

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

GARY & KATHY HENRY, ET AL,

Plaintiffs,

v

THE DOW CHEMICAL COMPANY,
a Delaware Corporation,

Defendant.

File No. 03-47775-NZ
REVISED

FILED
SAGINAW COUNTY, MICH.
2010 JUN 22 P 1:55
SUSAN KALTEMBACH
COUNTY CLERK
BY DEPUTY CLERK

REVISED OPINION AND ORDER OF THE COURT

On reconsideration of this Court's November 9, 2009, Opinion and Order;

PRESENT: HONORABLE LEOPOLD P. BORRELLO, Visiting Judge.

This matter comes before the Court on Counsels' Request for Clarification.

BACKGROUND

Plaintiffs brought this cause of action in 2003, alleging that defendant Dow Chemical Company's Midland plant negligently released dioxin, a synthetic chemical that is potentially hazardous to human health, into the Tittabawassee River, contaminating the soil of the floor plain and causing damage to plaintiffs' property. *Henry v Dow Chemical Company (Dow I)*, 473 Mich 63, 81; 701 NW2d 684 (2005). There have been numerous proceedings in this case, which has now been remanded by our Supreme Court for clarification of our October 21, 2005, decision granting plaintiffs' motion to certify a class. *Henry v Dow Chemical Company (Dow II)*, 484 Mich 483; 772 NW2d 301 (2009).

Defendant seeks an additional period of discovery, and an evidentiary hearing on all of the prerequisites for certification set forth in MCR 3.501(A)(1), including the prerequisites not found inadequate by our Supreme Court. We issued an opinion and order on November 9, 2009, but later, in

order to avoid any possible appearance of impropriety, granted defendant's motion to vacate and to revisit the issue without the assistance of Chief Judge Kaczmarek's law clerk.

DISCUSSION

DEFENDANT'S REQUEST FOR DISCOVERY AND EVIDENTIARY HEARING

We have again reviewed the record and the parties' briefs and now reconsider defendant's request. Defendant argues that additional discovery is needed in part because, during the past four years, there has been additional dioxin sampling and analysis, some properties have been sold, and extensive remediation has been performed. Defendant unsuccessfully raised many of these same concerns before our Supreme Court. Although many of these alleged developments, along with others, may become relevant if or when damages are at issue, we are not convinced that these proceedings, to clarify aspects of our previous ruling, would benefit by further discovery at this time. Indeed, we believe that such would be inconsistent with our Supreme Court's order, which provided a framework to move this case forward rather than to begin it anew.

Defendant will have the opportunity to conduct further discovery, and this Court does not foreclose the possibility of future relief or even limitations in the composition of the class. This Court has indicated and our Supreme Court has affirmed that this Court has discretion to later determine whether and to what extent bifurcation of the issues may be needed. Our Supreme Court agreed that "it is within [this Court's] discretion to certify a class on a limited basis and to decertify certain members of the class when it deems it appropriate under MCR 3.501(B)(3)," and recognized that "the most efficient method for conducting the proceedings will likely be affected by how other issues in the case develop." *Dow II*, 484 Mich at 508. This Court maintains the authority to limit further proceedings as to issues and forms of relief, as well as to subdivide the class, and to revoke certification for certain class members if warranted. Therefore, defendant's request for additional discovery and another evidentiary hearing at this time is denied.

THE SCOPE OF THE REMAND ORDER

Defendant also argues that each of the prerequisites of MCR 3.501(A)(1) must be reconsidered. Pursuant to MCR 3.501(A)(1), in order to proceed as a class action, plaintiffs must establish that the following prerequisites have been met: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (d) the representative parties will fairly and adequately assert and protect the interests of the class; and (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Our Supreme Court was very specific as to what this Court should do on remand. In deciding plaintiffs' motion for certification, this Court is required to consider the pleadings and other information to determine, without considering the merits, whether the plaintiffs have met their burden of establishing that each prerequisite has been satisfied.

As previously indicated, our Supreme Court recognized that, when granting plaintiffs' motion to certify the class in 2005, this Court did not merely consider plaintiffs' assertions, but rather,

conducted a two-day hearing and reviewed numerous documents from both parties, including scientific studies, affidavits from experts, and information provided by the MDEQ. In its analysis of MCR 3.501(A)(1)(a), (b), and (e), the circuit court appears to have independently determined that plaintiffs alleged a statement of basic facts and law sufficient to support each of those three prerequisites, and we hold that its analysis of those three prerequisites was sufficient. *Dow II*, 484 Mich at 505-506.

Our Supreme Court specifically instructed, in footnote 41, that, if this Court “determines that its standard was consistent with the proper standard, it should only revisit MCR 3.501(A)(1)(c) and (d) in order to provide further explanation on the record for its conclusion that the prerequisites were met.”

This Court is convinced that it applied the proper standard for our analysis regarding numerosity, commonality, and superiority. In this Court's 2005 Opinion and Order, this Court explained that plaintiffs had provided a map of the flood plain at issue, and had shown that there were approximately 2,000 people who owned property there on February 1, 2002, and would be included in the proposed class of landowners. On the basis of evidence and information, this Court independently determined that plaintiffs had shown that the proposed class was so numerous that joinder of all members was impracticable. MCR 3.501(A)(1)(a).

This Court also considered whether there were questions of law or fact common to all members of the proposed class that predominated over questions affecting only individual members. This Court explained that all of plaintiffs' negligence and nuisance claims were based on a single premise, the allegation that defendant polluted the soil of the Tittabawassee flood plain with dioxin, causing damage to the individual plaintiffs by reducing the value of their homes and properties. While this Court acknowledged that there may be different categories of damages, the predominate issues, the underlying basis of the action, and the law relevant to this stage of the proceedings, were the same for all plaintiffs. MCR 3.501(A)(1)(b).

Finally, in the 2005 Opinion and Order, this Court considered whether a class action would be superior to other available methods of adjudication in promoting the convenient administration of justice. In that Order, this Court explained that, with approximately 2,000 plaintiffs included in the proposed class, denial of certification could result in approximately 2,000 individual lawsuits. Such a result would undermine the convenient administration of justice, would duplicate judicial effort, and could result in inconsistent and varied results. This Court noted that a class action would ensure that all class members had legal assistance, and would achieve economy of time, effort and expense. This Court reasoned that, although there may be differences in the damages alleged by individual class members, they all share a single major issue. Because each class member lives within the specified flood plain,


and each is alleged to have suffered damage as a result of dioxin contamination, the same basic evidence would be required to establish negligence and causation. MCR 3.501(A)(1)(e).

Based on the foregoing, this Court concludes that its original analysis of MCR 3.501(A)(1)(a), (b), and (e) was consistent with the proper standard and that plaintiffs made an adequate showing of basic facts and law to support this Court's prior determination.

CONCLUSION

Defendant's request for discovery and an evidentiary hearing is DENIED.

It is so ordered.


LEOPOLD P. BORRELLO
Visiting Judge
10th Judicial Circuit

Dated: *June 22, 2010*