

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

APPEAL FROM THE MICHIGAN COURT OF APPEALS  
Murphy, P.J., and Smolenski and White, JJ.

---

MICHIGAN CITIZENS FOR WATER  
CONSERVATION,

Plaintiff -Appellant,

v

NESTLE WATERS NORTH AMERICA  
INC.,

Defendant-Appellee,

---

Supreme Court Docket No. 130802

Court of Appeals Case Nos. 25402 & 256153

Mecosta County Circuit Court  
Case No. 01-14563-CE  
Honorable Lawrence C. Root

**BRIEF ON BEHALF OF *AMICUS CURIAE* MECOSTA COUNTY  
ASSOCIATION FOR ECONOMIC GROWTH, IN SUPPORT OF  
DEFENDANT-APPELLEE NESTLE WATERS NORTH AMERICA**

**Attorneys for the Appellant:**

Robert Traver Smith (P11223)  
James Q. Stewart (P34455)

Fisher, Waters & Stone, PC  
222 Capitol Ave.  
Lansing, MI 48913  
(517) 333-2222  
(313) 321-7654

**Attorneys for the Appellee:**

John Harmsworth (P91234)  
Anthony Mazzoni (P43219)

Dewey & Howe, PC  
101 South Woodward  
Detroit, MI 48226

**TABLE OF CONTENTS**

	Page
<b>INDEX OF AUTHORITIES</b> .....	ii
<b>STATEMENT OF JURISDICTION</b> .....	iii
<b>COUNTER-STATEMENT OF THE QUESTIONS INVOLVED ON APPEAL</b> .....	iv
<b>ARGUMENT</b>	
<b>I. INTRODUCTION</b> .....	1
<b>II. DISCUSSION</b> .....	1
A. The Public Policies of Michigan and Mecosta County Support Both Resources Conservation and Economic Development .....	2-3
B. The Reasonable Use Balancing Test Adopted by the Court of Appeals Requires Consideration of Impacts on Both the Environment and on the Local Economy .....	3-6
<b>III. CONCLUSION</b> .....	6
<b>RELIEF REQUESTED</b> .....	7

## INDEX OF AUTHORITIES

	Page
<b>MICHIGAN SUPREME COURT</b>	
<i>Schenk v City of Ann Arbor</i> , 196 Mich 75 (1917).....	3
<b>MICHIGAN COURT OF APPEALS</b>	
<i>Maerz v US Steel Corp</i> , 116 Mich App 710 (1982).....	3
<i>Michigan Citizens for Water Conservation v Nestle Waters North America, Inc</i> , 269 Mich App 25 (2005) .....	1, 2
<b>OTHER AUTHORITIES</b>	
4 Restatement Torts, 2d, § 858 .....	2
Dow Jones & Reuters, November 30, 2005.....	5, 6
Mackinac Center for Public Policy, <i>Groundwater Regulation: An Assessment</i> , April 2005 .....	5
Michigan Chamber of Commerce, “Water Legacy Act or Costly Water Regulatory Scheme,” February 28, 2005, <a href="http://www.michamber.com/ba/taxplan.asp">http://www.michamber.com/ba/taxplan.asp</a> .....	6
Michigan Department of Labor and Economic Growth, Unemployment Statistics, <a href="http://www.milmi.org/cgi/dataanalysis/PeriodSelection.asp?menuchoice=labforce">http://www.milmi.org/cgi/dataanalysis/PeriodSelection.asp?menuchoice=labforce</a> .....	4
<i>Muskegon Chronicle</i> , January 7, 2007.....	2
U.S. Census Bureau: State and County Quick Facts. <a href="http://quickfacts.census.gov/qfd/states/26000.html">http://quickfacts.census.gov/qfd/states/26000.html</a> .....	3, 4

## **STATEMENT OF JURISDICTION**

Please see the brief of Plaintiff-Appellant.

## COUNTER-STATEMENT OF THE QUESTION INVOLVED

- I. Did the Court of Appeals Correctly Balance Competing Riparian Interests To Determine the Reasonableness of Defendant's Groundwater Withdrawals?

Plaintiff-Appellant answers, "no."

Defendant-Appellee Nestle answers, "yes."

*Amicus Curiae* Mecosta County Association for Economic Growth, answers, "yes."

## ARGUMENT

### I. INTRODUCTION

*Amicus Curiae* Mecosta County Association for Economic Growth (“MCAEG”) was organized in 1998 in order to encourage business development and investment in the county. Mecosta County has historically been economically disadvantaged, resulting in a loss of existing businesses, greater unemployment, greater poverty levels, and a decline in the percentage of population of workforce age.

MCAEG is concerned that a standard that rigidly prohibits a business from using the groundwater of its property if that groundwater ultimately is used or taken off-tract, without regard to the reasonableness of the use and the nominal impact on other riparians, will stifle Mecosta County’s ability to attract new businesses to the area, and may also affect other businesses, such as farms, which require substantial amounts of water to raise crops or livestock that are sold for use and consumption out of the area.

### II. DISCUSSION

In its November 25, 2003 Opinion Following Bench Trial, the trial court recognized that both the owner of groundwater and the owner of land adjoining a lake, river or stream are riparian property owners, and that when there is a conflict between the use of groundwater and surface bodies of water, common law riparian use doctrines apply.<sup>1</sup>

In its decision in *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc.*,<sup>2</sup> the Court of Appeals set forth a reasonable use balancing test for riparian rights

---

<sup>1</sup> Op. Tr.

<sup>2</sup> *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc.*, 269 Mich App 25 (2005).

similar to the rule set out in the Restatement of Torts.<sup>3</sup>

The Court of Appeals' summary of the test is as follows:

What constitutes a reasonable use must be determined on a case-by-case basis. ... Hence, under Michigan's riparian authorities, water disputes between riparian proprietors are resolved by a reasonable use test that balances competing water uses to determine whether one riparian proprietor's water use, which interferes with another's use, is unreasonable under the circumstances.<sup>4</sup>

Although the Court reached the correct conclusion, lacking from its analysis was consideration of the public policies involved.

**A. The Public Policies of Michigan and Mecosta County Support Both Resources Conservation and Economic Development.**

*Amicus* supports Defendant's analysis of the common law in support of the Court of Appeals' balancing test. Moreover, *Amicus* asserts that the public policy underlying the common law has not changed, as Plaintiff has suggested, from supporting economic development to natural resources protection. Rather, the public policies here balance the need for *both*.

Plaintiff claims that the public policy in Mecosta County is solely to protect the water resources, yet provides no support for this claim. To the contrary, the history of this particular groundwater pumping demonstrates that the public policy in this case was to bring economic development and growth to a stunted and sluggish local economy.

In 2001, when Perrier, the precursor to Defendant Nestle, began to pursue the pumping and bottling of groundwater in Mecosta County, the Department of Environmental Quality reviewed the groundwater studies and plans from Perrier and authorized the permit. Local governmental agencies were also in favor of the project.

---

<sup>3</sup> 4 Restatement Torts, 2d, § 858.

<sup>4</sup> *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc.*, 269 Mich App 25, 57-58 (2005).

The cost of construction of the bottling plant was over \$150 million. The additional land purchase and other expenses associated with the pumping and bottling facilities represented significant additional investment in Mecosta County. The bottling plant employs 245 people, generates \$16 million in annual payroll, and \$2.7 million in annual taxes.<sup>5</sup>

In 2001, then-Governor John Engler, who was adamantly opposed to unreasonable diversions of water from the Great Lakes, reviewed Defendant's scientific approach to groundwater management, enthusiastically supported the project, and awarded Defendant \$9.5 million in tax rebates to induce Defendant to make this investment.

Moreover, although Plaintiff has based its "concerns" on environmental grounds, it premised its arguments regarding the public trust doctrine on the commercial viability of the Dead Stream. It has claimed that the Dead Stream can be used for commercial purposes in floating shingle bolts, and suggests other possible commercial ventures. Thus, Plaintiff acknowledges that commercial interests should be considered when balancing interests. The cases cited by Plaintiff nearly all involve a commercial water usage.<sup>6</sup>

Clearly, public policy *in this situation* supports economic development in Mecosta County.

**B. The Reasonable Use Balancing Test Adopted by the Court of Appeals Requires Consideration of Impacts on Both the Environment and on the Local Economy.**

According to the United States Census Bureau, in 2000, the median value of homes in Mecosta County was 22% less than the statewide median home value.<sup>7</sup> The per capita income

---

<sup>5</sup> *Muskegon Chronicle*, January 7, 2007.

<sup>6</sup> See, e.g. *Maerz v US Steel Corp*, 116 Mich App 710; 323 NW2d 524 (1982) and *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917).

<sup>7</sup> U.S. Census Bureau: State and County Quick Facts, <http://quickfacts.census.gov/qfd/states/26000.html>. The median value for a home in Mecosta County was \$90,100, compared to a statewide median of \$115,600.

for Mecosta County was 26% less than the statewide average, and the percent of Mecosta's population below the poverty level was 3% higher than the statewide average.<sup>8</sup> The jobless rate for the past six years consistently has exceeded the statewide average.<sup>9</sup>

Obviously, the impact from the bottling plant on the County's economy is significant. These are permanent jobs that result in additional jobs coming in due to the increased need for housing and other goods and services.

By contrast, the impacts upon the water resources are minimal, and no specific harm or detriment has been identified.

Mecosta County has 97 lakes, 48 significant streams and rivers, and 2 marsh wetlands.<sup>10</sup> It is in an area of rich water aquifers, which recharge nearly completely daily.

Some scientists claim it is possible to pump millions of gallons of water and use it to grow crops, make soft drinks and beer, or in Defendant's case, bottle water, without any harm to nearby lakes and stream that receive less water as a result. Thomas Newhof, a member of Michigan's Groundwater Conservation Advisory Council, said Michigan should recruit more bottled water plants to create jobs and generate tax revenue.<sup>11</sup>

Together, all Michigan municipalities, industries, farms and other businesses pumped about 730 million gallons of groundwater/day in 2000. This was only about 2.6% of the estimated 27 billion gallons of water that flows each day into the underground aquifers.<sup>12</sup>

The more than 20 water bottlers operating in Michigan together represent a very small

---

<sup>8</sup> *Id.* The per capita income was \$16,372, compared to a statewide average of \$22,168. The percent below the poverty level was 15.3%, compared to a statewide average of 12.5%..

<sup>9</sup> Michigan Department of Labor and Economic Growth, Unemployment Statistics, <http://www.milmi.org/cgi/dataanalysis/PeriodSelection.asp?menuchoice=labforce>.

<sup>10</sup> 2007 Buttle & Tuttle Ltd, Placenames.com, <http://www.placenames.com/> .

<sup>11</sup> *Muskegon Chronicle*, January 7, 2007.

<sup>12</sup> *Id.*

water usage, about 1/100<sup>th</sup> of 1 per cent of fresh water used in the state.<sup>13</sup>

An independent analysis of Michigan's water resources has concluded:

Fears of a water crisis are disturbingly overblown. There is an abundance of groundwater in nearly every area of Michigan, and no evidence of a looming scarcity. The greater threats are the economic impact of draconian regulations and the forfeiture of riparian rights.<sup>14</sup>

That analysis reviewed proposed legislation to regulate more closely groundwater consumption:

The Water Legacy Act would encumber thousands of Michigan businesses, including factories, farms and even recreational facilities, as well as public water systems. Merely complying with application requirements, such as evaluating alternative water supplies, modeling withdrawal impacts and devising new conservation measures, would require the services of hydrologists or other specialists and cost each applicant hundreds of thousands of dollars per permit.<sup>15</sup>

A recent analysis by the Michigan Chamber of Commerce calculated that the application costs alone related to stricter water regulations ranging from \$315,000 to \$800,000, depending on the scope of the proposed withdrawal.<sup>16</sup> Thus the negative financial impact on businesses and the state and local economy caused by additional regulation would be considerable.

The Plaintiff cites studies finding that pumping at 400 gpm would reduce the Dead Stream by a half inch during the summer, and contends, without supporting scientific evidence, that permanent negative effects will ensue. In fact, studies cited by Defendant found that lowering the Dead Stream would improve the environment for trout by lowering the overall water temperature of the Stream.

Clearly, the environment impacts here will be slight, whereas the impact on Mecosta

---

<sup>13</sup> Dow Jones & Reuters, November 30, 2005.

<sup>14</sup> *Groundwater Regulation: An Assessment*, Mackinac Center for Public Policy.

<sup>15</sup> *Id.*

<sup>16</sup> Michigan Chamber of Commerce, "Water Legacy Act or Costly Water Regulatory Scheme," February 28, 2005, <http://www.michamber.com/ba/taxplan.asp>.

County's economy is substantial and positive. The application of a reasonable use balancing test to assess competing interests protects the resource, adds to the economy, and recognizes the rights of all riparian owners.

It also is worth noting, in the balancing of interests, that the Defendant has received many environmental awards for its commitment to the communities in which its facilities are situated and the environment. Among these include recognition of Defendant's Stanwood Michigan plant as one of the first to earn full LEED<sup>17</sup> certification, and the National Groundwater Association Outstanding Water Supply Project Award for its responsible management practices at the Sanctuary Springs water development project. Nestle has stated publicly many times that it is in its own best business interest to ensure a sustainable water resource. In fact, a number of water conservation interests, including the National Wildlife Federation and the Michigan Water Environment Association, filed *amicus* briefs in the Court of Appeals, noting that Nestles water resource protection program is a good example of how Michigan water users should operate.<sup>18</sup>

### **III. CONCLUSION**

The modified balancing test of the Court of Appeals adequately protects riparian rights, at the same time considering the impacts on the environment and the economy. Public policy for the state and the affected region must be considered as part of that balancing test.

---

<sup>17</sup> Leadership in Energy and Environmental Design.

<sup>18</sup> Dow Jones and Reuters, November 30, 2005.

## RELIEF REQUESTED

MCAEG respectfully requests that this Court adopt and affirm the modified balancing test specified by the Court of Appeals, and further specify that the test must include, in addition to the rights of the riparians, an analysis of the impact on the environment, the impact on the economy and the public policies demonstrated by state and local government in approving the project.

Respectfully submitted,

Dated: May 13, 2006

---

Paris Barryton (P54545)

---

Tanika Stanwood (P34455)

Attorneys for *Amicus Curiae*  
Mecosta County Association for Economic Growth

Empleo, Lavoro & Travail, PC  
4 Woodward Ave.  
Detroit, MI 48226  
(517) 333-2222