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

GARY and KATHY HENRY, et al.,

Plaintiffs,

v

THE DOW CHEMICAL COMPANY,

Defendant.

Case No. 03-4777-NZ
Hon. Leopold P. Borrello

ON REMAND

OPINION AND ORDER OF THE COURT DENYING CLASS CERTIFICATION

At a session of said Court held at the Courthouse in the City and County of Saginaw and State of Michigan on this 18th day of July, 2011.

PRESENT: HONORABLE LEOPOLD P. BORRELLO, VISITING JUDGE, 10TH JUDICIAL CIRCUIT

I. BACKGROUND

Plaintiffs, Gary and Kathy Henry, seek to represent a putative class in an action against defendant, Dow Chemical Company, alleging that Dow negligently released dioxin, a synthetic chemical that is potentially hazardous to human health, from its plant in Midland into the Tittabawassee River flood plain. MCR 3.501(A)(1) articulates the prerequisites for certification of a class in class action litigation in Michigan. Under the court rule, in order to proceed with a class action lawsuit in Michigan, the following requirements must be satisfied:

(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 class 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).]

These class certification requirements are commonly referred to as numerosity, commonality, typicality, adequacy and superiority. *Henry v Dow Chemical Co*, 484 Mich 483, 488; 772 NW2d 301 (2009).

On October 21, 2005, this Court issued an opinion and order concluding that the prerequisites to class certification articulated in MCR 3.501(A)(1)(a)-(e) had been met and granting plaintiff's motion to certify the class. Thereafter, defendant appealed. The Michigan Supreme Court held that this Court's analysis of the numerosity, commonality and superiority requirements, MCR 3.501(A)(1)(a), (b) and (e), was sufficient, but that this Court potentially used an evaluative framework that was inconsistent with the Supreme Court's interpretation of MCR 3.501(A)(1), and therefore remanded for this Court to "clarify its reasoning for ruling that MCR 3.501(A)(1)(c) [typicality] and (d) [adequacy] were met . . . ." *Dow*, 484 Mich at 506, 509. Although the Supreme Court ruled that this Court's analysis of the numerosity, commonality and superiority requirements was sufficient, it gave this Court the opportunity to reanalyze those prerequisites if this Court determined that the standard it initially used was inconsistent with the proper standard. *Id.* at 507 n 41.

After our Supreme Court remanded the present case for this Court to clarify its ruling regarding typicality and adequacy and/or reanalyze all of the class certification prerequisites, the United States Supreme Court decided *Wal-Mart Stores, Inc v Dukes*, 2011 US LEXIS 4567 (June 20, 2011). *Wal-*

Mart has far-reaching implications for certification of class action lawsuits, including the present case. Based on the United States Supreme Court's decision in *Wal-Mart* and our Supreme Court's decision in *Dow*, this Court has determined that it must reanalyze whether the commonality prerequisite to class certification was satisfied in this case.

II. ANALYTICAL FRAMEWORK FOR CERTIFYING A CLASS ACTION UNDER *DOW*, 484 MICH 483

In *Dow*, 484 Mich 483, the Michigan Supreme Court articulated the proper analysis that a certifying court must undertake in making class certification decisions. *Id.* at 504. According to the court in *Dow*, "a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied." *Dow*, 484 Mich at 488. Furthermore, a certifying court may not merely "rubber stamp" a party's allegations that the prerequisites to class certification are met. *Id.* at 502. A certifying court may base its certification decision on the pleadings alone if the pleadings set forth sufficient information to satisfy the court that each prerequisite is met; however, if the pleadings are not sufficient, the court must look to additional information beyond the pleadings in making its certification decision. *Id.* at 502-503. In doing so, certifying "courts shall analyze any asserted facts, claims, defenses, and relevant law without questioning the actual merits of the case." *Id.* at 504. While "strict adherence to the class certification requirements [in MCR 3.501(A)(1)] is required[,]" *id.* at 500, this Court has "broad discretion to determine whether a class will be certified." *Id.* at 504.

III. *WAL-MART STORES, INC V DUKES*, 2011 US LEXIS 4567 (JUNE 20, 2011)

Recently, the United States Supreme Court decided its historic and controversial class action case in *Wal-Mart*. In *Wal-Mart*, the employees sued Wal-Mart because of Wal-Mart's alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. The Supreme

Court denied class certification based on the employees' failure to establish the commonality prerequisite to class certification under Rule 23(a) of the Federal Rules of Civil Procedure.

In denying class certification based on the employees' failure to establish the commonality prerequisite to class certification, the Supreme Court stated about the commonality prerequisite:

> Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,' *Falcon*, *supra*, at 157. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways . . . . Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury . . . gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. [*Wal-Mart*, slip op p 9.]

According to the Supreme Court, a common contention does not occur in an intentional discrimination case unless there is a link to bind discriminatory decisions together: "Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why I was disfavored.*" *Id.*, slip op pp 11-12 (emphasis in original).

The Supreme Court further stated that "proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination . . . because, in resolving an individual's Title VII claim, the crux of the inquiry is 'the reason for a particular employment decision[.]'" *Id.*, slip op p 11 (emphasis in original). Relying on *General Telephone Co of Southwest v Falcon*, 457 US 147 (1982), an employment discrimination case, the Supreme Court ruled that the plaintiffs' burden was to provide "'significant proof' that Wal-Mart

'operated under a general policy of discrimination'" and that plaintiff failed to provide such proof. *Wal-Mart*, slip op p 13. Thus, the Supreme Court concluded: "Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question." *Id.*, slip op p 19.

As noted above, our Supreme Court stated in *Dow* that "a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied." *Dow*, 484 Mich at 488. Although this Court concludes that its analysis of the commonality prerequisite to class certification was based on the proper standard at the time it originally certified the class in October 2005, in light of the United States Supreme Court's decision in *Wal-Mart*, this Court must reanalyze whether the commonality requirement is satisfied in the present case. Based on the Supreme Court's decision in *Wal-Mart*, this Court determines that plaintiff has failed to provide this Court with sufficient information to establish that the commonality prerequisite to class certification is satisfied in this case. Although this Court recognizes that this conclusion is a departure from its conclusion regarding the commonality factor in its October 2005 opinion and order granting class certification in this case, this departure is mandated by the United States Supreme Court's *Wal-Mart* decision.

Like the Supreme Court in *Wal-Mart*, this Court denies certification in this case based on the failure to establish the commonality prerequisite to class certification because of the absence of a "glue" to hold all of the plaintiffs' claims together. The only common question in the present case is whether defendant released dioxin into the Tittabawassee River flood plain. Even assuming that defendant negligently released dioxin and that it contaminated the soil in plaintiffs' properties, whether and how the individual plaintiffs were injured involves highly individualized factual inquiries regarding issues such as the level and type of dioxin contamination in the specific properties, the different remediation

needs and different stages of remediation for different properties, and the fact that some of the properties have been sold. Similar individualized factual inquiries are necessary for plaintiffs' nuisance claims. Nuisance is an interference with a property owner's use and enjoyment of property, and "[t]here are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment." *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992). The individual plaintiffs in the present case use and enjoy their property in myriad ways. Whether plaintiffs have suffered an interference with or loss of use and enjoyment of their property requires an individualized factual inquiry into each plaintiff's use and enjoyment of their property.

In sum, because of the need for such highly individualized factual inquiries, plaintiffs cannot show that there is a common contention that is capable of classwide resolution. Therefore, they are unable to satisfy the commonality prerequisite to class certification, MCR 3.501(A)(1)(b), and certification of this matter as a class action is therefore denied.

Because this Court has concluded that the commonality prerequisite to class certification is not met in this case based on *Wal-Mart*, it is unnecessary to resolve whether plaintiffs satisfied the typicality and adequacy requirements. See *Dow*, 484 Mich at 500 ("A party seeking class certification must meet the burden of establishing each prerequisite [under MCR 3.501(A)(1)] before a suit may proceed as a class action."); see also *Wal-Mart*, slip op p 9 n 5 ("In light of our disposition of the commonality question . . . it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements . . . .").

IV. HOLDING

Based on the findings and reasoning set forth in this opinion, this Court hereby orders that Plaintiffs' Motion for Certification as a Class Action be and the same is hereby DENIED.

LEOPOLD P. BORRELLO
VISITING JUDGE
10th JUDICIAL CIRCUIT