a fourth supplemental and amending petition filed on September 3, 1996, however, plaintiffs have now withdrawn all specific allegations as to the dates of exposure.

reversed, finding insufficient support for the element of causation. **Blank v. Sid Richardson Carbon and Gasoline Co.**, 99-2459 (La. App. 1 Cir. 3/10/00)(unpublished writ action). The Louisiana Supreme Court granted writs, vacating the judgment of this court and remanding the matter to the trial court for reconsideration in light of its holding in **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181 (La. 2/29/00), 755 So.2d 226.[2] **Blank v. Sid Richardson Carbon and Gasoline Co.**, 2000-1025 (La. 6/2/00), 762 So.2d 1115.

On March 18, 2005, several years following remand of the case, Sid Richardson took the deposition of plaintiffs' expert, Dr. Rice. Sid Richardson then re-filed its motion for summary judgment on May 3, 2005, arguing that Dr. Rice's analysis did not meet the standard for admissibility of expert testimony. On May 16, 2005, the trial court denied the motion for summary judgment, concluding that Dr. Rice's opinions were based on valid scientific criteria. This court denied writs. **Blank v. Sid Richardson Carbon and Gasoline Co.**, 2005-1278 (La. App. 1 Cir. 8/22/05)(unpublished writ action).

On December 19, 2005, a status conference was held. At that time, plaintiffs advised the trial court that they wanted to re-urge their class certification motion. On that same date, plaintiffs filed a Motion to Maintain Class Action for Certification of Class and for Notice to Class Members. In support of the motion, plaintiffs alleged that the issues of multiple sources and damages had been resolved through the expert testimony of Dr.

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[2] In **Independent Fire Ins. Co.**, the Louisiana Supreme Court held that expert opinion testimony may be considered in support of or in opposition to a motion for summary judgment if such evidence is admissible under the standards set forth in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and **State v. Foret**, 628 So.2d 1116 (La. 1993). Accordingly, a discussion of **Independent Fire Ins. Co.** is not complete without reference to those cases.

In **Daubert**, the United States Supreme Court held that the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable and that, when faced with a proffer of expert scientific testimony, the trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. **Daubert**, 509 U.S. at 592, 113 S.Ct. at 2796. The Court explained that this would entail "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." **Daubert**, 509 U.S. at 592-593, 113 S.Ct. at 2796. The Court then set forth numerous factors that the trial court may consider in fulfilling its gatekeeping role. **Daubert**, 509 U.S. at 593-595, 113 S.Ct. at 2796-2797.

In **Foret**, the Louisiana Supreme Court adopted the **Daubert** standards as those to be utilized by Louisiana courts. **Foret**, 628 So.2d at 1123. Since that time, the **Daubert-Foret** standard has been widely recognized by Louisiana courts.

Rice directly linking the carbon black from Sid Richardson to the property of plaintiffs. Specifically, plaintiffs averred that the evidence showed: (1) that Dr. Rice's methodology for analyzing the carbon samples at issue is a widely recognized method of properly identifying carbon black; (2) that the carbonaceous material found on the air monitoring filters and samples taken from plaintiffs' homes and property positively matched the carbon black sample Sid Richardson provided to plaintiffs in size, shape and chemical composition; and (3) that the carbon black deposits caused financial as well as emotional damages by the staining of plaintiffs' homes, clothing, carpeting, furniture and other personal possessions, thereby necessitating the frequent, time-consuming cleaning of such items.

On February 16, 2006, the trial court held a hearing to address the issue of whether plaintiffs could re-urge their class certification motion. At that time, the trial court ruled that plaintiffs could re-urge the motion for class certification. We granted certiorari to determine the correctness of that decision.

DISCUSSION

The procedure for class certification is provided in Chapter 5, Title II, Section 1, of the Louisiana Code of Civil Procedure. At the time the instant suit was filed, La. Code Civ. P. art. 593.1 provided in pertinent part:

> A. After commencement of an action by or on behalf of parties alleged to be members of a class, the court, on its own motion, or on the motion of any party or on trial of any exception directed to such issue, shall determine whether the action may be properly maintained as a class action as a *prerequisite to any further proceedings therein.* If the court finds that the action should be maintained as a class action, it shall certify the action accordingly; *otherwise, the action shall be dismissed. The court may permit amendment of the pleadings in the action to permit maintenance thereof as an ordinary proceeding on behalf of parties expressly named therein.*
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> B. *In the process of class certification or at any time thereafter before decision on the merits, the court may alter, amend or recall its certification* and may enlarge, restrict, or otherwise redefine the constituency of the class or the issue to be maintained in the class action. (Emphasis added.)

The law on class actions, however, was substantially amended by Acts 1997, No. 839, effective July 1, 1997. Pursuant to the 1997 amendments, La. Code Civ. P. art.

593.1 was rewritten and redesignated as part and parcel of La. Code Civ. P. art. 592(A)(3). The statute now provides in pertinent part:

> (b) If the court finds that the action should be maintained as a class action, it shall certify the action accordingly. *If the court finds that the action should not be maintained as a class action, the action may continue between the named parties.* In either event, the court shall give in writing its findings of fact and reasons for judgment provided a request is made not later than ten days after notice of the order or judgment. A suspensive or devolutive appeal, as provided in Article 2081 et seq. of the Code of Civil Procedure, may be taken as a matter of right from an order or judgment provided for herein.
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> (c) *In the process of class certification, or at any time thereafter before a decision on the merits of the common issues, the court may alter, amend, or recall its initial ruling on certification* and may enlarge, restrict, or otherwise redefine the constituency of the class or the issues to be maintained in the class action. (Emphasis added.)

On writs, Sid Richardson first argues that the trial court erred as a matter of law in ruling that it can revisit the issue of class certification. Sid Richardson admits that the trial court's ruling is consistent with the decision of this court dated May 15, 1998, but argues that the prior decision of this court was erroneous insofar as it applied La. Code Civ. P. art. 592(A)(3), as amended by Acts 1997, No. 839, §1. Under the current law, Sid Richardson contends that the trial court has discretion to amend or reverse any decision regarding class certification at any time. See **Sutton Steel & Supply, Inc. v. Bellsouth Mobility, Inc.**, 2003-1536, p. 2 (La. App. 3 Cir. 6/9/04), 875 So.2d 1062, 1066. However, Sid Richardson points out that Section 3 of Acts 1997, No. 893, provides that the provisions of the Act are applicable only to actions filed on or after its effective date of July 1, 1997. Since this suit was initiated in 1993, Sid Richardson avers that former Article 593.1 is applicable and, under that statute, the issue of certification may not be re-urged following the denial of certification. Rather, under the old law, Sid Richardson argues that the only two options following denial of certification are dismissal of the suit or continuation as an ordinary proceeding.

In support, Sid Richardson cites the case of **Lafleur v. Entergy, Inc.**, 98-344 (La. App. 3 Cir. 12/9/98), 737 So.2d 761. In that case, electricity consumers brought a proposed class action against an electricity provider for loss of power suffered during a storm. Following a hearing, the trial court denied certification, finding individual issues

outweighed those common to the purported class. Thereafter, the plaintiffs filed a motion for reconsideration or new trial. Alternatively, the plaintiffs asked that the trial court certify a more limited class. The trial court denied the motion for reconsideration and/or certification of a limited class, and the plaintiffs appealed from that decision.

On appeal, the Third Circuit noted that former Article 593.1 was applicable. Under that statute, the appellate court found that reconsideration of the class was not permissible immediately following denial of certification, reasoning as follows:

> Thus, it would appear from reference to Article 593.1(A) that, after denying class certification, the trial court is required to dismiss the action or allow its continuation as an ordinary proceeding. Reference to Article 593.1(B), however, indicates that more flexibility is available to the trial court when the class has been certified. In the present case, of course, certification was denied.

Lafleur, 737 So.2d at 767-768. Based on the express language of the old statute and given the nature of testimony indicating the individual and varying nature of the plaintiffs' claims, the appellate court found no error in the trial court's denial of the plaintiffs' motion for reconsideration.

In this case, Sid Richardson points out that the trial court's certification ruling was reversed by this court as having been manifestly erroneous. In effect, therefore, it submits that certification was denied. Under the rationale of **Lafleur**, Sid Richardson submits that there is no statutory authority for permitting plaintiffs to re-urge the class certification question.

Second, even if reconsideration of class certification is permitted under former Article 593.1, Sid Richardson argues that plaintiffs have offered no new facts that provide reasonable grounds for a rehearing of their motion for class certification. Sid Richardson avers that plaintiffs' only justification for the pending motion is the identification by Dr. Rice in 1999 of samples taken from plaintiffs' properties as carbon black. Sid Richardson points out that the samples at issue consist of filter papers collected from the Sid Richardson monitoring station in Addis in January 1995, and on various dates in April and November 1993. To the extent that all of the samples were available to plaintiffs at the time of the original class certification hearing in 1996 and the filter papers collected in

April 1993 were actually offered into evidence at that hearing, Sid Richardson argues that such evidence does not offer any new factual basis for certification. Further, Sid Richardson submits that the report of Dr. Rice is not conclusive in that it did not exclude the possibility that carbon black came from other sources or opine that the soot caused damages. Rather, Dr. Rice has opined that carbonaceous soot is ubiquitous in the urban environment. Also, Dr. Rice admits that the carbon samples he tested were not personally collected by him and that he has never traveled to plaintiffs' homes.

Thirdly, Sid Richardson submits that plaintiffs' motion to re-urge class certification was untimely. In support, Sid Richardson cites former Article 593.1(A), enacted in 1984, which provided that the court shall determine whether the action may be properly maintained as a class action as a "pre-requisite" to any further proceedings. Likewise, although not applicable to the instant proceedings, Sid Richardson notes that current Article 592(A), as added by Acts 1997, No. 839, provides:

> (1) Within ninety days after service on all adverse parties of the initial pleading demanding relief on behalf of or against a class, the proponent of the class shall file a motion to certify the action as a class action. The delay for filing the motion may be extended by stipulation of the parties or on motion for good cause shown.
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> (2) If the proponent fails to file a motion for certification within the delay allowed by Subparagraph A(1), any adverse party may file a notice of the failure to move for certification. On the filing of such a notice and after hearing thereon, the demand for class relief may be stricken. If the demand for class relief is stricken, the action may continue between the named parties alone. A demand for class relief stricken under this Subparagraph may be reinstated upon a showing of good cause by the proponent.

Upon review of the legislative history, Sid Richardson argues that litigants are entitled to prompt resolution of motions for class certification.

In support of the argument that the second motion for class certification was untimely filed, Sid Richardson relies on the case of **McCarthy v. Kleindienst**, 741 F.2d 1406 (D.C. Cir. 1984). Therein, interveners in an action challenging arrests made during the 1971 May Day demonstrations in Washington D.C. appealed from an order of the U.S. District Court for the District of Columbia that denied class certification and dismissed the case. On appeal, the interveners argued that the district court erred in finding that the

plaintiffs' motion for class certification was not timely, because it was filed over three years after the inception of the lawsuit. In rejecting this argument, the appellate court reasoned as follows:

> Initially, we observe that Local Rule 1-13(b) of the District Court, which took effect on August 1, 1973, requires putative class members to move for class certification within ninety days after filing their complaint. While we utterly reject the suggestion that Local Rule 1-13(b) *directly* governs a case, such as the one before us, filed before the rule's effective date, it would manifestly be within the District Court's discretion to refer to the rule as a non-binding benchmark against which the timeliness of a class certification motion could be measured. Indeed, this court has noted that Local Rule 1-13(b) "implements the policy" behind the already extant requirement of Fed.R.Civ.P. 23(c)(1) that class certification decisions be made as soon as practicable."
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> In our view, Fed.R.Civ.P. 23(c)(1) and Local Rule 1-13(b) rest upon at least two fundamental policies. The first is that defendants are entitled to ascertain at the earliest practicable moment whether they will be facing a limited number of known, identifiable plaintiffs or whether they will instead be facing a much larger mass of generally unknown plaintiffs. Fundamental fairness, as well as the orderly administration of justice requires that defendants haled into court not remain indefinitely uncertain as to the bedrock litigation fact of the number of individuals or parties to whom they may ultimately be held liable for money damages. That is particularly true where, as here, the defendants were facing either thirty-nine named plaintiffs or a class of almost two hundred times the number of the original plaintiffs. Second, these rules foster the interests of judicial efficiency, as well as the interests of the parties, by encouraging courts to proceed to the merits of a controversy as soon as practicable. That, at bottom, is a matter of simple justice. As previously described, plaintiffs' three-year delay in moving for class certification indisputably thwarted these policies.

McCarthy, 741 F.2d at 1411-1412 (citations, parenthetical information, and footnotes omitted). For these reasons, the appellate court affirmed the denial of class certification.

In the instant case, Sid Richardson contends that the trial court did not consider the timeliness of the pending motion, which was filed almost thirteen years after commencement of the action. To permit plaintiffs to re-urge the motion for class certification, Sid Richardson argues, would thwart the policies of judicial efficiency and fundamental fairness by further delaying the litigation and subjecting it to the possibility of defending against a class, rather than a few named individuals.

In opposition, plaintiffs point out that this court, in its prior decision reversing certification on appeal, specifically left the door open for them to re-urge their motion for

class certification upon resolution of the issues of multiple sources and individualized, subjective damages. In this sense, plaintiffs distinguish this case from the Third Circuit's decision in **Lafleur**, wherein the motion for class certification was denied.

Further, plaintiffs deny Sid Richardson's claim that there is no new evidence sufficient to support a motion for class certification. To the contrary, plaintiffs argue that the expert report prepared by Dr. Rice effectively links the carbon black samples collected from their homes to Sid Richardson. Plaintiffs submit that this is evidenced by the fact that Sid Richardson has twice moved for summary judgment in this matter, to no avail.

Lastly, plaintiffs argue that Sid Richardson cannot aver that it would be inequitable to reconsider the motion for class certification some thirteen years after initiation of the litigation, because any delay in the proceedings up to the present time has been caused in large part by the actions of Sid Richardson. Specifically, plaintiffs point out that Sid Richardson has on more than one occasion sought review of adverse decisions of the lower court. Also, while plaintiffs admittedly failed to conduct any discovery for a period of at least two years, plaintiffs aver that neither did Sid Richardson. Moreover, plaintiffs argue that Sid Richardson has not shown that it suffered prejudice as a result of any delay.

Plaintiffs' arguments, however, fail to recognize the fact that former Article 593.1 is controlling, since the instant action was filed in 1993. The former law does not provide for the alteration or recall of the initial ruling on certification. For this reason, this court finds that the Third Circuit's interpretation of Article 593.1 in the case of **Lafleur**, supra, is correct in that the appellate court therein found that reconsideration of the class is not permissible following denial of certification. Moreover, to the extent that this court previously reversed certification of the class in this case, this court finds that the same result is appropriate herein.

Further, plaintiffs are erroneous in asserting that the prior action of this court indefinitely left the door open for them to re-urge the motion for class certification. Rather, this court indicated in dicta that plaintiffs could re-urge the motion if the remaining issues as to the source and nature of damages could be timely resolved. Even

if plaintiffs were not procedurally barred from re-urging consideration of their motion for class certification, to the extent that the motion to re-urge class certification was not filed for almost seven years after this court's initial action, the motion is untimely. This conclusion is especially warranted in a case such as the one at hand where plaintiffs seek to certify a class some thirteen years following the filing of suit and in the absence of any substantial new evidence in support of certification. Accordingly, the judgment granting plaintiffs permission to re-urge their motion for class certification must be reversed and the case remanded to the trial court for continuance as an ordinary proceeding.

CONCLUSION

Considering the foregoing, the order granting plaintiffs permission to re-urge their motion for class certification is reversed. This matter is remanded to the trial court for further proceedings consistent herewith.

REVERSED AND REMANDED.

CHARLES E. BLANK, JOLENE L. GOMEZ, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, L.D.G., IRMA JO LOUBIERE, RILEY SPURLOCK, JOHNNIE MAE SPURLOCK, PAUL D. KLEINPETER, EVA G. KLEINPETER, JOE L. FARLEY, LINDA F. FARLEY, AND MS. LEE B. ALLEMOND	**FIRST CIRCUIT**
VERSUS NO. 2006 CW 0356	**COURT OF APPEAL**
SID RICHARDSON CARBON AND GASOLINE COMPANY, ET AL.	**STATE OF LOUISIANA**

Kuhn, J., additionally concurring.

Plaintiffs urge that this court in ***Blank v. Sid Richardson Carbon and Gasoline Co.***, 97-0872, p. 5 (La. App. 1st Cir. 5/15/98), 712 So.2d 630, 633, previously authorized their action of re-urging class certification. Although this court stated therein that the trial court could subsequently grant or modify a requested class if certain legal requisites were met, such language was clearly *obiter dictum*. *Obiter dictum* is defined as:

> [A] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential ....
>
> ... a remark made or opinion expressed by a judge in his decision ... that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion ....
>
> Black's Law Dictionary (8th ed. 2004).

Accordingly, such statements are not binding as precedent because they are merely incidental expressions of the court that may have been made without full consideration of the matter addressed.

In the previous ***Blank*** decision, the issue presented to the court was whether the trial court had committed manifest error in certifying the class, and this court concluded that it had. As such, the court's discussion regarding possible future

action by the trial court was not necessary for the court's decision. Plaintiffs do not set forth any other authority to advance their position that they should be allowed another opportunity to obtain class certification. The majority opinion correctly concludes that former Louisiana Code of Civil Procedure article 593.1 is controlling and does not provide for the alteration or recall of the initial ruling on certification.