STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY AND KATHY HENRY, *et al.*,

Plaintiffs-Appellees,

vs.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Docket No. 328716

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

TROGAN & TROGAN, P.C.
Bruce F. Trogan (P26612)
7628 Gratiot Rd.
Saginaw, MI 48609
(989) 781-2060

STUEVE SIEGEL HANSON LLP
Todd M. McGuire
Norman E. Siegel
460 Nichols Rd., Ste. 200
Kansas City, MO 64112
(816) 714-7100

SPENCER FANE BRITT & BROWNE LLP
Michael F. Saunders
Carl H. Helmstetter
1000 Walnut, Ste. 1400
Kansas City, MO 64106
(816) 474-8100

THE WOODY LAW FIRM PC
Teresa A. Woody
1621 Baltimore Ave.
Kansas City, MO 64108
(816) 421-4246

Attorneys for Plaintiffs-Appellees

DICKINSON WRIGHT PLLC
Kathleen A. Lang (P34695)
Phillip J. DeRosier (P55595)
500 Woodward Ave., Ste. 4000
Detroit, MI 48226
(313) 223-2100

BRAUN KENDRICK FINKBEINER, PLC
Craig W. Horn (P34281)
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

KIRKLAND & ELLIS LLP
Douglas J. Kurtenbach, P.C.
Douglas G. Smith, P.C.
Scott A. McMillin, P.C.
300 N. LaSalle St., Ste. 2400
Chicago, IL 60654
(312) 862-2200

KIRKLAND & ELLIS LLP
Jeffrey Bossert Clark
655 Fifteenth St., N.W., Ste. 1200
Washington, D.C. 20005
(202) 879-5000

Attorneys for Defendant-Appellant

DEFENDANT-APPELLANT THE DOW CHEMICAL COMPANY'S OPENING BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

October 18, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

INDEX OF AUTHORITIES

Page(s)

Cases

Federal Statutes

Federal Legislative History

Michigan Statutes

Michigan Rules

Secondary Sources

INDEX OF EXHIBITS

STATEMENT OF THE BASIS OF THE COURT'S JURISDICTION

Defendant-Appellant The Dow Chemical Company ("Dow") is appealing the Saginaw County Circuit Court's order dated July 17, 2015 (**Tab 1**) denying Dow's motion for summary disposition as to Plaintiffs' claims for private nuisance, public nuisance, and negligence. Dow timely filed an Application for Leave to Appeal with this Court. See MCR 7.205(A). This Court originally denied Dow's Application for Leave to Appeal on December 17, 2015 (**Tab 2**). Subsequently, however, the Supreme Court remanded for consideration as on leave granted on June 28, 2016 (**Tab 3**). This Court is thus vested with jurisdiction pursuant to MCR 7.203(B)(1).

STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the trial court erred in denying Dow's motion for summary disposition based on the statute of limitations where Plaintiffs concede that threats to them and their properties from dioxin released into the Tittabawassee River existed by the late 1970s at the latest — nearly two decades before Plaintiffs filed this litigation — and the undisputed record demonstrates that, in fact, Plaintiffs' purported claims accrued, and the statute of limitations thus began to run, far earlier.

The trial court would answer: No.

Dow answers: Yes.

2. Whether the trial court erred in holding that Plaintiffs allege a present physical injury, when the Supreme Court previously ruled that Plaintiffs did not allege such an injury.

The trial court would answer: No.

Dow answers: Yes.

3. Whether the trial court erred in denying Dow's motion for summary disposition based on judicial estoppel, where Plaintiffs repeatedly represented to the trial court, to this Court, and to the Supreme Court that they did not allege a present physical injury in the course of successfully obtaining and appealing orders on class certification.

The trial court would answer: No.

Dow answers: Yes.

INTRODUCTION

This appeal comes to the Court on an order of the Supreme Court for consideration as on leave granted. Indeed, it is the third merits appeal arising from Plaintiffs' novel tort theories in this litigation first filed in 2003.[1] After the Supreme Court rejected several of those theories in *Henry I* in 2005, this appeal finds Plaintiffs continuing to pursue even more attenuated, purely risk-based claims alleging that dioxin released into the Tittabawassee River, ***starting more than one century ago***, might — in the future — cause some present physical injury to their properties in the floodplain. Plaintiffs' remaining claims face two inescapable legal defects: **(1)** these suits are time-barred; and **(2)** Plaintiffs have not alleged present physical injury to their properties.

Plaintiffs try in vain to distinguish *Henry I* as governing only medical monitoring claims. But that argument simply cannot explain why the Supreme Court concluded that "[P]laintiffs do not claim that they suffer from *present physical injuries to person* ***or property***." *Henry I*, 473 Mich at 77 (bold emphasis added). Indeed, the Supreme Court initially issued an opinion on July 13, 2005 referring only to injuries to "present physical injuries to ***person***," but later issued a corrected opinion on July 15, 2005 changing that phrase to "present physical injury to person ***or property***" at numerous points throughout its opinion, making clear that the Court's analysis of the requirements of Michigan tort law applied equally to both property and personal injury-style tort claims. In addition, because Plaintiffs represented that their claims are exclusively future-oriented and risk-based when they were before the Supreme Court in *Henry I & II*, they are now

[1] The Supreme Court previously handed down two decisions in this litigation: **(1)** *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005) ("*Henry I*") (landmark decision establishing the "present physical injury" to person or property requirement and on that basis holding that Plaintiffs' negligence claims seeking "medical monitoring" were subject to summary disposition); and **(2)** *Henry v Dow Chem Co*, 484 Mich 483; 772 NW2d 301 (2009) ("*Henry II*") (remanding for further consideration of class certification, which the trial court itself later correctly denied after the intervening U.S. Supreme Court decision issued two years later in *Wal-Mart v Dukes*, 131 S Ct 2541 (2011) (invigorating the commonality requirement)).

estopped from taking different positions here.

Consequently, the trial court should be reversed because it erred by failing to grant summary disposition on either the statute of limitations ground or the *Henry I* ground — each of which is independently fatal to Plaintiffs' claims:

First, the trial court erred in rejecting Dow's statute of limitations defense by finding that the alleged risk-based injuries first accrued in February 2002, premised not on any action by Dow but only on the publication of an informational report by the Michigan Department of Environmental Quality ("MDEQ"). Order at 3 (**Tab 1**). That decision amounted to an attempt to resurrect, by the backdoor, the discovery rule and/or the continuing-wrongs doctrines in Michigan, both of which were abrogated by the Supreme Court in *Trentadue v Buckler Auto Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007), and *Garg v Macomb County Cmty Mental Health Servs,* 472 Mich 263; 696 NW2d 646 (2005), respectively. The trial court's ruling was premised upon Plaintiffs' assertion that "[i]n early 2002, [Plaintiff] families learned shocking news from the Michigan Department of Environmental Quality," which Plaintiffs later explained was the publication of MDEQ tests "not released to the public until February of 2002." Third Am. Compl. at ¶¶ 2 & 138 (**Tab 4**). This assertion is nothing more than a discovery-rule allegation, which is no longer good law in Michigan.

Second, the trial court's order disregarded the Supreme Court's prior determination in *Henry I* that Plaintiffs had alleged no cognizable injury to person or property under Michigan law: "[P]laintiffs do not claim that they suffer from *present physical injuries to person or property*." *Henry I*, 473 Mich at 77 (emphasis in original).[2] The Legislature had already

[2] Indeed, the Supreme Court reached its conclusion concerning the absence of allegations of present physical injuries to person or property in the face of Plaintiffs' specific allegations that dioxin was present on their properties, which clearly indicates that advancing a claim of present

implemented a carefully calibrated remedial framework for addressing risk-based contamination claims such as those here. As a result, the Supreme Court refused in *Henry I* to expand Michigan tort law to encompass such claims. By contrast, the trial court's theory, issued in derogation of *Henry I*, premised its theory of injury on the same 2002 MDEQ report, not on any actions by Dow: "After this 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." Order at 3 (**Tab 1**) (emphasis added). The trial court cited no source of law (in Michigan or elsewhere) suggesting that a government report could serve as a cause of present physical injury. Nor did it cite any law supporting the notion that Dow could become derivatively liable for an alleged injury the trial court asserted MDEQ had created. In reality, the 2002 MDEQ report was just that — a report — it did not even impose any restrictions on the Plaintiffs or prevent them from using their property. *Henry I* requires ***present physical injury***; it does not authorize torts based on government reports. The only function of the 2002 MDEQ report as pleaded by Plaintiffs was to give them a fig leaf to try to explain away why they waited so long — ***until March 25, 2003*** — to sue.

Accordingly, Dow asks this Court to rule that Plaintiffs' remaining claims (for negligence, as well as for public and private nuisance), fall nearly four decades outside of the applicable three-year statute of limitations in MCL 600.5805(10) — and likely much farther. When this case began, the Supreme Court's limitations decisions in *Trentadue* and *Garg* were still years off. But those two eminent decisions are now governing law and they make clear that Plaintiffs' attempt to rely on the discovery rule to toll their claims is flatly contrary to the jurisprudence of this state. At this point, the Supreme Court's limitations precedent and

---

physical injury requires more than just alleging the presence of dioxin. See, e.g., Third Am. Compl. at ¶¶ 2, 135, 168, 184, 185 (**Tab 4**).

Plaintiffs' own concessions doom their claims as time-barred. And, as the undisputed record evidence Dow submitted below fully demonstrates, Plaintiffs seek to pursue claims so stale that they would be barred under a discovery rule — even if our state had one.[3]

Dow also asks the Court to apply *Henry I* as it is written and overturn the trial court's contrary decision, which at best read *Henry I* far too narrowly and which refused to apply, via the doctrine of judicial estoppel, the obvious legal consequences of Plaintiffs' many admissions to courts at every level in the Michigan judicial system that they seek to base their case on risk as opposed to present physical injury.

By contrast, Plaintiffs were allowed by the trial court below to sidestep the separation-of-powers defects facing their claims and vastly expand the scope of tort liability, as their legal positions comport ***neither with*** the Legislature's carefully selected three-year limitation period, ***nor with*** the "present physical injury" rule established in *Henry I* more than a decade ago to protect the prerogatives of the Legislature in environmental policymaking from judicial incursion. See *Henry I,* 473 Mich at 89-90 (explaining the decision's separation-of-powers basis). As a result, this Court should reverse the trial court's order, which both misapprehended *Henry I* and allowed Plaintiffs to concoct an untenable 2002 start date for the limitations period that has no basis in legislatively defined accrual law and which is contradicted by the undisputed evidence Dow submitted into the record showing that there was no magic to the claimed 2002 accrual date, even under the discovery-rule approach invalidated by *Trentadue*. Widespread publicity concerning dioxin releases that no reasonable person could ignore was commonplace in Michigan long before then.

[3] Because this litigation is so stale, Dow is now faced with the prospect of defending conduct that occurred a century ago — a time when record-keeping was less extensive and which inherently means that all percipient witnesses have long since died. This case is thus a dramatic and textbook example of exactly what a statute of limitations is meant to bar.

FACTUAL AND PROCEDURAL HISTORY

A. PLAINTIFFS PLEADED CLAIMS BASED ON A THEORY ASSERTING THAT THE RISKS IMPOSED BY DIOXIN RELEASES INJURED THEM DECADES AGO, WHILE SIMULTANEOUSLY ARGUING THAT THEIR CLAIMS DID NOT ACCRUE UNTIL 2002

In their initial class allegations, Plaintiffs identified the following "questions of law and fact common to the Classes": (1) "whether Dow's release of Dioxin into the Tittabawassee constitutes actionable negligence or gross negligence"; (2) "whether Dow's release of Dioxin into the Tittabawassee constitutes a private nuisance"; and (3) "whether Dow's release of Dioxin into the Tittabawassee constitutes negligence per se." Third Am. Compl. (**Tab 4**) at ¶ 162(i), (j), (k).

Plaintiffs allege that an "exposure risk" from such releases has been around ***for decades***. In addition to recognizing that Dow's plant has been operating on the River's banks ***for a century***, *id.* at ¶ 116, the Third Amended Complaint averred that "Dow released its waste [containing dioxins] for years" and that such waste "migrated down the river" due to annual "spring thaws and heavy rains." *Id.* at ¶ 126. According to that complaint, by 1982, when dioxins were discovered in Love Canal and Times Beach, the Tittabawassee River that Plaintiffs live near and its floodplain also harbored dioxins. See *id.* at ¶ 124-26. Plaintiffs allege that it was the presence of dioxin in the River that "pose[d] a serious risk to the health of the plaintiffs and other residents of the Flood Plain." *Id.* at ¶ 153. Based on allegations that "[a]ll persons" who have lived in the floodplain ***from and after 1984*** were placed at risk of illness as a result of the potential exposure to dioxin, Plaintiffs' complaint sought certification of a medical monitoring class that included ***all residents who had lived in the area since 1984***. *Id.* at ¶¶ 157 & 211. Plaintiffs also allege that, by 1984, Dow knew of "the presence of dioxin in the Tittabawassee River and Dow's responsibility for [it]." *Id.* at ¶ 150.

Contrary to these claims, however, Plaintiffs also asserted that they learned of the risk of

potential exposure to dioxin "for the first time [only in early 2002]." *Id.* at ¶ 2. Before they purportedly learned of this potential risk, they maintain that the Tittabawassee River was a "desirable place to live." *Id.* at ¶ 1. But they allege that they came to know, only as of 2002, that their homes had been "made worthless" as a result of these longstanding dioxin risks. *Id.* at ¶ 3. Plaintiffs attribute their newfound knowledge to statements made by MDEQ in a study released in 2002 entitled "Phase I Environmental Assessment." See *id.* at ¶¶ 137-138.

Throughout this litigation, Plaintiffs have repeatedly confirmed that their claims are based on ***potential health risks*** from dioxin exposure that they concede have existed for decades. Not only have they amended their collective complaint three times,[4] restating the same allegations, they have repeatedly told the trial court, this Court, and the Supreme Court that their claims are based on potential health risks from dioxin exposure that allegedly ***have existed since at least 1984***.[5]

In 2003, for example, the trial court heard arguments on Plaintiffs' negligence claim seeking medical monitoring for residents living in the region as of 1984. In trial and appellate briefing, Plaintiffs asserted that their causes of action were based on a risk of dioxin exposure. As they noted, medical monitoring "seeks to avoid harm rather than compensate for harm." Pl. Ans. to Dow Emer. App. for Leave to Appeal, at 11 (Dec. 15, 2003). While repeatedly conceding that they, as 1984-and-later residents, had no present physical injury, Plaintiffs maintained that they should be monitored so that if they did develop some dioxin-related illness, they could be promptly treated. In the briefing before the trial court and in their complaint, Plaintiffs made clear that their claims were based on a potential risk from exposure, citing the

[4] See also infra n 20 (further discussing amendment history).

[5] Various of Plaintiffs' representations bearing on the date of injury are compiled in Table 3 of Dow's Reply Brief in Support of Its Motion for Summary Disposition (**Tab 5**).

"risks created by pollution," *id.* at 16, their "enhanced risk of injury," *id.* at 9, and the risk created by the "release of dioxin," Third Am. Compl. at ¶ 162, into the River.[6] As the Supreme Court observed in directing that Plaintiffs' negligence claim seeking medical monitoring be dismissed, "plaintiffs do not claim that they suffer from ***present physical injuries to person or property***." *Henry I*, 473 Mich at 77 (bold emphasis added).

The trial court next addressed class certification with respect to Plaintiffs' remaining property claims. Judge Borrello conducted a two-day class certification hearing in September 2005, and in it Plaintiffs again explained that their remaining negligence and nuisance property claims were based on "their property [being] ***at risk*** from dioxin, that they're ***at risk*** from future injury, that they're ***at risk*** for loss of peace of mind. And that's significant ***injury***." Hr. Tr. at 26:21-25 (Sept. 16, 2005) (emphasis added). Plaintiffs maintained that because each of their properties allegedly had been placed "at risk," since it was those risk-based claims that they were pursuing, class certification was appropriate because such risk-based claims were class-wide and thus common to all Plaintiffs and putative class members and so could be proven with generalized evidence.[7] As noted above, each plaintiff — including each of the Plaintiffs remaining in this litigation — alleged that their properties and persons being placed "at risk" in this manner defined their lawsuit.

---

[6] See also Pl. Sup. Ct. Br. in *Henry I* at 4 (Aug. 31, 2004) ("The presence of dioxin in the Tittabawassee River and Flood Plain poses a serious risk to the health of the plaintiffs and other residents of the Flood Plain, requiring that they closely monitor their health for many years to come, if not the rest of their lives."); *id.* at 9 ("[I]f Dow, through its release of dioxin, put Plaintiffs in a position of enhanced risk of injury, then Dow should pay for the diagnostic testing necessary to detect latent injuries.").

[7] Hr. Tr. at 17:5-12 (Sept. 16, 2005) ("We have proposed very generalized proof and will present generalized proof on those issues… there's no reason to think that there's anything about the fact that there are differing levels of contamination that should make this Court deny certification in this case.").

Moreover, each of these Plaintiffs specifically avowed that their claims were not based on present injury, noting instead that "[c]ounsel for plaintiffs are unaware of any existing claim for personal injuries by any putative class member that would meet the legal standard necessary to pursue such a claim against Dow at this time." Pl. Reply in Support of Mot. for Class Cert., at 47, 52 (March 19, 2004). Plaintiffs argued that because none among them alleged a present physical injury and all were alleging they were at ***some increased risk*** from dioxin exposure, there was a common "injury" across all plaintiffs and thus class certification was proper. Based on these arguments, Judge Borrello (who presided over the case until May 2013) certified a property class in October 2005.

In 2006, Dow appealed to this Court, where Plaintiffs reiterated the risk-based nature of their remaining property claims and made admissions applicable not only to their ostensible health risks but to their claims of harm to their property interests. In their brief, Plaintiffs asserted that "the threat of further physical invasion of cancer-causing chemicals substantially and unreasonably interferes with the class members' use and enjoyment of their property." Pl.-App. Br. at 23-24 (Apr. 3, 2006). As they did in the trial court, Plaintiffs argued that their remaining property claims were based on a risk of harm and that such claims were shared by all class member plaintiffs in common, saying that "[t]he issue to look at is, is there a threat of harm that's significant enough to cause impairment to the use of enjoyment of the land, a loss of use of enjoyment of the land?" Hr. Tr. at 34:21-24 (July 9, 2007). Based on those assertions, Plaintiffs prevailed at the time. This Court affirmed the certification of a property class as to liability issues.

Dow appealed to the Supreme Court, and yet again Plaintiffs asserted that their remaining property claims could be tried on a class-wide basis because those claims were based on the ***risks***

of dioxin, which "threaten[ed] to be deposited on all flood plain properties now and repeatedly in the future." Pl.-App. Br. on Appeal, at 38 (January 26, 2009). According to Plaintiffs, it was this "present threat of further physical invasion of cancer-causing chemicals" that "substantially and unreasonably interfere[s] with the class members' use and enjoyment of their property." *Id.* Plaintiffs reiterated that their risk-based "injury" was "the same for all properties in the Flood Plain, because [the] contamination, deposited in river sediments, threatens every property in the Flood Plain." Pl.-App. Br. on Appeal, at 40 (January 26, 2009); see also Pl. Br. in Opp. to Dow Chem. App. for Leave to Appeal, at 31 (May 15, 2008)Pl.-App. Br., at 26 (April 3, 2006).

Based on Plaintiffs' characterizations of their negligence and nuisance claims, the Supreme Court, in *Henry II*, 484 Mich 483, established standards for assessing class certification and remanded for further proceedings consistent with its ruling. While Plaintiffs prevailed on appeal on the issues of numerosity, commonality, and superiority, Judge Borrello, after remand, ultimately declined to certify a class, finding that the commonality requirement was not satisfied under the analysis of the United States Supreme Court's intervening 2011 decision in *Wal-Mart*, 131 S Ct 2541.

B. THE SUPREME COURT ISSUES A SERIES OF RULINGS WHILE THE CASE IS PENDING, MAKING CLEAR THAT PLAINTIFFS' CLAIMS MUST BE DISMISSED

After the Supreme Court's remand and resolution of the class-certification issue, Dow moved for summary disposition on the remaining claims, invoking the same Michigan precedent it relies on here to show that these cases are time-barred and cannot satisfy *Henry I*.

1. In *Henry I*, the Supreme Court Held That a Present Physical Injury to Person or Property Is Necessary for a Tort Claim to Be Cognizable Under Michigan Law and That Plaintiffs' Complaint Alleged No Such Injury.

As noted above, in *Henry I*, the Supreme Court summarily disposed of Plaintiffs' negligence claims seeking medical monitoring on the ground that Michigan tort law requires an

"actual injury to person or property." 473 Mich at 73-74. The Supreme Court held that Plaintiffs alleged a risk-based injury causing additional medical monitoring costs for the possible health risks associated with dioxins. *Id.* at 71. Those allegations, however, did not satisfy the requirement of a present physical injury to person or property. *Id.* at 73-74. Instead, such a claim sought damages "incurred in ***anticipation of possible future injury*** rather than in response to present injuries," and therefore was "not derived from an injury that is cognizable under Michigan tort law." *Id.* (emphasis added). "Indeed, plaintiffs in their arguments to this Court expressly deny having any present physical injuries." *Id.* at 73. Critically, the Supreme Court initially issued an opinion on July 13, 2005 referring only to injuries to "present physical injuries to ***person***," but later issued a corrected opinion on July 15, 2005 that changed that phrase to "present physical injury to person ***or property***" at numerous points throughout its opinion, making clear that the Court's analysis of the requirements of Michigan tort law extended not only to personal-injury tort claims but also to property-related tort claims.

Henry I held there must be an "injury" (not a "risk") that is both "present" (not future or threatened) and "physical" (not intangible) — not the mere "increased risk of future harm." *Id.* at 73-74. As the Supreme Court explained, "[t]he requirement of present physical injury to person or property serves a number of important ends for the legal system," including preventing "speculation," "the risks of fraud," and "frivolous or unfounded suits." *Id.* at 76. Prohibiting tort claims lacking a present physical injury also avoids "compromising the judicial power" and invading the province of the Legislature, particularly where, as here, "the Legislature has already created a body of law that provides plaintiffs with a remedy." *Id.* at 92.

As the Court further observed, in a "modern society [where] we are all exposed to a wide

range of chemicals and other environmental influences on a daily basis," *id.* at 86 n.15, deviating from the present and physical injury requirement would create a "potentially limitless pool of plaintiffs." *Id.* at 83. Such a system, in which "resources are doled out on a first-come, first-served basis," would run "the risk of diverting limited resources from those devastated by cancer, birth defects, and other dioxin-related diseases to those who have yet to manifest dioxin-related illness." *Id.* at 99. The Court was unwilling to give "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 the medical costs of a segment of the population that has suffered no actual medical harm." *Id.* at 100. Accordingly, the Court rejected Plaintiffs' request for such a "radical change," *id.* at 89, from "current tort law," *id.* at 98, and directed that summary disposition be entered in Dow's favor. *Id.* at 89-90. "[W]e hold that plaintiff has not stated a claim under our current tort law and that the determination whether that law should change to accommodate plaintiffs' claims belongs, in our view, to the people's representatives in the Legislature." *Id.* at 98. In reaching that decision, the Supreme Court added its own emphasis to the following conclusion: "[P]laintiffs do not claim that they suffer from *present physical injuries* to person or property." *Id.* at 77.

2. In *Garg* and *Trentadue*, the Supreme Court Held That the Statute of Limitations May Not Be Tolled by the "Discovery Rule" or the Doctrine of Continuing Wrongs.

Dow further asked the trial court to grant summary disposition pursuant to MCR 2.116(C)(7) based on expiration of the statute of limitations. As noted above, Plaintiffs' claims based on the risk of exposure to dioxin accrued decades ago. Nonetheless, Plaintiffs sought to circumvent the statute of limitations based on the discovery rule or the doctrine of continuing

violations.[8] Binding Supreme Court precedent makes clear that these principles are invalid in Michigan.

In *Trentadue*, the Supreme Court held that the comprehensive statutory framework enacted by the Legislature "precludes th[e] common law practice of tolling accrual based on discovery." 479 Mich at 389. Instead, under Michigan law, a claim accrues "when the plaintiff is harmed" and it expires with the limitations period, regardless of whether plaintiffs knew or reasonably should have known of their injury. *Id.* at 387 n 8. Similarly, in *Garg*, the Court made clear that the "continuing violations" theory was inapplicable under Michigan law, noting that it bore "little relationship to the actual language" of Michigan's statute of limitations. 472 Mich at 281. The Court held that it was inappropriate for the judiciary "[t]o allow recovery for such claims," which simply "extend[ed] the limitations period beyond that which was expressly established by the Legislature." *Id.* at 282. Accordingly, under binding Supreme Court precedent, Dow argued, Plaintiffs' claims based on the asserted risks of dioxin released decades ago are plainly time-barred. See also *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 286; 769 NW2d 234 (2009) [hereafter "*Froling Trust*"] (*Garg* "complete[ly] abrogated the continuing wrongs doctrine of this state.").[9]

Both *Trentadue* and *Garg* have retroactive effect. See *Trentadue*, 479 Mich at 400-401; *Froling Trust*, 283 Mich App at 288 ("[W]e conclude that *Garg* and its progeny completely and

[8] See, e.g., Third Am. Compl., (**Tab 4**) (asserting dioxin was discovered in River sediment by "happenstance" in 2000 when "General Motors tested [it] near the confluence of the Tittabawassee and Saginaw Rivers," *id.* ¶ 136, and that the test results were "kept secret by the MDEQ," *id.* ¶ 137); *id.* ¶ 138 (alleging Plaintiffs did not learn of the "dangerous amounts" of dioxin until late 2001 or early 2002); *id.* ¶ 139 (pleading that MDEQ performed testing from April to June 2002 finding dioxin in the River and Flood Plain).

[9] Contrast Third Am. Complaint at ¶¶ 168, 170, 171, 173, 174, 175 (describing Dow's conduct as creating a "continuing nuisance" or "continuing private nuisance") and id. ¶¶ 184, 185, 186, 187 (describing Dow's conduct as continuing negligence).

retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases.").

Nonetheless, Dow further argued that Plaintiffs' claims would be barred even under the invalidated discovery rule. In support of its motion, Dow put into the record a vast array of documentary evidence demonstrating the pervasiveness of publicity regarding the risks of dioxin contamination decades before Plaintiffs filed their complaint.

Indeed, Plaintiffs repeatedly admitted that the first public pronouncements regarding the risks of and from such dioxin released into the River and its floodplain occurred ***more than two decades*** before MDEQ released the final results of its Phase I sampling initiative in 2002 (the date Plaintiffs say their claims accrued). In seeking class certification, for example, ***Plaintiffs themselves*** specifically claimed that they suffered a common "injury" as a result of widespread publicity surrounding government advisories alerting the public to dioxin contamination in the River and surrounding area — advisories that first appeared ***in 1978***:

> You know, there are fish and wildlife advisories for fish and wildlife in this area. These go out to everybody, not just specific people. ***And obviously all those things are also seen by the public. That has an impact on the value of property within the geographic area, has an impact on people's use and enjoyment in the area. And so all of those things are the same.*** All the proofs of those are very common.

7/9/07 Hr. Tr. at 35-36 (emphasis added).[10] (This and the numerous other referenced advisories, reports, and articles cited to in this section from the record to show Plaintiffs were on notice long before 2002 can be found in Dow's "Appendix to Reply in Support of Dow's Motion for Summary Disposition." (**Tab 5**).)

[10] See also 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 … 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).

Thus, Plaintiffs conceded in open court that they were put on notice of their claims of both diminished property values and of injury to their use and enjoyment by multiple government fish-and-wildlife advisories ***dating all the way back to the 1970s***, fatally undercutting any ability on their part to keep asserting that they were first put on notice only in 2002 by the MDEQ study or that this study fixed the point in time when their claimed injuries accrued within the meaning of *Trentadue* and *Garg*.

In the years following, threats from dioxin in the River and its floodplain received extensive media coverage. This media coverage not only documented the regulatory findings regarding the presence of dioxin in the River and surrounding area, but underscored the risks to the floodplain during significant flooding (such as the 100-year flood in 1986) from that dioxin-contaminated river. The media repeatedly quoted regulators as stating that "Dow's Midland plant is 'the major source, if not the only source, of TCDD[11] contamination found in the Tittabawassee and Saginaw Rivers and Saginaw Bay in Michigan,'"[12] which was described as a "'ticking bomb for human beings,'"[13] and repeated regulators' recommendation that the public "not eat[] fish from those rivers because of their high levels of TCDD."[14]

The dioxin in the Tittabawassee River garnered national attention, with ***three separate hearings*** before various subcommittees of the United States Congress in the early 1980s, each of

[11] "TCDD" is tetrachlorodibenzodioxin, commonly referred to more simply as "dioxin." See Third Am. Compl. at ¶ 120 (**Tab 4**).

[12] Waymire, EPA: *$3 Million of Dioxin Study Fund Earmarked for Michigan*, THE SAGINAW NEWS (Apr. 15, 1983).

[13] *EPA Calls Dioxin a "Ticking Bomb" for Humans*, THE SAGINAW NEWS (Apr 1, 1983).

[14] Waymire, *Bill Bans Dumping of Dioxin: Senate Proposal Calls for $100,000-a-Day Fine, Jail Term*, THE SAGINAW NEWS (Mar 30, 1983).

which received extensive publicity.[15] 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 dioxin in fish in the River not only led regulators to issue a series of fish and wildlife advisories warning the public of the risk from dioxin exposure, but also caused regulators to initiate studies of their own.[16] From 1978 to 1984, the EPA conducted a series of sampling studies along the Tittabawassee River and its floodplain, resulting in publication of final reports in June of 1986.[17] Those published studies specifically concluded that "[t]he distribution of TCDDs 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

[15] See **(1)** EPA: Investigation of Superfund and Agency Abuses (Part 1): Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 98th Cong. (1983); **(2)** EPA Oversight on Dioxin Contamination: Hearing Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the H. Comm. on Science and Technology, 98th Cong. (1983); and **(3)** Fiscal Year 1984 EPA Research and Development Authorization: Hearing Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the H. Comm. on Science and Technology, 98th Cong. (1983).

[16] See 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.

[17] *Id.* at ii-iii.

contamination of the river."[18]

Indeed, regulators brought suit against Dow to address the dioxin contamination — nearly two decades before Plaintiffs did. Plaintiffs allege as much by averring that Dow and the state entered into a widely publicized agreement (reached, in point of fact, back in ***May 1985***) in which 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…." Third Am. Compl. at ¶ 151 (**Tab 4**). The existence of lawsuits (which can obviously put potential private plaintiffs on notice to investigate whether they have been injured) is subject to judicial notice. See *Capac State Savings Bank v McKnight*, 34 Mich App 390, 391; 191 NW2d 55 (1971).

The publicity regarding the threat of dioxin was even greater during periods of flooding. From 1916 to 2000, the National Weather Service recorded 38 floods of the Tittabawassee River. National Weather Service, *Hydrologic Prediction Services for Tittabawassee River & Historical Crests for Tittabawassee River at Midland* (accessed 2011). The largest of these floods was in 1986, when the river crested at 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*** 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); Gray, *State Says River Pollution Level Very High*, MIDLAND DAILY NEWS (Sept. 15, 1986) ("Levels of contaminants found in samples taken by the DNR on Thursday through Saturday showed higher-than-allowable levels of solvents, pesticides

[18] *Id.* at 7.

and other compounds used at Dow…. The excessive discharge prompted the DNR to issue a health advisory for people living downstream of Dow."); Irwin, *Rain Delays Recovery: Damage May Top $86 Million*, MIDLAND DAILY NEWS (September 15, 1986) ("Higher-than-allowable levels of chemical compounds also were detected in the Tittabawassee River downstream from Dow's Midland complex, the state Department of Natural Resource said.").

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) ("officials are warning people to stay away from floodwaters because of toxic chemicals and germs that could cause infections and diseases.") (emphasis added).

Indeed, 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, given the emergency, the state authorized Dow to discharge wastewater into the river containing higher-than-permitted dioxin concentrations. 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.").

In light of all of these releases of information to the public, any reasonable plaintiff

would have investigated whether dioxin risks were affecting his or her property long before 2002. By contrast, Plaintiffs' theory as to when the statute of limitations clock was set in motion (as tied to the 2002 MDEQ study) implausibly imagines that Michigan's courts should ignore: **(a)** state fish and wildlife notices alerting residents of the risks of which Plaintiffs complain 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 issued repeatedly in the ensuing decades; **(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***; ***and*** **(*l*)** publicity attending the unusual regulatory authorizations Dow received to discharge dioxin during the 100-year flood emergency, among others.

Plaintiffs made ***no submission at all*** to dispute this massive record ***or respond to it in any way***.

C. THE TRIAL COURT FAILS TO APPLY EITHER THE SUPREME COURT'S *HENRY I* DECISION OR THE NEW SUPREME COURT STATUTE OF LIMITATIONS JURISPRUDENCE AND DOW'S APPEAL ENSUES

Despite this undisputed record and the binding law handed down by the Supreme Court in *Henry I*, *Trentadue*, and *Garg*, the trial court denied Dow's motion for summary disposition on both of Dow's statute-of-limitations and present-physical-injury grounds. In denying Dow's motion, the trial court stated:

> Plaintiffs allege that their injury is distinct and different from that suffered by the

> general public because 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. Therefore, such allegation of present physical injury, in addition to resulting financial damage, satisfies the pleading requirements of Michigan law for the tort of negligence.

Order at 2 (**Tab 1**).

The trial court did not address the fact that the Supreme Court in *Henry I* had held just the opposite, stating that Plaintiffs here "do not claim that they suffer from *present physical injuries* to person or property." *Henry I*, 473 Mich at 77 (emphasis in original). It also did not address the allegations in Plaintiffs' complaint and their multiple representations — to the trial court and this Court — making clear that Plaintiffs alleged no such present physical injury. Nor did it address at all Dow's contention that summary disposition should be granted under the doctrine of judicial estoppel given that Plaintiffs successfully sought and obtained property class certification based on their representations that they were asserting purely common, risk-based injury.

The trial court likewise cited no law in support of its ruling denying Dow's motion for summary disposition based on the statute of limitations. The trial court neither discussed nor reconciled its ruling with the Supreme Court's decision in *Trentadue*.[19] Rather, the trial court attributed Plaintiffs' injuries to MDEQ's 2002 report that was issued pursuant to the administrative remedies provided by the Legislature that the *Henry I* decision had highlighted as preferable to tort-law remedies:

[19] While Plaintiffs argued below that CERCLA preempted the Supreme Court's rulings in *Trentadue* and *Garg*, the trial court did not adopt that argument. See Dow Reply at 10-14 (**Tab 5**). Indeed, it did not cite or discuss CERCLA in its ruling. Plaintiffs' CERCLA arguments are rebutted in Part II.D of the Argument section below.

> The types of injuries Plaintiffs allege began, at the earliest, in February of 2002, and Plaintiffs' initial action here was filed well within the three years allowed by MCL 600.5805. ***Plaintiffs' causes of action accrued in February 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.*** Prior to this time, Plaintiffs were free to use and enjoy their property without worry or restriction, and to sell their property without loss of value. ***After this 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.***

Order at 3 (**Tab 1**) (emphasis added). The trial court did not address the Supreme Court's oft-repeated statements in *Henry I* that such regulatory actions were the alternative to tort remedies and thus could not form the basis for a Michigan tort claim.

Finally, the trial court did not address the allegations in Plaintiffs' complaint stating that they suffered injuries by at least 1984 and that dioxin releases first occurred decades before Plaintiffs ever brought suit. Nor did the trial court discuss in any way the undisputed record evidence Dow submitted to this effect, which showed that multiple sources of notice were available to any reasonable member of the public and that such information first appeared even farther back in time — *i.e.*, in the 1970s at the latest.

Dow responded to the trial court's opinion by filing an Application for Leave to Appeal to the Court of Appeals on August 7, 2015. Briefing was completed in late 2015. On December 17, 2015, the Court of Appeals issued an order stating that it was denying Dow's application "for failure to persuade the Court of the need for immediate appellate review." Order (**Tab 2**). Dow then sought review by the Supreme Court. Briefing there was completed on March 15, 2016. And on June 28, 2016, the Supreme Court directed this Court to proceed with Dow's appeal as on leave granted. Order (**Tab 3**). Proceedings in the trial court are currently stayed pursuant to a

stipulation between the parties.[20]

SUMMARY OF ARGUMENT

The trial court's July 17, 2015 order denying Dow's motion for summary disposition is deeply flawed and should be reversed, since this case is both time-barred and seeks to pursue a non-existent, risk-based tort action that fails under *Henry I*.

First, Plaintiffs' claims fall well outside the applicable three-year statute of limitations. The dioxin releases upon which they based their claims occurred began more than a century ago. Thus, their alleged injury accrued under well-settled Michigan law long before 2002, rendering their claims time-barred under *Trentadue* and *Garg* because a claim under Michigan law accrues ***once the alleged wrongful injury occurs*** — not when it is discovered, not as wrongful injury allegedly continues, and not as allegedly new consequences of a past wrongful injury are said to unfold.

Moreover, even under the discovery rule Plaintiffs argue now applies pursuant to federal law (a point Dow strenuously opposes, *see* Part II.D), undisputed record facts show that Plaintiffs had reasonable notice to investigate bringing suit ***at least as early as the late 1970s***. In reality, since the dioxin releases that they argue impose risks on them date back ***a century ago*** and some government reports and media reports alerting residents in the area to the issue were

[20] As Dow was seeking permission for this appeal, the trial court denied Plaintiffs' attempt to file a Fourth Amended Complaint on October 21, 2015. And before it stayed the litigation below, the trial court ordered Plaintiffs to file individual complaints, which 68 of them did on February 1, 2016. Only 43 of those individual complaints remain pending in the trial court in an amended form filed in mid-March 2016, just as briefing in the Supreme Court on Dow's application for leave to appeal was nearing completion. These new individual complaints (in their original or amended forms) assert the very same February 2002 asserted accrual date for the onset of purely risk-based "injury" Plaintiffs have long emphasized. And those complaints similarly tie that same date to Plaintiffs' assertions of when they allegedly began self-curtailing various activities on their property based on fears said to result from the purported initial cause of "injury" initiated by MDEQ's February 2002 information release.

released in the 1970s, the three-year statute of limitations ran out long before 2003, when Plaintiffs finally thought to file a putative class action lawsuit. The trial court's view that a 2002 informational report issued by MDEQ defines the accrual point for the alleged injuries is at odds with settled law. The trial court simply accepted Plaintiffs' view that the 2002 MDEQ report caused injury, even though it ordered residents to do nothing and even though Dow, not the MDEQ, would be the alleged tortfeasor. The trial court's statute-of-limitations analysis simply cannot stand.

Second, this Court should enforce the Supreme Court's decision in *Henry I* that "plaintiffs do not claim that they suffer from ***present physical injuries to person or property***." *Henry I*, 473 Mich at 77 (bold emphasis added). Plaintiffs' attempts to dismiss the applicability of *Henry I* fail for two basic reasons. The first of these is that Plaintiffs argue that *Henry I* did no more than reject their ability to use a negligence theory to recover for medical monitoring, and since that ruling involves only what Plaintiffs characterize as personal-injury style claims, it has no effect on their remaining causes of action, which they argue involve only what they characterize as property-tort claims.[21] Of course, were *Henry I* the narrow decision Plaintiffs paint it as, then the Supreme Court's step of reissuing its decision to add the phrase "***or property***" multiple times throughout that opinion to what had previously been the Supreme Court's ruling that "Plaintiffs fail to allege a present physical injury to person" would have been pointless and its repeated statements that a present physical injury is necessary for ***all*** claims alleging injury to person ***or property*** would also be rendered meaningless.

The second reason Plaintiffs' *Henry I* approach fails is that it never attempts to deal with

[21] See Pl. Resp. at 7 (Oct. 6, 2014) ("The pages of the Supreme Court's opinion in *Henry I* cited by Dow do not support its assertions of its argument. Instead, those pages confirm that the Supreme Court's rationale and rule related only to Plaintiffs' now dismissed claim for medical monitoring.").

their own ***disclaimer*** of present physical injury to the Supreme Court. "Indeed, plaintiffs in their arguments to this Court expressly deny having any present physical injuries." *Henry I*, 473 Mich at 73. The trial court compounded this problem and erred at a fundamental level because it ***did not even address Henry I's express ruling that these very Plaintiffs did not allege "present physical injury" to Plaintiffs' property***. Instead, the trial court simply referenced the Third Amended Complaint itself, as if the Supreme Court had said nothing on the topic, and held that this complaint adequately pleaded tort claims. The trial court's ruling failed to grapple with the Supreme Court's emphasis in *Henry I* on concessions Plaintiffs had already made and on the need to allow only tort claims for present physical injuries to proceed.

ARGUMENT

This Court should reverse the trial court's decision on the three issues presented by Dow's Application. These claims are plainly time-barred and reversal of the trial court's decision is necessary to enforce the Supreme Court's ruling in *Henry I* and avoid allowing Plaintiffs to make contradictory representations to the Court at different stages of this litigation.[22]

I. STANDARD OF REVIEW

A. Standard of Review Applicable to The Statute of Limitations Issue: Dow's motion for summary disposition on the statute of limitations is brought under MCR 2.116(C)(7). Under MCR 2.116(C)(7), summary disposition is appropriate when the undisputed facts expose a time-barred claim. *Froling Trust*, 283 Mich App at 278. "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-

[22] All three issues were preserved for appeal in Dow's September 12, 2014 motion for summary disposition (see pp 10-21) and in its December 12, 2014 summary disposition reply brief (see pp 2-22).

430; 726 NW2d 78 (2006) (emphasis added).

In its order rejecting Dow's statute-of-limitations defense, the trial court 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 Order at 2 (**Tab 1**). The trial court thus inaccurately treated subrule (C)(7) and (C)(8) claims identically. The review performed under MCR 2.116(C)(7) embracing consideration of documentary evidence differs from that under MCR 2.116(C)(8) because MCR 2.116(G)(5) provides that "[o]nly the pleadings may be considered when the motion is based on subrule (C)(8) …." See also Pls.' Br. in Opp. to Dow's App. for Leave to Appeal, Mich. S. Ct. No. 153093, at 5 (Feb. 23, 2016) (conceding this point). But under subrule (C)(7), as noted, the evidentiary record Dow compiled must be considered as part of its statute-of-limitations defense.

B. Standard of Review Applicable to the* Henry I, *Present Physical Injury Issue: Dow's motion for summary disposition based on Plaintiffs' failure to allege a present physical injury is brought under MCR 2.116(C)(8). Trial court decisions on a motion for summary disposition under MCR 2.116(C)(8) are reviewed *de novo*. *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).

C. Standard of Review Applicable to Judicial Estoppel Issue: Finally, Dow's motion for summary disposition based on judicial estoppel is likewise subject to *de novo* review. A "trial court's decision concerning equitable issues is reviewed de novo." *Eller v Metro Indus Contracting, Inc.*, 261 Mich App 569, 571; 683 NW2d 242 (2004). See also *Szyszlo v Akowitz*, 296 Mich App 40, 46; 818 NW2d 424 (2012) (applying the *de novo* standard to reviewing a decision on judicial estoppel).

II. THE TRIAL COURT ERRED BY NOT GRANTING SUMMARY DISPOSITION ON DOW'S STATUTE-OF-LIMITATIONS DEFENSE BECAUSE, JUDGED BY ANY LEGAL STANDARD, PLAINTIFFS' CLAIMS ARE IRREDEEMABLY LATE.

Plaintiffs' claims are barred under the three-year statute of limitations in MCL 600.5805(10). Under the Supreme Court's decisions in *Trentadue* and *Garg*, no judicially created doctrines can change that. Plaintiffs argued for the first time only recently that federal law pursuant to a provision of CERCLA resurrects the "discovery rule" here. But even under the discovery rule that Plaintiffs now advocate, Plaintiffs' claims would be barred given the undisputed record below demonstrating that this last-ditch argument cannot save Plaintiffs' claims. For even under the discovery rule, any reasonably diligent person would have or should reasonably have learned of their ability to assert their alleged injury decades ago.

A. Plaintiffs' Own Admissions Show on That Plaintiffs' Claims Accrued No Later Than the Late 1970s and Thus Are Now Time-Barred.

As Plaintiffs recognize, the operations at Dow's Midland facility that they claim are responsible for the release of dioxin into the Tittabawassee River began a century ago and "[f]or years, Dow released its waste into the river. For years, that waste contained poisonous Dioxin." Third Am. Compl. ¶¶ 116 & 126 (**Tab 4**). Plaintiffs specifically allege that, by 1982 when dioxins were discovered in Love Canal and Times Beach, dioxins had been released by Dow from its Midland plant and were "lurking in the Tittabawassee." *Id.* at ¶¶ 124-26. By January 1, 1984, according to the complaint, those dioxins allegedly placed floodplain residents — including Plaintiffs here — at "substantially greater risk" of personal injury and were sufficient to warrant the certification of a medical monitoring class of all persons who resided in the floodplain for any period of time in or after 1984. Accordingly, Plaintiffs' complaint makes clear that their asserted remaining claims accrued by 1982 or 1984 at the latest and thus were time-barred long ago.

Plaintiffs' claims are based on the "risk" posed by dioxin released into the Tittabawassee River. See, e.g., Third Am. Compl., at ¶¶ 117, 153, 192, 203(a) (**Tab 4**). Plaintiffs have taken the position throughout this litigation that they need not allege that ***any*** contamination reached their properties in order to state a claim under Michigan law: "You can have a nuisance claim if you're on the flood plain and not have any dioxin on your property, none. There's no need for physical intrusion."[23] Plaintiffs' claims are premised on a "risk" that dioxin might get onto their property, might expose them, and might cause them injury or, as they put it, they see "an objectively reasonable ***threat of such contamination*** . . . by virtue of [the parcel's] proximity to the pervasive presence of dioxin contamination all around it and the absence of any natural or other barriers to prevent its further dissemination throughout the flood plain area." Pl.-App. Br. in *Henry II* at 42 (Jan. 26, 2009) (emphasis added).

Plaintiffs cannot have it both ways. Having alleged that a cause of action can arise based on a "risk" of contamination and given their own discovery-rule theory, they had to undertake reasonable efforts to investigate whether such a "risk" existed as to their properties. See Part II.E below. The Third Amended Complaint made no such allegations — nor have Plaintiffs ever asserted in briefing in this more-than thirteen year-old litigation that they have done so. However analyzed, Plaintiffs' claims are late and thus barred.

B. Plaintiffs' Claims Are Barred by Operation of *Trentadue* and *Garg*.

Plaintiffs maintain that they can bring their claims based on an erroneous premise of law

[23] Hr. Tr. vol. 11, at 35:5-8 (September 16, 2005); see also *id.* at 27:7-9 ("You don't need physical intrusion at all … in Michigan to bring a negligence claim."); Pl. Br. in Opp. to Dow Chem. Application for Leave to Appeal at 31 (May 15, 2008) ("The injury is the same for all properties in the class area because Dow's contamination … threatens every property in the class area."); Pl.-App. Br. at 40 (January 26, 2009) ("Thus, the injury is the same for all properties in the Flood Plain, because Dow's contamination, deposited in river sediments, threatens every property in the Flood Plain.").

— that their claims were tolled by either the discovery rule or the allegedly continuing nature of the alleged tort. See Third Am. Compl. at ¶¶ 138, 168, 171, and 173 (**Tab 4**). Since the time this case was first brought, however, the Supreme Court has made clear that such doctrines do not apply under Michigan law.

In *Trentadue*, the Supreme Court held that the comprehensive statutory framework enacted by the Legislature "precludes th[e] common law practice of tolling accrual based on discovery." 479 Mich at 389. Instead, under the Michigan accrual statute, a claim accrues at the time of the alleged wrongful injury and it expires with the limitations period, regardless of whether plaintiffs knew or reasonably should have known of their injury. See *id.* at 387 n 8.

Similarly, *Garg*'s holding is that tolling is unavailable based on the continuing nature of an alleged tort because the "continuing violations" theory bore "little relationship to the actual language" of Michigan's statute of limitations. 472 Mich at 280-81. It was thus wrong, the Court held, for the judiciary "[t]o allow recovery for such claims," which simply "extend[ed] the limitations period beyond that which was expressly established by the Legislature." *Id.* at 282.

Michigan courts have applied these rulings in barring claims similar to those Plaintiffs assert here. In *Froling Trust*, 283 Mich App at 291, for example, this Court held that *Trentadue* and *Garg* barred plaintiffs' nuisance claim resulting from the flooding of plaintiffs' property. The Court found that plaintiffs' claims accrued when their land was flooded as a result of re-grading on their neighbors' lots and that subsequent flooding did not toll the statute of limitations: "Subsequent claims of additional harm caused by one act do not restart the claim previously accrued. For the purposes of accrual, there need only be one wrong and one injury to begin the running of the period of limitations." *Froling Trust*, 283 Mich App. at 291. As *Froling Trust* explained, "later damages" "give rise to no new cause of action" because "accrual

of the claim occurs when both the act and the injury first occur." *Id.* at 290.[24] That decision has direct application in a case like this where Plaintiffs allege that such flooding of the contaminated Tittabawassee River is the mechanism by which they were placed at risk.[25]

Similarly, in *Guastello v. LaFon*, this Court held that the plaintiff's trespass and nuisance action was time-barred by MCL 600.5805(10), the same statute of limitations applicable here. Unpublished opinion per curiam of the Court of Appeals, issued Sep 23, 2014; 2014 WL 10588248 (Docket No. 313725) (**Tab 6**).[26] There, plaintiff Thomas Guastello alleged that in 2006, the neighboring landowner defendants, the LaFons, installed certain drain equipment on plaintiff's property that more than tripled stormwater runoff onto his property. *Id* at *1. The trial court held that the suit, once brought in 2011, was not time-barred, on the theory that the presence of the drain equipment on Guastello's property constituted a continuing physical intrusion. *Id* at 2. This Court reversed, reasoning:

> [W]hether the presence of the expanded drainage ditch and increased storm water runoff are viewed as harmful effects of a past act or as continual tortious acts, plaintiff's claim is still time barred. First, caselaw has made it clear that harmful

[24] See also, e.g., *Smith v York*, unpublished opinion per curiam of the Court of Appeals, issued Oct 3, 2013; 2013 WL 5495569, *3 (Docket Nos. 304260, 304619) (same); *Silva v CH2M Hill Inc*, unpublished opinion per curiam of the Court of Appeals, issued Oct 15, 2013; 2013 WL 5629768, *5 (Docket No. 307699) (affirming summary disposition under MCR 2.116(C)(7) in a contamination case, holding that the continuing violation doctrine was "no longer applicable, including in cases alleging nuisance or trespass"). Unless specifically indicated on the Index of Exhibits, unpublished opinions are attached at Ex 21 to Dow's appendix to its summary disposition reply brief (**Tab 5**).

[25] See supra page 5 describing Plaintiffs' various allegations that Dow's releases together with flooding of the Tittabawassee River is the mechanism by which they were placed at risk of injury. For instance, Plaintiffs allege that "Dow released its waste [containing dioxins] for years" and that such waste "migrated down the river" due to annual "spring thaws and heavy rains." Third Am. Compl. at ¶ 126 (**Tab 4**).

[26] Dow's reliance on unpublished opinions in this section of its brief is solely to illustrate this Court's consistent application of established statute of limitations principles under circumstances similar to this case.

> effects of a past act do not toll the statute of limitations. See, e.g., *Terlecki* [*v Stewart*], 278 Mich. App [644,] 656[; 754 NW2d 899 (2008)]. Second, the fact that the drainage ditch and storm water runoff have a continual physical presence on the property does not toll the statute. There was a single trespassory act by defendants when they expanded the drainage ditch, and the drainage ditch and storm water runoff amount to continuing violations stemming from one wrong, see *Garg*, 472 Mich. at 282, which is the very definition of the continuing wrongs doctrine that *Froling Trust* abolished.
>
> …. Finally, although plaintiff did allege that he did not discover the expanded drainage ditch until 2009, the discovery rule has also been abolished and cannot save plaintiff's claim [citing *Trentadue*, 479 Mich at 389, 393; *Terlecki*, 278 Mich App at 652].

Id at *5. See also *Paquette v. Ron's Marine, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2016; 2016 WL 2988319 (Docket No. No. 325605 (**Tab 7**) (reaching similar outcome in nuisance and trespass case untimely brought in 2013 against the installation by defendant in 2004 of a downspout that caused recurrent flooding on plaintiff's property, rejecting the argument that every water intrusion was a separate tort).

C. The Trial Court Disregarded *Trentadue* and *Garg*.

In denying Dow's motion for summary disposition, the trial court neither discussed the Supreme Court's dispositive rulings in *Trentadue* and *Garg*, nor cited any precedent in support of its ruling. Instead, the trial court ruled that because Plaintiffs had argued that they were not injured until February 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," Order at 3 (**Tab 1**), this was sufficient to turn aside Dow's statute of limitations defense.

This argument is doubly wrong. The February 2002 MDEQ study reveals what Plaintiffs concede was not new information and the 2002 MDEQ study ***itself did not physically injure Plaintiffs***. Moreover, MDEQ is not a defendant here. Nor is it an entity whose actions Dow can

be held accountable for.[27] Yet the trial court appears to have assumed that an MDEQ report could somehow cause present physical injury to Plaintiffs: "After this time [*i.e.*, of the MDEQ study's release in 2002], ***MDEQ's dioxin-based restrictions*** [not Dow] ***unreasonably and significantly interfered*** with Plaintiff's use and enjoyment of their property, prevented Plaintiffs from freely using their property, and devalued Plaintiffs' property." Order at 3 (**Tab 1**).[28]

The trial court's reasoning is at odds with well-settled Michigan law, including the Supreme Court's ruling in *Henry I.* In holding that a claim did not accrue until MDEQ issued its report in 2002, the trial court made the mistake of ***confusing regulatory remedies (MDEQ information disclosure as part of its regulatory duties) with a tortious event that could start a statute-of-limitations clock***. In *Henry I*, the Supreme Court instructed that MDEQ actions undertaken as an expert administrative agency wielding delegated power from the Legislature to address exposure risks are salutary and, in fact, are better suited to address such risks than crude tort remedies.[29] While Plaintiffs may prefer a monetary tort remedy, MDEQ acted well within its power to disseminate information to the public. In short, the MDEQ action the trial court

[27] Indeed, MDEQ would presumably claim immunity from any such suit brought by plaintiffs like these, no doubt also arguing that the agency's information-gathering and analysis efforts in the 2002 study aimed to help protect floodplain residents from risk, not hurt them. See MCL 691.1407; *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

[28] Moreover, the 2002 MDEQ study simply reported the results of sampling from three floodplain areas; it did not even impose any restrictions. Nor does Plaintiffs' very carefully worded Third Amended complaint allege that any restrictions were imposed. Instead, it refers only to "warnings" contained in "fact sheets" issued beginning in Spring 2002. See Third Am. Compl. ¶ 141 (**Tab 4**).

[29] The Supreme Court observed that "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." *Henry I*, 473 Mich at 94-95. "Not only is the MDEQ specifically authorized under the NREPA [Natural Resources and Environmental Protection Act] to undertake 'health assessments' and 'health effect studies,' but the department is also empowered to take 'other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.'" *Id.*

focused on did not create new regulatory "injury" or even compound the already widely known "risks" referenced in Plaintiffs' non-*Henry I* theory of tort liability. Instead, MDEQ's 2002 report was, in the dispositive view of the Michigan Legislature, a remedy for purely risk-based claims (like the ones here), which cannot give rise to tort recoveries consistent with *Henry I*. For these reasons, the trial court erred in deeming that MDEQ's 2002 report started the limitations clock.

Whether MDEQ issued a study or fact sheets announcing the results of its sampling in the River floodplain area is thus irrelevant to the statute-of-limitations issue in this case. These regulatory actions are non-events within the meaning of *Trentadue* and *Garg*. Under those cases, such events cannot even toll the limitations period. Instead, all that MDEQ's actions in 2002 confirm is the wisdom of the Supreme Court's analysis in *Henry I* that the Legislature is "better suited . . . to balancing the competing societal interests at stake" in cases of this sort, 473 Mich at 68-69. The judiciary is particularly ill-suited to answering the risk-based questions necessarily intertwined with Plaintiffs' claims, "given the limited range of interests represented by the parties[,] the resultant lack of the necessary range of information on which to base a resolution," *id.* at 88, and the absence of "comprehensible legal standards." *Id*. at 77 (among such complex questions the Court identified were the following: "How far from the Tittabawassee River must a plaintiff live in order to have a cognizable claim? What evidence of exposure to dioxin will be required to support such a claim? What level of medical research is sufficient to support a claim that exposure to dioxin, in contrast, to another chemical, will give rise to a cause of action?").

As the *Henry I* Court recognized, regulatory action cannot form the basis of an actionable tort claim. To permit that would turn courts into bodies that decide — on an *ad hoc* and *post hoc* basis without access to the stakeholders or the necessary institutional expertise — what is and is

not an "acceptable" risk. That is not the function of our judicial system. "Were we to create an alternate remedy in such cases — one that may be pursued in lieu of the remedy selected by our Legislature — we would essentially be acting as a competing legislative body. And we would be doing so without the benefit of the many resources that inform legislative judgment." *Id.* at 92.

Indeed, this Court, in applying the Court's ruling in *Trentadue*, has repeatedly disregarded such subsequent regulatory actions or pronouncements as having any relevance to the point in time at which a claim accrues for purposes of the statute of limitations. In *Silva v CH2M Hill*, for example, the Court affirmed summary disposition where the plaintiffs alleged that contractors "spilled contaminated materials onto public streets near their homes, damaging their properties" when removing contaminated soil from a nearby site. Unpublished opinion per curiam of the Court of Appeals, issued Oct 15, 2013; No. 307699, 2013 WL 5629768, *1 (Oct. 15, 2013) (Docket No. 307699). In concluding that the plaintiffs' claims were barred by the statute of limitations, the Court disregarded the fact that the plaintiffs did not learn about the contamination until being notified by MDEQ years later. *Id*. The injury occurred, and the cause of action accrued, when the contamination was released.

Likewise, in *Beaulier v Ford Motor Co*, the plaintiffs alleged injury to their property as a result of groundwater contamination from a nearby manufacturing facility. Unpublished opinion per curiam of the Court of Appeals, issued Sept 25, 2008; 2008 WL 4367541, at *2-*4 (Docket No. 284064). Again, this Court affirmed summary disposition, rejecting the contention that the statute of limitations did not begin to run until MDEQ issued a public "notice of migration." *Id.* at *2-4.

Similarly here, the alleged risks of and from the dioxin being released into the Tittabawassee River first occurred decades ago, rendering Plaintiffs' claims long since time-

barred. See *Froling Trust*, 283 Mich App at 291 ("Subsequent claims of additional harm caused by one act do not restart the claim previously accrued."). And from the proper, separation-of-powers perspective of *Henry I*, MDEQ's information disclosure activities cannot even be properly conceived of as creating injury in the first place.

D. Plaintiffs' Eleventh-Hour CERCLA Preemption Argument Cannot Save Plaintiffs' Claims.

Recognizing that their claims are barred under the rule of *Trentadue* and *Garg*, Plaintiffs claimed at the eleventh hour that the Supreme Court's rulings were somehow preempted by the federal CERCLA statute, thereby resurrecting a discovery rule as applying to their claims. See 42 USC 9658 (purporting to revise state statutes that lack a discovery rule to dictate that they commence using a federally formulated discovery rule). Despite frequent adversarial exchanges between Plaintiffs and Dow concerning application of the three-year statute of limitations, Plaintiffs waited approximately 11 years, until ***October 2014***, to raise their novel preemption argument. Plaintiffs had never advanced such an argument before, and the trial court did not rely on it.[30]

[30] Indeed, in circumstances like these, it would not be unwarranted for the Court to conclude that Plaintiffs' CERCLA argument was waived. See *Silva*, 2013 WL 5629768 at *6 (rejecting as untimely a plaintiff attempt to apply CERCLA Section 9658 — the same provision Plaintiffs belatedly invoked here — because "the trial court's decision not to address the argument was not an unreasonable outcome because the property owners raised it for the first time on reconsideration and the argument was available to them before that time"); see also *ABB Indus Sys, Inc v Prime Technology*, 120 F3d 351, 360 n 5 (CA2, 1997) (holding argument from the same CERCLA provision was waived for failing to present it on a timely basis). Plaintiffs' failure to raise this issue early is particularly problematic because they must overcome the well-known and longstanding presumption against preemption. See, e.g., *Cipollone v Liggett Group*, 505 US 504, 518 (1992) (referring to "the presumption against the pre-emption of state police power regulations"). In other words, Plaintiffs had an ***affirmative duty*** to make a showing on preemption, since preemption could never operate in their favor ***by default***. See also *CTS v Waldburger*, 134 S Ct 2175, 2189 (2014) (recognizing this presumption prevented CERCLA Section 9658 from preempting a state statute of repose). Instead, Plaintiffs presented their CERCLA argument only in a responsive posture, years after *Trentadue* and *Garg*.

In any event, Plaintiffs' last-ditch CERCLA argument fails as a substantive matter to overcome the strong presumption against preemption, which is "consistent with both federalism concerns and the historic primacy of state regulation of health and safety." *CTS v Waldburger*, 134 S Ct 2175, 2189 (2014), quoting *Medtronic, Inc v Lohr*, 518 US 470, 485 (1996). No Michigan state court case has ever held that *Trentadue* and *Garg*'s interpretations of the three-year period in MCL 600.5805(10) are preempted by CERCLA Section 9658. Beyond that, Plaintiffs have failed to carry their burden to establish that the significant override and erosion of well-settled principles of Michigan law that Plaintiffs advocate here comports with the law of preemption.

First, Plaintiffs have not pleaded or otherwise attempted in any way to show that the threshold requirement for application of CERCLA Section 9658 has been met — *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 suit is premised and that all elements of a proper CERCLA cause of action have been advanced. *Becton v Rhone Poulenc, Inc*, 706 So2d 1134, 1141 (Ala, 1997).

Indeed, some courts have held that where plaintiffs (like those here) have not pleaded parallel CERCLA claims, Section 9658 carries no preemptive effect, even if the requirements of CERCLA could theoretically be met. See *Tippins v Caruso*, No. 16-cv-10140, 2016 WL 4253885, *6 (ED Mich, Aug. 12, 2016) (**Tab 8**); *Knox v AC & S, Inc*, 690 F Supp 752 (SD Ind, 1988); *Electric Power Bd of Chattanooga v Westinghouse Corp*, 716 F Supp 1069 (ED Tenn, 1988); but see *Barnes*, 534 F3d at 363. As the *Knox* court observed, the wording of the statute,

specifically its "incorporation of the terms of CERCLA and the CERCLA definition of those terms indicate that the provision was limited to application in the situation where a state cause of action exists ***in conjunction with*** a CERCLA cause of action." 690 F Supp at 758. See also *Tippins*, 2016 WL 4253885, *6 (Eastern District of Michigan following *Knox* in a case involving MCL 600.5805(10)).[31] Plaintiffs brought no CERCLA claim in conjunction with their Michigan common law claims here.

Second, CERCLA Section 9658 is a very unusual and constitutionally dubious statute, particularly as Plaintiffs propose to apply it here. The provision was not adopted until the Superfund Amendments and Reauthorization Act ("SARA") in 1986, many years after the claims here had already accrued, whether measured by either when Dow's alleged conduct occurred (as it should be), or as measured by when Plaintiffs purportedly received notice (as is inappropriate). As the Alabama Supreme Court has observed, construing CERCLA Section 9658 to retroactively preempt state discovery rules may run afoul of numerous constitutional prohibitions: "The potential ability of CERCLA's discovery rule to ***retroactively*** revive state-law-based claims for harm to persons or property from hazardous waste, which 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

[31] In fact, once the plaintiff in *Tippins* realized that his failure to allege a CERCLA claim was fatal to his argument that CERCLA preempted the three-year Michigan statute of limitations, he attempted to amend his complaint, but the Eastern District of Michigan denied that as well. See *Tippins v NW1-1 Inc*, No. 16-cv-10140, 2016 WL 5686381 (ED Mich, Oct. 3, 2016) (**Tab 9**). Here, Plaintiffs have amended or attempted to amend their pleadings numerous times to try to state a valid cause of action. This defective litigation should be dismissed via this appeal once and for all. Publication in F Supp 3d may be forthcoming for one or both of the *Tippins* decisions cited on this page.

(emphasis added).[32]

Third, the Supreme Court recently rejected CERCLA Section 9658 preemption in a situation analogous to this. In *Waldburger*, the Court held that CERCLA Section 9658 did ***not*** preempt state statutes that "put[] an outer limit on the right to bring a civil action" "equivalent to 'a cutoff'" or an "absolute bar." 134 S Ct at 2182-2183. As construed by the Supreme Court in *Trentadue*, MCL 600.5805(10) imposes precisely such a cutoff point. It establishes an ***absolute bar*** three years from the date of the alleged injury "regardless of the time when damage results" or whether plaintiffs "knew or should have known" of their claims. *Trentadue*, 479 Mich at 388 & 433; see also MCL 600.5827.

While Plaintiffs seek to distinguish *Waldburger* on the ground that it involved a non-preempted "statute of repose" rather than a preempted "statute of limitation," arguing that MCL 600.5805(10) is really a "statute of limitation" (Pl. Resp. at 14 (Oct. 6, 2014)), the Supreme Court has made clear that preemption analysis always looks past mere legal labels. See, e.g., *Central Machinery Co v Arizona State Tax Comm'n*, 448 US 160, 164 n 3 (1980). In essence, *Trentadue* and *Garg* recognized that Michigan's three-year statute of limitations here is the equivalent of a statute of repose for these purposes because, unlike the statutes of limitations in many other states, Michigan's statute of limitations operates as a flat bar, not as a presumptive time period subject to judicial doctrines that can extend the time period on a case-by-case basis.

[32] And since CERCLA Section 9658 does not create a federal cause of action and associated federal statute of limitations, but merely purports to ***alter how state-law based statutes of limitation — and thus how state causes of action operate*** — it also raises serious issues of commandeering the states to carry out federal policy — something that violates the Tenth Amendment. See, e.g., *New York v United States*, 505 US 144, 161 (1992) ("[T]his Court has never sanctioned explicitly a federal command to the states to promulgate and enforce laws and regulations"); see also generally Light, *New Federalism, Old Due Process, and Retroactive Revival: Constitutional Problems with CERCLA's Amendment of State Law*, 40 U KAN L REV 365 (1992) (canvassing Section 9658's various constitutional defects).

Whatever the label applied to the statute, the effect of MCL 600.5805(10) is to mark it out as precisely the sort of limitations statute that is ***not*** subject to preemption under *Waldburger* — *i.e.,* one that "put[s] an outer limit on the right to bring a civil action" "equivalent to 'a cutoff'" or an "absolute bar." 134 S. Ct. at 2182-2183. As one of the dissenters in *Trentadue* observed, "given th[e] Court's decision in *Henry v. Dow Chemical Co,* the very real possibility exists that there will be cases in which a plaintiff will never be able to file suit" and "no cause of action can ever be pursued," under the language of the Michigan statute as interpreted by the majority in *Trentadue* — *i.e.*, precisely the sort of impact that the *Waldburger* Court made clear would ***not*** trigger federal preemption under CERCLA. See *Trentadue*, 479 Mich at 444-445 (Kelly, J., dissenting).[33]

Fourth and finally, this Court does not even necessarily need to reach CERCLA Section 9658's validity and claimed applicability here because all that would accomplish is to secure application of a discovery rule, defined as "the date the plaintiff knew (***or reasonably should have known***) that the personal injury or property damages were caused ***or contributed to*** by the hazardous substance or pollutant or contaminant concerned." 42 USC 9658(b)(4)(A) (emphasis added). On the unrebutted evidence submitted by Dow, Plaintiffs cannot establish that their claims are timely even under a federal discovery rule. To the contrary, under such an objective test they should "reasonably have known" that dioxins "caused or contributed" to their purported risk-based injuries as of at least 1984 (by Plaintiffs' pleading admissions) or the late 1970s (based on the fish advisories they conceded they were aware of), if not decades earlier. See Part II.E immediately below (showing the claims here flunk the discovery rule). Rejecting Plaintiffs'

[33] After *Waldburger*, the United States Supreme Court denied a petition for certiorari arising out of the *Silva* case. The petition specifically challenged whether Michigan's rejection of the discovery rule was preempted by CERCLA. See *Silva v CH2M Hill Inc*, 135 S Ct 148 (Oct. 6, 2014).

last-minute CERCLA argument as superfluous to the outcome of this case also serves the ends of judicial restraint by avoiding the need to address the Supremacy Clause-related issues bound up in any preemption dispute and any need to address the constitutionally questionable aspects of CERCLA Section 9658. See, e.g., *People v McKinley*, 496 Mich 410, 415-16; 852 NW2d 770 (2014) (referring to the "widely accepted and venerable rule of constitutional avoidance") citing *Ashwander v TVA*, 297 US 288, 347 (1936) (Brandeis, J., concurring).

E. Plaintiffs' Decades-Old Claims Are Late Even Under a Discovery Rule.

The error in the trial court's reasoning is further demonstrated by the fact that Plaintiffs' claims would be time-barred even under a discovery rule — the very limitations rule rejected by *Trentadue*. Courts applying the discovery rule have repeatedly held that environmental contamination claims are time-barred where, as here, there is widespread publicity regarding the release of contamination prior to the limitations bar date. Indeed, as explained below, they have done so under circumstances much less compelling than those here.

In *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) (issued before *Trentadue*), for example, this Court itself likewise applied the discovery rule to grant summary disposition under MCR 2.116(C)(7) as to what was called a "possible cause of action" pursued by property owners alleging environmental contamination. There, the plaintiffs alleged groundwater contamination emanating from waste products produced at a Ford manufacturing facility. The Court held that the extensive publicity regarding potential contamination from events such as public meetings "should have alerted the plaintiffs to the existence of a possible cause of action related to the contamination." *Id.* at *3. The Court found "no merit to plaintiffs' argument that they could not file an action until release of a final report [by the MDEQ] on the remedial investigation." *Id.*

Similarly, in *Ball v Union Carbide Corp*, 385 F3d 713 (CA 6, 2004), the Sixth Circuit held that claims brought by residents of Oak Ridge, Tennessee were time-barred as a result of publicity regarding investigations into radioactive contamination from the neighboring nuclear weapons production facility as well as government notices regarding the investigation. The court observed that, "[w]here events receive …. widespread publicity, plaintiffs may be charged with knowledge of their occurrence." *Id.* at 722. "The relevant inquiry in [such] cases …. is an objective one." *Id.* "That is, the question is whether a typical person would have been aware of a possible link between emissions and health risks." *Id.* The court found that publicity regarding the mere investigation of such a link was sufficient to meet this test, even though the government had issued no final conclusions.[34]

And in *Shults v Champion Int'l Corp*, 821 F Supp 517 (ED Tenn, 1992), the court granted the defendants' motion to dismiss property damage claims resulting from alleged river-borne discharges, holding that the plaintiffs were on notice that dioxin dumped in the Pigeon River had damaged their properties because the river was "discolored and smelly." *Id.* at 518. The court rejected the plaintiffs' assertion that their claims did not accrue because they did not know what specific chemicals had been dumped in the river. As the court observed, "[t]he plaintiffs have always known that the river was polluted and that the pollution was caused by Champion. While they may, in fact, have not been aware of all the chemicals which made up the pollution, they had to know that the foam, odor, and discoloration were caused by chemicals of some sort." *Id.*

[34] See also *Blanton v Cooper Indus, Inc*, 99 F Supp 2d 797, 799 (ED Ky, 2000) (contamination claims from a National Electric Coil plant were time barred due to "widespread reports by local, regional and national media"); *Carey v Kerr-McGee Chem Corp*, 999 F Supp 1109, 1111 (ND Ill, 1998) ("extensive, widespread publicity" barred property damage claims from radioactive material).

As a final example of the many cases in the same vein, consider *Church v General Elec Co*, No. 95-30139; 1997 WL 129381 (D Mass, March 20, 1997), where the court held that publicity regarding PCBs released into the Housatonic River put the plaintiffs on notice of their potential causes of action. The court cited studies about PCBs in fish in the river along with articles "trumpeting accusations of PCB contamination by GE." *Id.* at *2. While the court denied the defendant's motion because the parties had not yet addressed whether the plaintiffs might be able to invoke the continuing torts doctrine to preserve their claims (a doctrine that the Supreme Court in *Garg* held null in Michigan), the court held that the plaintiffs could not preserve their claims by invoking the discovery rule. See *id.* at *5.[35]

Here, there is an even more compelling record placing Plaintiffs on notice of their purported claims — a record not contested below.[36] Not only was the threat posed by dioxin released into the Tittabawassee River a matter of widespread publicity in the media and in statements by regulators, but Plaintiffs here explicitly took the position in this litigation that they were injured on a common, plaintiff-wide basis when regulatory authorities issued fish advisories warning of dioxin in this same river beginning in 1978.[37] And unlike the plaintiffs in

[35] Again, Dow cites the unpublished decisions in *Beauchamp* and *Church* (both of which are attached at Ex 21 to Dow's appendix to its summary disposition reply brief (**Tab 5**)) in this subsection only to illustrate application of established law regarding the discovery rule to similar facts.

[36] The trial court apparently failed to address this evidentiary record in any way, perhaps based on the mistaken belief that Dow's motion for summary disposition was brought solely under MCR 2.116(C)(8) and that "[t]he Court may consider only the pleadings when deciding a motion based on subrule (C)(8)." Order at 2 (**Tab 1**). However, Dow's motion specifically invoked MCR 2.116(C)(7), under which a movant may "contradict[] [plaintiff's] evidence with documentation" of its own in arguing that "a statute of limitations bars the claim." *Froling Trust*, 283 Mich App at 278. See supra Part I.

[37] See Hr. Tr. at 35-36 (July 9, 2007) ("You know, there are fish and wildlife advisories for fish and wildlife in this area. ***These go out to everybody, not just specific people.*** And obviously ***all those things are also seen by the public***. ***That has an impact on the value of property within***

Schults, Plaintiffs here even had notice of the specific alleged contaminant. See supra n 10. Moreover, regulatory authorities had already filed (and concluded) litigation against Dow seeking redress for dioxin releases into the Tittabawassee River. See *Mangini v Aerojet-Gen Corp.*, 230 Cal App 3d 1125, 1152–53 (Cal Ct App, 1991) (plaintiff had sufficient notice of its claim when California Department of Justice merely had "investigated defendant's practices regarding disposal of hazardous waste in the area" despite fact that plaintiffs did not receive report detailing contamination until later date).[38]

Plaintiffs themselves argued that Dow knew or should have known when it discharged dioxin into the River that it could have injured Plaintiffs' downstream properties, yet they seek to entirely ignore what ***they should have known***.[39] Plaintiffs cannot now assert that they were not on notice of the alleged injury, given that any discovery-rule inquiry "is an objective one." *Ball*, 385 F3d at 722.

---

the geographic area, has an impact on people's use and enjoyment in the area.") (emphasis added).

[38] Plaintiffs have argued that media materials are hearsay but Dow did not put these sources forward to show the truth of the matter asserted, see MRE 801(c), in the underlying broadcasts and newspaper stories. Rather, they are competent to show Plaintiffs were put on reasonable notice to investigate whether their property was impacted by dioxin risks long before 2002. For instance, in *Fletcher v Ford Motor Co*, the Court stated that it would allow the admission of "[l]earned treatises discussing the safety of a product" during the plaintiff's case in chief "to raise a presumption of notice." 128 Mich App 823, 829; 342 NW2d 285 (1983). The court recognized that "[t]his is a nonhearsay purpose — so MRE 802 would pose no bar to admissibility[.]" *Id.* See also, e.g., *DeBenedictis v Merrill Lynch & Co*, 492 F3d 209, 214 (CA 3, 2007) (relying on articles published in *USA Today* and *Wall Street Journal* to affirm dismissal of claim on statute of limitations grounds).

[39] See, e.g., Order at 2 (Aug. 18, 2003) ("Plaintiffs [themselves] claim that the Defendant [Dow] knew or should have known that the dioxin it released in the Tittabawassee River would migrate downstream and settle on the Plaintiffs' land."). See also Third Am. Compl. ¶ 172 (**Tab 4**) ("Dow knew or should have known that its handling and disposal of dioxin unreasonably and significantly interferes with Plaintiffs' and the Property-Owner Class Members' properties and/or would cause a condition that would unreasonably and significantly interfere with the Plaintiffs' and the Property-Owner Class Members' properties.").

Indeed, regulators publicly reported the results of dioxin sampling in the Tittabawassee River and floodplain nearly two decades before the February 2002 date that Plaintiffs convinced the trial court to latch onto. Many dioxin fish and wildlife advisories were issued in the 1970s. See supra n 10 and accompanying text. The EPA published the results of sediment sampling it had conducted along the River and its floodplain as early as 1986. See supra n 16. The trial court's ruling that no claim accrued until subsequent sampling was reported in February 2002 simply disregards this undisputed record evidence. Additionally, the existence of dioxin sampling results decades ago cinches that even the discovery rule, if it applied, sinks Plaintiffs' claims. See *New W Urban Renewal Co v Viacom, Inc*, 230 F Supp 2d 568, 573 (D NJ, 2002) ("[T]olling under the discovery rule is not dependent on whether actual sampling results have been taken, but whether there are enough indications of environmental contamination to put the plaintiff on reasonable notice of a need to investigate further.").

The uncontested and extensive record Dow submitted below shows that Plaintiffs were on reasonable notice of their risk-based claims long before 2002 and yet they did not file them until years later. They simply worked backward from their 2003 filing date to try to find a notice event that had occurred in the prior three years. That cannot be countenanced.

Therefore, not only are Plaintiffs' claims barred under the governing rule of *Trentadue*, but they are just as barred under a discovery rule, given that the undisputed record evidence demonstrates that the statute of limitations expired decades ago because various incidents of government action and publicity long ago put potential claimants on notice. That the trial court's ruling would allow these decades-old, stale claims to proceed, which undeniably would be barred by a discovery rule — a rule not even applicable in Michigan — underscores the manifest error made below.

III. THE TRIAL COURT ERRED IN NOT GRANTING SUMMARY DISPOSITION TO DOW BASED ON THE SUPREME COURT'S PRIOR DECISION IN *HENRY I* THAT PLAINTIFFS DID NOT ALLEGE PRESENT PHYSICAL INJURY TO PROPERTY.

In *Henry I*, the Supreme Court directed that Dow be granted summary disposition on Plaintiffs' negligence claim for medical monitoring on the ground that Michigan tort law required an "actual injury to person or property." 473 Mich at 73. "[M]ere exposure to a toxic substance" such as dioxin did not meet the requirement of a "present physical injury." *Id.* at 72-74.

Instead, as the Court observed, it could "reach only one conclusion": "[I]f the alleged damages cited by plaintiffs were incurred in anticipation of possible future injury rather than in response to present injuries, these pecuniary losses are not derived from an injury that is cognizable under Michigan tort law." *Id.* See also *id.* at 78 ("A financial 'injury' is simply not a present physical injury, and thus not cognizable under our tort system."); *Wickens v Blue Cross/Blue Shield*, 465 Mich 53, 60; 631 NW2d 686 (2001) ("plaintiff can only recover for a present injury, not for a potential future injury").

In the course of dismissing Plaintiffs' negligence claim for medical monitoring, the Court in *Henry I* emphasized that the requirement of present physical injury to person or property applies equally to other tort claims. That requirement is based on "fundamental tort principles" embedded in the "common law," see *id.* 73, 79, 96, and it applies with special force within the "toxic tort" context — for good reason. *Id.* at 72. The requirement, the Court noted, "defines more clearly who actually possesses a cause of action"; it "reduces the risk of fraud"; and it "avoids compromising the judicial power" by delving into areas more appropriately addressed by the Legislature. *Id.* at 76-77. Indeed, such a requirement embodies "the very logic of tort law," which provides relief "only when [a plaintiff] has suffered a present injury." *Id.* at 74.

As the Court observed in *Henry I*, Plaintiffs here "do not claim that they suffer from

present physical injuries to person or property." *Id.* at 73 (it is "clear that Plaintiffs do not claim that they have suffered any present physical harm because of defendant's allegedly negligent contamination of the Tittabawassee flood plain"). *Henry I* held that mere exposure to dioxin failed to state a tort claim. *Id.* 72-73 ("*Larson* [*v Johns-Manville Sales Corp*, 427 Mich 301, 314; 399 NW2d 1 (1986)] squarely rejects the proposition that mere exposure to a toxic substance and the increased risk of future harm constitutes an 'injury' for tort purposes. It is *present* injury, not a fear of an injury in the future, that gives rise to a cause of action under negligence theory.").

Plaintiffs here are even farther removed from what constitutes a valid tort in Michigan because they allege damage merely from the "***risk***" from and of dioxin exposure. Third Am. Compl. ¶¶ 117, 135, 153 (**Tab 4**). That risk, according to Plaintiffs' complaint, has "threaten[ed]" their properties and "subjected [them] to a reasonable apprehension of danger." *Id.* at ¶ 196.

In the trial court, this Court, and the Supreme Court, Plaintiffs repeatedly confirmed that their remaining claims (including those sounding in negligence) are based on a "risk from future injury [from dioxin]." Hrg. T. at 26:14-25 (Sept. 16, 2005). According to Plaintiffs, every property "sitting directly in the pathway" of the contamination has been put "at risk." Pl.-App. Br. at 26 (Apr. 3, 2006). As a result, Plaintiffs assert that each plaintiff's property faces "an objectively reasonable threat of such contamination," Pl.-App. Br. at 42 (Jan. 26, 2009) (similar), a threat that they allege is "the same for all properties in the Flood Plain" because "contamination, deposited in river sediments, threatens every property in the class area." Pl. Br. in Opp. to Dow App. For Leave to Appeal, at 31 (May 15, 2008). Plaintiffs have repeatedly made clear that, "[a]s much as it seems Dow wanted us to, we have not and do not assert claims

for personal injury." Hrg. Tr. at 52 (Oct. 28, 2003). Instead of asserting such claims, Plaintiffs have consistently alleged that potential exposure to dioxin has created an increased risk of future injury to them and their properties.

These allegations and this type of recovery theory are precisely the sort of tort claims that the Supreme Court determined were insufficient in *Henry I*. Plaintiffs' negligence claim for medical monitoring in *Henry I* was based on alleged "exposure to a hazardous substance." Pl.-App. S. Ct. Br., at 11-12 (Aug. 31, 2004). Indeed, these remaining claims are even more attenuated — *i.e.*, less "present" and less "physical" — than Plaintiffs' negligence claim for medical monitoring that was based on actual exposure to dioxin. Here, Plaintiffs seek redress for Dow's release of dioxin into the Tittabawassee River. See, e.g., Third Am. Compl. at ¶¶ 1-3, 162(i), (j), (k),and (*l*) (**Tab 4**). The claim at issue in *Henry I* was at least based on what Plaintiffs characterized as actual exposure — *i.e.*, dioxin not merely released into the River, but dioxin to which Plaintiffs themselves were said to have been exposed. Nevertheless, the Court held that claims alleging only exposure were insufficient as a matter of law because Plaintiffs failed to allege a "present physical injury."[40]

This penetrating analysis by the Supreme Court is the law of this case and thus controls here: An allegation of a risk of future injury to person or property from exposure fails to satisfy the requirement of a present physical injury to person or property that is the *sine qua non* of an actionable claim under *Henry I*.

[40] See *Henry I*, 473 Mich at 72-74 ("[I]f plaintiffs' claim is that by virtue of their potential exposure to dioxin they have suffered an 'injury,' in that any person so exposed would incur the additional expense of medical monitoring, then their claim is also precluded as a matter of law, because Michigan law requires an actual injury to person *or property* as a precondition to recovery under a negligence theory…. [A] plaintiff must … demonstrate an actual *injury* to person or property. Indeed, such injury constitutes the essence of a plaintiff's claim.") (emphasis in original).

The same is true as to worries or fears concerning risks of potential exposure. See *Ford Motor Co v. Miller*, 260 SW3d 515, 517 (Tex App 2008) (applying Michigan law to negligence action, holding "Michigan law is clear that negligence recovery must be based on a present injury, not the fear of a speculative future injury."); *see also Henry I*, 473 Mich at 78-79 (fears of future injury, even reasonable ones, do not state Michigan tort claims).

In denying summary disposition, the trial court disregarded the binding precedent of *Henry I*, and in particular the Supreme Court's laser-focused determination that Plaintiffs here "do not claim that they suffer from present physical injuries to person or property." Nor did the trial court's opinion address Dow's argument that Plaintiffs have alleged nothing more than what the Supreme Court described as a "present financial injury, *i.e.*, damages" in the form of diminution of property value, but not "*present physical injuries to person or property*." *Henry I*, 473 Mich at 77-78 (emphasis in original). Specifically, the trial court never addressed itself to the following teaching of *Henry I*:

> While plaintiffs arguably demonstrate economic losses that would otherwise satisfy the "damages" element of a traditional tort claim, the fact remains that these economic losses are wholly derivative of a possible, future injury rather than an actual, present injury. A financial "injury" is simply not a present physical injury, and thus not cognizable under our tort system.

Id. at 78.[41]

Nowhere did the trial court address the Supreme Court's determination in this same case that allegations of fear of dioxin exposure, viewed in the most favorable light, could amount to nothing more than a "present . . . fear of future illness," which was insufficient to state a claim no matter how reasonable or unreasonable such fears might be. *Henry I*, 473 Mich at 78. The trial

[41] See also *Means v United States Conf of Catholic Bishops*, --- F.3d ---, 2016 WL 4698275, *7 (CA 6, 2016) (even if complaint had alleged additional expenses due to claimed negligence, it would flunk *Henry I*'s present physical injury requirement in the absence of allegations of such physical harms).

court was likewise silent as to the Supreme Court's rejection in this very case of the notion that Plaintiffs could assert any such claims based on the fear of future injury, failing to recognize that the Supreme Court had ruled that "Plaintiffs' fear, however reasonable, is still not enough to state a claim." *Id.* at 79. The trial court's failure to follow this precedent — including as the specific law of this case — dictates reversal.

IV. THE TRIAL COURT ALSO ERRED BY FAILING TO ADDRESS DOW'S CONTENTION THAT PLAINTIFFS ARE NOW ESTOPPED FROM ARGUING THAT THEY SUFFERED A PRESENT PHYSICAL INJURY TO THEIR PROPERTY.

The trial court also erred by failing to grant Dow summary disposition on the ground that Plaintiffs are judicially estopped from asserting that they allege a present physical injury. Under judicial estoppel, a party that has asserted a position successfully may not take an inconsistent one in subsequent proceedings. See *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW 2d 441 (1994). The trial court said nothing on the estoppel issue at all. Estoppel applies here because Plaintiffs repeatedly relied on their allegations of a risk-based "injury" to successfully argue to the trial court, this Court, and the Supreme Court that they met MCR 3.501's requirements for class certification.

Plaintiffs told all three courts that the alleged "common injury" for all persons in their putative property class was that dioxin contamination "threaten[ed] to be deposited on all flood plain properties now and repeatedly in the future." Pl.-App. Br. on App. at 38 (Jan. 26, 2009); see also Pl. Br. in Opp. to Dow Chem. App. for Leave to Appeal, at 29 (May 15, 2008); Pl.-App. Br. at 23 (Apr. 3, 2006). Plaintiffs equated the term "threat" with their concept (rejected in *Henry I*) that they could pursue merely risk-based injury. "People within the flood plain are well aware that their property is at risk from dioxin, that they're at risk from future injury, that they are at risk for loss of peace of mind. And that's the significant injury, and we're going to be able to show that by generalized proof." Hrg. T. at 26:20-25 (Sept. 16, 2005).

In a similar vein, Plaintiffs also maintained **[i]** that this "threat … substantially and unreasonably interfere[d] with the class members' use and enjoyment of their property," Pl.-App. Br. on App. at 38 (Jan. 26, 2009); **[ii]** that this threat was the basis for the claims brought by ***all*** Plaintiffs and ***all*** potential property class members; **[iii]** that this threat was ***all*** that was being alleged; and indeed **[iv]** that this threat was purportedly "the same for all properties," Pl.-App. Br. on App. at 38 (Jan. 26, 2009), "in the Flood Plain," Pl.-App. Br. at 26 (Apr. 3, 2006). See also Pl. Br. in Opp. to Dow Chem. App. for Leave to Appeal, at 31 (May 15, 2008). Moreover, they maintained that the consistency in this alleged injury and the lack of individual differences among the purported injuries (which were all risk-based) dictated that the predominance and superiority requirements of the class action rule were also satisfied.[42]

Having convinced courts to rule in their favor based on these representations, Plaintiffs cannot now contradict them. Indeed, applying judicial estoppel here should have been a ministerial black-letter exercise, for judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 479; 822 NW2d 239 (2012).

It was a violation of *Paschke* for the trial court to countenance Plaintiffs leading our judicial system down the path of certifying a class of thousands of plaintiffs based on the argument that the Plaintiffs were asserting only risk-based claims and then allowing Plaintiffs to try to repudiate such arguments when they began to reveal that Plaintiffs cannot possibly meet the present physical injury requirement of *Henry I*. That was error and it alone warrants reversal.

[42] The Supreme Court in *Henry II* concluded "[i]n its analysis of MCR 3.501(A)(1)(a), (b), and (e), the circuit court appears to have independently determined that plaintiffs alleged a statement of basic facts and law sufficient to support each of those three prerequisites, and we hold that its analysis of those three prerequisites was sufficient." 484 Mich at 506. Although class certification was later denied based on *Wal-Mart* commonality grounds, the trial court's rulings on the class prerequisites of predominance and superiority have never been reversed.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Dow requests that this Court reverse the trial court's order and remand for entry of summary disposition in Dow's favor to include dismissing this litigation in its entirety.

Dated: October 18, 2016

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: /s/ Phillip J. DeRosier
KATHLEEN A. LANG (P34695)
PHILLIP J. DEROSIER (P55595)
500 Woodward Ave., Ste. 4000
Detroit, MI 48226
(313) 223-2100

BRAUN KENDRICK FINKBEINER, PLC
CRAIG W. HORN (P34281)
4301 Fashion Square Blvd.
Saginaw, MI 48603
(989) 498-2100

KIRKLAND & ELLIS LLP
DOUGLAS J. KURTENBACH, P.C.
DOUGLAS G. SMITH, P.C.
SCOTT A. MCMILLIN, P.C.
300 N. LaSalle St., Ste. 2400
Chicago, IL 60654
(312) 862-2200

KIRKLAND & ELLIS LLP
JEFFREY BOSSERT CLARK
655 Fifteenth St., N.W., Ste. 1200
Washington, D.C. 20005
(202) 879-5000

Attorneys for Defendant-Appellant The Dow Chemical Company