STATE OF MICHIGAN

COURT OF APPEALS

GARY HENRY and ALL OTHERS SIMILARLY SITUATED, Plaintiff-Appellee, v DOW CHEMICAL COMPANY, Defendant-Appellant.	UNPUBLISHED January 24, 2008 No. 266433 Saginaw Circuit Court LC No. 03-04775-NZ

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant Dow Chemical Company appeals by leave granted from the trial court's order granting plaintiffs' motion for class certification in this action alleging toxic torts caused by dioxin release from defendant's plant. We affirm.

This case was the subject of a prior appeal. In the prior appeal, the 173 plaintiffs sought to represent a putative class of thousands in an action against defendant Dow Chemical Company. The core of the dispute was the allegation that defendant's plant in Midland, Michigan, negligently released dioxin, a synthetic chemical that may be potentially hazardous to human health, into the Tittabawassee flood plain where the plaintiffs and the putative class members lived and worked. The litigation presented an issue of first impression because plaintiffs sought certification as a class that would create a program, funded by defendant, to establish medical monitoring of the class. The Court of Appeals denied the requested interlocutory application for leave to appeal. The Supreme Court accepted the case and rendered a decision. *Henry v The Dow Chemical Co*, 473 Mich 63, 67-68; 701 NW2d 684 (2005). The *Henry* decision set forth the following basic facts and procedural history:

> Defendant, The Dow Chemical Company, has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan, for over a century. The plant has produced a host of products, including, to name only a few, "styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides including Chlorpyrifos, Dursban and 2, 4, 5-trichlorophenol." Michigan Department of Community Health, Division of Environmental and Occupational Epidemiology, *Pilot Exposure Investigation: Dioxin Exposure in Adults Living in the Tittabawassee River Flood Plain, Saginaw County, Michigan,*

May 25, 2004, p 4.

According to plaintiffs and published reports from the MDEQ, defendant's operations in Midland have had a deleterious effect on the local environment. In 2000, General Motors Corporation was testing soil samples in an area near the Tittabawassee River and the Saginaw River when it discovered the presence of dioxin, a hazardous chemical believed to cause a variety of health problems such as cancer, liver disease, and birth defects. By spring 2001, the MDEQ had confirmed the presence of dioxin in the soil of the Tittabawassee flood plain. Further investigation by the MDEQ indicated that defendant's Midland plant was the likely source of the dioxin. Michigan Department of Environmental Quality, Remediation and Redevelopment Division, *Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study*, June 2003, p 42 (identifying Dow's Midland plant as the "principal source of dioxin contamination in the Tittabawassee River sediments and the Tittabawassee River flood plain soils").

In March 2003, plaintiffs moved for certification of two classes in the Saginaw Circuit Court. The first class was composed of individuals who owned property in the flood plain of the Tittabawassee River and who alleged that their properties had declined in value because of the dioxin contamination. The second group consisted of individuals who have resided in the Tittabawassee flood plain area at some point since 1984 and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from Dow's Midland plant. This latter class consists of 173 plaintiffs and, by defendant's estimation, "thousands" of putative members.

Defendant moved under MCR 2.116(C)(8) for summary disposition of plaintiffs' medical monitoring claim. The Saginaw Circuit Court denied this motion, and denied defendant's subsequent motions for reconsideration and for a stay of proceedings.

After the Court of Appeals denied defendant's motion for peremptory reversal and emergency application for leave to appeal, the defendant sought emergency leave to appeal in this Court. Discovery and other preliminary proceedings on plaintiffs' motion for class certification continued in the Saginaw Circuit Court until, on June 3, 2004, we stayed the proceedings below and granted defendant's application for leave to appeal. [*Henry, supra* at 69-70 (emphasis in original).]

Ultimately, the Supreme Court reversed the circuit court's denial of the defense motion for summary disposition of the claim seeking class certification of medical monitoring claims, concluding:

We now reverse the circuit court order denying the motion and remand for entry of summary disposition in favor of defendant on plaintiffs' medical

monitoring claim. Because plaintiffs do not allege a *present* injury, plaintiffs do not present a viable negligence claim under Michigan's common law.

Although we recognize that the common law is an instrument that may change as times and circumstances require, we decline plaintiffs' invitation to alter the common law of negligence liability to encompass a cause of action for medical monitoring. Recognition of a medical monitoring claim would involve extensive fact-finding and the weighing of numerous and conflicting policy concerns. We lack sufficient information to assess intelligently and fully the potential consequences of recognizing a medical monitoring claim. [*Id*. at 68.]

When the case was returned to the trial court, the parties addressed the issue of class certification with regard to the individuals claiming nuisance, negligence, and public nuisance. The court presided over two days of argument with regard to the issue of class certification, then granted the motion for class certification. The opinion and order provided:

In this cause, on March 25, 2003, Plaintiffs filed a Motion for Certification as a Class Action pursuant to MCR 3.501(B). Defendant Dow has filed objections thereto. In Plaintiffs' Complaint and First, Second, and Third Amended Complaints, Plaintiffs allege six claims for relief: Count I – Nuisance; Count II – Trespass; Count III – Negligence; Count IV – Public Nuisance; Count V – Strict Liability or Abnormally Dangerous Activity; and Count VI – Medical Monitoring.

On August 18, 2003, the Court granted Defendant's Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(8) as to Count II - Trespass and Count V – Strict Liability or Abnormally Dangerous Activity, but denied Defendant's Motion as to Count VI – Medical Monitoring. Subsequently, the Michigan Supreme Court, on July 13, 2005, issued its Opinion which reversed this Court's Order denying Defendant's Motion as it related to Plaintiffs' medical monitoring claim and remanded this matter for entry of an order of summary disposition in Defendant's favor with regard to Plaintiffs' medical monitoring cause of action.

Currently before the Court is Plaintiffs' Motion for Class Certification. Plaintiffs allege that the Defendant, in operating its chemical plant, has over the years introduced various chemical products into the Tittabawassee River, including Dioxin, that Plaintiffs claim is a hazardous chemical. Plaintiffs propose that the class consists of all persons who owned real property within the one-hundred year Flood Plain of the Tittabawassee River in Saginaw County, Michigan, on February 1, 2002. For purposes of this class definition, the one-hundred year Flood Plain of the Tittabawassee River is defined as the geographic area set forth on the map herein attached as Exhibit B, which is generally bounded on the west and south by River Road and Stroebel Road, including property on the west and south side of such roads, and generally bounded on the east and north by Midland Road, St. Andrews Road, and Michigan Avenue, including property on the east and north sides of such roads and avenue. Plaintiffs estimate that the proposed class would consist of approximately 2,000 persons.

Due to the limited case law in Michigan addressing certification of class action lawsuits, the Court can refer to federal case law that interprets the federal rules on class certification. *Brenner v. Marathon Oil Co.*, 222 Mich. App. 128, 133 (1997). When evaluating a motion for class certification, the court is to accept the allegations of the plaintiff in support of the motion as true. The merits of the case are not examined. *Allen v. Chicago*, 828 Fed. Supp. 543, 550 (N.D. Ill. 1993). The plaintiff bears the burden of proving that the class should be certified. *Ibid*.

One or more members of the class may sue or be sued as representative parties on behalf of all the members of the class action only if:

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 interest 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 a convenient administration of justice. [MCR 3.501(A)(1)]

a. The first requirement that the Plaintiffs must meet is that "the class is so numerous that joinder of all members is impracticable". MCR 3.501(A)(1)(a). The Plaintiffs define the potential class as:

"All persons who owned real property within the one-hundred year Flood Plain of the Tittabawassee River in Saginaw County, Michigan on February 1, 2002. For purposes of this class definition, the one-hundred year Flood Plain of the Tittabawassee River is defined as the geographic area set forth on the map attached as Exhibit A (Exhibit B attached to this order), which is generally bounded on the west and south by River Road and Stroebel Road, including property on the west and south side of such roads, and generally bounded on the east and north by Midland Road, St. Andrews Road, and Michigan Avenue, including property on the east and north sides of such roads and avenue."

The Plaintiffs also allege and the Court finds that there would be approximately 2,000 persons in the proposed class. The Court finds that 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.

All of the Plaintiffs' claims are based on the allegation that the Defendant polluted the Tittabawassee River, causing damage to the Plaintiffs in the form of reduced value of their home and property. Therefore, the alleged negligence of the Defendant, if any, as to the cause of the alleged pollution is common to all potential Plaintiffs. Equally, any questions of law would be common to the entire class. Although the question of damages may be individualized, the mere fact that damages may have to computed individually is not enough to defeat a class action. As the Court stated in *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988):

"No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remaining after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." See also *Dix v. Am. Bankers Life Assurance Co.*, 429 Mich 410, 417, 418, 419 (1987), and the more recent case of *Mejdrech, et al v Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003).

This Court finds that 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.

In this case, Plaintiffs contend that their property claims arise from the same course of conduct by Defendant Dow and that they share common legal and remedial theories with the members of the class. The court in *Cook v Rockwell Int'l Corp. and The Dow Chem. Co.*, 151 FRD 378 (1993), stated:

"So long as there is a nexus between the class representatives' claims are defenses and the common questions of fact or law which untie the class the typicality requirement is satisfied (citations omitted) …. The positions of the named plaintiffs and the potential class members do not have to be identical. 'Thus, the requirement may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other members of the class. The court finds that the representative parties' claims are not adverse or antagonistic to others in the class. Therefore, the court finds that the claims or defenses of all of the representative parties are typical of the claims or defenses of the class and are not antagonistic to the class.[']"

d. The representative parties will fairly and adequately assert and protect the interest of the class.

There presently are approximately seven Plaintiffs who are the representative parties. Further, no proof has been submitted to this Court that

would indicate that the Plaintiffs herein, the representative parties, would not fairly and adequately assert and protect the interest of the class.

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.

To deny a class action in this case and the Plaintiffs to pursue individual claims would result in up to 2,000 individual claims being filed in this Court. Such a result would impede the convenient administration of justice. Further, such a procedure would or could result in inconsistent or varying adjudications with respect to individual members of the class. A class action would also assure legal assistance to the members of the class. Moreover, a class action would achieve economy of time, effort and expense. The Court specifically finds that the action would be manageable as a class action based on the facts and the reasons set forth herein. Each member of the class lives in the area alleged to have been damaged. Each member of the class allegedly suffered damages as a result of the release of contaminates in the Tittabawassee River. Almost identical evidence would be required to establish negligence and causal connection between the alleged toxic contamination and Plaintiffs' damages and the type of damages allegedly suffered. The Court stated in *Sterling v. Velsicol Chem. Corp* (supra) at page 1197:

"In the instant case, each class member lived in the vicinity of the landfill and allegedly suffered damages as a result of the ingesting or otherwise using the contaminated water. Almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered and the defendant's liability. A single major issue distinguishing the class members is the nature and amount of damages, if any, that each sustained. To this extent, a class action in the instant case avoided duplication of judicial effort and prevented separate actions from reaching inconsistent results with similar, if not identical, facts. The district court clearly did not abuse its discretion in certifying this action as a rule of 23(b)(3) class action. However, individual members of the class still would be required to submit evidence concerning their particularized damages, damage claims and subsequent proceedings."

The Court finds that 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.

Based on the findings and reasons set forth above, the Court hereby orders that Plaintiffs' Motion for Certification as a Class Action be and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the class shall consist of all persons who owned real property within the one-hundred year Flood Plain of the

> Tittabawassee River in Saginaw County, Michigan, on February 1, 2002. For purposes of this class definition, the one-hundred year Flood Plain of the Tittabawassee River is defined as the geographic area set forth on the map herein attached as Exhibit B, which is generally bounded on the west and south by River Road and Stroebel Road, including property on the west and south side of such roads, and generally bounded on the east and north by Midland Road, St. Andrews Road, and Michigan Avenue, including property on the east and north sides of such roads and avenue.
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> IT IS FURTHER ORDERED that the notice set forth in Plaintiffs' Memorandum Opinion and herein marked as Exhibit A is hereby approved by the Court as the notice to be utilized in this class action, subject to being modified in compliance with this order.

Defendant filed this application and leave to appeal was granted.

The Court of Appeals will reverse an order granting class certification only when it is clearly erroneous. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 556; 492 NW2d 246 (1992). Clear error is presented only when the appellate court is left with the definite and firm conviction that a mistake has been made. *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006).

Based on the standard of review and the manner in which defendant briefed the case, in my view, the trial court's decision with regard to certification of the class was not clearly erroneous.

The party requesting class certification bears the initial burden of demonstrating that the criteria for certifying a class action is satisfied. *Tinman v Blue Cross & Blue Shield*, 264 Mich App 546, 562; 692 NW2d 58 (2004). Class certification is an issue that is governed by the court rules, MCR 3.501,[1] and provides, in relevant part:

> **(A) Nature of Class Action**.
>
> (1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (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;

[1] The subject of this appeal concerns the requirements of MCR 3.501(A)(1).

(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.

Review of defendant's statement of questions presented reveals that it contests the requirements of the class certification rule that mandate common questions of fact or law that predominate over questions involving individual members. Despite the question presented, the discussion section of the brief filed by defendant asserts that the trial court erred in reaching conclusions without holding an evidentiary hearing. However, at the start of hearing, the trial court inquired whether the parties intended on calling witnesses. Plaintiffs' counsel indicated that she would only seek to do so in response to defendant's presentation. It does not appear that either party requested an evidentiary hearing. Moreover, it should be noted that the court rule normally requires that the motion be filed within 91 days of the filing of the complaint. MCR 3.501(B)(1)(a). Arguably then, it would be very rare for the parties to have the opportunity to present proofs at an evidentiary hearing when the motion is addressed prior to the completion of any significant discovery. On the contrary, in this case, to a degree, the trial court allowed defendant to engage in discovery before entertaining the motion for class certification. Therefore, defendant was in a position to present proofs and permit the trial court to engage in fact finding that the criteria for certification would not be satisfied with regard to all members of the class. Despite the available discovery, defendant chose not to present proofs in response to the trial court's inquiry. To the extent that defendant asserts that the trial court erred in failing to conduct an evidentiary hearing, I disagree. A party may not harbor error as an appellate parachute by assigning error to something that counsel deemed proper at trial. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

Without an evidentiary hearing, there are no factual findings to review. Consequently, it is difficult to satisfy the clearly erroneous standard for reversal of the trial court's decision where the parties presented conflicting documentation. The trial court did not adopt factual findings by one party or the other. Rather, the court relied on case law in support of its decision, and each side presented case law that supports its respective position. Therefore, to the extent the parties failed to request an evidentiary hearing or present witnesses at the motion for class certification as a matter of strategy, I cannot conclude that the trial court clearly erred.

Two published Michigan decisions have addressed the common questions of law or fact requirement of the court rule, MCR 3.501(A)(1)(b), the requirement challenged by defendant in this appeal. In *Zine v Chrysler Corp*, 236 Mich App 261, 263; 600 NW2d 384 (1999), the plaintiff purchased a truck manufactured by Chrysler in 1994, and received a booklet in the vehicle. In some states, purchasers of an automobile are entitled to receive information about their state's lemon laws. However, Michigan did not require that the manufacturer provide such information. The booklet contained information regarding how to resolve a vehicle problem by working with the dealership or contacting the defendant's customer service center. The booklet also advised of pursuing relief through a customer arbitration board. In 1996, the plaintiff filed a proposed class action alleging that the information contained in the booklet was misleading because it "caused the probability that Plaintiffs would believe that the state of Michigan does not have a 'lemon law' and that the Chrysler Arbitration Board was or is their only remedy for

defective Chrysler vehicles." The *Zine* plaintiff sought to maintain a cause of action based on the Michigan Consumer Protection Act (MCPA). *Id*. at 263-265.

Defendant challenged plaintiff's motion to certify his action as a class action, asserting that the plaintiff was not representative of the class and that individual issues dominated over common ones. *Id*. at 266-267. The trial court denied the motion for class certification, and this Court affirmed. With regard to the common question factor, this Court held:

> The second factor is common questions of law or fact that predominate over individual questions. The common question factor is concerned with whether there "is a common issue the resolution of which will advance the litigation." It requires that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof."
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> The common question here is whether the new car documents supplied by Chrysler violated the MCPA. Even if that question were to be resolved in plaintiffs' favor, the trial court would have to determine for each class member who had purchased a new vehicle whether the vehicle was bought primarily for personal, family, or household use, whether the plaintiff had a defective vehicle and reported the defect to the manufacturer or dealer, had the vehicle in for a reasonable number of repairs, was unaware of Michigan's lemon law, read the documents supplied by Chrysler, and was led to believe that Michigan did not have a lemon law, and chose not to pursue a remedy under the lemon law because of that belief. These factual inquiries, all of which were subject to only individualized proof, predominate over the one common question and would render the case unmanageable as a class action. Therefore, we hold that the trial court properly denied the motion for class certification on this ground as well. [*Id*. at 289-290 (footnotes and internal citations omitted).]

The *Zine* decision dealt with a consumer transaction wherein there were many different factors to determine if some misrepresentation regarding Michigan law occurred, and the plaintiff had the ability to control the transaction. Specifically, the purchaser went to a dealership to negotiate a sale. The purchase had to be for personal use in order to raise a claim based on the MCPA, and the lemon law information was available from other sources. Therefore, the purchaser's claim based upon the MCPA was subject to multiple variants that would make a class action difficult to pursue. However, in the present case, defendant's Midland facility emitted toxins into the environment that were absorbed in the neighboring properties. These toxins were released into the river, and the extent of the rain or flood season caused movement through the Tittabawasee River. Thus, the variants present in the *Zine* case are not present here.

In *Tinman*, *supra*, the minor plaintiff was taken to the emergency room because he was vomiting and had a fever. The plaintiff had a debilitating illness and underwent surgery to correct scoliosis shortly before visiting the emergency room. The plaintiff was treated at the hospital, then released to the care of his home nurse. The defendant paid the laboratory component of the visit to the emergency room, but refused to pay for the remainder of the charges. The defendant sent an explanation of benefits (EOB) to the plaintiff indicating that the diagnosis that was reported on the claim did not meet the criteria for a medical emergency. If

there was a belief that the patient's signs and symptoms could have resulted in serious bodily harm or death, the plaintiff could contact the physician or the defendant's customer service center. *Id*. at 548-549.

Although the EOB did not indicate that it was a bill, the plaintiff's father paid the outstanding amount not covered by the defendant. The plaintiff then filed a complaint on behalf of himself and others similarly situated alleging that the defendant's denial of coverage for emergency health care services based on the insured's final diagnosis violated Michigan health care statutes. *Id*. at 549-550. With regard to the commonality element of the class certification test, the trial court concluded that the "commonality" element was satisfied by the allegation of whether the conduct by the defendant violated statutory law and its certificates when it denied benefits based upon a final diagnosis. *Id*. at 552.

On appeal, this Court reversed the trial court's conclusion that the commonality element was satisfied, stating:

> Here, the trial court broadly framed a common question that merely encompasses the legal claim in this case. As correctly asserted by defendant, a highly individualized inquiry must take place to determine whether defendant engaged in a reasonable investigation based on the available information before denying a particular claim. In other words, whether a potential class member is "entitled" to coverage for emergency health services depends at least in part on whether the individual's condition rose to the level described in MCL 550.1418. In the context of plaintiff's contention that defendant's alleged violation of MCL 550.1418 also comprises a violation of MCL 550.1402, it must be determined with respect to each claimant whether the claimant was provided emergency health services "for medically necessary services" resulting from "the sudden onset of a medical condition that manifested itself by signs and symptoms of sufficient severity," as well as whether any denial of payment was for emergency health services up to or after the point of stabilization. The same inquiries apply in regard to plaintiff's assertion that defendant's alleged violation of MCL 550.1418 also constitutes a breach of contract.
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> Rather than being subject to generalized proofs, the evidence of the type of emergency health services and medically necessary services provided, the medical conditions involved and whether they occurred suddenly, the signs and symptoms that manifested those medical conditions, and whether payment was denied for services up to the point of stabilization will all vary from claimant to claimant. Thus, it is evident that to determine defendant's liability, highly individualized inquiries regarding the circumstances relevant to each claim clearly predominate over the more broadly stated common question in this case. The trial court clearly erred in concluding that class-action certification was warranted under MCR 3.501, and erred in denying defendant's motion to decertify the class action. See *Hamilton, supra* at 551 (stating that whether television and telephone services were "reasonably necessary" expenses depended on individual circumstances, making class-action certification improper); see also *Crosby v Social Security Admin*, 796 F2d 576, 581 (CA 1, 1986) (stating that the issue in

> that case, the reasonableness of a delay in time, "may be analyzed . . . only in the context of individual cases, and so any class-wide time requirements are inappropriate").
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> Having concluded that the trial court erred in denying defendant's motion to decertify the class action, we need not address defendant's additional claim on appeal that the class definition is inadequate. [*Id*. at 564-565.]

Once again, the potential plaintiffs in *Tinman* also presented individual rather than common facts because each person will arrive at the hospital with different symptoms. Some individuals will have different experiences. For example, the proposed plaintiff in *Tinman* immediately paid the claim, then filed suit. However, there seemingly was an appeal process, in that, the insured was invited to contact his doctor or customer service. It is entirely possible that missing or supplemental documentation would have resulted in payment of the claim. Moreover, because some patients may proceed to the hospital regardless of whether the criteria for emergency treatment was met, each individual patient will have a different encounter, calling the commonality element into question.

In the present case, defendant asserts that the properties and the dioxin levels vary. Furthermore, the dioxin levels may come from other sources, such as a property that had a history of prior manufacturing use. However, the trial court is not required to accept the defendant's assertions and proofs, but looks to the allegations in the complaint.

Moreover, irrespective of the allegations raised by the defense, plaintiffs presented information from the MDEQ that contradicted the assertion by defendant with regard to prior use and variant dioxin levels. The "declaration" filed by Andrew W. Hogarth, the chief of remediation and redevelopment for the MDEQ, supports plaintiffs' request for class certification. Although the document indicates that it is a "declaration," the last page of the document indicates that it was subscribed and sworn before a notary public. The "declaration" sets forth the following information regarding Hogarth's knowledge of the property and the dioxin levels: (1) the MDEQ became involved in the property in the flood plain[2] near the river after General Motors alerted the agency to the high levels of dioxin; (2) Some of the levels were as high as 2,200 parts per trillion (ppt), a concentration 25 times the residential direct contact criterion; (3) the MDEQ began an investigation, called phase I, and found a pervasive distribution of dioxin contaminated soil that was probably transported downstream onto the flood plain during flood events; (4) the MDEQ hired a survey firm to develop a flood plain map and developed the estimated 100-year flood plain contour of the Tittabawasee River; and (5) relying on the survey, the MDEQ provided an information bulletin to 2,500 individuals of the potential hazards

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[2] The following definitions are helpful: "Floodplain" = any land area susceptible to inundation by floodwaters from any source. "100-Year Flood" = the flood having a one percent chance of being equaled or exceeded in magnitude in any given year. Contrary to popular belief, it is not a flood occurring once every 100 years. "100-year Floodplain" = the area adjoining a river, stream, or watercourse covered by water in the event of a 100-year flood. See www.dnr.ne.gov/floodplain/flood/flood100.html (last accessed January 7, 2008).

associated with dioxin and the need to investigate further, a/k/a Phase II. After additional investigation, areas of dioxin concentration were discovered that exceeded residential direct contact criteria. Consequently, these properties with the excessive dioxin concentrations could be deemed a "facility" under state environmental laws, and the MDEQ gave notice of the law. The classification of property as a "facility" imposed obligations on the individual property owner. If a property constituted a "facility," the property owner had to notify a potential buyer because the potential buyer would unknowingly be purchasing contaminated property. The MDEQ then determined that the *principal* source of the dioxin was defendant's Midland facility.

To counter the conclusions offered by the MDEQ, defendant asserted that there was another source of the contamination, PCBs, but the MDEQ determined that the concentrations in the soil were too low to cause the levels of dioxin found. Therefore, the MDEQ sent updated notices to the owners of the property within the *estimated* 100-year flood plain. The MDEQ also gave property owners notice of the hazardous effects of exposure to dioxin and steps that could be taken to reduce dioxin exposure.

In light of this "declaration," I cannot conclude that the trial court clearly erred. Although it could be argued that the source of the dioxin could vary, the MDEQ concluded that defendant was the "principal" source of the dioxin levels. While defendant proposed that there were other sources for the dioxin level, including the assertion that bonfire residue accounted for dioxin levels, the MDEQ's preliminary investigation found that the theory did not hold. Therefore, in light of the fact that there are different theories regarding dioxin levels, the trial court did not clearly err.

Additionally, the all or nothing approach of the defense is troubling. MCR 3.501(B)(3)(d)(i) provides that, when ordering a class action, the trial court may order that the action be maintained as a class action limited to particular issues or forms of relief. Therefore, it is questionable why defendant did not propose that the trial court limit the class certification to discovery. That is, the parties could utilize the discovery process to better manage the litigation. However, if the discovery process did yield a significant number of class members who could not satisfy the high dioxin levels or if another source for the dioxin level was located, defendant could assert that the class should be de-certified. See *Tinman, supra*. Similarly, defendant alleges that damages will differ. Therefore, defendant could have motioned the trial court to exclude that phase of the litigation from the certification. Under the circumstances, defendant had options, but accepted the all or nothing approach. Because defendant does not allege that the trial court erred in failing to bifurcate the class certification issues in accordance with the court rules, I cannot conclude that the class certification decision was erroneous.[3]

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[3] I am not suggesting that bifurcation is inappropriate merely because defendant did not request it. Rather, this Court is an error correcting court, *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002), and the standard of review applied to the trial court's decision regarding class certification is clear error. *Mooahesh, supra*. Clear error occurs only when there is a definite and firm conviction that a mistake has been made. *Herald, supra*. The posture of this case was that some discovery had occurred, and the trial court had time set aside for an

(continued…)

Additionally, defendant discusses the elements of a nuisance claim and a negligence claim and asserts that all class members cannot satisfy the elements, particularly when the dioxin levels are zero on some properties. Accepting that argument, that some properties will not satisfy the elements of a nuisance claim, the elements of a negligence claim are: (1) duty; (2) breach of that duty; (3) causation; and (4) damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). Although a nuisance claim may require that the use and enjoyment of the property was altered, a standard negligence claim would seemingly not require high dioxin levels or impact on use and enjoyment, but other damages might be applicable such as property valuations. Therefore, even assuming that the nuisance claim would not qualify for class certification, a broader tort claim such as negligence could be satisfied by most members regardless of dioxin levels if other damages were proved. Accordingly, the trial court did not clearly err in certifying the class.

Next, defendant takes issue with the language of the certified class. However, the investigation into the dioxin levels arose when General Motors was investigating the area and a wetland in the area. When General Motors found the high dioxin levels, it contacted the MDEQ. The MDEQ then performed a multi-phase investigation that first affirmed the high dioxin levels. It then retained a surveying firm to track the flood plain to determine the travel of the dioxin path. It found that properties downstream from the Midland plant experienced the high dioxin level. Based on the survey, the MDEQ determined who should receive notice of the dioxin levels such that they could take measures to protect themselves. Plaintiffs' definition of the class is premised on the MDEQ study and investigation.

I agree that if it can be proven that there are property owners that have zero to a little amount of dioxin level, they arguably do not fall within the class. However, there is no indication that defendant sought to limit the definition in that manner. Therefore, in light of the fact that the MDEQ's investigation served as the basis for the definition of the location, I cannot conclude that the trial court clearly erred.

Affirmed.

/s/ Karen M. Fort Hood

(…continued)

evidentiary hearing. Despite these circumstances, the parties chose to utilize that time for argument in lieu of the presentation of proofs. I simply conclude that, in light of the strategy in addressing the motion for class certification by the parties in the lower court, the trial court did not clearly err.