

STATE OF MICHIGAN
COURT OF APPEALS

EARL RENNIE and BRENDA RENNIE,

Plaintiff-Appellee,

and

157 CLASS MEMBERS,

Plaintiffs-Appellants,

v

MARBLE HEAD LIME, INC., a/k/a
MARBLEHEAD LIME COMPANY,

Defendant-Appellee.

UNPUBLISHED

June 16, 2005

No. 249913

Wayne Circuit Court

LC No. 02-241029-NZ

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Appellants, 157 class members, appeal as of right, challenging the circuit court's orders entering judgment on a settlement to which the class representatives and defendant agreed, and denying a motion to set it aside. We vacate and remand.

The named plaintiffs commenced this action in November 2002, on behalf of themselves "and all other persons similarly situated," alleging that defendant invaded their property interests through emissions of harmful pollutants and noxious odors.

The named plaintiffs and defendant arrived at a settlement, to which the trial court granted preliminary approval, and ordered that the unnamed class members receive notification of the proceedings through publication in three area newspapers. At the hearing on the motion for entry of final judgment, the named parties reported that no unnamed class members had come forward to opt out of the proposed settlement, and the court agreed to enter final judgment on the settlement agreement.

The following month, counsel for 157 unnamed class plaintiffs (appellants) filed an emergency motion to set aside the settlement and judgment, emphasizing that the unnamed plaintiffs had not received adequate notice of the proceedings. The trial court ruled that the publication notice provided was reasonable and adequate, and that the settlement was fair, and

thus denied the motion. A trial court's decision on a motion to set aside a consent judgment is reviewed for an abuse of discretion. *Trendell v Solomon*, 178 Mich App 365, 369-370; 443 NW2d 509 (1989).

I. Notice

Appellants argue that the trial court erred in allowing notice to be served on the unnamed class members exclusively through newspaper publication. A trial court has "some discretion" in determining the adequacy of notice, but must remain mindful of the due process rights of the persons to be notified. *Kass v H B Shaine & Co*, 71 Mich App 101, 105-106; 246 NW2d 396 (1976).

"[T]he requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard." *Schroeder v City of New York*, 371 US 208, 212; 83 S Ct 279; 9 L Ed 2d 255 (1962). Accordingly, "[w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 213, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 318; 70 S Ct 652; 94 L Ed 865 (1950).

In *Schroeder*, the United States Supreme Court further observed that "[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice . . ." *Schroeder, supra* at 213, quoting *City of New York v New York, NH & HR. Co*, 344 US 293, 296; 73 S Ct 299; 97 L Ed 333 (1953). Accordingly, "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder, supra* at 212-213.

MCR 3.501(C) governs the service of notice on class members. Subrule (C)(4)(a) requires "[r]easonable notice . . . as the court directs," and subrule (C)(4)(b) states that the court "may require individual written notice to all members who can be identified with reasonable effort," but may also resort to "another method reasonably calculated to reach the members of the class," including publication. Subrule (C)(4)(c)(i)-(v) directs that the court, in deciding on the manner of notice, consider the extent and nature of the class, the relief sought, the expense of notification, the resources of the plaintiff, and prejudice to be suffered by class members whom notice does not reach.

The record in this case does not reveal any discussion concerning the sufficiency of serving notice exclusively through publication until appellants came forward with their objections. When they did bring their challenge, the trial court, after hearing arguments, issued no factual findings or legal conclusions, other than to declare that "[t]he Court's of the opinion that based upon its familiarity with the case that the notice by publication was both reasonable and adequate."

It is thus not possible on the existing record to ascertain the extent to which the trial court considered any of the factors set forth in the court rule. Appellees themselves resort to the mere assertion that the court "[u]ndoubtedly . . . considered the five factors set forth in MCR 3.501(C)(4)(c)," and that the named plaintiffs' lack of ready access to names and addresses of

potential class members “was undoubtedly one of the many factors considered by the trial court in determining that notice through publication . . . was the ideal method for class notice in this case.”

However, as counsel for the named plaintiffs stated, this case “was brought to cease lime dust emission and particulate emission.” It is apparent, then, that potential plaintiffs are persons residing in proximity to defendant’s physical operations, presumably including the named plaintiffs’ neighbors.

In light of the obvious, and judicially well-recognized, problems with publication notice, we conclude that the circuit court erred in permitting exclusive reliance on publication to serve notice on the unnamed members of the class in question without stating on the record factual findings and legal conclusions to justify that decision. MCR 3.501(C)(4)(c) and MCR 2.517(A). “An appellate court cannot review a decision for abuse of discretion unless it knows how and why the discretionary decision was made.” *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 631; 420 NW2d 835 (1987).

Because it is not clear whether the trial court erred in allowing notice solely by publication, it is not clear whether the court should have granted the motion to set aside the settlement agreement because of faulty notice to the unnamed class members. For these reasons, we remand this case to the trial court for full development of these issues.

Because we remand on the ground that the trial court failed to justify its decision to rely exclusively on publication notice, we decline to reach appellants’ challenge to the form of the notice as it appeared in the three newspapers.

II. Adequacy of Class Representation

Appellants argue that the trial court erred in allowing the named plaintiffs to act as class representatives. Appellees assert that this issue was not raised below, but we regard the challenge to the named plaintiffs’ representation of the unnamed plaintiffs as inhering in the articulated complaint that the settlement agreement was unfair and inadequate, and covered an “unconscionable” scope of persons and claims. This Court reviews a trial court’s decision to certify a class for clear error. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 588; 654 NW2d 572 (2002).

Appellees also argue that appellants, being unnamed parties who failed to appear before judgment was entered, lack standing to raise objections to the judgment. However, challenges to standing must be timely raised or they are waived. MCR 2.116(C)(5) and 2.116(D)(2). There was no challenge to appellants’ standing below, and so objections are waived.

The merits of this issue are closely bound up with those of the notice issue. If appellants received adequate notice of the proceedings, then the court’s decision not to allow them to

disturb the judgment after the fact may not have been an abuse of discretion.¹ If, however, appellants did not receive adequate notice, then that error unfairly truncated their ability to challenge appellees' adequacy to represent their interests.

The factors relevant to the certification of a class are set forth in MCR 3.501(A)(1). Subrule (A)(1)(d) specifies that "the representative parties will fairly and adequately assert and protect the interests of the class . . ." This provision "*requires* the trial court to *scrutinize* whether the representative parties will fairly and adequately assert and protect the interests of the class." *A & M Supply, supra* at 601 (emphases added). In this case, however, it is not clear from the record that the trial court applied any such scrutiny.

Again, appellees can do more than resort to mere assertion in arguing to affirm the trial court, stating that "the trial court undoubtedly found there to be no dispute that Plaintiffs' counsel has had great experience with class action litigation," and thus acted with the required "zeal and competence." Although appellees argue that the trial court's statement that the settlement was fair carries an implicit conclusion that appellees adequately represented the interests of appellants, the court's lack of specific factual findings or legal conclusions leaves this Court without a basis to review the decision. *Houston, supra*.

For these reasons, we remand this case to the trial court with instructions to set aside the settlement agreement, and to decide anew whether to enter judgment on that agreement after full factual and legal development of appellants' objections concerning both notice and the adequacy of the named plaintiffs' representation of the class.

Vacated and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White

¹ "The test for an abuse of discretion is very strict, and oftentimes elevates the standard of review to an apparently insurmountable height." *Sparks v Sparks*, 440 Mich 141, 150-151; 485 NW2d 893 (1992) (footnote, internal quotation marks, and citation omitted).