

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals
Meter, PJ, and Kelly and Fort Hood, JJ

GARY HENRY, KATHY HENRY, and ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Docket No. 1 36298

Court of Appeals No. 266433

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

DEFENDANT-APPELLANT'S REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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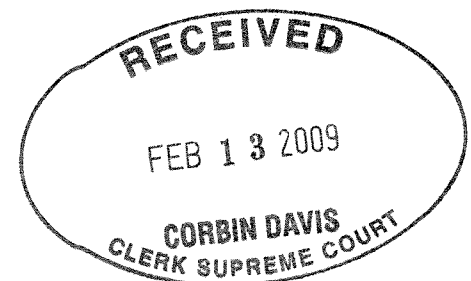


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INTRODUCTION

Plaintiffs devote their brief to defending a decision that does not exist. According to plaintiffs, the trial court here “conduct[ed] a rigorous analysis by any measure” of the class certification requirements in MCR 3.501. Pls’ Br 25. That assertion is demonstrably incorrect. To the contrary, the court specifically held 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,” and accordingly proceeded to certify this class because “[p]laintiffs *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,” and “[e]ach member of the class *allegedly* suffered damages as a result of the release of contaminants in the Tittabawassee River.” Class Cert Order 2-4, App 768-70a (emphasis added). Despite these explicit statements, plaintiffs speculate that the trial court nonetheless conducted a covert “rigorous analysis” of the Rule 3.501 requirements, and that this approach is perfectly acceptable because Michigan law generally does not require courts to make findings of fact or conclusions of law. Pls’ Br 24. Plaintiffs are incorrect. The trial court here did not conduct a “rigorous analysis” under Rule 3.501, and no such analysis could possibly justify certification where, as here, plaintiffs failed to establish that they can prove an essential element of their claims—injury—on a classwide basis with classwide proof, and thus common issues cannot predominate as a matter of law.

ARGUMENT

I. Trial courts must conduct a rigorous analysis of the class action requirements before certifying a class, and the trial court here failed to conduct that analysis.

In its opening brief, Dow explained that trial courts must conduct a rigorous analysis of the requirements of—and thereby ensure compliance with—MCR 3.501 before certifying a class. See Dow Br 16. That duty stems not only from the plain language of Rule 3.501, which specifies that a class may be certified “*only if*” the plaintiffs satisfy certain conditions, but also

from fundamental tenets of state and federal due process, which require careful judicial scrutiny before a litigant is allowed to represent (and bind) absent class members not before the court.

Plaintiffs devote the bulk of their argument not to challenging the rigorous analysis requirement *per se*,¹ but instead to arguing that trial courts satisfy that requirement by “accept[ing] the allegations made in support of the request for certification as true.” Pls’ Br 18. But that position is a contradiction in terms: if courts had to accept allegations that the requirements of Rule 3.501 have been met as true, they would not conduct *any* analysis—much less a *rigorous* analysis—of those requirements. Plaintiffs attempt to deal with this contradiction in a footnote, where they declare that accepting the allegations in support of class certification “does not ... require that the trial court blindly rely on conclusory allegations that merely parrot the requirements for class certifications.” Pls’ Br 18 n 14 (quotation omitted).

But plaintiffs cannot have it both ways. They cannot and do not explain how a trial court must, on the one hand, “accept the allegations made in support of the request for certification” but may not, on the other hand, “blindly rely on conclusory allegations.” To the extent that plaintiffs agree with Dow that trial courts must independently assess compliance with the requirements of Rule 3.501, they necessarily disagree with the trial court in this case, which (as noted above) relied on the plaintiffs’ allegations of compliance with those requirements. See Class Cert Order 2-4, App 768-70a. And to the extent that they believe that trial courts must accept allegations of compliance with the requirements of Rule 3.501, they are essentially

¹ Plaintiffs suggest in passing that the rigorous analysis requirement does not apply here at all, because “Michigan courts are not bound by a federal case construing the federal rule on class actions when called upon to construe this State’s class action rule.” Pls’ Br 17. But, as noted above, such a requirement is implicit in Rule 3.501 itself, which authorizes class certification “only if” a plaintiff satisfies the Rule’s conditions. And in any event, both the state and federal requirements for class certification are ultimately “grounded in due process,” *Taylor v Sturgell*, 128 SCt 2161, 2176 (2008), which applies equally in state and federal court.

arguing that trial courts need not analyze compliance with those requirements at all. After all, plaintiffs seeking class certification invariably allege that they satisfy the requirements of Rule 3.501. Plaintiffs' version of a "rigorous analysis" thus drains that standard of any meaning.

Plaintiffs' efforts to square their approach with federal caselaw, see Pls' Br 19-20, are misplaced. As plaintiffs' own quotations make clear, those cases stand for the unremarkable proposition that "the court may not consider the merits of the case, but must accept the allegations of the complaint as true and resolve doubts in favor of the plaintiffs." Pls' Br 19 (quoting *Bell v Caruso*, 2007 WL 3275067, *3 (WD Mich, Nov 5, 2007), and *Rankin v Rots*, 220 FRD 511, 517 (ED Mich, 2004) (similar)). All this means, as the U.S. Supreme Court has explained, is that a court may not deny certification just because it believes that plaintiffs are unlikely to prevail on the merits. See *Eisen v Carlisle & Jacquelin*, 417 US 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (quotations and citation omitted). That does not mean, as plaintiffs insist, that a trial court must "accept the allegations *made in support of the request for certification as true.*" Pls' Br 18 (emphasis added).

The Seventh Circuit's decision in *Szabo v Bridgeport Machs, Inc*, 249 F.3d 672 (CA 7, 2001), makes this point clear. That decision vacated a class certification order where the trial court had accepted as true the plaintiffs' allegations in support of class certification. See *id.* at 674-75. As the Seventh Circuit explained, there is a fundamental difference between accepting a plaintiff's allegations on the merits of the dispute (which are for the factfinder to resolve) and accepting a plaintiff's allegations on the validity of class certification (which is for the court to resolve). *Id.* at 675-76. Therefore, "[b]efore deciding whether to allow a case to proceed as a class action, ... a judge should make whatever factual and legal inquiries are necessary" to

determine whether certification is warranted. *Id.* at 676. For example, if “the plaintiff alleged that the class had 10,000 members, making it too numerous to allow joinder, while the defendant insisted that the class contained only 10 members,” then the “judge would not and could not accept the plaintiff’s assertion as conclusive; instead the judge would receive evidence (if only by affidavit) and resolve the disputes before deciding whether to certify the class.” *Id.* (citation omitted). The same, of course, is equally true of the predominance requirement. That is why the “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. The Sixth Circuit, and district courts within that Circuit, follow this sensible approach. See, e.g., *In re Am Med Sys, Inc*, 75 F3d 1069, 1079 (CA 6, 1996) (“A class is not maintainable as a class action by virtue of its designation as such in the pleadings.”); *Weathers v Peters Realty Corp*, 499 F2d 1197, 1200 (CA 6, 1974) (“[O]rdinarily, the [certification] determination should be predicated on more information than the pleadings will provide.”); *Curry v SBC Commc’ns, Inc*, 250 FRD 301, 309 (ED Mich, 2008) (same; citing, *inter alia*, *Szabo* and *Weathers*).²

Unable to ground their approach in the law, plaintiffs rely on the materials that the trial court supposedly considered in its review as evidence of a rigorous analysis. According to plaintiffs, the “extensive briefing by the parties,” “active[] participat[ion by the trial court] in a

² To be sure, as Dow has acknowledged, there is language in some Court of Appeals opinions stating that courts are bound to accept a plaintiffs’ allegations that the requirements of MCR 3.501 have been satisfied. See, e.g., *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002); *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2005; 2005 WL 3191394, *2 (Docket No. 258498). But (as in those very cases) the Court of Appeals has often held that class certification is unwarranted notwithstanding such allegations. Indeed, one of the very reasons that Dow urged this Court to grant leave in this case was to resolve the inconsistency in the Court of Appeals’ jurisprudence on this issue, and thereby to provide guidance to the trial courts. Needless to say, in resolving this issue, this Court is not bound by the language previously used by the Court of Appeals.

two-day hearing,” “extensive evidentiary record,” and “detailed substantive allegations” of their complaint, see Pls’ Br 21, taken together, establish that the trial court conducted a rigorous analysis in this case. That is wrong. The extensive briefing, the voluminous record, and the parties’ active participation all mean nothing where, as here, the trial court expressly “accept[ed] the allegations of the plaintiff in support of the motion as true.” Class Cert Order 2, App 768a. Contrary to plaintiffs’ assertion, see Pls’ Br 24, Dow is not challenging the trial court’s failure to make specific findings of fact or conclusions of law; rather Dow is challenging the court’s application of an erroneous legal standard to the class certification inquiry. By accepting the plaintiffs’ allegations in support of class certification as true, the trial court never addressed the unrebutted evidence in the voluminous record that not every member of the class was injured, and that plaintiffs thus could not establish predominance as a matter of law.

Plaintiffs also highlight the trial court’s observation that “[t]he plaintiff bears the burden of proving that the class should be certified.” Pls’ Br 23 (quoting Class Cert Order 2, App 768a). But that observation proves nothing, because it does not describe the *nature* of that burden. If, as the trial court stated, a court must “accept the allegations of the plaintiff in support of the motion as true,” Class Cert Order 2, App 768a, then plaintiffs bear only the feather-light burden of alleging compliance with the rule. The key point is that the trial court never analyzed whether plaintiffs could establish the elements of their claims on a classwide basis with classwide proof, and thereby abdicated its responsibility to conduct a “rigorous analysis” into class certification.

II. Plaintiffs failed to establish that questions of law or fact common to the members of the class predominate over questions affecting only individual members.

In arguing that their claims satisfy the predominance requirement of MCR 3.501(A)(1), plaintiffs simply identify some allegedly common issues, see Pls’ Br 27-28, and then declare without analysis that “[a]ny individualized differences between class members or their properties

are not enough to overshadow these predominating factual and legal questions,” *id.* at 28. But plaintiffs have no credible response to Dow’s point that common issues cannot predominate over individualized issues as a matter of law where, as here, an essential element of plaintiffs’ claims—injury—cannot be proven on a classwide basis with classwide proof. See, e.g., *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F3d 154, 188 (CA 3, 2001); *Windham v American Brands, Inc.*, 565 F2d 59, 66 (CA 4, 1977). Indeed, plaintiffs themselves acknowledge that the Court of Appeals has held in other cases that class certification under MCR 3.501 is unwarranted unless the plaintiff establishes that ““all members of the class had a *common injury* that could be demonstrated with generalized proof, rather than evidence unique to each class member.”” Pls’ Br 26 n 23 (emphasis added; quoting *A&M Supply Co v Microsoft Corp.*, 252 Mich App 580, 599-600; 654 NW2d 572 (2002), and citing *Tinman v Blue Cross & Blue Shield of Mich.*, 264 Mich App 546, 563-64; 692 NW2d 58 (2004)). They simply assert that these cases are “likely erroneous,” *id.*, but that assertion is itself erroneous: those cases recognize that common issues cannot predominate as a matter of law where, as here, plaintiffs cannot establish an essential element of their claims—injury—on a classwide basis with classwide proof.

Plaintiffs try to avoid that point by asserting that classes have been certified in other “environmental pollution class action decisions.” Pls’ Br 29. As Dow has explained, however, it is inappropriate to paint with such a broad brush in this context. Whether class certification is appropriate in any particular case depends on the legal claims and facts of that case; it makes no sense to debate whether class certification is warranted or unwarranted in “environmental pollution cases” in the abstract. There may be environmental pollution cases in which the named plaintiffs can establish injury on a classwide basis with classwide proof. See, e.g., *Sterling v Velsicol Chem Corp.*, 855 F2d 1188 (CA 6, 1988). But this is not such a case. There is no basis in either law or fact to assume that alleged contamination of a river has contaminated every

parcel of property in the river's 100-year floodplain. See, e.g., *Church v Gen Elec Co*, 138 F Supp 2d 169, 180-82 (D Mass 2001); *Satsky v Paramount Commc'ns, Inc*, 1996 WL 1062376, *13-15 (D Col, Mar 13, 1996); *McGuire v International Paper Co*, 1994 WL 261360, *6-9 (SD Miss, Feb 18, 1994).

In fact, the record establishes that (1) many properties in the class area (even many properties in the class area that are frequently flooded) do *not* contain elevated levels of dioxin, see App 801a, and (2) the alleged contamination has had *no* impact on many plaintiffs' use or enjoyment of their property, see App 833a n 18. It is, to say the least, disingenuous for plaintiffs to assert that "[a]s the Court of Appeals correctly observed, Dow's assertions and claimed proofs, including Dow's contentions concerning variant dioxin levels, among others, were contradicted by information Plaintiffs presented from the MDEQ and other sources." Pls' Br 22 n 18 (citing Fort Hood op 11, App 898a); see also Pls' Br 3, 12, 42-43. Plaintiffs (like the Court of Appeals majority) rely on the *preliminary* MDEQ report, which suggested contamination throughout the entire class area. But the MDEQ subsequently *retreated* from that report, and acknowledged that many properties in the class area are *not* contaminated, so that contamination must be assessed on a "case-by-case" basis. See App 783a. Based on the MDEQ's testing to date, approximately one-third of the parcels that are frequently flooded (and hence at the highest risk for contamination) have dioxin levels below even the most conservative regulatory criteria. See App 801a. Plaintiffs' mere promise to establish a classwide injury with classwide proof at some point in the future is not enough to justify class certification. See Pls' Br 13 ("Through fate and transport modeling and further analysis/extrapolation of existing and future testing of soil samples in the class area, Plaintiffs can readily establish that all members of the class have a common injury that can be demonstrated with generalized proof.").

Nor is it true, as plaintiffs contend, that “[i]ndividualized fact-finding, if any, will concern the *amount* of damage, not the *existence* of damage (*i.e.*, the fact of injury or impact).” Pls’ Br 44 (emphasis in original). Injury is a liability issue, not a damages issue. Without injury, there is no liability, and hence no basis for damages. And plaintiffs cannot avoid that point by flipping the burden of proof, and insisting that class certification is warranted here “unless *Dow* can prove what it has never even suggested: that contamination of properties in the class area is *impossible* and that Plaintiffs’ injuries and damages are based on the unfounded fears of third parties.” Pls’ Br 38 (emphasis added). It is not Dow’s burden to show that plaintiffs *cannot* prove their claims on a classwide basis with classwide proof; rather, it is plaintiffs’ burden to show that they *can* prove their claims on a classwide basis with classwide proof.

Nothing better illustrates the weakness of plaintiffs’ position than their reliance on a West Virginia trial court’s unpublished class certification order. See Pls’ Br 33-36 (discussing *Carter v Monsanto Co*, unpublished order of the Circuit Court of Putnam County, West Virginia, issued Jan 7, 2008, 2008 WL 1693652 (Docket No. 00-C-300)). Even assuming that *Carter* was correctly decided, it is not (contrary to plaintiffs’ assertion) “strikingly similar” to this case. Pls’ Br 33. The *Carter* plaintiffs alleged “that all [downstream] properties in the [relevant] flood plains ... contain dioxin-contaminated sediment,” an expert “concluded that dioxin-contaminated sediment ... has likely contaminated the 100-year Flood Plain,” and (as far as the order reveals) nothing in the record contradicted the allegation and expert opinion. By contrast, here the record says the opposite—as noted above, the unrebutted evidence establishes that many properties in the class area do *not* have elevated levels of dioxin. See App 783a, 801a.

III. Plaintiffs have failed to establish that they can prove an essential element of their claims—injury—on a classwide basis with classwide proof.

Presumably because plaintiffs recognize that they cannot establish that each parcel of property in the class area contains elevated levels of dioxin, they insist that their common injury

is not contamination, but “decreased property values” *regardless* of whether any particular parcel of property is contaminated. Pls’ Br 2. According to plaintiffs, they “intend to show at trial that the impact of Dow’s contamination on flood plain property values can and should be determined on a class-wide basis through a mass appraisal model.” Pls’ Br 13. The problem for plaintiffs is that, under substantive Michigan law, they cannot prove either a classwide nuisance claim or a classwide negligence claim based solely on an alleged decrease in property values.

With respect to nuisance, plaintiffs assert that “Michigan courts have long held that physical invasion of property is not necessary for a cause of action.” Pls’ Br 37. But that assertion misses the point. As plaintiffs concede, “[n]uisance requires a substantial and unreasonable interference with a property owner’s use and enjoyment of his land.” *Id.* The problem for plaintiffs, which they never address, is that such a claim—regardless of whether based on a present physical injury or a threat of future injury—is not susceptible of being proven on a classwide basis with classwide proof: what may be a “substantial and unreasonable interference” with one property owner’s “use and enjoyment of his land” may not be the same for another property owner. See, e.g., *Church*, 138 F Supp 2d at 182; *O’Connor v Boeing N Am, Inc*, 197 FRD 404, 418 (CD Cal 2000). Indeed, several of the named plaintiffs in this case conceded that their use and enjoyment of their property has *not* been affected by the alleged contamination, see App 833a n 18 (citing, *inter alia*, App 185a, 233a, 278a, 281a, 356a), which may explain why the Court of Appeals majority “[a]ccept[ed]” that plaintiffs could not prove their nuisance claim on a classwide basis and thus “assum[ed] that the nuisance claim would not qualify for class certification.” Fort Hood op 13, App 900a. Plaintiffs’ reliance on *Adkins v. Thomas Solvent Co*, 440 Mich 293; 487 NW2d 325 (2004), is misplaced, because that case was not a class action, and did not remotely establish the proposition that a nuisance claim based on the threat of future injury to property can be proven on a classwide basis with classwide proof.

With respect to negligence, plaintiffs assert that “decreased property values” alone—unaccompanied by any physical contamination of property—can establish a legally cognizable injury. Pls’ Br 41-42. Thus, according to plaintiffs, even the owner of an uncontaminated parcel of property has a negligence claim where (as they allege with respect to the entire class area) there is “an objectively reasonable *threat* of such contamination ... by virtue of [the parcel’s] proximity to the pervasive presence of dioxin contamination all around it and the absence of any natural or other barriers to prevent its further dissemination throughout the flood plain area.” *Id.* at 42 (emphasis added); see also *id.* at 40 (“The injury is the same for all properties in the class area because Dow’s contamination ... *threatens* every property in the class area.”) (emphasis added); *id.* at 43 (“[E]ven a soil sample test result that reveals ... a negligible level of dioxin contamination ... does not mean that ... the same sample site will not *in the future* become contaminated.”) (emphasis added). But that is the very same argument that plaintiffs previously, and unsuccessfully, advanced in support of their “medical monitoring” claim in this very case. See *Henry v Dow Chem Co*, 473 Mich 63, 69; 701 NW2d 684 (2005). This Court squarely rejected that argument, holding that “a *present physical* injury to person or property” is necessary to state a negligence claim under Michigan law. *Id.* at 75-76 (emphasis added). “Indeed, such injury constitutes the essence of a plaintiff’s claim.” *Id.* at 74. By definition, a “present physical injury to ... property” is neither (1) a *future* physical injury to property, nor (2) a present *non-physical* injury to property. Plaintiffs thus cannot justify certification of their negligence claim by framing that claim as a medical monitoring claim for property.

CONCLUSION AND RELIEF REQUESTED

For these reasons, and those set forth in its opening brief, Dow respectfully requests reversal of the decision of the Court of Appeals and such other relief as equity requires.

Respectfully submitted,

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