

1 United States Court of Appeals,
2
3 Fifth Circuit.

4
5 No. 94-60545.

6
7 Dessie Lee APPLEWHITE, et al., Plaintiffs-Appellants,

8
9 v.

10
11 REICHHOLD CHEMICALS, INC., Defendant-Appellee.

12
13 Oct. 31, 1995.

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15 Appeal from the United States District Court for the Southern
16 District of Mississippi.

17
18 Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

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20 WISDOM, Circuit Judge.

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22 The appellants seek review of the district court's refusal to
23 certify a class action lawsuit and its dismissal of the appellants'
24 complaint. We AFFIRM the district court's denial of class
25 certification but VACATE the dismissal and REMAND for
26 reconsideration of whether dismissal is appropriate in this case.

27 I.

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29 Reichhold Chemicals, Inc., the defendant/appellee, operated a
30 chemical manufacturing plant in Columbus, Mississippi between
31 January 1975 and March 1977. Operations at the plant closed after
32 an explosion and fire in 1977. In 1984, the Reichhold site was
33 designated for cleanup under the EPA Superfund after the discovery
34 of toxic wastes at the site.

35 Numerous suits were filed against Reichhold Chemicals. In
36 1989, in one of these cases, *Levell Mark et al. v. Reichhold*
37 *Chemicals, Inc.*, a class was certified under Federal Rule of Civil
38 Procedure 23(b)(1)(B) for the resolution of punitive damage claims
39 against Reichhold Chemicals. The notice of certification provided

1 that only those litigants with a lawsuit pending against Reichhold
2 or filed within sixty days from the date of notice seeking punitive
3 damages and who were found entitled to compensatory damages would
4 be eligible to share in the class's recovery.

5 The plaintiff/appellants filed this suit in response to the
6 punitive damages class notice. Dessie Lee Applewhite, along with
7 two hundred other plaintiffs, filed this suit seeking both
8 compensatory and punitive damages from Reichhold Chemicals for
9 injuries allegedly caused by the defendant's operations in
10 Columbus. This action was originally filed in the *Mark* case. The
11 case, however, was subsequently re-captioned *Dessie Lee Applewhite*
12 *et al. v. Reichhold Chemicals, Inc.*

13 In 1993, the plaintiffs, in a joint motion with plaintiffs in
14 the case of *Delores Abram et al. v. Reichhold Chemicals, Inc.*,
15 filed a motion for class certification under Rule 23(b)(3). After
16 some discovery, the district court denied the plaintiffs' motion
17 for class certification. The district court also dismissed the
18 plaintiffs' complaint without prejudice based on a March 3, 1992
19 order in the *Mark* case requiring all subsequent suits against
20 Reichhold Chemicals regarding the Columbus site to be filed
21 separately. On appeal, the plaintiffs challenge both of these
22 decisions.

23 II.

24 The district court has wide discretion in deciding whether to
25 certify a class action.¹ We review this decision for an abuse of
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¹*Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471-72
(5th Cir.1986).

1 discretion.² The party seeking class certification has the burden
2 of showing that the requirements for a class action have been met.³
3 There are six basic requirements for a Rule 23(b)(3) class action
4 suit. First, Rule 23(a) imposes four prerequisites: numerosity,
5 commonality, typicality, and adequacy of representation. In
6 addition, Rule 23(b)(3) requires that the common factual and legal
7 issues predominate and that the movant show that a class action is
8 the superior method of adjudication.⁴

9 The district court determined that the plaintiffs had
10 "totally failed to meet the requirements of Rule 23 for
11 certification of the proposed class."⁵ We agree. On appeal, the
12 plaintiffs' brief fails to address two of the six requirements for
13 class action certification.⁶ Failure to brief and argue these
14 issues constitutes waiver.⁷ Also, in regard to the commonality

²*Id.* at 472.

³*Zeidman v. J. Ray McDermott & Company, Inc.*, 651 F.2d 1030, 1038 (5th Cir.1981).

⁴*See, Jenkins*, 782 F.2d at 472-73.

⁵The district court's memorandum opinion denying class certification and dismissing the plaintiffs' complaint, Record, volume 2 at 272.

⁶The plaintiffs' brief fails to address the requirements of Rule 23(b)(3) that the common issues predominate over those issues affecting individual litigants and that the movant show that a class action is the superior method of adjudication.

⁷*Gann v. Fruehauf Corporation*, 52 F.3d 1320, 1328 (5th Cir.1995) (deeming a claim abandoned on appeal because the appellant did not "advance arguments in the body of his brief in support of his appeal of his ... claims"); *Cavallini v. State Farm Mutual Auto Insurance Company*, 44 F.3d 256, 260 n. 9 (5th Cir.1995) (noting that "the failure to provide any legal or factual analysis of an issue results in waiver of that issue"); *United States v. Maldonado*, 42 F.3d 906, 910 n. 7 (5th Cir.1995) (refusing to consider an issue because it was not discussed in

1 requirement, the plaintiffs only assert one common issue.⁸
2 Although the threshold for commonality is not high, class
3 certification requires at least two issues in common.⁹
4 Furthermore, the plaintiffs seek a Rule 23(b)(3) class action which
5 requires that the common issues predominate. If the plaintiffs
6 cannot identify more than one common issue, they cannot argue that
7 the common issues predominate this litigation. Finally, the
8 omissions in the plaintiffs' appellate brief, as well as counsel's
9 conduct below, counsels against a finding that the class members
10 would be adequately represented. Since the plaintiffs have failed
11 to demonstrate that their case meets the requirements of Rule 23,
12 we hold that the district court did not abuse its discretion when
13 it denied class certification.

14 The plaintiffs also argue that the district court erred when
15 it dismissed their complaint without prejudice based on a blanket
16 order that all future suits against Reichhold Chemicals should be
17 filed separately.¹⁰ Generally, permissive joinder of plaintiffs

the appellant's brief).

⁸In their brief, the plaintiffs argue that the common issue is the defendant's gross negligence. The plaintiffs close their section on commonality by stating that "the parties to this litigation have one or more issues of law or fact common to them all". The plaintiffs choose not to identify what these additional common issues are, if any. We will not attempt to identify those issues on behalf of the plaintiffs.

⁹*Stewart v. Winter*, 669 F.2d 328, 335 n. 16 (5th Cir.1982) (noting that "by its terms, Rule 23(a)(2) requires more than one common question").

¹⁰The plaintiffs also maintain that the district court's dismissal violates their rights to due process and equal protection of the laws as well as the doctrine of separation of powers. The plaintiffs cite no authority in support of these arguments. In the light of the plaintiffs failure to adequately

1 under Federal Rule of Civil Procedure 20 is at the option of the
2 plaintiffs, assuming they meet the requirements set forth in Rule
3 20.¹¹ Under Rules 20 and 21, the district court has the discretion
4 to sever an action if it is misjoined or might otherwise cause
5 delay or prejudice.¹² Further, the district court also has
6 discretion to sever claims under Federal Rule of Civil Procedure
7 42(b), in furtherance of convenience or economy, or to prevent
8 prejudice. This discretion, however, should be exercised after an
9 examination of the individual case. Thus, we remand this case for
10 the district court to consider whether the plaintiffs are properly
11 joined and whether they should be allowed to continue in one
12 action.

13 III.
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15 We AFFIRM the district court's decision not to certify a class
16 action under Rule 23(b)(3) but VACATE the dismissal and REMAND for
17 further proceedings on the issues of joinder and the advisability
18 of severance.
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brief these issues and our decision to vacate the dismissal and
remand, we do not address the plaintiffs constitutional
arguments.

¹¹*Field v. Volkswagenwerk AG*, 626 F.2d 293, 299 (3rd
Cir.1980). Rule 20 requires that all of the plaintiffs' claims
arise out of the same transaction or occurrence and that there is
a common issue of fact or law. See, *Demboski v. CSX
Transportation, Inc.*, 157 F.R.D. 28, 29-30 (S.D.Miss.1994).

¹²*Mosley v. General Motors Corporation*, 497 F.2d 1330, 1332-
33 (8th Cir.1974); see also, *Demboski*, 157 F.R.D. at 29; *Hanley
v. First Investors Corporation*, 151 F.R.D. 76, 77-80
(E.D.Tex.1993).