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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Michigan Circuit Court.
Timothy CARLSON, Randall and Linda Kolodziejski, William and Beverly Glasson, David and Kristin Abraham, Dennis D. Marlowe, Dennis and Tracy Hight, Ted Dobek, Carolyn Kupiec, Frederick and Michelle Cross, Sandra Powers, Daniel G. Olivares, Francesco and Pamela Simone, Gary Potapshyn, Gerald Kowalski, Frank Vitale, Ronald and Eileen Wine, William and Susan Cunningham, Dolores Gough, Helen Dailey, Grace Campanella, Richard Karlowski, Candi Debrowsky, Christopher and Melinda Small, Mark and Kandi Krumins, Sheryl Przewlocki, Jeffrey and Dawn Crumley, Sanzio Piacentini, Donna Bonior, Gary Bonior, Kenneth and Kimberly Kook, Frances Cavataio, Michael Allgeyer, Mary S. Davis, and Larry and Nancy Samyn, Plaintiffs,
v.
CITY OF WARREN, a municipal corporation, Defendant.
HILL, et al., Plaintiffs,
v.
CITY OF WARREN, Defendant.
CARLSON, et al., Plaintiffs,
v.
CITY OF WARREN, Defendant.
No. 00-1823-CZ.

Nov. 24, 2004.

Gerard V. Mantese, Robert A. Kaatz, Mantese & Associates, P.C., Troy, MI, for Plaintiffs.

John J. Gillooly, Garan, Lucow, Miller, P.C., Detroit, MI, for Defendant.

Stuart A. Fraser, IV, Fraser & Souweidane, P.C., Mount Clemens, MI, for Plaintiffs.

OPINION AND ORDER

BIERNAT, J.

***1** Plaintiffs renew their motion for class certification.

Plaintiffs filed their complaint on May 2, 2000, and a first amended complaint on June 14, 2000, claiming trespass-nuisance (count I), negligence (count II), government taking and violation of due process (count III), injunctive relief (count IV) and declaratory judgment (count V). The claims stern from the City's planting of trees in front of residences in Warren, on the easement between the sidewalk and the street. Over the years, as the trees have grown, the roots have allegedly caused problems, including breaking through and cracking sewer pipes. Plaintiffs allege the roots and other material obstructed the pipes to the point that sewage from the plaintiffs' homes had no room to drain, thereby flooding their houses with raw sewage. Plaintiffs sought class certification of those residents in Warren who have been harmed by the City's plans and practices relating to its trees. Class certification was denied in an *Opinion and Order* dated August 2, 2000, the Court not being persuaded that the principal common issues predominate over individual questions. The Court of Appeals, after initially affirming, ultimately reversed this Court, finding common issues predominate. In an order dated November 21, 2003, the Supreme Court reversed the Court of Appeals, finding that this Court had not erred in denying class certification, and remanded back to this Court for further proceedings. Plaintiffs now renew this motion for class certification.

Plaintiffs aver, first, that the issue of class certification remains open to consideration throughout the course of the case, and the current motion is not one for reconsideration. Second, plaintiffs contend that new facts and new law justify and mandate a fresh look at certification and should yield a different result. In this regard, plaintiffs note that since this case was originally filed, the Supreme Court has ruled that an individual may not bring a trespass-nuisance claim against a municipality such as defendant City of Warren. Plaintiffs note that the case, *Pohutski v. City of Allen Park*, 465 Mich. 675, 641 N.W.2d 219 (2002), reads that it is to be applied prospectively, because to apply it retrospectively would serve to deny relief to a distinct class of litigants, i.e., those whose cases were currently pending.

Plaintiffs assert that because individuals cannot now bring a trespass-nuisance claim against defendant, a class must be certified to permit those who had not filed before *Pohtuski* to join the current case. Plaintiffs aver that the potential litigants number some 6,950, and that plaintiffs have become aware of at least 52 other individuals who wish to seek to recover in this lawsuit. Plaintiffs contend that new facts have been discovered, i.e., the identities of potential litigants. Third, plaintiffs argue that all of the elements for class certification are met here.

Defendant responds, first, that the current motion is untimely. Specifically, defendant contends that pursuant to MCR 3.501(B)(1), plaintiffs were allowed 91 days after the filing of a complaint to seek class certification, which could be extended only upon a motion for cause shown. Defendant contends that while the current motion is premised on the effect of the *Pohtuski* ruling, that ruling was made two years ago. Second, defendant contends that the renewed motion is procedurally improper and is barred by the law of the case doctrine. In this regard, defendant asserts that the federal rule, upon which plaintiffs rely, is different from the Michigan court rule, which does not explicitly state that class certification may be considered at any time before final judgment. Further, defendant contends, Michigan's law of the case doctrine should be applied to hold that plaintiffs should not return to this issue which was decided by the Supreme Court. In support of this argument, defendant asserts that plaintiffs twice argued on appeal to the Supreme Court that the ruling of *Pohtuski* constituted a change in the law requiring reversal of this Court's decision to deny class certification, and both times the Supreme Court rejected such argument. Third, defendants contend that the renewed motion for class certification is without merit. In this regard, defendant asserts that while plaintiffs assume that class certification would permit new members to avoid application of *Pohtuski*, the law would hold that the trespass-nuisance exception could not be resurrected for new members. Moreover, defendant contends, application of *Pohtuski* does not render this matter more appropriate for class certification than it was before. Defendants aver that plaintiffs attempt to use *Pohtuski*, which holds that persons such as the putative members would have no viable trespass-nuisance claim against Warren, to support widening the number of persons who will, nevertheless, be allowed to proceed on such claims. Defendant contends this reasoning is fallacious.

***2** After much careful consideration of the record and pleadings filed since the Court's initial decision denying class certification the Court is persuaded to reconsider its denial. Whether to certify a class in this case has always been a close decision (indeed, in the Court's initial denial, the Court noted that several factors weighed in favor of certifying a class). After reviewing additional pleadings, including the additional cases filed concerning this matter after *Hill* (but before *Pohutski v. Allen Park*, 465 Mich. 675, 697, 641 N.W.2d 219 [2002], *infra*), the Court has become persuaded that the commonalities in the case outweigh the causation and damages issues to be resolved. Moreover, the Court has become persuaded that it would be more convenient for the Court to address the litigation as a class action and the same would be a superior method of litigating the multiple cases now filed. For these reasons, the Court will certify the class.

The Court notes that defendant avers that it is too late to certify a class, and that federal precedent is not binding. The Court does not agree. Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification. *Neal v. James*, 252 Mich.App. 12, 15, 651 N.W.2d 181 (2002). According to the federal court rule and case law, an order denying class certification "may be altered or amended before the decision on the merits." Fed R Civ P 23(c)(1); *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (C.A.6, 1991). The United States Supreme Court has stated that "because class status under this rule may always be altered or amended, 'a district court's order denying or granting class status is inherently tentative." ' *Mallory*, 1282. Thus, it is proper to reconsider a denial of a class action at a later time in the case than the initial motion.

The Court further notes that it does not agree with defendant that the Supreme Court's order constitutes law of the case and therefore class certification may not be revisited. The Supreme Court's order merely read that "the Macomb Circuit Court's denial of class certification was not clearly erroneous." *Hill v. City of Warren*, --- Mich. ----, 671

N.W.2d 534 (2003). The law of the case doctrine states that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue. *International Union v. State*, 211 Mich.App. 20, 24, 535 N.W.2d 210 (1995). The doctrine seeks to promote finality as to litigated issues and to prevent forum shopping. The doctrine applies to questions specifically determined in a prior decision and to questions necessarily determined to arrive at the decision. *International Union*, 24. Here, the Supreme Court did not decide an issue. Instead, it merely stated that the Court had not erred in deciding not to certify the class.

Finally, the Court advises that its current decision is not rendered in an attempt to nullify the effect of *Pohutski v. Allen Park*, 465 Mich. 675, 697, 641 N.W.2d 219 (2002). In that case, the Michigan Supreme Court interpreted the governmental immunity statute, and found that there is no trespass-nuisance exception to a municipality's governmental immunity. The Supreme Court ruled that its holding would have prospective application, and that no claim of trespass-nuisance could be brought against a municipality after its publication date, April 2, 2002. A federal court considered whether putative plaintiffs could be added to a class after April 2, 2002, in *Lessard v. City of Allen Park*, 267 F Supp 2d 716, 717 (2003). The *Lessard* Court reasoned that "given the Michigan Supreme Court's *Pohutski* decision, a class certified now would only include plaintiffs whose names were on the complaint as of April 2, 2002. Unnamed plaintiffs would no longer be similarly situated because they did not 'bring suit' by April 2, 2002 under *Pohutski." Lessard*, 716, n. 1. However, in that case, the Court had not yet ruled on whether there would be a class action. In the case at bar, the Court is merely reconsidering its prior decision. In other words, had the Court initially decided to certify the class, *Pohutski* would have no impact on the current matter. The Court is persuaded that because the Court is reconsidering a decision made prior to the issuance of *Pohutski*, *Pohutski* does not impact the current case.

***3** Having stated that the Court's current decision is not prompted by *Pohutski*, the Court notes that court rule permits, upon the Court's reconsideration, for the class to relate back to the time of the original motion for certification for purposes of tolling the statute of limitations on the claims of the class members. MCR 3.501(F)(3) provides that "[i]f the circumstance that brought about the resumption of the running of the statute [of limitations] is superseded by a further order of the trial court ... the statute of limitations shall be deemed to have been tolled continuously from the commencement of the action." See, further, *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 330, n. 1, 100 S.Ct. 1166, 63 L.Ed.2d 427 (U.S.Miss.1980).

For the foregoing reasons, plaintiffs' renewed motion for class certification is GRANTED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

2004 WL 2697729 (Mich.Cir.Ct.)

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