STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY & KATHY HENRY, ET AL.,

Property Owners-Appellees,

vs.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Docket No. 328716

Saginaw County Circuit Court
LC No. 03-047775-NZ
Hon. Patrick J. McGraw

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RESPONSE BRIEF OF PLAINTIFFS-APPELLEES (PROPERTY OWNERS) ON APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INDEX OF EXHIBITS

COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.305(H)(1) pursuant to the June 28, 2016, Order of the Michigan Supreme Court, which remanded this case to the Court of Appeals for consideration as on leave granted.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Circuit Court err in denying Dow's Motion for Summary Disposition under MCR 2.116(C)(7) based on the three-year statute of limitations of claims for nuisance and negligence contained in a now superseded Third Amended Class Action Complaint that Dow never answered, where no evidentiary record was developed, and where Property Owners have not conceded any facts that support Dow's motion?

Circuit Court answers:	No
Property Owners answer:	No
Dow answers:	Yes

2. Did the Circuit Court err in denying Dow's Motion for Summary Disposition under MCR 2.116(C)(8) of claims for nuisance and negligence asserted in a now superseded Third Amended Class Action Complaint based on the Supreme Court's ruling that dismissed Property Owners' claim for medical monitoring?

Circuit Court answers:	No
Property Owners answer:	No
Dow Answers:	Yes

3. Did the doctrine of judicial estoppel require the Circuit Court to grant Dow's Motion for Summary Disposition under MCR 2.116(C)(8) of claims for nuisance and negligence asserted in a now superseded Third Amended Class Action Complaint based on legal arguments made in connection with Property Owners' motion for class certification?

Circuit Court answers:	No
Property Owners Answer:	No
Dow Answers:	Yes

INTRODUCTION

Plaintiffs-Appellees ("Property Owners") filed their Third Amended Class Action Complaint on February 5, 2004. Defendant-Appellant The Dow Chemical Company ("Dow") filed its Motion for Summary Disposition under MCR 2.116(C)(7) and (8) in September of 2014, more than ten years later. Despite this significant delay, Dow never filed an answer to the Third Amended Class Action Complaint and never produced a single document in discovery before filing its Motion for Summary Disposition.

Dow now asserts that the standard tort claims for nuisance and negligence alleged in the Third Amended Class Action Complaint must be dismissed because they are "attenuated, purely risk-based claims" that are infected with "separation-of-powers defects" which will "vastly expand the scope of tort liability" if Dow is required to file an answer and defend itself at trial. (Dow Opening Brief on Appeal ("Opening Brief") at pp. 1, 4.) Dow further argues that its contamination of the Tittabawassee River with dioxin was so well known that Property Owners' nuisance and negligence claims accrued "more than two decades" before the MDEQ and Dow itself discovered in 2002 that dangerous levels of dioxin had poisoned that river's floodplain soil, including Property Owners' properties. (*Id.* at p. 13). Although its Motion for Summary Disposition challenged claims asserted in the Third Amended Class Action Complaint, Dow admits in a footnote that forty-three separate complaints were subsequently filed by individual property owners and replaced the Third Amended Class Action Complaint in February of 2016. (*Id.* at p. 21, fn. 20.)

Despite its hyperbole, Dow presents no legal or factual justification for reversing the Circuit Court's denial of Dow's Motion for Summary Disposition under MCR 2.116(C)(7) and (8). Contrary to Dow's assertions, the Circuit Court did not disregard any prior Supreme Court

ruling, did not ignore any relevant, admissible evidence, and did not attempt to resurrect either the discovery rule or the continuing-wrongs doctrine. Instead, the Circuit Court correctly ruled that the tort claims for negligence and nuisance asserted in the Third Amended Class Action Complaint accrued when Property Owners alleged Dow's dioxin first caused harm: *i.e.*, February of 2002. The Circuit Court's ruling is consistent with applicable law, with the Supreme Court's prior rulings, with available documentary evidence, and with Property Owners' prior representations in this longstanding case. Accordingly, the Circuit Court's order denying Dow's Motion for Summary Disposition should be affirmed.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

Property Owners filed the Third Amended Class Action Complaint on February 5, 2004. (Dow Tab 4.) In addition to the three "questions of law and fact common to the Classes" that are cited by Dow at page 5 of its Opening Brief, Property Owners identified nine others. Those nine included the following: "(a) whether Dioxin is within the Tittabawassee River sediment and Flood Plain;" "(b) whether Dow caused the Dioxin pollution in the Tittabawassee River sediment and Flood Plain;" "(c) whether Dioxin pollution is dangerous and deadly;" and "(d) whether the Dioxin pollution has caused property values to decrease." (Dow Tab 4, at ¶162(a), (b), (c), (d).)

In paragraph 153 of the Third Amended Class Action Complaint, Property Owners alleged that 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." (Dow Tab 4 at ¶153.) Based in part on that factual allegation, Property Owners asserted a claim for medical monitoring in Count VI of the Third Amended Class Action Complaint. (Dow Tab 4 at ¶¶ 205-219.) On July 13, 2005, the Supreme Court dismissed Property Owners' medical monitoring claim, noting that "Plaintiffs have not cited an exception to the rule that a present physical injury is required in order to state [such] a claim…." *Henry v. The Dow Chemical Co.*, 473 Mich. 63, 73, 701 N.W.2d 684 (2005) (*Henry I*). The Supreme Court made no ruling in *Henry I* with respect to Property Owners' claims for nuisance and negligence.

On October 21, 2005, the Circuit Court granted Property Owners' motion for class certification. Dow appealed that ruling and on July 31, 2009, the Supreme Court remanded the case to the Circuit Court for clarification of its ruling that MCR 3.501(A)(1)(c) and (d) had been met. *Henry v. Dow Chemical Co.*, 484 Mich. 483, 509, 772 N.W.2d 301 (2009) (*Henry II).* In

Henry II, the Supreme Court characterized Property Owners' remaining claims as follows: "The representative Plaintiffs allege that they, along with the proposed class members, have incurred property damage caused by the dioxin contamination. Plaintiffs' claims are based on theories of negligence and nuisance." *Henry II*, 484 Mich. at 488-89. On July 18, 2011, the Circuit Court on remand revoked its prior class certification. On August 15, 2014, the Circuit Court ordered that an approved Notice be published one time per week for four consecutive weeks in three local newspapers advising former class members that the claims asserted in the Third Amended Class Action Complaint would not proceed as a class action.

On September 12, 2014, Dow filed its motion under MCR 2.116(C)(7) and MCR 2.116(C)(8) for summary disposition of the remaining class claims for nuisance and negligence that were asserted in the Third Amended Class Action Complaint. By order dated July 17, 2015, the Circuit Court denied Dow's Motion for Summary Disposition. Dow filed its Application for Leave to Appeal the Circuit Court's order on August 7, 2015. While Dow's Application for Leave to Appeal was pending, the Circuit Court on October 21, 2015, denied Property Owners' motion for leave to file a joint Amended and Supplemental Complaint pursuant to MCR 2.118, and ruled "that in this case, where such a voluminous number of Plaintiffs exist, separate pleadings will advance this litigation by requiring that each Plaintiff file an individual complaint containing specific, individual allegations, that obviously must conform with MCR 2.111." (October 21, 2015, Order at p. 4). In an order dated December 15, 2015, the Circuit Court ruled that the claims of the named plaintiffs in the Third Amended Class Action Complaint were misjoined, severed all claims asserted in the Third Amended Class Action Complaint, and directed each plaintiff who wished to pursue a claim against Dow to file an individual complaint

containing specific, individual allegations on or before February 5, 2016. (December 15, 2015, Order at pp. 2-5).

On December 17, 2015, this Appellate Court denied Dow's Application for Leave to Appeal the Circuit Court's July 17, 2015, order denying Dow's Motion for Summary Disposition. On June 28, 2016, the Supreme Court remanded Dow's Application to the Appellate Court for consideration as on leave granted. At that time, forty-three individual amended complaints were proceeding to trial in the Circuit Court on behalf of individual plaintiffs who, as of February 1, 2002, owned property that is frequently flooded by the Tittabawassee River. Dow has not challenged, and the Circuit Court has not ruled upon, the legal sufficiency of any claim asserted in any of the pending forty-three individual amended complaints.

SUMMARY OF ARGUMENT

Dow asserts that the Circuit Court erred in denying its motion under MCR 2.116(C)(7) and MCR 2.116(C)(8) for summary disposition of claims for nuisance and negligence alleged in the Third Amended Class Action Complaint. Dow bases its assertion on three arguments: (1) Property Owners' joint claims, as alleged in the Third Amended Class Action Complaint, accrued on or before 1984 and are barred by the three-year statute of limitations contained in MCR 600.5808 (Opening Brief at 17-21, 25-26); (2) the Supreme Court held in *Henry I* that Property Owners had failed to allege any present physical injury to person or property in the Third Amended Class Action Complaint (Opening Brief at 9-11, 22-23, 43-47); and (3) the doctrine of judicial estoppel bars Property Owners from arguing that their now superseded Third Amended Class Action Complaint contains allegations of present, physical injury (Opening Brief at 47-48). All of Dow's arguments are factually and legally incorrect for the following reasons.

First, Dow's statute of limitations argument is based on material misrepresentations of Property Owners' alleged injuries in the Third Amended Class Action Complaint and is not supported factually by any of the newspaper articles and regulatory reports which Dow references in its Opening Brief. Second, Dow's arguments in support of summary disposition under MCR 2.116(C)(8) are moot because the Third Amended Class Action Complaint has been superseded by multiple individual complaints containing property-specific allegations that were filed initially in February of 2016 pursuant to the Circuit Court's order. Third, the Supreme Court did not issue any ruling in *Henry I* regarding the legal sufficiency of the non-medical monitoring claims for nuisance and negligence that were alleged in the Third Amended Class Action Complaint. Finally, the equitable doctrine of judicial estoppel is inapplicable in this case and provides no basis for reversing the Circuit Court's order denying Dow's Motion for

Summary Disposition. Accordingly, the Circuit Court's July 17, 2015, order denying Dow's Motion for Summary Disposition should be affirmed.

ARGUMENT

I. Standard of Review.

A circuit court's decision on a motion for summary disposition is reviewed de novo on appeal. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 N.W.2d 817 (1999). A circuit court properly grants such a motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v. General Motors Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Spiek v. Department of Transportation,* 456 Mich. 331, 337; 572 N.W. 2d 201 (1998). All well-pleaded factual allegations must be accepted as true, and must be construed in the light most favorable to the nonmoving party. *Maiden v. Rozwood,* 461 Mich. at 119. Such a motion may be granted only "where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v. Department of Corrections,* 439 Mich. 158, 163; 483 N.W.2d 26 (1992). The application of judicial estoppel is an equitable doctrine that also is reviewed de novo on appeal. *Spohn v. Van Dyke Public Schools,* 296 Mich. App. 470, 479; 822 N.W.2d 239 (2012).

II. The Circuit Court Did Not Err in Denying Dow's Motion for Summary Disposition Under MCR 2.226(C)(7) Based on the Applicable Statute of Limitations.

Dow argues that the Circuit Court erred in denying its Motion for Summary Disposition under MCR 2.116(C)(7) because Property Owners' claims for nuisance and negligence asserted in the Third Amended Class Action Complaint are barred by the three-year statute of limitations

set forth in MCL 600.5805(10). The Circuit Court, however, correctly ruled that Property Owners' claims accrued in 2002, which is when Property Owners alleged they first suffered injury to their real property from Dow's contamination of the Tittabawassee River floodplain with dangerous levels of dioxin. Nothing argued or cited by Dow in its Opening Brief requires or justifies a reversal of that ruling.

A. Property Owners' Claims for Nuisance and Negligence Accrued Under Michigan Law When Property Owners Allege They First Suffered Harm to Real Property by Loss of Use, Enjoyment, and Value.

MCL 600.5827 provides that the period of limitation set forth in MCL 600.5805(10) "runs from the time a claim accrues…," and that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." The Supreme Court has interpreted this language to mean that a "wrong is done when the plaintiff is harmed rather than when the defendant acted." *Trentadue v. Buckler Lawn Sprinkler Co.*, 479 Mich. 378, 388, 738 N.W.2d 664 (2007), quoting *Boyle v. General Motors Corp.* 468 Mich. 226, 231 n.5, 661 N.W.2d 557 (2003). A plaintiff is harmed "once all of the elements of an action for … injury, including the element of damage, are present…." *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club*, 283 Mich.App. 264, 290, 769 N.W.2d 234 (2009), quoting *Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich. 146, 151; 200 N.W.2d 70 (1972). Accordingly, Property Owners' claims for nuisance and negligence accrued under MCL 600.5827 at the time when Property Owners first suffered the injuries that are alleged in the Third Amended Class Action Complaint. The Circuit Court followed this controlling precedent exactly in denying Dow's Motion for Summary Disposition. (July 17, 2015, Order at pp. 2-3.)

Dow's initial argument to reverse the Circuit Court's order is based on two false assertions. First, Dow falsely asserts that Property Owners' claims (as alleged in the Third Amended Class Action Complaint) for nuisance and negligence are based merely on a risk of injury posed by the dioxin that Dow released into the Tittabawassee River. (Opening Brief at p. 26.) Second, and relying on this misrepresentation of Property Owners' claims, Dow then falsely asserts that Property Owners' nuisance and negligence claims "accrued by 1982 or 1984 at the latest and thus were time-barred long ago" because beginning in 1978 fish advisories and newspaper articles disclosed the presence of dioxin in the Tittabawassee River and the danger of eating contaminated fish. (*Id.* at p. 25). The Circuit Court, however, properly found that Counts I, III, and IV of the Third Amended Class Action Complaint contained allegations of injury to property that **first occurred in 2002**.

> Plaintiffs' causes of action accrued in February of 2002 when the MDEQ's phase I sampling results were released to the public and concluded that elevated dioxin concentrations were pervasive in the Tittabawassee river floodplain. 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. (July 17, 2015, Order at p. 3.)

Contrary to Dow's argument, the harm to Property Owners did not occur when Dow contaminated the Tittabawassee River with dioxin. Rather, it occurred when the Property Owners learned that the levels of dioxin released by Dow into the River had accumulated in floodplain soils deposited onto their properties at levels so high that the MDEQ issued notices restricting Property Owners' rights to use those properties. Nothing cited by Dow in its Opening Brief – including the numerous, but irrelevant, newspaper articles and other miscellaneous documents selectively quoted in Tables 3 and 4 of Dow's Tab 5 – provide any legally sufficient

basis for reversing the Circuit Court's Order, which expressly found that "the statute of limitations under Michigan law did not accrue until February, 2002 at the earliest, and Plaintiffs' complaint was timely filed on March 25, 2003." (*Id.*)

1. The Claims for Nuisance and Negligence in the Third Amended Class Action Complaint Allege Individual Injury to Property Caused by Dow's Contamination of the Tittabawassee River Floodplain With Hazardous Levels of Dioxin.

Count I of the Third Amended Class Action Complaint asserts a claim against Dow for private nuisance. In accordance with the elements of a private nuisance claim set forth in *Adkins v. Thomas Solvent Co.,* 440 Mich. 293, 303-304; 487 N.W.2d 715 (1992), Property Owners therein alleged that "Dow's handling and disposal of dioxin has resulted in the long-lasting, significant contamination of Plaintiffs'and the Property-Owner Class Members' properties and has created a continuing nuisance which unreasonably and significantly interferes with Plaintiffs' and the Property-Owner Class Members' use and enjoyment of their properties." (Dow Tab 4, ¶168-70, p. 31.) Property Owners' alleged present injuries, therefore, arise from actual contamination and actual interference with the use and enjoyment of their properties caused by Dow's undeniable contamination of the Tittabawassee floodplain – the soil which migrated onto and contaminated Property Owners' real property parcels, not just the River and its fish – with dangerous levels of dioxin.

Property Owners also alleged a claim against Dow for public nuisance in Count IV of the Third Amended Class Action Complaint. In accordance with the elements of a public nuisance claim set forth in *Cloverleaf Car Co. v. Phillips Petroleum Co.,* 213 Mich.App. 186, 190; 540 N.W. 2d 297 (1995), and *Adkins*, 440 Mich. at 306, n.11, Property Owners alleged that Dow's conduct, which allowed dioxin to contaminate the Tittabawassee River and floodplain soil, significantly interfered with the public's health, safety, peace, comfort, and convenience;

produced an ongoing nuisance by contaminating public and private property with dioxin; and inflicted distinct present injury upon Property Owners by significantly and unreasonably interfering with their use and enjoyment of their private property. (Dow Tab 4, ¶¶ 192-200), pp. 35-36.) Once again, the distinct actual injury alleged by Property Owners in their claim for public nuisance arises from Dow's contamination of floodplain **soil** with dangerous levels of dioxin.

Finally, Property Owners alleged a claim against Dow for negligence and/or gross negligence in Count III of the Third Amended Class Action Complaint. In accordance with the elements of a negligence claim set forth in *Henry I*, 473 Mich. at 471-72, Property Owners alleged that Dow owed them a duty to handle and dispose of dioxin in a manner that did not significantly harm Property Owners' property; that Dow breached that duty; that Dow's breach of duty injured Property Owners by contaminating their property with dioxin; and that Property Owners' injury resulted in financial damages. (Dow Tab 4, ¶¶ 183-90, pp. 33-34.) Again, the present physical injury to property alleged by Property Owners in their claim for negligence is the contamination of Property Owners' parcels of real property with dioxin in amounts that significantly and unreasonably limit Property Owners' ability to use and enjoy those parcels.

Contrary to Dow's false assertions, therefore, all of the present injuries alleged by Property Owners in Counts I, III, and IV of the Third Amended Class Action Complaint involved substantial interference with Property Owners' use and enjoyment of private property caused by the contamination of Tittabawassee River floodplain soil, including Property Owners' individual parcels of real property, with dangerous levels of dioxin. In addition, all of the injuries alleged by Property Owners occurred in 2002 when MDEQ and the EPA first became aware that Dow had contaminated not just the Tittabawassee River, but also the adjacent

floodplain soils, with dangerous levels of dioxin and put the public, including Property Owners, on notice of property use restrictions.

2. Facts Alleged by Property Owners in Counts I, III, and IV of the Third Amended Class Action Complaint Establish That Property Owners First Suffered Injury in 2002.

Property Owners alleged specific facts in paragraphs 136 through 145 of the Third Amended Class Action Complaint which establish 2002 as the year in which Property Owners first suffered injury and their claims accrued under MCL 600.5827. Those alleged facts, which Dow fails to mention in its Opening Brief on Appeal, are as follows:

- In December of 2000, the Michigan Department of Environmental Quality (MDEQ) confirmed the presence of significant concentrations of dioxin in river sediment near the confluence of the Tittabawassee and Saginaw rivers.

- During the period from December of 2000 through June 2001, the MDEQ performed a Phase I testing of soil samples collected from other locations in the Tittabawassee River floodplain and confirmed the presence of dioxin in high levels.

- The information acquired by the MDEQ in December of 2000 and the data from the Phase I testing were not released to the public until February of 2002. (*See*: MDEQ Information Bulletin dated February 2002, attached as **Exhibit 1**.)

- From April to December of 2002, the MDEQ conducted a broader Phase II testing of Tittabawassee River floodplain soil and conclusively established the presence of highly dangerous levels of dioxin in the Tittabawassee floodplain down stream of Dow's facilities in Midland. (*See:* MDEQ Information Bulletin # 3 dated June 2003, attached as **Exhibit 2**.)

- Based on the results of its testing, the MDEQ issued warnings in the spring of 2002 to residents of property located within the Tittabawassee floodplain, including a Dioxin Fact Sheet which advised that "Children should not play in soil or sediment near sites of known or suspected dioxin contamination." (**Dow Tab 4** at ¶ 141.)

- In June of 2003, the MDEQ issued a "Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study" in which it concluded that elevated dioxin concentrations were pervasive in the floodplain downstream of Dow's Midland plant. (*See*: Final Report, attached as **Exhibit 3,** at pp. 40-44.)

- Based on the findings in the Final Report, the MDEQ designated the entire floodplain downstream of Midland as a facility subject to regulation under Part 201 of Michigan's Natural Resources and Environmental Protection Act. (*See:* MDEQ Supplemental Advisory, attached as **Exhibit 4**.)

(**Dow Tab 4**, ¶¶ 136-45, pp. 23-25.) These allegations confirm that Property Owners first suffered the injuries to their properties that were caused by Dow's undeniable contamination of the Tittabawassee River floodplain in February of 2002.

3. Property Owners' Alleged Injuries Were Neither Present nor "Discoverable" Prior to 2002.

Dow also falsely asserts that Property Owners' claims are barred by the three-year statute of limitations set forth in MCL 600.5805(10) because widespread publicity surrounding fish advisories alerted the public to dioxin contamination in the Tittabawassee River as early as 1978. (Opening Brief, pp. 13-14, 40-42.) Dow attempts to support this assertion by citing newspaper articles from 1978 through 1999 warning the public not to eat fish from the Tittabawassee River and describing Dow's contamination of the River and Dow's own plant in Midland, Michigan, with dioxin. (*Id.*, Dow Tab 5, Table 4). Dow also cites numerous regulatory reports and other miscellaneous documents from the same time period confirming the dangers posed by fish contaminated with dioxin, and describing various attempts made by regulatory agencies to identify the extent to which dioxin from Dow's operations had contaminated its Midland plant and surrounding wildlife. (*Id.*, Dow Tab 5, Table 4.) None of the newspaper articles, regulatory reports, and other documents selectively quoted by Dow, however, mention the dangerous levels of dioxin contamination that were found in the Tittabawassee River **floodplain soils** in 2002. In fact, Dow itself has admitted that the significant levels of dioxin that contaminated the Tittabawassee River floodplain and caused Property Owners' alleged injuries were unknown even to Dow prior to 2002.

In a press release dated October 2002, Dow stated that "[w]e understand how people living along the Tittabawassee River may be concerned about the levels of dioxin found in the Tittabawassee River flood plain by the Michigan Department of Environmental Quality (MDEQ) in 2002." (DOWEPA00018149, attached as **Exhibit 5**.) Dow then assured the understandably concerned floodplain residents (including the Property Owners) that it had had no knowledge of the danger found until MDEQ's 2002 samples were tested, despite prior rounds of sediment testing in the Riverbed dating as far back as 1985.

> In 1985, the Environmental Protection Agency (EPA) issued a report on their Tittabawassee River sediment testing which tested for the one type of dioxin that was thought to be a marker for dioxin from Dow manufacturing processes. **The EPA found nothing that concerned them.** That one type of dioxin had been monitored in Dow processes for more than 20 years, and emissions from Dow to the river have been essentially zero since 1985. In addition, the levels of dioxin in walleye declined dramatically. **As a result, before the MDEQ samples were taken we believed that the levels of dioxins in the river were not significant.** (*Id.*, emphasis added.)

The EPA also has acknowledged that it was unaware of significant dioxin contamination of the Tittabawassee River floodplain prior to 2002. In a memorandum dated July 30, 2004 (PLTF ALL00046380, attached as **Exhibit 6**), the EPA noted that it had completed a comprehensive, multi-pathway risk assessment of dioxin emissions from Dow in 1988 "to characterize risks from all exposure routes and communicate these finds to the public." (*Id.* at p. 2). Based on that study, "EPA determined that dioxin contamination of fish represented substantial risks to fish consumers, including the developing child." (*Id.*)

Dioxin contamination of river sediment, however, was an entirely different issue. "**Based upon limited sediment data of only tetra dioxins (TCDDs), we concluded that sediment contamination by dioxins was not likely to be significant.** [Document cite omitted.] **It is now clear, based on recent data, which evaluated all key dioxins (CDDs) and**

dibenzofurans (CDFs), that our original conclusion regarding dioxin in sediments was not correct. (*Id.*, emphasis added.) The EPA concluded that the "current situation is sufficiently different, and over a wider area than known in 1988, to warrant another comprehensive look at the dioxin issue…." (*Id.* at p. 3.)

As was made crystal clear in EPA's July 30, 2004, report, the dioxin contamination "situation" which the Property Owners faced in 2002 was "significantly different" from that which EPA, MDEQ and even Dow itself believed to exist in any prior year. And it is exactly that "significantly different" dioxin contamination "situation" which first became known in 2002 that produced the injuries alleged by Property Owners in the Third Amended Class Action Complaint.

Accordingly, the "accrual of claim" date which applies under MCL 600.5827 to the Property Owners' claims for nuisance and negligence is February 2002 at the earliest, which is when the Property Owners first learned that Dow's dioxin contamination of the Tittabawassee River extended to floodplain soils located on their individual properties. The Circuit Court's denial of Dow's Motion for Summary Disposition, therefore, was proper and should be affirmed.

4. The Circuit Court Did Not Disregard the Supreme Court's Rulings in *Trentadue* or *Garg.*

In *Trentadue v. Buckler Auto Lawn Sprinkler Co.*, 479 Mich 378, 388; 738 N.W.2d 664 (2007), the Supreme Court ruled that a claim accrues under MCL 600.5827 at the time the wrong upon which the claim is based was done, and that the wrong is done when the plaintiff is harmed. In making that ruling, the Supreme Court expressly rejected the "discovery rule," under which a claim does not accrue until a plaintiff knows, or objectively should know, that a claim exists. *Id.* at 389. In *Garg v. Macomb County Community Mental Health Services*, 472 Mich. 263, 282; 696 N.W.2d 646 (2005), the Supreme Court ruled that characterizing an injury as part of a

"continuing violation" does not extend the applicable limitations period under Michigan law. The Supreme Court in *Garg* "completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases." *Froling Trust,* 283 Mich. App. at 288. Dow argues that these decisions bar Property Owners' nuisance and negligence claims. (Opening Brief at pp. 26-27.) Dow's argument, which again relies on misrepresentations of Property Owners' claims and unsupported factual assertions, is simply wrong.

As noted above, Property Owners alleged in the Third Amended Class Action Complaint that they first suffered harm in February of 2002. That is when they first learned that soil within the Tittabawassee River floodplain, including their individual properties, contained dangerous levels of dioxin. The severity of Property Owners' alleged harm was confirmed in the Spring of 2002 when the MDEQ mailed to Property Owners a Dioxin Fact Sheet detailing the dangers of dioxin and warning them to keep their children from playing in contaminated soil. Based on these allegations, the Circuit Court correctly found, in full compliance with *Trentadue* and *Garg,* that Property Owners' claims accrued in February of 2002 at the earliest, when both the act and the injury first occurred. (*Froling Trust,* 283 Mich.App.at 291.) Rather than disregard the Supreme Court's Rulings in *Trentadue* or *Garg,* the Circuit Court complied with them completely.

Dow, however, cites *Froling Trust,* as well as multiple unreported decisions, as confirmation that the discovery rule and continuing wrongs doctrine are not operative in Michigan cases involving nuisance claims caused by flooding. (Opening Brief at pp. 27-29.) Dow then argues that these cases have "direct application in a case like this where Plaintiffs allege that … flooding of the contaminated Tittabawassee River is the mechanism by which they

were placed at risk." (*Id.* at p. 28.) Dow's argument provides no basis for reversing the Circuit Court's ruling because it confuses the central issue of **when** Property Owners allege they first sustained injury with the totally irrelevant issue for claim accrual purposes of **how** that injury occurred.

Dow also makes the unsupported – and factually incorrect – assertion that the February 2002 MDEQ study revealed no new information. (Opening Brief at p. 29). As noted above, that statement is refuted by Dow's own press release (Exhibit 5) as well as by EPA study results issued in July of 2004. (Exhibit 6). Dow also makes the totally frivolous argument that the Circuit Court "appears to have assumed that an MDEQ report could somehow cause present injury to Plaintiffs." (Opening Brief at p. 30). The Circuit Court made no such assumption and did not confuse "regulatory remedies" with a tortious event. Instead, the Circuit Court based its ruling on established Michigan law and the factual allegations set forth in Property Owners' Third Amended Class Action Complaint. Dow not only has never denied those allegations, it refuses even to mention them in its Opening Brief on Appeal. The Circuit Court's ruling denying Dow's Motion for Summary Disposition was entirely proper and should be affirmed.

5. If This Court Interprets Michigan Law as Triggering the Statute of Limitation Prior to February of 2002 (the Trigger Date Determined by the Circuit Court), That Earlier Date Is Preempted by the Federal Superfund Statute, Which Will Impose a Federally Mandated Discovery Rule Claims Deadline.

Dow's Opening Brief devotes ten of its forty-eight substantive argument pages to rebutting a rationale for allowing Property Owners' claims to proceed that the Circuit Court did not even mention, much less rely upon – the applicability to Property Owners' claims of the federal Superfund law's discovery rule, which preserves state law tort claims that otherwise would be barred by state statutes of limitation. Dow's devotion to this topic was not necessary.

As established above, the Circuit Court correctly ruled that **under Michigan law,** Property Owners were not harmed by Dow's release of dioxin into the Tittabawassee River until February of 2002 at the earliest, when the MDEQ, the EPA, and Property Owners became aware that Dow had contaminated Property Owners' properties with dangerous levels of dioxin. Accordingly, Property Owners' claims accrued under MCL 600.5827, at the earliest, in February of 2002, and the filing of their Complaint on March 25, 2002, was timely. Nevertheless, Dow's devotion deserves a response.

Section 309(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §9658, provides that in an action filed under state law for personal injury or property damage resulting from exposure to hazardous substances, if the applicable state law statute of limitations begins to run earlier than the "federally required commencement date," then the federal commencement date will apply. Section 309(b)(4) goes on to define the "federally required commencement date" 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." In other words, CERCLA imposes a discovery rule trigger date on state statutes of limitation if the state's own statutory time limit for filing a claim commences earlier than the federally required trigger date and would bar the claim.

In 2014, the U.S. Supreme Court considered the scope and impact of CERCLA Section 309's preemption and the federally required commencement date in the context of a North Carolina personal injury case seeking damages resulting from hazardous substances contamination at a former industrial property. In *CTS Corp. v. Waldburger*, 134 S.Ct. 2175 (2014), the Court reviewed a North Carolina statute of repose which provided that "[N]o cause of

action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." 134 S.Ct. at 218, *quoting* N. C. Gen. Stat. Ann. §1–52(16). Defendant CTS asserted that because its "last act" must have occurred by or before it sold the property in 1987, the ten-year statute had extinguished plaintiffs' claims by 1997, making plaintiffs' filing in 2011 untimely. The *Waldburger* plaintiffs responded with CERCLA Section 309, asserting that it preempted North Carolina's ten-year statute and instead imposed a discovery rule on the accrual of their claims, which they alleged began to run in 2009. The Fourth Circuit agreed, and allowed Section 309's discovery rule to preserve plaintiffs' claims. The U.S. Supreme Court reversed, holding that Section 309 only preempts state statutes of limitation and not statutes of repose, and finding that the North Carolina statute at issue was one of repose.

In so holding, the *CTS v Waldburger* Court first confirmed that Section 309 means what it says – it expressly preempts any state statute of limitations which accrues earlier than the "federally required commencement date" and substitutes a federal, discovery-based commencement date instead. "It is undoubted that the discovery rule in § 9658 pre-empts state statutes of limitations that are in conflict with its terms. The question presented in this case is whether § 9658 also pre-empts state statutes of repose." 134 S.Ct. at 2180.

The Court then determined that Congress' use of the phrase "statutes of limitation" in Section 309 did not also encompass state "statutes of repose," because the two types of statutory limits on the filing of claims are intended to accomplish different goals. The Court observed that statutes of limitation focus on claims by plaintiffs, and are intended to encourage a plaintiff to timely file a claim for damages once the injury and the likely cause of harm are known, while statutes of repose focus on a defendant's conduct, are intended to create finality, and are triggered by the last act or omission of a defendant which caused the harm or injury. 134 S.Ct. at

2182-83. The Court also distinguished the two types of statues by examining each one's temporal language – a statute of limitations defines the time period within which a plaintiff may bring a claim, while a statute of repose mandates that no cause of action exists against a defendant after a certain definite period of time. *Id.* at 2187.

Despite Dow's attempts to argue to the contrary, it is clear from the language of MCL 600.5805 that it is a statute of limitations, not a statute of repose. First, the section is titled (emphasis added): "Injuries to persons or property; **limitations**; 'dating relationship' defined." If the Michigan legislature had intended MCL 600.5805 to be a statute of repose rather than one of limitation, it likely would not have included "limitations" in the title.

Second, the Michigan Legislature knows the difference between statutes of limitation and statutes of repose. The body of that same statute contains the following provision: "(15) The periods of **limitation** under this section are subject to any applicable period of **repose** established in section 5838a, 5838b, or 5839." MCL 600.5805(15) (emphasis added). By way of example, section 5839(1) cuts off tort claims against licensed architects and professional engineers six years after occupancy, use, or acceptance of an improvement to real property; and section 5839(2) terminates negligence claims against licensed surveyors six years after delivery of the survey to the client. MCL 600.5839.

Third, the temporal references to plaintiff and plaintiff's injuries in MCL 600.5805 – "the action is commenced within the periods of time" and "the period of limitations is 3 years after the time of the death or injury"—are very different from the "last act or omission of the defendant" wording found in the North Carolina statute of repose at issue in *CTS v.*

Wladburger.[1] Last, a related statutory provision, MCL 600.5827, defines the "accrual" of claims under Michigan law as occurring "at the time the wrong upon which the claim is based was done regardless of the time when damage results."

Unlike the North Carolina statute at issue in *CTS v. Waldburger*, neither the limitations period specified in MCL 600.5805 nor the accrual definition found in MCL 600.5827 purports to link the statute's limitations period to any "last act or omission" of a defendant, nor do they attempt to cut off claims against a defendant after some definite period of time without regard to any harm experienced by a plaintiff. *See* FN 1. Rather, MCL 5600.5805(10) provides a relatively short, three-year period within which a claim may be brought after a plaintiff experiences damages as a result of injuries to persons or property. This is a prime example of a statute of limitations, and has been construed as such by Michigan courts. *See, e.g., Ostroth v. Warren Regency, G.P., L.L.C.*, 709 N.W.2d 589, 592-94, 474 Mich. 36 (Mich. 2006) (holding that MCL 600.5839 is both a statute of limitations and a statute of repose, and precludes application of the more general three-year statute of limitations found in 600.5805).

Dow's suggestion (Opening Brief, p. 36) that the *Trentadue* and *Garg* opinions somehow converted MCL 600.5805(10) from a statute of limitations to a statute of repose has no support in law. All statutes of repose serve as an absolute bar to claims filed outside of the allowed time

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[1] The Michigan statute of limitations for injury to persons or real property provides (emphasis added, subsections omitted):

"(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section. …

(10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805.

In contrast, the North Carolina statue of repose specifies that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N.C. Gen. Stat. Ann. §1-52(16).

frame. And, contrary to Dow's contention, the time frames established by MCL 600.5805 are statutorily subject to extension by reason of: infancy, insanity, or imprisonment (MCL 600.5851); death of the claimant or his or her personal representative (MCL 600.5852); absence from the state (MCL 600.5853); or fraudulent concealment (MCL 600.5855). Although the Michigan Supreme Court has curtailed the application of judicial or equitable tolling to the limitations periods set by MCL 600.5805, it does still recognize the possibility of tolling under appropriate circumstances. *Bryant v. Oakpointe Villa Nursing Centre,* 684 N.W.2d 864, 876 (Mich. 2004). As noted by the U.S. Supreme Court in *CTS v. Waldburger*, statutes of repose are not generally subject to extension or tolling. 134 S.Ct. at 2183. MCL 600.2805 is a statute of limitations, and CERCLA Section 309 is applicable to extend the statutory limitations period commencement date if warranted under the circumstances.[2]

Property Owners did not experience the harms they suffered to the use, enjoyment, and value of their properties until February of 2002, at the earliest, which is when MDEQ released the results of floodplain soil sampling for Dow's dioxin and issued notices restricting use of Property Owners' properties. Therefore, there is no conflict between the Michigan statute of

[2] *See also Krygoski Construction Co. v. Flanders Industries, Inc.,* slip op. No. 2:08-CV-202 (WD Mich., Mar. 17, 2009) (copy attached as **Exhibit 7**), in which the court assumed that Section 309 was applicable, but found that the discovery-extended statute of limitations had run; and *Barton v. NL Industries, Inc.,* slip op. No. 08-12558 (ED Mich., Sept. 30, 2010) (copy attached as **Exhibit 8**), in which the court found Section 309 applicable, notwithstanding *Trentadue's* abolishment of the discovery rule under Michigan law, and denied summary judgment against 48 Property Owners because establishing when each individual knew or should have known of adverse health effect arising from the Master Metal's lead smelter site rasied genuine issues of material fact.

Property Owners also note that Dow's citations to *Silva v. CH2M Hill, Inc.*, unpublished slip op. No. 307699 (Mich. Ct. App. Oct. 15, 2013) may be misleading, insofar as those plaintiffs did not raise the CERCLA Section 309 discovery rule exemption to the statute of limitations until they filed a motion for reconsideration of the trial court's summary disposition of their claims. The trial court declined to consider the argument at the reconsideration stage, and the appellate court affirmed this result as within the trial court's discretion. Dow also raises this case at its footnote 33 with the suggestion that the U.S. Supreme Court substantively rejected the Section 309 argument. It did not—the *Silva* case was one of hundreds denied *certiorari* on the first day of the Court's 2014 term. 135 S.Ct. 148.

limitations and the federally required commencement date under CERCLA Section 309, and the Michigan statute controls.

In the event, however, that the Court construes MCL 600.5805 such that Dow's suggested "accrual of injury" date of no later than 1984 applies to Property Owners' claims for injuries and damages to real property, then that 1984 trigger date will be preempted by CERCLA Section 309. Section 309 imposes a federally required commencement date on state law nuisance and negligence claims related to injuries from hazardous substances. This commencement date begins when a 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." CERCLA Section 309(b)(4). Property Owners did not know, nor reasonably should or could have known, until February of 2002, at the earliest, that dioxin had contaminated their parcels of real property to such an extent as to cause injury and damage, because it was not until then that MDEQ provided notice of: (1) the unreasonable and significant curtailment of their ability to freely use their property; (2) the loss of the use and enjoyment of their property; and (3) the resulting damages in the form of a decrease in the value of their property. All of these injuries flowed as a consequence of MDEQ's public release of the sampling results which found widespread dioxin contamination existed in the floodplain soils adjacent to and on the Property Owners' properties.

Dow argues that CERCLA Section 309 should not apply to this action because Property Owners have not properly pled a CERCLA cleanup action. (Opening Brief, pp. 34-35.) Dow is correct that Property Owners are not asserting a CERCLA cleanup action against Dow. Both the federal EPA and the Michigan DEQ are pursuing Dow for CERCLA-based cleanup work at and

adjacent to Property Owners' properties. Indeed, unless Property Owners were willing to incur response costs and clean up Dow's dioxin contamination themselves, they have no ability to sue Dow regarding its CERCLA cleanup while EPA and MDEQ are diligently pursuing that goal. *See* CERCLA Section 310(d)(2), 42 U.S.C. §9659(d)(2) (citizen's suits may not be brought during the pendency of an EPA cleanup).

But Dow's contentions regarding the necessity of a contemporaneous, private CERCLA claim are incorrect. Property Owners' state law tort claims against Dow for property damage do not have to be paired with a CERCLA cleanup action. The opening passage of the U.S. Supreme Court's opinion in *CTS v. Waldburger* makes it crystal clear how and when CERCLA Section 309 applies:

> The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2767, as amended, 42 U. S. C. §9601 *et seq.*, contains a provision that by its terms pre-empts statutes of limitations applicable to state-law tort actions in certain circumstances. §9658. Section 9658 applies to statutes of limitations governing actions for personal injury or property damage arising from the release of a hazardous substance, pollutant, or contaminant into the environment.
>
> Section 9658 adopts what is known as the discovery rule. Under this framework, statutes of limitations in covered actions begin to run when a plaintiff discovers, or reasonably should have discovered, that the harm in question was caused by the contaminant. A person who is exposed to a toxic contaminant may not develop or show signs of resulting injury for many years, and so Congress enacted §9658 out of concern for long latency periods.
>
> It is undoubted that the discovery rule in §9658 preempts state statutes of limitations that are in conflict with its terms.

134 S.Ct. at 2180. Notably, the plaintiffs in *CTS v. Waldburger* did not, in fact, bring a CERCLA cleanup action against defendant CTS: their claims sounded only in state nuisance law. *See: Waldburger v. CTS Corp.* 723 F.3d 434, 440 (4th Cir. 2013), *reversed by CTS v. Waldburger*, 134 S.Ct. 2175 (2014). Dow's citations to the contrary, which predate the Supreme Court's *CTS v. Waldburger* decision, are misguided.

Property Owners observe that Dow's Opening Brief (at page 34) does discuss one unpublished, post *CTS v. Waldburger* decision from the federal district court for Eastern Michigan. *Tippins v. NW1-1*, No. 16-cv-10140, slip op. (E.D. Mich. Aug. 12, 2016), involved a state prisoner, filing *pro se*, who claimed that water he drank from 2004 to 2007 was contaminated and caused him to develop Graves' disease, which was diagnosed in April of 2007. Tippins' complaint, filed in state court on October 23, 2015, and later removed to federal court, specifically alleged that he told corrections department officials in 2007 that he believed his stomach ailments were the result of drinking contaminated water, but they denied this connection. The federal court dismissed plaintiff's claims based, in part, on the three year statute of limitations found in MCL 600.5805(10).

In dismissing Tippins' complaint, the *Tippins v. NW1-1* court cited to a pre-*CTS v. Waldburger* decision – *Knox v. AC&S, Inc.* 690 F. Supp. 752, 757 (S.D. Ind. 1988) – which found that CERCLA Section 309 could only apply in circumstances where an underlying CERCLA cleanup action exists. The *Tippins v. NW1-1* court did not discuss the impact of the *CTS v. Waldburger* opinion on the *Knox* holding – it did not mention the *CTS v. Waldburger* decision at all. But the *Tippins v. NW1-1* court also dismissed the case because even if CERCLA Section 309 applied, Tippins "knew of the alleged cause of his injuries no later than 2007 when he was diagnosed with Graves' disease. [Citations omitted.] The fact that Tippins allegedly did not know of the specific contaminant at issue until 2014 does not change this fact… Because Plaintiff knew of the alleged cause of his injury by 2007, Plaintiff's claims are untimely." Slip op. at 13.

Moreover, and contrary to Dow's arguments, Property Owners' Third Amended Complaint makes repeated references to the fact that Property Owners' action arises from the

release of dioxin (which is undoubtedly a hazardous substance, pollutant, or contaminant) into the environment from Dow's Midland plant facility. *See, e.g.*, Third Amended Complaint, ¶¶ 122 and 123 (U.S. EPA's determination of the toxicity of dioxins), ¶¶ 116 and 126 (Dow's Midland plant released dioxin into the Tittabawassee River), ¶ 139 (Dow's Midland facilities are the source of the dioxin in the River and in the Flood Plain), ¶ 143 (Dow is the principal source of elevated dioxin concentrations in the River and the Flood Plain), and ¶¶ 168, 183, 197 (Dow handled and disposed of dioxin). It also is undisputed that U.S. EPA and MDEQ are using CERCLA to respond to dioxin contamination released from Dow's Midland facilities into the Tittabawassee River and the River's Flood Plain, including Property Owners' properties. *See, e.g.,* U.S. EPA's September 14, 2014, slideshow presentation explaining the Proposed Cleanup Plan for Tittabawassee River Floodplain Soil, attached as **Exhibit 9**.

Dow's attempt to raise a constitutionality argument involving CERCLA Section 309 similarly is wholly unfounded. Opening Brief, p. 35. CERCLA's constitutionality has been upheld by multiple courts dating back decades. Indeed, in *U.S. v. Sterling Centrecorp Inc.*, 960 F. Supp.2d 1025, 1053-54 (ED CA 2013), the U.S. District Court for the Eastern District of California rejected a Commerce Clause challenge to CERCLA.

> The Court also observes that the Supreme Court has repeatedly stressed that it will presume that a statute enacted by Congress is constitutional. *Bowen v. Kendrick*, 487 U.S. 589, 617, 108 S. Ct. 2562, 2579 (1988); *Rostker v. Goldberg*, 453 U.S. 57, 64, 101 S. Ct. 2646, 2651 (1981). Consistent with this respect for the constitutionality of acts of Congress, CERCLA has survived every challenge to its constitutionality. S*ee, e.g., Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 203 (2nd Cir. 2002) ("Clearly CERCLA itself was enacted as a valid response to a national problem, was directly related to a valid congressional concern, and was within Congress's powers under the Commerce Clause."); *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997); *United States v. NL Indus. Inc.*, 936 F. Supp. 545, 563 (S.D. Ill. 1996); *Nova Chemicals, Inc. v. GAF Corp.*, 945 F. Supp. 1098, 1105 (E.D. Tenn. 1996) ("CERCLA does not violate the Commerce Clause."); *United States v. Alcan Aluminum Corp.*, 87-CV-920, 91-CV-1132 (Consolidated), 1996 U.S. Dist. LEXIS 16358, *20 (N.D.N.Y. Oct. 25, 1996).

The *Becton v. Rhone-Poulenc, Inc.* decision cited by Dow as support for its erroneous contention that Section 309 cannot be applied retroactively involved a workplace exposure to chemicals, not the release of hazardous substances into the environment. (S*ee* 706 So.2d 1134, 1135 (Ala., 1997). *Freier v. Westinghouse Electric Corp.* 303 F.3d 176, 203-204 (2d Cir. 2002), *cert denied,* 538 U.S. 998 (2003), is more on point – it involved both Commerce Clause and Tenth Amendment challenges to the "federally required commencement date" (FRCD) portion of CERCLA Section 309.

In rejecting those constitutional challenges, the *Freier v. Westinghouse* court found as follows:

> [T]he FRCD was adopted in response to findings, made in a study required by § 301(e) of CERCLA, that state-law dates of accrual of claims for injuries caused by exposure to hazardous substances — especially injuries having a long latency period, such as cancer — frequently resulted in such claims becoming time-barred even before the injured person knew the cause of his injury. In requiring that the courts apply instead, if later than the state-law date, an objective accrual date, to wit, the date when the plaintiff "reasonably should have known" the injury's cause, § 9658 gives companies responsible for hazardous wastes greater incentives to clean up the waste sites, for it exposes those companies to a longer period of liability for the harms those sites cause to human health and the environment. The longer the period of liability, the more likely it is that a responsible company will bear the expense of the harms it has caused. The greater the potential cost to the company, the greater the likelihood that the company will strive to avoid liability by taking appropriate remedial actions with respect to its hazardous waste sites. And the more remedial action that is undertaken voluntarily, the less the need for government intervention, and the cleaner the environment.
>
> In sum, we conclude that the FRCD is an integral part of the regulatory scheme established by CERCLA, furthering CERCLA's goals in various ways, and that the enactment of the FRCD constituted a valid exercise of Congress's powers under the Commerce Clause.
>
> …
>
> Defendants also contend that the FRCD violates the Tenth Amendment, arguing that it effectively alters certain state statutes of limitations, overruling important policy choices made by a state legislature that had evaluated and balanced the

> competing interests, and that the FRCD improperly coerces states to regulate state-law toxic tort claims according to a federal formula.
>
> …
>
> The FRCD, however, does not conscript into federal services either the state's legislature or its executive branch. Rather, in order that persons victimized by exposure to hazardous wastes not be "deprive[d]…of their day in court," [citation omitted], and that the companies that substantive state law would hold responsible not escape liability, the FRCD simply requires courts in which state-law toxic tort claims are asserted to recognize that such a claim did not accrue before the plaintiff knew or reasonably should have known the cause of the injury. This is a modest requirement that is squarely within Congress's long established powers under the Supremacy Clause of the Constitution.

Finally, Dow's Opening Brief makes much of the supposed "eleventh-hour" nature of Property Owners' suggestion that CERCLA Section 309 may be applicable to their claims. This characterization is neither warranted nor justifiable. Asserting the expiration of a statute of limitations is an affirmative defense under Michigan Court Rule 2.111(3)(a). Because of the protracted procedural course this action has followed, Dow has never filed an answer to Property Owners' now superseded Third Amended Class Action Complaint. Dow filed its motion for summary disposition in September of 2014, raising the issue of the statute of limitations. Property Owners responded with explanations as to the timeliness of their claims under Michigan state law, as well as the potential applicability of CERCLA Section 309 to modify the commencement date of the period within which they could file suit. There is nothing "eleventh-hour" about Property Owners' response. Dow's Motion for Summary Disposition on the issue of the statute of limitations is wholly unfounded and should be denied.

III. The Circuit Court Did Not Err in Denying Dow's Motion for Summary Disposition Under MCR 2.226(C)(8).

Dow argues that the Circuit Court erred in denying its motion for summary disposition under MCR 2.226(C)(8) because the Supreme Court ruled in *Henry I* that Property Owners' allegations in the Third Amended Class Action Complaint were deficient and because Property

Owners are equitably estopped from alleging a present physical injury to their property. Dow's argument is based on a misrepresentation of Michigan law, including the Supreme Court's ruling in *Henry I* and the doctrine of equitable estoppel, and ignores both the procedural history and current status of this long delayed action.

A. Dow's Motion for Summary Disposition Under MCR 2.116(C)(8) Is Moot Because the Allegations Asserted in Property Owners' Third Amended Class Action Complaint Have Been Superseded by Subsequent Individual Complaints Filed by Former Class Members.

It is well settled that courts will not decide moot issues that have no practical legal effect in the case before it. *People v. Richmond*, 486 Mich. 29, 34; 782 N.W.2d 187 (2010); *B P 7 v. Bureau of State Lottery*, 231 Mich.App. 356, 359; 586 N.W.2d 117 (1998). An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief. *Id.*; *Contesti v. Attorney General*, 164 Mich.App. 271, 278; 416 N.W.2d 410 (1987). That situation exists in this case with respect to Dow's Motion for Summary Disposition under MCR 2.116(C)(8).

Dow's Motion for Summary Disposition under MCR 2.116(C)(8) challenged the legal sufficiency of claims for nuisance and negligence that were alleged in the Third Amended Class Action Complaint. Those claims have been replaced by forty-three separate complaints containing specific, individual allegations that were filed by former class members in compliance with Circuit Court Orders dated October 21, 2015, and December 17, 2015. As provided under MCR 2.118(A)(4), the individual complaints filed by the former class members have superseded the Third Amended Class Action Complaint. Furthermore, Property Owners would have been entitled under MCR 2.116(I)(5) to file an amended complaint even if the Circuit Court had granted Dow's Motion for Summary Disposition under MCR 2.116(C)(8). *Yudashkin v. Linzmeyer*, 247 Mich.App. 642, 651-52; 637 N.W.2d 257 (2001). Because the Third Amended

Class Action Complaint has been superseded by separate complaints filed by individual former class members pursuant to Circuit Court Order, Dow's Motion for Summary Disposition under MCR 2.116(C)(8) is now moot and the Circuit Court's Order denying that motion should be affirmed.

B. The Trial Court Did Not Err in Denying Dow's Motion for Summary Disposition Under MCR 2.116(C)(8) Because the Michigan Supreme Court Has Never Ruled on the Sufficiency of Property Owners' Claims for Nuisance and Negligence Asserted in the Third Amended Class Action Complaint.

Dow argues that the Circuit Court erred in denying its Motion for Summary Disposition under MCR 2.116(C)(8) because the Michigan Supreme Court held in *Henry I* that the Third Amended Class Action Complaint contained no allegations of present physical injury to person or property, which are necessary to support claims for nuisance and/or negligence. Dow's argument is based on a mischaracterization of the Supreme Court's ruling in *Henry I.*

The question presented to and decided by the Supreme Court in *Henry I* was "whether, in seeking a court-supervised medical monitoring program for future dioxin-related illnesses, plaintiffs have stated a claim on which relief may be granted." (*Henry I,* 473 Mich. at 71.) To answer that question, the Supreme Court stated that "[a]s an initial matter, it is necessary for us to determine the exact nature of plaintiffs' claim." (*Id.* at 72.) In making that statement, the Supreme Court confirmed unambiguously that it was evaluating the legal sufficiency under MCR 2.116(C)(8) of a single claim: *i.e.*, the medical monitoring claim asserted on behalf of a proposed class consisting of "individuals who have resided in the Tittabawassee flood plain area at some point since 1984 and who seek a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from Dow's Midland plant." (*Id.* at 70.)

The Supreme Court determined that "at its core, plaintiffs' medical monitoring claim is one of negligence." (*Id.* at 71.)

Noting that "Michigan law requires an actual injury to person or property as a precondition to recovery under a negligence theory" (*Id.* at 73), the Supreme Court expressly reaffirmed "the principle that a plaintiff must demonstrate a present physical injury to person or property in addition to economic losses that result from that injury in order to recover under a negligence theory." (*Id.* at 75-76.) The Supreme Court then stated that "[h]ere, it is apparent that the only 'injuries' alleged by the putative representatives of the medical monitoring class are the 'losses they have and will suffer as they are forced to monitor closely their health and medical condition because of their exposure to Dow's Dioxin [sic] pollution.'" (*Id.* at 77.) Finding that the only noneconomic injury alleged on behalf of the medical monitoring class was a "fear of future physical injury," the Supreme Court held that such fear, "however reasonable, is still not enough to state a claim of negligence." (*Id.* at 79). The Supreme Court made no ruling whatsoever in *Henry I* regarding the sufficiency of the non-medical monitoring claims for nuisance and negligence alleged in the Third Amended Class Action Complaint on behalf of the separate proposed class of individuals who owned property in the Tittabawassee River floodplain.

The Supreme Court confirmed its limited ruling in *Henry I* when it decided Dow's challenge to the Circuit Court's class certification order in *Henry v. Dow Chemical Company*, 484 Mich. 483, 772 N.W.2d 301 (2009) (*Henry II).* In *Henry II*, the Supreme Court stated that *Henry I* had "addressed plaintiffs' allegations that dioxin negligently released by Dow caused a risk of harm to their health." (*Henry II*, 484 Mich. at 489). The Supreme Court then described its holding in *Henry I* as follows: "Given that plaintiffs did not allege a *present* medical injury,

we concluded that plaintiffs did not assert a viable negligence claim recognized by Michigan common law. Therefore, we reversed the circuit court's denial of Dow's Motion for Summary Disposition **with regard to plaintiffs' medical monitoring claims** and remanded the matter to the circuit court for entry of an order of summary disposition accordingly." (*Id.* at 490-91, emphasis added.)

In a separate opinion in *Henry II,* Justice Corrigan, who authored the majority opinion in *Henry I,* stated that "*Henry I* created a bright line rule by unambiguously requiring a plaintiff alleging negligence to prove *present physical injury.*" (*Id.* at 533.) Justice Corrigan also confirmed, however, that *Henry I* did not change Michigan tort law governing nuisance claims. "To prove private nuisance, a plaintiff must show substantial interference with the use and enjoyment of his land. *Adkins v. Thomas Solvent Co.,* 440 Mich 293, 303-304, 487 N.W.2d 715 (1992). Because a nuisance is a 'nontrespassory invasion,' a plaintiff need not show *physical* intrusion upon his land to prove nuisance. *Id.* at 302, 487 N.W.2d 715." Justice Corrigan further explained that the "substantial interference" required for a viable nuisance claim under Michigan law could result from a "threat of future injury that is a present menace and interference with enjoyment." (*Id.* at 53.)

Contrary to Dow's assertion, therefore, the Supreme Court did not hold in *Henry I* or in *Henry II* that all tort claims – including claims for nuisance – must allege present *physical* injury to person or property in order to survive a motion for summary disposition under MCR 2.116(C)(8). Moreover, neither of those cases contains any ruling that the Third Amended Class Action Complaint did not contain allegations of present injury sufficient to support the non-medical monitoring claims for nuisance and negligence subsequently challenged by Dow in its Motion for Summary Disposition under MCR 2.116(C)(8). The Circuit Court, therefore, did not

err in denying Dow's Motion for Summary Disposition based on any ruling made by the Supreme Court in *Henry I.*

C. The Circuit Court Did Not Err in Denying Dow's Motion for Summary Disposition Under MCR 2.226(C)(8) Based on the Equitable Doctrine of Judicial Estoppel.

Judicial estoppel is an equitable doctrine invoked by a court at its discretion to protect the integrity of the judicial process. *Opland v. Kiesgan*, 234 Mich.App. 352, 365; 594 N.W.2d 505 (1999). "The 'prior success' model adopted in Michigan has as its focus 'the danger of inconsistent rulings.'" *Id.*, quoting *Paschke v. Retool Industries,* 445 Mich. 502, 510, n.4; 519 N.W.2d 441 (1994).) For the judicial estoppel doctrine to apply, the challenged party's claims must be wholly inconsistent and "there must be some indication that the court in the earlier proceeding accepted that party's position as true." *Paschke,* 445 Mich. at 510. The doctrine "is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims." (*Opland,* 234 Mich.App. at 364). Instead, judicial estoppel is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." (*Id.*) The "extraordinary remedy" of judicial estoppel does not apply in this case for three reasons.

First, Property Owners have not asserted "wholly inconsistent" positions at any time in these proceedings. The claims for nuisance and negligence asserted by Property Owners in the Third Amended Class Action Complaint remained unchanged from their filing in February of 2004 until the Circuit Court denied Dow's Motion for Summary Disposition in July of 2015. As noted by the Supreme Court in *Henry II,* those claims included allegations of property-related damage caused by Dow's contamination of the Tittabawassee River with dioxin. (*Henry II,* 484 Mich. at 488-89.) Property Owners' legal arguments supporting their dismissed equitable claim

for medical monitoring and the subsequently revoked certification of a property owner class were not "wholly inconsistent" with the substantive allegations of the Third Amended Class Action Complaint challenged by Dow in its Motion for Summary Disposition under MCT 2.116(C)(8).

Second, no danger of inconsistent rulings exists in this case. As noted by Dow, the Supreme Court rejected Property Owners' arguments and dismissed the equitable claim for medical monitoring in *Henry I.* In *Henry II,* the Supreme Court noted that the Circuit Court had "reviewed numerous documents from both parties, including scientific studies, affidavits from experts, and information provided by the MDEQ in its analysis of MCR 3.501(A)(1)(a), (b) and (e)," and held that the Circuit Court's "analysis of those three prerequisites was sufficient." *Henry II,* 484 Mich. at 506. The Supreme Court then remanded the case for a clarification by the Circuit Court of "its reasoning for ruling that the requirements of MCR 3.501(A)(1)(c) and (d) for class certification had been met." (*Id.* at 507.) The Supreme Court also noted the Circuit Court's discretion "to decertify certain members of the class when it deems it appropriate under MCR 3.501(B)(3)." (*Id.*) Neither of the Supreme Court's decisions, nor the decisions of the Circuit Court to certify and on remand revoke its certification of a property owner class, are inconsistent with the Circuit Court's denial of Dow's Motion for Summary Disposition under MCR 2.116(C)(8). Accordingly, none of those decisions satisfies the "prior success" requirement under Michigan law for application of the judicial estoppel doctrine in this case.

Finally, none of the written and oral statements of Property Owners' legal counsel that are referenced at Tab 5, Table 2, of Dow's Opening Brief justify the application of the judicial estoppel doctrine to reverse the Circuit Court's denial of Dow's Motion for Summary Disposition under MCR 2.116(C)(8). As noted above, a motion under MCR 2.116(C)(8) "tests

the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v. Department of Transportation,* 456 Mich. 331, 337, 572 N.W.2d 201 (1998). Such a motion may be granted only "where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v. Department of Corrections,* 439 Mich. 158, 163; 483 N.W.2d 26 (1992).

In this case, each of the claims for nuisance and negligence alleged in the Third Amended Class Action Complaint contained clear and unambiguous allegations of present injury to property. (*See:* Dow Tab 4, ¶¶ 168-200). Dow's invocation of judicial estoppel, therefore, is nothing more than an assertion of a "technical defense" for the purpose of derailing meritorious claims, which was expressly rejected in *Opland.* (234 Mich. App. at 364.) The Circuit Court's decision denying Dow's Motion for Summary Disposition under MCR 2.116(C)(8) was proper, was not inconsistent with any other rulings issued in these proceedings, and should be affirmed.

Respectfully submitted,

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