

STATE OF MICHIGAN
COURT OF APPEALS

GARY HENRY and ALL OTHER 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UNPUBLISHED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.

METER, J. (*concurring in part and dissenting in part*).

I concur in Judge Fort Hood's conclusion that the circuit court did not clearly err in certifying the class with regard to defendant's potential liability. However, I believe that, with regard to damages, individual questions predominate over common questions and that the damages phase, should liability be established, must be dealt with on a case-by-case basis. I would specifically direct the circuit court to bifurcate the proceedings into (1) a class action with regard to liability and (2) individualized proceedings with respect to damages.

As noted in *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 555; 692 NW2d 58 (2004), we review for clear error a trial court's decision to certify a class. "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* I am not left with "a definite and firm conviction that a mistake has been made" concerning the trial court's certification of the class for purposes of liability. The question of who or what discharged dioxin into the Tittabawassee flood plain involves common questions of fact that would best be addressed by way of a class action, see MCR 3.501(A)(1)(b), and the other requirements of MCR 3.501(A)(1) have also been fulfilled. The circuit court set forth a reasoned and supported opinion in favor of class certification, and its decision is not clearly erroneous.

However, I believe that with regard to damages, individualized questions prevail. Although the circuit court alluded to this fact in its opinion, its final order failed to note that the question of damages would be dealt with by way of individualized proceedings. I would direct the court to use individualized proceedings for the damages phase, should liability be established. As noted in *Sterling v Velsicol Chemical Corp*, 855 F2d 1188, 1197 (CA 6, 1988):

In the instant case, each class member lived in the vicinity of the landfill and allegedly suffered damages as a result of 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. The 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 . . . class action. However, individual members of the class still will be required to submit evidence concerning their particularized damage claims in subsequent proceedings.

I believe that such a bifurcated process is the appropriate course of action in the present case. Essentially, if liability is established, each plaintiff must then choose whether to proceed to the damages phase. The circuit court may certainly, at that point, use case-management tools to consolidate claims that will involve largely similar proofs on the issue of damages.

Judge Fort Hood suggests that a bifurcated approach is not appropriate here because defendant did not request such an approach below. I disagree that this failure on the part of defendant precludes bifurcation. MCR 3.501(B)(3)(d)(i) states that a court may order that "the action be maintained as a class action limited to particular issues or forms of relief" The court had the discretion to bifurcate even in the absence of any request to do so, and it in fact alluded to bifurcation in its opinion.

I believe that a class action is appropriate with regard to liability and that individualized proceedings are appropriate with regard to damages.

I concur in part with Judge Fort Hood.

/s/ Patrick M. Meter