



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 2-00-052-CV

BECTON DICKINSON AND COMPANY,
AMERICAN HOME PRODUCTS
CORPORATION, TYCO INTERNATIONAL
(U.S.), INC., A/K/A TYCO INTERNATIONAL
LTD., AND SHERWOOD MEDICAL COMPANY

APPELLANTS

V.

JOAN USREY AND SUE WANG

APPELLEES

FROM THE 342ND DISTRICT COURT OF TARRANT COUNTY

**OPINION DISSENTING TO DENIAL OF
MOTION FOR REHEARING EN BANC**

I respectfully dissent from this court's failure to grant rehearing en banc in this case. See TEX. R. APP. P. 47.5. I believe our court was in error in reaching the merits of the trial court's class certification order because there is no justiciable controversy involved.

In reviewing a trial court's propriety in certification of a class on appeal, one of the preliminary questions the reviewing court must address is whether a justiciable controversy exists and whether the named plaintiffs have standing to pursue it. *In re M.M.O.*, 981 S.W.2d 72, 81 (Tex. App.—San Antonio 1998, no pet.). Before a plaintiff may be entitled to represent a class under rule 42, the plaintiff must show she has standing to bring the suit. TEX. R. CIV. P. 42; *M.M.O.*, 981 S.W.2d at 81. A court should only decide those cases that involve live issues where the parties have an interest in the outcome. *M.M.O.*, 981 S.W.2d at 81. If the claims of the class representatives become moot before they seek class certification, the class action becomes moot. *Id.* (citing *Tarrant County, Tex. Comm'rs Court v. Markham*, 779 S.W.2d 872, 876 (Tex. App.—Fort Worth 1989, writ denied)).

Standing is also a component of a court's subject matter jurisdiction. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001). "Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). To be justiciable, the controversy must involve a real controversy between parties that will actually be resolved by the relief sought. *Id.* Texas courts only have jurisdiction over real parties' controversies and may not render

advisory opinions. TEX. CONST. art. II, § 1, art. V, § 8; *Hanna v. Godwin*, 876 S.W.2d 454, 457 (Tex. App.—El Paso 1994, no writ). A class representative's individual standing is a "factor to consider in deciding whether the named plaintiff would be a proper class representative." *Novak*, 52 S.W.3d at 708. Lack of standing deprives a trial court of subject matter jurisdiction over the plaintiff's individual claims and those of the class. *Id.* at 711. Subject matter jurisdiction cannot be waived and may be raised for the first time on appeal by a party or by the court. *M.M.O.*, 981 S.W.2d at 79-80.

Our review of a trial court's class certification is limited to a review of whether a trial court abused its discretion in ordering class certification. *Henry Schein, Inc. v. Stromboe*, 28 S.W.3d 196, 201 (Tex. App.—Austin 2000, pet. dismiss'd w.o.j.); *M.M.O.*, 981 S.W.2d at 83-84. However, when we review subject matter jurisdiction, we review that issue de novo because we determine jurisdiction as a matter of law. *Trinity Universal Ins. Co. v. Sweatt*, 978 S.W.2d 267, 269 (Tex. App.—Fort Worth 1998, no pet.) (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999)). One of the preliminary matters encompassed in review of a class certification order necessarily encompasses a determination that a justiciable controversy exists. *M.M.O.*, 981 S.W.2d at 79. That should be the starting point for our review here.

In appellants' sixth issue, they point to appellees' lack of damages; the class representatives have sued to recover the costs of their post-needlestick testing. However, the representatives have conceded that they have not had to pay for any of their testing and that those costs have been covered by their employers. Joan Usrey specifically stated she has incurred no financial harm or injury as a result of her needlestick. Sue Wang testified similarly. Further, according to regulations of the Occupational Safety and Health Administration, healthcare employers are required to pay for and provide testing and treatment at no costs to their employees. Labor, 29 C.F.R. § 1910.1030(f)(1) (1998). Thus, these two remaining class representatives, Usrey and Wang, have incurred no damages despite their pleadings to recover some and, in great likelihood, will incur none of the damages they have pled for in the future. For these reasons, I believe these representatives have no standing to pursue their claims individually or on behalf of the class, no live controversy exists, and any claims they might have had are now moot. Therefore, I would reverse the trial court's class certification order with instructions to dismiss the suit for lack of subject matter jurisdiction.

TERRIE LIVINGSTON
JUSTICE

PUBLISH

[Delivered October 25, 2001]