

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

GARY & KATHY HENRY, ET AL.,

Plaintiffs,

v.

File No. 03-047775-NZ

THE DOW CHEMICAL COMPANY,

Defendant.

A TRUE COPY
af
Susan Kaltenbach, Clerk

OPINION AND ORDER OF THE COURT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 9th day of November 2009;

PRESENT: HONORABLE LEOPOLD P. BORRELLO, Visiting Judge.

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

BACKGROUND

At a hearing held August 28, 2009, the Court instructed the parties to brief the issues involved pursuant to our Supreme Court's ruling remanding the certification issue back to this Court, including the question of whether a further evidentiary hearing may be required. Oral arguments have been scheduled for November 13, 2009. The parties have now requested clarification as to the issues to be addressed through oral arguments.

DISCUSSION

Having reviewed our Supreme Court's Opinion and Order of July 31, 2009, and the briefings submitted, the Court determines that oral arguments on the issue of conducting a new evidentiary hearing are not required.

In the majority opinion, our Supreme Court observed that:

[T]his case does not present a situation in which plaintiffs provided the circuit court with only a complaint containing bare assertions that the prerequisites of MCR 3.501(A)(1) were met and the circuit court granted plaintiffs' motion for class certification on the basis of those assertions alone. Instead, the circuit court conducted a two-day hearing and reviewed numerous documents from both

parties, including scientific studies, affidavits from experts, and information provided by the MDEQ.

Henry v. Dow Chemical Co., 484 Mich. 483, 505-506, 772 N.W.2d 301, 313 (2009).

Consequently, our Supreme Court expressly recognized and held that this Court's analysis of MCR 3.501(A)(1)(a), (b), and (e) was "sufficient" as it had "independently determined that plaintiffs alleged a statement of basic facts and law sufficient to support each of those three prerequisites." *Id.* at 505-506; 313 (2009).

With regard to the remaining two prerequisites, our Supreme Court determined that further clarification was necessary:

[G]iven the extensive evidentiary record developed in this case before the class certification decision, the circuit court may have made a valid, independent determination that the plaintiffs had alleged an adequate statement of basic facts and law sufficient to support a finding that MCR 3.501(A)(1)(c) and (d) were met. Nonetheless, because the circuit court potentially used an evaluative framework that is inconsistent with this Court's interpretation of the rule, we remand this case to the circuit court so that it may at least clarify its reasoning for ruling that MCR 3.501(A)(1)(c) and (d) were met, in light of this Court's decision today.^{FN41}

FN41. To the extent that the circuit court determines that the standard it initially used is inconsistent with the proper standard, it should reanalyze all the prerequisites under MCR 3.501(A)(1). If, however, the circuit 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.

Id. at 507; 313-314 (emphasis added).

As this Court believes its original determinations as to MCR 3.501(A)(1)(a), (b), and (e) were consistent with the proper standard, and were the product of an independent determination that plaintiffs had shown an adequate statement of basic facts and law to support those determinations, it will proceed to "only revisit MCR 3.501(A)(1)(c) and (d)" on remand.

The Court will therefore deny Defendant's request for an additional period of discovery, and another evidentiary hearing, as inconsistent with the remand instructions. Particularly when three of the class certification prerequisites have been affirmed on the basis of the original 2005 record. The Court does not believe it would be appropriate at this juncture to "clarify its reasoning for ruling that MCR 3.501(A)(1)(c) and (d) were met" by considering a new and possibly different record as to those issues alone. Rather, the Court is of the opinion that a new period of discovery and another evidentiary hearing would necessitate a reevaluation as to all prerequisites in order to assure all determinations are grounded in the same record. However, Defendant will have full opportunity to conduct further discovery even if it happens to occur post-certification.

Proceeding in this manner does not foreclose the possibility of future relief with regard to the composition of the class as the Court continues to possess the authority to limit the class action to particular issues or forms of relief, or even subdivide the class, "when appropriate." MCR 3.501(B)(3)(d).

The Court will clarify its reasoning as to the typicality (MCR 3.501(A)(1)(c)) and adequacy (MCR 3.501(A)(1)(d)) requirements as required by our Supreme Court's remand order in a forthcoming opinion and order.

CONCLUSION

Accordingly, the Court **DENIES** Defendant's request for additional discovery and a new evidentiary hearing and **ADJOURNS** oral arguments scheduled for November 13, 2009.

It is so ordered.



LEOPOLD P. BORRELLO

Visiting Judge
10th Judicial Circuit

Dated: November 9, 2009.