

**STATE OF MICHIGAN
IN THE SUPREME COURT**

(On appeal from the Court of Appeals
Patrick M. Meter, PJ, and Kristen Frank Kelly and Karen Fort-Hood, JJ.)

GARY and KATHY HENRY, *et al.*,

Plaintiffs-Appellees

v

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Supreme Court No.: 136298

Court of Appeals No.: 266433

Saginaw Co Cir Ct No.: 03-47775-NZ

**AMICUS CURIAE BRIEF OF THE
MICHIGAN ASSOCIATION FOR JUSTICE**

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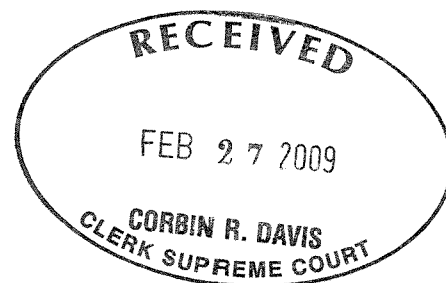


Table of Contents

Index of Authorities ii

Interest of Amicus Curiae 1

Counter-Statement of Question Presented 2

Argument 3

I. THE PLAIN LANGUAGE OF MCR 3.501 DOES NOT INCLUDE
A “RIGOROUS ANALYSIS” REQUIREMENT AND THIS
COURT HAS NOT AND SHOULD NOT IMPORT SUCH A
REQUIREMENT INTO THE PLAIN LANGUAGE OF THE RULE
..... 3

II. EVEN IF THE COURT WERE TO AMEND THE RULE
THROUGH ITS DECISION IN THIS CASE, THE TRIAL
COURT’S ACTIONS MET THE “RIGOROUS ANALYSIS”
STANDARD 9

Conclusion 9

Proof of Service 10

INDEX OF AUTHORITIES

Cases

CAM Const. v. Lake Edgewood Condominium Ass'n, 465 Mich. 549; 640 N.W.2d 256 (2002) . 5

Cameron v. Auto Club Ins. Ass'n, 476 Mich. 55; 718 N.W.2d 784 (2006) 4

Collins v. Collins, 2003 WL 22495580 (Mich.App.,2003) 5

Cruz v State Farm Mut Auto Ins Co, 466 Mich. 588; 648 N.W.2d 591 (2002) 4

Devillers v. Auto Club Ins. Ass'n, 473 Mich. 562; 702 N.W.2d 539 (2005) 4

Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007) 9

Erie R Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 3

Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir.2004) 8

Gen Tel Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364 (1982) 3

*Greater Bethesda Healing Springs Ministry v. Evangel Builders & Greater
Bethesda Healing Springs Ministry v. Evangel Builders & Const. Managers, LLC*,
--- Mich. App. ---; --- N.W.2d ---, 2009 WL 330239 (2009) 5

Grievance Administrator v. Underwood, 462 Mich. 188;
612 N.W.2d 116 (2000) 4

Griffith v. State Farm Mut. Auto. Ins. Co., 472 Mich. 521;
697 N.W.2d 895 (2005) 4

Grigg v. Michigan Nat. Bank, 405 Mich. 148; 274 N.W.2d 752 (1979) 8

Hill v. City of Warren, 480 Mich. 1195; 748 N.W.2d 520 (2008)(Corrigan, J., concurring) 5

Hill v. City of Warren, 276 Mich.App. 299; 740 N.W.2d 706 (2007) 8

Hyslop v. Wojjusik, 252 Mich.App. 500; 652 N.W.2d 517 (2002) 4

In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3rd Cir.2008) 8

Kloian v. Domino's Pizza L.L.C., 273 Mich. App. 449; 733 N.W.2d 766 (2006) 5

Neal v. James, 252 Mich.App. 12; 651 N.W.2d 181 (2002) 8

<i>Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 259 F.3d 154 (9 th Cir.2001)	8
<i>Oda v. State</i> , 44 P.3d 8 (Wash.Ct.App.2002)	3
<i>People v. Mack</i> , 265 Mich. App. 122; 695 N.W.2d 342 (2005)	5
<i>Rinas v. Mercer</i> , 259 Mich. App. 63; 672 N.W.2d 542 (2003)	5
<i>Rinke v. Potrzebowski</i> , 254 Mich. App. 411; 657 N.W.2d 169 (2002)	5
<i>Spencer v. State</i> , 389 So.2d 652 (Fla.App., 1980)	3
<i>State Farm Fire and Cas. Co. v. Old Republic Ins. Co.</i> , 466 Mich. 142; 644 N.W.2d 715 (2002)	5
<i>Sternberg v. Michigan State University</i> , 2009 WL 131737 (Mich.App.,2009)	5
<i>Thorn v. Jefferson-Pilot Life Ins. Co.</i> , 445 F.3d 311 (4 th Cir.2006)	8
<i>Vallario v. Vandehey</i> , --- F.3d ----; 2009 WL 251938, *7 (10 th Cir.2009)	8
<i>Vizena v. Union Pacific R. Co.</i> , 360 F.3d 496 (5 th Cir.2004)	8
<i>Washington v. Brown & Williamson Tobacco Corp.</i> , 959 F.2d 1566 (11 th Cir.1992)	8
<i>Yudashkin v. Linzmeyer</i> , 247 Mich.App. 642; 637 N.W.2d 257 (2001)	5

Statutes and Court Rules

MCR 3.501	3, 6, 8, 9
Fed. R. Civ. P. 23	8
Ala.Code 1975 § 6-5-641	3
Ala.R. Civ. P. 23	3

Interest of Amicus Curiae

This Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work. MAJ consists of member attorneys and recognizes an obligation to assist this Court on important issues of law that would affect substantially the orderly administration of justice in the trial courts of this state. This Court has invited MAJ to file this amicus curiae Brief. MAJ supports Plaintiffs-Appellees in urging this Court to affirm the Court of Appeals' decision.

Counter-Statement of Question Presented

WHERE THE PLAIN LANGUAGE OF MCR 3.501 DOES NOT INCLUDE A “RIGOROUS ANALYSIS” REQUIREMENT, SHOULD THIS COURT DECLINE TO IMPORT SUCH A REQUIREMENT INTO THE PLAIN LANGUAGE OF THE RULE?

Amicus Curiae MAJ answers, “Yes.”

EVEN IF THE COURT WERE TO AMEND THE RULE THROUGH ITS DECISION IN THIS CASE, SHOULD THIS COURT AFFIRM THE COURT OF APPEALS BECAUSE THE TRIAL COURT’S ACTIONS MET THE “RIGOROUS ANALYSIS” STANDARD?

Amicus Curiae MAJ answers, “Yes.”

Argument

I. THE PLAIN LANGUAGE OF MCR 3.501 DOES NOT INCLUDE A “RIGOROUS ANALYSIS” REQUIREMENT AND THIS COURT HAS NOT AND SHOULD NOT IMPORT SUCH A REQUIREMENT INTO THE PLAIN LANGUAGE OF THE RULE

Amicus Curiae MAJ fully supports Plaintiffs-Appellees. This Court should affirm the Court of Appeals’ decision upholding the trial court’s decision to certify the class. Plaintiffs-Appellees’ Brief on Appeal is comprehensive and MAJ joins in the arguments presented there. MAJ writes separately regarding the “rigorous analysis” issue.

This Court asked whether the Federal “rigorous analysis” requirement mentioned in *Gen Tel Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364 (1982), applies to state class actions. Order, Nov. 5, 2008. The short answer is “no,” the “rigorous analysis” requirement does not apply to class actions under MCR 3.501.

Pronouncements of the United States Supreme Court are not binding on state courts and state procedures except for constitutional issues and matters of federal law. *See Erie R Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Spencer v. State*, 389 So.2d 652 (Fla.App., 1980). The class action rules do not invoke such matters and thus the “rigorous analysis” requirement is not mandatory in class actions under MCR 3.501. While some states have adopted the “rigorous analysis” explicitly, *see Oda v. State*, 44 P.3d 8, 15 (Wash.Ct.App.2002), Ala.Code 1975 § 6-5-641,¹ this Court has never done so. The plain language of MCR 3.501 does not include

¹The Alabama statute requires both an evidentiary hearing and use of “rigorous analysis:”

(d) The court shall, on motion of any party, hold a full evidentiary hearing on class certification.

(e) When deciding whether a requested class is to be certified, the court shall determine, by employing a rigorous analysis, if the party or parties requesting class certification have proved its or their entitlement to class certification under Ala.R.Civ.P. 23.

such a standard.

As this Court has said on many occasions, the plain and unambiguous language of a statute controls. *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 483; 702 N.W.2d 539 (2005) (“Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.”). Statutory language must be given its plain meaning and courts must not rewrite statutory language. *Cameron v. Auto Club Ins. Ass'n*, 476 Mich. 55, 63; 718 N.W.2d 784 (2006) (“We believe this ruling was erroneous for the most uncomplicated reason; namely, that we must assume that the thing the Legislature wants is best understood by reading what it said.”); *Griffith v. State Farm Mut. Auto. Ins. Co.*, 472 Mich. 521, 526; 697 N.W.2d 895 (2005) (“When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.”)(citation omitted); *Cruz v State Farm Mut Auto Ins Co*, 466 Mich. 588, 594; 648 N.W.2d 591 (2002) (“The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written.”)(citation omitted).

These same rules of statutory interpretation apply to the language of the Michigan Court Rules. *Grievance Administrator v. Underwood*, 462 Mich. 188; 612 N.W.2d 116 (2000). In *Grievance Administrator*, this Court stated:

When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. *McAuley v. General Motors Corp.*, 457 Mich. 513, 518, 578 N.W.2d 282 (1998). Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See *Tryc v. Michigan Veterans' Facility*, 451 Mich. 129, 135, 545 N.W.2d 642 (1996). Similarly, common words must be understood to have their everyday, plain meaning. See M.C.L. § 8.3a; MSA 2.212(1); see also *Perez v. Keeler Brass Co.*, 461 Mich. 602, 609, 608 N.W.2d 45 (2000).

462 Mich. at 193-94; *Hyslop v. Wojjusik*, 252 Mich.App. 500, 505; 652 N.W.2d 517 (2002) (“The

rules governing statutory interpretation apply equally to the interpretation of court rules. ... If the plain and ordinary meaning of the language employed is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used.”)(citations omitted); *Yudashkin v. Linzmeyer*, 247 Mich.App. 642, 652; 637 N.W.2d 257 (2001)(“We must avoid constructions that render any part of a court rule surplusage or nugatory.”)(citations omitted); *Rinas v. Mercer*, 259 Mich. App. 63; 672 N.W.2d 542 (2003); *Greater Bethesda Healing Springs Ministry v. Evangel Builders & Greater Bethesda Healing Springs Ministry v. Evangel Builders & Const. Managers, LLC*, --- Mich. App. ---; --- N.W.2d ----, 2009 WL 330239 (2009).

Courts may not amend the Court Rules by adding language not found there.

People v. Mack, 265 Mich. App. 122, 128; 695 N.W.2d 342 (2005)(inappropriate to rewrite plain language of statute); see *Kloian v. Domino's Pizza L.L.C.*, 273 Mich. App. 449, 458; 733 N.W.2d 766 (2006); *State Farm Fire and Cas. Co. v. Old Republic Ins. Co.*, 466 Mich. 142; 644 N.W.2d 715 (2002). Courts of this state regularly enforce the plain language of the Court Rules. In *CAM Const. v. Lake Edgewood Condominium Ass'n*, 465 Mich. 549; 640 N.W.2d 256 (2002), this Court enforced the plain language of MCR 2.403 in holding that “upon acceptance of a case evaluation under MCR 2.403, a party may not subsequently appeal an adverse summary disposition on one count in the action.” 465 Mich. at 555. This Court rejected an argument for bifurcation because “it is contrary to the court rule's unambiguous language....” *Id.*; see *Collins v. Collins*, 2003 WL 22495580 (Mich.App.,2003)(enforcing plain language of MCR 2.117); *Sternberg v. Michigan State University*, 2009 WL 131737 (Mich.App.,2009)(enforcing plain language of MCR 2.108(C)(1)); *Rinke v. Potrzebowski*, 254 Mich. App. 411; 657 N.W.2d 169 (2002)(enforcing plain language of MCR 2.112(K)(4)); see also *Hill v. City of Warren*, 480 Mich. 1195; 748 N.W.2d 520 (2008)(Corrigan,

J., concurring in leave denial)(plain language of MCR 3.501 does not allow for multiple motions for certification).

The language of the class action rule, MCR 3.501, is plain and unambiguous and provides in relevant part:

(A) Nature of Class Action.

(1) One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:

- (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.

(2) In determining whether 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, the court shall consider among other matters the following factors:

- (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
 - (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
 - (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
- (b) whether final equitable or declaratory relief might be appropriate with respect to the class;
- (c) whether the action will be manageable as a class action;
- (d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
- (e) whether it is probable that the amount which may be recovered by

individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

(B) Procedure for Certification of Class Action.

(1) Motion.

(a) Within 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.

(b) The time for filing the motion may be extended by order on stipulation of the parties or on motion for cause shown.

(3) Action by Court.

(a) Except on motion for good cause, the court shall not proceed with consideration of the motion to certify until service of the summons and complaint on all named defendants or until the expiration of any unserved summons under MCR 2.102(D).

(b) The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures.

(c) In an order certifying a class action, the court shall set forth a description of the class.

(d) When appropriate the court may order that

(i) the action be maintained as a class action limited to particular issues or forms of relief, or

(ii) a proposed class be divided into separate classes with each treated as a class for purposes of certifying, denying certification, or revoking a certification.

(e) If certification is denied or revoked, the action shall continue by or against the named parties alone.

The Rule lists the requirements that must be met and specifies certain factors that the Court must “consider” when deciding the superiority issue. The Rule requires early presentation of the class certification issue to the trial court and gives flexibility to the court in handling and deciding the motion. The Rule requires that an order granting certification contain a definition of the class. Nothing in the Rule’s plain language contemplates or imposes some additional “rigorous analysis” requirement and this Court should not add such language through its judicial decisional process.

The “rigorous analysis” sentence of *Falcon, supra*, is not supported by the plain language

of MCR 3.501. The language of MCR 3.501 and Fed. R. Civ. P. 23 is different. *See Grigg v. Michigan Nat. Bank*, 405 Mich. 148; 274 N.W.2d 752 (1979)(discussing prior versions). Among other differences, MCR 3.501 contains a time limit for the filing of the certification motion. *Hill v. City of Warren*, 276 Mich.App. 299, 306 n.2; 740 N.W.2d 706 (2007)(“Federal Rule of Civil Procedure 23 has no similar time limitations, likely making any federal precedent inapplicable.”). MCR 3.501 combines elements from different subsections of Rule 23. Rule 23 includes language that requires “findings” by the district court. Fed. R. Civ. P. 23(b)(3).²

“Rigorous analysis” typically includes merits determinations. See discussion in *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir.2008). The “findings” requirement set forth in the language of Rule 23 is one of the bases for these determinations and the “rigorous analysis” requirement. *Id.*; *see Vallario v. Vandehey*, --- F.3d ----; 2009 WL 251938, *7 (10th Cir.2009); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir.2006); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir.2004); *see also Vizena v. Union Pacific R. Co.*, 360 F.3d 496 (5th Cir.2004). Rigorous analysis and the findings requirement are intertwined.

The Michigan Rule contains no requirement that the trial court make “findings.” The Rule is dissimilar to Rule 23 in this regard. The addition of “rigorous analysis” to MCR 3.501 would violate this Court’s duty to uphold and enforce the plain language of the statute. It would result in the incorporation of a new requirement that a trial court in Michigan make findings and conduct merits determinations. The plain, unambiguous language of MCR 3.501 does not allow for such additions by judicial decision.

²In addition, the standard of review differs: clear error in Michigan, *Neal v. James*, 252 Mich.App. 12; 651 N.W.2d 181 (2002), versus abuse of discretion in the federal courts, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (9th Cir.2001); *see Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir.1992).

II. **EVEN IF THE COURT WERE TO AMEND THE RULE THROUGH ITS DECISION IN THIS CASE, THE TRIAL COURT'S ACTIONS MET THE "RIGOROUS ANALYSIS" STANDARD**


The trial judge in this case utilized the flexibility found in MCR 3.501 and in reality engaged in a "rigorous analysis" of the type required under Rule 23. The Brief of Plaintiffs-Appellees and the opinion of the Court of Appeals in this case demonstrate the analysis conducted by the trial court and MAJ will not repeat the details here. What is clear, however, is the comprehensive and inquiring nature of the trial court's decision-making. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007).

Therefore, the trial court's decision to certify should be upheld even if this Court were to amend MCR 3.501 to add a "rigorous analysis" requirement through a decision in this case. It is equally clear that no such decision should be made here based on the plain language of the Rule.

Conclusion

For all the aforementioned reasons, MAJ urges this Court to affirm the Court of Appeals' decision in this case.

Respectfully submitted,



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Dated: February 27, 2009

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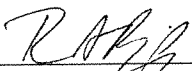
Two copies of the foregoing Amicus Curiae Brief of the Michigan Association for Justice and this Proof were served on February 27, 2009 by first class mail, postage prepaid, on each of the following (and sent via email as well):

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