

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Meter, P.J., and Kelly and Fort Hood, J.J.

GARY & KATHY HENRY, et. al,

Plaintiffs-Appellees,

v.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Supreme Court Docket No. 136298

Court of Appeals Docket No. 266433

Saginaw County Circuit Court

Case No. 03-047775-NZ

**BRIEF OF *AMICUS CURIAE* MICHIGAN CHAMBER OF COMMERCE IN SUPPORT
OF DEFENDANT-APPELLANT THE DOW CHEMICAL COMPANY'S
APPLICATION FOR LEAVE TO APPEAL**

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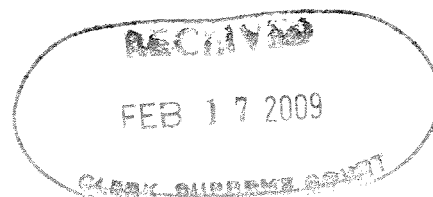


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- 1 Opinion & Order Granting Class Certification dated October 21, 2005.
- 2 *Henry v Dow Chem Co*, unpublished opinion per curiam of the Court of Appeals issued Jan 24, 2008 (Docket No 266433); 2008 WL 207937.
- 3 *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam of the Court of Appeals issued Nov 29, 2005, (Docket No 258498); 2005 Mich App LEXIS 2975.
- 4 *Williams v Terra Energy, Ltd*, unpublished opinion per curiam of the Court of Appeals issued July 25, 2006 (Docket No 260725); 2006 Mich App LEXIS 2309.
- 5 *Coponen v Wolverine Pipe Line Co*, unpublished opinion per curiam of the Court of Appeals issued Sept 30, 2004 (Docket Nos 235692, 235693, 235694, 235695); 2004 Mich App LEXIS 2557.
- 6 *Creech v WA Foote Mem Hosp, Inc*, unpublished opinion per curiam of the Court of Appeals issued June 8, 2004 (Docket Nos 237437, 237438, 237439, 237440, 237441, 237442, 237443, 237444, 237445, 237446); 2004 Mich App LEXIS 1404.

ORDER APPEALED AND RELIEF SOUGHT

Defendant-Appellant The Dow Chemical Company (“Dow”) has sought leave to appeal from the decision of the Court of Appeals entered on January 24, 2008, affirming the Opinion and Order Granting Class Certification entered by the Tenth Judicial Circuit Court on October 21, 2005 (“Opinion & Order”). On November 5, 2008, this Court granted the application for leave to appeal in Case No. 136298, reported at 2008 Mich LEXIS 2242.

STATEMENT OF INTEREST OF *AMICUS CURIAE* **MICHIGAN CHAMBER OF COMMERCE**

Amicus curiae Michigan Chamber of Commerce (the “Chamber”) is a non-profit Michigan corporation that represents more than 7,000 private Michigan corporations and businesses engaged in commercial, industrial, agricultural, civic, and professional activities across the State of Michigan, as well as local chambers of commerce, and trade and professional associations. Members include businesses of every size and type and come from every one of the state’s 83 counties, representing a broad cross-section of the state’s economy. The Chamber actively advocates for solutions that foster Michigan’s economic recovery and create jobs for residents. In this context, the Chamber requests the Court to enter an order reversing the decision of the Court of Appeals and remanding the action to the Circuit Court for entry of an order denying class certification.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should rule that a reviewing court evaluate a motion for certification that an action may be maintained as a class action under Rule 3.501(B)(1) of the Michigan Court Rules of 1985 based on the evidence actually proffered by the parties and not merely on a plaintiff's contested allegations? Specifically, did the trial court err in granting class certification based on Plaintiffs' contested allegations without regard to the evidence presented?

The trial court answered, No.

The Plaintiffs-Appellees would answer, No.

The Court of Appeals did not specifically address this issue.

The Defendant-Appellant would answer, Yes.

The Chamber answers, Yes.

2. Whether the Court should rule that when there is no evidentiary hearing on a motion for class certification, appellate review must be based on the existing documentary record?

The Court of Appeals answered, No.

The Plaintiffs-Appellees would answer, No.

The Defendant-Appellant would answer, Yes.

The Chamber answers, Yes.

INTRODUCTION

In Rule 3.501 of the Michigan Court Rules of 1985, this Court established a procedure for class actions in Michigan. Even though the Rule is substantially the same as Rule 208 of the General Court Rules of 1963, there have been few decisions from this Court over the past half century to guide lower courts and litigants in the application of Rule 3.501. This case provides the Court with the opportunity to fill that void and provide needed direction.

The class action is a powerful tool. Properly applied, it provides a mechanism for the efficient administration of justice in large cases that would otherwise be unwieldy and drain the resources of courts and litigants alike. When applied without uniform standards, however, it creates a mechanism for costly and meritless lawsuits. And, when applied with the standard adopted by the lower courts in this case, it becomes an invitation for abuse.

Recognizing the need for an early determination of whether an action should proceed as a class action, Rule 3.501 requires a plaintiff to move within 91 days after filing a complaint for certification that the action may be maintained as a class action. MCR 3.501(B)(1). This requirement provides the litigants and the courts with an opportunity to determine whether the factual and legal bases for class certification has been met well before preparing for, and engaging in, a costly and time-consuming trial.

The standard of review adopted by the trial court in this case, and accepted by the Court of Appeals, eviscerates this early opportunity to test the validity of class certification. The trial court held that when evaluating a motion for class certification, it had to accept as true the allegations of the plaintiff in support of the motion. Opinion & Order at 2 (attached as Ex 1). This conclusion was echoed by the Court of Appeals, which concluded that “the trial court is not required to accept defendant’s assertions and proofs, but looks to the allegations in the

complaint.” *Henry v Dow Chem Co*, unpublished opinion per curiam of the Court of Appeals issued Jan 24, 2008 (Docket No 266433); 2008 WL 207937, at *9 (attached as Ex 2).

The type of review employed by the trial court and the Court of Appeals does not test the factual and legal basis for class certification; it merely tests the plaintiff’s ability to parrot the court rule. Worse, it shifts to the defendants the burden of later moving for decertification, without ever requiring the plaintiffs to prove that certification was proper in the first instance.

If the *Henry* decision is allowed to stand, it will brand the State of Michigan as possessing a jurisprudence which encourages litigants with class claims that do not pass muster under the rule to choose Michigan as their preferred place to litigate, because all they need to do to expose a defendant to the Damoclean threat of catastrophic liability -- which creates inordinate and improper pressure to settle -- is to *allege* the factors necessary for a class to be certified. This is not, and should not be, Michigan jurisprudence.

In *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999), this Court clarified the correct legal standard for summary judgment under Rule 2.116(C)(10). It held that the reviewing court should evaluate a motion for summary judgment by considering the *substantively admissible evidence* actually proffered in opposition to the motion and that the reviewing court may *not* employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. As the Court explained, “A mere promise is insufficient under our court rules.” *Id.* at 121.

As it did in *Maiden*, this action provides the Court with the perfect opportunity to declare the correct legal standard for review of class certification motions under Rule 3.501(B) and establish that a plaintiff’s mere allegation that it can meet the requirements for class certification is insufficient under the court rules. Instead of allowing class certification to be determined by

artful pleading without any evidentiary basis, the Court should endorse a standard of review under which the moving party must present sufficient evidence to enable the reviewing court to conclude that the requirements of Rule 3.501(A)(1) have been met.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The Chamber adopts the Statement of Facts and Procedural Background in Defendant-Appellant The Dow Chemical Company's Application for Leave to Appeal.

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING AN "ALLEGATIONS ONLY" REVIEW OF PLAINTIFFS' CLASS CERTIFICATION MOTION INSTEAD OF REVIEWING THE EVIDENCE PRESENTED TO DETERMINE WHETHER THE REQUIREMENTS OF RULE 3.501 HAVE, IN FACT, BEEN SATISFIED

Under Rule 3.501(A)(1):

[o]ne 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*:

(a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately assert and protect the interests of the class; and

(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. [MCR 3.501(A)(1) emphasis added].

Under Rule 3.501(B)(1), it is the plaintiff's obligation to move for certification that the action may be maintained as a class action. *Id.* 3.501(B)(1). The reviewing court, when faced with a motion for certification of a class, may allow the action to be maintained as a class action,

it may deny the motion for class certification, or it “may order that a ruling be postponed pending discovery or other preliminary matters.” *Id.* 3.501(B)(3)(b).

In this case, after plaintiffs moved for class certification, Dow sought, and was granted leave to conduct class-specific discovery. Pls-Appellants’ Br in Opp to The Dow Chemical Company’s App. for Leave to Appeal at 5. Dow conducted 52 depositions of plaintiffs, purported expert witnesses, and a third party. *Id.* It received 15,000 pages of documents and verified interrogatory answers from plaintiffs. *Id.* Surely this was not a vain ruling by the Court; it presumably ordered that discovery for a purpose.

Nevertheless, after permitting Dow to conduct this class-related discovery in accordance with Rule 3.501(B)(3)(b), the trial court completely ignored the evidence submitted by Dow in opposition to plaintiffs’ motion for class certification. Instead, ostensibly relying on federal law, the trial court concluded that “[w]hen evaluating a motion for class certification, the court is to accept the allegations of the plaintiff in support of the motion as true.” Opinion & Order at 2 (citing *Allen v Chicago*, 828 F Supp 543, 550 (ND Ill, 1993)).

Thus, in its order certifying the action as a class action, the trial court considered *only* the plaintiffs’ allegations and contentions, making no mention whatsoever of any evidence supporting, or refuting, plaintiffs’ allegations. (See, e.g., Opinion & Order at 3 (“Plaintiffs also allege and the Court finds that there would be approximately 2,000 persons in the proposed class”); (“All of Plaintiffs’ claims are based on the allegation that Defendant polluted the Tittabawassee River, causing damage to Plaintiffs Therefore, the alleged negligence of the Defendants, if any, as to the cause of the alleged pollution is common to all Plaintiffs”); (“Plaintiffs contend that their property claims arise from the same course of conduct by

Defendant Dow and that they share common legal and remedial theories with the members of the class.”))

The trial court’s “allegations only” approach to class certification ignores the language of Rule 3.501(A)(1), which permits a party sue in a class action “only if” the five requirements of that Rule are established. When, as happened here, the reviewing court relies only on a plaintiff’s allegations, especially contested allegations, it is hardly in a position to ensure that it is certifying a class action that, in fact, meets the requirements of Rule 3.501(A)(1). At most, it can certify that plaintiff has *alleged* that the action meets these requirements. Supporting evidence never enters the equation.

Yet nothing in the Rule suggests that a motion for class certification tests only the sufficiency of the pleadings. Rather, the “only if” language clearly suggests that the reviewing court should actually determine whether these factors have, in fact, been met. And to do that the reviewing court must analyze the evidence, not just the plaintiff’s allegations.

This conclusion is buttressed by the fact that Rule 3.501(B)(3)(b) expressly provides that one of the reviewing court’s options in deciding a motion for class certification is to “order that a ruling [on a class certification motion] be postponed pending discovery” MCR 3.501(B)(3)(b). If allegations were all that counted, there would be no reason for this subrule. After all, what is the point of allowing pre-certification discovery if the reviewing court is not supposed to consider the evidence obtained through that discovery?

In addition to ignoring the plain import of Rules 3.501(A)(1) and 3.501(B)(3)(b), the trial court’s opinion invokes a discredited notion of federal law. See *Szabo v Bridgeport Machs, Inc.*, 249 F3d 672 (CA 7, 2001). As the United States Court of Appeals for the Seventh Circuit explained in *Szabo*, “[t]he proposition that a district judge must accept all of the complaint’s

allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.” *Id.* at 675. Contrasting a class certification hearing under Rule 23 of the Federal Rules of Civil Procedure with a hearing on a motion to dismiss under Rule 12(b)(6), the *Szabo* court continued:

The reason why judges accept a complaint’s factual allegations when ruling on motions to dismiss under Rule 12(b)(6) is that a motion to dismiss tests the legal sufficiency of a pleading. Its *factual* sufficiency will be tested later-by a motion for summary judgment under Rule 56, and if necessary by trial. By contrast, an order certifying a class usually is the district judge’s last word on the subject; there is no later test of the decision’s factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional). Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23. [*Id.* at 675-676. emphasis in original].

The approach to class certification motions recently described by the United States Court of Appeals for the Second Circuit is consistent with the approach of other federal circuits. See 5 Moore’s Federal Practice (3d ed) § 23.84[2] at 23-391 (quoting *Miles v Merrill Lynch & Co (In re Init Pub Offering Sec Litig)*, 471 F3d 24, 41 (CA 2, 2006.)) The Second Circuit identified five factors that govern trial court review of class certification motions:

1. [A] district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met.
2. [S]uch determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met.
3. [T]he obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement.
4. [I]n making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement.

5. [A] district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits. [471 F3d at 41].

The federal approach is consistent with the approach advocated by some panels of the Michigan Court of Appeals. For example, in *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam of the Court of Appeals issued Nov 29, 2005, (Docket No 258498); 2005 Mich App LEXIS 2975 (attached as Ex 3), the Court of Appeals reviewed an opinion and order denying class certification. The *Jackson* court acknowledged that, while it should not examine the merits of the case, this does not mean it must “blindly rely on conclusory allegations.” *Id.* at *5 (citing 3 Newberg & Conte, *Newberg on Class Actions* (4th ed), § 7.26, p 81). The court explained:

To the contrary, class certification should be granted only “if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [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). Because “the class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action,’” “such analysis 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 155, 160 (citation and internal quotation marks omitted). [*Id.* at *6, footnote omitted].

See also *Williams v Terra Energy, Ltd*, unpublished opinion per curiam of the Court of Appeals issued July 25, 2006 (Docket No 260725); 2006 Mich App LEXIS 2309, at *6, *9-*11, *14,*19-*20 (noting that trial court considered deposition testimony, language in individual leases, an affidavit, and letters, and specifically holding that that plaintiffs’ marketing claim fails to satisfy the commonality requirement “[o]n the basis of the evidence defendants presented”) (attached as Ex 4).

In contrast, other panels of the Michigan Court of Appeals have taken the same approach as the trial court did in this case, adhering to the notion that they must accept as true the allegations made in support of the request for certification, without regard to the factual evidence. Thus, as Judge Fort Hood asserted in this case, “the trial court is not required to accept defendant’s assertions and proofs, but looks to the allegations in the complaint.” *Henry, supra* at *9; see also *Coponen v Wolverine Pipe Line Co*, unpublished opinion per curiam of the Court of Appeals issued Sept 30, 2004 (Docket Nos 235692, 235693, 235694, 235695); 2004 Mich. App. LEXIS 2557, at *3 (“Accepting as true the allegations made in support of the class certification, we find that the trial court did not err in certifying the class.”) (attached as Ex 5); *Creech v WA Foote Mem Hosp, Inc*, unpublished opinion per curiam of the Court of Appeals issued June 8, 2004 (Docket Nos 237437, 237438, 237439, 237440, 237441, 237442, 237443, 237444, 237445, 237446); 2004 Mich App LEXIS 1404, at *9-*10 (“accepting plaintiffs’ allegations made in support of the request for certification as true, we find the trial courts determination that numerosity existed was not clearly erroneous”) (attached as Ex 6).

The decisions of these other panels are simply wrong. This Court should rule that a plaintiff’s mere allegation that it can meet the requirements for class certification is insufficient and that a motion for class certification must be based upon sufficient evidence in the record to enable the reviewing court to conclude that the requirements of Rule 3.501(A)(1) have been met as a matter of proven fact.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT, WITHOUT AN EVIDENTIARY HEARING, THERE ARE NO FACTUAL FINDINGS TO REVIEW

Under Rule 7.210(A)(1), “[i]n an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other

proceedings in the case appealed, and the exhibits introduced.” MCR 7.210(A)(1). In this case, there was no evidentiary hearing. There were, however, numerous original papers filed in the trial court, including official regulatory reports, excerpts from “class” depositions, and expert reports and affidavits. (See Def-Appellant The Dow Chemical Company’s App for Lv to Appeal at 6.) These papers are part of the record under Rule 7.210(A)(1).

Nevertheless, the Court of Appeals concluded that “[w]ithout an evidentiary hearing, there are no factual findings to review.” *Henry, supra* at *7. In fact, the Court of Appeals made it clear that it did not intend to actually review the evidence in the record, stating, instead, “[c]onsequently, it is difficult to satisfy the clearly erroneous standard for reversal of the trial court’s decision where the parties presented conflicting documentation,” *id.*, and as one judge concluded:

Therefore, to the extent the parties failed to request an evidentiary hearing or present witnesses at the motion for class certification as a matter of strategy, I cannot conclude that the trial court erred. [*Id.*].

The reluctance of the Court of Appeals to actually analyze the relevant facts in the record is understandable given its conclusion that “the trial court is not required to accept the defendant’s assertions and proofs, but looks to the allegations in the complaint.” *Id.* at *9. But, unless the Court reviews the record, including “conflicting documentation,” it is in no position to assess whether plaintiffs’ allegations were supported by sufficient evidence to justify class certification.

Saying that the parties did not request an evidentiary hearing misses the point. Rule 3.501 does not mandate an evidentiary hearing on a motion for class certification. The issue is whether the trial court and Court of Appeals should have evaluated the facts. There is no standard of appellate review dictating that, in the absence of an evidentiary hearing, the appellate

court will not weigh the documentary evidence in the record. To the contrary, in the absence of an evidentiary hearing, appellate review is based on the existing record. See, e.g., *People v Riley*, 468 Mich 135, 139; 659 NW2d 611, 613 (2003) (in the absence of an evidentiary hearing, “our review of the relevant facts is limited to mistakes apparent on the record”). That record “consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced.” MCR 7.210(A)(1).

Regardless of whether the appellate courts review class certification rulings under a “clearly erroneous” standard, as the Court of Appeals did here, *Henry, supra* at *6, or whether the Court adopts the “abuse of discretion” standard followed by the federal courts, see, e.g., *Reeb v Ohio Dep’t of Rehab & Corr, Belmont Corr Inst*, 435 F3d 639, 643-644 (CA 6, 2006),¹ review is meaningless if the record is ignored. This is clearly evident from the appellate court’s superficial analysis in this case of whether there are common questions of law or fact that predominate over questions affecting only individual members, as required by Rule 3.501(A)(1)(b).

Under Michigan law, to prove a nuisance claim, each plaintiff in the putative class has to show that the claimed unlawful conduct (1) substantially and (2) unreasonably interfered with (3) the particular plaintiff’s use or enjoyment of his or her property, resulting in (4) injury as to that particular plaintiff. *Adkins v Thomas Solvent Co*, 440 Mich 293, 309; 487 NW2d 715 (1992). All of these issues are specific to particular plaintiffs and cannot be resolved on a classwide

¹ Under this standard, the appellate court will “find an abuse of discretion when the district court relies on erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.” *Reeb*, 435 F3d at 644. The Chamber joins amicus curiae Product Liability Advisory Council, Inc., in advocating

basis. The same is true of a negligence claim. As this Court itself declared in a prior phase of this case, each plaintiff in the putative class has to show “a present physical injury to person or property,” which is necessarily specific as to each plaintiff. *Henry v Dow Chemical*, 473 Mich 63, 75; 701 NW2d 684, 690 (2005). These individualized issues predominate and thus defeat class certification.

While plaintiffs’ third amended complaint alleges in three counts private and public nuisance and negligence, the Court of Appeals seemingly accepted the fact that “some properties will not satisfy the elements of a nuisance claim” and “assume[d] that the nuisance claim would not qualify for class certification.” *Henry*, 2008 WL 207937, at *10. Nevertheless, after concluding, without any factual or legal analysis, that “a broader tort claim such as negligence could be satisfied by most members regardless of dioxin levels if other damages were proved,” the Court of Appeals held that the trial court did not err in certifying all of the claims as a class action. *Id.*

In so doing, the Court of Appeals improperly conflated the nuisance and negligence claims. It also completely glossed over the negligence claim elements of causation and injury, both of which are individual issues that cannot be established on a class-wide basis, but must be proven on an individual basis by each of the 2,000 members in plaintiffs’ proposed class. Judge Kelly, in her dissenting opinion, noted this very point:

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. [*Id.* at *15 (Kelly, J., dissenting.)]

the Court’s adoption of this abuse of discretion standard. (See Amicus Curiae Br of the Product Liability Advisory Council, Inc in Support of Def-Appellant’s App for Lv to Appeal at 5-9.)

Unlike the majority, Judge Kelly reviewed the record, which led her to conclude that “individual issues overwhelmingly predominate over any common issues of law and fact” and that “the trial court’s decision to certify the class is clearly erroneous.” *Id.* at *16. As she explained:

A review of the record clearly shows that factual inquiries 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. There is no 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. [*Id.* at *15.]

Unlike the trial court or the Court of Appeals’ lead opinion, Judge Kelly performed an appropriate review of the extensive record of the original papers in this case. Such a proper review of the record confirmed that class certification is not warranted here because individual issues overwhelmingly predominate over any common issues.

CONCLUSION AND RELIEF REQUESTED

The standard applied by the trial court and the Court of Appeals in this case removes from the courts virtually all oversight over whether an action will be certified as a class action, provided that a plaintiff is capable of parroting the language of Rule 3.501. Such a hands off approach is rarely appropriate, and it is certainly not appropriate when applied to class actions, where judicial involvement is crucial to management of class and defense interests and to prevent runaway costs.

The Chamber requests the Court enter an order reversing the opinion of the Court of Appeals and remanding the action to the trial court for entry of an order denying class certification. It further requests the Court to rule that when there is no evidentiary hearing on a motion for class certification, the trial court must still base its decision on certification on the existing documentary record.

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