COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2004-1166B

KIM DeLEO, ET AL,
Plaintiffs,

vs.

BOUCHARD TRANSPORTATION
COMPANY, INC., ET AL,
Defendants,

**MEMORANDUM OF DECISION AND ORDER ON
(1) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND
(2) DEFENDANTS' MOTION FOR DETERMINATION THAT
MATTER IS NOT MAINTAINABLE AS CLASS ACTION**

The plaintiffs are persons who allege that they have residential seashore property interests that were damaged as a result of an oil spill which occurred on April 27, 2003. On that date, the Tug Evening Tide was towing Barge B No. 120 (B-120) through Buzzards Bay. The B-120 struck rocks near the western end of the Cape Cod Canal. Approximately 98,000 gallons of fuel oil escaped from the barge. As a result, an extensive portion of the southern shoreline of Massachusetts was contaminated by the fuel oil. The parties disagree as to the extent of the pollution. The defendants have stipulated that the fuel was released due to their negligence.

The plaintiffs claim rights to property interests that were damaged by the oil release and have filed a motion that the court certify a plaintiff class consisting of all

persons with an interest in residential property in Massachusetts as of April 27, 2003, which property was harmed or adversely affected by the negligent discharge of fuel oil from B-120. The defendants countered with a motion for a determination that the matter is not maintainable as a class action. Due to the commendably complete submissions of the parties, this court has determined that no evidentiary hearing is required to resolve this issue. Fletcher vs. Cape Cod Gas Co., 394 Mass. 595, 597 (1985).

> Under Rule 23, a plaintiff must show that (1) the class is sufficiently numerous to make joinder of all parties impracticable; (2) there are common questions of law and fact; (3) the claim of the named plaintiff representative is typical of the claims of the class, and (4) the named plaintiff will fairly and adequately represent the interests of the class. Weld vs. Glaxo Wellcome, Inc., 434 Mass. 81, 86 (2001).

The plaintiffs have sustained their "burden of providing information sufficient to enable the motion judge to form a reasonable judgment ..." (Weld, 587) as to whether class certification is proper.

The plaintiff Kim DeLeo is a joint owner of property located in Mattapoisett, which includes the right to use, in common with certain other persons, a beach known as Leisure Shores. Joseph DeLeo, the husband of Kim DeLeo, is the joint owner of that property. The Plaintiff, Francis Haggerty, is a joint owner of property in Mattapoisett, which includes the right to use, in common with certain other persons, the Leisure Shores beach. His wife, Natalie, is the other joint owner of that property. Earl Cornish formerly owned property in Mattapoisett which included the right to use, in common with others, Crescent Beach for the purposes of fishing and recreation. Cornish owned that

property for approximately 7 years. He transferred title in August, 2005.

A preliminary issue is whether any of the three named plaintiffs have the right to prosecute this action since they were not possessed of complete title to their respective properties when the suit was commenced. The defendants assert that the fact that DeLeo and Haggerty only had a joint interest in their respective properties and that Cornish transferred the interest in his property in 2005 exposes the defendants to multiple lawsuits for the same damages.

The issue of whether a joint tenant may maintain an action without the joinder of the other joint tenant was resolved in the decision of Nemet vs. Boston Water and Sewer [Dept.], 56 Mass. App. Ct. 104 (2002). The Appeals Court held that co-owners of real property, whether joint tenants or tenants in common, possess the requisite interests to prosecute an action for damages without the joinder of the co-owners. Nemet at 112. Analysis of the claim of Cornish reveals that there can be no duplication of claims against the defendant for that property. Cornish may maintain whatever claims he has for the premises from the date of the incident, April 27, 2003, until the date that he transferred title to the property in August, 2005.

The court addresses the requirements of Rule 23, as explicated by the Weld Decision, by focusing first on the fourth element, that is, whether the plaintiffs "will fairly and adequately represent the interests of the class. Weld at 86. In the initial application, the plaintiffs sought to represent, as a class, all owners of residential beach property in Massachusetts which had been contaminated by the escape of fuel oil from Barge B-120. That class would have encompassed a number of communities extending from Falmouth in the east to Dartmouth in the west. The communities differ

greatly in the types of residences impacted by the oil spill. Some of the homes in certain communities are very expensive while the residences in other communities are quire modest. In certain communities the areas impacted appear to consist solely of year round homes while other neighborhoods have many buildings used primarily for summer occupancy.

During oral arguments the court obviously wrestled with the contention that DeLeo, Haggerty and Cornish would "fully and fairly represent the interests" of such a diverse group. Even prior to the filing of the Plaintiff's Emergency Motion for Alternative Class Definition, the court had made a preliminary determination that the plaintiffs could not adequately represent the interests of such a diverse class. At the same time, the court also made a preliminary determination that the plaintiffs might adequately represent the interests of persons with an interest in residential property located in Mattapoisett which was damaged as a result of the oil spill rom B-120 on April 23, 2003.

It is with respect to such a class that the court analyzes the requirements of Rule 23. The first issue is whether the joinder of all parties is impracticable. According to the Affidavit of Mark Maguire, there are 291 residential properties affected by this oil spill. Deeds for 162 of those properties were examined which revealed that 269 persons have interest in such properties. The joinder of such a large number of persons is clearly impracticable. "...[T]he word impracticable in the context of Rule 23 has been interpreted to mean impractical, unwise, and imprudent rather than impossible or incapable of being performed." Brophy vs. School Committee of Worcester, 6 Mass. App. Ct. 731, 735 (1978). (certifying a class of 230 teachers).

It is the issue of whether common issues of fact and of law predominate that

poses the most difficult question with respect to certification. The defendants assert that the fact that they have stipulated to negligence is a substantial factor requiring a ruling in their favor on this issue. Granted that said admission is entitled to significant weight, it is not determinative. The current stature of the admission of negligence is that it only applies to these three named plaintiffs. However, for the purposes of this analysis, the court assumes that such an admission would be made as to all property owners in the "Mattapoisett class" discussed above. The defendants have not stipulated to the claim that the plaintiffs' property interests were damaged. Where a large number of potential class members have an interest in a particular beach, such as Crescent Beach, there are common, mixed questions of fact and law applicable to all persons who have rights to the use of that beach. Common questions of law which could be outcome determinations are also present. Among those questions are the issues regarding the proper measure of damages, if any. It appears that the court's decision on that critical issue would be applicable to all claimants and control each of the claims. Further, evidentiary issues, including Daubert/Lannigan challenges, associated with that issue, would affect the claimants equally.

The pleadings at this early stage have also put in issue the question as to whether any recovery is possible at all. The defendants have maintained that this class is improperly seeking recovery for damages which are duplicative of those sought by government entities. (Defendant's Memorandum, p. 19). Rulings on nuisance laws, applicable to all parties, would be required.

Although a proper measure of damages might require a determination of the value of the loss sustained with respect to each property, that alone does not bar

certification of an appropriate class. Weld at 92. Olden vs. LaFarge Corp., 383 F.3d 495, 508-510 (6th Cir. 2004)

In Church vs. General Elec. Co., 138 F.Supp.2d 1969 (D. Mass. 2001), the plaintiffs sought certification for all persons in the judicial district whose properties had been damaged by the discharge of polychlorinated biphenyls from the defendant's plan on the Hoosatanic River. The court declined to certify the class on the basis that individual issues predominated over common issues. Resolution of the involved claims required an adjudication of the amount of PCBs present on a particular property and whether that amount was sufficient to allow compensable damages to be awarded.

The individual damages issue in the present case do not appear, on the record, to be as complex. The degree of pollution at a particular area such as Crescent Beach can be established. That result will be common to all members of the class who have rights to that beach. The same appears to be true as to Leisure Shores and similar locations. Likewise, if the court, through a Daubert/Lanigan hearing or other pretrial procedures, establishes the proper method of calculating damages, application of that rule to an individual property will pose no unusual difficulty. Further, the justice presiding over this matter has the ability to bifurcate resolution of the numerous common issues from the determinations of individual claims for calculations of damages.

The issue of "typicality" requires no extensive discussion beyond that set forth above with respect to the question of individual damages. It is interesting to note that the defendants seem to argue that the particular use each person made of the beach and their "subjective" losses are relevant and require denial of class certification.

Whether such considerations are indeed relevant is an issue that would be properly considered in a class action. It may be that an objective standard is what the law requires in these situations. Further, "typicality" focuses on the conduct of the defendant and how that conduct is alleged to have affected the claimants.

> Typicality is established when there is 'a sufficient relationship ... between the injury to the named plaintiff and the conduct affecting the class, and the claims of the named plaintiff and those of the class are based on the same legal theory.' ... the plaintiff representative normally satisfies the typicality requirement with an allegation that the defendants acted consistently toward the [representatives and the] members of the particular class.' Weld at 87 (citations omitted).

The present plaintiffs have made that allegation, i.e. the defendants were negligent in allowing the release of the fuel oil.

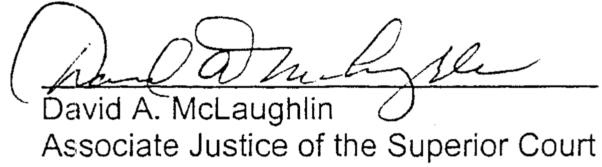
The final issue to be determined is whether certification will promote judicial efficiency and access to the court. Trial of this will probably involve somewhat complex issues of liability and damages. Some issues will probably affect both liability and damages. For example, what is the degree of harm that must have resulted for a cognizable claim for damages to exist? A justice at various stages of the proceeding (summary judgment, evidentiary rulings, and the charge to the jury, for examples) will be required to make decisions on issues that are complex. Although not presented directly by these motions, it may be that there will be issues as to the proper measure of damages and the type of testimony required to prove the same. Will evidence of loss of fair market rental value be admissible? If such evidence is admissible, is it to prove a direct loss or is it a proxy for use in hedonic analysis? The court can foresee a number of Daubert/Lanigan challenges, not to mention omnibus summary judgment motions. It

simply makes no sense for a number of judges sitting in different sessions to have to independently resolve these issues. The impact on the time available for other matters, such as jury trials, would be very adverse. In addition, since many of the evidentiary issues involve the exercise of discretion, there would be a clear risk of inconsistent rulings. Weld at 93. Granting certification to the "Mattapoisett" class will implement the policies of class certification. Numerous small claims where values might preclude a claimant from having a day in court can be resolved in an efficient manner. The court has considered whether the granting of the class certification will pressure the defendants to settle. On this record, it does not appear that certification of the "Mattapoisett" class could have such an effect.

ORDER

The plaintiffs' Motion for Class Certification is ALLOWED to the extent that the court certifies a plaintiff class consisting of all persons who, as of April 27, 2003, had an interest in real property located in the Town of Mattapoisett, Massachusetts, which property allegedly was damages as the result of the negligent operations of the Tug Evening Tide and oil being released or discharged from the barge B-120 into Buzzards Bay, which release or discharge commenced on April 27, 2003, and/or from the subsequent effort to clean-up said release or discharge. Excluded from this class are the defendants, any subsidiary thereof, their officers and directors as well as any judge presiding over this matter at any time and any of the judge's family members.

The defendants' Motion for Determination That Matter Is Not Maintainable As A Class Action is DENIED except as to the extent to the class is limited as set forth above.



David A. McLaughlin
Associate Justice of the Superior Court

Dated: March 2, 2006