

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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

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**MICHIGAN CITIZENS FOR WATER  
CONSERVATION**, a Michigan nonprofit  
corporation,

Plaintiff-Appellant,

v

**NESTLÉ WATERS NORTH AMERICA  
INC.**,

Defendant-Appellee.

Supreme Court  
Docket No. 130802

Court of Appeals  
Case Nos. 254202 & 256153

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

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**APPELLANT'S BRIEF**

**ORAL ARGUMENT REQUESTED**

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**STATEMENT IDENTIFYING JUDGMENT AND ORDERS APPEALED FROM,  
GROUNDS, AND RELIEF SOUGHT**

Plaintiff-Appellant, Michigan Citizens for Water Conservation, Inc. (“Plaintiff”) appeals and seeks reversal of the Trial Court’s and the Court of Appeals’ decisions that repudiated the common law doctrines governing water use; held that a non-riparian may impair the rights of riparian property owners through the pumping of spring water, subject to a balancing test that places the rights of the riparian and the non-riparian on equal legal footing; and found that the Dead Stream is not a public trust water body and the public trust doctrine is not applicable to this case.

Plaintiff appeals these decisions and orders under MCR 7.302(B)(2), (3) & (5), because this case presents issues of substantial public interest, major jurisprudential significance, and important unresolved questions of law.

## QUESTIONS PRESENTED FOR REVIEW

### I

Did the Court of Appeals err in repudiating the common law doctrines governing water use and substituting a balancing test from the Restatement of Torts which recognizes no distinction between the rights of riparian and non-riparian or the on-tract or off-tract use of the water?

Plaintiff-Appellant says: Yes

Defendant Appellee Nestlé says: No

### II

Did the Trial Court and Court of Appeals err in dismissing Plaintiff's public trust claims where Plaintiff established that the Dead Stream was large enough to float commercially valuable shingle bolt logs, there was a history of logging activity in the area, and the removal of spring water impaired public trust uses of surface water?

Plaintiff-Appellant says: Yes

Defendant Appellee Nestlé says: No

## STATEMENT OF FACTS AND PROCEEDINGS

Except as clarified below, the facts and proceedings set forth in the decisions of the trial court and the Court of Appeals, are adopted by reference.

In December 2000, Defendant-Appellee Nestlé Waters North America (“Nestlé”) obtained a deed purporting to convey to Nestlé the water rights in a 600-acre hunting preserve called the “Sanctuary” in Mecosta County. A river called the Dead Stream originates from a spring on the Sanctuary property, which is now covered by a man-made lake called Osprey Lake.<sup>1</sup> The Dead Stream flows out of the lake and roughly one mile to the southeast until it joins a channel that connects Blue Lake and Lake Mecosta. These two lakes, together with a third lake called Round Lake, are known locally as the “Tri-Lakes.” The Dead Stream flows into the West Branch of the Little Muskegon River, which flows into Lake Michigan. The trial court found a direct connection between the spring and the Dead Stream; every gallon of water pumped from the Sanctuary property represents a gallon of water that does not flow into the Dead Stream and onward through the system.<sup>2</sup>

Michigan Citizens for Water Conservation, Inc. (“MCWC”) is a non-profit corporation dedicated to the protection and conservation of Michigan’s water resources. MCWC was formed after Nestlé’s predecessor, Perrier Group of America, announced its plans to extract and sell water from the Dead Stream watershed. MCWC has over 2,000 members, many of whom are riparian<sup>3</sup> property owners’ in the Tri-Lakes area.

Riparian members of MCWC, other riparian landowners, and members of the public all use the Dead Stream for recreational purposes from the Tri-Lakes area up to the bridge on State

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<sup>1</sup> *MCWC v Nestlé*, 269 Mich 25, 35 (2006).

<sup>2</sup> Tr. Op. p. 11.

<sup>3</sup> “Riparian” refers to land adjacent to or abutting a natural water course.

Highway M-20.

In 2001, over objections by the riparians, Nestlé’s predecessor Perrier began construction of four high-capacity wells on the Sanctuary property. The wells are capable of pumping 400 gallons of groundwater per minute, 500,000 gallons per day, and 210 million gallons per year. After it is pumped, the water is transported 12 miles through a pipeline to a bottling plant in Stanwood, Michigan. The water is bottled at the plant and sold under the “Ice Mountain” brand. The bottling plant is outside of the watershed of the Dead Stream and outside of the source aquifer for the spring. Ice Mountain water bottled at the plant is marketed throughout the Midwest, including to areas outside the Great Lakes basin.

In June 2001, just before Perrier began construction of the plant and the wells, Plaintiff filed suit in Mecosta County Circuit Court. Plaintiff sought a temporary restraining order (“TRO”) to stop construction of the plant pending a determination of claims involving common law water rights, public trust, the Michigan Environmental Protection Act,<sup>4</sup> (“MEPA”), and zoning. The trial court denied the request for a TRO on the basis that the construction of the plant was not the harm sought to be addressed by the request for the injunction. However, the trial court warned that Nestlé “will have to assume the risks that accompany the business decisions,” and that “[h]aving done so to its detriment will not be considered as an argument against future equitable proceedings.”<sup>5</sup>

Plaintiff’s complaint requested injunctive relief against the construction of wells, wellhouses, and pipelines for the water extraction and diversion operation, alleged that Nestlé’s actions were unlawful under the common law doctrines governing the use of surface water and groundwater, alleged that Nestlé’s actions violated the public trust doctrine, asserted that

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<sup>4</sup> MCL 324.1701, et seq.

<sup>5</sup> *MCWC v Nestlé*, 269 Mich App at 36, n 9.

Nestlé's diversion and sale of water without the consent of the State was an unlawful taking of a public resource, and would impair natural resources in violation of MEPA.<sup>6</sup>

In May 2002, Plaintiff filed a motion for partial summary disposition<sup>7</sup> on the surface water, groundwater, and public trust counts. Plaintiff argued that a diminishment of a stream by a non-riparian was unreasonable *per se*, and it was undisputed that the Stream was navigable and subject to the public trust doctrine. Nestlé filed a counter-motion for summary disposition. Through a series of rulings, the trial court dismissed all of Plaintiff's claims except groundwater and MEPA prior to trial.<sup>8</sup>

Trial was held for 19 days in a series of sessions between May 5 and September 10, 2003. On November 25, 2003, the trial court issued a 67-page Opinion and Judgment/Order, consisting of 4 parts. The first part of the opinion contained the factual findings, among which were:

- The spring from which Nestlé pumps has a direct hydrological connection to the Dead Stream and the lakes it flows into; for every gallon pumped from the spring, nearly a gallon (85%) is removed from the Stream.
- The pumping had and would continue to diminish the flow of the Stream by up to 29%; reduce the level of the Stream and two small lakes by several inches; and reduce the Stream's width by 4 or more feet.
- Even at lower pumping rates, the Stream and natural resources associated with it had already been adversely impacted.
- Nestlé's hydrologist overstated the volume of recharge to the Stream and the flow of

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<sup>6</sup> Michigan Environmental Protection Act, MCL 324.1701, *et seq.*

<sup>7</sup> A motion for summary disposition is a pre-trial motion requesting that the Court rule in a movant's favor because there is no material question of fact and the movant is entitled to the ruling as a matter of law.

<sup>8</sup> *MCWC v Nestlé*, 269 Mich App at 37, 103.

water in the Stream, resulting in greater-than-predicted reductions in flow and worse impacts.

- The reduction in water flows would impair the biological character and functions of the lakes, Stream, and adjacent wetlands, and it would harm both the resources and Plaintiff's riparian rights. Photographs introduced during trial showed water shortages during the summer of 2003.
- The pumping was an unreasonable use under Michigan law. The pumping was for a use off the tract and out of the watershed and aquifer from which it was taken. The pumping measurably diminished the amount of water in the streams and lakes and interfered with Plaintiffs' exercise of traditional riparian property rights.
- The pumping impaired natural resources under MEPA.
- Due to the complexity of the hydrological system, and the difficulty of ascertaining a threshold below which the impacts could be considered acceptable, there was no satisfactory remedy but to prohibit pumping from the wells.

After the trial court issued its opinion, Nestlé filed a motion for stay pending appeal. The trial court denied the motion because Nestlé had proceeded with construction of the wells and bottling plant at its own risk, and because the company could bottle water from other sources at the plant if it chose. Nestlé filed a motion for stay with the Court of Appeals on December 15, 2003, which was granted the next day. The stay order allowed the company to pump up to 250 gallons per minute ("gpm") pending appeal. The trial court denied Nestlé's motion for new trial and other relief on February 14, 2004.

Nestlé filed a claim of appeal on the trial court's judgment from the trial and its order denying post judgment relief. Plaintiff filed a cross-appeal on the dismissal of its public trust claims.

The Court of Appeals issued its Decision and Remand Order on November 29, 2005, in which it upheld the trial court's factual findings, including the findings relative to the reductions in water that would result from Nestlé's pumping, the impacts to natural resources, and the interferences with Plaintiff's riparian rights.<sup>9</sup>

The Court of Appeals' opinion contains three main holdings relevant to this appeal.

First, the Court of Appeals affirmed the trial court's conclusion that the pumping is an unreasonable use of groundwater that is tributary to and directly connected to adjacent lakes or streams under Michigan's common law.<sup>10</sup> The Court of Appeals also affirmed the trial court's detailed findings,<sup>11</sup> concluding that "the loss of recreational use and the physical alternation of the Dead Stream will directly and substantially harm the riparian value of the Dead Stream." However, in reaching its conclusion on the groundwater claim, the Court of Appeals rejected longstanding precedent in favor of a "balancing test." The balancing test adopted by the court states that each user of groundwater or surface water is entitled to make use of a portion of that resource regardless of whether the water is retained in the source watershed or aquifer or transported out of it. Under the balancing test, the court held that Nestlé was pumping more than its fair share of the Stream, but that Nestlé was entitled to pump a substantial portion of the Stream for sale outside the watershed, including outside of the Great Lakes basin.

Second, the Court of Appeals affirmed the trial court's conclusion that the public trust doctrine did not apply on the bases that (1) the stretch of the waters in question was not navigable; and (2) the public trust doctrine did not preserve the State's sovereign title in the water distinct from the navigability test.<sup>12</sup>

Third, the Court of Appeals' opinion retained jurisdiction and remanded the injunctive remedy to set pumping limits consistent with the new "balancing test," and to clarify the "impairment" findings under the MEPA. The Court also modified the stay pending appeal to

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<sup>9</sup> *MCWC v Nestlé*, 269 Mich App at 76.

<sup>10</sup> *Id.* at 79.

<sup>11</sup> *Id.* at 52.

<sup>12</sup> *Id.* at 97.

reduce Nestlé's pumping limit from a 250 gpm monthly average to a 200 gpm weekly average.

Plaintiff filed a motion for reconsideration of the Court of Appeals' holdings, which challenged the new balancing test; argued that the trial court had made sufficient findings for affirmance of its MEPA decision; and contended that the Court of Appeals improperly narrowed the scope of the public trust doctrine. The Court of Appeals denied Plaintiff' motion for reconsideration.

The trial court judge declined the Court of Appeals' request that he return from retirement to hear the remand proceeding, and Kent County Circuit Judge Dennis C. Kolenda was assigned to preside over the remand. In lieu of a hearing, the parties entered a stipulated remand order on January 25, 2006, which set interim pumping limits until after this Court reviews the matter. After the filing of the stipulated remand order, the Court of Appeals entered a final order on February 14, 2006. This Appeal follows.

## ARGUMENT

### Introduction

Nothing less than the future rights and interests in Michigan's water are at stake in this appeal, including the rights of private riparian landowners, the public trust, and the sovereign power of the State against federal and international interests. Appellant Nestlé Waters wants "spring water" for its scheme to market water elsewhere—as much as it can get. Fortunately, Michigan is a reasonable use state with distinct common law limitations that protect riparian rights and values from the removal of water from lakes, streams, or their spring aquifers and tributary groundwater for use or sale off-tract and out of the watershed.<sup>13</sup> Unfortunately, the Court of Appeals' opinion in this case substantially undermines these protections by repudiating this Court's prior water law precedents and creating a new "balancing test" *not* based on established precedents for water withdrawals.

The trial court and Court of Appeals both agreed that, factually, Nestlé's removal of water *has* caused and will continue to cause substantial harm to the Dead Stream<sup>14</sup> and that harm will be even greater at Nestlé's planned increased rates of pumping. The trial court held that the common law does not allow non-riparians to do what riparians are not permitted: pump large quantities of water from a spring aquifer, remove it out of a watershed for sale, and materially diminish or harm a stream as if the end of the pipe was in the stream itself.<sup>15</sup> If riparian owners do not have the right to do this, certainly non-riparians should not be permitted to do so.

The Court of Appeals affirmed the trial court's factual determination that Nestlé's water

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<sup>13</sup> For purposes of this Application, the terms "tributary groundwater" and "spring aquifer" are used interchangeably. While in a general sense all groundwater becomes a lake or stream as part of the larger water cycle, these terms refer to groundwater that has an immediate and direct hydrological connection to a lake or stream; that is, a lake or stream is formed or sustained by the recharge from the spring aquifer or tributary waters, and a lake or stream is materially diminished if a portion of the spring aquifer is removed before it reaches the lake or stream.

<sup>14</sup> *MCWC v Nestlé*, 269 Mich App at 73.

<sup>15</sup> *Id.* at 56, n 33.

removal was unreasonable. But in doing so, the Court reversed the established precedents upon which the trial court relied, which limit off-tract and out of watershed removals, *particularly* for sale, where the removal materially or measurably diminishes the flow or level of a lake or stream and interferes with riparian rights.

In fact, the Court of Appeals repudiated this Court's prior precedents for *both* groundwater and surface water, and then adopted a new "reasonable use balancing test" that eliminated the distinction between riparians and those who remove and transfer water away from a spring aquifer.<sup>16</sup>

Boiled down, this new "balancing test" substantively shifts the common law of water and property in Michigan from a riparian reasonable use state to a correlative rights or allocation law state. If not overturned, this new "balancing test" will create new rights of non-riparian, out-of-watershed users of tributary groundwater in all of Michigan's lakes and streams. Non-riparians who want to exploit and sell tributary groundwater out of a watershed and the Great Lakes Basin have now been granted rights in the Stream that are no different than riparian owners, and downstream riparian owners will suffer the harm and effectively be divested of their riparian rights. The traditional common law protections for these riparian property owners will have been reduced and subordinated to non-riparian diversions that cause unreasonable and substantial harm.

Also important to this appeal is the Court of Appeals' erroneous application of the public trust doctrine to Michigan's water resources. Despite substantial and unrefuted evidence of public recreational and commercial use of the water resources involved, the trial court ruled that the water was not protected by the public trust doctrine because the limited area of the Stream below the Nestlé well-field was not navigable under a narrow "20 to 40 foot log floating" test.

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<sup>16</sup> *Id.* at 69.

The Court of Appeals opinion upheld this narrow reading of the public trust doctrine to determine what constitutes a navigable water body. In doing so, the court rejected the application of the public trust doctrine to protect public trust waters from harm caused by the removal of large quantities of non-navigable waters that form the headwaters of navigable public trust waters.

This Court recently rebuked an effort to restrict the application of the public doctrine to block public access to the bottomlands of the Great Lakes below the ordinary high water mark as determined by the common law in *Glass v Goeckel*,<sup>17</sup> holding that rejecting the application of the public trust doctrine to prevent or remedy the interference with public trust use from removals of water that diminish public trust waters will not leave the public trust doctrine “alive and well.”<sup>18</sup> Restricting the public trust doctrine to only those streams that have the capacity to float 20 to 40 foot in length has the same effect.

The Court of Appeals decision is clearly erroneous and contrary to existing precedent or established principles of water and public trust law. If it is not overturned, Michigan’s economy and treasured waters will suffer irreversible long term effects, detrimental to the public interest and the sound jurisprudence of Michigan.

**I. THE COURT OF APPEALS ERRED BY DISREGARDING WATER USE DOCTRINES ADOPTED BY THIS COURT, USING INSTEAD AN UNPRECEDENTED “BALANCING TEST.”**

**Standard of Review.**

The Supreme Court reviews questions of law *de novo*.<sup>19</sup>

**A. The Court of Appeals Misinterpreted Michigan Precedents on the Tract, Watershed, and Aquifer of Use.**

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<sup>17</sup> *Glass v Goeckel*, 473 Mich 667 (2005).

<sup>18</sup> *Id.*

<sup>19</sup> *People v Petty*, 469 Mich 108, 113 (2003).

## 1. Introduction and Summary of Michigan Water Law Precedents.

The trial court ruled that an off-tract, out-of-watershed use of groundwater cannot “measurably diminish” the flow of surface water to another riparian:

In cases where there is a groundwater use that is from a water source underground that is shown to have a hydrological connection to a surface water body to which riparian rights attach, the groundwater use is of inferior legal standing than the riparian rights. In such cases, as here, if the groundwater use is off-tract and/or out of the relevant watershed, that use cannot reduce the natural flow to the riparian body. This is not a pure *per se* rule in that it does require a showing that the flow to/in the surface water body has been affected to a degree that there is a level of confidence that the effect(s) are not part of the natural forces at work on the surface water(s). I accept Plaintiffs’ counsel’s suggestion that, in this case, a showing of effects in the range of three to five percent would be sufficient to exclude the natural “background” in the system such that effects in excess of that range satisfies the requisite showing. The next step in the rule is in cases where, again as here, the groundwater use is shown to have measurable and proven negative impacts on the riparian body/bodies, with the analysis not having any component regarding whether the use is off-tract/out of watershed. The reader will note that the phrase “material diminishment” has not been used. I have perceived that the phrase “material diminishment” has been a source of confusion in that there has never been a good definition, or even analysis, of what is or is not “material.” For those intent on using the phrase I suggest that it be used in the second scenario above, using the phrase “measurable diminishment” for the first. Both are harms for which a remedy will lie.<sup>20</sup>

The trial court based its statement of the law in part on language from precedents of this Court. The language in those precedents suggests that uses of water off-tract and out of its source watershed or groundwater aquifer should be treated differently than uses on-tract and in the relevant watershed or aquifer. The difference in treatment is a lower threshold of harm that must occur before a use becomes actionable. Uses that transport water away from the area from which it was obtained are more restricted than uses that keep water in the area from which it was obtained before they are adjudged to be unreasonable. Drawing such a distinction has always

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<sup>20</sup> Tr. Op. p. 48.

been an important tenet of the common law of water use in the eastern United States.

The distinction is made because removal of water away from its source watershed or aquifer has a greater cumulative impact on the correlative rights of other water users because they do not return any water to the source.

The Court of Appeals reversed the trial court's statement of the law and adopted a "reasonable use balancing test" based on Section 850A of the Restatement of Torts:

We agree with the *Maerz* Court's conclusion that a reasonable use balancing test is consistent with the Michigan authorities governing water use. Beginning with *Dumont* and *Schenk* and concluding with *Maerz*, Michigan courts have consistently avoided strict rules that permit one water user to utilize water at the expense of an adjacent user. Instead, while employing various tests, the courts have generally sought to ensure the greatest possible access to water resources for all users while protecting certain traditional water uses. Michigan courts have already recognized the value of the reasonable use balancing test for that purpose. Consequently, in order to recognize the interconnected nature of water sources and fully integrate the law applicable to water disputes, we adopt the reasonable use balancing test first stated in *Dumont* as the law applicable to disputes between riparian and groundwater users. (citations omitted).<sup>21</sup>

This new balancing test lists a number of factors that are to be considered in determining whether a use of water is reasonable, but without distinction in their importance:

While the nature of the balancing test requires that the appropriate factors be ascertained on a case-by-case basis, several factors can be discerned that will be relevant to every application of the test. These factors include (1) the purpose of the use, (2) the suitability of the use to the location, (3) the extent and amount of the harm, (4) the benefits of the use, (5) the necessity of the amount and manner of the water use[d], and (6) any other factor that may bear on the reasonableness of the use.<sup>22</sup>

The factors are not listed in any hierarchy of importance. And, the Restatement gives no "clear guidance as to how the several factors are to be weighed should they all fail to point to a single outcome."<sup>23</sup> Whether the water being removed within the watershed for commercial use outside the watershed is not specified among these factors. Although *one* of the 'considerations.'

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<sup>21</sup> *MCWC v Nestlé*, 269 Mich App at 67-68.

<sup>22</sup> *Id.*, at 71.

<sup>23</sup> Sax, *Legal Controls of Water Resources*, 3d ed, p. 27.

relevant to the first factor listed is the purpose of the use—whether the water is used on or off-tract:

...water uses that benefit the riparian land or the land from which the groundwater was removed are given preference over water uses that ship the water away or otherwise benefit land unconnected with the location from which the water was extracted.

Traditional riparian rights water law gives preference to on-tract use, whereas the balancing test devised by the Court of Appeals makes this only one of a number of considerations in a determination of whether the water use is reasonable:

While we acknowledge that, at least in the context of riparian rights, prior courts have determined that uses that did not benefit the riparian land were per se unreasonable...we believe that such a per se rule is incompatible with modern use of the balancing test. Instead, we hold that the location of the use is but one of the factors that should be considered in balancing the relative interests.<sup>24</sup>

## **2. Surface Water Cases.**

The Court of Appeals began its discussion of Michigan water law precedents by asserting that there were two distinct lines under which the law has developed: one line for riparian rights in surface water, and one line for rights in groundwater. For riparian rights in surface water, the court noted three main doctrines: (1) the natural flow doctrine; (2) the reasonable use doctrine; and (3) the prior appropriation doctrine of the American West. The Court of Appeals relies throughout the opinion on nine pages from a property-law book for its descriptions of the various water law doctrines.<sup>25</sup>

The Court of Appeals summarized the natural flow doctrine as having two components: first, that a riparian could not “substantially or materially diminish the quantity or quality of water” in a stream; and second, that a landowner could not transport water “to land beyond the

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<sup>24</sup> *Id.* at n 49.

<sup>25</sup> See Stoebuck & Whitman, *The Law of Property* (3d Ed), pp. 421-430.

riparian land.”<sup>26</sup>

The Court of Appeals summarized the reasonable use doctrine as allowing “any and all reasonable uses of the water, as long as they do not unreasonably interfere with the other riparian owners’ opportunity for reasonable use.”<sup>27</sup> The Court further noted that the determination of reasonableness depends “upon the weighing of factors” meant to balance the interests of the riparian owners in conflict, and to “consider all the circumstances that are relevant in a given case.”<sup>28</sup> Finally, the Court characterized the reasonable use doctrine as having no tract or watershed limitations, though such considerations could be one of the relevant facts and circumstances in determining reasonableness: “while the reasonable use doctrine generally allows water to be transported and used on non-riparian lands, such uses may be disfavored over uses on riparian land.”<sup>29</sup> Thus, the Court of Appeals found that distinctions based on the tract or watershed of use are an artifact of the natural flow doctrine, and are *not* a part of the reasonable use doctrine.

Having characterized reasonable use in this way, the Court of Appeals next stated that *this* Court adopted the reasonable use doctrine for surface water stated in *Dumont v Kellogg*.<sup>30</sup> In *Dumont*, a case between two on-tract users, this Court overturned jury instructions based on the natural flow doctrine. Instead, the Court held, a *riparian* user of surface water on-tract could use as much water as did *not unreasonably interfere* with the on-tract use of surface water by another *riparian*.<sup>31</sup> (Emphases added.)

The Court of Appeals described *Dumont* as having adopted a reasonable use doctrine

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<sup>26</sup> *MCWC v Nestlé*, 269 Mich App at 55.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 29 Mich 420; 18 Am Rep 102 (1874).

<sup>31</sup> *Id.* at 423-25.

with the following characteristics: (1) “What constitutes a reasonable use must be determined on a case-by-case basis;” (2) “diversions of water from a lake or stream that do not benefit riparian lands were generally considered per se unreasonable;” (3) “natural water uses are preferred over artificial uses;” and (4) “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>32</sup>

In contrast, the trial court found that *Dumont* stood for the principle that a use of surface water off-tract and out of the source watershed had lower legal standing than a use on-tract and in the source watershed. The source of the disagreement between the trial court and the Court of Appeals was their divergent interpretations of the following dicta:

And, in considering the case it may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from the proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage. It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters: for this is wholly wrongful, and no question of the reasonableness of his actions in causing the diminution can possibly arise.<sup>33</sup>

The trial court interpreted *Dumont* to mean that uses of surface water off-tract or out of the source watershed could be found unlawful *without* evaluating a list of factors meant to determine reasonableness:

From this dicta the Michigan Supreme Court as early as 1874 is commenting on diversions of streams from their course to the detriment of lower riparians and any diversion by “strangers” being per se wrongful.

The Court of Appeals stated that the *Dumont* dictum is not about the use of water off-tract or out of the source watershed, but rather about uses of surface water by someone who did

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<sup>32</sup> *MCWC v Nestlé*, 269 Mich App at 58.

<sup>33</sup> *Dumont*, 29 Mich at 422.

not own property that was riparian to the stream:

[T]he Court determined that the jury instructions, which followed the natural flow rule, would have been applicable had the interference been caused by a stranger.

[Fn 33]: This bifurcation of the applicable rule, depending on the status of the party interfering with the riparian owner's water use, is not without precedent. However, the *Dumont* Court's use of the word stranger suggests that the Court was referring to a nonriparian who attempted to exercise riparian water rights. This understanding is consistent with the Restatement approach, which recognizes that a nonriparian who uses the water of a watercourse or lake is liable for interference caused to a riparian by such use without reference to the reasonableness of the use. (citations omitted).<sup>34</sup>

However, this interpretation is not an accurate reading of the language of the passage; is inconsistent with cases in other eastern states decided around the same time; and is inconsistent with Michigan cases decided after *Dumont*.

The language of *Dumont* distinguishes the case from two other scenarios, not one: “[where] a stream has been diverted from its natural course and turned away from the proprietor below;” and where the diversion is due to “interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters.” The Court of Appeals’ statement that the *Dumont* passage was referring to the use of water by a non-riparian only accounts for the second scenario, “interference by a stranger.” The Court of Appeals did not address the first scenario dealing with diversion of a stream from its natural course and away from lower riparians. It is this scenario under which *Dumont* suggests a prohibition on diversion off-tract or out-of-watershed. By failing to recognize this, the Court of Appeals fundamentally misreads *Dumont*.

**a. Cases in Other States Decided Around the Time of *Dumont*.**

Moreover, the Court of Appeals’ interpretation of *Dumont* would have meant that

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<sup>34</sup> *MCWC v Nestlé*, 269 Mich App at 56, including n 33.

Michigan followed a rule inconsistent with the rules in other riparian jurisdictions at the time. The idea that *Dumont* recognized a prohibition on the use of water by non-riparians, but not a tract or watershed limitation, would have put it at odds with the prevailing view in other eastern water law states—which recognized both a prohibition on use by non-riparians and also a tract or watershed limitation. *Dumont* provides no indication that the position taken therein was at variance with other similar cases. By way of example, consider these contemporaries of the *Dumont* decision:

*Williams v Wadsworth* 51 Conn 277 (1884):

The defendant has no right to divert or use the water, except a right which is incident to and parcel of the [riparian] land \* \* \* If one man may, by purchasing a small parcel upon the bank of a stream, thus acquire the right to divert it to distant points, of course others may do the same thing. The defendant might divert the stream to as many distant points as he might own or control, and thus the stream might be exhausted.

*Lord v Meadville Water Co*, 135 Pa 122, 130-31 (1890):

[T]hat the rights of a riparian owner would justify the plaintiff in carrying the water for miles out of its channel, to supply the borough of Ashland with water, is a proposition so palpably erroneous that it would be a waste of time to discuss it.

*City of Paterson v East Jersey Water Co*, 70 A 472, 488 (NJ 1908):

[T]he uses of the water of a flowing stream, both ordinary and extraordinary, by the riparian owner, must, in order to be reasonable, be connected with the occupation and enjoyment of the riparian lands themselves, and as an incident to such enjoyment, and that the permanent diversion of the waters for nonriparian user and for sale is unlawful use, is the one now generally, if not universally, adopted; and the courts taking this view also agree that, in order to obtain relief against such unlawful or unreasonable use, it is not necessary that the lower riparian owner show any actual damage.

*Roberts v Martin*, 72 W Va 92; 77 SE 535, 537 (1913):

[T]he diversion of the water by the defendant for the purposes of sale is an infringement of the complainant's right as a lower riparian owner to

the continued flow of the stream, and that without proof of any actual or perceptible damage, so far as the establishment of its legal right is concerned, if the diversion is of such a perceptible and sensible amount as not to be excluded under the maxim “de minimis,” complainant is entitled to resort to this court for protection, in view of the fact, against defendant’s claim of the right to divert and to continue the diversion.<sup>35</sup>

*Stratton v Mt Hermon Boys’ School*, 216 Mass 83; 103 NE 87, 88-89 (1913):

[T]he use by a riparian owner by virtue of his right as such must be within the watershed of the stream, or at least that the current of the stream shall be returned to its original bed before leaving the land of the user. This is implied in the term “riparian.” It arises from the natural incidents of running water. A brook or river, so far as concerns surface indications, is inseparably connected with its watershed and owes the volume of current to its area \* \* \* Abstraction for use elsewhere not only diminishes the flow of the parent stream but also increases that which drains the watershed into which the diversion is made, and may injure thereby riparian rights upon it. Damage thus may be occasioned in a double aspect.\*\*\*

The governing principle of law in a case like the present is this: A proprietor may make any reasonable use of the water of the stream in connection with his riparian estate and for lawful purposes within the watershed, provided he leave the current diminished by no more than is reasonable, having regard for the like right to enjoy the common property by other riparian owners. If he diverts out of the watershed or upon a disconnected estate the only question is whether there is actual injury to the lower estate for any present or future reasonable use.

In sum, all of these cases recognize legal distinctions based on the tract and watershed of use—not just a distinction between use by riparians and use by non-riparians. If *Dumont* really only recognized the latter distinction and not the former, as the Court of Appeals asserted, *Dumont* would have been alone among its contemporaries in doing so, highly unlikely given Justice Cooley’s standing as a jurist.

**b. Michigan Cases Decided After *Dumont*.**

The third problem with the Court of Appeals’ interpretation is that it fails to account for the Michigan cases decided after *Dumont* that do recognize some form of tract or watershed

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<sup>35</sup> Quoting *City of Paterson, supra*. The case also cites *Dumont* as authority for its holding.

distinction. A nice summary of these cases is provided by the Court of Appeals' opinion, at footnote 34:

*Hall v Ionia*, 38 Mich 493, 500 (1878) (“We think the complainant has a right to an injunction against the threatened proceedings of the defendants *to collect and divert the water to purposes foreign to their use and enjoyment of the woolen factory premises*, and that the prayer of the bill to that effect should have been granted.); .....*Hoover v Crane*, 362 Mich. 36, 42; 106 NW2d 563 (1960) (“Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed.”); *Thompson v Enz*, 379 Mich 667, 686-687; 154 NW2d 473 (1967) (“Use for an artificial purpose must be (a) only for the benefit of the riparian land and (b) reasonable in light of the correlative rights of the other proprietors.”).<sup>36</sup> (Emphases added)

In spite of citing the language and results in these cases, the Court of Appeals nonetheless concluded that Michigan surface water law since *Dumont* does not draw distinctions based on the tract or watershed of use. The disconnect between the cited cases and the Court of Appeals' statement of the rule is inexplicable.<sup>37</sup>

### c. Conclusion on Surface Water Law.

Michigan common law on surface water has always recognized significant distinctions between uses of water on-tract and within the source watershed and uses of water off-tract and out of the source watershed. The Court of Appeals was mistaken to assert otherwise.

### 3. Groundwater Cases.

The Court of Appeals mistakenly refused to recognize distinctions in the common law on groundwater in Michigan as it did for the common law on surface water.

The Court of Appeals began its discussion of groundwater by stating that as with surface water, the law on groundwater had also developed three main doctrines: (1) a rule of absolute ownership, or capture; (2) a “doctrine of reasonable use;” and (3) a “variant of the reasonable use

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<sup>36</sup> *MCWC v Nestlé*, 269 Mich App at 58, n 34.

<sup>37</sup> *MCWC v Nestlé*, 269 Mich App at 105.

doctrine . . . often called the correlative rights doctrine.”<sup>38</sup>

The court described capture as a rule in which one could withdraw unlimited amounts of groundwater with no liability to impacted landowners. Second, it described “reasonable use” as having two components: (a) a rule of no liability for one withdrawing groundwater for use on the land from which the water was withdrawn; and (b) a rule prohibiting the withdrawal of groundwater for use off the land from which it was withdrawn if the withdrawal causes any injury to others within the aquifer. Third the court described “correlative rights” as a rule of equitable apportionment between landowners who use groundwater on-tract and permitting transport off-tract only if the on-tract users are fully supplied with water.

**a. *Schenk v City of Ann Arbor.***

The Court of Appeals called *Schenk v City of Ann Arbor*<sup>39</sup> the seminal case dealing with groundwater rights in Michigan. *Schenk* was a dispute between an on-tract user of groundwater and a city that planned to pump groundwater off-tract to meet municipal needs. The *Schenk* court stated that the common law rule it adopted:

does not prevent the proper user by any landowner of the percolating waters... although the underground water of neighboring properties may thus be interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water upon his land, or if his wells, springs, or streams are thereby materially diminished in flow...<sup>40</sup>

The Court of Appeals described *Schenk* as adopting the reasonable use rule. However, the passage from *Schenk* is actually a statement of correlative rights, the rule the Court of Appeals described as a variant of reasonable use. The off-tract user is not absolutely prohibited from

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<sup>38</sup> *Id.*, at 58-59.

<sup>39</sup> *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917).

<sup>40</sup> *Schenk*, 196 Mich at 84, quoting *Meeker v City of East Orange*, 77NJ Law 623; 74 A 379 (1909).

diverting off-tract; but may only use as much water as will not interfere with the on-tract use.

Further support for the notion that *Schenk* adopted a correlative rights rule was *Schenk's* heavy reliance on *Katz v Walkinshaw*.<sup>41</sup> *Katz*, decided 14 years before *Schenk*, is viewed throughout the country as the seminal case on correlative rights.<sup>42</sup> *Schenk* adopted the following head note from *Katz* as the correct statement of the rule:

Each owner of soil lying in a belt which becomes saturated with percolating water is entitled to a reasonable use thereof *on his own land*, notwithstanding such reasonable use may interfere with water percolation in his neighbors' soil; *but he has no right to injure his neighbors by an unreasonable diversion of the water percolating in the belt for the purpose of sale or carriage to distant lands.*<sup>43</sup> (Emphases added.)

In other words, a land owner may make use of as much groundwater on-tract as does not unreasonably interfere with another land owner's on-tract use. An off-tract use, although not categorically prohibited, may not cause injury to other riparian land owners. Thus, *Schenk* did not adopt a rule of "capture" for competing on-tract users any more than it adopted an absolute prohibition on diversion. It adopted a rule of balancing uses between on-tract users, coupled with a rule that an off-tract use could not interfere with an on-tract use.

The rule that an off-tract, out-of-watershed use of groundwater may cause no interference to an on-tract user (or may take the surplus only) is consistent with the trial court's "measurable diminishment" standard, which the trial court derived from language in *Schenk*. In *Schenk*, the term "material diminishment" means that an off-tract user could not cause any interference with a use on-tract. If the uses that may not be interfered with include riparian uses of a surface water body like the Dead Stream, then the laws of surface water and groundwater may be linked by a single standard.

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<sup>41</sup> 141 Cal 116; 70 P 663 (1903).

<sup>42</sup> *Sax, supra* at 377-80; see also *Stoebuck, supra* at 429, n 9.

<sup>43</sup> 196 Mich at 91.

The Court of Appeals argued that the trend to eliminate distinctions between on-tract and off-tract use continued in *Bernard v City of St Louis*,<sup>44</sup> and *Hart v D'Agostini*.<sup>45</sup> However *Hart* expressly noted the importance of tract or watershed distinctions in both the *Schenk* and *Bernard* decisions, and upheld the pumping in *Hart* in part because the water was *not* being diverted away:

Both cases [*Schenk* and *Bernard*] involved a public water company intentionally removing water from the subterranean supply and transporting it elsewhere for consumption, and in both cases it was held that such removal of the water, which was in fact a partial destruction of the water table, was an unreasonable use of the specific land and unreasonable as to the surrounding lands. The municipalities were liable for the partial destruction of the water table with the resulting damages to the wells on surrounding land. The restricted nature of these holdings was pointed out in the *Schenk* case:

'This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation, or otherwise, Nor does it prevent any reasonable development of his land by mining or the like, Although the underground water of neighboring proprietors may thus be interfered with or diverted; \* \* \*'

In the case before us water was not transported to distant areas for consumption, nor was there any evidence or permanent damage to the subterranean water table. Here, water was merely moved out of the immediate area of the public easement in order to facilitate sewer construction. 7 Mich App at 322 (quoting *Schenk* quoting *Meeker, supra*) (emphasis added).

Thus, *Bernard* and *Hart* do not represent a shift away from *Schenk's* version of the correlative rights rule.

**b. *Maerz v U.S. Steel.***

The Court of Appeals also stated that tract and watershed distinctions were eliminated, and the pure balancing approach of the Restatement was adopted, in *Maerz v US Steel Corp.*<sup>46</sup>

This is simply not the case.

*Maerz* was a case between two on-tract users. The defendant's pumping of groundwater

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<sup>44</sup> 220 Mich 159 (1922).

<sup>45</sup> 7 Mich App 319 (1967).

<sup>46</sup> 116 Mich App 710; 323 NW2d 524 (1982).

for a limestone quarry dried up the plaintiff's well and plaintiff filed a suit for damages. The defendant argued that under the reasonable use doctrine it had no liability for its on-tract use of groundwater. The Court of Appeals in *Maerz* disagreed, holding that an on-tract user of groundwater could not unreasonably interfere with a neighbor's on-tract use.

The result in *Maerz* is not in dispute; the debate is over the implications. According to the Court of Appeals in this case, *Maerz* represents a shift in Michigan groundwater law from the reasonable use doctrine to the doctrine expressed by Section 858 of the Restatement, which balances competing interests regardless of the location where the groundwater is used.<sup>47</sup>

The *Maerz* Court explicitly rejected the traditional reasonable use rule and the English rule as the law applicable to groundwater disputes in Michigan. Instead, it determined that Michigan precedents had departed from the strict application of those rules in favor of a balancing approach to the resolution of groundwater disputes. Based on this, the *Maerz* Court reversed the trial court's determination that the extraction of groundwater in connection with the land is per se not actionable.

The holding in *Maerz* actually kept the law on groundwater right where it was—with correlative rights. This interpretation is supported by the following passage in *Maerz* on whether *Schenk* recognized liability for an on-tract use that unreasonably interfered with another on-tract use:

More recently, in the case of *Woodson v Twp of Pemberton*, 172 NJ Sup 489, 503-504; 412 A2d 1064 (1980), the New Jersey court pointed to *Meeker's* strong approval of a New Hampshire decision which held that:

“[T]he true rule is that the rights of each owner being similar, and their enjoyment dependent upon the action of other landowners, their rights must be correlative and subject to the operation of the maxim *sic utera*, so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property in view of the similar rights of others.” *Woodson* concluded that *Meeker* never intended its correlative rights rule be limited to situations of off-premises use of

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<sup>47</sup> Even states that have adopted Sec. 858 of the Restatement have retained a distinction between competing groundwater users and off-tract or out of watershed sale or uses of water that interfere with riparian rights.

withdrawn subterranean water.

Thus, the view that *Schenk* established a rule permitting unrestricted withdrawal of underground water for on-premises purposes not only relies upon dictum but assumes *Schenk* adopted from *Meeker* a rule that was not there.<sup>48</sup>

Thus, *Maerz* did not eliminate the doctrine of reasonable use (and its rule of no liability for competing on-tract users) when it held that the defendant's on-tract use of groundwater could not unreasonably interfere with another on-tract use. Since the Court of Appeals in *Maerz* could not (and did not) overrule *Schenk* and repudiate correlative rights in favor of the Restatement, the Court of Appeals should not have done so in this case, either.

#### **4. Rulings from Other States.**

The common law doctrine represented by *Dumont* and *Schenk*, specifically the distinction that gives uses of water on the land from which it is taken priority over diversions, is also the law of many other eastern states:

At common law, any use of water on land outside the watershed (the area draining into the water-body) of the source of supply was unreasonable per se and actionable even if it caused no injury. The philosophical premise of the rule is that water courses and lakes exist primarily to benefit the lands through which they flow, rather than to benefit riparian landowners \* \* \* Despite adoption of a reasonable use theory, the majority of states continue to apply this watershed limitation.<sup>49</sup>

The eastern states that draw a distinction based on tract, watershed, or aquifer of use are many.<sup>50</sup>

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<sup>48</sup> 116 Mich App at 718-719.

<sup>49</sup> Getches, *Water Law in a Nutshell* (3d ed), pp. 51-52.

<sup>50</sup> Alabama - *Martin v City of Linden*, 667 So2d 732 (1995) (surface water); Arkansas - *Lingo v City of Jacksonville*, 258 Ark 63 (1975) (groundwater); Connecticut - *Collens v New Canaan Water Co*, 155 Conn 477; 234 A2d 825 (1967) (groundwater impacting surface water); Florida - *Tequesta v Jupiter Inlet Corp*, 371 So 2d 663 (1979) (groundwater); Kentucky - *United Fuel Gas v Sawyers*, 259 SW2d 466 (1953) (groundwater); Maine - *Maddocks v Giles*, 1999 ME 63 (1999) (groundwater); Maryland - *Finley v Teeter Stone Inc*, 251 Md 428 (1968) (groundwater); New York - *Baumann v City of New York*, 227 NY 25 (1919) (groundwater)<sup>44</sup>; Pennsylvania - *Rothrauff v Sinking Springs Water Co*, 14 A2d 87 (1940) (surface water); Tennessee - *Nashville C & St L Ry v Rickert*, 19 Tenn App

## 5. The Restatement Approach Is a Minority Rule.

As discussed earlier, the Restatement approach for both surface water and for groundwater is to eliminate any firm distinctions based on the tract, watershed or aquifer where the water is used.<sup>51</sup> Instead, the Restatement makes the locus of use only one factor on a list of factors reviewed to determine whether a use is reasonable.<sup>52</sup> The Restatement gives no guidance as to how the factors should be weighed when different factors point to different outcomes.

The Restatement's approach to the locus of use does *not* represent the weight of authority in the eastern states:

The Restatement (Second) of Torts § 855 rejects the absolute prohibition of non-riparian uses.\*\*\* The Restatement approach has been generally followed in a number of states including Georgia, Kansas, Massachusetts, New Hampshire, New York, North Carolina, Oklahoma, Texas, and Vermont. The majority of riparian states continue to apply the common law rule limiting uses to riparian lands.<sup>53</sup>

Frank Trelease, the author of Chapter 41 of the Restatement, which contains the water law sections, agrees his view is in the minority:

Riparian land may extend beyond the watershed of the stream. The greater number of courts have held to the contrary.<sup>54</sup> (citations omitted).

Thus the Restatement's elimination of distinctions based on locus of use is not an expression of the weight of authority on the issue; it is just a policy preference: "Since development should be encouraged, the Restatement adopts the broader rule."<sup>55</sup> Or at least it was a policy preference when Chapter 41 was written almost 30 years ago. Accordingly, the Court of Appeals relied on the Restatement to change the common law in Michigan, in spite of the

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446 (1935) (groundwater); Virginia - *Clinchfield Coal Corp v Compton*, 148 Va 437 (1927) (groundwater); *Town of Gordonsville v Zinn*, 129 Va 542; 106 SE 508 (1921) (surface water); and *Drummond v White Oak Fuel Co*, 104 W Va 368 (1927) (groundwater). Also on this list are Michigan and New Jersey, discussed previously.

<sup>51</sup> Restatement (Second) of Torts, §§ 855 and 858.

<sup>52</sup> *Id.*, §§ 850A and 858.

<sup>53</sup> Getches, *supra*, pp 52-53.

<sup>54</sup> Restatement (Second) of Torts, Reporter's Notes to § 843, p 8, n 1.

<sup>55</sup> *Id.*

Restatement being inconsistent with prior Michigan case law, as well as the minority rule in eastern states' water law. Moreover, the Restatement reflects a 30-year-old policy preference to encourage development rather than to conserve water resources.

## **6. Conclusion on Michigan Water Law Precedents.**

In conclusion, the Court of Appeals in this case took two common law doctrines—reasonable use for surface water and correlative rights for groundwater—and fused them. Under Michigan precedents, both the surface water and groundwater doctrines drew a distinction between uses on-tract and in the source watershed or aquifer and uses off-tract and out of the source watershed or aquifer. Yet the fused doctrine created by the Court of Appeals draws no such distinction, other than mentioning it as one consideration with no particular importance relative to several other considerations.

### **B. The Court of Appeals Erred in Applying a Balancing Test to a Conflict of Uses Between Plaintiffs, Who Are Riparian to the Stream, and Nestlé, Who Is Not.**

The Court of Appeals correctly recognized that Plaintiff was comprised of property owners riparian to the Dead Stream, and that their use of the Stream for aesthetic and recreational purposes “is a reasonable use worthy of protection.”<sup>56</sup> Where the Court of Appeals erred was in determining that *Nestlé* was, *also* a riparian owner entitled to use the Stream by diverting, bottling and selling a significant portion of it for off-tract use. Nestlé is not a riparian owner, and therefore is not entitled to use water from the Stream to the detriment of people who are riparian owners.

The Court of Appeals noted the following facts which are relevant to the discussion of this issue:

- Plaintiffs were riparian landowners who exercised riparian rights to use water in

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<sup>56</sup> *MCWC v Nestlé*, 269 Mich App at 74.

connection with their riparian land.<sup>57</sup>

- Nestlé purchased the water rights to the Sanctuary property from Donald and Nancy Bollman. Nestlé *did not purchase* the Sanctuary property; the deed for the water rights purported to sever those rights from the fee of the property.<sup>58</sup>
- The pumping of water from the spring on the Sanctuary property removed water that otherwise would have flowed into the Dead Stream.<sup>59</sup> Thus, Nestlé was using riparian surface water.
- The removal of water that otherwise would have been flowing in the Dead Stream had the effect of lowering the Stream, narrowing it, and interfering with riparian uses of it, including boating and fishing.<sup>60</sup>
- “[T]he loss of recreational use and the physical alteration of the Dead Stream will directly and substantially harm the riparian value of the Dead Stream.”<sup>61</sup>

The Court of Appeals also recognized that a non-riparian *cannot* interfere with a riparian’s use of water:

[A] nonriparian who uses the water of a watercourse or lake is liable for interference caused to a riparian by such use without reference to the reasonableness of the use.<sup>62</sup>

Nestlé is a *non-riparian*. Riparian rights “are not alienable or severable, divisible or assignable apart from the land which includes therein, or is bounded, by a natural water course.”<sup>63</sup> This includes the corporeal right to the flow of a stream.<sup>64</sup> Therefore, Nestlé could *not* obtain riparian rights to the Dead Stream by buying them from the Bollmans. If the Sanctuary

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<sup>57</sup> *Id.* at 75.

<sup>58</sup> *Id.* at 35.

<sup>59</sup> *Id.* at 75.

<sup>60</sup> *Id.* at 60.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at n 33, citing Restatement § 857.

<sup>63</sup> *Thompson v Enz*, 379 Mich 667, 686; 154 NW2d 473 (1967).

<sup>64</sup> *Id.* at 677.

property was riparian to the Stream (which it is not), Nestlé would have had to buy the *property* to obtain the water rights; the Bollmans cannot sever the water rights and sell them to Nestlé.

Not only is Nestlé's use of the water unconnected to the land from which it was severed, but it is also used out of the watershed. *Schenk* and a host of other cases from the eastern United States note that the reasonable use doctrine "does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land."<sup>65</sup>

Moreover, even if Nestlé were a riparian, it would not have the right to bottle water for sale outside of the watershed. Michigan law recognizes four principal riparian rights: (1) the right to use water for general purposes, such as bathing, domestic use; (2) the right to "wharf out," (3) the right to access for boating and fishing, and (4) the right of livelihood and accretions.<sup>66</sup> Moreover, the private riparian right of access to boat or fish extends to the entire surface of the lake or stream to which they are riparians.<sup>67</sup>

The Court of Appeals' decision treated Nestlé's non-riparian use of water on a par with Plaintiff's riparian property rights to use the entire surface of the Stream for the listed purposes. Before any comparative rights analysis, the reviewing court must make the threshold determination of whether the diversion of water is by a riparian or a non-riparian.<sup>68</sup> If there is an interference by a non-riparian with the riparians' use of the entire surface of the Stream for a traditional right connected with the land, then the activity is *per se*. Nothing further need be

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<sup>65</sup> *Schenk, supra*, 196 Mich at 84, quoting *Meeker, supra*; *Smith v City of Brooklyn*, 52 NY Supp 983 (1898); *aff'd* 160 NY 357; 54 NE 787 (1899); *Collens v New Canaan Water Co*, 155 Conn 477; 234 A2d 825 (1967); *Cline v American Aggregates Corp*, 64 Ohio App 3d 503 (1989); *Hatfield v Lansdale Municipal Authority*, 463 Pa 113 (1961); Cameron, *Michigan Real Property Law*, 3d ed, p. 95.

<sup>66</sup> *Thompson v Enz, supra*, 379 Mich at 686; *Hilt v Weber*, 252 Mich 198, 224-225; 233 NW 159 (1930); Cameron, *Michigan Real Property Law*, 3d ed, p. 95.

<sup>67</sup> *Burt v Munger*, 314 Mich 659, 664; 23 NW2d 117 (1946) (filling of only 7,500 square feet interfered with plaintiff's ability to fish and boat on the lake).

<sup>68</sup> *Burt v Munger, supra*; *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902).

reviewed. It was clear error for the Court of Appeals to expand the list of persons or entities with whom riparian rights must be shared to include a *non-riparian*, purporting to exercise rights to divert the water away from the land under a deed that purported to sever the water rights from the land.

Accordingly, this Court should reverse the Court of Appeals' ruling and affirm that the traditional common law riparian rights to water remain the law in Michigan.

## **II. THE LOWER COURTS APPLIED THE PUBLIC TRUST DOCTRINE TOO NARROWLY.**

### **Standard of Review.**

Questions of law are reviewed *de novo*.<sup>69</sup> The grant of summary disposition is also reviewed *de novo*.<sup>70</sup> A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.<sup>71</sup> The purpose of the motion is to determine whether plaintiff has stated a claim upon which relief can be granted. Such a motion should be granted only if *no* factual development could possibly justify recovery.<sup>72</sup>

### **A. Summary on Public Trust.**

The Court of Appeals affirmed the trial court's decision dismissing Plaintiff's claim based on the public trust doctrine, pursuant to Defendant's motion. The Court held that the public trust doctrine did not apply to the Dead Stream, or to Nestlé's pumping of groundwater that was tributary to the Stream. The Court of Appeals held that the only way the public trust doctrine could have applied to the Dead Stream is if the Stream could float what the court

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<sup>69</sup> *Petty, supra*.

<sup>70</sup> *Maiden v Rozwood*, 461 Mich 109, 118, 597 NW2d 817 (1999).

<sup>71</sup> *Beaudrie v Henderson*, 465 Mich 124, 631 NW2d 308 (2001).

<sup>72</sup> *Id.*, at 129-130, 631 NW2d 308.

described as “large mill logs” 20 to 40 feet in length.<sup>73</sup> The Court of Appeals rejected Plaintiffs’ arguments that the Stream’s ability to float shingle bolts, which are much smaller but nonetheless commercially valuable, impressed the Stream with the public trust.. The court also rejected Plaintiff’s argument that the existence of a public access point on the Stream coupled with the actual use of the Stream for public recreation could impress the Stream with the public trust.

These holdings by the Court of Appeals were incorrect. The precedents on public trust do not specifically limit the log-float test for navigability to logs at least 20 feet in length; they are expressly flexible on this point. Nor do the precedents limit the exercise of public trust uses to streams that are navigable under the log float test; rather, they say that a public access point provides the public with the same ability to use a lake or stream that a littoral or riparian property owner has. The public trust doctrine also protects the public access.

Because the public trust attaches to the Stream, public trust uses of it are paramount to any private rights. Therefore, even if this Court does not reverse the new balancing test adopted by the Court of Appeals for competing private rights to use water, nonetheless, the decision should be reversed since public uses of the Stream have priority over Nestlé’s private commercial interest in diverting groundwater tributaries.

## **B. The Public Trust Doctrine Applies to the Dead Stream.**

### **1. Evidence on Public Trust.**

The evidence on public trust, which, in deciding a motion for summary disposition must be read in the light most favorable to the respondent, established:

- The Dead Stream has the capacity to float and has actually floated commercially viable shingle bolts from the M-20 bridge downstream to the Tri-lakes. Shingle bolts 18 inches long made of cedar are found in the bottom of the Stream from shipments

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<sup>73</sup> 269 Mich App at 101.

in logging days.<sup>74</sup>

- The Dead Stream is 40 feet wide and an average of two feet deep, although in a few places it is one foot deep.
- M-20 is a State road that provides existing lawful public access to the Dead Stream
- Plaintiff's members and others canoe and fish the Dead Stream between Lake Mecosta, Blue Lake, and Round Lake, and the connecting channel.<sup>75</sup>
- Given the long history of public canoeing and fishing on the Stream up to the M-20 bridge, the Stream historically has been considered to be public.

## **2. The Public Trust Doctrine Applies Because Valuable Timber Was, and Can Be Floated on the Stream in the Form of Shingle Bolts.**

The two principal cases on the navigability of water bodies in Michigan are *Moore v Sanborne*,<sup>76</sup> and *Bott v Natural Resources Comm'n*.<sup>77</sup>

The Court of Appeals here held:

Although the floating of a shingle bolt may demonstrate that the Dead Stream is capable of floating a commercially viable log, *Moore* and *Bott* both require the floating of large mill logs to demonstrate navigability.<sup>78</sup>

However, neither *Moore* nor *Bott* says this. *Moore* states:

[I]n nearly all the States, this rule has been extended so as to be adapted to the necessities of our trade and commerce, and to embrace all streams upon which in their natural state, there is *capacity for valuable floatage*, irrespective of the fact of actual public use, or the extent of such use.<sup>79</sup> (emphasis in original).

In other words, under *Moore*, capacity for valuable floatage determines navigability

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<sup>74</sup> *MCWC v Nestlé*, 269 Mich App.

<sup>75</sup> No riparians have ever objected to public use as a trespass, and Nestlé, as a non riparian, has no standing to object to public use.

<sup>76</sup> 2 Mich 519; 59 Am Dec 209 (1853).

<sup>77</sup> 415 Mich 45; 327 NW2d 838 (1982).

<sup>78</sup> 269 Mich App at 66.

<sup>79</sup> 2 Mich at 523.

under the log-float test, not the size of the logs. There is nothing in Michigan law that restricts navigability solely to the floating of logs 20 to 40 feet in length.<sup>80</sup> The “capacity for valuable floatage” test remains the basis for application of the common law public trust doctrine in Michigan.<sup>81</sup> *Moore* emphasized the “wants of the public and the necessities of trade and commerce” and “rafts and logs.”<sup>82</sup> The scope of the public uses allowed depends on the public need: “if a stream be naturally of sufficient size to float boats, or mill logs, the public have a right to its free use *for that purpose*.”<sup>83</sup> (emphasis in original)

### **3. The Public Trust Applies Because the Dead Stream Has a Public Access Point and Is Used for Public Recreation.**

Plaintiff also raised public trust claims because the Dead Stream actually is used for public trust purposes. Public uses of a lake or stream are protected from interference from the removal of tributary waters. Michigan law affirmatively asserts the State’s sovereign power to regulate lakes and streams to protect the public trust in the water, *regardless of navigability*, for purposes of public access.<sup>84</sup>

The original test for navigability in Michigan was broader than the log-float test. *Moore* defined navigable streams as those which could be used by the public for some public purpose:

The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use and hence, in a region where the principal business is lumbering, or the pursuit of any particular branch of manufacturing or

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<sup>80</sup> *Moore, supra; Collins v Gerhardt*, 237Mich 38; 211 NW 115 (1926).

<sup>81</sup> *Moore, supra*, at 523-524.

<sup>82</sup> *Id.* at 523, 526.

<sup>83</sup> *Id.* at 526.

<sup>84</sup> Inland Lakes and Streams Act (Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, et seq. (“ILSA”)(protects public trust in all streams and lakes, even tiny ones) and Great Lakes Preservation Act (“GLPA”), MCL 324.32701, et seq. (Declares water a “public resource held in trust.”) This language remains unchanged by recent amendment to GLPA, Tab 25, 33 PA 2006 and 37 PA 2006. The package of bills regulate high volume withdrawals over 2 million and 5 million gallons per day, impose a no adverse resource impact standard, and require permits for “new and increased” withdrawals above these high volume limits. The bills expressly state that their provisions do not alter or modify any common law statutory remedies, and do not alter or modify existing law regarding riparian rights and uses.

trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient. In one instance, perhaps, boats can only be used profitably, from the nature of the product to be transported—whilst, in another they would be utterly useless. Upon many of our streams, although of sufficient capacity for navigation by boats, they are never seen—whilst rafts of lumber of immense value, and mill logs which are counted by thousands, are annually floated along them to market. Accordingly, we find that a capacity to float rafts and logs in those States where the manufacture of lumber is prosecuted as a branch of trade, is recognized as a criterion of the public right of passage and of use, upon the principle already adverted to, that such right is to be ascertained from the public necessity and occasion for such use.<sup>85</sup>

*Moore* makes the point again later—if there is a public trust use of a water body, then the water body is impressed with the public trust for that use:

But it is urged that conceding such to be the rule, if a stream be not capable of being used to float mill logs, in an ordinary stage of water, it is not subject to the servitude of the public interests. But we have already attempted to show that *a capacity for use to meet the public necessities, furnishes the true test in such cases.*<sup>86</sup> (emphasis added).

Even *Bott* recognizes other ways of gaining rights of public use:

If there is a public access site then the members of the public who have access to that site have the same right to use the waters as does a littoral owner.<sup>87</sup> (citations omitted).

The rights referred to in that passage are the rights to use the entire surface of the water for traditional purposes such as swimming, boating and fishing.<sup>88</sup> This Court also has recognized that these rights apply to the public on a water body where there is a public access point:

Plaintiffs, in their brief in this Court, state that they have never argued that the general public does not have a right of navigation on the waters of Higgins Lake and that they “take no exception whatsoever” to the Attorney General’s argument that the public has a right to navigate and to exercise the incidents of navigation on waters of this state which are capable of being navigated by oar or motor-propelled craft, small craft, so

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<sup>85</sup> 2 Mich at 525-26.

<sup>86</sup> *Id* at 526.

<sup>87</sup> 415 Mich at 57, nl.

<sup>88</sup> *Beach v Hayner*, 207 Mich 93; 173 NW 487 (1919); *Burt v Munger*, *supra*.

long as members of the public have lawful means of access to such waters.

The Court of Appeals stated: “Assuming lawful access, that portion of the lower court’s order which prohibited the defendants from ‘bathing, swimming, \* \* \* (temporarily) anchoring boats or similar activities’ must be vacated (deletion and addition by the Court of Appeals).”

The public, as plaintiffs acknowledge, may lawfully enter the waters of Higgins Lake from the points where the other streets of the subdivision terminate at the water’s edge, and may use the waters in front of plaintiffs’ lots, provided they have so or otherwise lawfully gained access, for bathing, swimming and temporarily anchoring boats.<sup>89</sup>

*McCardel* was the case cited by the *Bott* Court when it referred to the rights of the public being the same as those of a littoral (or riparian) owner.

Insofar as it is capable of ownership, water is owned by the State for the benefit of the public.<sup>90</sup> The public’s rights to use the water must be legally protected, whether the public rights are recognized based on a log-float test or because the public accesses the water from public property.

**C. The Public Trust Uses of the Dead Stream Are Paramount and May Not Be Impaired by Withdrawal of Tributary Waters by a Non-riparian for Use Off-Tract.**

The public right in a stream and its waters is paramount and should not be alienated, subordinated, or disposed of for primarily private, off-tract purposes.<sup>91</sup>

Tributary waters are the source of flow and level of all Michigan’s public lakes and streams. In *National Audubon Soc’y v Superior Court of Alpine County*,<sup>92</sup> the California Supreme Court held that the diversion of water from a non-navigable tributary stream was

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<sup>89</sup> *McCardel v Smolen*, 404 Mich 89, 96; 273 NW2d 3 (1978).

<sup>90</sup> *Collins v Gerhardt*, *supra*, 54.

<sup>91</sup> *Illinois Central Railroad v Illinois*, 146 US 387; 13 SCt 110; 36 L Ed 1018 (1892); *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); *Collins v Gerhardt*, *supra*; *Nedtweg v Wallace*, 237 Mich 14, 20; 208 NW51 (1926); see also, *People ex rel Scott v Chicago Park District*, 661112d 65; 360 NE2d 773 (1976); Sax, *The Public Trust Doctrine in Natural Resources Law*, 68 Mich L Rev 471, 490 (1970).

<sup>92</sup> 33 Cal 3d 419; 658 P2d 709 (Ca. 1983).

subject to the public trust doctrine, not for purposes of a public trust servitude or access, but for a cause of action to protect the public trust waters that were impaired or diminished by the diversion of the tributary water.<sup>93</sup> As acknowledged by the Court of Appeals, an upstream riparian owner cannot divert and sell water out of the watershed of the water's origin.<sup>94</sup> The same is true for the diversion of tributary groundwater or spring aquifers that materially diminish a lake or stream and interfere with riparian property rights.<sup>95</sup> The rule should be no less applicable for the diversion of tributary waters that harm or diminish public trust waters.

The Court of Appeals characterized Plaintiff's public trust arguments as claiming that "all water within Michigan is property held in trust for the people regardless of navigability."<sup>96</sup> The Court also noted that "private persons obtain property rights in water on the basis of ownership of land."<sup>97</sup> Both of these statements are wrong.

From time immemorial, the law has been that private landowners do *not* own the water, that it is not capable of private ownership,<sup>98</sup> that the right in water is only usufructuary or a right to use as allowed by the common law.<sup>99</sup> As this Court explained in *Collins v Gerhardt, supra*, a landowner "does not own the water, and he does not own the fish. So far as they are capable of

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<sup>93</sup> The Oklahoma Supreme Court reached a similar conclusion in extending a cause of action to protect a stream from the removal of tributary groundwater. In *Oklahoma Water Resources Board v City of Lawton*, 580 P2d 510 (Okla. 1977), a landowner wanted to tap a spring before it reached the surface and formed a stream. The court held "If it forms a definite stream, it is public water from its inception and may not be diverted for private use" unless it has been appropriated by a riparian.

<sup>94</sup> *MCWC v Nestlé*, 269 Mich App at 57-58, n 34.

<sup>95</sup> This too was wrong. As noted in *Collins*, 237 Mich at 45, *supra*, a riparian does not own the water or the fish. Oddly, the ownership of land was ignored as to riparian rights when the Court of Appeals erased the "off-tract" or "out of watershed" limitation in riparian law and adopted the "reasonable use balancing test. *Schenk v City of Ann Arbor, supra*, relying on *Smith v Brooklyn, supra*; see also *Collens v New Canaan Water Co, supra*.

<sup>96</sup> *MCWC v Nestlé*, 269 Mich App at 104.

<sup>97</sup> *Id.*, 269 Mich App at 105.

<sup>98</sup> *Collins, supra*, at 45.

<sup>99</sup> Cooley's Blackstone, Col I, Chpt. 2, p. 16. ("For water is a moveable, wandering thing, and must of necessity continue common by the law of nature").

ownership they belong to the state for the common benefit of the people.”<sup>100</sup>

The common law public trust provides an actionable claim against the impairment or harm to public trust waters.<sup>101</sup>

Moreover, the legislature can affirmatively exercise this sovereign power to preserve the public trust in the waters of Michigan’s lakes and streams. The State has exercised its police power over tributary groundwater, noting that the waters of the state are a “public resource” that is “held in trust.”

The Courts are bound by the legislative exercise of power to protect these waters as public resources subject to a public trust.<sup>102</sup> ILSA’s public trust protections apply to tiny lakes (less than 5 acres) and tributary creeks with very volumes of flow. These legislative declarations recognize the public trust in the tributary waters, whether they are non-navigable streams or the spring aquifers that form and sustain them.

The Court of Appeals’ reference to water as not owned by the public and implying private ownership is wrong and must be corrected to reflect the legal fact that these waters are a public resource—*publici juris*—at least “in so far as capable of ownership” with only a qualified right in landowners or riparian owners to use the water for the benefit of their land consistent with a lawful reasonable use under applicable principles of the public trust doctrine.

The Court of Appeals’ failure to recognize Plaintiffs’ public trust claim to preserve these

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<sup>100</sup> 237 Mich at 45. See also *People v Hulbert, supra*. (“Flowing water, as well as light and air, are in one sense ‘publici juris’ [owned by the public]... .”); *Arnold v Mundy*, 6 NJL 1, 49 (1821) (“[A]ir, the running water, the sea, the fish ...But in as much the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had ... the wisdom of the law has placed it in the hands of the sovereign power, to be held, protected, and regulated for their common use and benefit.” The right to use flowing water “is qualified by the rights of the others to have a stream substantially preserved in its natural size, flow, and purity, and to protect against material diversion or pollution. This is the common right of all, which must not be interfered with by any.”)

<sup>101</sup> *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960); *People v Broedel*, 365 Mich 201, 112 NW2d 517 (1961).

<sup>102</sup> Inland Lakes and Streams Act (now Part 301 of the Natural Resources and Environmental Protection Act), MCL 324.30101, et seq. (“ILSA”); Great Lakes Preservation Act, MCL 324.32702(c)(“public resources held in trust”).

waters would deny Plaintiffs, other citizens, and the State the right to file civil actions to prevent harmful removals of tributary waters, whether tributary groundwater or surface water. This ignores the hydrological reality of the direct connection of the tributary waters to the public trust waters and the legal right to preserve them.

If a tributary forms or sustains a stream, then any removal or diversion that significantly diminishes flows or levels and impairs the public trust or public waters or their uses should be subject to a claim under the State's public trust to preserve these waters. As Michigan enters the 21st century with the rising world water crisis thirsting for its freshwater reserves, it is critical for the Court, as it did in *Glass, supra*, to clarify the power and claims that may be used by citizens and the State to preserve the public trust in the State's waters from harm as the result of the removal of large quantities of water from navigable or non-navigable waters.

## CONCLUSION AND RELIEF REQUESTED

Plaintiff respectfully requests this Court to reverse or modify the decision of the Court of Appeals and re-affirm the limitations imposed by the common law against the diversion of water based on long-standing water law and public trust principles.

Respectfully submitted,

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