STATE OF MICHIGAN

IN THE SUPREME COURT

GARY AND KATHY HENRY, et al,

Plaintiffs-Appellees,

-vs-

THE DOW CHEMICAL COMPANY,

Defendant-Appellant,

_____/

Supreme Court
No. 121405

Court of Appeals
No. 251234

Saginaw County Circuit Court
No. 94-410338-NH

DEFENSE RESEARCH INSTITUTE AMICUS BRIEF IN SUPPORT OF THE DOW CHEMICAL COMPANY'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF THE QUESTION PRESENTED

SHOULD THIS COURT GRANT LEAVE TO CONSIDER WHETHER THE TRIAL COURT ERRED IN RECOGNIZING A CAUSE OF ACTION RESULTING IN DAMAGE FOR MEDICAL MONITORING WHERE PLAINTIFF HAS NOT YET SUFFERED PHYSICAL ILLNESS OR A PHYSICAL INJURY?

Plaintiff-Appellee answers "No"

Defendant-Appellant Dow answers "Yes."

Amici Defense Research Institute answers "Yes."

The trial court did not answer this question but would presumably answer "No"

ORDERS APPEALED FROM AND RELIEF SOUGHT

Amicus Curiae Defense Research Institute files this brief in support of defendants-appellants' application for leave to appeal. DRI urges this Court to grant the application for leave to appeal because the issues presented are of jurisprudential significance in this state. This Court has a duty to give guidance to trial courts concerning the proper approach to interpreting and applying Michigan law. The trial court's August 18, 2003 order recognizing medical monitoring as an actionable claim, absent any present injury, is manifestly erroneous and contrary to the rulings from this court and Michigan common law. Specifically, this Court's 1998 order in *Meyerhoff v Turner Construction Co,* 456 Mich 933; 575 NW2d 550 (1998), vacated a Court of Appeals' decision wherein the Court of Appeals held that medical monitoring claims are actionable, *Meyerhoff v Turner Construction Co,* 210 Mich App 491, 492-493; 534 NW2d 204 (1995). Based on this Court's 1998 order vacating the appellate court's decision in *Meyerhoff*, any precedential authority for the recognition of a medical monitoring claim has been extinguished. Therefore, the trial court's order in this matter is not based upon a rule of law pronounced by this Court but is based upon a misinterpretation of the Supreme Court's ruling in *Meyerhoff* vacating the Court of Appeals' decision.

It is necessary for this Court to evaluate the trial court's August 2003 decision in order to ensure proper application of Michigan common law. It is necessary for this Court to intervene when a trial court's decision is based upon a Court of Appeals' opinion that was vacated by this Court, and therefore, rejected the recognition of medical monitoring as a cause of action. The lower court's order reflects the ongoing confusion created by the lack of a clear rule by this Court rejecting a cause of action for medical monitoring. Unless this Court intervenes, other courts in Michigan be led astray by the trial court's erroneous ruling. The trial court's decision

contradicts traditional tort law principles that an injury must be present in order to recover damages. This Court must address the issues presented by the defendants-appellants and the amici herein in order to establish proper parameters for Michigan common law based upon the principles of traditional tort law and to reject the recognition of medical monitoring as is set forth in the trial court's August 18, 2003 order.

STATEMENT OF FACTS

Amicus Curiae Defense Research Institute adopts the statement of facts and proceedings set forth in the brief on appeal of the Defendant-Appellant the Dow Chemical Company.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews *de novo* questions of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991). A trial court's ruling on a motion for summary disposition is also reviewed *de novo*, *Maskery v Board of Regents of the University of Michigan,* 468 Mich 609; 664 NW2d 165, 167 (2003); *Hinkle v Wayne County Clerk,* 467 Mich 337, 340; 654 NW2d 315 (2002); and *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (2000). In engaging in such review, the appellate court must study the record to determine if the movant was entitled to judgment as a matter of law, *Groncki v Detroit Edison Co,* 453 Mich 644, 649; 557 NW2d 289 (1996) and *Adkins v Thomas Solvent Co,* 440 Mich 293, 302; 487 NW2d 715 (1992). Stated otherwise, giving the benefit of doubt to the non-movant, an appellate court is charged with independently determining whether the movant would have been entitled to judgment as a matter of law.

In the court below, the Defendant-Appellant moved for summary disposition pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint on the basis of the pleadings alone, *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. *Id.* A motion brought under (C)(8) is properly granted if no factual development could justify recovery, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998) and *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).

ARGUMENT

THE TRIAL COURT ERRED IN RECOGNIZING A CAUSE OF ACTION RESULTING IN DAMAGE FOR MEDICAL MONITORING WHERE PLAINTIFF HAS NOT YET SUFFERED PHYSICAL ILLNESS OR A PHYSICAL INJURY

A. Medical Monitoring Absent A Present Injury Involves A Significant Departure From Michigan's Common-Law.

The trial court's August 18, 2003 order recognizing medical monitoring as a cause of action absent a present injury is contrary to Michigan common law. The error in the trial court's order is clear and is contrary to the rulings of this court. The trial court erred by misinterpreting this Court's decision in *Meyerhoff v Turner Construction Co*, 456 Mich 933; 575 NW2d 550 (1998), which vacated a prior court of appeals ruling on medical monitoring, *Meyerhoff v Turner Construction Co*, 210 Mich App 491; 534 NW2d 204 (1995). See also, *Meyerhoff v Turner Construction Co*, 202 Mich App 449; 509 NW2d 847 (1993) vacated by 447 Mich 1022; 527 NW2d 513 (1994). Other precedent from this Court establishes that future damages must be reasonably certain to result from the original injury. *See, e.g. Adkins v Thomas Solvent Co,* 440 Mich 293; 319; 487 NW2d 715 (1992); *Larson v Johns-Manville,* 427 Mich 301, 317; 399 NW2d 1 (1986); *Prince v Lott,* 369 Mich 606, 609; 120 NW2d 780 (1963); *King v Neller,* 228 Mich 15, 22; 199 NW 674 (1924); *Brininstool v Michigan United Ry Co,* 157 Mich 172, 180; 121 NW 728 (1909). Based upon this Court's decision in *Meyerhoff,* 456 Mich 933, *Meyerhoff,* 447 Mich 1022, and Michigan common law, the trial court's order recognizing medical monitoring as a cognizable claim absent a present injury constitutes reversible error.

1. The Supreme Court's Decisions in *Meyerhoff* Do Not Support The Trial Court's August 18, 2003 Order.

The trial court's order denying Dow's motion for summary disposition is based on a fundamental misinterpretation of the Michigan Supreme Court's decision in *Meyerhoff v Turner Construction Co,* 456 Mich 933; 575 NW2d 550 (1998). In *Meyerhoff*, this Court vacated a Court of Appeals' decision that had recognized medical monitoring claims as actionable. See, *Meyerhoff v Turner Construction Co,* 202 Mich App 449; 509 NW2d 847 (1993) vacated by 447 Mich 1022; 527 NW2d 513 (1994).[1] In vacating the Court of Appeals' decision in *Meyerhoff*, the Michigan Supreme Court, in part, explained that "... [t]he factual record is not sufficiently developed to allow... medical monitoring damages." *Meyerhoff,* 456 Mich at 933.

By vacating the Court of Appeals' decision in *Meyerhoff*, this Court, in its 1998 Opinion and Order, rejected claims for medical monitoring and nullified the only authority in Michigan that has ever recognized medical monitoring claims as actionable. In its 1998 opinion and order, this Court rejected plaintiffs' medical monitoring claims based on the legal deficiency of the factual allegations in the plaintiffs' pleadings. The trial court here misinterpreted the Supreme Court's order believing that the Court's decision went to the kind and weight of the factual evidence. Yet, in *Meyerhoff*, no "factual evidence" had ever been "developed" at the time this Court rejected plaintiffs' medical monitoring claims. Therefore, the Supreme Court's reference to the insufficiency of the factual record was directed to the absence of any allegations in the record below describing manifest physical injuries for which medical monitoring damages were sought.

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[1]The Michigan Supreme Court first vacated the 1993 decision on another ground. See, *Meyerhoff v Turner Construction Co*, 447 Mich 1022; 527 NW2d 513 (1994). When the Court of Appeals persisted in recognizing the cause of action on remand, see 210 Mich App 491, the Supreme Court granted review for a second time and again vacated the Court of Appeals' decision. *Meyerhoff*, 456 Mich at 933.

Had the Michigan Supreme Court in *Meyerhoff* found the legal deficiency in plaintiff's medical monitoring claims to be a lack of *factual* evidence to support the allegations, the Court would have remanded the case to the trial court with instructions to allow plaintiffs to "develop" a "record" of factual evidence to support their claims. Instead, this Court vacated the Court of Appeals' decision in *Meyerhoff* because, even if a "factual record" were developed, plaintiffs' pleadings based upon medical monitoring were insufficient as a matter of law.

In the present case, the trial court's misinterpretation of the Supreme Court's order vacating and nullifying the Court of Appeals' decision recognizing medical monitoring claims, led the trial court to enter its manifestly erroneous order of August 18, 2003. The trial court's conclusion that plaintiffs should be permitted the opportunity to develop a factual record in support of their medical monitoring claims is a fundamental misunderstanding of the state of the law in Michigan on medical monitoring after this Court's decision in *Meyerhoff.*

2. Michigan Common Law Does Not Support A Cause of Action For Medical Monitoring Absent A Present Injury.

The trial court's recognition of a cause of action for medical monitoring absent a present injury is also contrary to Michigan common law. The Court's 1998 decision in *Meyerhoff* rejecting medical monitoring claims is consistent with the well-established principle of Michigan law that a claim for potential injuries (such as a claim for medical monitoring expenses associated with the risk of, but not the fact of, suffering a compensable injury) is not actionable. See, *Adkins v Thomas Solvent Co,* 440 Mich 293; 487 NW2d 715 (1992); *Larson v Johns-Manville Sales Corp,* 427 Mich 301; 399 NW2d 1 (1987). More recent Michigan Supreme Court authorities further confirm that actionable claims are limited to suits alleging physically manifest injuries actually sustained before the suit was filed. See *Wickens v Oakwood Healthcare System,* 465 Mich 53; 631 NW2d 686 (2001); *Weymers v Khera,* 454 Mich 639; 563 NW2d 647 (1997);

Adkins, supra, 440 Mich at 310. Invoking the traditional concept of *damnum absque injuria,* a loss without an injury, the Court distinguished between a proper element of damages and a legally cognizable injury. This argument undercuts plaintiffs' contention that because future medical monitoring costs may be recoverable in a negligence action, such damages constitute a claim for recovery in and of themselves. To be sure, the *Adkins* Court did not deal with plaintiffs who were alleging an increased risk of illness, *Adkins, supra,* 440 Mich at 318. But the rationale that persuaded the majority of this Court to refuse to expand nuisance recovery is equally applicable in this case.

The *Adkins* Court cautioned that recognizing the plaintiffs' theory would permit numerous individuals a cause of action even absent a traditionally cognizable injury. Further, the Court emphasized that the ultimate effect might be a reordering of polluters' resources for the benefit of persons who have suffered no cognizable harm at the expenses of those claimants who have been subjected to a substantial and unreasonable interference in the use and enjoyment of property. *Id.* The Court noted that corporations engaging in conduct causing environmental contamination or exposure often seek protection in bankruptcy court, and thus, not all claimants will recover. Given this fact, coupled with the existence of numerous federal and state statutes providing remedies, the Court concluded that "the significant interests involved appear to be within the realm of those more appropriate for the Legislature." *Id.*

This Court's decision in *Larson, supra,* 427 Mich 301 also provides support for the conclusion that an existing injury is a predicate to tort recovery. In *Larson, supra,* the court examined the accrual of causes of action by a group of plaintiffs who developed asbestosis[2] and by a group of plaintiffs who developed asbestosis and later cancer, but who had not previously

[2]Asbestosis, the most common of asbestos-related diseases, is the nonmalignant scarring of lung tissue which can lead to reduced pulmonary function.

brought an action for their asbestosis. This Court was asked to determine whether the actionable injury occurred at the time of the exposure (the inhalation of asbestos) or when the resultant harm (disease) was discovered.

The Court noted that plaintiffs in asbestos cases are normally exposed to asbestos many years before they suffer "measurable harm" from the exposure. *Larson, supra*, at 311. Acknowledging that the time lag between exposure to asbestos and the onset of asbestosis ranges from ten to forty years, this Court stated:

> [I]f a worker files suit on the day he commences or terminates employment which involves breathing asbestos dust, he may as yet have no signs of developing asbestosis. *Such a suit would be readily dismissed since there has been no injury*, and thus, "no cause of action shall have accrued. . . ."

Id., quoting *Strickland v Johns-Manville Int'l Corp*, 461 F Supp 215 (SD Tex, 1978) (emphasis added). The Court adopted the "discovery rule" for asbestosis claim accrual, in part because it did not want to encourage plaintiffs to pursue claims when they would be unable to determine whether they had been injured. *Larson, supra*, 427 Mich at 311-12.

The Court next examined the claims of plaintiffs who developed asbestosis but did not pursue a cause of action until they later developed cancer. The Court reasoned that asbestos claims involve special needs for several reasons:

- since the beginning of World War II, between eleven to thirteen million workers have been exposed to asbestos;
- since the early 1970's, over 30,000 claims have been filed against asbestos manufacturers;
- concern over the ability of future claimants to receive adequate compensation because of recent bankruptcy filings . . . and the growing numbers and costs of the claims.

427 Mich at 316-317. The Court also examined the fairness to the plaintiffs, determining that if the plaintiffs' causes of action accrued at the onset of asbestosis, they would not have been able to prove future damages for the possibility of contracting cancer. The Court stated:

> [I]n order to recover damages on the basis of future consequences, it is necessary for a plaintiff to demonstrate with "reasonable certainty" that the future consequences will occur. *Prince v Lott,* 369 Mich 606, 609; 120 NW2d 780 (1963); *King v Neller,* 228 Mich 15, 22; 199 NW 674 (1924) ("only such future damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained.")

Larson, supra at 317. The Court stated that the plaintiffs could not have proven with a reasonable certainty that they would develop cancer because only fifteen percent of people with asbestosis later develop cancer. *Id.*

The *Larson* Court concluded that the discovery rule of claim accrual applied to cases where a plaintiff with asbestosis later developed cancer, limited to those plaintiffs who did not earlier bring a cause of action for asbestosis. The Court noted that allowing victims to wait for the appearance of cancer before suing was "infinitely preferable," and that it wanted to:

> [D]iscourag[e] suits for relatively minor consequences of asbestos exposure [, which] will lead to a fairer allocation of resources to those victims who develop cancers. Rather than encouraging every plaintiff who develops asbestosis to recover an amount of money as compensation for the chance of getting cancer, we prefer to allow those who actually do develop cancer to obtain a full recovery.

Larson, supra, 427 Mich at 319 (emphasis added).

Thus, the *Larson* Court determined that in the timeline of a plaintiff's life, the plaintiff was not injured at the time of the inhalation of the asbestos; was injured and could sue upon the discovery of asbestosis; or, preferably, could wait to see if cancer later developed and sue upon its occurrence. The *Larson* Court, in characterizing asbestosis as a "relatively minor consequence" of asbestos exposure, emphasized that it preferred that the defendants' resources be more fairly allocated to those who later develop cancer. *Larson, supra,* 427 Mich at 311, 319.

The *Larson* Court plainly stated that a plaintiff who has yet to suffer from an asbestos-related disease has not suffered an injury. 427 Mich at 311, 312. The Court further stated that even plaintiffs with asbestosis could not prove with reasonable certainty that they would contract cancer since the relationship between exposure to asbestos and cancer was so small. *Id.* at 317. This analysis is consistent with traditional tort principles.

Michigan common law, like the common law of other jurisdictions, has been that a plaintiff must suffer actual injury before he or she will receive an award in tort. *Brininstool v Michigan United Ry Co,* 157 Mich 172; 121 NW 728 (1909). *See also Urie v Thompson,* 337 US 163, 170; 69 S Ct 1018 (1949) (in FELA context, court holds that there is a compensable injury only when "the accumulated effects of the deleterious substance manifest themselves"). The actual injury requirement flows from the notion that tort law needs some basic boundaries. Indeed, this Court's decisions in *Larson* and *Adkins* reflect the Court's predisposition for leaving intact the basic boundaries of tort law

B. This Court Should Not Deviate From Traditional Tort Principles To Accommodate Medical Monitoring.

The trial court's August 18, 2003 order constitutes reversible error because it is a departure from a basic tenet of tort law: an existing injury is a predicate to the recovery of damages. Restatement of Torts, 2d, § 902, (1965) comment a . This suit is an attempt to exponentially expand the boundaries of traditional common law tort theory to encompass a vastly increased number of lawsuits for toxic torts or environmental exposure of various kinds and in various circumstances. *See* Lindheim, Self-Insurers and Risk Managers: Annual Survey, 27 Tort and Insurance Law Journal, pp 445-449 (1992). The trial court's order undermines traditional tort law. Furthermore, numerous courts have rejected medical monitoring as a cause of action, absent a present injury, based upon the principles of traditional tort law.

1. Under Traditional Tort Law The Mere Possibility Of A Future Harm Is Insufficient To Recover Damages.

Under common law principles, the mere possibility of future harm is not a sufficient basis for recovery. Prosser & Keeton on the Law of Torts, § 30, p 165 (5th ed 1984). Present injury is the "proof"—a tangible recognition that the tort has occurred, which becomes a touchstone for future damages. Present injury is concrete and does not require speculation. The requirement of a present injury ensures a fair assessment of beneficial medical treatment, is a standard for certainty, and safeguards against speculative and fraudulent claims. *See* Farber, *Toxic Causation*, 71 Minn L R 1219 (1987); Parnell, Curia, & Bridges, *Medical Monitoring: A Dangerous Trend, For the Defense*, p 6 (April 1992). Since plaintiffs do not have present injuries, it is a quantum leap to assume that future damages will incur. In other words, the absence of a present injury rules out a finding that future damages are " reasonably certain" to occur. Thus, to grant plaintiffs' relief, the common-law must be drastically altered.

Courts are often challenged by litigants to be progressive and to adjust the lines of liability to accommodate new theories under notions of social justice or policy. *See, e.g. Falcon v Memorial Hosp*, 436 Mich 443; 462 NW2d 44 (1990) (loss of opportunity to survive elevated to compensable item of damage in a wrongful death case).[3] Those urging for a change in the law, especially tort law, often suggest that the existing boundaries of liability are arbitrary and should not stand as an obstacle to expanding liability. The proponents of change argue forcefully that it is the essence of judicial function to draw lines, and to redraw such lines when necessary. The emphasis on expanding liability should not outweigh policy considerations for retaining the existing law:

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[3]In 1994, the Michigan Legislature abrogated the *Falcon* opinion. A lost opportunity is not now a compensable item of damage in Michigan. MCL 600.2912a(2); MSA 27A.2912a(2).

> Characterizing a rule limiting liability as "unprincipled" or "arbitrary" is often the result of overemphasizing the policy considerations favoring imposition of liability, while at the same time failing to acknowledge any countervailing policies and the necessary compromise between competing and inconsistent policies informing the rule.

Consolidated Rail Corp v Gottshall, 114 S Ct 2396, 2411; 512 US 532; 129 L Ed 2d 427 (1994), quoting with approval *Cameron v Pepin,* 610 A2d 279, 283 (Me, 1992).

Medical monitoring creates the real possibility of nearly infinite and unpredictable liability for defendants. Medical monitoring, if adopted, is the first step in overcoming historic reticence to common law recognition of emotional and fear claims as the equivalent of traditional tort claims. Furthermore, the adoption of medical monitoring for asymptomatic patients does not assist the Court in developing clarity, logic and stability in the law. Medical monitoring cannot, in any sense of the word, be considered an incremental development from the traditional law of torts. Prosser stated: "Some boundaries must be set to liability for the consequence of any act, upon the basis of some social idea of justice or policy." Prosser & Keeton on the Law of Torts, § 41, p 264 (5th Ed 1984). One of those boundaries in the law of damage is the rule of certainty, by which proof of damages must be based on factual evidence, not on mere speculation. This is the cornerstone of this Court's opinions in *Larson* and *Adkins.* The Court should not wander beyond the basic boundary of the law of damages to accommodate the vagaries suggested as beneficial to potential medical monitoring plaintiffs.

2. Numerous Courts Have Rejected Medical Monitoring As A Cause of Action Absent A Present Injury.

In numerous jurisdictions, the courts have specifically required a physical injury before recognizing medical monitoring as an element of damage (and thus rejected an independent medical monitoring tort). See *Metro-North Commuter RR Co v Buckley,* 521 US 424, 442; 117 S Ct 2113; 138 L Ed 2d 560 (1997) (where the court rejected medical monitoring claims under

FELA and noting that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance exposure related medical monitoring"); *Hinton v Monsanto Co*, 813 So 2d 827, 828-829 (Ala, 2001) (the court answered a certified question by rejecting medical claims under Alabama's requirement that claimants allege a "manifest, present injury before [they] recover in tort"); *Badillo v American Brands, Inc,* 16 P3d 435, 441 (Nev, 2001) (the Court answered a certified question and held that "Nevada common law does not recognize a cause of action for medical monitoring"); *Wood v Wyeth-Ayerst Labs*, 82 SW3d 849, 852 (Ky, 2002) (granting discretionary review and rejecting a medical monitoring cause of action because "a cause of action in tort requires a present physical injury to the plaintiff") (applying Kansas law); *Haggerty v L & L Marine Services, Inc*, 788 F2d 315, 319 (CA 5, 1986) (applying La law).

Other courts have specifically rejected recovery for medical monitoring where the plaintiff has not suffered physical injury or physical illness, thus retaining the tradition of common-law present injury rule. *See, e.g. Thomas v FAG Berrings Corp*, 846 F Supp 1400, 1410 (WD Mo, 1994) (applying Missouri law); *Carrol v Litton Systems, Inc*, 1990 US Dist LEXIS 16833 at 148-153 (WD NC, 10/29/90) (North Carolina law); *Mergenthaler v Asbestos Corp of America*, 480 A2d 647, 651 (De,l 1984); *Hayes v AC & S, Inc*, Docket No. 94-CH 1835, opinion, pp 12-14 (Circuit Court for Cook County, Illinois, rel'd 10/30/96); *Purjet v Hess Oil Virgin Island Corp*, 1986 WL 1200, p 4 (Dist VI 1/8/86) (Virgin Island law) and *Ball v Joy Mfg Co*, 755 F Supp 1344 (SD W Va, 1990) *aff'd* 958 F2d 36 (CA 4, 1991) (Virginia and West Virginia law).

The United States Supreme Court recently declined to take such a drastic step in *Consolidated Rail Corp v Gottshall*, 512 US 532; 114 S Ct 2396; 129 L Ed 2d 427 (1994)

(standard for evaluating claims under Federal Employer's Liability Act [FELA]) (for negligent infliction of emotional distress must be derived from the applicable statute *and* from relevant common-law doctrine). The *Gottshall* majority worked from the premise that "policy considerations mandate that infinite liability be avoided by restrictions that . . . narrow the class of potential plaintiffs." 114 S Ct at 2405-2406, quoting *Thing v La Chusa*, 48 Cal 3d 644; 771 P2d 814, 819 (Cal, 1989). Holding that the court would not take the "radical step of reading FELA as compensating for stress arising in the ordinary course of employment," 114 S Ct at 2412, the *Gottshall* majority refused to cross the uncharted waters of infinite liability which had not yet been fully developed in the common-law:

> Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. [Quoting *Tobin v Grossman*, 301 NYS2d 554, 560; 249 NE2d 419, 424 (1969)] . . . [T]here are clear judicial days on which a court can foresee forever and thus determine liability but not on which that foresight alone provides a socially and judicially acceptable limit on recovery. [Quoting *Thing, supra,* 771 P2d at 830].

Gottshall, supra, 114 S Ct at 2409 (citations omitted).

Only a handful of jurisdictions have recognized a medical monitoring tort absent present physical injury. *See, e.g.* New Jersey, *Ayers v Jackson Twp*, 106 NJ 557; 525 A2d 287 (1987)[4]; California, *Potter v Firestone Tire & Rubber Co*, 25 Cal Rptr 2d 550; 863 P2d 795 (1993); Utah, *Hansen v Mountain Fuel Supply Co,* 858 P2d 970 (Utah, 1993); Arizona, *Burns v Jaquays Mining Corp*, 752 P2d 28 (Ariz App, 1987) and New York *Askey v Occidental Chemical Corp*, 477 NYS2d 242; 102 AD2d 130 (App Div, 1984). *See also Simmons v Pacor, Inc*, 543 Pa 664;

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[4]The *Ayers* opinion has been significantly undercut by a 1993 New Jersey Supreme Court opinion, entitled *Theer v Philip Carey Co*, 133 NJ 610; 628 A2d 724 (NJ, 1993), in which the court held that medical monitoring may be pursued only by persons who have experienced a "direct" exposure to a hazardous substance or has suffered a physical injury as a result of the exposure. 628 A2d at 733.

674 A2d 232 (Penn, 1996) (court requires physical injury in asbestos context, but concludes that plural thickening is sufficient as an identifiable physical consequence of asbestos exposure; holding subsequently interpreted to mean that recovery from medical monitoring requires proof of "demonstrable physical consequence" caused by exposure. *Fried v Sungard Recovery Services*, 936 F Supp 310, 311 [ED Penn, 1996]).[5]

Yet, in this case, the plaintiffs have failed to make a compelling case why Michigan courts should abandon one of the basic boundaries of tort liability, namely the need for a present injury. A claim for medical monitoring where a plaintiff has suffered no present physical injury or physical illness is a novel theory of damages, or a new cause of action, that is contrary to the recently addressed traditional common-law principles of this state. *See Larson, supra; Adkins, supra.* While medical monitoring may be recognized in a small minority of jurisdictions, in this case, the plaintiffs fail to adequately address the inappropriateness of allowing medical monitoring for asymptomatic patients. This is especially true when the issue presented transcends so many public policy and highly debated healthcare and insurance-related issues.

Medical monitoring, absent a present injury carries, at best, a speculative value. The accuracy of screening tests and the efficacy of early detection bode against recognition of the doctrine. The existing medical science suggests that inappropriate medical monitoring is not benign: it carries a cost to the tested claimant.

Furthermore, this Court should actively consider the impact on the civil judicial system in this state if asymptomatic medical monitoring is allowed. The volume, scope, and speculative

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[5]There are some federal cases in which the courts have attempted to predict state law jurisprudence and determined, absent any controlling authority, that medical monitoring would be recognized in those states. See, e.g. *Cook v Rockwell Int'l Corp*, 755 F Supp 1468, 1476-1477 (Dist Colo, 1991) (Colorado law); *Day v NLO, Inc*, 851 F Supp 869, 879-882 (SD Ohio, 1994) (Ohio law); *Bocoock v Ashland Oil, Inc*, 819 F Supp 530 (SD W Va, 1993) (Kentucky law).

nature of the litigation warrant judicial abstention. The asymptomatic medical monitoring claimant is not unfairly treated because, once symptomatic, the existing system exists to address the claim.

The case against monitoring for asymptomatic plaintiffs was best made by the court in *Ball, supra,* in which it stated:

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. Again, this is not to say that defendants who have caused such exposure should not pay the price. Certainly, theoretically both justice and common sense dictate that they should, however, practically, there must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless. Thus to prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the when's and if's individuals will be allowed recovery for a wrong committed against them.

755 F Supp at 1372.

C. The Cost/Benefit Calculus Does Not Support A Cause Of Action For Medical Monitoring Absent A Present Injury.

Recognition of a cause of action for medical monitoring absent a present injury would create the type of speculative claim that would be costly to the claimants, severely hamper the limited resources of the judicial system and limit the monetary amount defendants could potentially pay plaintiff's who have suffered an actual injury.

1. The Costs Of Testing To The Claimant.

It is wrong to conclude that ineffective medical screening carries no cost to the claimant. The use of inaccurate screening test carries a high price. Those persons who receive a false-

negative result[6] "may experience important delays in diagnosis and treatment . . . [and may] develop a false sense of security, resulting in inadequate attention to risk-reducing behaviors and delays in seeking medical care when warning symptoms become present." Task Force Guide, *supra*, p xliii.

Persons who receive false-positive results[7] may be subject to follow-up testing, with this accompanying expense, inconvenience, and possibly deleterious effect, as well as unnecessary treatment. False-positive results may understandably lead persons to experience "unnecessary anxiety until the error is corrected." Task Force Guide, *supra*, p xliv.

It is not only the inaccuracy of screening tests that may result in harm to the patient, but also the pure ineffectiveness of early detection. As explained in the Task Force Guide, *supra*:

> Potential adverse effects of interventions must also be considered in assessing overall health impact, but often these effects receive inadequate attention when effectiveness is evaluation. For example, the widely held belief that early detection of disease is beneficial leads many to advocate screening even in the absence of definitive evidence of benefit. Some may discount the clinical significance of potential adverse effects. A critical examination will often reveal that many kinds of testing, especially among ostensibly healthy persons, have potential direct and indirect adverse effects. Direct physical complications from test procedures (e.g. colonic perforation during sigmoidoscopy), labeling and diagnostic errors based on test results (see above), and increased economic costs are all potential consequences of screening tests. Resources devoted to costly screening programs of uncertain effectiveness may consume time, personnel, or money needed for other more effective health care services.

Task Force Guide, *supra*, p xlvi.

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[6]A false-negative result occurs when a test with poor sensitivity will miss cases (persons actually have the condition) and who are told incorrectly that they are free of disease.

[7]False-positive result reflects when a healthy person is told that they have a condition that does not exist. Task Force Guide, *supra*, p xliii.

2. Costs To The Civil Judicial System.

There are many deleterious effects to the civil judicial system if medical monitoring is approved for asymptomatic patients. The first is the sheer volume of potential medical monitoring claims. Exposure to potentially toxic substances is immeasurable. There is "little doubt that millions of people have suffered exposure to hazardous substances." *Ball, supra*, 755 F Supp at 1372. The quality of the environment transcends any one category of exposure. Potentially toxic substances are in the air, the land, the water, the food, are man-made, are natural, are aggregated in specific areas, are otherwise virtually universal, affect city dwellers, affect suburbanites, affect rural dwellers, transcend socio-economic lines, are encountered involuntarily and voluntarily, and inevitably result in aggregate exposure to any one claimant. Asbestos alone represents a single, voluminous category of potential medical monitoring plaintiffs. As noted by this Court in *Larson, supra*, it is estimated that between eleven and thirteen million workers have been exposed to asbestos since World War II. *Larson, supra*, 327 Mich at 316. Exposure goes beyond workers and could include simple residents (See *Eagle-Pitcher Indus, Inc v Liberty Mutual Ins Co*, 682 F2d 12, 19 [CA 1, 1982]) (one expert testified that "over 90% of all urban city dwellers have asbestos-related scarring"). The sheer volume of symptomatic asbestos claimants has "burdened the dockets of many state and federal courts, and has particularly challenged the capacity of the federal judicial system." *Georgine v Amchem Prod*, 83 F3d 610, 617 (CA 3, 1996) cert granted 117 S Ct 379 (1996). One can only imagine the exponential increase in litigation if asymptomatic claimants are given the keys to the courthouse doors.

Second, given the exposure to diverse potentially toxic substances that can trigger a claim if medical monitoring is recognized, the scope of the litigation will be expansive. Testimony regarding the accuracy of tests and the efficacy of early testing will vary from substance to

substance. The evolution of science will undoubtedly prevent a static portfolio of scientific information upon which to evaluate the claims.

Third, such medical monitoring claims as proposed by the plaintiffs may be subject to jury consideration. Whether surveillance is reasonable and necessary will turn on the significance and extent of exposure, the toxicity of the substance, the seriousness of the disease, the relative increase in the chance of onset of the disease, the value of early diagnosis, and the need for medical diagnostic examinations. These questions are highly technical, difficult for a lay jury to sort out, and costly to litigate because of the need for experts.

Fourth, medical monitoring claims lend themselves to speculative testimony. By its very nature, medical monitoring requires testimony as to causation between the toxic substance and the monitored-for disease, as well as expert testimony on the accuracy of screening and efficacy of early detection. The prospect for "junk science" testimony in such circumstances is strong.[8]

Fifth, for medical monitoring damages to be used effectively and as intended, some court administration program must be put into place to ensure that plaintiffs do not spend the medical monitoring award on items other than monitoring. Examine the court-administered funds for items such as asbestos. Judicial Conference Ad Hoc Committee On Asbestos Litigation, Report of the Ad Hoc Committee, p 2, 1991. See also administration of silicone breast implant claims in both state court (Administrative Order 1993-2) and the federal court (see, e.g. *In re Breast Implant Cases*, 942 F Supp 958 (ED SD NY, 1996); *In re Silicone Breast Implants Products*

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[8] *In re Paoli II*, 35 F3d 717, 793-795 (3d Cir Pa, 1994), one of the experts testified that anyone who has been exposed to even a single molecule of a hazardous substance should receive medical monitoring, an opinion that the Third Circuit found admissible under FRE 702 and under the Supreme Court's decision of *Daubert v Merrill Laboratories*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Thus, despite the recent efforts taken by this Court to prevent claims from reaching the jury on the basis of speculative testimony (see *Skinner v Square D*, 445 Mich 153; 516 NW2d 475 [1994]), a certain percentage of such claims will nonetheless be subject to full judicial and jury scrutiny.

Liability Litigation, 887 F Supp 1997 (ND Ala, 1995). Absent a court-administered fund, there are no assurances that a damage award will be used to help a person learn about the onset of avoidable disease, which, after all, is the alleged synchronon of medical monitoring.

Finally, and more generally, this is an unwise use of judicial resources. The claimant is not presently ill, most likely will never develop the exposure-related illness, and should be entitled to an award, if at all, only for testing above and beyond what normally would have occurred. These factors, together with the questionable accuracy of screening in the efficacy of early detection, suggest that Michigan courts should decline to cross the precipice into fear cases.

3. Requiring That A Claimant Have A Present Injury Is Not Unfair To Potential Medical Monitoring Plaintiffs.

If a person exposed to a hazardous substance eventually does develop an injury or a disease that he or she can prove is caused by the exposure, then that person is entitled to pursue a traditional tort claim under the law of Michigan. Any difficulties with the statute of limitations or claim-splitting can be addressed in such a suit. This Court has already lent a willing ear to alleviate such potential problems. See, e.g. *Larson*. The medical monitoring which may have taken place through the years through the time of injury may represent an item of past damage for the injured claimant.

This approach is attractive for many reasons. Judicial resources are properly allocated to the symptomatic rather than asymptomatic claimant. The speculative nature of medical monitoring is replaced by the traditional rules of tort liability and the concomitant rules already governing the propriety of future damages. Monetary resources of the defendant otherwise earmarked for asymptomatic patients will presumably be more available for symptomatic

patients. Bankruptcies will not be spawned by the prospect of future injury.[9] Society has always placed a high priority on addressing claims of the truly injured. There is no reason to doubt that such a priority will change if and when medical monitoring plaintiffs become symptomatic.

D. Whether To Allow A Cause Of Action For Medical Monitoring Absent A Present Injury Is An Issue For The Legislature.

1. The Court's Ability to Develop Foundational Information Regarding Medical Monitoring Is Limited By The Nature Of Its Ability To Exercise Only Judicial Power.

The Michigan courts employ the "actual controversy" requirement similar to the "case or controversy" found in the United States Constitution. US Const, art II, § 2. See also *Lee v Macomb County Board of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). Mere hypotheticals are insufficient and when there is no actual controversy, the court lacks subject matter jurisdiction. *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). This limitation inheres in the structure of a three branch government, in which the courts decide individual cases by exercising their judicial power while the legislature solves broad social problems, by exercising its legislative power.

This Court has recognized the limitations arising from the actual controversy restriction, thus deferring to the Legislature on several occasions. See *Adkins, supra*, 440 Mich at 319 (upon this Court's refusal to allow a nuisance claim to proceed in the absence of an interference with the plaintiffs' interests, the Court noted that "the significant interests involved appear to be within the realm of those more appropriate for resolution by the Legislature"); *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988) (any decision to extend claims for loss of

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[9]It is reported that traditional asbestos claims have already forced at least sixteen companies into bankruptcy by reason of the cost of mass tort litigation. See New York Law Journal, p 7 (Feb 6, 1995).

consortium to include a negligent tortfeasor's liability for loss by a parent of a child's society and companionship should be determined by the Legislature).

Justice Scalia has taught that the governmental principle of separation of powers coupled with the rise of democratic principles and systems has led to increasing recognition that we "live in an age of legislation, and most new law is statutory law." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, p 13 (1977). Scalia cautioned against judicial lawmaking quoting Madison:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be legislator.

The Federalist No. 47, p 326 (James Madison) (Jacob E. Cooke ed, 1961) quoted in Scalia, *supra* at 10. It is the structural limitations on its power that allows the judiciary to retain its legitimacy within our democratic system. See generally Alexander M. Bickel, *The Least Dangerous Branch The Supreme Court at the Bar of Politics*, (1962). And although state courts retain common law powers, they have increasingly deferred to legislatures when asked to create a broad new cause of action.

That deference to a legislative solution is appropriate here. The decision of whether to create a new cause of action for medical monitoring involves acquiring and considering scientific information on, the efficacy of medical surveillance, the balancing of interests of the toxic exposure litigants, and the burdens on society and judicial administration:

> [T]o prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and must be drawn, and will continue to be drawn, to limit and delineate the when's and if's individuals will be allowed recovery for a wrong committed against them.

Ball, supra, 755 F Supp at 1372.

An opinion of this Court, in the area of loss of consortium, supports that the Legislature is best suited to balance the competing interests herein involved. In *Sizemore, supra*, 430 Mich 283, a solid majority of this Court held that any decision to extend claims for loss of consortium to include a negligent tortfeasor's liability for loss by a parent of a child's society and companionship should be determined by the Legislature. In *Sizemore*, the Court acknowledged important public policy considerations such as societal consequences and economic burdens, including the intangible and sentimental elements of the claim, whether the award would deter negligent conduct, and the fact that insurance premiums would likely increase with the resulting increase in litigation. 430 Mich at 292-298. In reversing the Court of Appeals decision recognizing such a claim, this Court stated that:

> [F]urther extension of a negligent tortfeasor's liability involves a variety of complex social policy considerations. In light of these concerns, we believe that the determination of whether this state should further extend a negligent tortfeasor's liability for consortium damages should be deferred to legislative action rather than being resolved by judicial fiat.

430 Mich at 299 (footnote omitted). The same reasoning applies here.

2. Unlike The Courts, The Legislature Is Not Confined To Exercising Its Judicial Power To Decide Individual Cases.

The legislative process includes opportunities to arrive at informed value judgments superior to the opportunities afforded judges or jurors. *Zeni v Anderson*, 397 Mich 117, 135; 243 NW2d 270 (1976). In *Barcume v City of Flint*, 638 F Supp 1230 (ED Mich 1986), the federal district court was called upon to rule whether the city's failure to include women in its affirmative action plan violated the equal protection clause. The court noted this would require the court to engage in:

> [S]ocial engineering - a task which does not lie within judicial competence. This task lies more properly with legislative bodies who are "expected to take action that may benefit one group at the expense of another. . . ."

638 F Supp at 1236 (citations omitted). See also *Adkins, supra*, 440 Mich at 319 ("[T]he significant interests involved appear to be within the realm of those more appropriate for resolution by the Legislature.").

The measurement, estimation, and valuation of medical monitoring for asymptomatic persons is a complex undertaking. There are four areas in which the Legislature is more adept (as it is designed to be) to resolve in the context of medical monitoring.

First, the Legislature can commission investigation, studies, and expert testimony on the value of early diagnosis and the efficacy of treatment for early diagnosis. Is a screening test able to detect the target condition earlier than without screening and with sufficient accuracy to avoid producing large numbers of false-positive and false-negative results? If so, does screening for and treatment of persons with early diseases improve the likelihood of favorable health outcomes compared to treating patients when they present manifest signs or symptoms of the disease.[10]

Second, assuming a particular screening test is "effective," the Legislature can define, if appropriate, a method of monitoring where medical monitoring damages are actually used on a periodic basis for screening. In contrast, the courts cannot dictate how medical monitoring claimants will spend the lump sum award for future screening.[11] The state legislature can pass a statute providing awards through periodic payments to ensure that such damage awards are actually used to pay the expense of medical monitoring. The State Legislature has so provided already in the medical malpractice arena. See MCL 600.6309; MSA 27A.6309. When courts

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[10]These rhetoric questions are taken from the United States Preventive Service Task Force's Publication, The Guide to Clinical Preventive Services (2nd Ed 1996) (hereafter "Task Force Guide"). A screening test must satisfy these two major requirements to be considered effective. Task Force Guide, p xlii.

[11]In most medical monitoring cases, lump sum awards are the vehicle of recovery. See, e.g. *Merry v Westinghouse Electric Corp*, 684 F Supp 847 (MD Pa, 1988). See also *Herber v Johns-Manville Corp*, 785 F2d 79 (CA 3, 1986).

are embroiled in the administration of damages in mass tort cases, it is, without question, a draw on the judicial use or resources otherwise used to resolve cases in controversy.

Third, and perhaps most importantly, the Legislature can periodically evaluate the continued propriety of medical monitoring to determine whether it confers a benefit upon the medical monitoring claimant, and to re-evaluate the cost-benefit balance through statutory medical monitoring. This evaluation could include efficacy by subject area (for example, cardiovascular, infectious disease, environmental disorders, etc.). The Legislature can examine the effect of patient education and counseling on the need for future medical monitoring, above and beyond screening which the patient would normally do in any event. The Legislature can re-evaluate without a case in controversy the methodology of medical monitoring, the cost effectiveness of medical monitoring, the efficacy of medical monitoring, and the interplay between medical monitoring and third-party payment plans, such as health insurance and other collateral sources.[12] The very existence of the Task Force Guide supports the notion that the Legislature, not the judiciary, is more properly involved in considering the propriety and scope of medical monitoring.[13]

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[12]For example, it is reported that approximately eighty percent of all standard medical tests are presently paid for by third-party insurance. See American Law Institute, 2 Enterprise Responsibility for Personal Injury-Reporters' Study, p 379 (2d Ed 1991).

[13]The Guide to Clinical Preventive Services, *supra*, note 13, was prepared under the supervision of the United States Preventive Services Task Force. It has staff support from the United States Department of Health and Human Services. As noted in the Task Force Guide itself:

> The Guide has benefited from unprecedented cooperation - between the U.S. and Canadian Task Forces, between the Federal government and the private sector, and between the Task Force and literally hundreds of reviewers.
>
> Task Force Guide, p x.

Finally, the Legislature is the more appropriate body to examine the complex social policy considerations and determine whether this state should further extend liability to include damages for future medical monitoring. Public policy concerns are better presented to and resolved by the Legislature. As in *Sizemore, supra*, the determination of whether Michigan should extend a tortfeasor's liability should be deferred to legislative action. See also *In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940) ("a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter. . . .").

CONCLUSION

WHEREFORE, Amicus curiae The Defense Research Institute respectfully requests that this Court grant defendants-appellants' application for leave to appeal.

Respectfully submitted,

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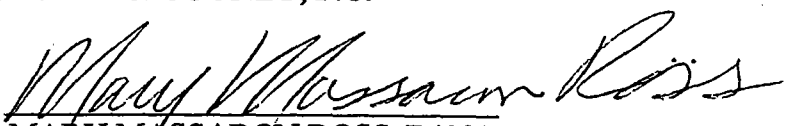
By: 

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

GARY AND KATHY HENRY, et al., Plaintiffs-Appellees, v. THE DOW CHEMICAL COMPANY, Defendant-Appellant.	Court of Appeals No. 266433 Saginaw County Circuit Court No. 03-47775-NZ Hon. Leopold P. Borrello

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

GARY AND KATHY HENRY, et al., Plaintiffs—Appellees, v. THE DOW CHEMICAL COMPANY, Defendant—Appellant.	Docket No. 266433 Saginaw County Circuit Court LC No. 03-47775-NZ Hon. Leopold P. Borrello

MOTION FOR LEAVE TO FILE BRIEF OF THE DEFENSE RESEARCH INSTITUTE, MICHIGAN DEFENSE TRIAL COUNSEL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

The Defense Research Institute ("DRI"), the Michigan Defense Trial Counsel ("MDTC"), the Chamber of Commerce of the United States of America ("Chamber"), American Tort Reform Association ("ATRA"), American Chemistry Council ("ACC"), and National Association of Manufacturers ("NAM") (collectively "*Amici*") hereby move for leave to file the accompanying brief as *Amici Curiae* in support of Defendant-Appellant in the above-captioned case. In support of their motion, *Amici* state as follows:

1. *Amici* seek to address the practical and public policy implications as to why this Court should reverse the circuit court's order of October 21, 2005, which granted class certification based on the broad allegations in the complaint, rather than after conducting a rigorous analysis of whether the facts and issues in the case satisfy the factors for class action certification under the Michigan Rules of Civil Procedure.

2. DRI is an organization with more than 21,000 individual lawyer and 400 corporate members throughout the United States. It seeks to advance the cause of civil justice in America by ensuring that issues of importance to the defense bar, to its clients, and to the preservation and enhancement of the judicial process are properly and adequately addressed. These objectives are accomplished through publishing scholarly material, educating the bar by conducting seminars on specialized areas of law, testifying before Congress and state legislatures on select legislation impacting the civil justice system, and participating as *amicus curiae* on issues of importance to the defense bar and its clients. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

3. MDTC is an organization consisting primarily of civil defense attorneys in the State of Michigan. The MDTC has as one of its organizational goals to support improvements in the adversary system of jurisprudence and the operation of the courts. The MDTC serves its membership through programs of continuing education. It serves the defense bar by appearing as amicus curiae in cases such as this.

4. The Chamber is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1,000 *amicus curiae* briefs in federal and state courts.

5. Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources

to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

6. ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $520 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

7. The NAM is the nation's largest industrial trade association. The NAM represents small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's future and living standards.

8. *Amici* seek leave to file the accompanying Brief in Support of Defendant-Appellant to assist this Court in clarifying the trial court's role and responsibilities in determining whether the state's class action certification requirements in MCR 3.501 are satisfied. The circuit court's ruling below indicates that such clarification is greatly needed.

The relative lack of Michigan appellate law on the implementation of the state's class-action device means that state courts look to federal cases construing the similar FR Civ P 23 for guidance. *See, e.g., Zine v Chrysler Corp*, 236 Mich App 261, 288 n12; 600 NW2d 384, 400 n 12 (1999). This approach reduces forum shopping between state and federal courts, a matter of particular importance in class actions. The law in the federal courts is clear: The Supreme Court of the United States has emphasized that courts are required to conduct a "rigorous analysis" of the class action prerequisites before certifying a class. *General Telephone Co of SW v Falcon*, 457 US 147, 161 (1982). Because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" such analysis may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question." *Id.* at 155, 160 (citation and internal quotation marks omitted).

Despite this strong guidance from the Supreme Court of the United States, the circuit court below appears to be confused as to the import of these decisions. The circuit court certified the class in this case in a conclusory opinion that failed to address the elements of the inherently individualized tort claims, analyze the claims with or without a backdrop of the voluminous record developed in extensive class discovery, or consider whether the claims could be proven on a classwide basis. Instead, the court fell back on the position that it must accept the allegations in the complaint as true—and then relied upon the broadest characterization possible of those allegations as sufficient evidence to support certification.

This Court itself recently issued an unpublished opinion rejecting such a superficial approach to class certification. *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam

of the Court of Appeals, issued November 29, 2005 (Docket No. 258498). The opinion states that while a trial court must accept as true the allegations made in the complaint in support of certification, "[t]his does not, however, require that the trial court 'blindly rely on conclusory allegations' that merely 'parrot' the requirements for class certification." *Id.* at *2 (quoting 3 Newberg & Conte, Newberg on Class Actions (4th ed), § 7.26, p 81)).

Indeed, this Court then went on to apply the "rigorous analysis" standard set forth by the United States Supreme Court: "To the contrary, class certification should be granted only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [class certification] have been satisfied.'" *Id.* (quoting *Falcon*, 457 US at 161). This Court also reiterated the need to "probe behind the pleadings" when conducting this analysis. *Id.* (quoting *Falcon*, 147 US at 155, 160).

Unfortunately for litigants and courts seeking guidance from Michigan appellate courts on MCR 3.501, this Court's opinion in *Jackson* was unpublished and, as a result, is not precedentially binding under the rule of stare decisis. *See* MCR 7.215(C)(1). This Court should adopt the "rigorous analysis" level of scrutiny for class certification decisions under MCR 3.501, in an opinion that sets strong, binding precedent. Otherwise, the adverse legal and public policy consequences will reach far beyond the parties in this case to the state court system and its litigants, to state businesses and residents, and to others who rely on clear statements of the law as they order their affairs. Forum shopping may run amuck.

8. The accompanying brief will show that, as a matter of law and sound public policy, this Court should reverse the circuit court's order granting plaintiffs' motion for class certification dated October 21, 2005, and rule that a "rigorous analysis" of the class action factors is required before a class action can be certified under MCR 3.501. If the Court upholds

the circuit court's order, it would encourage a flood of filings of questionable putative class action cases by plaintiffs seeking a lax approach to the application of the class action rules. The numerous public policy problems created when class certification decisions are made absent a rigorous analysis of the class factors are explained in the brief.

WHEREFORE, the Defense Research Institute, the Michigan Trial Defense Counsel, the Chamber of Commerce of the United States of America, the American Tort Reform Association, the American Chemistry Council, and the National Association of Manufacturers respectfully request that this Court grant their motion for leave to file the accompanying *Amici Curiae* brief in support of Defendant-Appellant.

Respectfully submitted,

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STATEMENT OF THE QUESTIONS PRESENTED

I.

SHOULD THIS COURT REVERSE THE TRIAL COURT'S MANIFESTLY ERRONEOUS ORDER CERTIFYING A CLASS UNDER MCR 3.501 TO PURSUE MASS TORT PROPERTY DAMAGE CLAIMS IN WHICH INDIVIDUAL ISSUES OF FACT AND LAW PREDOMINATE OVER ANY ISSUES THAT CAN BE PROVEN ON A CLASSWIDE BASIS AND WHICH DEMONSTRATE THE PREREQUISITE FACTORS TO MAINTAIN A CLASS ACTION ARE NOT SATISFIED?

Defendant-Appellant, The Dow Chemical Company, answers "Yes."

Plaintiffs presumably will answer "No."

The Saginaw County Circuit Court would presumably answer "No."

Amici curiae answer "Yes."

II.

SHOULD THIS COURT REVERSE THE TRIAL COURT'S ORDER CERTIFYING A CLASS PURSUANT TO MCR 3.501 WHERE THE DEFINITION IS VAGUE, INTERNALLY CONTRADICTORY AND DOES NOT IDENTIFY AN ASCERTAINABLE CLASS?

Defendant-Appellant, The Dow Chemical Company, answers "Yes."

Plaintiffs presumably will answer "No."

The Saginaw County Circuit Court would presumably answer "No."

Amici curiae answer "Yes."

III.

SHOULD THIS COURT REJECT PLAINTIFFS' NOVEL APPROACH TO CLASS CERTIFICATION BASED ON THE LOWEST COMMON DENOMINATOR CONCLUSION?

Defendant-Appellant, The Dow Chemical Company, answers "Yes."

Plaintiffs presumably will answer "No."

The Saginaw County Circuit Court would presumably answer "No."

Amici curiae answer "Yes."

STATEMENT OF INTEREST

The Defense Research Institute ("DRI") is an organization with more than 21,000 individual lawyer and 400 corporate members throughout the United States. It seeks to advance the cause of civil justice in America by ensuring that issues of importance to the defense bar, to its clients, and to the preservation and enhancement of the judicial process are properly and adequately addressed. These objectives are accomplished through publishing scholarly material, educating the bar by conducting seminars on specialized areas of law, testifying before Congress and state legislatures on select legislation impacting the civil justice system, and participating as amicus curiae on issues of importance to the defense bar and its clients. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

The Michigan Defense Trial Counsel ("MDTC") is an organization consisting primarily of civil defense attorneys in the State of Michigan. The MDTC has as one of its organizational goals to support improvements in the adversary system of jurisprudence and the operation of the courts. The MDTC serves its membership through programs of continuing education. It serves the defense bar by appearing as amicus curiae in cases such as this.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1,000 amicus curiae briefs in federal and state courts.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and

professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed amicus curiae briefs in cases before federal and state courts that have addressed important liability issues.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care(r), common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $520 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

STATEMENT OF FACTS

Amici adopt by reference the Statement of Facts and Proceedings Below of Defendant-Appellant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The questions presented go to the very heart of the protections afforded putative class members and defendants when a court determines whether to certify a class action: the level of scrutiny a trial judge must give to determining whether the case warrants class treatment. For the purpose of class certification, should judges merely accept statements in a plaintiff's pleading, or conduct an independent analysis of this important issue? Federal and state courts alike have ruled that a "rigorous analysis" or similar meaningful review of the suitability of class certification is required. This requirement recognizes that inappropriate class certification implicates constitutional due process rights and places undue practical burdens on class members and defendants. Close consideration of class certification requests also helps assure that class treatment is granted only where it is truly appropriate and will further the goals of full, fair and efficient resolution of claims.

The superficial standard used by the trial court in this case harkens back to the days of "drive by" class certifications, where some state trial courts routinely granted class action treatment without any meaningful evaluation of the class action factors, sometimes on the same day the complaints were filed. The error is particularly egregious where, as here, there was a sizeable record demonstrating that individualized issues of fact predominate, yet that record is not considered by the court. This laissez-faire approach to class certification had a number of adverse impacts on class members and defendants, ranging from reducing individual class members' recoveries while increasing class counsel's fees to forcing defendants into "blackmail settlements" of questionable claims. Moreover, it fuels forum shopping from federal to state

courts. In 2005, Congress enacted legislation to curb abuses in certain interstate class actions, but, properly, not in primarily state-focused class actions. As a result, plaintiffs' lawyers are likely to seek out class-action friendly state courts in order to avoid the reach of the federal law.

The circuit court's decision in this case to adopt a superficial class certification standard is simply an invitation to recreate these class action mills in Michigan courts. If this ruling is upheld, then class action filings against Michigan-based businesses and industries will increase dramatically, regardless of the merits of the claims or the propriety of class treatment. The attendant adverse effects will hurt consumers of products and services, the state's economy and workforce, and participants in the state's civil justice system. Such a ruling also will stand as persuasive precedent for those in other states seeking to undermine the protections that a more rigorous standard provides to litigants.

As a result, *Amici Curiae* respectfully ask the Court to reverse the trial court's order granting class certification dated October 21, 2005, and to emphasize that Michigan follows the "rigorous analysis" standard set by the Supreme Court of the United States to be used in class certification decisions.

ARGUMENT

Class certification should not be treated as a matter of routine, with a cursory review of the allegations in a complaint and an order devoid of any meaningful analysis of the class action factors applied to the record in the case. Class treatment is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Telephone Co of SW v Falcon*, 457 US 147, 155 (1982) (quoting *Califano v Yamasaki*, 442 US 682, 700-701 (1979)). As such, "careful attention" to the requirements of class certification rules is "indispensable." *E Tex Motor Freight System, Inc v Rodriguez*, 431 US 395, 405 (1977).

The Supreme Court of the United States has emphasized that courts are required to conduct a "rigorous analysis" of the class action prerequisites before certifying a class. *Falcon*, 457 US at 161. This analysis is more akin to a "diamond cutter" than a "cookie cutter" approach—it requires a laser-sharp individualized examination of the issues.

Many state courts adopted the federal class action rule when they created their own class action procedures and have decided to follow federal precedent when making their own class certification decisions. See *Zine v Chrysler Corp*, 236 Mich App 261, 288 n 12; 600 NW2d 384, 400 n 12 (1999) ("There being little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule ... for guidance."); S Rep 109-14, at 13 (2005) (stating that 36 states adopted the basic federal class action rule, some with minor revisions, and most of the rest adopted federal court class action policy and contain similar requirements); see, e.g., *Hefty v All Other Members of the Certified Settlement Class*, 680 NE2d 843, 848 (Ind, 1997); *Getto v Chicago*, 426 NE2d 844, 848 (Ill, 1981).

State courts have adopted the "rigorous analysis" standard for the certification of class actions under state rules. For example, in Ohio, a trial court "is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of

[Ohio] Civ. R. 23 have been satisfied." *Hamilton v Ohio Savings Bank*, 694 NE2d 442, 447 (Ohio, 1998); see *Creveling v Gov't Employees Ins Co*, 828 A2d 229, 238-239 (Md, 2003) ("A trial court must conduct a 'rigorous analysis' of these prerequisites before certifying a class" under Rule 23 of the Maryland Rules of Civil Procedure); *SW Refining Co, Inc, v Bernal*, 22 SW3d 425, 435 (Tex, 2000) (adopting "rigorous analysis" standard and recognizing that "[a]ggregating claims can dramatically alter substantive tort jurisprudence...by removing individual considerations from the adversarial process," thus magnifying and strengthening the number of unmeritorious claims"); *Baptist Hospital of Miami, Inc v Demario*, 661 So 2d 319, 321 (Fla Dist Ct App, 1995) (requiring "rigorous analysis" of class certification factors and stating that certification of a class "considerably expands the dimensions of the lawsuit, and commits the Court and the parties to much additional labor over and above that entailed in an ordinary private suit"); accord *Chemtall, Inc v Madden*, 607 SE2d 772, 783 (W Va, 2004) ("a class action may only be certified if the trial court is satisfied, after a thorough analysis, that the prerequisites of Rule 23(a) of the West Virginia Rules of Civil Procedure have been satisfied. Further, the class certification order should be detailed and specific in showing the rule basis for the certification and the relevant facts supporting the legal conclusions.").

This approach makes both legal and common sense. Rulings by federal courts experienced with the benefits and drawbacks of class certification can provide guidance on the issues. As a policy matter, it makes sense for federal and state courts to use similar standards in certifying class actions to avoid systematic abuses and rampant forum shopping.

Indeed, this Court recently adopted the "rigorous analysis" standard in an unpublished case. *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 258498); 2005 WL 3191394, *2. The *Jackson* Court upheld a trial court's denial of class certification in a case arising out of plaintiffs' employment.

The Court stated that while a trial court must accept as true the allegations made in the complaint in support of certification, "[t]his does not, however, require that the trial court "blindly rely on conclusory allegations" that merely "parrot" the requirements for class certification." *Id.* at *2 (quoting 3 Newberg & Conte, Newberg on Class Actions, (4th ed), § 7.26, p 81). This Court wrote:

> To the contrary, class certification should be granted only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [class certification] have been satisfied." Because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" such analysis may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question."

Id. (citing *Falcon*, 147 US at 155, 160, 161) (citation and internal quotation marks omitted in original)). This Court further explained:

> [T]he principle that a court must accept as true a plaintiff's allegations in support of class certification merely limits review of the merits of the plaintiff's claim, and should not be invoked to artificially limit the required "rigorous analysis" of the factors necessary to the determination whether plaintiffs have met their burden of establishing each of the certification requirements.

Id. at *4 (citing *Falcon*, 147 US at 161; *Bell v Ascendant Solutions, Inc*, 422 F3d 307, 311-313 (CA 5, 2005) (noting that the suggestion that a court "must accept, on nothing more than pleadings, allegations of elements central to the propriety of class certification" is fundamentally "at odds" with the court's duty to make findings that the requirements for certification have been met")).

While *Jackson* is an unpublished case and as such does not constitute binding precedent under the rule of stare decisis, MCR 7.215(C)(1), the public policy judgments made by this Court in its ruling are sound. The "rigorous analysis" level of scrutiny of class action certification decisions should be applied in this case and in all future cases considering whether to grant class

certification under MCR 3.501. The potential for problems under a laissez-faire approach to class certification is simply too great.

This case provides an example of such a laissez-faire approach. As Defendant-Appellant has aptly explained, the trial court's ruling certifying the class failed to give the appropriate level of scrutiny to whether the purported class claims met the Michigan class action requirements, such as predominance, superiority, typicality and adequacy. The court was clearly erroneous in certifying a class whose members owned property with substantially varying dioxin levels, including some with no elevated dioxin level, with different flooding histories alleged to have caused the dioxin contamination, and some properties subject to other dioxin sources, such as those standing on former industrial or manufacturing sites. In fact, the court entirely ignored that the record shows that the existence and level of any dioxin on a class property will depend on the frequency and lever of any flooding—which has varied significantly from property to property—over the past century. Moreover, the effect of the alleged dioxin contamination on each class members varies considerably, with some expressing no more than vague concerns, others experiencing some impact on their gardening or yard usage, and still others claiming a variety of property value diminution claims. Thus, injury, causation, and damages are all highly individualized issues in this case. Had the court engaged in a "rigorous analysis" of the record and properly applied the class action factors, it would have found that this litigation can only proceed on a case-by-case, property-specific basis.

ARGUMENT I

A "LAISSEZ-FAIRE" APPROACH TO CLASS CERTIFICATION, LIKE THAT TAKEN BY THE TRIAL COURT, INVITES EXCESSIVE AND UNWARRANTED LITIGATION AND ABUSIVE LEGAL PRACTICES.

The ways in which inconsistent and lax certification standards encourage class action abuse became notorious when it spurred a cottage industry in nationwide class litigation in certain state courts in the late 1980s and 1990s. During that time, class action filings against Fortune 500 companies increased 338 percent in federal court and more than 1000 percent in state court. See Federalist Society, Analysis: Class Action Litigation—A Federalist Society Survey, 1:1 Class Action Watch 5 (1999). The RAND Institute reported in 1997 that "class action activity has grown dramatically" with the increase "concentrated in the state courts." Deborah Hensler, et al, Preliminary Results of the RAND Study of Class Action Litigation, 15 (RAND Inst for Civ Justice 1997).

The reason: some state courts did not adopt the United States Supreme Court's requirement for a "rigorous analysis" and took a laissez-faire approach to applying the class certification factors. Entrepreneurial contingency fee lawyers flocked to these state "magnet" courts to file putative class action suits, hoping that class treatment would give them an advantage in litigation. See, e.g., S Rep 109-14, at 14 (explaining that the "explosion" in state class action filings occurred because "many state court judges are lax about following the strict requirements of Rule 23 (or the state's governing parallel rule), which are intended to protect the due process rights of both unnamed class members and defendants.").

Some state trial courts certified classes while federal courts considering identical claims against the same defendant would not, explaining that constitutional due process guarantees prevented class treatment of individualized claims. Compare, e.g., *Ex parte Masonite Corp*, 681 So 2d 1068 (Ala, 1996), citing *Naef v Masonite Corp*, No. CV-94-4033 (Mobile County Cir Ct,

Ala, 11/15/95) (certifying a nationwide class of plaintiffs alleging their house siding was defective) with *In re Masonite Hardboard Siding Products Liability Litigation*, 170 FRD 417, 424, 427 (ED La, 1997) (rejecting class certification of claims against same defendant and presenting identical legal issues, as its analysis found class treatment would, inter alia, infringe the parties' due process rights). Other state courts engaged in so-called "drive by" class certifications, certifying a class at the request of plaintiffs' counsel before defendants were served with a complaint or had been given an opportunity to answer. See, e.g., S Rep 109-14, at 22 (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:sr014.109.pdf) citing *Davison v Bridgestone/Firestone, Inc*, Case No. 00C-2298 (Eighth Cir Ct, 20th Judicial Dist, Nashville, Tenn, August 18, 2000) (certifying nationwide class just four days after service of the complaint); and *Farkas v Bridgestone/Firestone, Inc*, Case No. 00-CI-5263 (Jefferson County Cir Ct, Ky, August 18, 2000) (ordering injunctive relief in favor of the class before defendant was even notified of the lawsuit). While some plaintiffs' lawyers defended the practice on the ground that the certifications were "conditional" and subject to challenge, it created an uphill battle for defendants.

It became clear through such cases that class certification can greatly influence the dynamics and even the outcome of a lawsuit, a troubling result since the class action device was intended as a procedural tool, not a mechanism to affect substantive litigation results. State courts should be cognizant of past abuses and the opportunities for future ones, and affirmatively work to ensure that their implementation of state class action rules does not invite them. These abuses occur in numerous ways.

A. LAX CLASS ACTION CERTIFICATION ENCOURAGES UNWARRANTED LITIGATION.

As a fundamental matter, class treatment greatly increases the number of claims brought against a defendant. Sometimes class members are swept into lawsuits from which they may not

benefit and that they may not have wanted to bring in the first place. This happens because under the rules in many jurisdictions, including Michigan, once a class is certified, all potential plaintiffs are automatically included in the class unless they affirmatively choose to "opt out." See, e.g., MCR 3.501(A)(3) (addressing class members' right to elect to be excluded from the action); FR Civ P 23(c)(2). Potential class members, who may not understand an opt-out notice written in dense legalese, may inadvertently be included in a class. When this occurs, class members lose their right to bring an individual claim and they are bound by the result obtained by class counsel.

In other cases, plaintiffs may be drawn to participate because of the perception that they can get easy money. As the Honorable Jack B. Weinstein, a judge who has been particularly sensitive to plaintiffs' needs, observed, "[t]he drum beating that accompanies a well-publicized class action ... may well attract excessive numbers of plaintiffs with weak to fanciful cases." *In re "Agent Orange" Products Liability Litigation*, 818 F2d 145, 165 (CA 2, 1987), *cert den* 484 US 1004 (1988). For example, one plaintiff in a mass tort case was quoted in the media as saying that he did not know whether he had a claim, but "heard that they were getting up a suit, ... [and] wanted to get in on the party." Bruce Nichols, *Steel Plant Lawsuit Lingers 9 Years*, Dallas Morning News, April 21, 1996, at 32A.

B. CLASS ACTIONS MAY RESULT IN "JUDICIAL BLACKMAIL."

It is particularly important to closely examine a request for class certification, as the grant of certification places tremendous pressure on a defendant to settle, regardless of a case's merit. The resulting settlements have been variously termed "blackmail settlements,"[1] "legalized

[1] *In re Rhone-Poulenc Rorer, Inc*, 51 F3d 1293, 1298 (CA 7, 1995) (Posner, J.) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

blackmail,"[2] and "judicial blackmail"[3] by federal courts considering nationwide class actions, and the characterization applies equally in high-risk statewide class actions. The specter of a high damages award, potentially including punitive damages, is daunting, whether the case involves a nationwide or a statewide class. "For defendants, the risk of participating in a single trial [of all claims], and facing a once-and-for-all verdict is ordinarily intolerable," even where an adverse judgment is improbable. Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 FRD 483, 490 (1996). In addition, the legal defense costs associated with discovery of individual class members' claims, pre-trial practice, and trial can be crippling.

As a result, the economics of class action practice mean that even claims with a very small chance of success at trial are settled when the anticipated costs of defense and the claims for damages are high. Defendants who are forced to settle due to these circumstances are denied appellate review of the claims against them, the most important safeguard against unfairness in the court system. See McNeil & Fanscal, *supra*, at 490. The lack of appellate court review of questionable legal claims, in turn, invites more questionable claims to be filed and "processed," distorting the civil justice system even further.

C. CLASS ACTION STATUS INFLUENCES TRIAL OUTCOMES.

Class treatment can severely hamper a defendant's prospects at trial by "skewing trial outcomes." *Castano v American Tobacco Co*, 84 F3d 734, 746 (CA 5, 1996). Evidence indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award which may result. See McNeil & Fanscal, *supra*,

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[2] *In re Gen Motors Corp Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F3d 768, 784 (CA 3, 1995).

[3] *Castano v American Tobacco Co*, 84 F3d 734, 746 (CA 5, 1996).

at 491-492. Defendants are far more likely to be found liable in cases with large numbers of plaintiffs than in cases involving one or just a few plaintiffs, and their damages (particularly punitive damages) tend to be higher. See *Id.*; Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989).

Evidence suggests that the presence of even one severely injured plaintiff will likely increase the damages awarded to the other plaintiffs, regardless of individual circumstances. See McNeil & Fanscal, *supra*, at 491; Kenneth S. Bordens & Irwin A. Horowitz, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 L & Human Behavior 209, 211-212, 226 (1988) (juror interviews from actual trial and empirical research indicate jurors assume all plaintiffs will suffer as much harm as the most severely injured person). This gives those class members with less severe injuries a windfall benefit. *Id.*; McNeil & Fanscal, *supra*, at 491. Likewise, in settlements, the higher potential jury award value for serious claims is spread to weaker claims, at least in part. This benefits those with weaker claims and the attorneys who receive contingency fees at the expense of those who have experienced greater injury. See Christopher Edley, Jr., *Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong, at II 1 (July 1, 1999) (discussing treatment of consolidated dissimilar claims in asbestos litigation).

D. CLASS ACTIONS LET LAWYERS BENEFIT AT THEIR CLIENTS' EXPENSE.

1. PLAINTIFFS' LAWYERS CALL THE SHOTS.

The class action system allows lawyers, not their clients, to decide when and whether to file lawsuits. While some class actions undoubtedly spring from the concerns of injured consumers, many are the result of the creativity of entrepreneurial contingency fee lawyers.

Plaintiffs' lawyers search for some corporate misstep that arguably could constitute a colorable claim by scanning newspapers, searching the Internet, and digging through advertisements. See Editorial, *Class War*, Wall St J, March 25, 2002, at A18. Once they identify a "misstep," they typically find friends or colleagues who fit the class to be the representative plaintiffs. *Id.* However, unnamed class members—the real parties in interest - may not want their claims adjudicated in the forum chosen or under the strategies selected. They may not even want to be plaintiffs.

Lawyer-driven class actions can put class members' rights at risk by proceeding on a lowest-common-denominator basis. Class members with more serious and complex claims may simply be "lumped into" the rest of the class and not given the individual attention they need. See John H. Beisner, *Prepared Statement Before the Subcomm. On Administrative Oversight and the Courts of the U.S. Senate Committee on the Judiciary, Hearing on S. 353: The Class Action Fairness Act of 1999*, 10 (May 4, 1999), available in Federal News Service. Moreover, plaintiffs' lawyers may dispense with certain claims for tactical reasons - such as waiving fraud claims because they require individual demonstrations of reliance that can defeat class status. See *Id.*

Unnamed class members, particularly those without legal training, have little say in how their claims are handled. Notices of class actions or proposed settlements provide little or no information about rights to class members not versed in legalese. Class members may therefore miss opportunities to make the crucial decision to opt out of a plaintiff class.

2. PLAINTIFFS' LAWYERS CAN GENERATE WINDFALL FEES, LEAVING THEIR CLIENTS EMPTY-HANDED.

The opportunity to generate large fees is a major reason plaintiffs' lawyers file class actions. As Stanford University Law Professor Deborah Hensler observed, "[l]awyers are entrepreneurial, they're part of the capitalist economy, and there are very powerful economic

incentives to bring these types of lawsuits." Eddie Curran, *On Behalf of All Others: Legal Growth Industry Has Made Plaintiffs of Us All*, Mobile (Ala) Register, December 26, 1999, at 1A.

While class counsel should receive fair compensation for work to further their clients' interests, class action settlements have been abused in courts that use a "rubber stamp" approach in their class action decisions. This allows class lawyers to bring in windfall fees at the expense of their clients. One notorious example is the Bank of Boston case, which involved allegations that the Bank of Boston had over-collected escrow monies from homeowners and profited from the interest. *Kamilewicz v Bank of Boston Corp*, 92 F3d 506, 508-509 (CA 7, 1996), cert den 520 US 1204 (1997). The settlement awarded up to $8.76 to individual class members. See *Id.* The plaintiffs' lawyers received more than $8.5 million in fees, which were debited directly from individual class members' escrow accounts, leaving many of them worse off than they were before the suit. See Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, NY Times, November 21, 1995, at A1. In testimony before the Subcommittee on Administrative Oversight and the Courts, class member Martha Preston recounted how she received $4 from the settlement, but was charged a mysterious $80 "miscellaneous deduction," which she later learned was an expense used to pay the class lawyers' settlement fees. S Rep 109-14, 14-15.

Another is the practice of "coupon settlements" that began in the early 1990s. These settlements provided that class members received coupons, often for the same product or services at issue in the suit and accompanied by restrictions that made them difficult to use, while class counsel were rewarded with millions of dollars in fees. See S Rep 109-14 (providing numerous examples of such settlements). Congress recently curbed the use of coupon settlements in interstate class actions when it enacted the Class Action Fairness Act of 2005 (CAFA), PL 109-

2, § 3, 119 Stat 4 (codified at 28 USC §§ 1711-1715), but the potential for its exploitation in statewide class litigation remains.

These problems certainly do not mean that class actions are always or almost always inappropriate. What is important to understand is that it is critical for a trial court to give serious consideration to the question of whether class certification in a given case is appropriate and desirable under the factors set forth in the class action rule.

ARGUMENT II

IF LEFT TO STAND, THE TRIAL COURT'S RULING WILL FOSTER UNWARRANTED CLASS LITIGATION AND MAKE MICHIGAN COURTS A MAGNET FOR STATEWIDE CLASS ACTIONS.

The legal and public policy implications of this case are important to interests beyond the litigants before the Court. If allowed to stand, the trial court's ruling sanctioning the "rubber stamping" of class certification requests would adversely impact Michigan-based businesses and the state's economy, Michigan consumers, and participants in the state's civil justice system.

Michigan courts would likely be flooded with statewide class actions under this standard, particularly in light of the recent enactment of CAFA. When CAFA was enacted, class litigation practice was an extremely lucrative cottage industry for a certain segment of the contingency fee bar. State courts with lax class certification standards provided the key to this business, as they allowed lawyers to obtain nationwide classes in state courts and wield the power of class certification to generate lucrative settlements and high fee awards. See generally Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv J Legis 483 (2000).

Congress enacted CAFA to reduce this forum shopping by providing federal jurisdiction over class actions with certain interstate characteristics. Importantly, out of respect for federalism and states' interests in addressing issues primarily affecting their own jurisdictions, Congress did not provide solutions for abuses in intrastate class action litigation. Lawyers seeking to fill the gap in their litigation portfolios created by CAFA will naturally turn to states with easy class certification rules and avoid federal jurisdiction, for example, by suing only in-state businesses or including mostly resident plaintiffs as class members. See Victor E. Schwartz, *The Class Action Fairness Act of 2005: The Defense Discusses Benefits and Minefields, Products Liability L & Strategy*, Vol 24, No. 3, September 2005, at 1, 4-5. As a result, the composition of class action lawsuits brought in state courts will change, but attempts to abuse them will not.

A. POTENTIAL EFFECTS ON MICHIGAN BUSINESSES, CONSUMERS AND THE ECONOMY.

Michigan businesses would be likely to become repeated targets of unwarranted class litigation under the trial court's laissez-faire class certification standard. CAFA contains provisions that could allow sizable class actions to proceed in a state court. For example, if all of the defendant companies are citizens of the forum state, a federal court can decide to allow the class action to proceed in state court even if up to two-thirds of the class members are from other states. PL 109-2, § 4, 119 Stat 9, 10, 28 USC §§ 1332(d)(3) & (d)(4)(A)(i)(I). Plaintiffs' lawyers already have illustrated their ability to generate class action claims from thin air. See *Class War, supra*. They would be likely to concoct claims against Michigan-based businesses in order to pursue class actions in Michigan courts, rather than try to meet the more exacting class certification standards used in federal court and in other states.

The adverse effects of excessive litigation on business and industry are well-documented. Corporations that are subject to repeated lawsuits are unwilling or unable to invest resources in

the development of new products and services. They are forced to pass their liability and legal defense costs on to consumers, resulting in higher prices. They may be forced to withdraw beneficial products and services because the litigation costs associated with them are too much to bear. See, e.g., Steven B. Hantler, Mark A. Behrens & Leah Lorber, *Is the "crisis" in the civil justice system real or imagined?* 38 Loy L R 1113, 1120 & n 31 (2005) (providing examples of effects of excessive liability); Michael Moore & W. Kip Viscusi, *Product liability, research and development, and innovation*, 101 J of Political Econ 161, 174-175 (1993) (explaining that once damages become excessively high, either product development will stagnate or firms will withdraw from the market altogether); P.W. Huber & R.E. Litan, eds, *The Liability Maze 5-7* (The Brookings Inst, 1991) (noting that in the United States, excessive liability has created problems in a number of industries, raising consumer costs, causing beneficial products to be removed from the market, discouraging innovation, and leading to corporate layoffs and bankruptcies).[4]

If the state gains a reputation for having a lax class certification standard, then economic development efforts will be hampered by unwarranted class litigation, as new companies are likely to decide against basing themselves in Michigan and existing companies may move their headquarters elsewhere to avoid the potential for overwhelming liability costs. At the worst end of the spectrum, as illustrated by years of asbestos litigation, lie litigation-driven corporate bankruptcies, job layoffs, and company closings, with adverse consequences for employees, shareholders, and retirees with investments in those companies. See Mark A. Behrens & Manuel

[4]A Conference Board survey of more than 2,000 chief executive officers in 1988 found that 36 percent of the companies had discontinued product lines as a result of actual liability experience and that 11 percent of the companies had done so based on anticipated liability problems. Thirty percent of the companies surveyed had decided against introducing new products and 21 percent had discontinued product research as a result of adverse liability experiences. See S Rep No 105-32, at 8 (citing E. Patrick McGuire, *The Impact of Product Liability*, The Conference Board, Research Report No. 908, tbl 28 (1988)).

Lopez, *Unimpaired asbestos dockets: they are constitutional*, 24 R Litig 253, 254, 285-286 (2005).[5]

B. POTENTIAL EFFECTS ON THE MICHIGAN COURT SYSTEM AND ITS PARTICIPANTS.

The Michigan civil justice system itself would suffer under the trial court's certification standard, particularly in light of another CAFA provision which allows a class action to proceed in state court if there are up to 99 plaintiff class members, whether from the forum state or elsewhere. PL 109-2, § 4, 119 Stat 10; 28 USC § 1332(d)(5). An adroit plaintiffs' lawyer could seek to evade this restriction by filing multiple class action complaints, identical except for narrowly drawn class descriptions, thereby keeping essentially national claims in state court, subject to what would be a less-rigorous class certification standard.[6] While CAFA provides the

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[5]The Conference Board also reported that as a result of actual adverse liability experiences, 15 percent of the companies had laid off workers, and 8 percent closed production plants. Nearly a quarter of the companies lost market share, and 17 percent decided against acquiring or merging with another company. See *Id.*

[6]In a parallel example of profit-driven legal creativity, in August 2005 lawyers filed more than 1,000 claims in Alabama state court alleging injury from decades-old pollution from polychlorinated biphenyls, or PCBs, in and around Anniston, Alabama. Most of the lawsuits were filed in neat packages of just under 100 plaintiffs, apparently to avoid any attempt to move them to federal court in accordance with CAFA. PL 109-2 § 4, 119 Stat 11, 28 USC § 1332(d)(11)(A) (providing for removal to federal court of "mass action" state court cases with 100 or more plaintiffs). These filings came just two years after a $700 million global settlement resolved the claims of more than 20,000 plaintiffs in two massive class action PCB lawsuits—and awarded class counsel (including some of these lawyers) over 40 percent of that amount in fees. See Assoc Press, *$700 Million Settlement in Alabama PCB Lawsuit*, NY Times, August 21, 2003, at C4; Charles Seabrook, *PCB Settlement Share Irks Claimants; Lawyers Win Big in Alabama Class-Action Case*, Atlanta J & Const, April 12, 2004, at A1; Jay Reeves, *Attorney Fees Rile Alabama Plaintiffs; PCB Victims Average $7,725 Each, Lawyers About $4 Million Each*, St Louis Post-Dispatch, March 24, 2004, at C1. See also *Reaves v Pharmacia Corp*, No. 05-4624 (Jefferson County Cir Ct, Ala) (filed August 5, 2005) (96 listed plaintiffs); *Satcher v Pharmacia Corp*, No. 05-4623 (Jefferson County Cir. Ct., Ala.) (filed August 5, 2005) (79 listed plaintiffs); *Conley v Pharmacia Corp*, No. 05-4622 (Jefferson County Cir Ct, Ala) (filed August 5, 2005) (96 listed plaintiffs); *Allen v. Pharmacia Corp*, No. 05-4671 (Jefferson County Cir Ct, Ala) (filed August 9, 2005) (99 listed plaintiffs); *Abbott v Pharmacia Corp*, No. 05-4718 (Jefferson County Cir Ct, Ala) (filed August 11, 2005) (99 listed plaintiffs); *Bentley v Pharmacia Corp*, No. 05-4824 (Jefferson County Cir Ct, Ala) (filed August 15, 2005) (99 listed plaintiffs);
(Continued on next page.)

potential for some relief in such situations, such claims could flood court dockets, consuming court resources and delaying the adjudication of the claims of Michigan residents and others who legitimately deserve access to Michigan courts. There is no reason for Michigan courts to encourage the development of class action mills within the state.

ARGUMENT III

THIS COURT SHOULD REJECT PLAINTIFFS' NOVEL APPROACH TO CLASS CERTIFICATION BASED ON THE LOWEST COMMON DENOMINATOR.

Plaintiffs-Appellees' brief suggests a novel and dangerous approach to class certification that this Court should firmly reject. Faced with the fact that the property of class members have substantially varying levels of dioxin, including some that do not have more than background

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(Continued from previous page.)
Cambric v Pharmacia Corp, No. 05-4823 (Jefferson County Cir Ct, Ala) (filed August 16, 2005) (99 listed plaintiffs); *Adams v Pharmacia Corp*, No. 05-4865 (Jefferson County Cir Ct, Ala) (filed August 17, 2005) (93 listed plaintiffs); *Kelley v Pharmacia Corp*, No. 05-4967 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Roberts v Pharmacia Corp*, No. 05-4968 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Stanfield v Pharmacia Corp*, No. 05-4969 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Brown v Pharmacia Corp*, No. 05-4969 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Carlisle v Pharmacia Corp*, No. 05-4963 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (98 listed plaintiffs); *Clayburn v Pharmacia Corp*, No. 05-4964 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (74 listed plaintiffs); *Fitzpatrick v Pharmacia Corp*, No. 05-4965 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Taylor v Pharmacia Corp*, No. 05-4970 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Woods v Pharmacia Corp*, No. 05-4971 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Austin v Pharmacia Corp*, No. 05-4962 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (97 listed plaintiffs); *Bowman v Pharmacia Corp*, No. 05-4960 (Jefferson County Cir Ct, Ala) (filed August 19, 2005) (96 listed plaintiffs); *Ary v Pharmacia Corp*, No. 05-4987 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Creed v Pharmacia Corp*, No. 05-4988 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Henderson v Pharmacia Corp*, No. 05-4989 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Moates v Pharmacia Corp*, No. 05-4990 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Roberts v Pharmacia Corp*, No. 05-4991 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Thompson v Pharmacia Corp*, No. 05-4992 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs); *Aderholt v Pharmacia Corp*, No. 05-4982 (Jefferson County Cir Ct, Ala) (filed August 22, 2005) (99 listed plaintiffs).

levels of dioxin, and that each property has a different flooding history and other potential sources of contamination, plaintiffs' propose that class certification proceed based on the lowest common denominator. That is, plaintiffs request that the court certify a class based on the barest minimum alleged commonality—that they are located within the one-hundred year Flood Plain of the Tittabawassee River and allegedly share a fear that the river could flood at unknown times and frequency in the future, could leave contamination on their property related to the defendant company after sufficient repeated flooding, and could impact their use and enjoyment of the property at some undetermined future date. See Plaintiffs-Appellees' Brief at 16 ("Plaintiffs allege that all class members have been injured by Dow's contamination, because it has already invaded (or threatened to invade) Plaintiffs' property or because future flooding bringing additional contamination is a virtual certainty.") (emphasis added); see also *Id.* at 23-25 (discussing the threat of future flooding and contamination). This is essentially a fear of a future injury claim.

Such a class includes members whose concern is a purely speculative future harm, among those who claim they have documented contamination on their property. As plaintiffs concede, "One cannot predict how floods will behave or exactly where they will deposit the most contaminated sentiments." *Id.* at 26. Aside from the obvious lack of typicality between members who might experience future contamination and those who have found contamination on their property, as a matter of public policy, courts should not certify such a claim. The class action mechanism generally serves two purposes: (1) to provide the ability to bring a lawsuit where the individual claims are small and there otherwise might not be an effective remedy; and (2) to provide judicial efficiency in deciding substantially identical claims. See *Pressley v Lucas*, 30 Mich App 300; 186 NW2d 412 (1971) ("By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility

of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.") (quoting *Eisen v Carlisle & Jacquelin*, 391 F2d 555, 560 (CA 2, 1968)). Neither of these policy bases apply in this case. Here, each plaintiff who has experienced a loss of use or enjoyment of property has the ability and adequate incentive to bring a nuisance action seeking injunctive relief. Moreover, judicial efficiency is not achieved by bringing class treatment in a nuisance action based on speculative fears of future contamination, where the highly individualized issues arising from the assessment of the effect of the alleged conduct on each plaintiff's property and remedy are only compounded by further assessing the level and impact of the threat (if any) of future contamination. The river-flooding based claims erroneously certified below is illustrative: each class member's claim based on the fear of future contamination would depend on highly individualized and subjective factors, including the varying level of risk of varying levels of frequency of flooding for his or her class property, the impact of any such future repeated flooding on his or her use of the property, as well as impact of that risk of the individual's state of mind.

Allowing for "threat-based" class actions is contrary to Michigan law which disfavors claims where there is only a fear of future injury; these claims are particularly susceptible to class action abuse. For example, in this very case, the Michigan Supreme Court recognized that allowing a claim for medical monitoring would result in a "potentially limitless pool of plaintiffs," allowing personal injury lawyers to "virtually begin recruiting people off the street" to act as plaintiffs. See, e.g., *Henry v Dow Chem Co*, 473 Mich 63, 84-85; 701 NW2d 684, 694 (2005). The Court also recognized that lawsuits by plaintiffs who are not presently hurt have the potential to "create a stampede of litigation" and "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." 473 Mich at 84-

85; 701 NW2d at 694-695. The Court has also recognized the principle that a plaintiff must show a tangible injury in other types of actions where, without some reasonable limit, the potential for unbridled claims exists. See, e.g., *Bogaerts v Multiplex Home Corp*, 423 Mich 851, 851; 376 NW2d 113, 113 (1985) (reinstating trial court order vacating emotional damages award where plaintiffs "failed to allege and prove a sufficient physical injury"); *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390, 395 (1970) (recovery available only where a "definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct"); *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 319; 399 NW2d 1, 9 (1987) (cancer-related claims do not accrue until "the discoverable appearance of cancer").

The same public policy considerations hold true with respect to the plaintiffs' request for class treatment of a nuisance claim resting on a fear of future harm. If this Court recognizes such an action, plaintiffs lawyers could file class action lawsuits on behalf of groups of individuals around nearly any industrial facility, claiming that a substance released from that facility might fall on the land of some of the thousands of people surrounding the site at some undetermined point in the future and could affect the future use and enjoyment of the property.

CONCLUSION

For the foregoing reasons, *Amici Curiae* the Defense Research Institute, the Michigan Trial Defense Counsel, the Chamber of Commerce of the United States of America, the American Tort Reform Association, the American Chemistry Council, and the National Association of Manufacturers respectfully request this Court to reverse the trial court's order granting plaintiffs' motion for class certification dated October 21, 2005, and rule that a "rigorous analysis" of the class action factors is required before a class action can be certified under MCR 3.501.

Respectfully submitted,

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STATE OF MICHIGAN

COURT OF APPEALS

KEVAN JACKSON, JR.,

Plaintiff-Appellant/Cross-Appellee,

and

BRENDA SCOTT, PAMELA MACKERWAY, LINDSAY ARMANTROUT, NADIA ZUFELT CRYSTAL PATTON, and TERESA BAUSCHKE,

Plaintiffs,

v

WAL-MART STORES, INC. and SAM'S CLUB,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
November 29, 2005

No. 258498
Saginaw Circuit Court
LC No. 01-040751-NZ

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff Kevan Jackson, Jr. appeals as of right the trial court's opinion and order denying class certification of this action alleging unjust enrichment and breach of an implied-in-law contract.[1] Defendant Wal-Mart Stores, Inc. cross-appeals, challenging the trial court's opinion and judgment, entered following a bench trial, awarding Jackson $539.14 for time worked by Jackson for which he was not compensated during his employment by Wal-Mart. In both instances, we affirm.

[1] Although plaintiffs Brenda Scott, Pamela Mackerway, Lindsay Armantrout, Nadia Zufelt, Crystal Patton, and Teresa Bauschke originally joined Jackson in seeking class action certification, each has since been either dismissed from this suit or have had their claims severed from the instant action and transferred to their counties of residence. Accordingly, Jackson is the sole-remaining plaintiff and appellant in this matter. Nonetheless, to avoid confusion we refer to all plaintiffs in discussing the class certification matter at issue in this appeal.

I. Basic Facts and Procedural History

This case arises from allegations that, through a system of restrictive budgetary and employment practices, Wal-Mart Stores, Inc. (Wal-Mart) and its subsidiary, Sam's Club, improperly required employees of their Michigan stores to perform work without compensation during the six-year period between September 26, 1995 and September 26, 2001. On September 26, 2001, onetime plaintiff Brenda Scott[2] filed a six-count complaint seeking, on behalf of herself and all other similarly situated current and former hourly employees of Wal-Mart's Michigan stores, compensation for time she allegedly worked "off the clock" and for missed and/or shortened rest and meal break periods. Although initially alleging various tort theories of recovery, Scott's complaint was ultimately amended to allege only breach of an implied in law contract and unjust enrichment, and to add Kevan Jackson, Jr., Pamela Mackerway, Crystal Patton, Lindsay Armantrout, Teresa Bauschke, and Nadia Zufelt as plaintiffs and potential class representatives.

In accordance with MCR 3.501(B)(1), plaintiffs moved for class certification on December 26, 2001, arguing that their suit meets the requirement for class certification as set forth in MCR 3.501(A)(1).[3] Following an extensive period of discovery and an evidentiary hearing on plaintiffs' motion, the trial court concluded that plaintiffs had failed to meet any of the several requirements for certification of plaintiffs' suit as a class action under MCR 3.501(A)(1). Each of the plaintiffs' individual claims were thereafter severed, and their respective cause of actions transferred to the counties in which the claim arose. Because his claims arose from employment at Wal-Mart's Saginaw store, plaintiff Kevan Jackson, Jr.'s claims remained in the Saginaw Circuit Court and were tried before the bench. As previously noted, at the conclusion of the proofs at trial, the trial court issued an opinion and judgment awarding Jackson $539.14 as compensation for missed breaks and time worked while "off the clock" during his employment at Wal-Mart's Saginaw store. These appeals followed.

II. Analysis

A. Denial of Class Certification

Plaintiffs argue that the trial court erred in finding that he failed to meet any of the several requirements for certification of his suit as a class action. A trial court's decision on a motion for certification as a class action is reviewed for clear error. *Hamilton v AAA Michigan*, 248 Mich App 535, 541; 639 NW2d 837 (2001). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002).

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[2] See note 1.

[3] MCR 3.501(B)(1)(a) provides that "[w]ithin 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action."

Pursuant to MCR 3.501(A)(1), a member of a class may maintain a suit as a representative of all members of that class only if each of the following requirements are met:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

Plaintiff argues that these requirements, often referred to as numerosity, typicality, commonality, adequacy, and superiority, are each present in this case and that class certification should, therefore, have been granted by the trial court. We disagree.

The party requesting certification of the class action bears the burden of demonstrating that the action meets the conditions for certification found in MCR 3.501(A)(1). *Neal*, *supra* at 16. When evaluating a motion for class certification, the trial court may not examine the merits of the case. *Id.* at 15. Rather, it must accept as true the allegations made in support of the request for certification. *Id.* This does not, however, require that the trial court "blindly rely on conclusory allegations" that merely "parrot" the requirements for class certification. See 3 Newberg & Conte, Newberg on Class Actions (4th ed), § 7.26, p 81. To the contrary, class certification should be granted only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [class certification] have been satisfied." *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982).[4] Because "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" such analysis may, and often does, require that the court "probe behind the pleadings" and analyze the claims, defenses, relevant facts, and applicable substantive law "before coming to rest on the certification question." *Id.* at 155, 160 (citation and internal quotation marks omitted).

With these principles in mind, we address the merits of plaintiffs' challenge of the trial court's denial of its request to certify this matter as a class action.

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[4] "Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification." *Neal*, *supra* at 15; see also *Zine v Chrysler Corp*, 236 Mich App 261, 288 n 12; 600 NW2d 384 (1999).

1. Numerosity

As previously noted, in order to obtain class certification, a plaintiff must satisfy each of the requirements of numerosity, commonality, typicality, adequacy, and superiority. *Neal, supra* at 16. To prove numerosity, a plaintiff is required to demonstrate that the putative class is "so numerous that joinder of all members is impracticable." MCR 3.501(A)(1)(a). Although in doing so the party is not required to plead and prove the exact number of class members, *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999), "impracticability of joinder must be positively shown, and cannot be speculative." *McGee v East Ohio Gas Co*, 200 FRD 382, 389 (SD Ohio, 2001) (citations and internal quotation marks omitted). As stated by this Court in *Zine, supra* at 287-288:

> Because the court cannot determine if joinder of the class members would be impracticable unless it knows the approximate number of members, the plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. [(Internal citations omitted).]

In *Zine, supra* at 265, plaintiffs Christopher Zine and Leonard and Lois Terry filed a proposed class action alleging that informational booklets provided by Chrysler to each purchaser of new Chrysler products erroneously misled the purchaser to believe that Michigan did not have a "lemon law" and that an arbitration board established by Chrysler was their only remedy for defective vehicles. The plaintiffs asserted that the class potentially included each of the more than 522,600 persons who had purchased a Chrysler vehicle during the relevant time period. *Id.* at 267. In affirming the trial court's conclusion that the plaintiffs' evidence and allegations in this regard were insufficient to establish numerosity, this Court stated:

> Neither Zine nor the Terrys identified a specific number of class members, but indicated that the class potentially included all 522,658 purchasers of new Chrysler products from February 1, 1990, onward. However, class members must have suffered actual injury to have standing to sue, *Sandlin* [*v Shapiro & Fishman*, 168 FRD 662, 666 (MD Fla, 1996)], so plaintiffs must show that there is a sizable number of new car buyers who had seriously defective vehicles and lost their right to recovery under Michigan's lemon law because they were mislead by the documents supplied by Chrysler. Neither Zine nor the Terrys indicated even approximately how many people might come within this group, nor did they indicate a basis for reasonably estimating the size of the group. Therefore, both Zine and the Terrys failed to show that the proposed class is so numerous that joinder of all members is impracticable. [*Id.* at 288-289.]

In this case, plaintiffs defined the class sought to be represented by them as "all current and former hourly employees of Wal-Mart Stores, Inc., . . . in the State of Michigan who have worked off-the-clock without compensation, and/or worked through any part of a rest and/or meal break during the period from September 26, 1995 to the present . . . ." Relying on *Zine, supra*, the trial court found that although plaintiffs had presented evidence that Wal-Mart had employed approximately 96,000 people in its Michigan stores during the prescribed period, plaintiffs "made no allegations as to a number of potential members that have suffered an actual injury," and failed to present any "reasonable way to estimate the size of the proposed class."

Therefore, the court concluded plaintiffs had failed to meet their burden of establishing that "the class is so numerous that joinder is impracticable."

On appeal, plaintiffs do not challenge the applicability of *Zine*, or the trial court's reliance thereon to conclude that plaintiffs had failed in their burden of establishing that the class was so numerous as to make joinder of the members impracticable. Rather, plaintiffs assert that the trial court was required to accept as true that each of the 96,000 persons employed by Wal-Mart during the prescribed period had been forced to work off the clock or otherwise forgo rest or meal breaks as a result of the corporate-wide budgetary policies allegedly employed by Wal-Mart. This assertion, however, is inconsistent with both the rationale employed in *Zine* as well as the definition of the class provided by plaintiffs in their complaint, which expressly limits the proposed class to those employees who in fact worked off the clock or had forgone rest or meal breaks. Moreover, the principle that a court must accept as true a plaintiff's allegations in support of class certification merely limits review of the merits of the plaintiff's claim, and should not be invoked to artificially limit the required "rigorous analysis" of the factors necessary to the determination whether plaintiffs have met their burden of establishing each of the certification requirements. *Falcon, supra*; see also *Love v Turlington*, 733 F2d 1562, 1564 (CA 11, 1984); *Bell v Ascendant Solutions, Inc*, 422 F3d 307, 311-313 (CA 5, 2005) (noting that the suggestion that a court "must accept, on nothing more than pleadings, allegations of elements central to the propriety of class certification" is fundamentally "at odds" with the court's duty to make findings that the requirements for certification have been met).

As recognized by the trial court in employing the rationale of *Zine*, in order to meet their burden of establishing numerosity, i.e., that joinder of all class members is impracticable, plaintiffs were required to provide some evidence reasonably estimating or otherwise showing the number of proposed class members who suffered actual injury. *Zine*, *supra* at 288-289. Although plaintiffs offered evidence estimating the total number of persons employed by Wal-Mart during the relevant time period, plaintiffs offered no proof or estimate of the size of the actual proposed class, i.e., those employees who were forced to work off the clock or to forgo rest and meal breaks during that period.[5] Accordingly, the trial court could not ascertain whether

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[5] Plaintiffs attempted, through the use of expert testimony, to assert a method for reasonably estimating the size of the proposed class through a series of random surveys and extrapolation of electronic time card punch data available for a five-week period between January 2001 and early February 2001, when Wal-Mart repealed its policy requiring that employees punch out for rest breaks. However, although not expressly addressing the merits of this methodology, in concluding that "[t]here is no way to reasonably estimate the size of the proposed class," the trial court impliedly rejected that methodology as unreasonable for purposes of establishing numerosity. Other than their assertion that the testimony of their expert constitutes, under *Zine*, *supra* at 288, "some evidence" to establish by reasonable estimate the number of class members, plaintiffs offer no argument to support that the trial court clearly erred in rejecting a methodology by which the break patterns of more than 96,000 employees over a six-year period would be determined through the use of random polling and extrapolation of electronic data collected over a period of only five weeks.

the numerosity requirement was satisfied and, as such, did not clearly err in concluding that plaintiffs had failed to meet their burden in that regard. *Zine*, *supra*; *Neal*, *supra* at 15.

2. Commonality

As indicated above, MCR 3.501(A)(1)(b) requires that there be "questions of law or fact common to the members of the class that predominate over questions affecting only individual members." In *Zine*, *supra* at 289, this Court explained that this "common question factor is concerned with whether there 'is a common issue the resolution of which will advance the litigation,' [and] requires that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" (Citations omitted). Here, the trial court concluded that although such matters as whether Wal-Mart engaged in a pattern or practice that caused its employees not to report all time worked or to forgo rest and meal breaks were common to all members of the proposed class, Wal-Mart's liability for such conduct, and the extent thereof, could "only be answered by individualized inquiry" into the circumstances of each class member. Thus, the court concluded, "common questions of law or fact do not predominate over questions affecting only individual members." In reaching this conclusion, the trial court rejected plaintiffs' allegation that the need for such individualized inquiry could be obviated by the use of statistical models developed through the use of random surveys and the records of Wal-Mart's employee database.[6] As explained below, we find no clear error in the trial court's conclusion that individual inquiries, which cannot be adequately circumvented by statistical sampling or a general review of employee time records, predominate over the common questions in this matter.

As previously noted, in determining whether certification as a class action is appropriate, it is often necessary that the court analyze the claims, defenses, and substantive law applicable in the suit at issue. *Falcon*, *supra* at 155, 160. Here, plaintiffs alleged damages and associated liability under two purportedly separate theories of recovery: breach of an implied in law contract and unjust enrichment. It is well settled, however, that a contract implied by law "is not a contract at all," but rather an obligation imposed by the law "where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation." *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988). Thus, plaintiffs' claim for breach of an implied in law contract is itself a claim for unjust enrichment. See *Tingley v 900 Monroe, LLC*, 266 Mich App 233, 247; ___ NW2d ___ (2005) ("[a] claim of unjust enrichment requires proof that the defendant received a benefit from the plaintiff and that permitting the defendant to retain the benefit would result in inequity to the plaintiff"); see also *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993)

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[6] Contrary to plaintiffs' assertion, the trial court did not reject statistical modeling as an acceptable manner of overcoming the need for individual inquiry into such matters as liability and damages solely on the ground that plaintiffs' statistical expert, Dr. Martin Shapiro, acknowledged at the class certification hearing that such modeling would not be "100% accurate." Although noting Shapiro's acknowledgement in this regard, the court also relied on the highly individualized nature of the inquiries that, as explained below, are required to establish liability and damages under the theories of recovery alleged by plaintiffs.

(when such elements exists, "the law operates to imply a contract in order to prevent unjust enrichment"). As such, to establish liability under either theory alleged, plaintiffs are required to show that Wal-Mart received a benefit from its employees, the retention of which without compensation would result in an inequity to those persons. *Tingley, supra*. While the receipt of a benefit by Wal-Mart, in the form of work performed off the clock or during periods when an employee was entitled to be on break, might adequately be shown by the statistical models profferred by plaintiffs, whether inequity would result from retention of that benefit necessarily requires inquiry into the reasons why each individual member of the proposed class performed work off the clock or missed rest or meal breaks. As noted by the trial court, the evidence presented by the parties indicated that while some potential class members were expressly required by their supervisors to work off the clock or forgo a break, others had either never performed work off the clock or simply chose to do so for a number of personal reasons.[7] Other evidence indicated that the performance of work off the clock or during rest or break periods varied with the positions held by an employee. Indeed, plaintiff Pamela Mackerway herself testified that although she occasionally performed off-the-clock work while assigned to the receiving department, she never did so while working in the claims department. Plaintiff Kevan Jackson similarly testified that while he regularly missed rest breaks as an inventory control specialist and bike assembler, he always received all meal and rest breaks to which he was entitled while working as an overnight stocker. The evidence further indicated that many proposed class members failed to consistently punch in and out for both breaks and scheduled work shifts for a variety of reasons, including forgetfulness and mere convenience, and that some employees opted to forgo submission of a request to adjust their time to account for missed breaks or work performed off the clock, despite their awareness they could do so. These highly individualized scenarios directly affect the equities of any claim for unjust enrichment by the proposed class members. Moreover, as recognized by the court in *Basco v Wal-Mart Stores, Inc*, 216 F Supp 2d 592, 603 (ED La, 2002), plaintiffs' "proposed statistical analysis ignores the highly individualized issues . . . [regarding] the myriad of reasons why any employee may have missed a meal or work break or worked off-the-clock, [and the] possible defenses available to defendant to explain or justify any employee's missed work or meal break or work off-the-clock."

Accordingly, because many of the claims will stand or fall, not on the answer to the question whether Wal-Mart, as the result of a policy or practice that caused its employees not to report all time worked or to forgo required rest and meal breaks, received a benefit, but on the resolution of the highly individualized question whether it would be inequitable for Wal-Mart to retain that benefit without compensation, we do not conclude that the trial court clearly erred in finding that plaintiffs failed to satisfy the requirement of commonality set forth in MCR 3.501(A)(1)(b). See *Rutstein v Avis Rent-A-Car Systems, Inc*, 211 F3d 1228, 1234 (CA 11,

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[7] Although plaintiffs assert in their brief on appeal that "numerous courts" have rejected the contention that the voluntary nature of missed breaks or off-the-clock work will excuse an employer from compensating its employees for such matters, the sole authority cited by plaintiffs for their assertion in this regard concerns the statutory requirement for overtime pay under the Fair Labor Standards Act of 1938, 29 USC 201, *et seq*. In contrast, the claims at issue here seek recovery in equity, for which the voluntary nature of the work at issue is highly relevant.

2000) ("[w]hether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action"); see also *Klay v Humana, Inc*, 382 F3d 1241, 1255 (2004) (when, "after adjudication of the class-wide issues, [the] plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification").

3. Typicality

MCR 3.501(A)(1)(c) requires that the claims of the representative parties be "typical of the claims . . . of the class" as a whole. As this Court explained in *Neal, supra* at 21:

> The typicality requirement . . . directs the court "to focus on whether the named representatives' claims have the same essential characteristics as the claims of the class at large." While factual differences between the claims do not alone preclude certification, the representative's claim must arise from "the same event or practice or course of conduct that gives rise to the claims of the other class members and . . . [be] based on the same legal theory." In other words, the claims, even if based on the same legal theory, must all contain a common "core of allegation." [quoting *Allen v Chicago*, 828 F Supp 543, 553 (ND Ill, 1993) (citations omitted).]

Here, the trial court found that because the claims of each class member were, as discussed above, highly individualized, "there was no single event or course of conduct that can be applied to all of the class representatives." In doing so, the court reasoned that "there are simply too many different factual circumstances involved in these claims to show that the claims presented by the class representatives are typical of the claims of the remaining members of the class." We again find no clear error in the trial court's conclusion in this regard.

As previously discussed, although plaintiffs' claim that Wal-Mart has been unjustly enriched arguably arises from a "common core of allegation," i.e., that it employs a practice or policy causing its employees to perform work off the clock or forgo rest and meal breaks to which they are entitled, the question whether it is inequitable for Wal-Mart to retain any benefit received as a result of a particular employee having performed work off the clock or missed a break varies with each individual class member. See *Falcon, supra* at 157 n 13 ("[t]he commonality and typicality requirements . . . tend to merge"); see also *Newton v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 259 F3d 154, 183 (CA 3, 2001) ("[t]he typicality inquiry . . . centers on whether the named plaintiffs' individual circumstances are markedly different"). Indeed, a named plaintiff who proves his or her claim will not necessarily have proven the claim of any other member of the proposed class and, as such, the trial court did not clearly err in finding that plaintiffs' claims were not typical of those of the "class at large," *Neal, supra*, and that, therefore, plaintiffs failed to meet the requirement of typicality set for in MCR 3.501(A)(1)(c). See *Sprague v Gen Motors Corp*, 133 F3d 388, 399 (CA 6, 1998) (summarizing the typicality requirement as entailing the premise that "as goes the claim of the named plaintiff, so goes the claim of the class").

4. Adequacy of Representative Parties

MCR 3.501(A)(1)(d) requires that "the representative parties will fairly and adequately assert and protect the interests of the class." To assess whether this requirement is met, a court must employ a two-part inquiry: "'First, the court must be satisfied that the named plaintiffs' counsel is qualified to sufficiently pursue the putative class action. Second, the members of the advanced class may not have antagonistic or conflicting interests.'" *Neal, supra* at 22, quoting *Allen, supra.*

In this case, although finding "no reason to challenge the competency" of plaintiffs' counsel to adequately represent the class, the trial court concluded that there exists an "inherent conflict" between the named plaintiffs and those members of the class who are hourly department managers, because such managers may in fact be the cause of another class member's complaint. In challenging the trial court's conclusion in this regard, plaintiffs argue that because they allege misconduct on the corporate, as opposed to department level, the conflict envisioned by the trial court simply does not exist. Plaintiffs' argument in this regard, however, ignores the statements of proposed class representatives such as Pamela Mackerway Lindsay Armantrout, and Kevan Jackson, each of whom recalled during their testimony having been asked by their department managers to perform work off the clock despite their knowledge that doing so was a clear violation of Wal-Mart policy. Given the disciplinary consequences for such conduct testified to by nearly every Wal-Mart employee who provided evidence in this matter, we reject plaintiffs' claim that the trial court erred by finding conflict where none exists. See also *Neal, supra* at 23 (finding that the potential for conflict between class members who competed for but were denied promotions, allegedly on the basis of race, properly supported a finding that the requirement of MCR 3.501(A)(1)(d) had not been satisfied).

5. Superiority

Finally, MCR 3.501(A)(1)(e) requires that "the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice." In deciding this factor, a court may consider the practical problems that can arise if the class action is allowed to proceed. *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 414 n 6; 415 NW2d 206 (1987). "The relevant concern . . . is whether the issues are so disparate" that a class action would be unmanageable. *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 504-505; 459 NW2d 1 (1989). Thus, as recognized by this Court in *Zine, supra*, the question whether a class action would be the superior form of suit is closely tied to the commonality factor because, "if individual questions of fact predominate over common questions, the case will be unmanageable as a class action." *Id.* at 289 n 14, citing *Lee, supra.* Recognizing this fact, the trial court here found that "the proposed class should not be certified because this is not a superior method of litigation, due to the seemingly vast amount of individualized inquiry that will be needed to prove the plaintiffs' claims," which the court found would render the proposed class action "unmanageable." In challenging the trial court's conclusion in this regard plaintiffs argue simply that, given the small nature of each individual class members claim in relation to the cost to litigate those claims, a class action is the superior method to resolve the claims at issue here. However, although the likely "negative value" of the individual suits is a "compelling rationale for finding superiority in a class action," *Castano v American Tobacco Co*, 84 F3d 734, 748 (CA 5, 1996), it is insufficient in and of itself to justify a "headlong plunge into an unmanageable and interminable litigation process" involving predominantly individual-specific issues, *Thompson v American Tobacco Co, Inc*, 189 FRD 544,

556 (D Minn, 1999) (citation and internal quotation marks omitted). See also *Allison v Citgo Petroleum Corp*, 151 F3d 402, 419 (CA 5, 1998) (predominance of individual-specific issues relating to the plaintiffs' claims detracts from the superiority of the class action device in resolving those claims). Here, the problems inherent in managing the proposed class action include the involvement of more than 96,000 potential plaintiffs spread across the state, who have worked or are currently working in more than forty different departments of eighty-five stores over a period of six years. Given these factors, we cannot conclude that the trial court clearly erred in finding that this matter would unmanageable and, therefore, not superior, as a class action suit. Consequently, we do not find that the trial court's denial of plaintiffs' motion for class certification was clearly erroneous. *Hamilton, supra.*

B. Cross-Appeal

1. Denial of Motion for Summary Disposition

Following the trial court's denial of plaintiffs' motion for class certification, Wal-Mart moved for summary disposition of plaintiffs' claims under MCR 2.116(C)(10). Wal-Mart argued, among other things, that because plaintiffs' claims for breach of an implied in law contract and unjust enrichment were equitable in nature, the availability of adequate remedies at law under both the federal Fair Labor Standards Act of 1938 (FLSA), 29 USC 201 *et seq.*, and the Michigan wages and fringe benefits act (WFBA), MCL 408.471 *et seq.*, precluded recovery under those theories. The trial court denied Wal-Mart's motion without addressing the applicability of the state and federal statutory remedies alleged by Wal-Mart to be available to plaintiffs in lieu of their equitable claims. On cross-appeal, Wal-Mart renews its assertion that summary disposition of plaintiffs' claims was appropriate on the ground that adequate remedies at law were available to plaintiffs. As explained below, we find such claim to be without merit, at least insofar as argued by Wal-Mart.

As previously discussed, Wal-Mart is correct that the claims asserted by plaintiffs are equitable in nature, *Tingley, supra*, and that equitable remedies are not appropriate where an adequate remedy at law is available, *Jeffrey v Clinton*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). With respect to the FLSA, Wal-Mart cites §§ 204, 211, and 216 of the act as authority for the proposition that the act applies and provides for enforcement of its provisions via "prompt administrative investigation, private rights of action, double damages, and attorneys' fees." See 29 USC 204, 211, and 216. Sections 204 and 211 of the FLSA, however, merely provide for the creation of a "Wage and Hour Division" within the United States Department of Labor, and grant authority to its representatives to "investigate such facts, conditions, practices, or matter as [they] may deem necessary or appropriate to determine whether any person has violated" the provisions of the act. See 29 USC 204 and 211. Moreover, although § 216(b) of the act provides for a private right of action against any employer that violates the minimum wage, 29 USC 206, or overtime, 29 USC 207, provisions of the act, it provides no such right of action for the claims asserted by plaintiffs, i.e., that, through a pattern or practice that caused its employees not to report all time worked or to forgo rest and meal breaks, Wal-Mart has been unjustly enriched by its employees. See 29 USC 216(b). As such, the FLSA does not, insofar as argued by Wal-Mart, provide plaintiffs with an adequate remedy at law precluding their equitable claims.

Regarding the WFBA, Wal-Mart cites §§ 481, 488 and 489 of the act as authority for the proposition that the act applies and provides for enforcement of its provisions via "prompt administrative investigation, private rights of action, double damages, and attorneys' fees." See MCL 408.481, 488, 489. Section 481 of the act provides that "[a]n employee who believes that his or her employer has violated this act may file a written complaint with the [Michigan] department [of labor] within 12 months after the alleged violation." MCL 408.481. Pursuant to § 488, the department may thereafter "order an employer who violates section 2, 3, 4, 5, 6, 7, or 8 [of the act] to pay" any wages due the employee, the amount of which may be doubled by the department "if the violation was flagrant or repeated." See MCL 471.488; see also MCL 408.472-473. Section 488(2) further provides for the imposition of attorney fees and other costs for violation of the act. MCL 408.488. However, with respect to the violations enumerated in § 488, none are even arguably applicable to the claims asserted by plaintiffs in this suit. To the contrary, the sections enumerated in MCL 408.488 concern only delineation of pay periods, MCL 408.472, payment of fringe benefits in accordance with a written contract or policy, MCL 408.473, the withholding of compensation due as a fringe benefit at termination of employment, MCL 408.474, payment of wages due at discharge, MCL 408.475, permissible methods for the payment of wages, MCL 408.476, permissible deductions from wages, MCL 408.477, and gratuities as a condition of employment, MCL 408.478. Consequently, there is no merit to Wal-Mart's assertion that summary disposition of plaintiffs' equitable claims was required on the ground that the WFBA and the FLSA provide adequate remedies at law.

B. Judgment in Favor of Plaintiff Kevan Jackson, Jr.

As previously noted, following denial of plaintiffs' motion for class certification, each of the originally named plaintiffs' individual claims were severed, and their respective cause of actions transferred to the counties in which the claim arose. Because his claims arose from employment at Wal-Mart's Saginaw store, plaintiff Kevan Jackson, Jr.'s claims remained in the Saginaw Circuit Court and were tried before the bench. At the conclusion of trial, the court issued an opinion and judgment awarding Jackson $539.14 as compensation for missed or shortened breaks and work performed by him off the clock.[8] On appeal, Wal-Mart challenges the trial court's award in this amount on the ground that the evidence at trial was insufficient to support any finding that the equities in this matter weighed in favor of Jackson. We disagree.[9]

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[8] In rendering this award, the trial court rejected as incredible Jackson's claims regarding having been locked either inside or outside the store at the beginning or end of shifts and, therefore, awarded Jackson nothing for these claimed times.

[9] Wal-Mart also argues that the trial court erred in awarding Jackson compensation for all missed or shortened rest break time evidenced by the time card punch exception report summary submitted by Jackson at trial, which it further asserts erroneously calculates a portion of such time. However, these arguments are not preserved for appellate review because Wal-Mart failed to include these issues in its statement of questions presented. See MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Consequently, we decline to consider these arguments. *Busch, supra.*

Where, as here, the proceeding was equitable in nature, this Court reviews the trial court's ultimate determination de novo and reviews for clear error the findings of fact supporting that determination. *Webb v Smith*, 224 Mich App 203, 210; 568 NW2d 378 (1997). A trial court's findings are clearly erroneous only where, although there is evidence to support those findings, this Court is left with a definite and firm conviction that a mistake has been made. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004); see also MCR 2.613(C). This Court will defer, however, to the trial court's superior ability to judge the credibility of the witnesses. *Glen Lake, supra.*

As previously discussed, to be successful Jackson's claims for breach of an implied in law contract and unjust enrichment required that he establish that Wal-Mart received a benefit from him that it would be inequitable for the company to retain without compensation to Jackson. *Tingley, supra*; see also *Lewis, supra.* In arguing that the evidence proffered at trial failed to meet this required showing, Wal-Mart cites its provision of a procedure for employees to request that their time be adjusted to reflect work performed but not otherwise recorded, of which Jackson acknowledged he was aware but failed to use to inform Wal-Mart of the missed or shortened breaks and off-the-clock work at issue in this case. Wal-Mart asserts that, in the face of such evidence, any conclusion that it would be unjust or otherwise inequitable for it to retain the benefits it may have received as a result of Jackson's claimed uncompensated work is clearly in error. Wal-Mart's argument in this regard, however, ignores the basic premise of the inequity claimed in this suit and supported by the testimony of organizational behavior expert William Cooke, i.e., that the business strategy employed by Wal-Mart, in conjunction with the corporate culture expressly fostered by the company, resulted in a work environment wherein employees were compelled to perform work off the clock and to forgo rest and meal breaks. Indeed, Cooke testified that Wal-Mart employees would do so without "a second thought," because it was simply a part of the culture in which they worked. Given this premise and the testimony in support thereof, we do not find the trial court's award inequitable under the circumstances of this case, despite the knowing existence of procedures purportedly set in place to prevent such inequity.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray