STATE OF MICHIGAN

IN THE SUPREME COURT

GARY & KATHY HENRY,

Plaintiffs-Appellees,

v

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Docket No. _____
Court of Appeals No. 328716

Saginaw County Circuit Court
Case No. 03-47775-NZ
Hon. Patrick J. McGraw

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DEFENDANT-APPELLANT THE DOW CHEMICAL COMPANY'S APPLICATION FOR LEAVE TO APPEAL

July 13, 2017

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ORDERS APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant The Dow Chemical Company seeks leave to appeal the Court of Appeals' decision of June 1, 2017 (**Tab 1**) affirming the Saginaw County Circuit Court's order of July 17, 2015 (**Tab 2**) denying Dow's motion for summary disposition as to the negligence and nuisance claims pleaded in plaintiffs' Third Amended Class Action Complaint (**Tab 3**). This application is timely filed within 42 days of the date of the Court of Appeals' decision. See MCR 7.305(C)(2).

Dow respectfully requests this Court to reverse the Court of Appeals' decision and remand for the entry of an order to dismiss plaintiffs' common-law negligence and nuisance claims. In the alternative, Dow requests the Court to enter a peremptory order reversing the Court of Appeals' decision and remanding to the circuit court for entry of summary disposition in Dow's favor.

STATEMENT OF QUESTIONS PRESENTED

I. Whether plaintiffs' allegations of risk-based "injury" give rise to a cause of action for common-law negligence or nuisance.

II. Whether, assuming that plaintiffs' allegations of risk-based "injury" give rise to a cause of action for common-law negligence or nuisance, such a cause of action is time-barred.

INTRODUCTION AND SUMMARY OF ARGUMENT

After a remarkable fourteen-year odyssey through the courts of this state, this remains a case in search of a theory. Plaintiffs allege that Dow polluted the Tittabawassee River with the chemical dioxin over the past century, and that sporadic flooding from the river contaminated the "100 year flood plain" on which their properties are located, subjected them to increased risk and fear of future disease, and adversely affected their property values. For the past fourteen years, plaintiffs have attempted to dress up these risk-based environmental claims as traditional common-law torts. By now, it should be perfectly clear that those attempts are in vain. This is an environmental regulatory matter, not a tort case. No matter what label is affixed to plaintiffs' risk-based allegations, they do not give rise to a legally cognizable injury subject to a judicial remedy. Let there be no mistake: plaintiffs are trying to lure the courts into the business of environmental regulation. Under Michigan's system of separated powers, that is an invitation this Court must decline. Assessing risks and weighing the costs and benefits of regulation is a legislative function, not a judicial one, and indeed the Legislature has established and enabled the Michigan Department of Environmental Quality (MDEQ), to do just that. It is neither necessary nor appropriate for the Michigan courts to act as a surrogate MDEQ. Accordingly, this Court should grant this application for review and reverse the lower courts' decisions allowing plaintiffs' ersatz tort claims to proceed.

There can be no question that this case involves "legal principle[s] of major significance to the state's jurisprudence." MCR 7.305(B)(3). Indeed, this Court has granted plenary review in this case on two prior occasions and rendered two landmark decisions. The first, in 2005, rejected plaintiffs' efforts to pursue a medical monitoring claim precisely because the tort system is not the proper forum for assessing risks and weighing the costs and benefits of regulation. See *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005) (*Henry I*). The second, in 2009,

clarified the standards for pursuing claims on a classwide basis. See *Henry v Dow Chem Co*, 484 Mich 483; 772 NW2d 301 (2009) (*Henry II*). The issues presented here are no less weighty. Indeed, they cut to the very heart of this dispute: does the Michigan common law of negligence and nuisance cover claims of risk-based "injury" and, if so, when do such claims accrue? This Court already recognized the importance of these issues by directing the Court of Appeals, which had declined Dow's application for leave to appeal, to review the circuit court's order denying summary disposition of plaintiffs' negligence and nuisance claims. A sharply divided panel of the Court of Appeals has now affirmed the circuit court's order in a published opinion, thereby setting the stage for this Court's plenary review of these important legal issues.

At issue here is nothing less than the proper, and properly limited, role of the judiciary in a democratic system of separated powers. The circuit court held, and a divided panel of the Court of Appeals affirmed, that plaintiffs have stated valid negligence and nuisance claims under Michigan law. As this Court recognized in *Henry I*, however, plaintiffs have alleged no present physical injury to person or property; instead, they allege increased risk and fear of future disease and diminished property values. But courts—unlike regulators—redress *actual* injuries, not risk or risk-based fear of potential *future* injuries. The lower courts missed this foundational point, and held that plaintiffs suffered a legally cognizable injury in February 2002, when Michigan regulators issued a notice regarding the presence of dioxins in the Tittabawassee River floodplain. In particular, the lower courts held that plaintiffs could piggy-back on the regulators' actions by suing Dow in both negligence and nuisance. That holding represents a fundamental distortion of Michigan tort law: because regulators act based on risk, but increased risk is not a legally cognizable tort injury, both plaintiffs' negligence and nuisance claims fail as a matter of law. To characterize a protective and risk-based regulatory restriction as a legally cognizable

injury is to erase the line between risk and injury—a line that derives from "the very logic of tort law." *Henry I*, 473 Mich at 74.

And even if increased risk *were* a legally cognizable injury, the Michigan regulators' February 2002 notice did not itself create any increased risk, and hence did not trigger the statute of limitations. Rather, the alleged increased risk arose many years earlier—well outside the three-year limitations period for both negligence and nuisance—when the Tittabawassee River and its floodplain were allegedly contaminated with dioxin in the first place. The February 2002 MDEQ notice was a response to an *existing* risk; it did not create the risk (and hence the alleged injury). The courts below thus distorted not merely substantive tort law, but also statute-of-limitations law. Although Michigan does not recognize either the discovery rule or the continuing injury rule, the lower courts effectively circumvented both those rules by characterizing a regulatory response to alleged decades-old environmental contamination as a separate and independent injury. Nor can plaintiffs salvage the timeliness of their state-law tort claims by invoking Section 309 of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq*, which purports to preempt the application of certain state statutes of limitations with a federal discovery rule. Plaintiffs have never established that this provision applies here in the first place, and it would do plaintiffs no good even if it did, because their claims are manifestly untimely even under CERCLA's federal discovery rule.

It is high time for this Court to bring this legal odyssey to an end. After fourteen years, plaintiffs have identified no legally cognizable injury, and hence no viable tort claims. And even if such claims existed, they would long since be time-barred, as they challenge alleged risks from pollution that dates back a century. Interlocutory review is warranted to avoid the prospect of

dozens of unnecessary individual trials and the associated waste of judicial resources required to obtain final judgments in this litigation alone—not to mention the havoc that the decisions below, if allowed to stand, would wreak on Michigan's law and economy. It is plain—*here and now*—that plaintiffs' tort claims are not viable as a matter of law and, even if they were, are time-barred. If anything, the lower court decisions in this case underscore that this Court's further guidance on basic tenets of tort and limitations law, and the separation-of-powers principles that undergird them, is overdue.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This Court outlined the relevant background facts in its prior decisions in this case. Dow has operated a plant on the banks of the Tittabawassee River in Midland, Michigan, for over a century. *Henry I*, 473 Mich at 69. In February 2002, the Michigan Department of Environmental Quality (MDEQ) released a notice regarding the presence of dioxins in the River's floodplain. See MDEQ February 2002 Notice (**Tab 4**). That notice was based on soil sampling at three locations in the floodplain, none of which was on any of the plaintiffs' properties. See *id.*

In March 2003, 26 individual plaintiffs filed this class action alleging that Dow polluted the Tittabawassee River with dioxin over the past century, and—through intermittent flooding of the River—that dioxin made its way onto the River's floodplain, where plaintiffs own real property. Plaintiffs purported to represent not only themselves, but also two putative classes. "The first class was composed of individuals who owned property in the flood plain of the Tittabawassee River and who alleged that their properties had declined in value because of the dioxin contamination. The second group consisted of individuals who have resided in the Tittabawassee flood plain area at some time *since 1984* and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from

Dow's Midland plant." *Henry I*, 473 Mich at 70 (emphasis added). In their original complaint, and their first, second, and third amended complaints, plaintiffs alleged six claims for relief: Count I - Nuisance, Count II - Trespass, Count III - Negligence, Count IV - Public Nuisance, Count V - Strict Liability or Abnormally Dangerous Activity, and Count VI - Medical Monitoring. By the time plaintiffs filed their Third Amended Class Action Complaint in February 2004, the original 26 named plaintiffs had swelled to 173 named plaintiffs.

In August 2003, the trial court (Borrello, J) granted Dow's motion for partial summary disposition as to Count II - Trespass and Count V - Strict Liability or Abnormally Dangerous Activity, but denied Dow's motion as to Count VI - Medical Monitoring. Dow applied for leave to appeal that decision to the Court of Appeals, but that application was denied. Dow then sought leave to appeal to this Court, which granted the application. This Court reversed the trial court's order denying Dow's motion for summary disposition as to the "medical monitoring" claim and remanded for entry of summary disposition in Dow's favor on that claim. See *Henry I*, 473 Mich at 102. As this Court explained, plaintiffs' "medical monitoring" claim was, at bottom, a negligence claim, and Michigan law does not recognize such a claim in the absence of "a present physical injury to person or property." *Id.* at 75. Because "it is apparent that plaintiffs do not claim that they suffer from present physical injuries to person or property," their "medical monitoring" claims thus failed as a matter of law. *Id.* at 77.

On remand from *Henry I*, at plaintiffs' request, the trial court took up plaintiffs' motion for class certification on their claims for nuisance (Counts I and IV) and negligence (Count III). The record developed in connection with that motion showed that whether and to what extent each property in the alleged class area has flooded from the Tittabawassee River, and whether such property is contaminated with dioxin, varies widely and depends on an assessment of that

property's individualized history and circumstances. Thus, some of the named plaintiffs' properties had *never* flooded, while others had flooded only once (in 1986) and not since, and for some plaintiffs it was not clear that the waters from such floods came from the Tittabawassee or other (non-contaminated) rivers. The trial court nonetheless certified the proposed classes based on the plaintiffs' *allegations*, and a sharply divided panel of the Court of Appeals affirmed. Once again, Dow sought leave to appeal to this Court, which granted the application and remanded for the circuit court to engage in the more searching analysis of certification required by Michigan law. See *Henry II*, 484 Mich at 496-509. On remand, the trial court decertified the class.

After the class was decertified, Dow moved for summary disposition of the remaining claims alleged in the Third Amended Class Action Complaint, negligence and nuisance, pursuant to MCR 2.116(C)(7) and (8). In particular, Dow argued that (1) plaintiffs' allegations failed to state a claim for common-law negligence or nuisance as a matter of law, and (2) in the alternative, any such claims were time-barred under the applicable three-year statute of limitations of MCL 600.5805.

The circuit court denied the motion. According to that court, the Third Amended Class Action Complaint adequately pleaded both negligence and nuisance claims by alleging that "the dioxin released by Dow into the Tittabawassee river directly and permanently contaminated their individual private property as well as public property, has unreasonably interfered with plaintiffs' use and enjoyment of both public and private property, and has caused Plaintiffs to suffer individual financial harm in the form of decreased property values." 7/17/15 Order, at 2. Similarly, the court rejected Dow's limitations defense by declaring that "[t]he types of injuries Plaintiffs allege began, at the earliest, in February of 2002," and hence "Plaintiff's causes of

action accrued" at that time, "when the MDEQ's phase I sampling results were released to the public and concluded that elevated dioxin concentrations were pervasive in the Tittabawassee river floodplain." *Id.* at 3. Whereas before February 2002, "Plaintiffs were free to use and enjoy their property without worry or restriction, and to sell their property without loss of value," after that time, "MDEQ's dioxin-based restrictions unreasonably and significantly interfered with Plaintiffs' use and enjoyment of their property, prevented Plaintiffs from freely using their property, and devalued Plaintiffs' property." *Id.*

Dow sought immediate appellate review.[1] After the Court of Appeals denied the application for leave to appeal, see 12/17/15 Order, Dow sought relief from this Court. In lieu of granting leave to appeal, this Court remanded the case to the Court of Appeals for consideration as on leave granted. See 6/28/16 Order.

A divided Court of Appeals panel then affirmed the circuit court's order in a published opinion. The majority, per Judge Jansen, held that the Third Amended Class Action Complaint stated cognizable negligence and nuisance claims because it "alleged actual injury in the form of [1] direct contamination and [2] restrictions on the use of their property." 6/1/17 Op., at 9; see

[1] While Dow was pursuing interlocutory review of the trial court's order denying the motion to dismiss the Third Amended Class Action Complaint, plaintiffs moved for leave to file a Fourth Amended Complaint. The trial court denied that motion on October 21, 2015, but allowed plaintiffs to file individual complaints. Needless to say, the filing of such new complaints does not moot this challenge to the circuit court's order denying the motion to dismiss the prior complaint insofar as "the defects raised in the original motion remain in the new pleading." 6 Charles Alan Wright *et al*, *Federal Practice & Procedure* § 1746 (Apr 2017 update). Were the law otherwise, plaintiffs could effectively thwart appellate review of an order denying a motion to dismiss. Upon the parties' stipulation, the trial court has since stayed the proceedings below.

also *id.* at 10. And those claims were timely, the majority continued, because "plaintiffs allege specific facts to support the argument that they did not sustain *injury* until, at the earliest, February, 2002," when the MDEQ released its notice. *Id.* at 5 (emphasis added). According to the majority, "[t]he 2002 MDEQ notice did not simply inform plaintiffs of the harm caused by defendants' activities"; rather, "[i]t marked the creation of the damages element necessary for plaintiffs' nuisance and negligence claims." *Id.* at 6; see also *id.* ("Plaintiffs' damages, including the loss of the use and enjoyment of their property and depreciation of their property values, arose from the harm of dioxins in their soil reaching potentially toxic levels but did not exist in any tangible form until the MDEQ published its 2002 notice."). Because the majority concluded that "plaintiffs' complaint was filed within the three-year limitations period under Michigan law," it did not address plaintiffs' argument that Section 309 of CERCLA "preempts our Supreme Court's interpretation of the Michigan statute of limitations to provide for application of a discovery rule in toxic tort cases." *Id.* at 7.

Judge Gadola dissented. He did not address whether, as a threshold matter, plaintiffs stated cognizable negligence and nuisance claims, because he concluded that any such claims were barred by the three-year statute of limitations. In his view, "[t]he harm to plaintiffs is the presence of dioxin in the soil of their properties." 6/1/17 Op. at 4 (dissenting opinion). Because "the publication of the MDEQ bulletin [in 2002] did not place the dioxins in plaintiffs' soils," it is not the relevant wrong underlying plaintiffs' claims. *Id.* Rather, "[t]he MDEQ bulletin, at most, marks the *discovery* by plaintiffs of the extent of the harm and the level of damages." *Id.* (emphasis in original).

This application for leave to appeal follows.

STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Henry I*, 473 Mich at 71. "A movant is entitled to summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.'" *Id.*, *quoting* MCR 2.116(C)(8). This standard governs this Court's review of Dow's argument that the trial court erred by denying the motion for summary disposition because plaintiffs' allegations of risk-based "injury" do not give rise to a cause of action for common-law negligence or nuisance.

Turning to the statute-of-limitations issue, summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts demonstrate that a claim is time-barred. See, e.g., *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). "If the pleadings or other documentary evidence reveal that there is no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred." *Vance v Henry Ford Health Sys*, 272 Mich App 426, 429-430; 726 NW2d 78 (2006). The trial court below addressed only the standard of review under MCR 2.116(C)(8) even though Dow's motion for summary disposition based on the statute of limitations was brought under MCR 2.116(C)(7). See 7/17/15 Order at 2.

ARGUMENT

I. Plaintiffs' Allegations Of Risk-Based "Injury" Do Not Give Rise To A Cause Of Action For Common-Law Negligence Or Nuisance.

By holding that the Third Amended Class Action Complaint states actionable claims for both common-law negligence and nuisance, the lower courts in this case have stretched Michigan tort law beyond all bounds of principle and precedent. This is, and always has been, a case about *risk*: plaintiffs allege that the presence of dioxins in the Tittabawassee River floodplain increased their risk of disease, and that such increased risk, and associated risk-based

fears, represent cognizable legal injuries. They are wrong. Courts provide remedies for actual, present injuries, not increased risk or risk-based fear of future injury. Risk is the concern of regulatory agencies, not courts. The judicial system is not set up to deal with the types of risk that drive regulatory action: judges and juries, unlike regulators, are not equipped to determine how much risk is too much, nor when a claim based on such risk accrues. To characterize an increased risk of injury as an injury is to ask the judiciary to cross a bright line, and to assume the role of regulatory agencies. The lower courts in this case crossed that line.

Not coincidentally, the lead case in this area is *this very case*. In *Henry I*, this Court addressed the legal sufficiency of the allegations of the same complaint at issue here, the Third Amended Class Action Complaint. In particular, this Court considered whether plaintiffs' putative "medical monitoring" claim was cognizable under Michigan law, and concluded that it was not. See 473 Mich at 71-102. The Court of Appeals majority below dismissed *Henry I* as nothing more than a case about medical monitoring, with no broader implications for the general common law of negligence or nuisance. See 6/1/17 Op. at 8 ("In *Henry I*, the Court considered *only* the claim for medical monitoring," and "made no ruling with regard to the sufficiency of the negligence and nuisance claims raised by the property-owner class") (emphasis added). That is far too narrow a reading of *Henry I*.

Indeed, the basic lesson of *Henry I* is that courts are not in the business of regulating risk, and that risk-based injuries thus are not legally cognizable. Thus, in the course of concluding that Michigan does not recognize a medical-monitoring claim, *Henry I* provided substantial guidance about Michigan tort law generally, and Michigan negligence law in particular. As *Henry I* explained, "at its core, plaintiffs' medical monitoring claim is one of negligence." 473 Mich at 71. But, the Court continued, a plaintiff cannot state a negligence claim under Michigan

law in the absence of "a present physical injury to person or property." *Id.* at 76; see also *id.* ("[P]resent harm to person or property is a necessary prerequisite to a negligence claim.") (emphasis in original).

Reviewing the allegations of the Third Amended Class Action Complaint—the same complaint reviewed by the lower courts here—the *Henry I* Court noted:

> [T]he plaintiffs do not allege that the defendant's negligence has actually caused the manifestation of disease or physical injury. Instead, they allege that defendant's negligence has created the *risk* of disease—that they *may* at some indefinite time in the future develop disease or physical injury because of defendant's allegedly negligent release of dioxin. [*Id.* at 67 (emphasis in original).]

And precisely "[b]ecause plaintiffs do not allege a *present* injury, plaintiffs do not present a viable negligence claim under Michigan's common law." *Id.* at 68 (emphasis in original); see also *id.* at 72 ("[D]efendant argues that plaintiffs have not established any present physical injuries, and have therefore failed to state a valid negligence claim. We agree."); *id.* at 77 ("[I]t is apparent that plaintiffs do not claim that they suffer from present physical injuries to person or property."). In short, *Henry I* recognized that "it is necessary for us to determine the exact nature of plaintiffs' claim," and decided that "plaintiffs are in fact seeking compensation for future injuries they *may* suffer," as opposed to "present injuries they *have* suffered." *Id.* at 72 (emphasis added).

Needless to say, *Henry I* should have been the beginning and the end of the negligence claim pleaded in the Third Amended Class Action Complaint. As noted above, this Court carefully reviewed that complaint, and categorically held that it did not state a viable negligence claim because plaintiffs did not allege any present physical injury to person or property. On remand, the trial court was not free to second-guess this Court's interpretation of the complaint, or this Court's conclusion that it failed to allege a viable negligence claim. But that is exactly

what the trial court did. Contrary to this Court's unambiguous conclusion, the trial court held that the Third Amended Class Action Complaint *did* allege "present, physical injury, in addition to resulting financial damage, [which] satisfies the pleading requirements of Michigan law for the tort of negligence." 7/17/15 Op., at 2. That is so, the trial court stated, because "[p]laintiffs allege that ... the dioxin released by Dow into the Tittabawassee river directly and permanently contaminated their individual private property as well as public property, has unreasonably interfered with plaintiffs' use and enjoyment of both public and private property, and has caused Plaintiffs to suffer individual financial harm in the form of decreased property values." *Id.* The Court of Appeals affirmed, holding that "[p]laintiffs, in their Third Amended Class Action Complaint, alleged actual injury in the form of [1] direct contamination and [2] restrictions on the use of their property. ... Accepted as true, plaintiffs' allegations identify a present, physical injury to support their negligence claims." 6/1/17 Op., at 9.

As a threshold matter, these rulings are squarely inconsistent with the law of the case as established in *Henry I*, and should be reversed for that reason alone. Under the law of the case doctrine, "an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Adm'r v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). On remand, the trial court and the Court of Appeals reviewed the *same* complaint this Court reviewed in *Henry I*, and simply came to the opposite conclusion as to whether plaintiffs alleged a present physical injury to person or property so as to support a negligence claim. Those courts had no authority to revisit that issue.

Nor is it any answer to assert, as did the Court of Appeals majority, that "[i]n *Henry I*, the Court considered *only* the claim for medical monitoring," and "made no ruling with regard to the sufficiency of the negligence ... claim[] raised by the property-owner class." 6/1/17 Op., at 8

(emphasis added). As noted above, this Court in *Henry I* analyzed the medical monitoring claim as a putative negligence claim, which failed precisely because "plaintiffs do not claim that they suffer from present physical injuries to person *or property*." 473 Mich at 77 (emphasis modified).

But even putting that (dispositive) point aside, the lower court rulings at issue here are squarely inconsistent with substantive Michigan negligence law as set forth in *Henry I*. As noted above, that case holds that a viable negligence claim requires a present physical injury to person or property. None of the various "injuries" cited by the lower courts in upholding the negligence claim—(1) the alleged contamination of plaintiffs' properties without present physical injury, (2) the alleged risk-based restrictions on the use of those properties, and (3) the alleged diminution in value of those properties—involves a present physical injury to those properties.

Again, that conclusion flows ineluctably from *Henry I*. As this Court explained in that case, "[i]t is a reality of modern society that we are all exposed to a wide range of chemicals and other environmental influences on a daily basis." 473 Mich at 86 n 15. That is why exposure to a contaminant, in and of itself, is not a legally cognizable injury. See *id.* at 72-73 (discussing *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 314; 399 NW2d 1 (1986)); *id.* at 85-86, citing *Metro-North Commuter R Co v Buckley*, 521 US 424, 442 (1997). Rather, an injury to a person arises only when such an exposure results in disease. See *id.* That point is equally—if not more—true with respect to property. Real property, like a real person, is constantly exposed to a wide range of contaminants. It would be entirely anomalous to hold (as this Court did in *Henry I*) that the presence of a contaminant in a human body, in and of itself, does *not* give rise to a legally cognizable injury, but that the presence of a contaminant on real property, in and of itself, *does* give rise to such an injury. See, *e.g.*, *Rainer v Union Carbide Corp*, 402 F3d 608,

620 (CA 6, 2005), quoting *Rockwell Int'l Corp v Wilhite*, 143 SW3d 604, 623 (Ky Ct App 2003). While exposure to contamination *can* lead to a physical injury to person or property, exposure or contamination is not itself a physical injury to person or property. To hold otherwise would be "to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay" damages to persons who have suffered no actual injury. *Henry I*, 473 Mich at 100. Because plaintiffs here have not alleged any present physical injury to person or property, but instead increased risk and fear of future disease and diminished property values, they have not stated a viable negligence claim under Michigan law.

Similarly, alleged regulatory restrictions on the use of land do not qualify as a "present physical injury to person or property." A "physical" injury is an injury to the land itself. A restriction on the *use* of the land is not a *physical* injury to the land. Accordingly, under *Henry I*, a restriction on the use of land cannot give rise to a negligence claim.

Finally, the circuit court erred by concluding that plaintiffs pleaded a "present, physical injury," and thereby "satisfie[d] the pleading requirements of Michigan law for the tort of negligence" by alleging that they "suffer[ed] individual financial harm in the form of decreased property values." 7/17/15 Order, at 2. An alleged loss of property value is not a physical injury. And *Henry I* teaches that a financial loss alone does not state a viable negligence claim; rather, a present physical injury to person or property is necessary. See 473 Mich at 77-78. A financial loss is not a legally cognizable injury; at most, it represents the *damages* that may flow from an injury. "A financial 'injury' is simply not a present physical injury, and thus not cognizable under our tort system." *Id.* at 78.

And plaintiffs' claims about increased risk and risk-based fears fare no better under the common law of nuisance. That tort is commonly described as "a significant interference with the use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 309; 487 NW2d 715 (1992). But not *every* alleged significant interference with the use and enjoyment of land gives risk to a nuisance claim; rather, a nuisance plaintiff must identify a "legally cognizable injury." *Id.* at 316. Thus, for example, *Adkins* held that a diminution of property value, in and of itself, is not a legally cognizable nuisance injury *regardless* of whether such a diminution actually diminishes a landowner's enjoyment of his property. See 440 Mich at 311-20; see also *Henry I*, 473 Mich at 78 ("A financial 'injury' is ... not cognizable under our tort system.").[2] A plaintiff who cannot "show invasion of a legally cognizable interest" cannot state a nuisance claim. *Adkins*, 440 Mich at 315 n.32. In this situation, this Court explained, the plaintiff has at most suffered *damnum absque injuria*—he may have suffered some damage in fact, but cannot recover in court in the absence of a cognizable injury at law. See *id.* at 309-11 and nn 21-22. As noted above, Michigan tort law does not recognize an increased risk of injury from environmental contamination as a legally cognizable injury. See *Henry I*, 473 Mich at 72-73 (Michigan law "squarely rejects the proposition that mere exposure to a toxic substance and the increased risk of future harm constitutes an 'injury' for tort purposes"); *id.* at 73 ("[A]lleged damages ... incurred in anticipation of possible future injury rather than in response to present injuries ... are not derived from an injury that is cognizable under Michigan tort law."). And if increased risk is not a cognizable injury, it follows that fear based on increased risk is not a

[2] Thus, insofar as the circuit court concluded that plaintiffs could state a nuisance claim based on alleged diminution of property value, see 7/17/15 Order, at 2, that conclusion is squarely inconsistent with *Adkins.*

cognizable injury. Thus, even if plaintiffs alleged facts that an increased risk or risk-based fear interfered with their use or enjoyment of property, they would not state a legally cognizable injury.

That point makes sense because, as *Henry I* underscored, the courts of this state do not deal in risk. Risk is a fact of life, and allowing plaintiffs to sue based on risk "would create a potentially limitless pool of plaintiffs." 473 Mich at 83. Allowing such risk-based claims would not only swamp the judicial system, but would "drain resources needed to compensate those with manifest physical injuries and a more immediate need for [relief]." *Id.* at 84; see also *id.* at 99 (noting that a tort system in which "resources are doled out on a first-come, first-served basis" would risk diverting resources from injured to uninjured persons). In addition, an analysis of risk necessarily entails "extensive fact-finding and the weighing of important, and sometimes conflicting, policy concerns" that the judiciary is ill-equipped to undertake. *Id.* at 84. "Because ... we lack sufficient information to assess intelligently and fully the potential consequences of our decision, we do not believe that the instant question is one suitable for resolution by the judicial branch." *Id.* In addition, it is not clear when some increased risk is enough to give rise to a risk-based claim, or when any such claim would accrue.

Indeed, as this Court emphasized in *Henry I*, to allow plaintiffs to sue in tort based on alleged environmental risks would violate the separation of powers. See *id.* at 89-90. Courts are in the business of redressing injuries, not assessing and addressing risks. "[A] threshold concern would likely be the determination" of the level of risk necessary to trigger a claim. *Id.* at 91. "Such a determination involves the consideration of a number of practical questions and the balancing of a host of competing interests—a task more appropriate for the legislative branch than the judiciary." *Id.* And it is not only unnecessary but inappropriate for courts to intrude

into the regulatory domain where, as here, "the Legislature has already provided a method for dealing with the negligent emission of toxic substances such as dioxin." *Id.* at 93. In particular, "[t]he Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, empowers the [Michigan Department of Environmental Quality (MDEQ)] to deal with the environmental and health effects of toxic pollution." *Id.*; see also *id.* at 68 ("[T]he Legislature has already established policy in this arena by delegating the responsibility for dealing with health risks stemming from industrial pollution to the [MDEQ]." Because "the Legislature has authorized the MDEQ to address precisely the sort of environmental and health risks occasioned by Dow's alleged emission of dioxin into the Tittabawassee flood plain," *id.* at 94, courts have no license to take up the regulatory mantle by entertaining risk-based tort claims.

It is no answer to argue that courts should intervene because the MDEQ has not addressed the risks to plaintiffs' satisfaction. See 3d Am Compl ¶ 3 ("While Dow lobbies the government so that Dow may do little or nothing; while the government contemplates, considers and studies Dow's requests, nothing is done."). This Court in *Henry I* rejected plaintiffs' argument that judicial intervention was warranted because "the MDEQ's response has been insufficient," noting that "the Legislature has already signaled its preference" for addressing environmental risks through the environmental statutes administered by the MDEQ. 473 Mich at 95. In light of this statutory regime, there is simply no basis for the courts to recognize a new private right of action to enforce the risk-based regulatory regime set forth in the NREPA and enforced by the MDEQ. Here, as in *Henry I*, this Court should "decline to create this alternative remedial regime." *Id.* at 95; see generally *Lash v City of Traverse City*, 479 Mich 180, 191-197; 735 NW2d 628 (2007) (refusing to imply private right of action to enforce statute); *Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 30-31; 556 NW2d 4 (1997) ("Michigan

jurisprudence holds that where a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred."). As *Henry I* recognized, allowing such novel risk-based claims would involve "a transformation in tort law that will require the courts of this state—in this case and the thousands that would inevitably follow—to make decisions that are more characteristic of those made in the legislative, executive, and administrative processes." 473 Mich at 80.

For similar reasons, any alleged regulatory restrictions on the use of property imposed by the MDEQ cannot form the basis for a valid nuisance claim. Plaintiffs have alleged that the "MDEQ has invoked NREPA to restrict plaintiffs' outdoor activities on their property; require plaintiffs to obtain state permits for all major household soil movement activities; and compel plaintiffs to disclose all available information about area dioxin contamination to potential buyers under penalty of law." 3d Am Compl ¶ 145. But plaintiffs have never explained how such risk-based regulatory "restrictions" create a cognizable tort injury. And neither plaintiffs nor the courts below have identified any case in the history of Michigan law holding that regulatory restrictions on the use of property can give rise to a nuisance claim. That is no oversight: regulators, after all, operate on the basis of risk, not actual injury.

The bottom line here is that this case presents fundamental issues about the role of the Michigan courts in adjudicating claims based on environmental risk under the traditional tort rubrics of negligence and nuisance. The lower courts broke new and dangerous legal ground by allowing plaintiffs to proceed with these claims, and those decisions warrant this Court's review.

II. Even Assuming That Plaintiffs' Allegations Of Risk-Based "Injury" Give Rise To A Cause Of Action For Common-Law Negligence Or Nuisance, Such A Cause Of Action Is Time-Barred.

Even assuming for argument's sake that plaintiffs have stated viable negligence and nuisance claims, there is no conceivable way that those claims could have been timely filed in March 2003. Plaintiffs allege that Dow polluted the Tittabawassee River with dioxins over the course of a *century*, and that floods over the course of that period contaminated the River's floodplain. See 3d Am Compl ¶¶ 116, 126. Even if such contamination, or the resulting increased risk or fear of disease, could be characterized as legally cognizable tort injuries (which, as explained above, they cannot), plaintiffs do not, and cannot, allege that such injuries started within the three years before they filed their initial complaint. Accordingly, this lawsuit is time-barred by any measure.

A. Plaintiffs' Tort Claims Are Time-Barred Under Michigan Law.

The lower courts concluded that plaintiffs' tort claims were timely filed under Michigan law only by mischaracterizing the "wrong" alleged here. MCL 600.5827. According to the circuit court, "[p]laintiffs' causes of action accrued in February of 2002 when the MDEQ's phase I sampling results were released to the public and concluded that elevated dioxin concentrations were pervasive in the Tittabawassee river floodplain." 7/17/15 Order, at 3. The Court of Appeals majority affirmed that conclusion, agreeing with the circuit court that "[p]laintiffs' claims did not accrue until the 2002 MDEQ notice was released and plaintiffs first suffered damages as a result of dioxin contamination." 6/1/17 Op., at 7.

That conclusion misses the mark. The February 2002 MDEQ notice is not the source of plaintiffs' alleged injuries, and plaintiffs have not sued the MDEQ. Rather, plaintiffs allege that they *learned* of their injury upon the publication of that notice:

> In early 2002, those families *learned* shocking news from the Michigan Department of Environmental Quality. They *learned* for the first time that all of these activities are dangerous, especially to their children. They *learned* that their homes and yards are polluted with Dioxin, the same toxin that has caused entire towns to disappear; a substance that has been described as 'one of the deadliest toxins known to man.' They *learned* that they are at risk to suffer from many deadly and life altering diseases: cancer, immune deficiencies, and birth defects, to name but a few. Worst of all, they *learned* that their children suffer the greatest risk.

3d Am Compl ¶ 2. As this Court has emphasized, however, *learning* of an injury is not itself an injury. Rather, plaintiffs were injured (if at all) at the time of the alleged dioxin contamination from which all of their subsequent alleged damages flow. See MCL 600.5827; see also 6/1/17 Op., at 4 (Gadola J, dissenting) ("[T]he period of limitations began to run from the date that plaintiffs were harmed, which occurred (if at all) when the dioxin dumped into the river by defendant reached plaintiffs' properties or otherwise reached a particular plaintiff."). Indeed, plaintiffs' proposed "medical monitoring" class was defined as persons who lived in the Tittabawassee floodplain "from January 1, 1984 to present." 3d Am Compl ¶ 157. That proposed definition would be nonsensical if plaintiffs did not believe that dioxin was present on the floodplain as early as 1984. Plaintiffs' reliance on the MDEQ's 2002 notice thus can only be understood as attempt to invoke the "discovery rule," but—as this Court subsequently clarified—that judge-made rule does not apply in this state. See *Trentadue*, 479 Mich at 379. Under Michigan law, a claim accrues when the plaintiff is injured, regardless of the plaintiff's knowledge. See *id.*

Nor can plaintiffs avoid that point by arguing that they were injured by alleged restrictions that they, or the MDEQ, placed on their use of their properties in 2002 and subsequent years. Putting aside the fact that the Third Amended Class Action Complaint identifies no specific restrictions (much less any specific restrictions with the force of law), any such restrictions would at most be the *consequences* of the underlying "wrong" upon which all of

plaintiffs' claims are based, MCL 600.5827—alleged increased risk resulting from the presence of dioxins in the Tittabawassee River floodplain. Thus, for example, if someone is injured in a car crash, and subsequently foregoes certain activities as a consequence of those injuries, his claims, if any, accrued at the time of the crash, not at the subsequent date on which he limited his activities. The same would be true if his doctor advised him to forego those activities; any claims would still accrue at the time of the crash, not at the subsequent date of the doctor's advice. The adverse consequences of injuries are not new and independent injuries.

To characterize the MDEQ's protective and risk-based regulatory response as a legally cognizable injury, as did the circuit court and the Court of Appeals majority, is "to blur the distinction between 'injury' and 'damages.'" *Henry I*, 473 Mich at 78. As this Court has explained, "'damages' and 'injury' are not one and the same—damages flow from the injury." *Hannay v Department of Transp*, 497 Mich 45, 64; 860 NW2d 67 (2014); see also *Adkins*, 440 Mich at 313-14 (distinguishing between underlying injury and damages flowing from that injury). The February 2002 MDEQ notice was a consequence of the alleged dioxin contamination, not a separate and independent injury. For the same reasons that this Court has rejected the so-called "continuing violations" doctrine, see *Garg v Macomb Cty Community Mental Health Servs*, 472 Mich 263, 278-285; 696 NW2d 646 (2005), it should reject any attempt to evade the three-year statutory limitations period established by the Legislature by characterizing the consequences flowing from alleged injuries as new and independent injuries. The *reaction* to an injury (whether by a plaintiff, a regulator, or the public) is not a legally distinct injury. Thus, as Judge Gadola noted in dissent below, "[i]t may be true that the value of plaintiffs' property changed when the MDEQ published its 2002 notice, but plaintiffs' discovery in 2002 that their damages were greater than originally supposed when the dioxin was deposited

on their properties, possibly as early as the 1970s, did not create a new accrual date for plaintiffs' claims." 6/1/17 Op., at 4 (dissenting opinion).

B. CERCLA Section 309 Does Not Render Plaintiffs' Tort Claims Timely.

Apparently understanding that their claims are time-barred under Michigan limitations law, plaintiffs argue in the alternative that Michigan limitations law is preempted by federal law. In particular, they argue that CERCLA Section 309, 42 USC 9658, imposes a federal discovery rule on state-law claims involving environmental contamination. Because both the circuit court and the Court of Appeals resolved this case on state-law grounds, neither court addressed this argument. Nonetheless, because that argument has implications not only for the proper disposition of this long-running litigation, but also for Michigan's sovereignty, this Court can and should make clear that it lacks merit for two basic reasons: (1) plaintiffs have not established that CERCLA's federal discovery rule applies here in the first place (and it would raise a federal constitutional issue of the first order if it did); and (2) even if CERCLA's federal discovery rule applied here, it would not save plaintiffs' claims, because they knew or should have known about the presence of dioxins in the Tittabawassee River area decades before they filed this lawsuit in March 2003. Each of these reasons is discussed in turn below.

1. Plaintiffs Have Not Established That CERCLA Section 309's Discovery Rule Applies Here.

As a threshold matter, plaintiffs have not established that CERCLA applies here in the first instance. They have never pursued a CERCLA claim. Indeed, the Third Amended Class Action Complaint contains not a single reference to CERCLA. Nor have plaintiffs ever attempted to prove that each of the various statutory requirements for CERCLA applies here. Rather, without establishing that CERCLA applies here in the first place, they have simply invoked a provision of CERCLA that, under certain circumstances, purports to preempt state-law

limitations periods for putative state-law claims. Plaintiffs' reliance on that provision is misplaced.

CERCLA Section 309 reaffirms the general rule that "statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility." 42 USC 9658(a)(2). But the provision also carves out an exception to that rule:

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

Id. § 9658(a)(1). The statute defines the "federally required commencement date," in turn, as "the date the plaintiff knew (or reasonably should have known) that [his] personal injury or property damages .... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* § 9658(b)(4)(A). Plaintiffs contend that, insofar as Michigan's three-year statute of limitations would bar their claims, it is preempted by this federal discovery rule.

But the threshold problem for plaintiffs is that they have never established that CERCLA applies here at all. As other courts faced with the same argument have explained, a plaintiff invoking preemption under CERCLA Section 309 must establish that CERCLA applies to a particular case in the first place—*i.e.* that "the conditions for CERCLA cleanup are satisfied." *Barnes ex rel Estate of Barnes v Koppers Inc*, 534 F3d 357, 365 (CA 5, 2008); see also *Angle v Koppers, Inc*, 42 So3d 1, 8 (Miss, 2010). Among other things, each CERCLA plaintiff must first

establish that CERCLA fits the factual circumstances of unlawful release on which the lawsuit is premised and that all elements of a proper CERCLA cause of action have been advanced. See *Becton v Rhone Poulenc, Inc*, 706 So2d 1134, 1141 (Ala, 1997). Indeed, for just this reason, some courts have held that CERCLA Section 309 does not apply in the absence of an underlying CERCLA claim. See, e.g., *Knox v AC&S, Inc*, 690 F Supp 752, 757-58 (SD Ind, 1988); *Tippins v Caruso*, No. 16-cv-10140, 2016 WL 4253885, *6 (ED Mich Aug 12, 2016) (**Tab 6**); but see *Barnes*, 534 F3d at 363.[3] Regardless of whether those decisions are correct, plaintiffs have not established that CERCLA Section 309 should apply here because they have never established that the various prerequisites for CERCLA apply here in the first place.

Plaintiffs' failure to establish that CERCLA Section 309 applies here should relieve this Court of the need to address that provision's constitutionality. Suffice it to say that the constitutional question presented is a grave one. In our federal system, the federal government is entitled to make federal law (within constitutional constraints) while the states are free to make state law (also within constitutional constraints). Section 309 departs from that structure by purporting to preempt *state*-law limitations periods for *state*-law claims. Such federal interference in the workings of state law unconstitutionally blurs the lines between federal and state authority. And that constitutional problem is only magnified insofar as federal law would revive a limitations period that had already lapsed under state law. Thus, as the Alabama Supreme Court has noted, "[t]he potential ability of CERCLA's discovery rule to retroactively revive state-law-based claims for harm to persons or property from hazardous waste, which

[3] Publication in F Supp 3d may yet be forthcoming for the *Tippins* decision. In any event, Dow cites it only as an example of a court requiring a CERCLA claim to be advanced in order for CERCLA Section 309 to apply.

claims had previously expired under otherwise controlling state statutes of limitations, would seem to create several federalism issues as state government and federal government clash over which has the prerogative to control various facets of environmental policy." *Becton*, 706 So2d at 1142. This Court can and should construe the statute not to apply here to avoid these weighty constitutional issues. See *id.*

2. Even If CERCLA Section 309's Discovery Rule Applied Here, It Would Not Render Plaintiffs' Claims Timely.

Finally, even if CERCLA Section 309 applied here, and even if that provision were constitutional, it still would afford plaintiffs no relief, as their risk-based claims (assuming *arguendo* they exist under Michigan law) are time-barred even under the federal discovery rule. Under that rule, a limitations period begins to run when the plaintiff "knew (or reasonably should have known) that [his] personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* § 9658(b)(4)(A). On the undisputed record in this case, there can be no doubt that plaintiffs knew or reasonably should have known of their alleged injuries more than three years before they filed this lawsuit.

In support of its motion for summary disposition on limitations grounds, Dow put into the record extensive documentary evidence demonstrating that there was widespread publicity decades earlier regarding the risks of and from this very same dioxin contamination, and thus plaintiffs' risk-based claims would be time-barred even under any form of "discovery" rule. See Dow's "Appendix to Reply in Support of Dow's Motion for Summary Disposition" (**Tab 5**). Plaintiffs made *no effort* to rebut any of that evidence.

The unrebutted evidence establishes that, starting in the 1970s, the risks associated with dioxin in the Tittabawassee River and floodplain received extensive media coverage. The media repeatedly quoted regulators as stating that "Dow's Midland plant is 'the major source, if not the

only source, of TCDD [dioxin] contamination found in the Tittabawassee and Saginaw Rivers and Saginaw Bay in Michigan,'" which was described as a "'ticking bomb for human beings,'" and repeated regulators' recommendation that the public "not eat[] fish from those rivers because of their high levels of TCDD." Waymire, *Bill Bans Dumping of Dioxin: Senate Proposal Calls for $100,000-a-Day Fine, Jail Term*, THE SAGINAW NEWS (Mar 30, 1983); *EPA Calls Dioxin a "Ticking Bomb" for Humans*, THE SAGINAW NEWS (Apr 1, 1983); Waymire, EPA: *$3 Million of Dioxin Study Fund Earmarked for Michigan*, THE SAGINAW NEWS (Apr. 15, 1983).

The risks associated with dioxin in the Tittabawassee River area garnered national attention, with *three separate hearings* before various subcommittees of the U.S. Congress in the early 1980s, each of which received extensive publicity. In 1983, Michigan Attorney General Frank Kelley publicly announced the formation of a "special task force to investigate dioxin pollution in the state" as a direct result of "a state and federal study linking Dow Chemical Co. of Midland to dioxin contamination of the Tittabawassee River." Ashenfelter & Everett, *Attorney General Forms Task Force to Study Dioxin*, DETROIT FREE PRESS (Apr. 2, 1983). The executive secretary of the Michigan Toxic Substance Control Commission underscored what was by then the well-known historical nature of the contamination, telling the public in the early 1980s that "We've known that the Tittabawassee River has had dioxin in it for years." *Id*.

Dow's public disclosure of its test results finding the presence of such dioxin contamination spurred regulators both to issue a series of fish and wildlife advisories warning the public of the risk from dioxin exposure, and to initiate additional studies of their own. See, *e.g.*, EPA, Dioxin and Other Toxic Pollutants (Apr. 1985) ("*In June 1978*, Dow Chemical advise[d] the Michigan Department of Public Health (MDPH) that it had found dioxin (2378-TCDD) in fish caught from the Tittabawassee River. The MDPH immediately issued an advisory against

eating fish from the river. *That advisory is still in effect today.*") (emphasis added), available at http://tinyurl.com/yaphgkpe; EPA Publ. No. 905/4-88-03, *Dow Chemical Wastewater Characterization Study; Tittabawassee River Sediments and Native Fish* (June 1986), *available at* http://tinyurl.com/EPA86Publication. From 1978 to 1984, EPA conducted a series of sampling studies along the Tittabawassee River and its floodplain, resulting in publication of final reports in June of 1986—more than fifteen years *before* the February 2002 MDEQ notice on which plaintiffs and the lower courts relied. *Id.* at ii-iii. Those studies concluded that "[t]he distribution of [dioxins] in Dow Chemical tertiary pond sediments, outfall 031 wastewater solids, and Tittabawassee River sediments and flood plain samples is consistent, establishing another direct linkage between the discharge and contamination of the river." *Id.* at 7.

At the same time—nearly two decades before plaintiffs filed this lawsuit—regulators initiated litigation against Dow to address dioxin contamination in the Tittabawassee River area. Plaintiffs concede as much in the Third Amended Class Action Complaint, where they reference that in May 1985, Dow and the State of Michigan entered into a widely publicized agreement providing that Dow would "build two boat ramps in exchange for the State releasing Dow of all liability to the State for cleanup of the Tittabawassee River of the dioxin and other contaminants …." 3d Am Compl ¶ 151.

The publicity regarding dioxin risk in the Tittabawassee River area was even greater during periods of flooding. From 1916 to 2000, the National Weather Service recorded 38 floods of the Tittabawassee River. See National Weather Service, *Hydrologic Prediction Services for Tittabawassee River & Historical Crests for Tittabawassee River at Midland*, available at http://tinyurl.com/y97w5xvb. The largest of these floods was in 1986, when the river crested as 33.94 feet, over 4 feet higher than the next biggest flood in the century. See

EPA, *Enforcement Action Memorandum*, at 4 (July 15, 2008). The 1986 flood is frequently referred to as the *100-year flood* (as it affected the corresponding 100-year floodplain) and received extensive media coverage, with public health authorities issuing an advisory warning people to avoid exposure to the river and its runoff due to health concerns. See, e.g., Flowers, *Contaminated Floodwaters Pose Serious Health Risk*, THE SAGINAW NEWS (Sept. 10, 1986); *State Says River Pollution Level Very High*, MIDLAND DAILY NEWS (Sept. 15, 1986); *Rain Delays Recovery: Damage May Top $86 Million*, MIDLAND DAILY NEWS (Sept. 15, 1986).

As especially relevant here, media reports noted that the floods were "sweeping dangerous levels of pollution across widespread areas of the state, posing public health risks and causing long-term environmental damages," that "[p]ortions of Dow's property where the ground is contaminated with cancer-causing dioxin remain flooded," and that "there is continuing runoff that has run through chemical production plants, run across areas identified as having dioxin contaminated soils … [and was] just going in (the river)." Schmidt, *Experts Fear Floods Spreading Across the State*, THE SAGINAW NEWS (Sept. 13, 1986) ("State officials are warning people to stay away from floodwaters because of toxic chemicals and germs that could cause infections and diseases."). While their properties were being flooded, residents saw "messages flash on their TV screens warning them to avoid the floodwater because it might contain dangerous levels of bacteria and toxic chemicals." Howard, *Dioxin Scare*, NEWSWEEK (Sept. 29, 1986). The media even reported that, due to the flood emergency, State officials had permitted Dow to discharge wastewater into the river containing higher-than-permitted concentrations of dioxin. See Vega, *Plant Discharges More Dioxin Than Permitted During Flood*, THE ASSOCIATED PRESS (October 8, 1986) ("Hazardous dioxin was dumped into a river at six times the permitted rate when floodwaters swamped Dow Chemical Co.'s wastewater treatment plant

last month, says a state official.").

Thus, risks associated with area dioxin contamination were certainly common knowledge to any reasonably or even minimally aware resident long before the MDEQ's February 2002 notice. Plaintiffs' argument that the limitations clock did not begin to run until then implausibly supposes that a reasonable local resident somehow missed:

(a) state fish and wildlife notices stretching back into the 1970s;

(b) other federal and state regulatory notices in the 1980s;

(c) general, non-technical publicity about such federal and state regulatory notices;

(d) multiple United States congressional hearings in the 1980s;

(e) the national news about such hearings;

(f) the Michigan Attorney General's Special Task Force concerning dioxins set up in 1983;

(g) media coverage of that Special Task Force;

(h) Dow's public disclosure of its testing results and publicity as to those results;

(i) state enforcement litigation against Dow as to dioxins and publicity surrounding the settlement of that litigation;

(j) special publicity of dioxin issues during flood events, including the once-in-a-century flood in 1986;

(k) emergency television broadcasts while such a once-in-a-lifetime flood was unfolding to inundate plaintiffs' properties; and

(l) publicity attending the unusual regulatory authorizations Dow received to discharge dioxin during the 100-year flood emergency.

Plaintiffs made *no submission at all* to dispute this massive record, and failed to respond

to its existence in any way. Because the discovery-rule inquiry "is an objective one," plaintiffs must be deemed to have been on notice of the risks from the presence of dioxin in the Tittabawassee River area much longer than three years before they filed this lawsuit in 2003. *Ball v Union Carbide Corp*, 385 F3d 713, 722 (CA 6, 2004); see also *Beauchamp v Ford Motor Co*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005; 2005 WL 1229749, *3 (Docket No. 256175); *Blanton v Cooper Indus, Inc*, 99 F Supp 2d 797, 799 (ED Ky, 2000); *Carey v Kerr-McGee Chem Corp*, 999 F Supp 1109, 1111 (ND Ill, 1998); *Church v General Elec Co*, No 95-30139, 1997 WL 129381, *2, 5, 7 (D Mass, Mar 20, 1997); *Shults v Champion Int'l Corp*, 821 F Supp 517 (ED Tenn, 1992).[4]

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Dow respectfully requests that this Court grant leave to appeal the Court of Appeals' decision affirming the circuit court's order denying Dow's motion for summary disposition of plaintiffs' common-law negligence and nuisance claims. In the alternative, Dow requests that the Court enter a peremptory order reversing the Court of Appeals' decision and remanding to the circuit court for entry of summary disposition in Dow's favor.

Respectfully submitted,

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[4] Dow relies on the unpublished opinions in *Beauchamp* and *Church* only to illustrate application of established law regarding the discovery rule to similar facts. Both decisions are attached as Exhibit 21 to Dow's appendix to its summary disposition reply brief (Tab 5).

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