

until the PSC authorized rate relief. Edison cited MCL 460.6j(18).

However, the PSC concluded that Edison's PSCR clause automatically reinstated on January 1, 2004, when the rate freezes imposed by MCL 460.10d(1) expired. Ultimately, and after confusion engendered by unclear language in both the PFD and the PSC's November 23, 2004, order, the PSC concluded in its June 30, 2005, order granting in part and denying in part Edison's petition for rehearing that it should treat Edison's request for reinstatement and establishment of a PSCR base and factors pursuant to MCL 460.6j(3) through (7), rather than MCL 460.6j(18). This conclusion is consistent with the PSC's finding that Edison's PSCR clause was automatically reinstated.

Edison's actions in the proceedings before the PSC are consistent with the PSC's conclusion that, Edison's citation of MCL 460.6j(18) in its application notwithstanding, Edison intended to and did seek establishment of a PSCR base and factors pursuant to MCL 460.6j(3) through (7). Edison filed a separate 2005 PSCR plan case. Such a case could only proceed pursuant to MCL 460.6j(3) through (7) because it was not filed in conjunction with a general rate case.³¹

Given the PSC's conclusion that Edison's PSCR clause was automatically reinstated, and Edison's act of filing a separate 2005 PSCR plan case, we conclude that Edison's citation of MCL 460.6j(18) was not controlling, and that the PSC correctly concluded that it should treat Edison's request for establishment of a PSCR base and factors as having been brought under MCL 460.6j(3) through (7). The PSC's construction of the applicable regulatory scheme is reasonable and is entitled to deference. *Champion's Auto Ferry, su-*

31. The PSC's denial of the AG's motion to dismiss the 2005 PSCR plan case is consistent with the PSC's determination in this matter

pra. The PSC's decision is not unlawful, nor is it unreasonable. MCL 462.26(8).

V. Conclusion

We reverse that portion of the PSC's November 23, 2004, order that authorized Edison to impose a surcharge of \$0.05 a meter, each month, on all customers to subsidize its renewable energy program, and reverse the PSC's ruling that Edison may not recover its allocated share of the control premium, but affirm the PSC's orders in all other respects.

JANE E. MARKEY, KURTIS T. WILDER, JJ., concur.



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Robert HILL, Shirley Hill, Timothy Carlson, Randall Kolodziejcki, Linda Kolodziejcki, William Glasson, Beverly Glasson, David Abraham, Kristin Abraham, Dennis D. Marlowe, Dennis Hight, Tracy Hight, Ted Dobek, Carolyn Kupiec, Frederick Cross, Michelle Cross, Sandra Powers, Daniel G. Olivares, Francesco Simone, Pamela Simone, Gary Potapshyn, Gerald Kowalski, and Frank Vitale, Plaintiffs–Appellees,

v.

CITY OF WARREN, Defendant–Appellant.

No. 266426.

Court of Appeals of Michigan.

Submitted July 17, 2007, at Detroit.

Decided July 24, 2007, at 9:00 a.m.

Released for Publication Oct. 26, 2007.

Background: Following remand, 469 Mich. 964, 671 N.W.2d 534, homeowners,

that Edison intended to proceed pursuant to MCL 460.6j(3) through (7).

who had brought action against city, asserting claims for trespass-nuisance, negligence, and governmental taking, filed renewed motion for class certification. The Circuit Court, Macomb County, James M. Biernat, J., granted class certification. City filed application for leave to appeal. The Court of Appeals denied application. City filed application for leave to appeal to the Supreme Court. The Supreme Court, in lieu of granting application, remanded case to Court of Appeals for consideration as on leave granted, with directions.

Holdings: The Court of Appeals, Davis, P.J., held that:

- (1) homeowners were not precluded from filing a renewed motion for class action certification after remand;
- (2) trial court had authority on remand to revisit its denial of homeowners' prior motion for class certification;
- (3) law of the case doctrine did not apply to preclude trial court from reversing its initial denial of class certification;
- (4) homeowners met requirements for class certification;
- (5) trespass-nuisance exception to governmental immunity remained available to homeowners; and
- (6) homeowners' class action complaint tolled applicable limitations period continuously from commencement of action.

Affirmed.

1. Appeal and Error ⚖️893(1)

Interpretation of a statute is a question of law reviewed de novo on appeal.

2. Courts ⚖️85(2)

Statutes ⚖️181(2)

Interpretation of a court rule follows the general rules of statutory construction, and both must be construed to prevent

absurd results, injustice, or prejudice to the public interest.

3. Statutes ⚖️190

If the language of a statute is unambiguous, the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case.

4. Appeal and Error ⚖️893(1)

Scope of a trial court's powers is a question of law reviewed de novo on appeal.

5. Appeal and Error ⚖️893(1)

Application of the law of the case doctrine is a question of law reviewed de novo on appeal.

6. Appeal and Error ⚖️1203(1)

Homeowners were not precluded from filing a renewed motion for class action certification after remand order to trial court from Supreme Court in their action against city, under rule governing class actions, pursuant to which a plaintiff filing a complaint that included class action allegations had to move for class action certification within 91 days of filing complaint, as rule mandated that a motion for certification be brought within 91 days of complaint, which requirement homeowners fulfilled, but rule did not forbid subsequent motions for certification or mandate any particular timing requirements for bringing them. MCR 3.501(B)(1).

7. Appeal and Error ⚖️1203(1)

Trial court had authority on remand, in considering homeowners' renewed motion for class certification, to revisit its denial of homeowners' prior motion for class certification, though trial court treated motion as one for reconsideration, such that it was not timely, pursuant to rule governing motions for reconsideration, as court rules gave trial court explicit authority to revisit an order while proceedings

were still pending, and, on that reconsideration, to determine that original order was mistaken, and rule preventing trial court from setting aside or amending order while appeal from that order was pending did not apply after remand. MCR 2.119(F)(3), 2.604(A), 3.501, 7.208(A).

8. Motions ⇨39

As a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court. MCR 2.119(F)(3).

9. Appeal and Error ⇨440, 1217

Filing a claim of appeal only prevents the trial court from amending its orders while the appeal is pending, not after remand. MCR 7.208(A).

10. Appeal and Error ⇨1195(1)

Law of the case doctrine did not apply to preclude trial court on remand from reversing its initial denial of class certification to homeowners, in their action against city, on basis that the denial had been affirmed by Supreme Court, as Supreme Court held that trial court's denial of class certification was not clearly erroneous, which meant that Supreme Court was not definitely and firmly convinced that trial court made a mistake in denying class certification, which could not be construed as a determination that trial court would have made a mistake in granting class certification. MCR 3.501.

11. Appeal and Error ⇨1097(1)

Law of the case doctrine provides that if an appellate court has decided a legal issue and remanded the case for further proceedings, the legal issue determined by the appellate court will not be differently decided on a subsequent appeal in the same case where the facts remain materially the same.

12. Courts ⇨99(1)

Law of the case doctrine is sufficiently important that it applies without regard to whether the decision was actually correct, but it is a matter of practice and discretion rather than an absolute limit on the courts' authority.

13. Courts ⇨99(1)

Law of the case doctrine will not be applied if the facts do not remain materially or substantially the same or if there has been a change in the law.

14. Appeal and Error ⇨1008.1(5)

The "clear error standard" provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake.

See publication Words and Phrases for other judicial constructions and definitions.

15. Appeal and Error ⇨1008.1(5)

A finding of clear error means that the trial court made a mistake, but the logical inverse is not necessarily true; a finding of no clear error does not necessarily mean that the trial court was "right" in the sense of having reached "the only correct result," and this is particularly true given the great deference generally afforded to trial courts, which are in a better position to examine the facts.

16. Appeal and Error ⇨1008.1(5)

A finding of no clear error can only mean that the reviewing court was not definitely and firmly convinced that a mistake was made, not that it is definitely and firmly convinced that a mistake was not made.

17. Appeal and Error ⇨1008.1(5)

The clear error standard of review must, by definition, accommodate the pos-

sibility of multiple “right” results, or at least “permissible” results, similarly to the abuse of discretion standard; underlying both standards is the possibility that the reviewing court could have reached a different result had it been in the shoes of the trial court, or that the reviewing court suspects an error occurred but lacks a sufficient basis to justify reversal.

18. Appeal and Error ⇔1024.1

Trial court’s ruling regarding certification of a class is reviewed for clear error, meaning that the ruling will be found clearly erroneous only where there is no evidence to support it, or there is evidence, but appellate court is nevertheless left with a definite and firm conviction that a mistake has been made.

19. Parties ⇔35.5

Plaintiff seeking to certify a class must show that all five requirements enumerated in rule governing class actions are satisfied. MCR 3.501(A)(1).

20. Parties ⇔35.79

Homeowners who brought action against city arising from property damage they sustained from roots of trees planted on public easements between sidewalk and street curb met numerosity requirement necessary for class certification; evidence indicated there were thousands of trees causing problems to homeowners properties, and, thus, general knowledge and common sense indicated that there were thousands of putative class members. MCR 3.501(A)(1)(a).

21. Parties ⇔35.11

There is no particular number of members necessary to qualify for class certification, nor need the number be known with precision, as long as general knowledge and common sense indicate that the class is large. MCR 3.501(A)(1)(a).

22. Parties ⇔35.11, 35.41

For purposes of numerosity requirement for class certification, the class must be sufficiently well-defined and the members sufficiently well-identified that a reasonable estimate of the number of members can be determined. MCR 3.501(A)(1)(a).

23. Parties ⇔35.79

Homeowners who brought action against city arising from property damage they sustained from roots of trees planted on public easements between sidewalk and street curb met requirement for class certification that there be questions of law or fact common to members of class that predominate over questions affecting only individual members; homeowners presented photographs and deposition testimony from city’s then-current director of parks and recreation indicating that establishing whether any homeowner had suffered damages from city-planted trees was likely to be simple and easy, and individualized determinations of extent of damage would not predominate over common question whether city was liable at all for damage caused by its trees. MCR 3.501(A)(1)(b).

24. Parties ⇔35.17

Requirement for class certification that there are questions of law or fact common to members of class that predominate over questions affecting only individual members does not require all issues in the litigation to be common; rather, it merely requires the common issue or issues to predominate over those that require individualized proof. MCR 3.501(A)(1)(b).

25. Parties ⇔35.17

Requirement for class certification that there are questions of law or fact common to members of class that predominate over questions affecting only individual members relates to the fifth factor for

certification in that, if individual questions of fact predominate over common questions, the case will be unmanageable as a class action. MCR 3.501(A)(1)(b, e).

26. Parties ⇔35.17

For purposes of requirement for class certification that there are questions of law or fact common to members of class that predominate over questions affecting only individual members, the amount of damage need not be uniform as long as the trial court has some basis for concluding that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member. MCR 3.501(A)(1)(b).

27. Parties ⇔35.79

Homeowners who brought action against city arising from property damage they sustained from roots of trees planted on public easements between sidewalk and street curb met requirement for class certification that claims or defenses of representative parties must be typical of claims or defenses of the class, as homeowners' legal theories were the same, i.e., trespass- nuisance, negligence, and governmental taking without due process, and their core of allegation was also the same, i.e., that city planted inappropriate trees that damaged their property, and city was impeding or denying correction of problem. U.S.C.A. Const.Amend. 5, 14; MCR 3.501(A)(1)(c).

28. Parties ⇔35.79

Homeowners who brought action against city arising from property damage they sustained from roots of trees planted on public easements between sidewalk and street curb met requirement for class certification that representative parties would fairly and adequately assert and protect the interests of the class, as gravamen of named homeowners' claims was the same

as that of other class members. MCR 3.501(A)(1)(d).

29. Parties ⇔35.17

Factual differences between the class members' claims are not inherently fatal to certification, but their claims must share a legal theory and core of allegation. MCR 3.501(A)(1)(c).

30. Parties ⇔35.7

For purposes of factor trial court considers to determine whether class certification is appropriate, which asks whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action, the primary concerns are practicality and manageability. MCR 3.501(A)(1)(e).

31. Courts ⇔100(1)

Trespass-nuisance exception to governmental immunity remained available to homeowners in their class action against city arising from property damage they sustained from roots of trees planted on public easements between sidewalk and street curb, whether or not homeowners had been named as plaintiffs in lawsuit as of date of Supreme Court's *Pohutski* opinion, holding that governmental tort liability act did not preserve common-law trespass-nuisance exception to governmental immunity, in which Supreme Court held that its holding would be applied only to cases brought on or after date of issuance of opinion, as Supreme Court's holding applied to cases, not parties. M.C.L.A. § 691.1407.

32. Courts ⇔97(1)

Decisions from federal courts are only persuasive authority on state courts, not binding precedent.

33. Limitation of Actions ⇐126.5

Homeowners' class action complaint against city arising from property damage they sustained from roots of trees planted on public easements between sidewalk and street curb tolled applicable limitations period for class members' claims continuously from commencement of action, as there had been no change in claims or generic identities of potential plaintiffs, and trial court's conclusion that its earlier denial of class certification had been incorrect superseded the circumstance that brought about the resumption of the running of the statute of limitations. MCR 3.501(F)(3).

Macomb Circuit Court; LC Nos.2000-001823-CZ.

Mantese and Associates, P.C. (by Gerard V. Mantese and Mark C. Rossman), and Fraser & Souweidane, P.C. (by Stuart A. Fraser, IV), Troy, Mount Clemens, for the plaintiffs.

Garan Lucow Miller, P.C. (by Rosalind Rochkind and John J. Gillooly), Detroit, for the defendant.

Before: DAVIS, P.J., and HOEKSTRA and DONOFRIO, JJ.

DAVIS, P.J.

Defendant appeals the trial court's order granting plaintiffs' motion for class certification. We affirm.

This is not the first time this matter has been before this Court. In a prior appeal, this Court set forth the background facts:

In the late 1950's and early 1960's, the City of Warren planted silver maple trees on public easements between the sidewalk and street curb in front of residents' homes. In 1967, the city prohibited further planting of silver maples because they grow quickly and should have been planted away from structures and

streets to avoid interference with sewers and sidewalks. As the trees matured, their roots outgrew the space in which they were planted, and began to bore into the plaintiffs' adjacent private property. The roots invaded and obstructed the sewer pipes which resulted in raw sewage and water backups into plaintiffs' homes. The roots also grew upward and lifted the concrete sidewalk blocks which caused the sidewalk to be uneven and dangerous. The roots also destroyed the surface of plaintiffs' lawns and killed grass and vegetation. Also, plaintiffs spent a considerable amount of time and money for cleaning and repairs after their homes were flooded with raw sewage.

Because of certain provisions in the Warren Code, plaintiffs may not remove the silver maples and those residents who have tried to obtain a permit from the Director of Parks and Recreation to remove the trees have been repeatedly ignored or denied permission to do so. Defendant has not compensated plaintiffs for the damage caused by its trees, but has enacted various ordinances in order to help alleviate the problem. These measures include a cost-sharing plan for sidewalk replacement and the formation of a Sidewalk and Tree Board of Review. [*Hill v. City of Warren*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 2003 (Docket No. 229292, 2003 WL 245839).]

Plaintiffs seek redress as a class encompassing all property owners in the city who are similarly affected. Defendant opposes class certification. Plaintiffs' substantive claims include trespass-nuisance, negligence, and governmental taking.

This litigation was commenced by Rob-

ert and Shirley Hill¹ in their individual capacities, and they filed an amended class action complaint shortly thereafter. The trial court originally denied their timely motion for class certification, concluding that the litigation would entail too much individualized fact-finding. Plaintiffs filed an application for leave to file an interlocutory appeal in this Court, in Docket No. 229292. This Court initially denied leave to appeal, but on reconsideration issued a peremptory order reversing the trial court and remanding the case for entry of an order granting class certification. Unpublished order of the Court of Appeals, entered January 29, 2001 (Docket No. 229292). Defendant sought leave to appeal in our Supreme Court, and our Supreme Court in an unpublished order, entered March 5, 2002 (Docket No. 118639, 641 N.W.2d 857), held that application in abeyance pending its decision in *Pohutski v. City of Allen Park*, 465 Mich. 675, 641 N.W.2d 219 (2002). Following its decision in *Pohutski*, the Supreme Court, in lieu of granting leave to appeal, vacated this Court's peremptory order of reversal and remanded to this Court for plenary consideration. 466 Mich. 871, 645 N.W.2d 664 (2002). This Court then issued the unpublished opinion quoted above, holding that the trial court's denial of class certification was clearly erroneous. On November 21, 2003, our Supreme Court, in lieu of granting leave to appeal from our unpublished opinion, issued another peremptory order reversing this Court, holding that the trial court's "denial of class certification was not clearly erroneous," and remanding to the trial court for further proceedings. 469 Mich. 964, 671 N.W.2d 534 (2003).

On remand, some additional discovery took place. Plaintiffs then filed a "re-

newed motion for class certification." The trial court observed that its initial denial had "always been a close decision," and after "much careful consideration of the record and pleadings filed since the Court's initial decision denying class certification," it had become persuaded that class certification was the superior way for the action to proceed. It therefore granted class certification. Defendant applied for leave to appeal, which this Court denied for failure to persuade this Court of the need for immediate appellate review. Unpublished order of the Court of Appeals, entered April 11, 2005 (Docket No. 259706). Defendant then applied for leave to appeal in our Supreme Court, which, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. Our Supreme Court further directed us to

consider whether *Pohutski v. City of Allen Park*, 465 Mich. 675, 641 N.W.2d 219 (2002), affects the class certification issue in this case. *Pohutski* held that § 7 of the governmental tort liability act, MCL 691.1407, does not permit a trespass-nuisance exception to governmental immunity, but ruled that this holding would be applied only to cases brought on or after April 2, 2002. In light of *Pohutski*, are issues relating to putative plaintiffs unnamed as of April 2, 2002, sufficiently disparate from issues relating to plaintiffs who were named as of April 2, 2002, to the extent that certification of a single class containing both groups of plaintiffs would be inappropriate under MCR 3.501(A)(1)? [474 Mich. 916, 705 N.W.2d 345 (2005).]

The matter is therefore now before this Court for consideration as on leave granted.

1. Because they subsequently sold their home in Warren, they are no longer parties to this

suit.

Defendant first argues that the trial court was procedurally precluded from considering plaintiffs' "renewed motion for class certification" by statute, caselaw, or court rule. We disagree.

[1–5] Interpretation of a statute is a question of law reviewed de novo on appeal. *Veenstra v. Washtenaw Country Club*, 466 Mich. 155, 159, 645 N.W.2d 643 (2002). Interpretation of a court rule follows the general rules of statutory construction, and both "must be construed to prevent absurd results, injustice, or prejudice to the public interest." *Rafferty v. Markovitz*, 461 Mich. 265, 270, 602 N.W.2d 367 (1999). However, if the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra, supra* at 160, 645 N.W.2d 643. The scope of a trial court's powers is also a question of law reviewed de novo on appeal. *Traxler v. Ford Motor Co.*, 227 Mich.App. 276, 280, 576 N.W.2d 398 (1998). The application of the law of the case doctrine is also a question of law reviewed de novo on appeal. *Ashker v. Ford Motor Co.*, 245 Mich.App. 9, 13, 627 N.W.2d 1 (2001).

[6] Under MCR 3.501(B)(1), a plaintiff who files a complaint that includes class action allegations must move for class action certification within 91 days of filing the complaint, except by stipulation of the parties or on motion for good cause shown. If the plaintiff fails to do so, the class action allegations may be stricken unless the plaintiff shows excusable neglect. MCR 3.501(B)(2). "If certification is denied or revoked, the action shall continue by or against the named parties alone." MCR 3.501(B)(3)(e). Defendant argues that even if plaintiffs could file a renewed

motion after the remand order from our Supreme Court, plaintiffs would have been required to do so within 91 days thereof, which plaintiffs failed to do.

There are no published cases in Michigan² substantively addressing the pertinent provisions of the court rule, or the amended version of the predecessor rule, former GCR 1963, 208.2(A), which specified 90 days instead of 91 but was otherwise virtually identical to the current MCR 3.501(B)(1). The committee comments to Rule 208.2(A) indicate that the addition of a timing requirement was "designed to prevent cases from remaining pending for extended periods without the propriety of a class action being raised." 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), 1984 pocket part, p 341. Furthermore, the court rules explicitly permit a trial court to *de* certify a class at any time after certification, and thus requires "that motions for decertification be treated as distinct and independent motions that implicate the same considerations as a motion to certify a class action, rather than as a motion for reconsideration." *Tinman v. Blue Cross & Blue Shield of Michigan*, 264 Mich.App. 546, 561, 692 N.W.2d 58 (2004). There is no time limitation on a motion for decertification, and indeed a party could theoretically file multiple motions, subject to the prohibition against groundless motions found in MCR 2.114. *Tinman, supra* at 561 n. 11, 692 N.W.2d 58. The plain language of the court rule mandates that a motion for certification be brought within 91 days of the complaint; it does not forbid subsequent motions for certification or mandate any particular timing requirements for bringing them. Plaintiffs complied with the court rule.

2. Federal Rule of Civil Procedure 23 has no similar time limitations, likely making any federal precedent inapplicable. See *Tinman*

v. Blue Cross & Blue Shield of Michigan, 264 Mich.App. 546, 557–562, 692 N.W.2d 58 (2004).

[7–9] Defendant next argues that plaintiffs’ renewed motion was really a motion for reconsideration that was impermissible because it was not made within the 14-day period permitted under MCR 2.119(F). Although the trial court treated the motion as one for reconsideration, plaintiffs did not present it as such. As a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court. MCR 2.119(F)(3); *Smith v. Sinai Hosp. of Detroit*, 152 Mich.App. 716, 722–723, 394 N.W.2d 82 (1986). In any event, MCR 2.119(F)(1) explicitly refers to MCR 2.604(A) as “another rule” that “provides a different procedure for reconsideration of a decision. . . .” Under MCR 2.604(A), an order that does not dispose of all issues in a case does not terminate the action or entitle a party to appeal as of right and “is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties.” The court rules therefore give the trial court explicit procedural authority to revisit an order while the proceedings are still pending and, on that reconsideration, to determine that the original order was mistaken, as the trial court did here. Defendant asserts that because MCR 7.208(A) prevents a trial court from setting aside or amending an order while an appeal from that order is pending, it must not be able to do so after the appeal has been decided and the matter is returned to the trial court. However, filing a claim of appeal only prevents the trial court from amending its orders while the appeal is pending, not after remand. *Wilson v. Gen. Motors Corp.*, 183 Mich.App. 21, 41–42, 454 N.W.2d 405 (1990).

[10–13] Defendant’s final procedural argument is that the “law of the case” doctrine precludes the trial court from re-

versing its initial denial of class certification, given that its denial had been affirmed by our Supreme Court. “The law of the case doctrine provides that if an appellate court has decided a legal issue and remanded the case for further proceedings, the legal issue determined by the appellate court will not be differently decided on a subsequent appeal in the same case where the facts remain materially the same.” *Grace v. Grace*, 253 Mich.App. 357, 362, 655 N.W.2d 595 (2002). This doctrine is sufficiently important that it applies without regard to whether the decision was actually correct, but it is a matter of practice and discretion rather than an absolute limit on the courts’ authority. *Id.* at 363, 655 N.W.2d 595. “The doctrine will not be applied if the facts do not remain materially or substantially the same or if there has been a change in the law.” *Id.*

[14–16] Our Supreme Court’s holding was not, as defendant asserts, that denial of class certification was *the correct result*. Rather, our Supreme Court held that the circuit court’s “denial of class certification was not clearly erroneous.” The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake. *A & M Supply Co. v. Microsoft Corp.*, 252 Mich.App. 580, 588, 654 N.W.2d 572 (2002). In other words, a finding of clear error means that the trial court made a mistake. But the logical inverse is not necessarily true: a finding of *no* clear error does not *necessarily* mean that the trial court was “right” in the sense of having reached “the only correct result.” This is particularly true given the “great deference” generally afforded to trial courts, which are in a better position to

examine the facts. *Lumley v. Univ. of Michigan Bd. of Regents*, 215 Mich.App. 125, 135, 544 N.W.2d 692 (1996). A finding of no clear error can only mean that the reviewing court was not definitely and firmly convinced that a mistake was made—not that it is definitely and firmly convinced that a mistake was *not* made.

[17] In other words, the clear error standard of review must, by definition, accommodate the possibility of multiple “right” results, or at least “permissible” results, similarly to the abuse of discretion standard. Underlying both standards is the possibility that the reviewing court could have reached a different result had it been in the shoes of the trial court, or that the reviewing court suspects an error occurred but lacks a sufficient basis to justify reversal. Again, our Supreme Court was not definitely and firmly convinced that the trial court made a mistake in denying class certification. That cannot be construed as a determination that the trial court would have made a mistake in *granting* class certification. The cases defendant cites in support of its position are all significantly distinguishable because they all entailed an *explicit, affirmative determination* of a point of law that was subsequently disregarded after a remand. We particularly note *Reeves v. Cincinnati, Inc. (After Remand)*, 208 Mich.App. 556, 559, 528 N.W.2d 787 (1995), in which this Court determined that the defendant was not under a duty to give a warning and also stated that on remand the plaintiffs’ “failure to warn” theory “need not be submitted to the jury.” *Id.*, at 558–560, 528 N.W.2d 787. The trial court subsequently interpreted this language as a grant of discretion to submit the theory to the jury, which this Court explained was an elevation of style over substance. *Id.* at 560, 528 N.W.2d 787. But here, our Supreme Court did not determine that class certifi-

cation was *unwarranted*, merely that denying it was not clearly a mistake. The law of the case doctrine does not apply here.

Defendant argues that class certification was substantively improper. We disagree.

[18, 19] A trial court’s ruling regarding certification of a class is reviewed for clear error, meaning that the ruling will be found clearly erroneous only where there is no evidence to support it or there is evidence but this Court is nevertheless “left with a definite and firm conviction that a mistake has been made.” *Zine v. Chrysler Corp.*, 236 Mich.App. 261, 270, 600 N.W.2d 384 (1999). The five factors a court must consider when deciding whether to certify a class are found in MCR 3.501(A)(1), and a plaintiff seeking to certify a class must show that *all* five enumerated requirements are satisfied. *A & M Supply Co.*, *supra* at 597–598, 654 N.W.2d 572. We are not definitely and firmly convinced that the trial court made a mistake in finding all five requirements satisfied.

[20–22] The first enumerated factor is numerosity. MCR 3.501(A)(1)(a). There is no particular number of members necessary, nor need the number be known with precision “as long as general knowledge and common sense indicate that the class is large.” *Zine, supra* at 287–288, 600 N.W.2d 384. However, the class must be sufficiently well-defined and the members sufficiently well-identified that a reasonable estimate of the number of members can be determined. *Id.* Although plaintiffs’ assertion that there are some 7,000 “problem trees” is unlikely to be the precise number, and although we agree with defendant’s assertion that not every “problem tree” will necessarily equate to a class member, we find this factor amply satisfied. The newspaper articles submitted, as well as a letter from defendant’s offi-

cial and defendant's decision to amend its ordinances apparently because of the tree problem, all support the conclusion that there are thousands of trees causing problems to homeowners' properties. General knowledge and common sense likewise indicate that there are thousands of putative class members. Defendant contends that this factor is unmet because the precise number should be easily ascertained. However, the precise number does not need to be ascertained. Furthermore, common sense and general knowledge indicate that, out of thousands of homes in a residential area, there might be a certain amount of turnover in home ownership. Joinder of the homeowners as individuals would therefore likely necessitate regularly moving plaintiffs in and out of the case, so identifying them with precision may not be as simple and straightforward as defendant suggests.

[23–25] The second factor, and the most significant to this litigation, is whether there exists a common question of fact or law that applies to the entire class, the resolution of which as a general issue will advance the litigation. MCR 3.501(A)(1)(b); *Zine, supra* at 289, 600 N.W.2d 384; *A & M Supply Co., supra* at 599, 654 N.W.2d 572. This factor does not require *all* issues in the litigation to be common; it merely requires the common issue or issues to predominate over those that require individualized proof. *Id.* This also relates to “the fifth factor in that if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.” *Zine, supra* at 289 n. 14, 600 N.W.2d 384. The parties agree that a common question of defendant's liability exists and that individualized questions of how much damage

each class member has suffered exist. The question before us is whether the trial court clearly erred in concluding that the *predominating* issue or issues to be resolved in the litigation are generalized and common to the class. We find that it did not.

[26] Defendant asserts that the homeowners have sustained a wide variety of damages ranging from raw sewage flooding their basements, to cracked sidewalks, to unattractive lawns; moreover, the homeowners have likely undertaken a wide variety of prophylactic or corrective actions. Defendant also notes that each homeowner would need to prove that any damage actually came from trees planted by the city on the public easement in front of the homeowner's property. Defendant therefore contends that class certification would be unwarranted because this matter would degenerate into a procession of “mini-trials.” However, plaintiffs have presented photographs and deposition testimony from defendant's then-current director of parks and recreation³ indicating that establishing *whether* any homeowner had suffered damages from city-planted trees is likely to be simple and easy. Plaintiffs have also provided a list of bills from plumbers indicating that sewer lines were plugged with roots. Most individualized fact-finding would concern the *amount* of damage, not the *existence* of damage. The amount of damage need not be uniform as long as the trial court has some basis for concluding “that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member.” *A & M Supply Co., supra* at 600, 654 N.W.2d 572.

The individualized determinations of the extent of damage will not predominate

3. The person who, by operation of defendant's ordinances, has complete and exclusive control over trees in front of residences, includ-

ing whether to permit their removal. Warren Ordinances §§ 38–2, 38–13.

over the common question whether defendant is liable *at all* for damage caused by its trees. We further note that defendant's letter to homeowners, signed by defendant's service division administrator and apparently drafted by defendant's deputy mayor, which discusses "[t]he dreaded property maintenance ordinance" and the fact that trees planted by prior city administrations were destroying sidewalks, implies that defendant itself recognizes that its liability is a predominating common issue. We find no clear error in the trial court's determination that the predominant issues were generalized, not individual.

[27–29] Under the third factor, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." MCR 3.501(A)(1)(c); *A & M Supply Co., supra* at 601, 654 N.W.2d 572. Factual differences between the class members' claims are not inherently fatal to certification, but their claims must share a legal theory and "core of allegation." *Neal v. James*, 252 Mich.App. 12, 21, 651 N.W.2d 181 (2002), quoting *Allen v. Chicago*, 828 F.Supp. 543, 553 (N.D.Ill., 1993) (further citation omitted). Here, the class members' legal theories are the same: trespass-nuisance, negligence, and governmental taking without due process. The class members' "core of allegation" is also the same: defendant planted inappropriate trees that damaged their property, and defendant is impeding or denying correction of the problem. Defendant contends that this factor has not been satisfied because of the potential for inconsistent claims and because of the different proofs that would be required. However, the significant differences pertain only to the amount of damage. Defendant's assertion that some class members' claims would be antagonistic to other class members' claims is speculative, but, in any event,

class members may opt out of the class. The gravamen of the named plaintiffs' claims is the same as that of the other class members. For the same reason, we reject defendant's contention that the named plaintiffs will not "fairly and adequately assert and protect the interests of the class." MCR 3.501(A)(1)(d); *A & M Supply Co., supra* at 601, 654 N.W.2d 572. The trial court found this fourth factor in plaintiffs' favor from the outset. We find no clear error in that determination.

[30] The final factor asks "whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action," the primary concern being that of practicality and manageability. *A & M Supply Co., supra* at 601, 654 N.W.2d 572; MCR 3.501(A)(1)(e). Under MCR 3.501(A)(2), the trial court is explicitly required to consider a number of subfactors in making its determination regarding the fifth factor. Our Supreme Court has explained that this fifth factor is "essentially the same" as the "convenient administration of justice" consideration required under former GCR 1963, 208, and it is essentially a practicality test. *Dix v. American Bankers Life Assurance Co. of Florida*, 429 Mich. 410, 413–414 ns. 4, 6, 415 N.W.2d 206 (1987). Furthermore, because "[a]lmost all claims will involve disparate issues of law and fact to some degree[, t]he relevant concern here is whether the issues are so disparate as to make a class action unmanageable." *Id.* at 419, 415 N.W.2d 206. We find that the arguments made under this factor are essentially duplicative of the arguments already discussed. We have considered the subfactors, and we find no clear error in the trial court's determination that this matter would be manageable as a class action.

[31, 32] Defendant further argues that, even if this matter proceeds as a class

action, plaintiffs' trespass-nuisance claims remain unavailable to any parties not explicitly named as plaintiffs as of April 2, 2002, when our Supreme Court decided *Pohutski*. We disagree. Defendant relies on *Lessard v. City of Allen Park*, 267 F Supp 2d 716 (E.D.Mich., 2003). However, decisions from federal courts are only persuasive authority, not binding precedent. *Allen v. Owens-Corning Fiberglas Corp.*, 225 Mich.App. 397, 402, 571 N.W.2d 530 (1997). Moreover, the holding in *Lessard* simply misconstrues the plain language of our Supreme Court's holding in *Pohutski*. Our Supreme Court stated that the *Pohutski* holding "will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield [v. Oakland Co. Drain Comm'r]*, 430 Mich. 139, 422 N.W.2d 205 (1988) will apply." *Pohutski, supra* at 699, 641 N.W.2d 219. Whereas the plain language of our Supreme Court's ruling applies to cases pending as of April 2, 2002, the federal district court concluded that it applied to plaintiffs named as of April 2, 2002. Our Supreme Court stated that its rationale was a concern for plaintiffs who would be denied any relief because of "an unfortunate circumstance of timing." *Id.* However, it chose to accomplish this goal by delineating the legal theories available in *cases*, not to *parties*. The trespass-nuisance exception to governmental immunity remains available in this matter. The names of the parties are not relevant.

[33] Finally, defendant argues that the unnamed class members face individualized questions pertaining to the applicable statutes of limitations. Although any statutory period of limitations is tolled with regard to described class members upon the filing of a class action complaint, MCR 3.501(F)(1), the period resumes running "on entry of an order denying certification of the action as a class action." MCR

3.501(F)(2)(c). However, "[i]f the circumstance that brought about the resumption of the running of the statute is superseded by a further order of the trial court . . . the statute of limitations shall be deemed to have been tolled continuously from the commencement of the action." MCR 3.501(F)(3).

In *Cowles v. Bank West*, 476 Mich. 1, 719 N.W.2d 94 (2006), our Supreme Court addressed "whether the filing of a class-action complaint tolls the period of limitations for a class member's claim that was not pleaded in the class-action complaint but arose out of the same factual and legal nexus. . . ." *Id.* at 13, 719 N.W.2d 94. Our Supreme Court discussed the balance between the policies to be served by statutes of limitations and by tolling, and it concluded that "under MCR 3.501(F), a class-action complaint tolls the period of limitations for a class member's claim that arises out of the same factual and legal nexus as long as the defendant has notice of the class member's claim and the number and generic identities of the potential plaintiffs." *Cowles, supra* at 20–21, 719 N.W.2d 94. In particular, putative class members who fear denial of class certification should not feel obligated to commence separate actions until after that denial takes place, lest all of them file needlessly duplicative actions. *Id.* at 25–27, 719 N.W.2d 94. Although in *Cowles* the class certification at issue was initially granted, our Supreme Court explained that this rule "has been applied in cases involving almost every conceivable basis on which class action status might be denied or terminated," including lack of typicality or commonality. *Id.* at 27–28, 719 N.W.2d 94.

Here, there has been no change in the claims or the "generic identities of the potential plaintiffs." And significantly, the trial court's conclusion that its earlier denial of class certification had been incorrect superseded the "circumstance that brought

about the resumption of the running of the statute.” Therefore, there is no limitations period on the unnamed class members’ becoming part of the litigation. Furthermore, our Supreme Court’s discussion of the policies in *Cowles* supports the conclusion that *Pohutski* is intended to apply to cases rather than to parties: as long as defendant was generally aware of the claims and parties it would face, the fact that the parties were not explicitly named should not be an impediment to their joining a pending class action suit in the future.

In summary, we find no procedural or legal impediment to the trial court’s revisiting its earlier denial of class certification. We also find no clear error in the trial court’s finding that class certification is appropriate. Finally, we find no procedural or legal impediment to extending class membership with regard to all claims in this matter to class members who were not explicitly named in the initial complaint or as of April 2, 2002.

Affirmed.



276 Mich.App. 365

Tally KACZYNSKI, Personal Representative of the Estate of Marilyn Holtrey, Deceased, Plaintiff–Appellant,

v.

Peggy ANDERSON, D.O., Defendant–Appellee (On Reconsideration).

Docket No. 268529.

Court of Appeals of Michigan.

Submitted June 25, 2007, at Lansing.

Decided July 26, 2007, at 9:15 a.m.

Released for Publication Oct. 26, 2007.

Circuit Court, Grand Traverse County,
Thomas G. Power, J.

Robert J. Riley, Grand Rapids, for the defendant.

Bigler, Berry, Johnston, Szykiel & Hunt, P.C. (by Steven C. Berry, Mary Jo Boerman, and Christopher S. Berry), Zeeland, for the defendant.

Timothy Reiniger, and Michael Closen, and The Googasin Firm, P.C. (by Dean M. Googasin), Chatsworth, Cal., Bloomfield Hills, for amici curiae the National Notary Association.

The Googasin Firm, P.C. (by George A. Googasin and Dean M. Googasin), Bloomfield Hills, for amici curiae the State Bar of Michigan.

Charfoos & Christensen, P.C. (by David R. Parker), Detroit, for amici curiae the State Bar of Michigan Negligence Section.

Charfoos & Christensen, P.C. (by David R. Parker), and Shermeta & Adams, P.C. (by Barbara L. Adams), Detroit, Rochester Hills, for amici curiae the Michigan Creditors Bar Association.

Before: SERVITTO, P.J., and
FITZGERALD and TALBOT, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the circuit court order granting defendant’s motion for summary disposition pursuant to MCR 2.116(C)(8) on the ground that plaintiff’s affidavit of merit was deficient for want of proper certification of the out-of-state notary public who notarized the instrument. We reverse and remand.

The affidavit of merit in this case was notarized by a Florida notary and was accompanied by a certificate from the Florida Secretary of State attesting the