

STATE OF MICHIGAN

COURT OF APPEALS

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

COA Docket N<sup>o</sup>: 254202

v

NESTLÉ WATERS NORTH AMERICA INC., a  
Delaware corporation,  
Appellant/Cross-Appellee,

Mecosta County Circuit Court  
Case N<sup>o</sup>: 01-14563-CE  
Hon. Lawrence C. Root, Circuit Judge

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

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CONSERVATION, a Michigan nonprofit  
corporation; R.J. DOYLE AND BARBARA DOYLE,  
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SHELLY M. SAPP, husband and wife,  
Appellees,

COA Docket N<sup>o</sup>: 256153

v

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**BRIEF OF PLAINTIFFS-APPELLEES IN SUPPORT OF MOTION  
FOR TERMINATION OR MODIFICATION OF STAY**

July 29, 2005

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## I. FACTS AND PROCEEDINGS

The Trial Court stopped Nestlé from pumping and diverting water from Sanctuary Springs, directly connected to the Dead Stream, the headwaters of the West Branch of the Little Muskegon River. Opinion and Judgement/Order, November 25, 2003 (“Opinion”). The Trial Court denied Nestlé’s motion to stay the Opinion. **Ex 2<sup>1</sup>, Bench Opinion**, Dec. 12, 2003. Nestlé filed an emergency application for leave in COA Docket No. 252717 on December 15, 2003, with a Motion for Stay and a Motion for Immediate Consideration. The Court of Appeals granted Nestlé a reprieve through a Stay Order, dated December 16, 2003, that allowed Nestlé to pump at 250 gallons per minute based on a monthly average pending appeal. **Ex 1**.

The Trial Court enjoined the pumping at the Sanctuary Springs because the Trial Court concluded that Nestlé’s pumping from the spring aquifer under the Springs removed water on an almost 1 to 1 ratio: a gallon from the stream and related water system for every gallon pumped. Based on stream flow and other monitoring data, the Trial Court concluded that stream flows would be diminished on average by 28 percent. Based on expert testimony, the Trial Court found that pumping would reduce the levels of some wetlands, Thompson and Osprey Lakes by as much as 4 inches, and the stream by as much as 2 inches. Opinion, pp.8-40. As a result of these significant and measurable effects, the Court concluded based on detailed findings that Defendant’s conduct was unlawful and issued the injunctive order permanently halting pumping. Opinion, pp. 49-50.

During the trial which took place over Spring and Summer 2003, Nestlé pumped at a rate of 160 to 170 gpm. The Trial Court found that there were significant effects and impacts at even these levels of pumping. *Id.*, pp. 49-50.

When Nestlé filed its emergency and immediate request for stay in the Court of Appeals on December 15, 2005, it relied on heavy rain fall and the presence of new beaver dams that masked the effects and impacts from pumping during late Fall 2003. Since that time, given the dynamic and

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<sup>1</sup> The reference to “**Ex \_\_**” (exhibits) in this Brief refers to the Exhibits attached to Plaintiffs-Appellees’ Motion for Termination or Modification of Stay Order, dated July 27, 2005, to which this Brief is attached. All other references are to the record on appeal that has been filed with this Court in the above-captioned consolidated appeals.

changing nature of a spring/stream/lake/wetlands complex of this nature and normal changes in precipitation due to natural cyclical or seasonal fluctuations, the stream is at or below base flow of 1200 gpm, and beavers have moved further downstream.<sup>2</sup> Compounding the natural variation in flow, the effects and impacts to the stream and related water resources caused by the pumping become greater at times of natural stream flow decrease. **Ex 4**, paragraph 8.

Dr, Hyndman, hydrogeological expert for Plaintiffs-Appellees, has evaluated the round of monitoring data taken from Sanctuary Springs, the lakes, stream, and wetlands from March to July 2005. **Ex 4**. Applying the recognized methods and calculations he used for trial, he has found that significant reductions in flows and level of the stream have continued and impacts have increased since the trial. *Id.*, paragraphs 2, 3. He concluded that current pumping rates, using a monthly average of 250 gpm, combined with decreasing flows in the stream, have diminished flows and dropped the level more than twice what he estimated at trial. The actual diminishment of flow and level of the stream under all conditions is a drop of 2 inches under the Stay; a drop of as much as 4 inches at the 400 gpm rate is likely. *Id.*, paragraph 4, Fig. 1 and Table 2. Unique conditions such as temporary beaver dams or heavy rainfall may temporarily mask the effects of pumping, but as Dr. Hyndman notes, it is critical to manage both short and long term average pumping rates to prevent significant adverse effects in Dead Stream. The 250 gpm monthly average will not prevent the aggregate damage done by days or weeks of pumping at higher levels, even offset by the lower levels then required to meet the monthly average. **Ex 4**, paragraph 9. As the Trial Court found when refusing Nestle's initial request for stay:

... the reality is that based on the findings contained within the opinion ... the entire system will ride up or down with the effects of pumping. If we're at an all time high, that high would be higher yet but for pumping. If we're at some point in between a high and a low, the difference created by pumping would exist. *Ex 2*, p. 10<sup>3</sup>

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<sup>2</sup> It should be noted that Nestle's reliance on beaver dams for its stay is misplaced. The trapping of beavers is a recognized riparian right. See *Johnson v. Burghorn*, 212 Mich. 19, 28-29 (1920); *Bott v. Commission of Natural Resources of State of Mich. Dept. of Natural Resources*, 415 Mich. 45, 101 (1982).

<sup>3</sup> See Trial Court Opinion, p. 33 (bottom) to 34, regarding impact on stream wetlands (continued...)

Shelly Sapp, a photographer who submitted photographs that monitored the conditions during the trial, Exs 90A-90Av, 93, 94, has taken another series of photographs over the last few months in the same locations depicted during trial. The photographs record the continuing impacts to the stream and aquatic resources. **Ex 6.**

During the trial, Plaintiffs' attorney cross-examined Nestlé's chief manager for Michigan operations. He was shown stream conditions similar to the current reality depicted in the photographs provided here as Exhibit 6. He conceded that Nestlé would agree to cease pumping if it determined significant adverse impacts were occurring as a result of pumping, even if it meant curtailment of production and jobs. **Ex 8**, pp. 124-128, 130-132, 134-139, 143-147.

The Trial Court warned Nestlé well before it constructed the plant, pipeline, and well that it proceeded at its own risk. **Ex 5**, Hearing Transcript, Plaintiffs' Motion for Order to Show Cause Why a Preliminary Injunction Should Not Issue, June 19, 2001, pp. 9-11; Opinion, Nov. 25, 2003, pp. 4, 49-50. Nestlé has a permitted 300 gpm water well at Stanwood Plant, and another one that size close by the plant. Nestlé did not plead or show that it has no alternatives, including trucking water from other water sources nearby or in another state, that would enable it to keep its plant in operation. Opinion, pp. 50, 63-65; Trial Transcript, May 6, 2003, pp. 194-195.

## **II. ARGUMENT**

### **A. Standard of Review**

A Stay under MCR 7.209 by a Trial Court or Court of Appeals is discretionary to preserve the status quo. The question is whether it is just to allow a continuation of the extraordinary equitable privilege of a stay when the reasons for the stay no longer exist, the stay is no longer justified, and the stay impairs rather than preserves the status quo as protected by the Trial Court's Opinion and Order.

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<sup>3</sup> (...continued)  
from a drop in 2 inches from the normal range of level. See also Trial Court findings in support of injunctive order halting pumping at such levels as would cause these impacts, even at lower pumping rates. Opinion, p. 49 (top), p. 50.

A stay is appropriate only when it is necessary to *preserve the status quo* until an appeal can be decided. *Red Star Motor Drivers Ass'n v City of Detroit*, 236 Mich 422, 424; 210 NW 496 (1926). Such equitable relief is an extraordinary remedy. *Pharmaceutical Researchers & Manufacturers of America v Dep't of Community Health*, 254 Mich App 397, 402; 657 NW2d 162 (2002). A stay is a form of injunctive relief; an appeal of the grant or denial of injunctive relief “requires a showing of probable abuse of discretion.” *Detroit Dep't of Public Works v AFSCME*, 34 Mich App 159, 160; 190 NW2d 700 (1971). A stay is not proper if there is no justification on consideration of the facts. *Huron Valley Hospital v Michigan Dep't of Public Health*, 92 Mich App 175, 179; 284 NW2d 758 (1979).<sup>4</sup>

In this case, the extraordinary privilege of a stay is no longer justified, given the base flow condition and effects that have occurred because of Nestlé’s conduct under the current Stay. The December 16, 2003 Stay Order no longer preserves the status quo; it actually works to irreparably destroy it as this appeal continues. Further, the assertions and claims on which it was granted no longer exist or are no longer justified. The Stay Order as written no longer serves to protect the public interest in light of the harm to riparian property rights and to the paramount public interest in the water and related water resources. Mich Const. 1963, Art. 4, Sec. 52.

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<sup>4</sup> The standards for stays and preliminary injunctions are similar to each other. MCR 7.105(G) allows a court to stay the decision which led to an appeal on finding that the appellant has demonstrated the following standards are met:

- (i) that the applicant will suffer irreparable injury if a stay is not entered;
- (ii) that the applicant has made a strong showing that it is likely to prevail on the merits;
- (iii) that the public interest will not be harmed if a stay is granted; and
- (iv) that the harm to the applicant in the absence of a stay outweighs the harm to other parties to the proceedings if a stay is granted...

The standards for preliminary injunctions listed in *Campau v McMath*, 185 Mich App 724, 728-29; 463 NW2d 186 (1990) were:

- (1) the likelihood that the party seeking the injunction will prevail on the merits; (2) the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued; (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and (4) the harm to the public interest if the injunction is issued.

**B. This Court Has the Authority to Grant, and Equitable Principles Support the Granting of, an Order Terminating or Reducing the Pumping Rate under the Current Stay Order.**

MCR 7.209(D) provides in part:

- (D) The Court of Appeals may grant a stay of proceedings in the Trial Court or stay of effect or enforcement of any judgment or order of a Trial Court on terms it deems just.

MCR 2.614(C) provides:

- (C) If an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court may suspend, modify, restore, or grant an injunction during the pendency of the appeal on terms as to bond or otherwise that are proper to secure the adverse parties rights.

MCR 7.216(A)(7) provides:

- (A) The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:

\* \* \*

- (7) enter any judgement or order or grant further or different relief as the case may require.

Plaintiffs submit that these two provisions give this Court the discretion to do what it deems just and appropriate under the circumstances before it, taking into account the interests of riparian property owners and the waters and natural resources and the public trust therein protected by Mich Const. Art 4, Sec. 52 and the Michigan Environmental Protection Act (now Part 17 of the Natural Resources and Environmental Protection Act), MCL 324.1701, *et seq.* (“MEPA”).

**C. Nestlé Proceeded with Full Knowledge of Its Own Risks and the Fact that It Could Avail Itself of Alternatives.**

The Trial Court made it very clear throughout the proceedings that Nestlé proceeded at its own risk by building its plant before all of the legal challenges to its water bottling scheme were resolved. The issue first came up via a request for preliminary injunction when the construction on the plant started. The Trial Court denied the requested injunction, but made it clear that Nestlé proceeded at its own risk:

Certainly, [Nestlé] cannot come back to this Court later and claim prejudice, estoppel, laches, or some other legal theory if it proceeds with construction and faces an adverse ruling here or elsewhere in the

future. [Nestlé] will have to assume the business risks that accompany business decisions in the face of contentious environmental litigation and permitting processes.... having done so to its detriment will not be considered as an equitable argument against future equitable proceedings at least in this court., **Ex 5**, pp. 9-10.

\* \* \*

And, as I said a few moment[s] ago, if [Nestlé] decides to go ahead with whatever construction operations it feels necessary to do what it wants to do, *they do so as a business decision on their own and will have to suffer any consequences*, if there ultimately are adverse conclusions reached, regarding what they want to do. *Id.* at p. 11.

The Trial Court reiterated this fact in its opinion on the merits of the case:

Early in the case I declined to restrain the building of the plant as its existence had, and has, nothing to do with Plaintiffs' claims in this case. Defendant Nestlé was cautioned that it was proceeding in building a bottling plant at its own risk should I decide Plaintiffs' claims have merit such that there might be no water to be bottled in the plant. However, the plant is not part of any analysis undertaken in this opinion, so nothing ruled on here has any effect on whether the plant may be used to bottle water and prepare it for shipment anywhere. Opinion, p. 4.

As the Trial Court concluded, Nestlé “came into this situation aware of the risks and must now regroup to deal with the consequences of losing.” Opinion, p. 65.

As noted above, a stay is an extraordinary and narrow avenue for temporary equitable relief. Nestlé’s completion of the plant, pipeline, and well field, and hiring of employees in the face of the clear knowledge of the unresolved water rights and environmental claims and questions (the “real claim” in this case) was done with the assumption of all risks, including the possibility of an injunction prohibiting withdrawal of water from the Sanctuary well field. Nestlé waived any “equitable argument,” particularly in light of the increased significant effects and impacts to the stream and related aquatic resources of the State that are protected by MEPA.

Nestlé also waived these arguments because it did not plead or prove that it has no viable alternative. On the record of this appeal, Nestlé had and continues to have alternatives.<sup>5</sup> That they

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<sup>5</sup> See **Ex 2**, p.41 Further, Nestlé has announced a water deal with the City of Evert to takeover a well of the City and divert it in tanker trucks down US 31 expressway to the Stanwood plant. While this is fraught with constitutional and legal problems, issues not waived or (continued...)

do not involve its idealized most profitable marketing scheme is a business decision, not the stuff of the extraordinary remedy of a stay pending appeal, particularly where there are ongoing and irreparable alterations to a stream and water resources such as those at issue in this appeal. Opinion, pp. 4, 49-50, 63-65.

**D. Nestlé's Emergency and Announcement Before Christmas 2003 to Lay Off Employees by the End of January if It Didn't Receive a Stay No Longer Exists or is No Longer Justified – Particularly Given Nestle's Policy to Curtail Production and Or Even Jobs If there Are Significant Adverse Impacts.**

The Court of Appeals panel had about 7 hours to consider and decide Nestlé's emergency request for stay on December 16, 2003. Nestlé's Motion for Stay specifically limited the duration of the Stay, acknowledging that the temporary higher water levels would extend only "through late Spring." Ex 3, paragraph 17, p. 4. Seasonal lows occur every year near late Spring and continue into the Fall. This condition has repeated itself again this year, beginning in May 2005. Ex 4.

Plant Manager and chief operating officer for Nestlé in Michigan, testified at trial that the company would reduce pumping, curtail production, and lay off employees if required in the event it determined significant adverse impacts were occurring. Ex 8, pp. 134-139, 143-144, 147.

Nestlé has continued to operate, including installation and withdrawal of water from high-capacity wells at the Stanwood plan, despite the obvious low flow conditions and its variable pumping under the Stay, at times over 300 gpm for long periods of time. Nestlé has demonstrated that it should no longer be given such wide latitude to police itself. The current Stay should be terminated or reduced and then terminated if conditions continue. Nestlé has other wells to continue production lines at the plant, and its duty toward its employees is its own assumed business risk. That it wants to put "spring water" on the labels of some of its containers or bottles coming off some of its lines is not enough. A company's own marketing scheme is not equitable justification for the

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<sup>5</sup> (...continued)

conceded by Plaintiffs-Appellees, and the Governor has issued an Executive Directive restricting diversion and export of the bottled water beyond the Great Lakes Basin, Nestlé is not subject to any formal order or decision, for the moment, that restricts it from using its privatized municipal well for bottled water within the Basin.

extraordinary remedy of a stay in the face of the continued harm and significant impacts, already ruled unlawful by the very opinion subject to appeal.

**E. Nestlé's Claims of Structural or Economic Harm Do Not Justify an Equitable Stay.**

Nestlé's other claim made in support of the original stay was that it would have to insure infrastructure and pay property taxes on it. These are purely economic concerns which Nestlé assumed when it constructed the plant and hired employees with full knowledge that it was proceeding at its own risk as to the underlying water and private property issues ultimately decided in favor of Plaintiffs. This purely economic harm is not a basis for injunctive relief. *Acorn Bldg Components, Inc v Local 2194*, 164 Mich App 358, 366; 416 NW2d 442 (1987).<sup>6</sup>

The claims of economic harm were also essentially waived by Nestlé before the Trial Court.

As Nestlé stated on page 1 of its reply brief on its motion for stay in the Trial Court:

The [trial] court has stated only [sic: not only] in the portions of its rulings quoted by Plaintiffs at pages 3-4 of their brief, but also on and off the record, that the Court would not countenance any claims, defenses or arguments based on economic consequences to Nestlé. Nestlé has made no such claims, defenses or arguments.

Nestlé took a business risk in proceeding before this litigation was resolved, as noted by the [trial] court, based on Nestlé's assessment of the law and science. Nestlé Waters North America Inc.'s Reply to Plaintiffs' Response to Nestlé Waters North America Inc.'s Motion for (1) Suspension or Modification of Injunctive Relief Pending Defendant's Post-judgment Motion Pursuant to MCR 2.611 and 2.612 and (2) Stay Pending Appeal, December 11, 2003.

As the Trial Court observed several times, Nestlé eliminated all of its alternatives, and discarded all of its contingency plans, with its eyes wide open. The Trial Court warned Nestlé not to do this, but Nestlé did it anyway. The Trial Court made a finding of fact, reviewed on a clearly erroneous standard by this Court, that Nestlé did these things in part for tactical reasons – for strategic advantage. This strategy having backfired, Nestlé should no longer benefit by a Stay that

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<sup>6</sup> Nor is the loss of employment the kind of irreparable injury that justifies injunctive relief, especially where it was a foreseeable consequence or part of the risks of doing business. *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152; 365 NW2d 93 (1984).

it needed as a result of the consequences of its tactical business decisions. Opinion, pp.63-65. Those seeking an equitable remedy cannot create a problem and then expect equity to bail them out. See *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002) (A stay is an equitable remedy, and those seeking relief from equity must do equity themselves).

**F. While the Merits of the Water Law and MEPA Issues Are Before this Court for Decision, Further Serious Impairment of the Stream and Water Resources Should Be Prevented During the Remainder of this Appeal.**

Factual and legal arguments surrounding riparian property rights, water law, and the MEPA have been briefed and argued, and the arguments need not be reargued for purposes of the instant motion. However, the circumstances caused by or attributable to Nestlé's continued pumping under the current Stay are having a dramatic impact on the natural resources at issue and should compel this Court to determine whether or not Nestlé's pumping should be terminated altogether or, if allowed continue, what new terms should be established to prevent or minimize significant diminishment or degradation of the stream and related water resources.

There is on-going serious, substantial, and irreparable harm or injury occurring to the stream and related water resources. Nestlé is allowed to pump under the current 250 gpm monthly average at rates that, together with the flows and levels, have seriously diminished the flow of a stream where it is already low. Based on the data over the last five months, present pumping is causing a further reduction in water level to the point that the bottomland is exposed and the stream narrowed. It appears that these effects are now greater than anticipated at trial. At trial, 400 gpm pumping was anticipated to reduce the level of the stream by up to 2 inches or more. Now it appears it will be on the order of 2 to 4 inches, or almost twice as much. Pumping under the 250 gpm limit has caused as much as a 2 inch drop in the stream, which was a basis for the Trial Court Opinion. See Affidavit of Dr. Hyndman, Motion **Ex 4**.

There have already been significant adverse impacts to the stream and related natural resources. **Ex 4**. And there does not appear to be any relief in sight, except for termination or reducing pumping further when the stream and levels reach a certain point as established on the

record before the Trial Court, the Trial Court's Opinion, and Exhibits attached to Plaintiffs-Appellees' instant motion.

The Trial Court made independent and detailed findings that Nestlé's pumping and diversion of the water out of the watershed had and would continue to impair the stream, lakes, and wetlands contrary to Section 1703(1) of the MEPA. In particular, the Trial Court's opinion makes numerous and detailed findings of fact in pages 8 through 40, and then discusses the MEPA claim in detail from pages 50-60, making it very clear that he incorporated his detailed findings on effects and impacts under the groundwater claim into his independent findings of fact for the MEPA claim.

The conclusions of Dr. Hyndman and photographs attached in Exhibits 4 and 6, respectively, substantiate these findings and demonstrate the need for termination or modification of the Stay that requires termination or reduction in pumping based on the specific criteria set forth by Dr. Hyndman at paragraphs 8-9 of his Affidavit. **Ex 4.**

### **III. CONCLUSION AND RELIEF**

For the reasons stated above, Plaintiffs-Appellees respectfully submit that the Court of Appeals' Stay Order, December 13, 2003, is no longer justified. Moreover, the extraordinary and narrow basis for the Stay no longer exists. The Stay actually works to harm, irreparably, the status quo and the water and water resources declared to be a protected and paramount public interest by the Constitution 1963 and the MEPA. Accordingly, Plaintiffs-Appellees request this Court to terminate or modify the Stay Order as set forth in the Motion for Modification of the Stay Order to Terminate or Reduce Pumping.

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