

STATE OF MICHIGAN
IN THE SUPREME COURT

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

MICHIGAN CITIZENS FOR WATER
CONSERVATION, 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/Cross-Appellees,

Supreme Court Docket No. 130802

Court of Appeals Case No. 254202

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

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,

Appellee/Cross-Appellant,

and

DONALD PATRICK BOLLMAN and NANCY
GALE BOLLMAN, a/k/a PAT BOLLMAN
ENTERPRISES,

Defendants.

130802
reply
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Appellants/Cross-Appellees,

Court of Appeals Case No. 256153

Mecosta County Circuit Court
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Honorable Lawrence C. Root

v

NESTLÉ WATERS NORTH AMERICA INC., a
Delaware corporation,

Appellee/Cross-Appellant.

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NESTLÉ WATERS NORTH AMERICA INC.'S REPLY BRIEF
IN SUPPORT OF ITS CROSS-APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

In their opposition to Nestlé's Cross-Application for Leave to Appeal, plaintiffs appear more interested in re-arguing the issues raised in their own application for leave than in responding to the arguments Nestlé sets forth in the cross-application. Nearly half of plaintiffs' brief is devoted to rehashing factual and legal claims that are largely irrelevant to Nestlé's cross-application, and debating issues (such as the Court of Appeals' holding on the MEPA impairment standard) which have not been appealed at all. When plaintiffs do address the arguments raised by Nestlé in its cross-application, they grossly misinterpret Michigan standing jurisprudence, fundamentally misconstrue the need for a proper application of this State's reasonable-use balancing test for resolving disputes between competing water users, and ask this Court to ignore basic equitable principles that have long been applied in Michigan.¹

ARGUMENT

I. PLAINTIFFS MISINTERPRET MICHIGAN STANDING JURISPRUDENCE IN THEIR UNCONVINCING EFFORT TO DEMONSTRATE STANDING UNDER CLEVELAND CLIFFS.

Plaintiffs first claim there is no need for this Court to review the panel majority's standing decision because, they say, its holding is fully consistent with this Court's decision in *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). Plaintiffs' arguments fail, however, because they are based on a fundamental misconception of Michigan standing jurisprudence.

A. Standing May Be Raised At Any Point In The Course Of Litigation.

Plaintiffs argue that Nestlé has waived the standing requirement of *Cleveland Cliffs* by failing to plead or assert lack of standing at trial. Pltfs.' Response, p 17. They insist that

¹ Also, contrary to plaintiffs' contention (Pltfs.' Response, p 5 n12) all of the evidentiary materials relied upon by Nestlé in its cross-application are found in the record.

standing is waived once the trial proofs are closed, and that “Nestlé raised the standing issue for the first time in Appellant’s Brief filed with the Court of Appeals in August 2004.” *Id.* Plaintiffs are wrong, however, because Nestlé expressly pleaded plaintiffs’ lack of standing as an affirmative defense in its Answer and Affirmative Defenses to Second Amended Complaint (p 13).² Even assuming *arguendo* that Nestlé had not done so, lack of constitutional standing can be raised at any time. *See Cleveland Cliffs, supra*, at 630. Indeed, because constitutional standing requirements are jurisdictional in nature (being rooted in the separation of powers principle that courts are only empowered to decide actual cases or controversies), it has been recognized that courts have “‘an obligation to assure ourselves’ of litigants’ standing under Article III.” *DaimlerChrysler Corp v Cuno*, 547 US __; 126 S Ct 1854, 1860; __ L Ed 2d __ (2006) (quoting *Friends of the Earth, Inc v Laidlaw Envtl Servs*, 528 US 167, 180; 120 S Ct 693; 145 L Ed 2d 610 (2000)).³ Plaintiffs’ waiver argument is therefore meritless.

B. Plaintiffs Have Failed To Demonstrate Standing As To OLI And Wetlands 112, 115, And 301 Under Cleveland Cliffs.

Cleveland Cliffs holds that environmental plaintiffs have a sufficient injury in fact to support standing only when they “‘aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” 471 Mich at 629 (quoting *Friends of the Earth, supra*, at 183). OLI and Wetlands 112, 115, and 301 are located entirely on the Sanctuary property and, as plaintiffs acknowledge, “no member or

² As the Court of Appeals explained, “[b]oth the Bollmans and [Nestlé] raised the issue of standing in their responsive pleadings. Therefore, plaintiffs’ waiver argument is without merit.” *Mich Citizens for Water Conservation v Nestlé Waters N Am Inc*, 269 Mich App 25, 83 n64; 709 NW2d 174 (2005).

³ The recent pronouncements of this Court and of the United States Supreme Court certainly prevail over any contrary implications plaintiffs might find in *FMB-First Michigan Bank v Bailey*, 232 Mich App 711; 591 NW2d 676 (1998), which did not even address standing.

property owner of MCWC owns an interest in the Sanctuary property.” Pltfs.’ Response, p 9. Not surprisingly, therefore, plaintiffs have neither argued nor presented evidence that they “use the affected area[s],” or that these areas have *any* “aesthetic or recreational” value to plaintiffs at all, as required by *Cleveland Cliffs, supra*, at 629.

Plaintiffs attempt to meet the *Cleveland Cliffs* standing requirement by piggy-backing standing as to OLI and Wetlands 112, 115, and 301 onto their undisputed standing to allege injury as to Deadstream. Plaintiffs argue that because the effects on Deadstream, the numbered wetlands, and OLI are all caused by Nestlé, and plaintiffs have standing to assert claims based on the effects to Deadstream, plaintiffs must therefore also have standing to assert claims based on effects to OLI and the numbered wetlands, because “it is all one single moving tributary and riparian water system.” Pltfs.’ Response, p 18. But standing is conferred based on harms to a plaintiff that are caused by effects on resources *actually used* by the plaintiff. *See Cleveland Cliffs, supra*, at 629. Plaintiffs simply cannot obtain standing based only on simultaneously occurring effects to *other* resources. In short, because plaintiffs do not use OLI or the numbered wetlands, they are not harmed by effects on those resources, and therefore have no standing to assert claims based on those effects.

Finally, plaintiffs’ claim that their interests are actually “stronger than the interests of the plaintiffs found to have standing in *NWF*” (Pltfs.’ Response, p 21) cannot be given credence. The plaintiffs in *Cleveland Cliffs* averred that they bird-watched, canoed, bicycled, hiked, skied, fished, and farmed in the affected area, and planned to do so as long as the area remained unspoiled. *Cleveland Cliffs, supra*, at 630. By contrast, plaintiffs here base their standing claim *only* on their “riparian rights and interests in the streams and lakes” that are *connected* to OLI

and the numbered wetlands.⁴ Pltfs.' Response, p 21. Such allegations do not establish that plaintiffs either use or enjoy the recreational and aesthetic values of OLI and Wetlands 112, 115, and 301 and plaintiffs therefore lack the requisite standing as to these bodies under *Cleveland Cliffs*.

C. **Because Plaintiffs Have Not Alleged The Requisite Injury Under *Cleveland Cliffs*, This Raises A Substantial Question As To The Validity Of MCL 324.1701(1), Which Purports To Grant Them Standing.**

Notwithstanding plaintiffs' failure to allege sufficient injury under *Cleveland Cliffs*, MCL 324.1701(1) purports to grant "any person" standing to assert a MEPA violation. This appeal therefore involves a substantial question as to the validity of a legislative act, as this Court's precedents and separation of powers principles prevent the Legislature from conferring standing on persons who have not suffered the "particularized injury" required under Michigan's Constitution. Plaintiffs unconvincingly assert that the Legislature's purported grant of standing to "all citizens who have a particular relationship to the air, water, or other natural resources in question," coupled with "the requirement for actual conduct that will or is likely to impair or degrade such natural resources," creates "by definition in each case a real, actual, and genuine

⁴ Plaintiffs claim that they "undoubtedly" use the "affected area" based on their use and enjoyment of Deadstream, even while admitting the waters they use are "not actually on the Sanctuary property." Pltfs.' Response, p 20. But if all that is needed to confer standing is that the defendant cause effects on resources that are somehow connected to other resources used by the plaintiff, constitutional standing will have expanded to the point where it no longer serves as an effective limitation on the judicial power.

Plaintiffs also erroneously attribute to Nestlé (and then purport to refute) an argument that OLI and the numbered wetlands are not within the "affected area." *Id.* What Nestlé actually asserted is that *each* of the numbered wetlands and OLI is a distinct "affected area." Because plaintiffs do not actually use any of the numbered wetlands or OLI, they are not harmed by effects that occur in any of these affected areas, and so lack standing to allege a claim based on such effects.

controversy consistent with the proper exercise of judicial power.”⁵ Pltfs.’ Response, pp 18-19. Plaintiffs’ assertions are directly contrary to *Cleveland Cliffs*, which holds that the Legislature cannot by statute broaden standing beyond the constraints imposed by the Michigan Constitution. Plaintiffs’ attempts to reconcile MCL 324.1701(1) with *Cleveland Cliffs* having failed, this appeal clearly raises a substantial question as to the validity of a legislative act.

D. The Stipulated Order Does Not Render The Standing Issue Moot.

Plaintiffs argue that “[b]ecause the relief as to the water and resources embodied in the Stipulated Order will control Defendant’s conduct in the same way as any relief required to protect the wetlands on the Sanctuary property, there is no meaningful relief that can be achieved in pursuing the standing issue.” Pltfs.’ Response, p 21. This appears to be an argument that the Stipulated Order on Remand has somehow rendered the standing issue moot. However, since the re-opening of proofs envisioned by the Stipulated Order can result in judicial hearings, the Court of Appeals’ erroneous standing holding will control the scope of any alleged harms that plaintiffs may attempt to prove at such future hearings. For example, at a future hearing pursuant to the Stipulated Order on Remand, the Court of Appeals’ decision would permit plaintiffs to establish a MEPA violation solely based on harm to OLI and Wetlands 112, 115, and 301. Where a settlement agreement contemplates future litigation, and it cannot be stated with definiteness that the issue in question will not arise, the matter is not moot. *See Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004).

⁵ In support of their argument, plaintiffs cite a passage from Justice Scalia’s opinion for the Court in *Bennett v Spear*, 520 US 154; 117 S Ct 1154; 137 L Ed 2d 281 (1997), which plaintiffs claim recognizes that “legislative enactments granting ‘any person’ a right to enforce suits as ‘private attorneys general’ should be read to grant ‘expanded standing.’” Pltfs.’ Response, p 19. However, the standing requirement discussed by Justice Scalia in *Bennett* is ordinary prudential standing and not the constitutional standing at issue in this appeal. *See* 520 U.S. at 162.

II. THE COURT OF APPEALS' ERRONEOUS APPLICATION OF THE REASONABLE-USE BALANCING TEST TO THE FACTS OF THIS CASE CONSTITUTES CLEAR ERROR WARRANTING THIS COURT'S REVIEW.

In its cross-application, Nestlé recognized that the Court of Appeals properly held that Michigan's flexible, reasonable-use balancing test applied to this dispute, and that plaintiffs' groundwater claim therefore did not warrant review by this Court. Should the Court grant plaintiffs' application for leave, however, Nestlé seeks leave to cross-appeal the Court of Appeals' application of the reasonable-use standard, as the court clearly erred in applying that standard to the facts of this case. While Nestlé seeks leave to cross-appeal the narrow issue of the Court of Appeals' erroneous *application* of the reasonable-use balancing test to the facts before it, plaintiffs devote most of their response to re-arguing their (erroneous) conclusions as to why the reasonable-use test should not apply in the first place. Plaintiffs fail to explain why this Court should narrowly circumscribe its review by excluding application of the law to be determined by this Court to the facts of the case. Indeed, the erroneous application of the correct standard can insert just as much error into this State's jurisprudence as the proper application of an erroneous test.

Plaintiffs themselves apparently disagree with one aspect of the Court of Appeals' application of the reasonable-use test. Plaintiffs argue that the "societal and economic benefits" resulting from Nestlé's water use should not be part of the balancing equation because Nestlé is removing the water purely for "private profit"; thus, according to plaintiffs, any jobs or tax revenues attributed to Nestlé's activities are "merely incidental." Pltfs.' Response, pp 28, 34. This argument is incorrect on several levels. Plaintiffs first take issue with Nestlé's statement in its cross-application that its operations provide "strong commercial and economic benefits to society and the local community which significantly offset the harms inflicted on the riparian plaintiffs." Pltfs.' Response, p 15. Plaintiffs claim "[t]he Court of Appeals made no such

finding and there is no such evidence in the record.” *Id.* This is manifestly false. The Court of Appeals expressly stated in its opinion that:

“[Nestlé’s] bottling enterprise does have significant commercial benefits. The plant directly employs 140 workers and indirectly benefits other workers who provide the plant with necessary goods and services. In addition, the plant provides increased tax revenues to the state and the local community through payroll and property taxes. *Overall, under the facts of this case, the harms inflicted on the riparian plaintiffs and the community in general are significantly offset by the economic benefits to society and the local community.*” *Mich Citizens for Water Conservation v Nestlé Waters N Am Inc*, 269 Mich App 25, 76-77; 709 NW2d 174 (2005) (emphasis added).

Indeed, the Court of Appeals recognized that “[t]he provision of water to the general public is an economically and socially beneficial use of the water.” *Id.* at 75.

In addition, plaintiffs are incorrect in their repeated assertions (Pltfs.’ Response, pp 3, 8, 15, 26, 27, 28, 29, 34) that any “private profit” enjoyed by Nestlé from its bottling operations somehow negates the significant societal and economic benefits derived from these activities. As the Restatement (Second) of Torts recognizes, “[a] major consideration in determining the reasonableness of a use of water is its utility and value to the user, measured in economic terms.”

4 Restatement Torts, 2d, § 850A, cmt e, p 225. The Restatement further provides that:

“Even though a use has economic value and is beneficial to the user, it must also be reasonable from the standpoint of society and have some social as well as economic value. It has social value if the general public good is in some way advanced or protected by making it. This value will depend in part upon economic factors, *since the general public good is normally promoted by private enterprises that produce goods and services.*” *Id.* cmt f, p 226 (emphasis added).

Thus, the social and economic benefits derived from a defendant’s water use are a vital factor in the reasonable-use balancing equation, and these benefits are derived, at least in part, from the jobs, economic activity, and tax revenues that are produced by a profitable, productive private enterprise.

Not surprisingly, the consideration of the social and economic benefits of a given water use have long been factored into the balancing equation of Michigan's reasonable-use test. *See, e.g., Thompson v Enz*, 379 Mich 667, 689; 154 NW2d 473 (1967); *People v Hulbert*, 131 Mich 156, 170, 91 NW2d 211 (1902). Thus, plaintiffs' objection to the consideration of "social and economic benefits" within the reasonable-use test is entirely devoid of merit.

III. THE COURT OF APPEALS COMMITTED CLEAR ERROR BY IGNORING FUNDAMENTAL EQUITABLE PRINCIPLES AND DIRECTING THAT THE TRIAL COURT ADMIT NEW EVIDENCE ON REMAND ONLY "AS NECESSARY."

Plaintiffs and Nestlé agree that the Stipulated Order on Remand provides for the introduction of new evidence in hearings revisiting maximum withdrawal rates and stage and flow criteria. If, however, this Court were to modify or vacate the Stipulated Order on Remand such that the Court of Appeals' limitation on the consideration of new evidence is reinstated, then it would become necessary for this Court to correct the Court of Appeals' erroneous instruction that "no new evidence shall be permitted at the hearing except as determined to be necessary by the trial court." *Mich Citizens for Water Conservation, supra*, at 81.

The Court of Appeals' instruction was clear error, as Michigan courts have long recognized "[t]hat equity may shape her relief according to the situation as it may present itself when the time for decree arrives. . . ." *Thompson v Enz*, 385 Mich 103, 110; 188 NW2d 579 (1971) (*per curiam*) (internal quotation marks omitted). As the Ohio Court of Appeals held in a similar case:

"Where the grounds and reasons for which an injunction was granted no longer exist by reason of changed conditions, a court may alter the judgment to adapt it to such changed conditions or set it aside altogether, as where there is a change in the controlling facts on which the injunction rests. This rule applies not only to changes occurring while the action is pending in the court of original jurisdiction, but also to those which occur while it is pending in an appellate court." *Franklin*

Co Dist Bd of Health v Paxson, 152 Ohio App 3d 193, 209-10; 787 NE2d 59 (2003) (internal citations omitted).⁶

Plaintiffs also ignore the fact that, even if the trial court were to decline to accept new evidence in the remand proceedings, upon termination of the appellate process Nestlé could submit the evidence via a motion for relief from the effect of the injunction under MCR 2.612(C)(1)(e), as an injunction is always subject to modification if the facts merit it. *See Twp of Oxford v Bentley*, No. 206581, 1999 WL 33434977, at *2 (Mich Ct App Oct 19, 1999); *Opal Lake Ass'n v Michaywe' Ltd P'ship*, 47 Mich App 354, 367; 209 NW2d 478 (1973). Thus, judicial efficiency dictates the admission of new evidence as well.

Plaintiffs contend that the introduction of any new evidence would simply “rehash the same testimony and arguments that were tried over days of trial.” Pltfs.’ Response, p 33. However, it is now 2006, and the trial occurred in mid-2003. It makes little sense to issue an injunction as to the effects of Nestlé’s pumping on a changing, dynamic ecosystem based on only a year’s worth of pumping and monitoring data compiled in 2002-03 and earlier, while ignoring three years of subsequent data. Equity commands that courts not issue injunctions while wearing blinders. *See Thompson, supra*, at 110.

In sum, the Court of Appeals committed clear error by restricting Nestlé’s ability to present on remand monitoring data for the period after the close of proofs at trial. Therefore, if this Court were to vacate or modify the Stipulated Order on Remand, this Court should correct

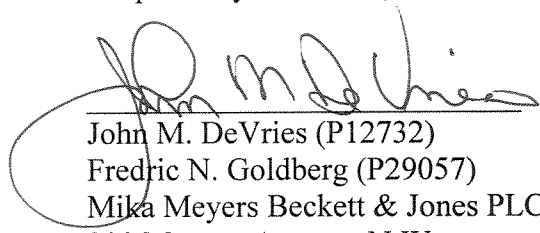
⁶ Plaintiffs attempt to distinguish *Paxson* by claiming that Nestlé can take advantage of this equitable principle only if it completely stops pumping. Pltfs.’ Response, p 32. This argument, however, has no basis in either case law or common sense. If Nestlé chose to completely stop pumping, the circumstances reflected in any potential injunction would make no difference to it in the first place. Plaintiffs’ interpretation of this fundamental equitable principle would render it superfluous.

the Court of Appeals' improper instruction regarding the consideration of new evidence on remand.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Nestlé's Cross-Application for Leave to Appeal, this Court should grant Nestlé's cross-application and issue a peremptory order reversing the Court of Appeals' holding that plaintiffs had standing to allege a MEPA violation as to OLI and Wetlands 112, 115, and 301. In addition, if the Court grants plaintiffs' Application for Leave to Appeal the Court of Appeals' groundwater holding, this Court should correct the Court of Appeals' erroneous application of the reasonable-use balancing test to the facts of this case as well as its improper instructions regarding the consideration of new evidence on remand.

Respectfully submitted,



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