

STATE OF MICHIGAN

SUPREME COURT

MICHIGAN CITIZENS FOR WATER
CONSERVATION, a Michigan nonprofit
corporation; R.J. DOYLE AND BARBARA DOYLE,
husband and wife; and JEFFREY R. SAPP AND
SHELLY M. SAPP, husband and wife,
Appellants,

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,
Appellee,

and DONALD PATRICK BOLLMAN AND NANCY
GALE BOLLMAN, husband and wife, a/k/a Pat
Bollman Enterprises,
Defendants.

Supreme Court Docket N° _____

COA Docket N° 254202

Mecosta County Circuit Court
Case N° 01-14563-CE
Hon. Lawrence C. Root, Circuit Judge

MICHIGAN CITIZENS FOR WATER
CONSERVATION, a Michigan nonprofit
corporation; R.J. DOYLE AND BARBARA DOYLE,
husband and wife; and JEFFREY R. SAPP AND
SHELLY M. SAPP, husband and wife,
Appellants,

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,
Appellee,

COA Docket N° 256153

Mecosta County Circuit Court
Case N° 01-14563-CE
Hon. Lawrence C. Root, Circuit Judge

**ERRATA SHEETS TO PLAINTIFFS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

FILED

APR 7 2006

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

April 5, 2006

130802

Suppl

On March 28, 2006, Plaintiffs-Appellants, Michigan Citizens for Water Conservation, Inc.; R.J. and Barbara Doyle; and Jeffrey R. and Shelly M. Sapp, filed and served their Application for Leave to Appeal with Appendix in Support of Application for Leave to Appeal. Plaintiffs-Appellants submit the attached errata sheets to make right small errors that were not corrected in the final version:¹

Location	Original Language	Corrected Language
p 3, n 9	The trial court later had misgivings about dismissing the public trust claims: “Frankly, were the court writing on a clean slate, state I would be inclined to a different conclusion.”	The trial court later had misgivings about dismissing the public trust claims: “Frankly, were the court writing on a clean slate, <u>which I’m not</u> , I would be inclined to a different conclusion.”
p 9, ¶ 2	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.	Boiled down, this new “balancing test” substantively shifts the common law of water and property in Michigan from a riparian/reasonable use state to <u>an</u> allocation law state.
p 10, ¶ 2	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.	Restricting the public trust doctrine to only those streams that have the capacity to float <u>logs</u> 20 to 40 foot in length has the same effect.
p 30, ¶ 2	To the extent that the Court of Appeals in this case relied on the Restatement to change the common law in Michigan, the relationship of the Restatement it should be kept in mind that....	To the extent that the Court of Appeals in this case relied on the Restatement to change the common law in Michigan, it should be kept in mind that....

Plaintiffs-Appellants respectfully request that the current pp 3, 9, 10, and 30 be removed from their Application for Leave to Appeal, and the attached errata sheets be inserted in their place.

¹ Deletions are shown in ~~strikeout~~; additions are underlined. Two sets of the affected pages are attached, (1) showing the original language with corrections, and (2) showing clean pages after the corrections.

OLSON, BZDOK & HOWARD, P.C.
Attorneys for Appellants

By: _____

James M. Olson (P18485)
Christopher M. Bzdok (P53094)
Scott W. Howard (P52028)

Date: _____

4/5/06

Chris A. Shafer
Co Counsel for Appellants

By: _____

Chris A. Shafer (P48068)

Date: _____

4/5/06

PROOF OF SERVICE

On the date below, I sent by first class mail a copy of **ERRATA SHEETS TO PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL** to the counsel of record of all parties to this cause, at their business address(es) as disclosed by the pleadings filed in this matter.

The statements above are true to the best of my knowledge, information and belief.

OLSON, BZDOK & HOWARD, P.C.

Date: April 5, 2006

By: _____

Ruth Ann Liebzeit, Legal Assistant

done so to its detriment will not be considered as an argument against future equitable proceedings.” *MCWC v Nestlé*, 269 Mich App at 36, n 9.

After later amendments, Plaintiffs’ complaint contained six counts. Count I requested injunctive relief against the construction of wells, wellhouses, and pipelines for the water extraction and diversion operation. Count II alleged that Nestlé’s actions were unlawful under the common law doctrine governing the use of surface water. Count III alleged that Nestlé’s actions were unlawful under the common law doctrine governing the use of groundwater.. Count IV alleged that Nestlé’s actions violated the public trust doctrine.⁸ Count V alleged that Nestlé’s diversion and sale of water without the consent of the State was an unlawful taking of a public resource. Count VI alleged that Nestlé’s actions would impair natural resources in violation of the Michigan Environmental Protection Act (Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* (“MEPA”).

In May 2002, Plaintiffs filed a motion for partial summary disposition on the surface water, groundwater, and public trust counts. Plaintiffs argued that a diminishment of a stream by a non-riparian was unreasonable per se, and that it was undisputed that the stream was navigable and subject to the public trust doctrine. Nestlé filed a counter-request for summary disposition. Through a series of rulings, the trial court dismissed all of Plaintiffs’ claims except groundwater (Count III) and MEPA (Count VI) prior to trial.⁹ *MCWC v Nestlé*, 269 Mich App at 37, 103.

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 (**Tab 2**). The

⁸ **Tab 14**, Second Complaint, November 12, 2001. See Argument II for more discussion of the public trust claim.

⁹ **Tab 7**, Bench Op, p. 8; **Tab 8**, Bench Op., pp. 18-24. The trial court later had misgivings about dismissing the public trust claims: “Frankly, were the court writing on a clean slate, slate which I’m not, I would be inclined to a different conclusion.” *Id.*, pp. 15.

stream as if the end of the pipe was in the stream itself. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 56, n 33; 709 NW2d 174 (2006).³¹

The Court of Appeals affirmed the trial court's conclusion that Nestle's water removal was unreasonable. But in doing so the appeals court reversed the trial court's reliance on the established precedents that limit off tract and out of watershed removals, particularly for sale and where a removal materially or measurably diminishes the flow or level of a lake or stream and interferes with riparian rights. The Court of Appeals repudiated this Court's prior precedent for both groundwater and surface water, and then adopted a new "reasonable use balancing test" that eliminated this limitation between riparians and those who remove and transfer water from a spring aquifer. *MCWC v Nestlé*, 269 Mich App at 69.

Boiled down, this new "balancing test" substantively shifts the common law of water and property in Michigan from a riparian/reasonable use state to an an ~~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 lower riparian owners will be forced to suffer the harm of this change in their private riparian rights. The traditional common law protections for these riparian property owners will have been substantively altered and subordinated to non-riparian diversions that cause unreasonable or even substantial harm.

The other important issue presented in this appeal is the application of the public trust doctrine to Michigan's water resources. Despite substantial evidence of recreational and commercial use the public uses of the water resources at issue in this case, the trial court ruled that the water was not protected by the public trust doctrine because the stretch of the stream below the Nestlé well-

³¹ The trial court further held that the significant diminishment and adverse impacts to the stream and lakes rose to the level of "impairment" of water and related natural resources contrary to the Michigan Environmental Protection Act, MCL 324.1701, *et seq.* ("MEPA").

field was not navigable under a narrow “20 to 40 foot log floating” test.³² The Court of Appeals opinion upheld this narrow reading of the public trust doctrine what constitutes a navigable water body. In doing so, the court rejected the application of the public trust doctrine as a cause of action to protect public trust waters from harm caused by the removal of large quantities of non-navigable waters from 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. *Glass v Goeckel*, 473 Mich 667; 703 NW2d 58 (2005). Restricting the public trust doctrine to only those streams that have the capacity to float logs 20 to 40 foot in length has the same effect. Further, rejecting the application of the public trust doctrine to prevent or remedy the interference with public trust uses form removals of water that diminishes public trust waters will not leave the public trust doctrine “alive and well.” *Id.*

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, given the rising tide of the global water crisis, that are detrimental to the public interest and the sound jurisprudence of Michigan.

I. THE COURT OF APPEALS ERRED BY REPUDIATING DISTINCTIONS IN THE COMMON LAW WATER USE DOCTRINES ADOPTED BY THIS COURT BASED ON THE TRACT, WATERSHED OR AQUIFER OF USE, AND THE STATUS OF THE USER AS A RIPARIAN OR NON-RIPARIAN, IN FAVOR OF A BALANCING TEST THAT RECOGNIZES NO SUCH DISTINCTIONS

Standard of Review

The Supreme Court reviews questions of law *de novo*. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

³² **Tab 8**, Bench Op, Oct. 29, 2002, p. 8.

majority of riparian states continue to apply the common law rule limiting uses to riparian lands. Getches, *supra*, pp 52-53 (emphasis added).⁴⁵

The author of Chapter 41 of the Restatement,⁴⁶ 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. Restatement (Second) of Torts, Reporter's Notes to § 843, p 8, n 1 (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." *Id.* Or at least it was a policy preference when Chapter 41 was written almost 30 years ago. To the extent that the Court of Appeals in this case relied on the Restatement to change the common law in Michigan, ~~the relationship of the Restatement~~ it should be kept in mind that (1) the Restatement is inconsistent with prior Michigan case law, (2) it is the minority rule in eastern states' water law, and (3) it represents a 30-year old policy preference to encourage development rather than conservation of water resources.

3. 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.

⁴⁵ Note that three of the states listed – Texas, Oklahoma and Kansas – are hybrid prior appropriation states.

⁴⁶ Frank Trelease.



done so to its detriment will not be considered as an argument against future equitable proceedings.” *MCWC v Nestlé*, 269 Mich App at 36, n 9.

After later amendments, Plaintiffs’ complaint contained six counts. Count I requested injunctive relief against the construction of wells, wellhouses, and pipelines for the water extraction and diversion operation. Count II alleged that Nestlé’s actions were unlawful under the common law doctrine governing the use of surface water. Count III alleged that Nestlé’s actions were unlawful under the common law doctrine governing the use of groundwater.. Count IV alleged that Nestlé’s actions violated the public trust doctrine.⁸ Count V alleged that Nestlé’s diversion and sale of water without the consent of the State was an unlawful taking of a public resource. Count VI alleged that Nestlé’s actions would impair natural resources in violation of the Michigan Environmental Protection Act (Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* (“MEPA”).

In May 2002, Plaintiffs filed a motion for partial summary disposition on the surface water, groundwater, and public trust counts. Plaintiffs argued that a diminishment of a stream by a non-riparian was unreasonable per se, and that it was undisputed that the stream was navigable and subject to the public trust doctrine. Nestlé filed a counter-request for summary disposition. Through a series of rulings, the trial court dismissed all of Plaintiffs’ claims except groundwater (Count III) and MEPA (Count VI) prior to trial.⁹ *MCWC v Nestlé*, 269 Mich App at 37, 103.

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 (**Tab 2**). The

⁸ **Tab 14**, Second Complaint, November 12, 2001. See Argument II for more discussion of the public trust claim.

⁹ **Tab 7**, Bench Op, p. 8; **Tab 8**, Bench Op., pp. 18-24. The trial court later had misgivings about dismissing the public trust claims: “Frankly, were the court writing on a clean slate, which I’m not, I would be inclined to a different conclusion.” *Id.*, pp. 15.

stream as if the end of the pipe was in the stream itself. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 56, n 33; 709 NW2d 174 (2006).³¹

The Court of Appeals affirmed the trial court's conclusion that Nestle's water removal was unreasonable. But in doing so the appeals court reversed the trial court's reliance on the established precedents that limit off tract and out of watershed removals, particularly for sale and where a removal materially or measurably diminishes the flow or level of a lake or stream and interferes with riparian rights. The Court of Appeals repudiated this Court's prior precedent for both groundwater and surface water, and then adopted a new "reasonable use balancing test" that eliminated this limitation between riparians and those who remove and transfer water from a spring aquifer. *MCWC v Nestlé*, 269 Mich App at 69.

Boiled down, this new "balancing test" substantively shifts the common law of water and property in Michigan from a riparian/reasonable use state to an 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 lower riparian owners will be forced to suffer the harm of this change in their private riparian rights. The traditional common law protections for these riparian property owners will have been substantively altered and subordinated to non-riparian diversions that cause unreasonable or even substantial harm.

The other important issue presented in this appeal is the application of the public trust doctrine to Michigan's water resources. Despite substantial evidence of recreational and commercial use the public uses of the water resources at issue in this case, the trial court ruled that the water was not protected by the public trust doctrine because the stretch of the stream below the Nestlé well-

³¹ The trial court further held that the significant diminishment and adverse impacts to the stream and lakes rose to the level of "impairment" of water and related natural resources contrary to the Michigan Environmental Protection Act, MCL 324.1701, *et seq.* ("MEPA").

field was not navigable under a narrow “20 to 40 foot log floating” test.³² The Court of Appeals opinion upheld this narrow reading of the public trust doctrine what constitutes a navigable water body. In doing so, the court rejected the application of the public trust doctrine as a cause of action to protect public trust waters from harm caused by the removal of large quantities of non-navigable waters from 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. *Glass v Goeckel*, 473 Mich 667; 703 NW2d 58 (2005). Restricting the public trust doctrine to only those streams that have the capacity to float logs 20 to 40 foot in length has the same effect. Further, rejecting the application of the public trust doctrine to prevent or remedy the interference with public trust uses form removals of water that diminishes public trust waters will not leave the public trust doctrine “alive and well.” *Id.*

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, given the rising tide of the global water crisis, that are detrimental to the public interest and the sound jurisprudence of Michigan.

I. THE COURT OF APPEALS ERRED BY REPUDIATING DISTINCTIONS IN THE COMMON LAW WATER USE DOCTRINES ADOPTED BY THIS COURT BASED ON THE TRACT, WATERSHED OR AQUIFER OF USE, AND THE STATUS OF THE USER AS A RIPARIAN OR NON-RIPARIAN, IN FAVOR OF A BALANCING TEST THAT RECOGNIZES NO SUCH DISTINCTIONS

Standard of Review

The Supreme Court reviews questions of law *de novo*. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

³² **Tab 8**, Bench Op, Oct. 29, 2002, p. 8.

majority of riparian states continue to apply the common law rule limiting uses to riparian lands. Getches, *supra*, pp 52-53 (emphasis added).⁴⁵

The author of Chapter 41 of the Restatement,⁴⁶ 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. Restatement (Second) of Torts, Reporter's Notes to § 843, p 8, n 1 (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." *Id.* Or at least it was a policy preference when Chapter 41 was written almost 30 years ago. To the extent that the Court of Appeals in this case relied on the Restatement to change the common law in Michigan, it should be kept in mind that (1) the Restatement is inconsistent with prior Michigan case law, (2) it is the minority rule in eastern states' water law, and (3) it represents a 30-year old policy preference to encourage development rather than conservation of water resources.

3. 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.

⁴⁵ Note that three of the states listed – Texas, Oklahoma and Kansas – are hybrid prior appropriation states.

⁴⁶ Frank Trelease.