

**STATE OF MICHIGAN
IN THE SUPREME COURT**

GARY & KATHY HENRY, et al.
Plaintiffs-Appellees,
vs.
THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Defendant-Appellant.

Supreme Court No. 125205

Court of Appeals No. 251234

Saginaw County Circuit Court,
Case No. 03-47775- NZ
Hon. Leopold P. Borrello

TERESA A. WOODY
TODD M. McGUIRE
STUEVE SIEGEL HANSON WOODY
LLP
330 W. 47th Street, Suite 250
Kansas City, MO 64112
(816) 714-7100
Lead Counsel for Plaintiffs-Appellees

CARL H. HELMSTETTER
MICHAEL F. SAUNDERS
SPENCER FANE BRITT & BROWNE LLP
1000 Walnut, Suite 1400
Kansas City, MO 64106
(816) 474-8100
Counsel for Plaintiffs-Appellees

BRUCE F. TROGAN
TROGAN & TROGAN, P.C.
(P26612)
7628 Gratiot Road
Saginaw, MI 48609
(989) 781-2060
Local Counsel for Plaintiffs-Appellees

KATHLEEN A. LANG
MICHAEL G. VARTANIAN
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500
Trial Counsel for Defendant-Appellant

JOHN A. DECKER
BRAUN KENDRICK FINKBEINER, PLC
4301 Fashion Square Boulevard
Saginaw, MI 48603
(989) 498-2100
Counsel for Defendant-Appellant

JOHN S. GUTTMAN
BEVERIDGE & DIAMOND, PC
1350 I Street, NW, Suite 700
Washington, DC 20005
(202) 789-6020
Co-Counsel for Defendant

BARBARA H. ERARD
CHRISTINE A. CHABOT
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500
Appellate Counsel for Defendant-Appellant

DOUGLAS KURTENBACH
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
(312) 861-2000
Co-Counsel for Defendant

MOTION FOR PARTIAL RELIEF FROM STAY

Plaintiffs respectfully request that the Court lift its now year-long interlocutory stay of all proceedings for the limited purpose of allowing the parties to proceed with pretrial discovery and a class certification hearing on those causes of action that assert property damage claims. As this Court is aware, Plaintiffs seek class certification for two distinct classes: a property-owners class and a medical monitoring class. Although the interlocutory appeal of defendant Dow Chemical Company (“Dow”) addressed only the validity of Plaintiffs’ medical monitoring claim, the Court

nevertheless issued a stay of all proceedings on the eve of class certification hearings. That stay has prevented the Plaintiffs from continuing to conduct discovery and develop and present their property damage claims. Such a result is particularly unfair, not only because Plaintiffs' property damage claims have no bearing on Dow's interlocutory appeal currently awaiting resolution in this Court, but because during the period of this stay Dow has initiated efforts to contact, question, and test individuals and their property in the affected area, many of whom are Plaintiffs in this action, while Plaintiffs and their counsel, because of this stay, lack the ability to have the same access to Dow and its representatives and agents. Moreover, Dow has conducted unauthorized testing of and around the property that is subject to the property claims, and otherwise is attempting to develop evidence relevant to these claims, while Plaintiffs are prohibited by this Court's stay from conducting relevant discovery to inquire into the facts surrounding Dow's testing and Dow's other actions. The stay thus has permitted Dow to go forward in attempting to develop evidence that is relevant to this case, but at the same time has prejudiced Plaintiffs by prohibiting their efforts to conduct relevant and necessary discovery. Plaintiffs therefore move, pursuant to MCR 7.313(A), to have the stay lifted as to the property claims and class.

I. PROCEDURAL STATUS

Plaintiffs commenced this action in the Circuit Court of Saginaw County on March 25, 2003, and moved for certification of the two classes on June 23, 2003. The Circuit Court denied Dow's Motion for Summary Disposition of the medical monitoring claims on August 18, 2003, denied Dow's follow-on Motion for Reconsideration on September 10, and denied Dow's Motion for Stay of Proceedings on September 26, 2003.

On October 1, 2003, Dow filed with the Court of Appeals a Motion for Peremptory Reversal and Emergency Application for Leave to Appeal, both of which were denied on October 29, 2003.

On December 10, 2003, Dow filed in this Court its Emergency Application for Leave to Appeal and Emergency Motion for Stay, together with a Motion for Immediate Consideration of those motions. Dow's request for relief from this Court centered on the propriety of Plaintiffs' claim for medical monitoring under Michigan law.

After the filing of its application and motions with this Court, Dow initiated extensive discovery related to Plaintiffs' June 23, 2003 motion for class certification. As a result, Plaintiffs produced interrogatory answers from 158 Plaintiffs and produced approximately 9,000 pages of documents. Dow deposed forty-nine Plaintiffs, two expert witnesses, and one third-party witness.

On February 27, 2004, nearly eight months after Plaintiffs filed for class certification, Dow filed its brief in opposition to Plaintiffs' motion for class certification. Plaintiffs' filed a reply brief in support of their motion for class certification on March 19, 2004.

By Order dated March 25, 2004, the Circuit Court scheduled a class certification to begin on Wednesday, June 9, 2004 at 9:00 a.m. and granted Dow's request to depose Plaintiffs' three rebuttal witnesses who submitted affidavits in support of Plaintiffs' reply brief. On Tuesday, June 1, 2004, the circuit court held a final conference to set out the class certification hearing procedures for the hearing the next week.

On Friday, June 4, 2004, four days before the hearing, Plaintiffs received a copy of this Court's June 3 Order granting Dow's application for leave to appeal. Most important for the property-owner class, this Court ordered that "[f]urther proceedings in the circuit court are STAYED until further order of this Court."

Dow filed its appellate brief with the Supreme Court on July 28, 2004; Plaintiffs filed a response on September 1, 2004; and Dow filed its reply on September 21, 2004. The Court heard oral argument on October 6, 2004. To date, there has been no ruling by the Court.

II. THE COURT SHOULD LIFT ITS STAY OF THE PROPERTY DAMAGE CLAIMS

A. It is Unfair to Compel the Property Owner Plaintiffs to Wait for the Outcome of an Issue that Does Not Affect Their Claims

By maintaining the stay on the property-owner class claims, the Court denies these Plaintiffs any opportunity to prosecute their legal claims and to conduct discovery addressed both to Dow's liability and Plaintiffs' damages. This outcome is manifestly unfair. There is no logical reason to continue the stay of discovery and of the certification process for the property-owner class. These putative class members seek relief under claims for nuisance, negligence/gross negligence and public nuisance. These claims are legally and factually separate and distinct from those of the medical monitoring class. Indeed, the certification ruling on one class is not dispositive with respect to the other class.

B. The Continuance of the Stay Is Prejudicial to Plaintiffs' Development of the Property Claims

For the past year, from June 3, 2004 through the present, Plaintiffs have been unable to pursue their case against Dow and have been unable to conduct discovery of Dow, its agents, or third parties. During that same time, Dow and its agents have been involved in extensive studies and testing, and have continued to conduct questioning and testing of individuals in the Flood Plain, some of whom are named Plaintiffs or represented parties, while Plaintiffs are not permitted to inquire as to Dow's studies and are not able to obtain split samples of the testing conducted by Dow. Further, on June 3, 2005, on the anniversary of the stay, the Detroit Free Press and the Midland Daily News revealed that, unbeknownst even to the Michigan Department of Environmental Quality ("MDEQ"), Dow has been conducting secret dioxin studies. Hugh McDiarmid, Jr., "Dow dioxin tests upset state", Detroit Free Press, website, June 3, 2005; Kathie Marchlewski and the Associated Press, "Regulators rap Dow on testing", Midland Daily News, website, June 3, 2005, true and correct copies of which are attached as Exs. 1 and 2, respectively. Dow has conducted at least a dozen

secret studies, many of which have occurred during the time this case has been stayed. Ex. 1 at p. 1. These studies took place without the approval or oversight of the MDEQ, and certainly without Plaintiffs' ability to obtain the information or examine the protocol under which the studies were conducted. One of the studies, now published on the MDEQ website, reveals that all of the soil samples in that study taken downstream of Dow along the Flood Plain last summer contain levels of dioxin all of which are above the Michigan's level of 90 ppt, with 12 of 16 samples showing levels ranging from 1359.28 to 8919.82 ppt, well above the ASTDR action level of 1000 ppt. Ecological Risk Assessment Support Sampling, Prepared for Dow Chemical Company, March 2005, true and correct copies of pages 1 through 9 attached as Ex. 3.

It is manifestly unfair that Dow is able to conduct such studies, and conduct who knows what other activities, without Plaintiffs having the ability to discover and inquire regarding that information. The stay provides a tremendous advantage to Dow, while at the same time prejudicing Plaintiffs' right to obtain discoverable material in a timely and protected manner. In effect, the stay ties Plaintiffs hands while allowing Dow free range to do whatever it wants, even conducting its own informal discovery regarding Plaintiffs and their property. For this reason, the stay should be lifted and Plaintiffs allowed to proceed with discovery in this case.

C. Continuing the Stay Does Not Promote Judicial Efficiency or Protect the Parties from Unnecessary Proceedings

This Court's ruling on the viability of an equitable medical monitoring claim will not affect the eventual need for hearings on the property-owner class certification. Discovery on class certification is complete. The parties have fully briefed the class certification issues. Plaintiffs remain prepared to proceed. Dow and its lawyers are also prepared to proceed. The trial court is ready to hear argument. Given the preparedness of all concerned, this Court should lift its stay and permit a hearing and decision on class certification for the property-owner class. A decision on class

certification could then be reviewed on appeal in the ordinary course without interruption while this Court renders its opinion on the propriety of Plaintiffs' claim for medical monitoring.

Furthermore, the stay of the property-owner class certification issues does not save the parties additional expense or costs, because the parties are fully prepared to proceed and because the class certification for the property-owner class will occur regardless of this Court's decision. Given the discovery and preparation already undertaken by the parties before this Court granted Dow's motion for stay, Dow's rationale for the stay remains moot.

WHEREFORE, Plaintiffs respectfully request that the Court lift the stay of discovery and of the class certification proceedings for the proposed property-owner class.

Dated: June 16, 2005

Respectfully submitted,

TROGAN AND TROGAN P.C.

Bruce F. Trogan
7628 Gratiot Road
Saginaw, Michigan
Telephone: (989) 781-2060
Facsimile: (989) 781-2293
LOCAL COUNSEL FOR PLAINTIFFS

STUEVE SIEGEL HANSON WOODY, LLP
Teresa A. Woody
Todd M. McGuire
330 W. 47th Street, Suite 250
Kansas City, Missouri 64112
Telephone: (816) 714-7100
Facsimile: (816) 714-7101
LEAD COUNSEL FOR PLAINTIFFS

SPENCER FANE BRITT & BROWNE LLP

Carl H. Helmstetter

Michael F. Saunders

1000 Walnut, Suite 1400

Kansas City, MO 64106

Telephone: (816) 474-8100

Facsimile: (816) 474-3216

COUNSEL FOR PLAINTIFFS

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PROOF OF SERVICE

TERESA A. WOODY
TODD M. McGUIRE
STUEVE SIEGEL HANSON WOODY LLP
330 W. 47th Street, Suite 250
Kansas City, MO 64112
(816) 714-7100
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CARL H. HELMSTETTER
MICHAEL F. SAUNDERS
SPENCER FANE BRITT & BROWNE LLP
1000 Walnut, Suite 1400
Kansas City, MO 64106
(816) 474-8100
Counsel for Plaintiffs-Appellees

BRUCE F. TROGAN
TROGAN & TROGAN, P.C.
(P26612)
7628 Gratiot Road
Saginaw, MI 48609
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KATHLEEN A. LANG
MICHAEL G. VARTANIAN
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500
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JOHN A. DECKER
BRAUN KENDRICK FINKBEINER, PLC
4301 Fashion Square Boulevard
Saginaw, MI 48603
(989) 498-2100
Counsel for Defendant-Appellant

JOHN S. GUTTMAN
BEVERIDGE & DIAMOND, PC
1350 I Street, NW, Suite 700
Washington, DC 20005
(202) 789-6020
Co-Counsel for Defendant

BARBARA H. ERARD
CHRISTINE A. CHABOT
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500
Appellate Counsel for Defendant-Appellant

DOUGLAS KURTENBACH
KIRKLAND & ELLIS
200 E. Randolph Drive
Chicago, IL 60601
(312) 861-2000
Co-Counsel for Defendant

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF SAGINAW)

_____ hereby certifies that on the ____ day of June, 2005, she did serve copies of **Motion for Partial Relief from Stay** upon:

KATHLEEN A. LANG (P34695) BARBARA H. ERARD (P31892) DICKINSON WRIGHT PLLC <i>Counsel for Defendant-Appellant</i> 500 Woodward Avenue, Suite 4000 Detroit, Michigan 48226	DOUGLAS KURTENBACH CHRISTOPHER M.R. TURNER STEVEN ENGEL KIRKLAND & ELLIS LLP <i>Counsel for Defendant-Appellant</i> 200 E. Randolph Drive Chicago, IL 60601
JOHN A. DECKER (P31078) BRAUN KENDRICK FINKBEINER PLC <i>Counsel for Defendant-Appellant</i> 4301 Fashion Square Boulevard Saginaw, Michigan 48603	JOHN S. GUTTMAN BEVERIDGE & DIAMOND, PC <i>Counsel for Defendant-Appellant</i> 1350 I Street, NW, Suite 700\ Washington, DC 20005-3311

by placing copies of the above-mentioned documents in an envelope, via Federal Express.

Subscribed and sworn to before me this
_____ day of _____, 2005.

Notary Public