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UNPUBLISHED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. 03-047775-NZ

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

KELLY, J. *(dissenting.)*

I respectfully dissent. Individual questions of fact and law predominate over the issues common to the class such that the commonality requirement of MCR 3.501(A) is not met. I would reverse the trial court.

I. Applicable Law

The party requesting class certification bears the initial burden of demonstrating that the criteria for certifying a class action are satisfied. *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 562; 692 NW2d 58 (2004). MCR 3.501 sets forth the criteria that must be established before a class can be certified. When determining whether to grant a motion for class certification, a trial court may not examine the merits of the case. *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002). However, while a trial court must accept as true the allegations made in support of the request for certification, it does not "blindly rely on conclusory allegations" that merely "parrot" the requirements for class certification. See 3 Newberg & Conte, Newberg on Class Actions (4th ed), § 7:26, p 81. To the contrary, class certification is appropriate only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [the court rule governing class certification] have been satisfied." *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982). Accordingly, "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question." *Id*. at 160 (citation and internal quotation marks omitted).

We will reverse an order granting class certification only when it is clearly erroneous. *Mooahesh v Dep't of Treasury*, 195 Mich App 551; 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 v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471; 719 NW2d 19 (2006).

II. Analysis

I would initially note that this case is not one that stems from an isolated event or a unified discharge of pollutants. Rather, as noted by our Supreme Court in *Henry v Dow Chemical Co*, 473 Mich 63, 69; 701 NW2d 684 (2005), defendant:

> 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.

Thus, plaintiffs' claims encompass a variety of defendant's activities over a significant period of time. It appears that discharges into the river were not uniform in type, amount or timing. Flooding was not uniform in terms of areas flooded or flooding cycle. And, during the past century, environmental laws were changing and the methodology of waste discharge was evolving. It is against this backdrop that plaintiffs seek class certification.

Class certification is governed by MCR 3.501, which states in relevant part:

> (A) Nature of Class Action.
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> (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:
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> (a) the class is so numerous that joinder of all members is impracticable;
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> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
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> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
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> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
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> (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.

A member of a purported class may maintain a suit as a representative of the class, but only if all the requirements of MCR 3.501(A) are met; a case cannot proceed as a class action when it satisfies only some, or even most, of the factors. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 597; 654 NW2d 572 (2002). Defendant argues that these requirements, often referred to as numerosity, typicality, commonality, adequacy, and superiority, are not present in this case and the trial court should not, therefore, have granted class certification. I agree. At a minimum, plaintiffs have failed to establish commonality in the class as certified, which is fatal to their request for class certification.

The requirement of a common issue calls for plaintiffs to show "that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof.'" *Neal*, *supra* at 16-17, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989). An issue is subject to common, generalized proof only where its resolution will not entail individualized inquiries into the circumstances of each class member. In *Zine v Chrysler Corp*, 236 Mich App 261, 289-290; 600 NW2d 384 (1999), this Court stated:

> 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. [Internal quotations and citations omitted.]

The *Zine* panel, in affirming the trial court's denial of class certification, held that the myriad factual inquiries, all of which were subject to only individualized proof, predominated over the one common question of whether the Michigan Consumer Protection Act had been violated. Thus, the case was unmanageable as a class action. *Id*. at 289-290

As previously noted, the commonality requirement must be subjected to a rigorous analysis of the parties' respective legal and factual positions. See *Falcon*, *supra* at 161. In *Tinman*, *supra*, this Court reversed the trial court's conclusion that the commonality element was satisfied, holding that the trial court erroneously framed the common question by merely encompassing the legal claim. Citing *Sprague v Gen Motors Corp*, 133 F3d 388 (CA 6, 1998), this Court stated:

> "It is not every common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." [*Id.*] at 397. A plaintiff seeking class-action certification must be able to demonstrate that "all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member . . . . [T]he question is . . . whether 'the common issues [that] determine liability predominate.'" *A & M Supply Co*[, *supra* at 600.] [*Tinman*, *supra* at 563-564.]

In their third amended class action complaint, plaintiffs allege three remaining claims for relief: Count I – Nuisance; Count III – Negligence; and Count IV – Public Nuisance.[1] With respect to their nuisance claim, plaintiffs allege that defendant's actions substantially and unreasonably interfere with their use and enjoyment of their properties. In their negligence claim, plaintiffs allege that their properties are permanently contaminated and/or continue to be contaminated. In their public nuisance claim, plaintiffs allege that as a result of defendant's conduct, plaintiffs "continue to fear for their health, safety and welfare and will be subjected to a reasonable apprehension of danger to person and property . . . ." They seek damages for "the mental anguish, suffering, anxiety, embarrassment, emotional distress, humiliation, distress, agony and other related nervous conditions and psychological orders and emotional sequelae" which result from the invasion and contamination of toxic chemicals from defendant's plant.

The parties engaged in extensive discovery and plaintiffs moved for class certification. However, instead of conducting a "rigorous analysis" on the commonality requirement, the trial court merely stated:

> 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 be 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):
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> > "No matter how individualized the issues 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).

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[1] To establish a negligence claim, a litigant must show: (1) duty; (2) breach of that duty; (3) causation; and (4) damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). To establish a nuisance claim, "[a] litigant . . . must show a legally cognizable injury, requiring proof of a significant interference with the use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992). For public nuisance, the interference must concern a right in common to all members of the public. *Id*. at 304 n 8.

> 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.

In my opinion, the trial court's decision suffers from the same inadequacy that the *Tinman* panel found fatal. Here, the trial court simply framed a common question that merely encompassed the legal claim made by plaintiffs, i.e., defendant allegedly polluted the Tittabawassee River. However, even if this common question were to be resolved in plaintiffs' favor, the trial court would still have to determine, for each plaintiff, exposure levels, causation, injury-in-fact, damages and/or defenses.

A review of the record clearly shows that factual inquires into each element of plaintiffs' claims will be subject to individualized proof which will predominate over the common question of whether defendant allegedly polluted the river. Some properties have elevated dioxin levels; others have none. Some property owners have experienced interference with the use and enjoyment of their properties; others have not. Some properties have been flooded on one or more occasions; others have never been flooded. Some may never be flooded.[2] There is no

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[2] With regard to the "fear of flooding" claim articulated by plaintiffs at oral argument, the Supreme Court noted, with respect to the viability of the health claims in the medical monitoring case, that being potentially subjected to a toxic substance is insufficient to bring a cause of action:

> If plaintiffs' claim is for injuries they may suffer in the future, their claim is precluded as a matter of law, because Michigan law requires more than a merely speculative injury. This Court has previously recognized the requirement of a present physical injury in the toxic tort context. In *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 314; 399 NW2d 1 (1986), for example, we held that a cause of action for asbestosis, which typically is manifest between ten and forty years after exposure, arises only when an injured party knows or should know that he has, in fact, developed asbestosis. Similarly, we held that a cause of action for asbestos-related lung cancer arises only when there has been a "discoverable appearance" of cancer. *Id*. at 319. Thus, *Larson* squarely rejects the proposition that mere exposure to a toxic substance and the increased risk of future harm constitutes an "injury" for tort purposes. It is a *present* injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory.
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> By requiring a prospective plaintiff to make a showing of an actual physical injury, present tort law thus excludes from the courts those who might bring frivolous or unfounded suits. In particular, the fact-finder need not be left wondering whether a plaintiff has in fact been harmed in some way, when nothing but a plaintiff's own allegations support his cause of action. [*Henry*, *supra* at 72-73, 76-77 (emphasis in original).]

uniform exposure to the class members that is subject to common proof. The dioxin levels may come from other sources, such as a property that had a history of prior manufacturing use. The application of statute of limitation defenses will require individual inquiry. As part of their damages claim, plaintiffs allege reduction in property values. But, in order to prevail on this claim, each plaintiff would have to produce individualized proofs on causation, actual injury and the amount of damages. This would entail establishing there was a reduction in property value, the extent of the reduction and that defendant, as opposed to a number of other sources, caused the reduction. Moreover, the measure of damages is almost exclusively dependent on individual factors and would all require individualized proofs.

Plaintiffs have also failed to present a model or generalized method for proving each element of their causes of action. On the nuisance claims, the trial court only focused on conduct and damages, ignoring causation and injury. On the negligence claim, the trial court failed to address the Michigan Department of Environmental Quality testing, which showed that a number of the originally named representative plaintiffs did not even have dioxin contamination on their properties.[3] "[I]f common issues truly predominate over individualized issues in a lawsuit, then 'the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.'" *Klay v Humana, Inc*, 382 F3d 1241, 1255 (CA 11, 2004), quoting *Alabama v Blue Bird Body Co*, 573 F2d 309, 322 (CA 5, 1978).

Because individual issues overwhelmingly predominate over any common issues of law and fact, the trial court's decision to certify the class is clearly erroneous.

The trial court clearly erred in certifying the class. I would reverse.

/s/ Kirsten Frank Kelly

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[3] In their initial pleadings, plaintiffs claimed damages due to actual contamination by dioxin. Through discovery, it was determined that a number of the parcels were not contaminated. It was also determined that different properties were affected in different ways. In my opinion, the large number of parcel-specific issues precludes the existence of any truly representative plaintiffs as required by MCR 3.501(A)(1)(c).