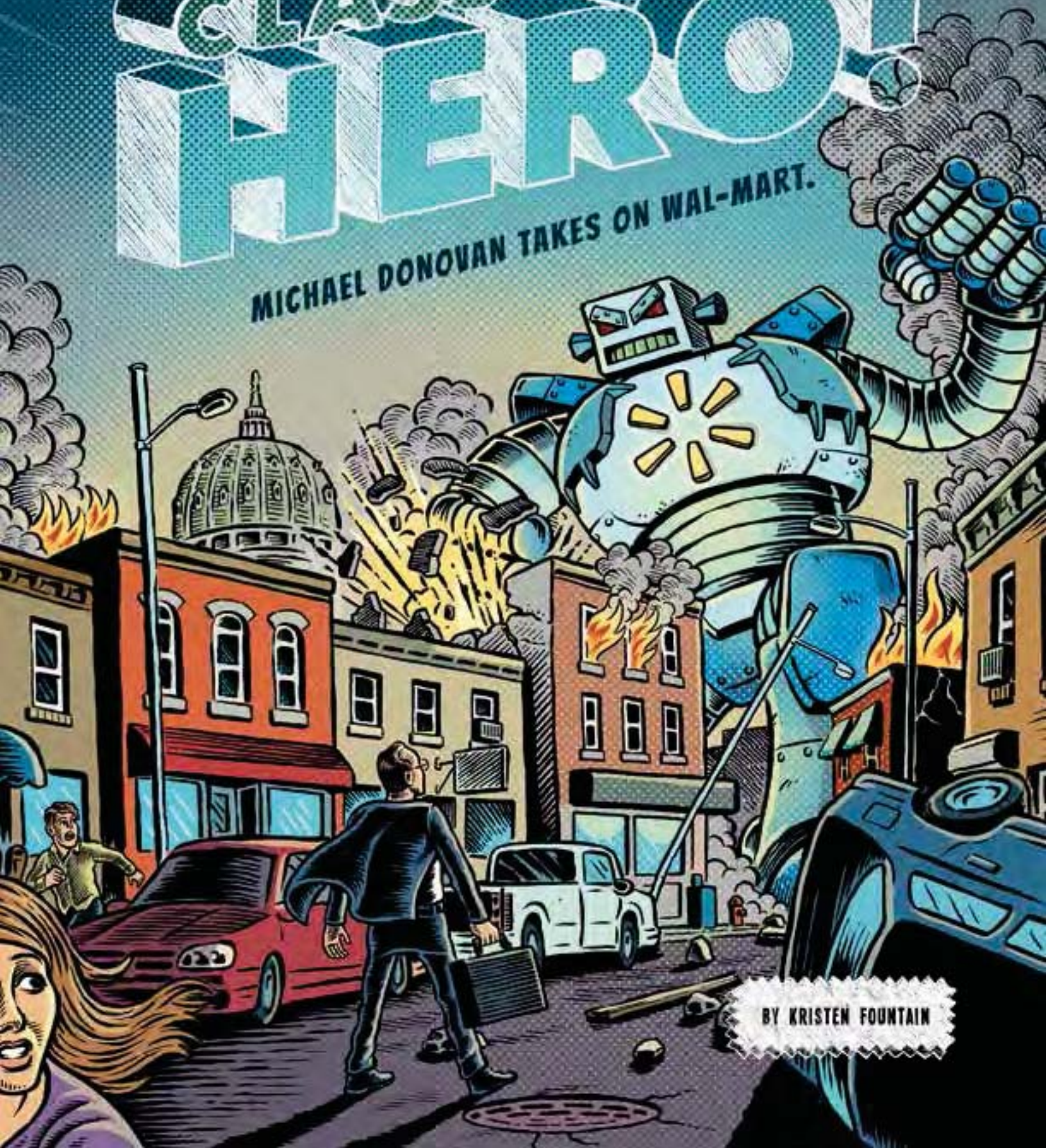


# CLASS ACTION HERO!

MICHAEL DONOVAN TAKES ON WAL-MART.



BY KRISTEN FOUNTAIN

# **A** N ENTERPRISING HOLLYWOOD PRODUCTION TEAM COULD SPIN OUT A LEGAL DRAMA RIGHT NOW ABOUT **MICHAEL DONOVAN JD'84** AND HIS CLASS-ACTION SUIT AGAINST WAL-MART, IF ONLY THEY KNEW THE ENDING.

## **THE STORYLINE IS A CLASSIC: DAVID VERSUS**

**GOLIATH.** A dogged attorney takes aim at the world's highest-grossing company over a matter of economic justice and, after more than a decade of legal battling, finally wins.

Maybe.

The fight, over back pay for hourly workers and violations of Pennsylvania labor laws, is already almost 14 years old. In 2006 a jury found in the workers' favor, but the retail giant repeatedly appealed various aspects of the case in lower and appellate state courts, eventually appealing to Pennsylvania's Supreme Court. In each court, Donovan prevailed.

Last spring, the case moved to a new venue, the U.S. Supreme Court.

At stake is more than \$140 million in wages and penalties, an amount that will likely almost double when attorney's fees and mounting interest are added. Also at risk, Donovan believes, is the very viability of class actions to recover small amounts of money owed to large numbers of working-class people. Without it, he says, big companies can rack up massive profits with impunity by short-changing individuals making barely more than minimum wage, like the nearly 188,000 workers he represents.

"If you're running an operation that makes its living on the margin, one way you make money is stealing from your employees," says Donovan, a partner at Donovan Axler in the Philadelphia Main Line suburb of Berwyn. Wal-Mart brought in roughly \$482 billion worldwide last year. In the U.S. employment arena, there is no one bigger. About 1.4 million Americans work at its 5,200 stores nationally, making it the largest employer in more than 20 states, including Pennsylvania.

From the beginning, *Braun/Hummel v. Wal-Mart Stores, Inc.* rested on the promises that Wal-Mart makes to those mostly hourly employees. "All associates will receive their breaks and lunches on time," reads a bright poster at one point found in every Wal-Mart and its affiliated Sam's Club stores in the country. The poster, along with the corporation's other human resources literature also makes it clear that unpaid overtime is not allowed. "Clock In. We appreciate your dedication to service," it says. "However, at no time should you work off the clock."

Donovan has some choice words for those promises. "Wal-Mart speaks out of both sides of its mouth. It says one thing, does another," he told a Philadelphia jury during his opening statement in 2006. At the same time, charged the initial complaint, Wal-Mart's corporate leaders oversee "a systematic scheme of wage abuse." Donovan was even more blunt in closing about the company's trustworthiness. "Poppycock. Balderdash," he said. "They are full of it."

His outrage at this kind of corporate deceit and economic injustice was stoked in his first job as a lawyer. After graduating from VLS, he joined the U.S. Securities and Exchange Commission in D.C., where he helped build cases against Ivan Boesky and Michael Milken, names now synonymous with insider trading and securities fraud. Seeing some of the defense attorneys operating in that world gave Donovan a bad taste in his mouth that didn't go away. He realized that defense work was not for him.

Even at that early stage in his career, Donovan had developed an appreciation for the long game. At VLS, he had studied the federal courts with Professor Gil Kujovich and corporate law with Professor Dennis Honabach. He was drawn to the complexity of financial and regulatory law and the challenge of finding the right legal framework for every step in a case.

That painstaking attention to detail—and the firebrand—are on display during the Wal-Mart trial, captured in a 3,645-page transcript, but so is Donovan the strategist. Over six weeks, his team proved the case so well that the jury needed less than a day to deliberate. In evidence were documents listing one of Wal-Mart's core operational goals: Payroll costs at each store were to be automatically lowered by two-tenths of one percent each year, regardless of how sales were trending. In other words, corporate heads required regular reductions in staff numbers and hours, even when business was booming. Store managers who met this and other goals received annual bonuses, often doubling or tripling their salaries.

Donovan's side introduced the company's own internal spot audits of store timesheets. The last one, the biggest, done in 2000 after lawsuits had already started rolling in, showed that rest breaks were skipped

hundreds of times during a week on average in each of the 127 stores examined. The following year, a memo from headquarters in Bentonville, Ark., informed store managers that associates should no longer clock out for rest breaks. “They do the duck and the run. (They say) ‘Let’s get rid of the evidence,’” he told the jury.

Then Donovan’s plaintiffs, culled from a list of hundreds he says were ready to testify, described working at stores with bare-bones staff. They operated in constant crisis mode, particularly during busy times of year. Delores Hummel, a cake decorator at a Sam’s Club in Reading from 1992 to 2002, said she regularly missed rest and meal breaks “because my managers told me to.” Kelly Freeman, the head of fabrics and crafts at a Wal-Mart in the Poconos, noticed that every time she got a raise, her department would lose staff. Eventually, she was the only person covering that area. Michelle Braun made \$6 an hour as a cashier during the 1998 holiday season at a Wal-Mart in an outlet mall in northeastern Philadelphia. Several times she clocked out for lunch, then was called back in early with no chance to clock back in. Her manager would say, “You don’t got time for that,” she testified. “You got to get back on the register. Look at the lines we got there.”

Wal-Mart’s corporate representative bolstered Donovan’s case under cross-examination. As the director of employment compliance, she testified that missed rest breaks were no longer a major problem, according to the most recent annual worker survey. First, Donovan’s co-counsel presented her with surveys from 2003, 2004, and 2005 from different stores in Pennsylvania in which employees had filled in the ‘No’ bubble after the question asking if they received all their rest breaks. He then asked her to look for the question in the 2006 version of the survey. She could not find it, because it was no longer included. “That was the killer testimony,” Donovan says. “That went a long way towards proving Wal-Mart’s bad faith.”



There were other moments in the long case that were equally cinematic. Like the day Donovan was told to go to an abandoned Wal-Mart outside of Camden, N.J., to pick up employee time clock records. They were finally being delivered after months of delay in response to a judge’s order. He watched a forklift bring in pallets stacked 10 feet high with white file boxes of paper records. It reminded

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Donovan of a scene in the 1991 movie “Class Action”. “They tried to overwhelm us with documents,” he says. “I felt like Gene Hackman.”

Opposing counsel changed almost every year. It seemed to Donovan that Wal-Mart rotated through every mega firm in the country. With each change, the new defense team requested additional time from the court to get up to speed. Says Donovan, “The logic was delay, delay, delay.”



**WAL-MART SPEAKS OUT OF BOTH SIDES OF ITS MOUTH. IT SAYS ONE THING, DOES ANOTHER.”**

– FROM MICHAEL DONOVAN’S OPENING STATEMENT, SEPT. 8, 2006

That tactic worked on a huge majority of plaintiffs’ lawyers pursuing similar claims. Since 2000, dozens had stepped up to take their shot at Wal-Mart’s Achilles’ heel, filing 70-plus separate cases in more than 40 states. Only two, Donovan’s and one in northern California, appear to have ever gone to trial. By 2010, they had all been settled, most for a fraction of the Pennsylvania judgment and with terms that Donovan believes were far more favorable to the lawyers than class members.

Donovan sees the company’s latest appeal to the U.S. Supreme Court as part of the same wear-them-out strategy. In March, Wal-Mart asked the top court to review Braun/Hummel in light of one of its holdings from 2011. That year, the highest court ruled unconstitutional a process that an appeals court dubbed “trial by formula” — in which a defendant’s liability towards a sample set of class members would be adjudicated to determine the percentage of the sample with valid claims, then that percentage would be extrapolated across the entire class to determine the defendant’s overall liability. The Supreme Court is likely to hold off on the Wal-Mart case until it decides on a different class action against Tyson Foods, which also asks for clarification on the earlier precedent.

So for now the Wal-Mart case sits, David and Goliath at standstill, at least until next year. This fall, though, Donovan was keeping busy. He is concerned about the outcome of the Tyson Foods case, particularly that the “trial by formula” decision would be used to deny the use of any kind of statistical inferences in class actions, and submitted an amicus brief.

“The Supreme Court has this penchant for going after class actions,” he says, “and trying to destroy the only real access that ordinary people have to the courts.”

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