

STATE OF MICHIGAN  
IN THE SUPREME COURT

GARY AND KATHY HENRY, et al.,

Supreme Court No. \_\_\_\_\_

Plaintiffs-Appellees,

Court of Appeals No. 251234

vs.

Saginaw County Circuit Court.  
Case No. 03-47775-NZ

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

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**DEFENDANT-APPELLANT THE DOW CHEMICAL COMPANY'S MOTION FOR IMMEDIATE CONSIDERATION OF ITS EMERGENCY APPLICATION FOR LEAVE TO APPEAL AND EMERGENCY MOTION FOR STAY**

Defendant-Appellant The Dow Chemical Company ("Dow"), pursuant to MCR 7.302 (F) and for all of the reasons set forth in its Emergency Application for Leave to Appeal, moves for

immediate consideration of its Emergency Application for Leave to Appeal and its Emergency Motion for Stay:

1. On August 18, 2003, the trial court denied Dow's Motion for Summary Disposition (brought under MCR 2.116(C)(8)) of Plaintiffs' medical monitoring claims. See August 18, 2003 Order ("August 18 Order," attached as Exhibit 1.) Contrary to the authority of the Michigan Supreme Court in Meyerhoff v Turner Construction Co, 456 Mich 933; 575 NW2d 550 (1998), the trial court recognized Plaintiffs' medical monitoring claims and allowed Plaintiffs to proceed with class certification proceedings as to those claims **even though** Plaintiffs have alleged no identifiable physical injuries. See Second Amended Complaint (attached as Exhibit 2.)

2. On September 2, 2003, Dow timely filed a Motion for Reconsideration which the trial court denied on September 10, 2003. (A copy of the Order denying Dow's Motion for Reconsideration is attached as Exhibit 3.)

3. Dow also filed a Motion for Stay of Proceedings which the trial court denied on September 26, 2003. (This Order and the transcript of the September 26, 2003 hearing are attached as Exhibit 4.)

4. Dow then timely filed an Emergency Application for Leave to Appeal, a Motion For A Stay of Proceedings, and a Motion for Peremptory Reversal with the Court of Appeals, asking the Court either to peremptorily reverse the trial court's manifestly erroneous decision and remand the case for entry of an Order dismissing Plaintiffs' medical monitoring claims or, in the alternative, to grant Dow's Emergency Application and stay all proceedings relating to these claims until the Court of Appeals could decide the issues presented.

Class Certification and apparently has already reached erroneous conclusions as to two central adjudicated in a class action; (3) the trial court has scheduled a hearing on Plaintiffs' Motion for absence of any guidance as to the elements of such a claim or how such claims may be fairly thousands of persons asserting (these previously unrecognized) medical monitoring claims in the the trial court has permitted Plaintiffs to proceed with their Motion to Certify a class of has unfairly and prejudicially precluded discovery as to Plaintiffs' medical monitoring claims; (2) of the August 18 Order and compromised fair process in the following respects: (1) the trial court has issued Orders and made statements from the bench that have compounded the manifest error

7. Since the Court of Appeals' denial of Dow's request for interlocutory relief, the trial court attached as Exhibit 7.)

2003, "November 7 Order", attached as Exhibit 6; List of Docket Entries from Trial Court, and related Motions on October 29, 2003. (See the trial court's Order entered on November 7, developments in the trial court since the Court of Appeals denied Dow's Emergency Application in this state. The need for swift intervention from this Court is especially pressing in light of the unchecked continuation of class proceedings will very likely foment further unfounded litigation claims as a matter of law, Dow will suffer substantial, irreparable harm and injustice and the

6. If this Court does not issue a stay and, ultimately, dismiss Plaintiffs' medical monitoring

of Dow's Emergency Application and Motion for Peremptory Reversal. (MCR 7.302 (C)(2)). Michigan Supreme Court have been timely filed within 42 days of the Court of Appeals' denial as Exhibit 5.) Dow's Emergency Application and alternative request for peremptory relief to the Order dated October 29, 2003, while one member of the panel dissented. (This Order is attached Emergency Application and related Motions denied Dow's request for interlocutory relief in an 5. Two out of three members of the Court of Appeals' panel who reviewed Dow's

continue to have significant consequences because the Order directs Dow to mount a  
Of All Proceedings. The August 18 Order from which Dow seeks appellate relief has and  
consideration of its Emergency Application For Leave To Appeal and Emergency Motion For

9. In accordance with the standards set forth in Rule 7.302 (F), Dow moves for immediate  
of all proceedings pending the disposition of Dow's appeal in the Court of Appeals.

Court of Appeals with directions to: (1) grant Dow's Emergency Application; and (2) enter a stay  
respectfully requests that, at the very least, this Court enter an Order remanding the case to the  
claims and reversing the trial court's other rulings pertaining to those claims. Finally, Dow  
Defendant-Appellant's request for peremptory relief, dismissing Plaintiffs' medical monitoring  
claims as a matter of law. In the alternative, Dow respectfully requests that this Court grant  
after reviewing the issues on appeal, enter an Order dismissing Plaintiffs' medical monitoring  
Emergency Application, enter an immediate Order staying all proceedings in this matter, and,  
future appeals—Defendant-Appellant Dow respectfully requests that this Court grant its  
compound the trial court's manifestly erroneous decision of August 18 and promise to spawn  
8. Rather than allowing the trial court to proceed with this litany of errors—which both

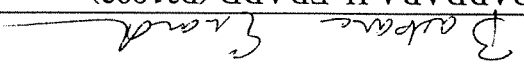
medical monitoring claims can be assessed individually or in the context of a class action.  
issue an imminent certification decision, in the absence of any legal standard by which Plaintiffs'  
The November 7 Order signals the trial court's intention to conduct certification proceedings, and  
detection of dioxin, in various concentrations, in areas of the flood plain where claimants reside.  
certification requirements of *commonality and typicality* may be established based on the alleged  
certification; and (4) in its November 7 Order (Ex. 6) the trial court apparently concluded that the  
(c) even though Defendant has not even had an opportunity to present its opposition to  
requirements for class certification --- *commonality and typicality* --- (see MCR 3.501(A)(1)(b)-

defense, prior to February 24, 2004 (see November 25, 2003 Tr., attached as Exhibit 8), to Plaintiffs' Motion To Certify a class of thousands of persons who seek damages based on medical monitoring claims that are not actionable in Michigan.

10. Dow has personally served on Plaintiffs' counsel copies of this Motion as well as its Emergency Application For Leave To Appeal and Emergency Motion For Stay Of All Proceedings. Therefore, this Motion is ready for immediate submission under MCR 7.302 (F). WHEREFORE, Dow respectfully requests that this Court grant its Motion for Immediate Consideration, that it grant its Emergency Application for For Leave To Appeal and Emergency Motion For Stay Of All Proceedings.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By:   
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and

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Dated: December 10, 2003

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Case No. 03-4775-NZ

Saginaw County Circuit Court.

AFFIDAVIT OF CHRISTINE A. CHABOT  
IN SUPPORT OF MOTION FOR IMMEDIATE CONSIDERATION

STATE OF MICHIGAN )  
) ss )  
COUNTY OF INGHAM )

Christine A. Chabot, being first duly sworn, deposes and says as follows:

1. I am one of the counsel of record for Defendant-Appellant The Dow Chemical Company.

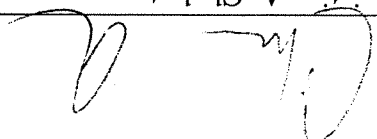
2. I file this Affidavit pursuant to MCR 7.313(A)(2), which requires an affidavit supporting any allegations of fact in a motion.

3. I have read Dow's Motion for Immediate Consideration, to which this Affidavit is appended.

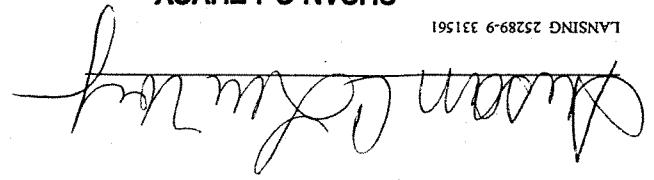
4. The facts and statements in that Motion are true and correct to the best of my knowledge and belief.

5. I have personal knowledge of the facts as set forth in this Affidavit, and if called and sworn as a witness could personally testify to same.

Further Affiant sayeth not.

  
Christine A. Chabot

Subscribed and sworn to before me,  
a Notary Public in and for said County,  
this 10<sup>th</sup> day of December, 2003.



LANSING 25289-9 331561

SUSAN C. LEUVOY  
Notary Public, Ingham County, MI  
My Comm. Expires Sept. 23, 2005