STATE OF MICHIGAN 22ND JUDICIAL CIRCUIT	**PRAECIPE FOR CIVIL / DOMESTIC MOTION**	CASE NO.: 88-34734-CE JUDGE: TIMOTHY P. CONNORS

Address: Central Assignment, 101 E. Huron St., P.O. Box 8645, Ann Arbor, Michigan 48107-8645 Telephone: (734) 222-3383 Fax: (734) 222-3084

ALL BLANKS ON THIS PRAECIPE MUST BE PROPERLY COMPLETED. FAILURE TO COMPLY WITH THIS REQUIREMENT MAY RESULT IN THE COURT DECIDING NOT TO HEAR YOUR MOTION.

ATTORNEY GENERAL for the State of MICHIGAN, etal. (Plaintiff) vs GELMAN SCIENCES, INC. (Defendant)

1. I wish to place a Motion for (state nature of motion in brief form): MOTION TO INTERVENE Pursuant to MCR 2.209

on the Motion Docket for Thursday (Day), December 15, 2016 (Date) at ~~8:30~~ 9:00 a.m. (Time)

BEFORE SUBMITTING THIS PRAECIPE TO THE COURT, YOU ARE REQUIRED TO CONTACT THE OTHER ATTORNEY OR PARTY (if in Pro Per) TO DETERMINE WHETHER THE SUBJECT OF YOUR MOTION IS A CONTESTED ISSUE. PLEASE INDICATE BELOW THAT YOU HAVE COMPLIED WITH THIS REQUIREMENT, OR EXPLAIN WHY IT WAS NOT POSSIBLE TO DO SO.

2. ☒ a. I have contacted opposing attorney/party and have been informed that this motion will / ~~will not~~ (CIRCLE ONE) be contested.

☐ b. I have not contacted opposing attorney/party for the following reason: _____

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DEC 05 2016
CENTRAL ASSIGNMENT

3. ☒ Are you serving by **MAIL**?
Opposing party must be served at least 9 days before the hearing date.

OR

☐ Are you serving in **PERSON**?
Opposing party must be served at least 7 days before the hearing date.

4. ☒ Motion has been filed with the Clerk's Office

Dated: December 5, 2016

(Signature of Moving Attorney/Party)

Attorney for INTERVENING Plaintiffs

(Name of Attorney for Plaintiff)

(Name of Attorney for Plaintiff)

10 S. Main St. Ste 401, Mt. Clemens, MI
(Street Address of Moving Attorney/Party)

(Name of Attorney for Defendant)

Mt Clemens, MI 48043
(City, State, and Zip Code of Moving Attorney/Party)

(Name of Attorney for Defendant)

(586) 469-4300
(Telephone Number of Moving Attorney/Party)

PRAECIPES shall be FILED in the Central Assignment Office, Room 1110, at least 7 days before the time set for hearing.

COURT USE ONLY (Do Not Write below line)

_____Adj to _____ _____Adj to _____

WASHTENAW COUNTY MICHIGAN 1826

(Rev. 2/16)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

Case No. 88-34734-CE
Hon. Timothy P. Connors

-v-

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

DAVIS BURKET SAVAGE LISTMAN TAYLOR
BY: Robert Charles Davis (P40155)
10 S. Main Street, Suite 401
Mt. Clemens, MI 48043
(586) 469-4300
Attorneys for Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ellen Rabinowitz

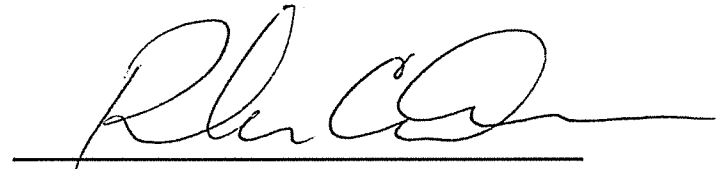
PROOF OF SERVICE

I served a copy of the the Intervening Plaintiffs, Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity Motion To Intervene Pursuant To MCR 2.209, Brief in Support of Motion to Intervene, Notice of Hearing, Praecipe, Appearance of Attorney Robert Charles Davis and Proof of Service upon:

Brian Negele
Assistant Attorney General
Michigan Dept of Attorney General
525 W Ottawa St
PO Box 30212
Lansing, MI 48909-7712
Attorney for Plaintiffs

Michael L. Caldwell
Zausmer August & Caldwell PC
31700 Middlebelt Rd Ste 150
Farmington Hills, MI 48334-2301
Attorney for Defendant Gelman Sciences, Inc.

on December 5, 2016 by US Mail by depositing these documents into a US mailbox in the City of Mt. Clemens, State of Michigan. **I declare the foregoing statement to be true to the best of my information, knowledge and belief.**

By: 

ROBERT CHARLES DAVIS (P40155)
Attorney for Intervening Plaintiffs
Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity,
10 S. Main St., Ste. 401
Mt. Clemens, MI 48043
(586) 469-4300
(586) 469-4303 – Fax
rdavis@dbsattorneys.com

Dated: December 5, 2016

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

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(586) 469-4300
Attorneys for Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ellen Rabinowitz

APPEARANCE

TO: CLERK OF THE COURT

Please enter the Appearance of attorney, Robert Charles Davis, as counsel for the Intervening Plaintiffs, Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity in the above-entitled cause of action.

By: 

ROBERT CHARLES DAVIS (P40155)
Attorney for Intervening Plaintiffs
Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity,
10 S. Main St., Ste. 401
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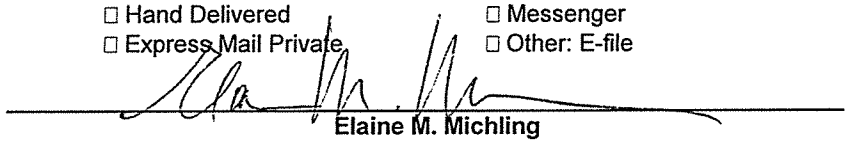
(586) 469-4300
(586) 469-4303 – Fax
rdavis@dbsattorneys.com

Dated: December 5, 2016

PROOF OF SERVICE

I served the foregoing **Appearance** upon the attorneys of record and/or parties in this case on **December 5, 2016**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

☒ **U.S. Mail**
☐ Hand Delivered
☐ Express Mail Private
☐ Fax
☐ Messenger
☐ Other: E-file



Elaine M. Michling

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

Case No. 88-34734-CE
Hon. Timothy P. Connors

-v-

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Attorneys for Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ellen Rabinowitz

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NOTICE OF HEARING

PLEASE TAKE NOTICE that the hearing on the Intervening Plaintiffs, Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity, Motion To Intervene Pursuant To MCR 2.209 will be heard before the Honorable Timothy P. Connors on Thursday, December 15, 2016, at 8:30 a.m., or as soon thereafter as counsel may be heard.

By: _____

ROBERT CHARLES DAVIS (P40155)
Attorney for Intervening Plaintiffs
Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity,
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(586) 469-4300
(586) 469-4303 – Fax
rdavis@dbsattorneys.com

Dated: December 5, 2016

PROOF OF SERVICE

I served the foregoing **Notice of Hearing** upon the attorneys of record and/or parties in this case on **December 5, 2016**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

☒ U.S. Mail
☐ Hand Delivered
☐ Express Mail Private
☐ Fax
☐ Messenger
☐ Other: E-file

_____
Elaine M. Michling

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

Case No. 88-34734-CE
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Attorneys for Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ellen Rabinowitz

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INTERVENING PLAINTIFFS, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, AND WASHTENAW COUNTY HEALTH OFFICER, ELLEN RABINOWITZ'S, MOTION TO INTERVENE PURSUANT TO MCR 2.209 AND PROOF OF SERVICE

The Intervening Plaintiffs, Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity for their Motion To Intervene Pursuant To MCR 2.209 rely upon their attached Brief in Support.

By: _____

ROBERT CHARLES DAVIS (P40155)
Attorney for Intervening Plaintiffs
Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity,
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(586) 469-4300
(586) 469-4303 – Fax
rdavis@dbsattorneys.com

Dated: December 5, 2016

PROOF OF SERVICE

I served the **Intervening Plaintiffs, Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity for their Motion To Intervene Pursuant To MCR 2.209** upon the attorneys of record and/or parties in this case on **December 5, 2016**. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

☰ U.S. Mail
☐ Hand Delivered
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☐ Messenger
☐ Other: E-file

_____
Elaine M. Michling

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

Case No. 88-34734-CE
Hon. Timothy P. Connors

-v-

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

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Attorneys for Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ellen Rabinowitz

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INTERVENING PLAINTIFFS, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, AND WASHTENAW COUNTY HEALTH OFFICER, ELLEN RABINOWITZ'S, BRIEF IN SUPPORT OF THEIR MOTION TO INTERVENE PURSUANT TO MCR 2.209 AND PROOF OF SERVICE

The Intervening Plaintiffs, Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity, for their Brief In Support of their Motion to Intervene Pursuant to MCR 2.209, state the following:

PREAMBLE

The Governor issued emergency "cleanup" levels for 1,4 dioxane. It is now time for the 1,4 dioxane contamination in Washtenaw County to be cleaned up to the new rules. The Governor also categorized the current situation as a "public health" concern. This triggers the statutory duties of the County and supports intervention as requested herein.

I. GENERAL INTRODUCTION

This matter was filed in 1988. This litigation is the result of 1,4 dioxane contamination caused by the operations at the Defendant's facility. The matters involved are well publicized and well grounded in the Court Record. There are no factual disputes about the source of the 1,4 dioxane contamination. There is no factual dispute that the contamination is impacting Washtenaw County as a public health concern.

In about 1992, the MDEQ's predecessor and the Defendant entered into a Consent Judgment. The goal of the first Consent Judgment was to provide details and steps for the cleanup of the 1,4 dioxane contamination. That effort failed. Over the years, a series of amended Consent Judgments were negotiated and executed. To date, there is no effective "cleanup" of the 1,4 dioxane contamination. The cleanup efforts have failed.

On October 27, 2016, Michigan issued certain Emergency Rules ("Emergency Rules") which now recognize that 1,4 dioxane is in the groundwater near residential homes in Ann Arbor, Michigan, County of Washtenaw. The Emergency Rules state that the prior cleanup criteria associated with the 1,4 dioxane "is insufficient" to protect the public health. A "public health" issue is now triggered and is squarely before this Honorable Court. By statute, the County and its appropriate officials are charged with jurisdiction and responsibility for public health issues in Washtenaw County.

The Emergency Rules impose new "cleanup" criteria for 1,4 dioxane. The procedures followed to issue the Emergency Rules amplify the emergency now before this Honorable Court. Based on a study, the Emergency Rules were signed by Governor Rick Snyder on October 27, 2016. The Emergency Rules impose an actionable cleanup standard and identify a public health concern.

The Intervening Plaintiffs include the Washtenaw County Health Department and its Health Officer, Ms. Ellen Rabinowitz ("Rabinowitz"). The Washtenaw County Health Department and Rabinowitz have a statutory duty to protect the "public health". The people of Washtenaw County include the individuals living in the residential homes which are at immediate and now confirmed risk from the 1,4 dioxane contamination. The Washtenaw County Health Department and Rabinowitz have a distinct interest and a statutory duty to protect the public health of the citizens of Washtenaw County. It is now clear -- as declared by the Governor -- that a public health issue is at issue.

Washtenaw County, the Washtenaw Health Department and Washtenaw Health Officer Rabinowitz seek to intervene in the captioned litigation to ensure that the impacted public health is protected and that the unique interests of the Intervening Plaintiffs are heard and protected in the litigation process. A draft Complaint is attached as **Exhibit 1**. The Emergency Rules are attached as **Exhibit 2**.

II. STANDARDS OF REVIEW

A. MCR 2.209(A) Intervention By Right.

MCR 2.209(A) states that, on timely application, a person has a right to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. This applies here.

B. MCR 2.209(B) Permissive Intervention.

MCR 2.209(B) provides that a party may seek permissive intervention when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Intervening Plaintiffs have an interest in the subject of this litigation and that defined interest will be affected if they are not allowed to intervene. As set forth herein, the Standards of Review favors and supports this Intervention Motion.

III. STATEMENT OF THE RELEVANT AND UNCONTROVERTED FACTS

A. CURRENT RELEVANT FACTS.

The Defendant used 1,4 dioxane in its manufacturing process. Impacted wastewater from the Defendant's processes was released from the Defendant's facility. Numerous plumes of 1,4 dioxane have now migrated in the groundwater throughout Washtenaw County. The impacted groundwater plumes stretch north toward M-14, east toward downtown Ann Arbor, and west along Jackson Avenue. The current Consent Judgment process is not effective in addressing this

contamination or effectuating a cleanup that protects the public health. (The various Consent Judgments are part of this Court's Record.)

Michigan recently released the results of a certain shallow groundwater investigation. The investigation discovered 1,4 dioxane in two (2) test wells located in a residential area on Seventh Street between Huron and Liberty. As a direct result, Michigan issued the Emergency Rules (**Exhibit 2**) which address the 1,4 dioxane "cleanup" criteria going forward. In addition to the discovery of 1,4 dioxane in shallow groundwater, 1,4 dioxane plumes continue to migrate in Washtenaw County. The current Consent Judgment process is not effective and is not protective of public health in Washtenaw County. The current Consent Judgment process does not include a viable "cleanup" strategy that addresses the public health concerns for Washtenaw County. Intervention to protect and advise on the public health concerns is requested.

The primary impact of the Emergency Rules is a new "cleanup" criteria for 1,4 dioxane. Between 2002 and October 27, 2016, the 1,4 dioxane cleanup criterion for drinking water was 85 parts per billion (ppb). Now, the State of Michigan has ruled that standard to be "outdated and not protective of public health". (**Exhibit 2**) The new criterion -- by emergency -- is 7.2 ppb in drinking water, with a residential vapor intrusion screening criterion of 29 ppb. These new cleanup standards will require an actionable cleanup plan to meet the cleanup criteria. The cleanup strategy going forward must address the declared public health issues. The cleanup going forward must address the source of the contamination and effectuate a cleanup that removes the contamination at issue to the newly allowed levels.

It is factually clear that the extent of 1,4 dioxane contamination in the groundwaters of Washtenaw County is not yet defined. It is factually clear that there is a "public health" threat. It is factually clear that a cleanup has not been completed. Intervention by the County --

especially its Health Department -- is appropriate now to ensure the protection of the public health in Washtenaw County.

B. CONSENT JUDGMENT HISTORY.

Michigan first brought this action in 1988 to compel the Defendant to remediate releases of hazardous substances from the "Source Property". In 1992, Michigan and the Defendant entered into a Consent Judgment. The goal of the first Consent Judgment was to remove and treat all of the contaminated groundwater. This has not happened. No cleanup is effectuated to date.

The MDEQ revised the Consent Judgment and permitted less stringent requirements. This violates the law at MCL 324.20118 and its regulations. In 2005, a second amended Consent Judgment and other Court Orders wholly changed the nature of the cleanup from the promise of removal and treatment of the contaminated groundwater to some form of "containment strategy". This violates the law and applicable regulations. In other words, the original goal of removing and cleaning up the contamination was set aside. Under the new Consent Judgment, the Defendant was only charged with "stopping the spread" of the contamination except in a certain "Prohibition Zone". This major concession and re-direction of the cleanup objective is significant -- but not supported by law. The change was contrary to the protection of public health. Now, the public health is determined to be at issue and a new cleanup criteria is required and dictated by the Emergency Rules. Intervention by the County parties is both timely and supported.

IV. LEGAL ARGUMENTS

A. The Intervening Plaintiff's Meet the Requirements For Intervention By Right Pursuant to MCR 2.209(A).

MCR 2.209(A) states that, on timely application, a person has a right to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Here each of those elements are met.

1. The Intervening Plaintiffs Have A Distinct Interest In Protecting The Public Health of The People Of Washtenaw County And That Interest Will be Impacted If They Are Not Allowed To Intervene.

The first element of intervention under MCR 2.209 (A) requires a demonstration that the Intervening Plaintiffs have an interest relating to the property or transaction which is the subject of the action. As stated in detail below, the Intervening Plaintiffs have a distinct interest in the subject of this action because it impacts the public health of Washtenaw County.

a. The Washtenaw County Health Department Has a Statutory Duty To Protect the Health of the People of Washtenaw County.

MCL 333.2413 states that the local governing entity of a county shall provide for a county health department.

> "Sec. 2413. Except if a district health department is created pursuant to section 2415,[1] **the local governing entity of a county shall provide for a county health department** which meets the requirements of this part, and may appoint a county board of health." (MCL 333.2413) (Emphasis Added)

MCL 333.2428 states that a local health department shall have a full-time local health officer appointed by the local governing entity. The local health officer shall act as the administrative officer of the board of health and may take actions necessary to carry out the local health

department's functions and to protect the "public health". This is the direct and statutory role/duty of Intervening Plaintiff Rabinowitz.

> "Sec. 2428. (1) **A local health department shall have a full-time local health officer appointed by the local governing entity** or in case of a district health department by the district board of health. The local health officer shall possess professional qualifications for administration of a local health department as prescribed by the department.
>
> **(2) The local health officer shall act as the administrative officer of the board of health and local health department and may take actions and make determinations necessary or appropriate to carry out the local health department's functions under this part or functions delegated under this part and to protect the public health and prevent disease."** (MCL 333.2428) (Emphasis Added)

Additionally, MCL 333.2433 states that a health department "shall" continually and diligently promote the public health including controlling **environmental health hazards**. The standard of statutory implementation is "shall".

> **"Sec. 2433. (1) A local health department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards**; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law.
>
> (2) A local health department shall:
>
> (a) Implement and enforce laws for which responsibility is vested in the local health department.
>
> (b) Utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.
>
> (c) Make investigations and inquiries as to:
>
> (*i*) The causes of disease and especially of epidemics.
> (*ii*) The causes of morbidity and mortality.
> (*iii*) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness.

(d) Plan, implement, and evaluate health education through the provision of expert technical assistance, or financial support, or both.

(e) Provide or demonstrate the provision of required services as set forth in section 2473(2).[1]

(f) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law.

(g) Plan, implement, and evaluate nutrition services by provision of expert technical assistance or financial support, or both.

(3) This section does not limit the powers or duties of a local health officer otherwise vested by law." (MCL 333.2433) (Emphasis Added)

The use of the term "shall" within MCL 333.2433 is instructive. According to the Michigan Court of Appeals, the use of the word "shall" in a statute requires that an action be mandatory.

> "The Legislature's use of the word " **'shall' indicates that the required action is mandatory, not permissive**, unless this interpretation 'would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." ' *Kosmyna v Botsford Community Hospital,* 238 Mich.App 694, 699; 607 NW2d 134 (2000), quoting *Browder v. Int'l Fidelity Ins Co,* 413 Mich. 603, 612; 321 NW2d 668 (1982)." **(Perez v. Black Clawson Co.**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [August 28, 2001] (Docket No. 221010).) (Emphasis Added) **(Exhibit 3)**

The Washtenaw County Health Department and its Health Officer have a mandatory duty to promote the public health and protect the people of Washtenaw from environmental health hazards.

MCL 333.2435 provides the Washtenaw County Health Department with the power to "advise" other agencies and persons as to the water supply. Again, this is a statutory mandate. This is directly on point to the issues now identified in this litigation.

"Sec. 2435. A local health department may:

(a) Engage in research programs and staff professional training programs.

(b) Advise other local agencies and persons as to the location, drainage, water supply, disposal of solid waste, heating, and ventilation of buildings.

(c) Enter into an agreement, contract, or arrangement with a governmental entity or other person necessary or appropriate to assist the local health department in carrying out its duties and functions unless otherwise prohibited by law.

(d) Adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination.

(e) Accept gifts, grants, bequests, and other donations for use in performing the local health department's functions. Funds or property accepted shall be used as directed by its donor and in accordance with the law, rules, and procedures of this state and the local governing entity.

(f) Sell and convey real estate owned by the local health department.

(g) Provide services not inconsistent with this code.

(h) Participate in the cost reimbursement program set forth in sections 2471 to 2498.[1]

(i) Perform a delegated function unless otherwise prohibited by law." (MCL 333.2435) (Emphasis Added)

It is clear that the Washtenaw County Health Department and its Health Officer have a duty to protect the public health of the people of Washtenaw.

b. The Public Health Of Washtenaw County Is At Risk.

1. The MDEQ Emergency Rules Executed By Governor Rick Snyder On October 27, 2016 Amplify The Concern And Support Intervention.

Michigan recently issued the Emergency Rules regarding the establishment of the new cleanup criteria for 1,4 dioxane. The Emergency Rules state that they are promulgated by the Department of Environmental Quality in order to establish a "cleanup criteria" under the

remediation provisions of the state law. Thus, the stated goal for the Emergency Rules is "cleanup". This must be the goal and the objective going forward given the now identified public health issue.

> "**These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane** under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended." (**Exhibit** 2 -- Emergency Rules) (Emphasis Added)

The Emergency Rules state that the MDEQ finds that releases of 1,4 dioxane have occurred and pose a threat to "public health" safety, or welfare of its citizens and the environment. This triggers the interests and statutory role of the County as set forth above.

> "**The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment.**" (**Exhibit** 2 -- Emergency Rules) (Emphasis Added)

The Emergency Rules affirmatively state that recent shallow groundwater investigations in the "Ann Arbor area" have detected 1,4 dioxane in the groundwater in close proximity to residential homes. This is a major problem and represents a significant ***public health concern***. Again, this triggers the statutory duties of the County as set forth above.

> "**Recent shallow groundwater investigations In the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes.** The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings." (**Exhibit 2** -- Emergency Rules) (Emphasis Added)

The Emergency Rules state that current cleanup criteria for 1,4 dioxane initially established in 2002 are outdated and are not protective of "**public health**" with respect to the drinking water

ingestion pathway and the vapor intrusion pathway. Again, this represents a significant public health concern and triggers the statutory duty of the County as set forth above.

> "**The *current* cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.**" (**Exhibit 2** -- Emergency Rules) (Emphasis Added)

The Emergency Rules then conclude that, because the previous cleanup criteria for 1,4 dioxane are not protective of public health, new emergency rules are demanded and set the residential drinking water cleanup criterion for dioxane in groundwater at 7.2 parts per billion and the residential vapor intrusion criterion at 29 parts per billion for 1,4 dioxane. These are new and actionable "cleanup" requirements.

> "**The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health** with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.
>
> **Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.**
>
> **Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion."** (**Exhibit 2** -- Emergency Rules) (Emphasis Added)

Governor Rick Snyder executed the Emergency Rules and stated that he concurs in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the "public interest" requires the promulgation of the above rule

> "Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rule." (**Exhibit 2** -- Emergency Rules) (Emphasis Added)

The Washtenaw County Health Department and its Health Officer have a unique interest and a statutory duty to protect the "public health" of Washtenaw County. By stating that the public health is at risk, the Governor has now triggered the interests and the duties of the Intervening Plaintiffs as set forth herein. The Intervening Plaintiffs clearly have an interest in protecting the public health of the people of Washtenaw from the environmental health hazards noted in the Emergency Rules executed by the Governor.

2. The Interests of The Intervening Plaintiffs Are Not Adequately Protected Necessitating the Involvement of the Intervening Plaintiffs.

The second element of intervention under MCR 2.209 (A) requires a demonstration that the interests of the intervening plaintiffs are not being adequately represented. As stated above, the Washtenaw County Health Department has its own mandatory statutory duty charged to it by the Michigan Legislature. MCL 333.2433 imposes a mandatory statutory duty on the Washtenaw County Health Department to promote the public health including controlling environmental health hazards.

> **"Sec. 2433. (1) A local health department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards**; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law." (MCL 333.2433) (Emphasis Added)

The Washtenaw County Health Officer has the statutory power to take actions necessary to carry out the local health department's functions and to protect the public health.

> "Sec. 2428. (1) **A local health department shall have a full-time local health officer appointed by the local governing entity** or in case of a district health department by the district board of health. The local health officer shall possess professional qualifications for administration of a local health department as prescribed by the department.

> **(2) The local health officer shall act as the administrative officer of the board of health and local health department and may take actions and make determinations necessary or appropriate to carry out the local health department's functions under this part or functions delegated under this part and to protect the public health and prevent disease."** (MCL 333.2428) (Emphasis Added)

The Governor -- for the first time -- has now pronounced that the public health is at risk due to an environmental health hazard. The Emergency Rules, as executed by the Governor, find that the previous cleanup criteria for 1,4 dioxane are not protective of public health.

> **"The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health** with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.
>
> **Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.**
>
> **Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion." (Exhibit 2** -- Emergency Rules) (Emphasis Added)

By noting that the public health is at risk, the statutory duty of the Washtenaw County Public Health Department and its Health Officer is triggered compelling their intervention in this matter.

The MDEQ has been handling this matter for many years. The process has failed. Despite their efforts, the situation is now the subject of Emergency Rules intended to address what is now asserted as a public health concern. The new standards are for "cleanup" and not for containment or prohibition zones. A "cleanup" standard requires action. There must now be action intended to meet the cleanup levels. The public health of Washtenaw County is governed

by state statutes which compel action. The County now has a direct and statutory duty to be involved in this litigation.

3. **The Intervening Plaintiffs' Motion To Intervene Is Timely.**

The Intervening Plaintiffs' Motion to Intervene is timely. The Intervening Plaintiffs initiated this Motion within weeks of the Emergency Rules being issued and signed by the Governor. While this case has already proceeded to various Consent Judgments, the prior entering of a Consent Judgment does not bar a Motion to Intervene under MCR 2.309(A)(3). The Michigan Court of Appeals has ruled that, the prior entry of a judgment, does not bar a motion to intervene under MCR 2.309(A). In **People** v **14925 Livernois**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [September 15, 2016] (Docket No. 327377) the trial court denied a motion to intervene solely because a final judgment had already been entered.

> "**The trial court denied IIG's motion to intervene solely because it determined that the motion was untimely, as a final judgment had already been entered. . . . We, however, disagree that a final judgment acts as a bar in all circumstances and that these cases are controlling.**" (**People** v **14925 Livernois**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [September 15, 2016] (Docket No. 327377).) (Emphasis Added) (**Exhibit 4**)

The Michigan Court of Appeals reversed and ruled that, when a party seeks intervention as a matter of right under MCR 2.209(A), there is no need to consider whether a judgment has already been entered.

> "Third, the proposed intervenors in *Dean* sought *permissive intervention* through MCR 2.209(B), **and here, IIG sought *intervention of right* through MCR 2.209(A). Under the rules for permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." MCR 2.209(B). Notably, under MCR 2.209(A) for intervention of right, there is no corresponding consideration**. Thus, unlike with intervention of right, when a request for permissive intervention occurs, a court must evaluate any potential prejudice to the original parties, which necessarily includes consideration of whether a judgment may have

> already been entered in the action." (**People** v **14925 Livernois**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [September 15, 2016] (Docket No. 327377).) (Emphasis Added) (**Exhibit 4**)

Here, much like in 14925 Livernois, the Intervening Plaintiffs seek intervention of right under MCR 2.209(A). As a result, the prior entry of the Consent Judgment does not bar this Motion.

B. The Intervening Plaintiffs Also Meet the Requirements For Permissive Intervention Pursuant to MCR 2.209(B).

MCR 2.209 provides that a party may seek permissive intervention when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Here, the Intervening Plaintiffs' claim related to protecting Washtenaw's "public health" has a common question of law and fact with the main action. As stated above, the Intervening Plaintiffs have a statutory duty to protect the County's public health. The Governor has made it clear through the Emergency Rules that the cleanup criteria established in the main underlying litigation are not sufficient to protect the public health. There is clearly a question of law and fact in common between the Intervening Plaintiffs' interest in this litigation and the Plaintiffs' interest in the litigation.

Moreover, the intervention of the intervening Plaintiffs will not unduly delay or prejudice the adjudication of the rights of the original parties. The Intervening Plaintiffs initiated this Motion within weeks of the Emergency Rules being issued by the MDEQ and signed by the Governor. While this case has already proceeded to various Consent Judgments, the prior entering of a Consent Judgment does not bar a motion to intervene under MCR 2.309(A)(3).

C. The Intervening Plaintiffs Have Standing.

In 2010, the Michigan Supreme Court ruled that Michigan standing jurisprudence should be "restored" to a limited, prudential doctrine where a litigant will have standing whenever there is a legal cause of action. The Michigan Supreme Court ruled that a litigant who meets the requirements of MCR 2.605 will have standing to seek a declaratory judgment. This applies here.

> "We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing.[FN19] **Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment.**[FN20] (**Lansing Schools Educ. Ass'n** v. **Lansing Bd. of Educ.**, 487 Mich. 349, 372, 792 N.W.2d 686, 699 (2010).)

According to this Michigan Supreme Court, an actual controversy, pursuant to MCR 2.605, will exist if the plaintiffs plead and prove facts which indicate an **"adverse interest"** necessitating the sharpening of the issues raised.

> "FN20. The pre- *Lee/Cleveland Cliffs* standard, which was also incorporated into *Associated Builders & Contractors,* remains: "[t]he essential requirement of the term 'actual controversy' under **the rule is that plaintiffs 'plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.**' " *Associated Builders & Contractors,* 472 Mich. at 126, 693 N.W.2d 374, quoting *Shavers,* 402 Mich. at 589, 267 N.W.2d 72." (**Lansing Schools Educ. Ass'n** v. **Lansing Bd. of Educ.,** 487 Mich. 349, 372, 792 N.W.2d 686, 699 (2010).)

The Washtenaw County Health Department has its own mandatory statutory duty charged to it by the Michigan Legislature. MCL 333.2433 imposes a mandatory and statutory duty on the Washtenaw County Health Department to promote the public health including controlling environmental health hazards. (See: MCL 333.2433) The Washtenaw County Health Officer has the statutory power to take actions necessary to carry out the local health department's functions and to protect the public health. (See: MCL 333.2428) Here, the

Governor has noted that the public health is at risk due to an environmental health hazard. As stated above, the Emergency Rules, as executed by the Governor, find that the previous cleanup criteria for 1,4 dioxane are not protective of public health. (**Exhibit 2** -- Emergency Rules) There is clearly an adverse interest necessitating the sharpening of the issues raised. The Intervening Plaintiffs clearly have standing to seek intervention.

V. CONCLUSIONS AND RELIEF REQUESTED

The Governor has signed Emergency Rules which relate directly to a specified public health concern. The public health concern impacts Washtenaw County. The County -- especially on behalf of its County Health Officer -- has a statutory duty to address public health issues. These statutory duties are triggered and intervention as a right is supported as a matter of fact and law.

WHEREFORE, the Intervening Plaintiffs respectfully request that this Honorable Court enter an Order:

(I) Granting the Plaintiffs' Motion to Intervene; and

(II) Granting such further relief in favor of the Plaintiffs as this Honorable Court deems just, equitable and appropriate under the circumstances presented.

By: _____

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Dated: December 5, 2016

PROOF OF SERVICE

I served Intervening Plaintiffs, Washtenaw County, Washtenaw County Board of Health and Washtenaw County Health Officer Rabinowitz's Brief in Support of the Motion to Intervene Pursuant to MCR 2.209 upon the attorneys of record and/or parties in this case on December 5, 2016. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

Ξ U.S. Mail	☐ Fax
☐ Hand Delivered	☐ Messenger
☐ Express Mail/Private	☐ Other: E-file

Elaine M. Michling

EXHIBIT 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

and

CITY OF ANN ARBOR

Intervening Plaintiff,

vs.

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant,

and

WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, AND WASHTENAW COUNTY HEALTH OFFICER, ELLEN RABINOWITZ, in her official capacity,

Intervening Plaintiffs,

vs.

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

Case No. 88-34734-CE

Hon. Timothy P. Connors

DAVIS BURKET SAVAGE LISTMAN TAYLOR
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(586) 469-4300
Attorneys for Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ellen Rabinowitz

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INTERVENING PLAINTIFFS, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, AND WASHTENAW COUNTY HEALTH OFFICER, ELLEN RABINOWITZ'S, COMPLAINT

There is currently a pending case in the Washtenaw County Circuit Court being Case No. 88-34734-CE before the Hon. Timothy P. Connors involving the same property and general matters set forth herein.

/s/ Robert Charles Davis
ROBERT CHARLES DAVIS (P40155)

The Intervening Plaintiffs, Washtenaw County, Washtenaw County Health Department and Washtenaw County Health Officer, Ms. Ellen Rabinowitz, in her official capacity (collectively herein referenced to as "Washtenaw"), state the following for their Complaint as Intervenors:

JURISDICTIONAL ALLEGATIONS

1. This Court has jurisdiction over this matter pursuant to MCL 324.1701, MCL 324.20135 and MCL 324.20137, and because Washtenaw seeks equitable/injunctive relief as set forth herein.

2. Venue is proper in this court pursuant to MCL 324.1701(1), MCL 324.20135(7), MCL 324.20137(3) and MCL 600.1629 because the release (MCL 324.20101) of Hazardous Substances that is the subject of this Complaint occurred in Washtenaw County, State of Michigan.

3. The Intervening Plaintiff, Washtenaw County, is an authorized governmental entity located at and conducting business at 200 N. Main Street, P.O. Box 8645, Ann Arbor, in Washtenaw County, State of Michigan.

4. The Intervening Plaintiff, Washtenaw County Health Department ("Health Department"), is an authorized governmental entity located at and conducting business at 55 Towner Street, Ypsilanti, Michigan 48197, in Washtenaw County, State of Michigan.

5. The Intervening Plaintiff, Washtenaw County Health Executive Director, Ms. Ellen Rabinowitz, is the authorized and appointed Health Officer for the Health Department and she conducts official business at 55 Towner Street, Ypsilanti, Michigan 48197, in the County of Washtenaw, State of Michigan.

6. MCL 333.2413 states that the local governing entity of a County "shall" provide for a county health department which otherwise complies with the applicable State law.

> "Sec. 2413. Except if a district health department is created pursuant to section 2415,[1] **the local governing entity of a county shall provide for a county health department** which meets the requirements of this part, and may appoint a county board of health." (MCL 333.2413) (Emphasis Added)

7. MCL 333.2428 states that a local health department "shall" have a full-time local health officer appointed by the local governing entity. The local health officer shall act as the administrative officer of the board of health and may take actions necessary to carry out the local health department's functions and to protect the "public health".

8. MCL 333.2433 states that a health department "shall" continually and diligently promote the public health including controlling **environmental health hazards**.

9. Under controlling state law, the Health Department and its duly appointed Health Officer have a mandatory duty to promote the public health and protect the people of Washtenaw County from environmental health hazards and public health concerns.

10. MCL 333.2435 provides the Health Department with the power to "advise" other agencies and persons as to the water supply. This is a statutory mandate.

11. The Health Department and its Health Officer have a duty to protect the public health of the people of Washtenaw County, State of Michigan.

12. Defendant Gelman Sciences, Inc. d/b/a Pall Life Sciences ("Pall" or "Defendant") is a Michigan corporation that conducts business in Washtenaw County, State of Michigan.

13. Defendant Pall is the successor of the 1997 merger between Gelman Sciences, Inc. and Pall Acquisition Corporation through a stock purchase agreement and merger.

14. Defendant Pall owns certain real property located at 600 South Wagner Road, Ann Arbor, Michigan, 48103 ("Source Property").

15. Defendant operates the Source Property.

16. The Defendant continues to occupy and operate the Source Property.

17. The Defendant caused Hazardous Substances to be released from the Source Property.

GENERAL ALLEGATIONS

A. History of the Defendant's Contamination.

18. For many years, the Defendant released 1,4 dioxane, a Hazardous Substance by law, to the environment at the Source Property.

19. Between 1966 and 1986, the Defendant unlawfully released 1,4 dioxane at the Source Property by several admitted and otherwise unlawful operations.

20. 1,4 dioxane in unacceptable levels in soils and groundwater is a public health concern to Washtenaw County as declared by the State of Michigan.

21. As a result of the unlawful actions by the Defendant, 1,4 dioxane entered the soil and groundwater at the Source Property and has now migrated in the groundwater and soils in Washtenaw County, State of Michigan.

22. Drinking water wells are contaminated by the 1,4 dioxane released at the Source Property and 1,4 dioxane has negatively impacted groundwater, soils and surface water in Washtenaw County, State of Michigan.

23. The 1,4 dioxane released by Defendant infiltrated the groundwater and continues to spread under and through Washtenaw County, State of Michigan.

24. In 1992, Defendant entered into a Consent Judgment with the State of Michigan, and the Defendant -- by Consent/Contract -- promised to remediate the 1,4 dioxane contamination in Washtenaw County, State of Michigan.

25. By Consent Judgment, contaminated groundwater was to be removed from affected aquifers, treated to eliminate the 1,4 dioxane contamination, and then returned to the environment safely.

26. By Consent Judgment, the Defendant was to conduct a remediation and removal of the 1,4 dioxane contamination.

27. The Defendant did not remove and treat the contaminated groundwater from the Source Property or from other aquifers in Washtenaw County, State of Michigan.

28. The Defendant did not contain the migration of 1,4 dioxane in Washtenaw County, State of Michigan.

29. In 1996, an amendment to the Consent Judgment required the Defendant to change its Remedial Action Plan. The Defendant was required to install additional monitoring and/or purge wells to ensure that the clean-up objectives in the first Consent Judgment were achieved.

30. In 2005, the Defendant stopped trying to remediate and remove (cleanup) the 1,4 dioxane contamination from the impacted groundwater as promised and as set forth by Consent/Contract.

31. In 2005, the Defendant broke its promises and switched to a process of containing and allowing the contamination in a "Prohibition Zone".

32. The Prohibition Zone encompassed the areas of known contamination.

33. The revised strategy of ignoring the remediation and removal of the 1,4 dioxane is contrary to State law and its applicable regulations.

B. <u>The Governor's Recent Execution Of The Emergency Rules.</u>

34. On October 27, 2016, Michigan issued Emergency Rules ("Emergency Rules") regarding the establishment of the new "cleanup" criteria for 1,4 dioxane. The rules govern actionable "cleanup" and not containment theories.

35. The Emergency Rules state that they are promulgated by the Department of Environmental Quality in order to establish a "<u>cleanup criteria</u>" under the "remediation" provisions of the State law. Again, the statutory purpose is cleanup.

> "**<u>These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane</u>** under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended." (**Exhibit 1** -- Emergency Rules) (Emphasis Added)

36. The Emergency Rules state that the MDEQ finds that releases of 1,4 dioxane have occurred and pose a threat to "public health" safety, or welfare of its citizens and the environment. This triggers the jurisdiction of Washtenaw County as set forth herein.

> "**The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment.**" (**Exhibit 1** -- Emergency Rules) (Emphasis Added)

37. The Emergency Rules affirmatively state that recent shallow groundwater investigations in the "Ann Arbor area" have detected 1,4 dioxane in the groundwater in close proximity to residential homes. There is now an affirmative admission that the extent of this public health concern "is unknown".

> "**Recent shallow groundwater investigations In the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes**. The known area of 1,4-dioxane groundwater contamination in Ann Arbor **covers several square miles defined by a boundary of 85 parts per billion**, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings." (**Exhibit 1** -- Emergency Rules) (Emphasis Added)

38. The Emergency Rules state that current cleanup criteria for 1,4 dioxane initially established in 2002 are outdated and are not protective of "**public health**" with respect to the drinking water ingestion pathway and the vapor intrusion pathway. Again, this triggers a public health concern and the jurisdiction of the County as set forth herein.

> "**The *current* cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.**" (**Exhibit 1** -- Emergency Rules) (Emphasis Added)

39. The Emergency Rules then find that, because the previous cleanup criteria for 1,4 dioxane are not protective of public health, new emergency rules are demanded which set the residential drinking water cleanup criterion for dioxane in groundwater at 7.2 parts per billion and the residential vapor intrusion criterion at 29 parts per billion for 1,4 dioxane.

> "**The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health** with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires the promulgation of emergency rules without following the notice and participation procedures

required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.

Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.

Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion." (**Exhibit 1** -- Emergency Rules) (Emphasis Added)

40. Governor Rick Snyder executed the Emergency Rules and stated that he concurs in the findings of the Department of Environmental Quality that circumstances creating an emergency have occurred and the "public interest" requires the promulgation of the above rule.

"Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), **I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rule**." (**Exhibit 1** -- Emergency Rules) (Emphasis Added)

41. The continued spread of the 1,4 dioxane plumes threatens the health, safety and welfare of the citizens of Washtenaw County, State of Michigan.

42. There are approximately 83 homes that are within 600 feet of the estimated 1,4 dioxane plume boundary. Approximately 62 of those homes do not currently have access to municipal water supplies. This raises a public health concern to Washtenaw County, State of Michigan.

43. Defendant's groundwater pollution threatens to impair homes and property by causing 1,4 dioxane levels in water under those homes to exceed the current and/or proposed cleanup criteria, for inhalation and drinking water.

44. In the past, when 1,4 dioxane has impaired drinking water wells, affected property owners have been forced to connect to the City's municipal water system.

45. The continued and uncontained spread of 1,4 dioxane, and the fact that the MDEQ has concluded that, even after a 30-year effort, the extent of contamination at levels above the current cleanup criteria is "unknown," threatens the drinking water supplies in Washtenaw County, State of Michigan.

COUNT I

DECLARATORY JUDGMENT

46. Washtenaw re-allege paragraphs 1 through 45 as though fully set forth herein.

47. MCR 2.605 states that, in a case of actual controversy within its jurisdiction, a court may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought.

48. MCR 2.605 states that a court may order a speedy hearing of an action for declaratory relief and may advance it on the calendar.

49. Washtenaw seeks a speedy hearing and the advancement of this case on this Court's calendar as this case involves immediate impacts and irreparable harm to the environment and the public health of Washtenaw County, State of Michigan.

50. Certain areas within Washtenaw County, including areas impacted by unforeseen changes in the migration pathway of the Hazardous Substances outside of the Prohibition Zone that have resulted in the presence of 1,4 dioxane at concentrations that exceed the applicable cleanup criteria and/or State of Federal Maximum Contaminant Level, are "Facilities," as that term is defined by MCL 324.20101(1)(o), due to Releases of Defendant's Hazardous Substances (1,4 dioxane) that originated at and from the Source Property owned or operated by the Defendant.

51. The Defendant owned the Source Property from which those Hazardous Substances (including 1,4 dioxane) were unlawfully Released.

52. The Defendant operated the Source Property from which those Hazardous Substances (including 1,4 dioxane) was Released.

53. The Defendant arranged to treat or to dispose of those Hazardous Substances (including 1,4 dioxane) that were Released at and from Defendant's Source Property.

54. The Releases of Hazardous Substances by Defendant have migrated to and under Washtenaw County, State of Michigan, in concentrations that exceed the current and legally imposed cleanup criteria.

55. Pursuant to MCL 324.20126(4)(c), Washtenaw County is not liable under Part 201 of NREPA with respect to the Hazardous Substances Released by the Defendant.

56. The Defendant is a liable party under Part 201 of NREPA with respect to the Releases of the Hazardous Substances described above, in accordance with one or more of the following: MCL 324.20126(1)(a) (as an owner or operator who is responsible for the activity that caused the Releases); MCL 324.20126(1)(b) (as an owner or operator at the time of the disposal of Hazardous Substances, who is responsible for the activity that caused the Releases).

57. In accordance with MCL 324.20114, the Defendant is required, among other things, to (i) "...determine the nature and extent of the release at the facility"; (ii) "Immediately stop or prevent an ongoing release at the source"; and (iii) "diligently pursue response activities necessary to achieve the cleanup criteria established under [Part 201]..."

58. The Defendant has failed and refused to undertake the Response Activities required by MCL 324.20114. The Defendant has further failed to comply with the terms of the Consent Judgments, and has failed to cleanup/remediate the 1,4 dioxane contamination in Washtenaw County, State of Michigan.

59. The Defendant has allowed the 1,4 dioxane contamination to migrate.

60. An actual, substantial legal controversy now exists between Washtenaw and the Defendant, and Washtenaw is entitled to a judicial declaration of its rights and legal relationship with Defendant. Washtenaw is entitled to a declaratory judgment pursuant to Part 201 of NREPA, that as between Washtenaw and the Defendant, the Defendant is solely responsible and liable for the removal actions and remediation of the resources/property contaminated by the Releases or disposal of Hazardous Substances originating at the Source Property.

WHEREFORE, Washtenaw respectfully requests that this Honorable Court enter a Declaratory Ruling and Judgment declaring the following particulars:

(I) Defendant owned, at all relevant times, the Source Property from which certain Hazardous Substances (including 1,4 dioxane) were Released.

(II) Defendant operated, at all relevant times, the Source Property from which certain Hazardous Substances (including 1,4 dioxane) were Released.

(III) Defendant arranged to treat or to dispose of certain Hazardous Substances (including 1,4 dioxane) that were Released at and from Defendant's Source Property.

(IV) The Releases of Hazardous Substances by Defendant have migrated to and under Washtenaw County, State of Michigan in concentrations that exceed the legal cleanup criteria.

(V) On October 27, 2016, the Michigan Department of Environmental Quality Remediation and Redevelopment Division issued Emergency Rules regarding the establishment of the new cleanup criteria for 1,4 dioxane.

(VI) The Emergency Rules state that they are promulgated by the Department of Environmental Quality in order to establish a "cleanup criteria" under the remediation provisions of the state law.

(VII) The Emergency Rules state that the MDEQ finds that releases of 1,4 dioxane have occurred and pose a threat to "public health" safety, or welfare of its citizens and the environment.

(VIII) The Emergency Rules affirmatively state that recent shallow groundwater investigations in the "Ann Arbor area" have detected 1,4 dioxane in the groundwater in close proximity to residential homes.

(IX) The Emergency Rules state that current cleanup criteria for 1,4 dioxane initially established in 2002 are outdated and are not protective of "**public health**" with respect to the drinking water ingestion pathway and the vapor intrusion pathway.

(X) The Emergency Rules find that, because the previous cleanup criteria for 1,4 dioxane are not protective of public health, new emergency rules are demanded which set the residential drinking water cleanup criterion for 1,4 dioxane in groundwater at 7.2 parts per billion and the residential vapor intrusion criterion at 29 parts per billion for 1,4 dioxane.

(XI) Governor Rick Snyder executed the Emergency Rules and stated that he concurs in the findings of the Department of Environmental Quality that circumstances creating an emergency have occurred and the "public interest" requires the promulgation of the above rule.

(XII) The Defendant shall immediately undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane, including stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanup/remove the 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels now established by MDEQ.

(XIII) The Defendant shall pay to Washtenaw all costs, including attorney fees, incurred by Washtenaw.

(XIV) Awards to Washtenaw its costs, attorney fees and expert witness fees incurred in bringing this action.

COUNT II

INJUNCTION

61. Washtenaw re-allege paragraphs 1 through 60 as though fully set forth herein.

62. The Michigan Court of Appeals has ruled that, in determining whether to issue an injunction, a court must consider the following: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted.

> "In determining whether to issue a preliminary injunction, a court must consider four factors: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. *Ins. Comm'r v. Arcilio,* 221 Mich. App. 54, 77–78, 561 N.W.2d 412 (1997)." (**Thermatool Corp**. v. **Borzym**, 227 Mich. App. 366, 376; 575 N.W.2d 334, 338 (1998).)

63. There is no harm to the public interest if Washtenaw's request for an injunction is granted as the injunction will only serve to stop, and otherwise prevent by Order of this Court, the environmental contamination and risk to the public health as set forth herein.

64. The harm to Washtenaw outweighs the harm to the Defendant if the injunction is not issued. If the injunction is issued, there will be no harm to the Defendant as the Defendant will be required to protect the environment and the public health as required by the law. If the injunction is not issued, Washtenaw will continue to suffer harm to its environment and the public health.

65. Washtenaw is likely to prevail on the merits. The Record is clear that the Defendant owned the Source Property from which Hazardous Substances (including 1,4 dioxane) were Released. The Defendant operated the Source Property from which the Hazardous Substances (including 1,4 dioxane) were Released. The Defendant arranged to treat or to dispose of the Hazardous Substances (including 1,4 dioxane) that were Released at and from Defendant's Source Property. The Releases of Hazardous Substances by the Defendant have migrated to and under Washtenaw in concentrations that exceed the cleanup criteria for unrestricted residential use, or threaten to continue to be Released to and under Washtenaw (by migration).

66. The Defendant is liable under Part 201 of NREPA with respect to the Releases of the Hazardous Substances.

67. In accordance with MCL 324.20114, the Defendant is required, among other things, to (i) "...determine the nature and extent of the release at the facility"; (ii) "Immediately stop or prevent an ongoing release at the source"; and (iii) "diligently pursue response activities necessary to achieve the cleanup criteria established under [Part 201]..."

68. The Defendant has failed and refused to undertake the Response Activities required by MCL 324.20114. The Defendant has further failed to comply with the terms of the Consent Judgments, and has failed to contain the 1,4 dioxane contamination.

69. The Defendant has allowed the contaminated plumes to continue to spread in previously unforeseen ways, such that the extent of the current contamination and potential future pathways are unknown. It is clear that Washtenaw will likely prevail on the merits.

70. Washtenaw will suffer irreparable injury if the injunction is not issued. If the injunction is not issued, Washtenaw will continue to suffer the aforementioned impacts to the environment and its public health.

WHEREFORE, Washtenaw respectfully requests that this Court enter an Order and a Judgment in its favor and against Defendant that, at a minimum:

(I) Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas of Washtenaw County, State of Michigan; (ii) to take all actions necessary to stop the spread of 1,4 dioxane, including stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanup/remove 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels now lawfully established by MDEQ;

(II) Awards to Washtenaw its costs, attorney fees and expert witness fees incurred in bringing this action; and

(III) Grants such other relief as this Honorable Court deems just, equitable and appropriate under the circumstances presented, including attorney fees and costs.

COUNT III

NUISANCE AND TEMPORARY NUISANCE

71. Washtenaw re-allege paragraphs 1 through 70 as though fully set forth herein.

72. By allowing the unlawful Release of Hazardous Substances at Defendant's Source Property, by failing to stop migration of those Hazardous Substances through soil and groundwater away from Defendant's Source Property, and by failing to take actions to adequately investigate and cleanup the subject Hazardous Substances, Defendant has created and is maintaining a nuisance and a temporary nuisance that has damaged, and continues to cause damage to public health in Washtenaw County, State of Michigan.

73. The Defendant has continued to maintain and has failed to abate the nuisance and temporary nuisance it created.

74. It is possible for the Defendant to abate the temporary nuisance through a cleanup of the contamination that is consistent with the law and the Emergency Rules.

75. Washtenaw has suffered damages as a consequence of the nuisance and temporary nuisance for which the Defendant is responsible, in the form of impaired property value, the loss of use and enjoyment of property, investigative costs, costs associated with identifying and developing alternative water supplies that are not threatened by the Defendant's Hazardous Substances, litigation costs, and other costs and damages.

WHEREFORE, Washtenaw respectfully requests that this Court enter a judgment in Washtenaw's favor and against Defendant that, at a minimum:

(I) Enjoins Defendant from releasing or allowing the continued migration of its Hazardous Substances;

(II) Orders Defendant to abate the nuisance;

(III) Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of

Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane, including stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ such that there no further Hazardous Substances will remain in the soil or groundwater; and

(IV) Awards to Washtenaw all interest costs and attorney fees incurred in this litigation.

COUNT IV

PUBLIC NUISANCE

76. Washtenaw re-allege paragraphs 1 through 75 as though fully set forth herein.

77. The Michigan Court of Appeals has ruled that a public nuisance is an unreasonable interference with a common right enjoyed by the general public. The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights.

> "**A public nuisance is an unreasonable interference with a common right enjoyed by the general public. The term "unreasonable interference" includes conduct that** (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. *Wagner v. Regency Inn Corp.*, 186 Mich. App. 158, 163, 463 N.W.2d 450 (1990)." (**Cloverleaf Car Co**. v. **Phillips Petroleum Co**., 213 Mich. App. 186, 190; 540 N.W.2d 297, 300 (1995).) (Emphasis Added)

78. By allowing the unlawful Release and disposal of Hazardous Substances at Defendant's Source Property, by failing to stop migration of those Hazardous Substances from Defendant's Source Property, and by failing to take actions to adequately investigate and clean

up the Hazardous Substances, Defendant has unreasonably interfered with the property rights of the public in the vicinity of Defendant's property, thereby creating a public nuisance.

79. The Defendants actions have significantly interfered with the people of Washtenaw's public health, safety, peace, and comfort

80. The Defendant's duties are clearly proscribed by the applicable laws.

81. The Defendant knew that its actions interference with the people of Washtenaw's public health, safety, peace and comfort is producing a permanent and significant impact on public health and safety.

82. Washtenaw, as a governmental unit, is not required to show that it has suffered harm different from the general public as a result of the nuisance created by Defendant.

WHEREFORE, Washtenaw respectfully requests that this Court enter a judgment in Washtenaw's favor and against Defendant that, at a minimum:

(I) Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane, including stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ such that there no further Hazardous Substances will remain in the soil or groundwater; and

(II) Enjoins Defendant from releasing or allowing the continued migration of Hazardous Substances; and

(III) Awards to Washtenaw all interest costs and attorney fees incurred in this litigation.

COUNT V

VIOLATION OF MICHIGAN'S ENVIRONMENTAL PROTECTION ACT

83. Washtenaw re-allege paragraphs 1 through 82 as though fully set forth herein.

84. By allowing the unlawful Release of Hazardous Substances at Defendant's Property, by allowing migration of those Hazardous Substances through the soil and groundwater, and by failing to take timely and appropriate actions to adequately investigate and clean up the Hazardous Substances, Defendant has impaired and destroyed groundwater and surface waters of the State and has violated the public trust in those resources.

85. The Defendant does not have a permit or other authorization to contaminate surface or groundwater with Hazardous Substances to Washtenaw's detriment.

86. The Releases of Hazardous Substances that have caused the impairment and destruction of these resources are in violation of federal, state and local law, and in particular, Michigan's Environmental Protection Act, MCL 324.1701 et seq., and Part 201 of NREPA.

87. In accordance with Part 201 of NREPA, Defendant has affirmative obligations to take a number of actions with respect to the contamination. Those actions include, but are not limited to, the following:

(a) Determining the nature and extent of the Release;

(b) Stopping or preventing the continuing Release at the Source Property;

(c) Preventing exacerbation of the contamination caused by the Release;

(d) Diligently pursuing response activities necessary to meet the cleanup criteria specified in Part 201 of NREPA; and

(e) Taking other actions specified in Part 201 of NREPA.

88. The Defendant has failed to satisfy its affirmative obligations to clean up the Hazardous Substance contamination it has caused, including but not limited to those required under Part 201 of NREPA. The Defendant's failure has caused Hazardous Substances to migrate beyond its property, causing regional pollution, impairment and destruction of surface and groundwater resources of the State and Washtenaw.

WHEREFORE, Washtenaw respectfully requests that this Court enter judgment in Washtenaw's favor and against Defendant that, at a minimum:

(I) Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane, including, as appropriate stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ such that there no further Hazardous Substances will remain in the soil or groundwater; and

(II) Declares that Defendant has failed to comply with state and federal environmental cleanup statutes, sets forth the legal responsibilities that Defendant has with respect to Washtenaw and determines the validity, applicability and reasonableness of the cleanup criteria applicable to Defendant's cleanup of Hazardous Substances; and

(III) Awards to Washtenaw its costs, attorney fees and expert witness fees incurred in bringing this action.

COUNT VI

THIRD PARTY BENEFICIARY BREACH OF CONTRACT

89. Washtenaw re-allege paragraphs 1 through 88 as though fully set forth herein.

90. The Michigan Court of Appeals has ruled that a consent judgment is in the nature of a contract, and is to be construed and applied as such.

> "**A consent judgment is in the nature of a contract, and is to be construed and applied as such**. *Gramer v. Gramer,* 207 Mich. App. 123, 125, 523 N.W.2d 861 (1994). If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy. *Rory v. Continental Ins. Co.,* 473 Mich. 457, 468, 703 N.W.2d 23 (2005). In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage. *Staple v. Staple,* 241 Mich. App. 562, 564, 616 N.W.2d 219 (2000); *Walker v. Walker,* 155 Mich. App. 405, 406-407, 399 N.W.2d 541 (1986)." (**Laffin** v. **Laffin**, 280 Mich. App. 513, 517; 760 N.W.2d 738, 740 (2008).) (Emphasis Added)

> **"Judgments entered pursuant to the agreement of parties are of the nature of a contract.** *Massachusetts Indemnity & Life Ins. Co. v. Thomas,* 206 Mich. App. 265, 268, 520 N.W.2d 708 (1994)." (**Gramer** v. **Gramer**, 207 Mich. App. 123, 125; 523 N.W.2d 861, 862, (1994).) (Emphasis Added)

91. The Consent Judgments in the Court Record serve as a contract and are to be construed and applied as such by this Court.

92. The Michigan Supreme Court has ruled that Michigan's third-party beneficiary statute, MCL 600.1405, states that any person for whose benefit a promise is made by way of contract has the same right to enforce said promise that they would have had if the promise had been made to them directly.

> **"Michigans third-party beneficiary statute, M.C.L. § 600.1405, states in pertinent part:**
>
> **Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.**
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person." (**Schmalfeldt** v. **North Pointe Ins. Co.**, 469 Mich. 422, 427; 670 N.W.2d 651, 654 (2003).) (Emphasis Added)

93. MCL 600.1405 states that any person for whose benefit a promise is made by way of contract has the same right to enforce said promise that he would have had if the promise had been made directly to him as the promise.

> "Sec. 1405. **Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.**" (MCL 600.1405) (Emphasis Added)

94. MCL 600.1405 states that a promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

> "(1) **A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.**" (MCL 600.1405) (Emphasis Added)

95. The rights of a person for whose benefit a promise has been made shall vest at the moment that the promise becomes legally binding on the promisor.

> **"(2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested**, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, **the moment the promise becomes legally binding on the promisor**, unless there is some stipulation, agreement or understanding in the contract to the contrary." (MCL 600.1405) (Emphasis Added)

96. Here, pursuant to the Consent Judgment, the Defendant, promised to remediate/cleanup the contamination at issue.

97. The Consent Judgment, on page 1, states that the parties enter into the Consent Judgment in recognition of, and with the intention of, furtherance of the "public interest".

> **"The Parties enter this Consent Judgment in recognition of, and with the intention of, furtherance of the public interest" (Exhibit B --** Consent Judgment) (Emphasis Added)

98. Pursuant to the Consent Judgment, the Defendant undertook to remediate/cleanup the contamination of the purge wells for the benefit of the public interest in Washtenaw County, State of Michigan, thus making Washtenaw a Third-Party Beneficiary of the Consent Judgments and the contractual promises made therein.

99. Pursuant to the Consent Judgment and MCL 600.1405, Washtenaw has the same right to enforce the Defendant's promises/duties and obligations contained within the Consent Judgment that it would have had if the promises had been made directly to Washtenaw as the promise.

100. Pursuant to the Consent Judgment, the Defendant -- by contract -- promised to "remediate and remove" the 1,4 dioxane contamination in Washtenaw County, State of Michigan.

101. Pursuant to the Consent Judgment, the Defendant -- by contract -- promised to remove the contaminated groundwater from affected aquifers, treat the contaminated groundwater to eliminate the 1,4 dioxane contamination, and then return the water to the environment safely.

102. Pursuant to the Consent Judgment, the Defendant -- by contract -- promised to conduct a remediation.

103. The Defendant breached the Consent Judgment by not removing and treating all of the contaminated groundwater from the Source Property or from other aquifers in Washtenaw County, State of Michigan.

104. The Defendant breached the Consent Judgment by not containing the migration of the 1,4 dioxane in Washtenaw County, State of Michigan.

105. The Defendant breached the Consent Judgment by stopping its efforts to remove (cleanup) the 1,4 dioxane contamination from the impacted groundwater.

106. The Defendant breached the Consent Judgment by failing to:

- Monitor/operate the purge wells;
- Remediate and remove the 1,4 dioxane contamination in Washtenaw County, State of Michigan;

- Remove and treat the contaminated groundwater, in order to eliminate the 1,4 dioxane contamination, and return the water safely to the environment;

- Remove and treat all of the contaminated groundwater from the Source Property or from other aquifers in Washtenaw County, State of Michigan; and

- Contain the migration of the 1,4 dioxane in Washtenaw County, State of Michigan.

107. Washtenaw has a right to the performance of the duties contained and otherwise promised within the Consent Judgment and can seek the enforcement of those promises contained in the Consent Judgment.

108. The Defendant's breach of the Consent Judgment has proximately caused damage to Washtenaw.

WHEREFORE, Washtenaw respectfully requests that this Court enter a judgment in Washtenaw's favor and against Defendant that enforces the promise and contractual duties in the Consent Judgement and applying the Emergency Rules for cleanup as now imposed by controlling state law.

By: 

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Dated: December 5, 2016

EXHIBIT A

DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIATION AND REDEVELOPMENT DIVISION

ESTABLISHMENT OF CLEANUP CRITERIA FOR 1,4-DIOXANE

EMERGENCY RULES

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

(By the authority conferred on the Department of Environmental Quality by 1994 PA 451, 1969 PA 306, MCL 324.20104(1), MCL 324.20120a(17), and MCL 24.248)

FINDING OF EMERGENCY

These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment. Recent shallow groundwater investigations in the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes. The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings. The current cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.

These rules establish the 1,4-dioxane cleanup criterion for the drinking water ingestion pathway at 7.2 parts per billion and the vapor intrusion screening criterion at 29 parts per billion. These criteria are calculated using the latest United States Environmental Protection Agency toxicity data for the chemical 1,4-dioxane and the Department of Environmental Quality's residential exposure algorithms to protect both children and adults from unsafe levels of the chemical.

The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires

the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.

Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.

Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

C. Heidi Grether

C. Heidi Grether
Director

Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rule.

Governor

10-27-16

Date

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, Attorney General for the State of Michigan, ex rel, MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN WATER RESOURCES COMMISSION, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

OCT 3 0 1992

File No. 88-34734-CE

Honorable Patrick J. Conlin

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Attorneys for Defendant

CONSENT JUDGMENT

The Parties enter this Consent Judgment in recognition of, and with the intention of, furtherance of the public interest by (1) addressing environmental concerns raised in Plaintiffs' Complaint; (2) expediting remedial action at the Site; and (3) avoiding further litigation concerning matters covered by this Consent Judgment. The Parties agree to be bound by the terms of this Consent Judgment and stipulate to its entry by the Court.

EXHIBIT 2

DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIATION AND REDEVELOPMENT DIVISION

ESTABLISHMENT OF CLEANUP CRITERIA FOR 1,4-DIOXANE

EMERGENCY RULES

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

(By the authority conferred on the Department of Environmental Quality by 1994 PA 451, 1969 PA 306, MCL 324.20104(1), MCL 324.20120a(17), and MCL 24.248)

FINDING OF EMERGENCY

These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment. Recent shallow groundwater investigations in the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes. The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings. The current cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.

These rules establish the 1,4-dioxane cleanup criterion for the drinking water ingestion pathway at 7.2 parts per billion and the vapor intrusion screening criterion at 29 parts per billion. These criteria are calculated using the latest United States Environmental Protection Agency toxicity data for the chemical 1,4-dioxane and the Department of Environmental Quality's residential exposure algorithms to protect both children and adults from unsafe levels of the chemical.

The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires

the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.

Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.

Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

C. Heidi Grether

C. Heidi Grether
Director

Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rule.

Governor

10-27-16

Date

EXHIBIT 3

2001 WL 985823
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Gilbert PEREZ, Plaintiff-Appellee,
and
TRAVELERS INSURANCE COMPANY,
Intervening Plaintiff-Appellee,
v.
BLACK CLAWSON COMPANY, Defendant/Cross-Plaintiff/Third-Party Plaintiff,
and
SORENSON PAPERBOARD COMPANY,
Defendant/Cross-Defendant,
and
BIG M PAPERBOARD, INC., Defendant-Appellant,
and
Merritt SORENSON and Simplex Paper Company, Third-Party Defendants.
Gilbert PEREZ, Plaintiff-Appellee,
and
TRAVELERS INSURANCE COMPANY,
Intervening Plaintiff-Appellee,
v.
BIG M PAPERBOARD, INC., Defendant-Appellant,
and
SIMPLEX PAPER COMPANY, Toronto Paperboard, Inc., and Sorenson Paperboard Company, Defendants.

Nos.
221010
, 221075.
|
Aug. 28, 2001.

Before: JANSEN, P.J., and COLLINS and COOPER, JJ.

Opinion

PER CURIAM.

*1 Defendant, Big M Paperboard, Inc.,[1] appeals as of right from an order entering judgment in favor of plaintiff, Gilbert Perez, following a jury trial on plaintiff's negligence claim. The jury awarded plaintiff $195,000 for past economic damages, $5,000 for past non-economic damages, $61,000 for future medical expenses, $90,000 for future wage loss, and $90,000 for future non-economic damages. The total damages awarded by the jurors were $441,000. After subtracting $227,500 that plaintiff received in previous settlements, the trial court adjusted the remaining damages to present value and judgment was entered in favor of plaintiff and against defendant for $139,843.44 plus costs. We affirm the judgment for plaintiff, but remand to the trial court for entry of an amended order of judgment consistent with this opinion.

This case arose from plaintiff's workplace injury on a paper-cutting and rewinding machine ("machine"), which was previously owned and modified by defendant. Although defendant no longer owned the machine or the paper mill where the machine was located at the time of plaintiff's injury, and plaintiff was employed by the successive owner of the machine and mill at the time of his injury, plaintiff alleged that his injuries resulted from the modifications made to the machine by defendant.

Defendant first contends that the trial court abused its discretion when it permitted the introduction of expert testimony on the federal occupational safety and health act standards ("OSHA"), 29 USC 651 *et seq.*, and the Michigan occupational safety and health act standards ("MIOSHA"), M.C.L. § 408.1001 *et seq.*, pertaining to paper-cutting machines. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *Chmielewski v. Xermac, Inc,* 457 Mich. 593, 613-614; 580 NW2d 817 (1998). We will find an abuse of discretion " 'only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." ' *Berryman v. K Mart Corp,* 193 Mich.App 88, 98; 483 NW2d 642 (1992), quoting *Gore v. Raines & Block,* 189 Mich.App 729, 737; 473 NW2d 813 (1991).

Evidence is relevant when it "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ' MRE 401; *Dep't of Transportation v. Van Elslander,* 460 Mich. 127, 129; 594 NW2d 841 (1999), quoting *Yates v. Keane,*

184 Mich.App 80, 82; 457 NW2d 693 (1990). The violation of safety regulations, such as OSHA and MIOSHA, may be admissible as evidence of the standard of care. *Co-Jo, Inc v. Strand,* 226 Mich.App 108, 115; 572 NW2d 251 (1998), citing *Beals v. Walker,* 416 Mich. 469, 481; 331 NW2d 700 (1982).

In this case, plaintiff had to prove the following elements by a preponderance of the evidence: (1) defendant owed plaintiff a duty; (2) defendant breached that duty; (3) defendant's breach of this duty caused plaintiff's injuries; and (4) plaintiff suffered damages as a result of defendant's breach of this duty. *Case v. Consumers Power Co,* 463 Mich. 1, 6; 615 NW2d 17 (2000). Plaintiff's theory of negligence was that defendant's modifications to the machine were unreasonably dangerous and caused plaintiff's injuries.

*2 Admiral Ben Lehman, a consulting engineer and a former Navy Admiral, who offered expert testimony on the machine, testified to the American National Standards Institute ("ANSI") safety standards governing the machine. Lehman further testified that the OSHA and MIOSHA standards applicable to slitter knives were identical to the ANSI standard.

The safety standard regulations were relevant to aid the jurors in determining what standard of care defendant owed plaintiff and whether defendant breached the standard of care. Specifically, OSHA and MIOSHA regulations were relevant to show how a reasonably prudent mill owner would have modified a paper-cutting machine. Accordingly, we are satisfied that the trial court did not abuse its discretion when it admitted testimony on the OSHA and MIOSHA regulations.

Defendant next contends that the trial court erred in adopting plaintiff's interpretation of M.C.L. § 600.6306 because M.C.L. § 600.6306 unambiguously required the trial court to reduce the future damages to present cash value before subtracting the previous settlements received by plaintiff. We agree. Questions of statutory interpretation are questions of law which we review de novo. *Cheron, Inc v. Don Jones, Inc,* 244 Mich.App 212, 215-216; 625 NW2d 93 (2000).

The relevant version of M.C.L. § 600.6306 [2] states in pertinent part:

Sec. 6306. (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. The order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.

(d) All future medical and other health care costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(3) If there is an individual who was released from liability pursuant to section 2925d, the total judgment amount shall be reduced, as provided in subsection (5), by an amount equal to the amount of the settlement between the plaintiff and that individual.

(4) If the plaintiff was assigned a percentage of fault pursuant to section 6304, the total judgment amount shall be reduced, as provided in subsection (5), by an amount equal to the percentage of plaintiff's fault. (5) When reducing the judgment amount as provided in subsections (3) and (4), the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

The relevant version of M.C.L. § 600.2925d [3] states in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons liable in tort for the same injury or same wrongful death:

*3 (b) It reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of consideration paid for it, whichever amount is greater.

When reviewing questions of statutory construction, our primary purpose is to ascertain and give effect to the Legislature's intent. *Nawrocki v. Macomb Co Road Comm,* 463 Mich. 143, 159; 615 NW2d 711 (2000). We must first examine the plain language of the statute. *Id.* When the plain language of the statute is clear, judicial construction is neither permitted nor required. *Sun Valley Foods Co v. Ward,* 460 Mich. 230, 236; 596 NW3d 119 (1999). The Legislature's use of the word " 'shall' indicates that the required action is mandatory, not permissive, unless this interpretation 'would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." ' *Kosmyna v Botsford Community Hospital,* 238 Mich.App 694, 699; 607 NW2d 134 (2000), quoting *Browder v. Int'l Fidelity Ins Co,* 413 Mich. 603, 612; 321 NW2d 668 (1982).

By its express terms, M.C.L. § 600.6306(1)(c)-(e) mandates that a trial court shall first reduce any future damages awarded by the trier of fact to gross present value before reducing the amount of judgment by the amount of the settlement the plaintiff received from other parties as directed in (3) and before performing the proportionate reduction between future and past damages specified in (5). Because the plain language of M.C.L. § 600.6306 is clear and unambiguous, further judicial construction is neither necessary nor permitted. *Sun Valley Foods, supra* at 236. Moreover, the use of the word "shall" in M.C.L. § 600.6306 indicates that the trial court was required to follow the order specified in the statute when entering an order of judgment for plaintiff and that the trial court did not possess the discretion to adopt a different interpretation of M.C.L. § 600.6306. *Kosmyna, supra* at 699. As such, we conclude that the trial court erred when it found that M.C.L. § 600.6306 was ambiguous and conferred discretion upon it to determine when to reduce the future damages to present cash value.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2001 WL 985823

Footnotes

1 Defendant, Big M Paperboard, Inc., and plaintiff, Gilbert Perez, are the only parties participating in this appeal, and hereinafter will be referred to as defendant and plaintiff respectively.

2 MCL 600.6306 was amended in 1995, and the amendments became effective in March 1996. PA 1995, No 161, § 1. Plaintiff's case against defendant was filed in October 1994; therefore, the pre-1995 version of M.C.L. § 600.6306 governs this case.

3 MCL 600.2925d was amended in 1995, and the amendments became effective in March 1996. PA 1995, No 161, § 1. Plaintiff's case against defendant was filed in October 1994; therefore, the pre-1995 version of M.C.L. § 600.2925d governs this case.

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EXHIBIT 4

2016 WL 4947279
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
14925 LIVERNOIS, Defendant,
and
Stanley White doing business as Tropical Hut Lounge, Claimant,
and
Intelligent Investment Group, L.L.C., Appellant.

Docket No.
327377

Sept. 15, 2016.

Wayne Circuit Court; LC No. 07–727338–CF.

Before: CAVANAGH, P.J., and SAAD and FORT HOOD, JJ.

Opinion

PER CURIAM.

*1 Intelligent Investment Group, L.L.C. ("IIG") appeals the trial court's decision to deny its motion to intervene and for relief from an order of abatement. The trial court concluded that IIG's motion to intervene was untimely because it was filed after a final judgment had been issued. The court consequently denied IIG's motion for relief from the order of abatement because IIG was not a party. IIG argues on appeal that the court's decisions were erroneous. We agree and reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND FACTS AND PROCEDURAL POSTURE

In October 2007, plaintiff filed a complaint for abatement of nuisance, pursuant to MCL 600.3801 *et seq.* and MCL 333.7521 *et seq.*, against defendant real property ("the property") and other parties, including claimant Stanley White, who owned the liquor license and operated the business, the Tropical Hut Lounge ("Tropical Hut"), on the property. The complaint alleged that Tropical Hut had "a reputation for violence, disorderly persons, underage drinking, and use of controlled substances," and that it had been cited for serving alcohol to minors on several occasions. In addition, it alleged that between 2006 and 2007, Detroit Police officers responded to two shootings and an armed robbery outside of Tropical Hut. Plaintiff asked the court to abate the nuisance by padlocking the property for a period of one year pursuant to MCL 600 .3801 *et seq.*, and/or to enter a permanent injunction against defendants to cease from operating Tropical Hut, and to order that the furniture, fixtures, and other contents of the building be sold to pay any outstanding taxes, liens, or other outstanding costs against the property, and that the court order the forfeiture of the property and authorize the appointment of a receiver.

Other than White's answer to the complaint, nothing of substance happened in the case until October 2014. At that time, White entered into a consent judgment with plaintiff and stipulated that he was the owner of the property and that no other person or entity had a valid legal claim or interest in the property. White agreed to make several changes to the property and his business operations under the terms of the judgment, including installing lighting in the parking lots and alley; installing security cameras; instructing employees to ensure that customers of Tropical Hut were age 21 or older; and training security staff in "de-escalating" situations in which patrons had to be escorted out of the bar. White also agreed to pay a "redemption fee" of $1,500 to the prosecutor's office by October 24, 2014. When White failed to pay the redemption fee, the circuit court ordered the property to be padlocked for one year, beginning November 21, 2014, and ordered any occupants of the property to vacate during the padlocking. The court further ordered that the property was not to be mortgaged, exchanged, or transferred during the padlocked period.

*2 In January 2015, IIG moved (1) to intervene and (2) for relief from the order of abatement. According to IIG, the Wayne County Treasurer had foreclosed on the property on April 20, 2011, for the failure to pay

property taxes, and in October 2011, IIG purchased the property from the treasurer. Thus, IIG claimed that it was the sole owner of the property and that it learned of the order of abatement only after it discovered that the property had been padlocked. The court denied IIG's motion to intervene as untimely because a final judgment had already been entered in the case. It also denied IIG's motion for relief from the order of abatement because it was not a real party in interest.

IIG filed with this Court an application for leave to appeal the trial court's decision, which we granted. See *People v. 14925 Livernois,* unpublished order of the Court of Appeals, entered July 27, 2015 (Docket No. 327377).

II. MOTION TO INTERVENE

IIG argues that the trial erred when it denied IIG's motion to intervene. We agree. This Court reviews a trial court's decision on a motion to intervene for an abuse of discretion. *Auto–Owners Ins. Co. v. Keizer–Morris, Inc.,* 284 Mich.App 610, 612; 773 NW2d 267 (2009). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id.* (quotation marks and citation omitted).

Pursuant to MCR 2.209(A)(3), a person who submits a timely application has a right to intervene

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The trial court denied IIG's motion to intervene solely because it determined that the motion was untimely, as a final judgment had already been entered. The court relied on *Dean v. Dep't. of Corrections,* 208 Mich.App 144, 150–151; 527 NW2d 529 (1994), aff'd 453 Mich. 448 (1996), and *W A Foote Mem. Hosp. v. Mich. Dep't. of Pub. Health,* 210 Mich.App 516, 525; 534 NW2d 206 (1995), for this proposition. We, however, disagree that a final judgment acts as a bar in all circumstances and that these cases are controlling.

In *Dean,* a panel of this Court held that the intervening plaintiffs' postjudgment motion to intervene was untimely, and stated that "[t]here should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant." *Dean,* 208 Mich.App at 150. We further stated:

> [The] intervening plaintiffs made a less-than-strong showing that intervention was appropriate. They merely claimed that their action and the main action had a question of law in common and that intervention would not unduly delay or prejudice the adjudication of the original parties' rights. *Nowhere in their motion do intervening plaintiffs explain why they failed to move for intervention while the main action was pending.* [*Id.* at 150–151 (emphasis added).]

*3 We concluded that "[a]llowing intervening plaintiffs to intervene after a judgment is entered promotes a bad public policy: intervening plaintiffs reap the benefits of a favorable judgment but would not be bound by an adverse judgment." *Id.* at 151.

However, *Dean* is distinguishable from the present case in three primary aspects. First, unlike the applicants in *Dean,* IIG did explain why they moved to intervene when they did. IIG claims it only became aware of any proceedings when it found the property padlocked pursuant to the trial court's order of abatement. Nothing in the record gives any indication that IIG could have or should have known about the proceedings earlier.

Second, the Court's concerns in *Dean*—that allowing parties to intervene after judgment has been entered promotes gamesmanship because a party could wait to intervene only after a favorable judgment has been entered, and thereby not be bound by any unfavorable judgment—are not present in the instant case. Here, no such favorable judgment had been entered from which IIG sought to benefit. Although White was permitted to continue operating the Tropical Hut under the terms of

the consent judgment, the judgment was not entirely in his favor, as White was required to expend monies to purchase lights and security cameras, and for additional employee training, in addition to the $1,500 redemption fee. Assuming that IIG would have been subject to the same terms under the judgment as White, there is no indication that IIG moved to intervene in order to benefit from a favorable judgment. And with respect to the later order for abatement, there is no question that this order was not advantageous to IIG. Under this order, the property was to be padlocked for a year, thereby preventing IIG, the clear owner of record, from utilizing the property in any fashion.

Third, the proposed intervenors in *Dean* sought *permissive intervention* through MCR 2.209(B), and here, IIG sought *intervention of right* through MCR 2.209(A). Under the rules for permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." MCR 2.209(B). Notably, under MCR 2.209(A) for intervention of right, there is no corresponding consideration. Thus, unlike with intervention of right, when a request for permissive intervention occurs, a court must evaluate any potential prejudice to the original parties, which necessarily includes consideration of whether a judgment may have already been entered in the action.

Similarly, in *W A Foote,* we concluded that the trial court abused its discretion when it allowed the intervening plaintiff to intervene. *W A Foote,* 210 Mich.App at 525. The intervening plaintiff argued "that the parties' claims arose out of the same transactions and occurrences, and that the identical question of law was at issue in both cases," which presumably entitled it to permissive intervention. *Id.* at 522; see MCR 2.209(B)(2). We cited our holding in *Dean* "that a trial court abuses its discretion in granting a motion to intervene after a judgment favorable to the intervenor has already been entered for the original party to the suit with whom the intervenor is attempting to align." *W A Foote,* 210 Mich.App at 525. Further, we stated that "[f]ollowing the rationale of *Dean,* it would be equally unfair to permit [the intervening plaintiff] to intervene in the case *when it knew that Foote had just received a favorable ruling from the trial court." Id.* (emphasis added).

*4 Here again, the facts in the instant case are not similar, as IIG did not wait to intervene until after entry of a favorable judgment. Rather, there is nothing in the record to show that it was aware of the litigation at any time before its building was padlocked pursuant to the order of abatement, a decision which certainly was not favorable to IIG.

Therefore, we hold that the trial court erred when it ruled that IIG's motion to intervene was untimely based on *Dean* and *W A Foote* because our holdings were not that, regardless of the circumstances, a motion to intervene as of right may *never* be granted after entry of a final judgment. In fact, in other decisions, we have held that entry of a final judgment is not a bar to a motion to intervene. See, e.g., *Vestevich v. West Bloomfield Twp.,* 245 Mich.App 759, 762–763; 630 NW2d 646 (2001); *Mahesh v. Mills,* 237 Mich.App 359, 364–365; 602 NW2d 618 (1999). Additionally, IIG correctly points out that MCR 2.209(A) does not contain any express language that an application to intervene must be made prior to entry of a final judgment.

In *Vestevich,* the plaintiff owned a piece of property zoned as residential, which he sought to develop commercially, and challenged the defendant's enforcement of a zoning ordinance as unconstitutional. *Vestevich,* 245 Mich.App at 760–761. The trial court upheld the ordinance, and we affirmed. *Id.* at 761. The plaintiff filed, but did not notice, a motion for reconsideration, and the parties entered into a consent judgment that allowed the plaintiff to develop the property commercially in exchange for "certain concessions." *Id.* However, adjacent and other nearby property owners objected to the plaintiff's development and filed motions to intervene, which were granted by the trial court. *Id.* We affirmed the decision of the trial court granting permissive intervention under MCR 2.209(B), stating that "the concern of inadequate representation of interests need only exist; inadequacy of representation need not be definitely established. Where this concern exists, the rules of intervention should be construed liberally in favor of intervention." *Id.* at 762–763. Further, we stated that although the consent judgment included terms that were "obviously intended to address the concerns of nearby landowners, this does not mean that defendant could not have failed to address all concerns of all affected landowners" and the "defendant's representation of the intervenors' interests might well have been inadequate"; thus, intervention was appropriate. *Id.* at 762–763.

Likewise, in the instant case, neither of the existing parties adequately represented IIG's interests in the litigation. White was no longer the owner of the property at the time of the entry of the consent judgment or order of abatement and, thus, was not similarly situated to IIG and could not have adequately represented its interests in the litigation. IIG's ownership interest in the property was not represented by the existing parties pursuant to MCR 2.209(A)(3). As a result, the trial court erred when it denied IIG's motion to intervene as of right.

*5 Incidentally, we note that plaintiff did not dispute that IIG was the owner of the property. Instead, plaintiff argued that IIG was nevertheless bound by the consent judgment because White was "associated" with IIG, and IIG had acted inequitably in order to avoid liability under the judgment. However, plaintiff offered no evidence to support these allegations. Because there was no evidence that IIG had acted in concert with White to avoid the consent judgment, or that IIG was aware of the foreclosure action, we hold that the trial court abused its discretion when it denied IIG's motion to intervene.

III. MOTION FOR RELIEF FROM JUDGMENT

IIG argues that the trial court improperly denied its motion for relief from the order of abatement under MCR 2.612(C). We review a court's decision on a motion for relief from judgment or order for an abuse of discretion. *Detroit Free Press v. Dep't. of State Police,* 233 Mich.App 554, 556; 593 NW2d 200 (1999).

MCR 2.612(C)(1) governs how a party may obtain relief from judgment or order and states as follows:

> On motion and on just terms, the court may relieve *a party or the legal representative of a party* from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.
>
> [Emphasis added.]

Here, the trial court did not analyze the merits of IIG's claims that it was entitled to relief due to mistake under subsection (a) or any other reason under subsection (f). Instead, because the court denied IIG's request to intervene, it found that IIG's motion for relief from judgment was improper because IIG was not "a party or the legal representative of a party," as the court rule requires. But because we have ruled that IIG should have been allowed to intervene, the court necessarily erred when it relied on IIG's status as a nonparty. Normally, we would allow the trial court on remand to consider the underlying merits of IIG's motion first, but the facts as presented are straight-forward and, due to the interests of justice, we will address whether IIG was entitled to relief.

When the underlying consent judgment and order for abatement were entered in October and November 2014, respectively, the trial court was under the impression that White was still the owner of the property, as he had been when the case was initiated seven years earlier in October 2007. However, the evidence clearly establishes that this was erroneous, i.e., a "mistake." IIG provided to the trial court the October 2011 deed, which established that it had been the owner of the property for the three years preceding the entry of both the consent judgment between the prosecutor and White and the subsequent order of abatement. Consequently, the derivative order of abatement was not valid as to IIG because White was not the property's owner and did not have authority to enter into the earlier consent judgment on behalf of IIG or the defendant property. [1]

*6 Because we hold that IIG was entitled to intervene as of right and obtain relief from the abatement order, we need not address IIG's other argument that the consent judgment and order of abatement were void because plaintiff's interest in the property was extinguished by the judgment of foreclosure. See *Ryan v. Ryan,* 260 Mich.App 315, 330; 677 NW2d 899 (2004) ("Generally, this Court need not reach moot issues or declare legal principles that have no practical effect on the case....").

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2016 WL 4947279

Footnotes

1 Additionally, assuming that the facts as presented do not constitute a "mistake" under subsection (a), White's representations that he was the owner of the property at the time of the consent judgment would constitute "fraud" or "misrepresentation" under subsection (b).

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