

PLAINTIFFS' COUNSEL VOWED TO "NEVER GIVE UP" IN 12-YEAR CLASS ACTION, RECOVERING \$1,420,000

– Case shows that you can fight city hall

Over 12 years ago, on May 2, 2000, several homeowners filed suit against the City of Warren challenging the City's practices and policies relating to City-owned trees in front of residents' homes. The City planted fast-growing trees with a highly aggressive root system and a known propensity to invade sewer pipes and cause damage to surrounding areas. Homeowners sustained clogged and broken sewer pipes, damaged lawns, broken sidewalks, and sewer backups into their homes. Many homeowners sought to mitigate their damages by having the nuisance trees removed, but the City had passed ordinances making it illegal to do so, effectively barring residents from engaging in self-help.

Plaintiffs filed suit on behalf of all similarly situated homeowners, alleging claims of trespass-nuisance, constitutional taking, and violation of due process. The theory of trespass-nuisance was, at that time, a recognized exception to governmental immunity under Michigan law. In 2000, just after the suit was filed, Plaintiffs overcame the City's motion to dismiss the suit. The Circuit Court, however, initially denied class certification to Plaintiffs, finding there were too many individualized issues to warrant a class action. Plaintiffs appealed, and obtained a reversal of the denial of class certification, on a motion for peremptory reversal in the Court of Appeals. The City of Warren appealed to the Michigan Supreme Court, which remanded the case back to the Court of Appeals for plenary consideration, upon which the Court of Appeals again found that class certification was proper. After the City again appealed the Court of Appeals' decision, the Michigan Supreme Court, in 2003, reversed the Court of Appeals and held that the Circuit Court's denial of class certification was not clearly erroneous.

After the case was remanded to the Circuit Court, Plaintiffs took discovery and filed a renewed motion for class certification, demonstrating that common issues of law and fact predominated. The Circuit Court agreed, and, in 2004, reversed its initial ruling by certifying the case as a class action. The City of Warren appealed and the Court of Appeals rejected the appeal. The City then appealed to the Michigan Supreme Court, which remanded the case to the Court of Appeals to determine if the decision of *Pohutski v City of Allen Park*, 465 Mich 675 (2002), which abolished the trespass-nuisance cause of action except in existing "cases," affected the Circuit Court's ruling. After further briefing in the Court of Appeals and oral argument, the Court of Appeals upheld the Circuit Court's class certification ruling in a published opinion, which is now a leading case in Michigan class action jurisprudence. See *Hill, et al v City of Warren*, 276 Mich App 299 (2007). The Court of Appeals also found that the case would retain the benefit of the pre-*Pohutski* exception to governmental immunity for trespass-nuisance. The City of Warren then filed another appeal to the Michigan Supreme Court, which was rejected.

In 2008, the case returned to the Circuit Court. While Plaintiffs took written discovery of the City and key depositions of City officials, the City of Warren argued that it was entitled to conduct full discovery of every single class member in order to investigate liability and damages. Plaintiffs, however, argued that prevailing class action law and due

process only permitted discovery on a sampling of class members, from which liability and damages issues could be extrapolated and litigated on a class-wide basis. After extensive briefing and oral argument, the Circuit Court ruled in favor of Plaintiffs and permitted the City to engage in discovery on only a sample of the class members. The City then engaged in extensive discovery of the sample class members, through depositions, interrogatories and document requests, and on-site home inspections.

Meanwhile, Plaintiffs' counsel engaged in significant outreach to the class members, speaking personally with countless Warren homeowners, holding "town hall" style meetings, and amassing cabinets full of class member documents and evidence.

After discovery ended, in 2010, the City filed numerous motions, seeking: summary disposition of Plaintiffs' claims on 7 different grounds, imposition of a mandatory pretrial proof-of-claim procedure, bifurcation of the trial into separate liability and damages phases, and decertification of the class. The motions involved traditional legal issues of causation, liability, and statute of limitations, as well as cutting edge and highly complex class action issues relating to proving damages and liability on a class-wide basis using methods of sampling and extrapolation and the attendant due process considerations for both the City and the class members. Plaintiffs prevailed on almost every legal point at issue in the summary disposition motions, and defeated the City's motions for a pretrial proof-of-claim requirement and bifurcation of trial. The case was then scheduled for trial.

The City then filed two applications for leave to appeal, and a claim of appeal on governmental immunity grounds. The Court of Appeals denied the two applications, and the City appealed to the Michigan Supreme Court. In early 2012, the Michigan Supreme Court denied leave to appeal in part, and remanded the case back to the Court of Appeals for consideration of a statute of limitations question involving the "continuing wrongs" doctrine and the question of "whether the defendant has a due process right to defend against the plaintiffs' individual claims of causation and damages in this class action and/or whether there are due process implications to the process of statistical 'extrapolation.'"

Before the remanded questions and the pending claim of appeal could be heard by the Court of Appeals, the case settled for \$1,420,000 – 12 years and 5 months after it was initially filed. In fighting so hard and so long for their clients, Plaintiffs' counsel were reminded of Winston Churchill's famous post-war commencement address wherein the Prime Minister slowly walked to the center of the stage of the auditorium, and said only the words, "Never give up! Never give up!" and with that, left the stage.

Type of action: Class action for trespass-nuisance, constitutional taking, and violation of due process

Type of injuries: Property damage

Name of case: Hill, et al. v. City of Warren; Carlson, et al. v. City of Warren

Court/Case no./Date: Macomb County Circuit Court; 00-1823-CZ and 01-1103-CZ;

October 9, 2012

Name of judge: Matthew Switalski (previously James Biernat, Sr.)

Facilitator: Jon Muth

Settlement amount: \$1.42 million

Most helpful experts: Robert Cool, forestry; Paul Bladdick, plumbing

Attorneys for Plaintiffs: Gerard Mantese, Stuart Fraser IV, Brian Saxe

Attorneys for Defendant: John Gillooly