STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY & KATHY HENRY, ET AL.,

Property Owners-Appellees,

v.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Docket No. 328716

Saginaw County Circuit Court
LC No. 03-047775-NZ

Hon. Patrick J. McGraw

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF THE QUESTION PRESENTED

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

The trial court would answer: No.

The Chamber of Commerce of the United States answers: Yes.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business organization. The Chamber directly represents the interests of its more than 300,000 members, and indirectly represents the nation's more than three million businesses. Its membership includes organizations of varied sizes from every business sector and region of the country. The Chamber regularly represents the interests of its members in state and federal courts in cases raising issues of national importance for the business community. In pursuit of that goal, the Chamber regularly files briefs as *amicus curiae* in state and federal courts across the United States.

The Chamber has a particular interest in the proper interpretation and application of statutes of limitations, like the Michigan statute at issue in this case. Among other things, the proper application of Michigan's statute of limitations will promote predictability for the businesses that operate in this State.

STATEMENT OF FACTS

Amicus adopts by reference the Statement of Facts and Proceedings Below of Defendant-Appellant Dow Chemical Company ("Dow").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Dow's briefing ably explains why Plaintiffs-Appellees' claims are doubly-barred, both by the statute of limitations and by Michigan's present physical injury rule. The Chamber submits this brief to emphasize an issue that is of particular concern to the broad array of businesses the Chamber represents within Michigan and throughout the nation.

Over a decade ago, the Michigan Supreme Court abolished the continuing violations doctrine in this State. In this appeal, Plaintiffs surreptitiously ask this Court to restore it. In Michigan, the limitations period for a claim begins running once a plaintiff has suffered some

injury from an alleged unlawful act and does not begin to run afresh as new injuries are incurred. Put simply, the statute of limitations runs from the *first* injury a plaintiff has suffered, not the last. The reasons for that rule are manifest and sensible. If a plaintiff received a new limitations period every time it could point to a supposed new injury from a bad act, liability would be unending. Conduct that is literally decades-old could repeatedly give rise to new causes of action. That in turn would deprive defendants of the finality that Michigan law bestows, allow plaintiffs to sleep on their rights until evidence and witnesses have disappeared, and burden the courts with a mass of increasingly stale claims.

This case—which has already been pending for years in the Michigan courts—presents a textbook example of why Michigan has rejected the continuing violations doctrine. The Plaintiffs here claim that they were injured by a 2002 state report discussing elevated dioxin concentrations in the Tittabawassee River floodplain. But Plaintiffs themselves acknowledge that those dioxins had been present in the area for decades, at least since 1978. Plaintiffs know that any claim of physical injury would be time-barred, and so they defined a new "injury" based on the publication of the 2002 report, which they claim drove down property values. Plaintiffs' claim for alleged injury from the dioxins accrued no later than 1978. Those claims cannot be resuscitated by alleging new harms from the same conduct that arose decades later. In essence, Plaintiffs are asking this Court to restart the limitations clock any time a government report (or other publication) discusses an already known alleged injury. That rule would wholly undermine the finality that Michigan's limitations law rightly seeks to provide. Accordingly, the Chamber strongly urges this Court to reaffirm that the continuing violations doctrine has no place in Michigan, and that Plaintiffs' claims are time-barred.

ARGUMENT

I. Michigan Has Rightly Rejected The Continuing Violations Doctrine Which Deprives Parties Of The Finality That Michigan Limitations Law Provides.

A. Michigan Rejects The Continuing Violations Doctrine.

Some jurisdictions have adopted a rule known as the "continuing violations" (sometimes the "continuing nuisance" or "continuing wrongs") doctrine. Under that rule, each new injury from an alleged unlawful act provides a fresh statute of limitations for the plaintiff. That is, each new occurrence or reoccurrence of the tortious conduct is considered "a separate cause of action," and "a new temporary nuisance claim accrues each time the injury occurs." 54 CJS, Limitations of Actions, § 236, p 277-78 (2010); see also 58 Am Jur 2d, Nuisances, § 221, p 740-41 (2012) (explaining that when an "injury from the alleged nuisance is temporary in its nature, or is of a continuing or recurring character, . . . one recovery against the wrongdoer is not a bar to successive actions for damages thereafter accruing from the same wrong," and that "every day's continuance is a new nuisance").

In *Garg v Macomb Country Community Mental Health Services*, 472 Mich 263, 696 NW2d 646 (2005), the Michigan Supreme Court squarely rejected the continuing violations doctrine as inconsistent with Michigan limitations law. A claim accrues in Michigan "at the time the wrong upon which the claim is based was done *regardless of the time when damage results*." MCL 600.5827 (emphasis added). Once accrued, the statute of limitations runs for three years "after the time of the death or injury."[1] MCL 600.5805(10). Thus, "[o]nce all of the elements of

[1] The Michigan Supreme Court has explained that the statutes' alternative references to "the time the wrong . . . was done" and the "time of death or injury" are not inconsistent but, rather, complementary. See *Trentadue v Buckler Auto Lawn Sprinkler Co*, 479 Mich 378, 387-88 n8, 738 NW2d 664 (2007). This is because "[t]he wrong is done when the plaintiff is harmed rather than when the defendant acted." *Id.* (quoting *Boyle v Gen Motors Corp*, 468 Mich 226, 231 n5, 661 NW2d 557 (2003)).

an action for personal injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run." *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151, 200 NW2d 70 (1972). Later damages may result from the wrong, but those damages "give rise to no new cause of action, nor does [the] statute of limitations begin to run anew as each item of damage is incurred." *Id.*

In *Garg*, the Court explained that the continuing violations doctrine "bears little relationship to the actual language of the relevant statute of limitations." *Garg*, 472 Mich at 281. If the court were to restart the limitations clock for each new injury, it would, in essence, be "simply . . . extend[ing] the limitations period beyond that which was expressly established by the Legislature." *Id.* at 282. As a result, the court determined there was "no basis" to "construct such an amendment," regardless of whether the doctrine would prove "a useful improvement in the law." *Id.* at 285.

As several panels of this Court have recognized, *Garg*'s rejection of the continuing violations doctrine applies with full force where the violations in question allege a nuisance. In *Terlecki v Stewart*, 278 Mich App 644, 754 NW2d 899 (2008), for example, this Court considered whether plaintiffs could assert claims for nuisance and trespass, among others, arising from the defendants' replacement of a wooden spillway with a concrete spillway eight years before the plaintiffs filed suit. The plaintiffs alleged that the replacement spillway caused a nearby lake to flood their property. *Id.* at 646. Although the plaintiffs initially noticed that "some trees on their wooded wetland began dying in 2001," they claimed that it was not until 2005 that they discovered the spillway had been improperly built higher than permitted. *Id.* at 647-48. Plaintiffs claimed, among other things, that "the flooding caused by the raised spillway constitute[d] continuing torts of trespass and nuisance." *Id.* at 650-51.

Relying on *Garg*, and noting that its holding "does not appear limited to discrimination cases," *id.* at 655, this Court concluded that the only tortious acts the plaintiffs alleged were the 1997 replacement of the spillway and a capping of the culvert four years later in 2001, *id.* at 656. Thus, this Court construed the damages that had taken place since 2001—specifically the continued flooding of plaintiffs' property and related tree damage—as "merely the harmful effects of the completed tortious acts." *Id.* Accordingly, the Court held that plaintiffs' claims were time-barred. *Id.* at 657-58.

This Court's more recent decision in *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 769 NW2d 234 (2009), is even more explicit. There, the Court held that "*Garg* and its progeny *completely and retroactively abrogated* the common-law continuing wrongs doctrine in the jurisprudence of this state, including in nuisance and trespass cases." *Id.* at 288 (emphasis added); see also *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 517, 739 NW2d 402 (2007).[2] That case similarly involved flooding to plaintiffs' property that began after neighbors regraded their property in 1986 and other neighbors took various actions through 2002 which only exacerbated the flooding. *Marilyn Froling*, 283 Mich App at 267-73. The plaintiffs relied on the *last* injury they allegedly suffered—a flood in 2004—as the injury that triggered the running of the limitations period. *Id.* at 289. Faithful to *Garg*, however, the Court concluded that the claim accrued as soon as "both the last conduct and the first, subsequent corresponding injury occurred." *Id.* at

[2] This Court acknowledged that, in one post-*Garg* case, a panel had "concluded that the continuing wrongs doctrine applied to an action alleging a recurrent nuisance," *Marilyn Froling*, 283 Mich App at 284 & n31 (citing *Dep't of Envt'l Quality v Waterous Co*, 279 Mich App 346, 760 NW2d 856 (2008)), and in another had suggested that *Garg* might be limited to civil rights actions, see *id.* at 281-82 & n23 (citing *Attorney General ex rel Dep't of Envt'l Quality v Bulk Petroleum Corp.*, 276 Mich App 654, 667 n3, 741 NW2d 857 (2007)). As this Court pointed out in *Marilyn Froling*, however, those panels failed to follow prior precedent or declare a conflict of precedent, and thus those decisions should not be followed. *Id.* at 285-86.

290. As this Court explained, "[s]ubsequent claims of additional harm caused by one act do not restart the claim previously accrued," and "there need only be one wrong and one injury to begin the running of the period of limitations." *Id.* at 291.

B. Michigan's Rejection Of The Doctrine Protects Finality And Reliance Interests That Are Of Great Importance To Businesses.

Not only is the continuing violations doctrine inconsistent with the Michigan Supreme Court's decision in *Garg*, it also best serves the finality and reliance policy interests that statutes of limitations advance. These interests are particularly important for both the businesses that operate in Michigan and those that are considering moving to or away from the State. Exposing businesses to ever-renewing statutes of limitations whenever a plaintiff can cast her injuries as "new" is detrimental to the predictability statutes of limitations are intended to secure.

Statutes of limitations "are grounded in a number of worthy policy considerations." *Lothian v City of Detroit*, 414 Mich 160, 166, 324 NW2d 9 (1982). Limitations periods encourage plaintiffs to promptly recover damages and "penalize plaintiffs who have not been industrious in pursuing their claims." *Id.* at 166-67. Statutes of limitations also protect defendants in several additional respects. They "relieve defendants of the prolonged fear of litigation." *Id.* at 167. In more practical terms, limitations periods guard against the assertion of stale claims, particularly when plaintiffs might otherwise "purposely . . . postpone[]" enforcement of their claims "until the lapse of time ha[s] destroyed the proofs of their falsity." *Smith v Smith's Estate*, 91 Mich 7, 11, 51 NW 694 (1892); see also *Gabelli v SEC*, 133 S Ct 1216, 1221 (2013) ("Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (internal quotation marks and citation omitted)); *Smith v Quality Const Co*, 200 Mich App 297, 300, 503 NW2d 753 (1993)

("Among the purposes of statutes of limitation are the preventing of stale claims."). Overall, statutes of limitations "relieve defendants of the prolonged fear of litigation" and provide certainty as to their potential liabilities. *Lothian*, 414 Mich at 167.

These policy goals are particularly applicable to nuisance claims—regardless of the type of nuisance claim involved. On the one hand, to the extent a nuisance is abatable, a requirement that a plaintiff assert his rights as soon as injury occurs both increases the possibility that a plaintiff's injuries will be minimized, and incentivizes defendants to take remedial action. If plaintiffs do not timely assert a claim, the limitations period serves to make business' "operating costs more predictable" and ensures that unexpected claims based on ongoing activities will not arise in the future. Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonzaga L Rev 271, 311 (2008). And, on the other hand, if a defendant's ongoing conduct cannot be abated, to allow for continuous assertion of claims would "undermine the important policies underpinning statutes of limitation, including preventing plaintiffs from sleeping on their rights." *Horvath v Delida*, 213 Mich App 620, 626, 540 NW2d 762 (1995).

II. Plaintiffs' Claims, Which Seek The Benefit Of The Rejected Continuing Violations Doctrine, Are Time-Barred.

Plaintiffs claim that their injuries occurred when they "learned that the levels of dioxin released by Dow into the River had accumulated in floodplain soils deposited onto their properties." Pl Br at 12. In doing so, they now argue that their injuries arose only from the "*actual* contamination" of their property, and that any prior pollution to the river or its fish is irrelevant. *Id.* at 13 (emphasis added). Plaintiffs thereby focus only on the most recent manifestation of their alleged injury, to the exclusion of the previous injuries that even they claim to have suffered as a result of pollution in the Tittabawassee River. Plaintiffs' position—that this latter injury is all that is relevant and gives rise to a separate claim—is a surreptitious

attempt to revive the continuing violations doctrine. Indeed, Plaintiffs' Third Amended Complaint specifically alleges that Dow "has created a continuing nuisance." See Third Am Compl ¶ 168 (reproduced in Dow Br, Tab 4); see also *id.* ¶¶ 170-175.

Plaintiffs rely solely on the 2002 Michigan Department of Environmental Quality ("MDEQ") report as the basis for the injury that, they claim, supports their remaining claims. Plaintiffs assert that they were not injured until they "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 [their] rights to use those properties." Pl Br at 12.

In making this argument, Plaintiffs contend that an action cannot accrue under Michigan law until at least *some* injury has occurred. See *id.* at 11. True enough. Yet previously they conceded that the contamination of the Tittabawassee River and floodplain had long allegedly caused injury to their properties. Third Am Compl ¶ 126.

And Dow has argued that the existence of dioxin contamination in the Tittabawassee River and its floodplains is supported by more than just Plaintiffs' own allegations, including a 1978 Michigan public health warning and 1985 and 1986 EPA disclosures. See EPA, *Study of Dioxin & Other Toxic Pollutants: Midland, Michigan,* at 3 (Apr. 1985); see also Hr Tr at 26:21-25 (Sept 16, 2005) ("[T]heir property [being] at risk from dioxin . . . that's significant injury."); 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. When flooding was imminent—particularly during the historic flood in 1986—the public was advised to avoid exposure to runoff from the river. See Dow Br at 16-17. These impacts

continued to receive public attention in local media reports, Congressional testimony, and government reports. See *id.* at 14-17.

It simply cannot be that a plaintiff can evade a clear statute of limitations by reliance on a single report as the basis for a "new" property injury, where virtually identical information had been publicly disclosed and disseminated for decades prior. If the lower court's decision is allowed to stand, enterprising plaintiffs' lawyers will be able to resurrect decades-old, time-barred claims whenever a "new" report surfaces retreading the same subject matter. Such claims should have been pursued, if ever, before "evidence has been lost, memories have faded, and witnesses have disappeared," *Gabelli*, 133 S Ct at 1221.

Plaintiffs appear to have gone to great lengths to dress up the now-rejected "continuing violations" theory precisely because once the doctrine is ruled out as a basis for resuscitating the statute of limitations, Plaintiffs' claims are straightforwardly time-barred. Under *Garg*, Plaintiffs claims accrued when they *first* suffered injury from those dioxins. Injury was apparent at least as of 1978, even if additional injuries have arisen since. Plaintiffs' attempt to focus solely on a more recent "type" of injury is a surreptitious attempt to revive the very continuing violations doctrine which *Garg* rejected.

For that reason, Plaintiffs' claims are time-barred under Michigan's three-year statute of limitations.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the Chamber of Commerce of the United States of America respectfully 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.

Respectfully submitted,

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February 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the True Filing system which will send notification of such filing to all counsel of record.

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