STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY

Plaintiffs-Appellees,

and

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP

Intervenors-Appellees,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No _____

Court of Appeals Docket No 357598

Washtenaw County Circuit
Court Case No. 88-034734-CE

APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT GELMAN SCIENCES, INC.

ORAL ARGUMENT REQUESTED

Brian J. Negele (P41846)
MICHIGAN DEPT OF ATTORNEY GENERAL
Attorney for Plaintiff-Appellee EGLE
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909-7712
(517) 373-7540

Bruce A. Courtade (P41946)
Gregory G. Timmer (P39396)
RHOADES MCKEE PC
Attorneys for Defendant-Appellant
Gelman Sciences, Inc.
55 Campau Avenue NW, Suite 300
Grand Rapids, MI 49503
(616) 235-3500
bcourtade@rhoadesmckee.com
gtimmer@rhoadesmckee.com

Fredrick J. Dindoffer (P31398)
Nathan D. Dupes (P75454)
BODMAN PLC
Attorneys for Intervenor/Appellee
City of Ann Arbor
1901 St. Antoine, 6th Floor
Detroit, MI 48226
(313) 259-7777

Stephen K. Postema (P38871)
ANN ARBOR CITY ATTORNEY'S OFFICE
Attorneys for Intervenor/Appellee
City of Ann Arbor
301 E. Huron, Third Floor
Ann Arbor, MI 48107
(734) 794-6170

Bruce T. Wallace (P24148)
William J. Stapleton (P38339)
HOOPER HATHAWAY P.C.
Attorneys for Intervenor/Appellee Scio Twp.
126 S. Main Street
Ann Arbor, MI 48104
(734) 662-4426

Michael L. Caldwell (P40554)
ZAUSMER, P.C.
Attorney for Defendant-Appellant
Gelman Sciences, Inc.
32255 Northwestern Hwy., Suite 225
Farmington Hills, MI 48334
(248) 851-4111

Robert Charles Davis (P40155)
DAVIS BURKET SAVAGE LISTMAN TAYLOR
Attorney for Intervenors/Appellees
Washtenaw County, Washtenaw County
Health Department, and Washtenaw County
Health Officer Jimena Loveluck
10 S. Main Street, Suite 401
Mt. Clemens, MI 48043
(586) 469-4300

Erin E. Mette (P83199)
GREAT LAKES ENVIRONMENTAL LAW
CENTER
Attorneys for Intervenor/Appellee HRWC
444 2nd Avenue
Detroit, MI 48201
(313) 782-3372

APPLICATION FOR LEAVE TO APPEAL
BY DEFENDANT-APPELLANT GELMAN SCIENCES, INC.

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT IDENTIFYING ORDER APPEALED FROM

Defendant-Appellant Gelman Sciences, Inc. ("Gelman") seeks leave to appeal the June 29, 2021 Order of the Michigan Court of Appeals dismissing Gelman's claim of appeal as of right upon the determination that the order appealed from was not a final judgment.[1] The Court of Appeals reasoned as follows:

> [T]he June 1, 2021 order [for which Gelman sought review as of right] was not "*the first*" judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties; the October 26, 1992 consent judgment was "*the first*" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case. MCR 7.202(6)(a)(i) contemplates that only the first judgment or order meeting the definition will be considered final under that provision unless that judgment or order is reversed. See *Varran v Granneman (On Remand)*, 312 Mich App 591, 600-601; 880 NW2d 242 (2015). The postjudgment addition of intervening parties into the case does not change this outcome. *Id.* Moreover, although the October 26, 1992 consent judgment was amended or modified several times, it was not reversed and it remains the final order pursuant to MCR 7.202(6)(a)(i).

Gelman moved the Court of Appeals for reconsideration of its June 29, 2021 Order, and the Court of Appeals denied reconsideration on August 23, 2021.[2] Gelman's Application for Leave to Appeal to this Court is, therefore, timely filed in accordance with MCR 7.305(C)(2)(c).

Gelman respectfully submits that the trial court's June 1, 2021 Order is a final judgment or final order appealable by right, as it is the first judgment that disposed of all claims and adjudicated the rights and liabilities of all the parties – in particular, the claims of six new intervening entities added to this action in 2017 (twenty-five years after the only real parties to the suit settled all of their claims via the 1992 Consent Judgment), and whose entitlement to intervention has never been subject to appellate review. Gelman respectfully requests an order of the Honorable Supreme Court

---

1 Appendix 2034.

2 Appendix 2035.

reversing the June 29, 2021 Order of the Michigan Court of Appeals and remanding this matter to that Court with instruction to permit Gelman's appeal to proceed as a matter of right.

STATEMENT OF QUESTION PRESENTED

Gelman and the State of Michigan entered into a Consent Judgment in October 1992 resolving all of the claims by, among and between themselves set forth in then-pending litigation concerning groundwater contamination. That Consent Judgment set forth a comprehensive and exclusive mechanism for resolving disputes that might arise during implementation of the remediation activity required under the judgment, and preserved Gelman's and the State's claims and defenses.

For twenty-five years, Gelman, the State and the Washtenaw County Circuit Court followed the Consent Judgment without issue – including entry of three modifications to the terms thereof negotiated by the parties. But in 2017, six entities that were not parties to the initial lawsuit or the Consent Judgment (as modified) sought to join the lawsuit, raising their own claims concerning issues related to the same groundwater plume. Over Gelman's objection, the Washtenaw County Circuit Court allowed those entities to join the lawsuit as Intervenors – without actually filing their complaints – for the limited purpose of trying to negotiate a Fourth Amended Consent Judgment. The court's orders granting intervention specifically stated that if the negotiations failed, the Intervenors could then file their complaints.

Gelman appealed the trial court's ruling allowing intervention to the Court of Appeals, but in a July 14, 2017 Order, that Court denied its application, stating: "The Court orders that the application for leave to appeal is DENIED for failure to persuade the court of the need for immediate appellate review." Similarly, Gelman's appeal of that decision to the Michigan Supreme Court was denied on the grounds that this Court was "not persuaded that the questions presented should be reviewed by this Court."

Four years of negotiations between the parties and Intervenors ensued. Eventually, those negotiations failed when the Intervenors rejected a settlement package recommended by their own attorneys and experts. When advised of this failure, the trial court ignored its prior order, determined that the proposed Intervenors did not have to file their proposed complaints, and instead announced its intent to proceed directly to a "remedy hearing," despite the fact that there had never been a finding of liability on Gelman's part.

Thereafter, the trial court (without affording Gelman any opportunity to raise defenses or challenge Intervenors' standing or the sufficiency of their claims, and barring any factual or expert discovery, depositions, or other standard practices intended to protect due process), held an "evidentiary hearing" that lacked every procedural and substantive protection normally afforded to litigants under the applicable court rules. At the hearing's conclusion, the court entered an order addressing the Intervenors' purported remedy demands by replacing the existing Consent Judgment (as amended) with a new remediation regime requiring cleanup and monitoring activities well beyond what the State agreed was sufficient to protect the public health and environment and granting Intervenors ongoing rights – all as if they were already parties to the action.

Since the trial court's June 1, 2021 Order both reversed the existing Consent Judgment (as amended) and for the first time addressed claims that were raised by the Intervenors (even though those claims were never actually submitted in a complaint filed with the court), Gelman filed a claim of appeal by right with the Court of Appeals. On June 22, 2021, the Court of Appeals rejected

that claim of appeal, asserting that the October 26, 1992 consent judgment was "'*the first*' judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case" – despite the fact that the 1992 Consent Judgment could not and did not address the claims that were decided by the trial court on June 1, 2021, because those claims (brought by the proposed Intervenors) were not even raised until 25 years after entry of the 1992 Consent Judgment.

I. WHERE THE TRIAL COURT ADDS NEW PARTIES TO A LAWSUIT A QUARTER CENTURY AFTER ENTRY OF FINAL JUDGMENT, AND THEREAFTER ENTERS AN ORDER DISPOSING OF THOSE NEW CLAIMS AND ADJUDICATING THE RIGHTS AND LIABILITIES OF THOSE NEW PARTIES, IS THAT ORDER – THE FIRST TO ADDRESS THE PURPORTED INTERVENORS' CLAIMS AND THEIR IMPACT ON THE ORIGINAL PARTIES' RIGHTS AND LIABILITIES – A FINAL JUDGMENT FROM WHICH AN AGGRIEVED PARTY HAS A RIGHT TO APPEAL?

Defendant-Appellant answers, "Yes."

Intervenors-Appellees answer, "No."

The Court of Appeals answered, "No."

II. WHERE THE JUNE 1, 2021 ORDER REPLACES THE EXISTING CONSENT JUDGMENT BETWEEN GELMAN AND EGLE, DID THAT ORDER EFFECTIVELY REVERSE THE EXISTING CONSENT JUDGMENT, AND THEREBY BECOME THE FIRST JUDGMENT THAT DISPOSED OF THE CLAIMS OF ALL THE PARTIES (INCLUDING THE INTERVENORS), FROM WHICH GELMAN IS ENTITLED TO APPEAL AS A MATTER OF RIGHT?

Defendant-Appellant answers, "Yes."

Intervenors-Appellees answer, "No."

The Court of Appeals answered, "No."

STATEMENT OF FACTS

I. INTRODUCTION

In 1988, Plaintiff/Appellee Michigan Department of Natural Resources and Environment (now known as the Department of Environment, Great Lakes and Energy and referred to herein as "EGLE" or the "State") filed this lawsuit against Defendant/Appellant Gelman Sciences, Inc. ("Gelman"), seeking to require Gelman to clean up contamination of local groundwater caused by permitted 1,4-dioxane ("dioxane") discharges.[3] A "Final Judgment" – a Consent Judgment between Gelman and EGLE setting forth an agreed-upon remediation program and which disposed of the claims and adjudicated the rights and liabilities of all the parties to the case – was entered on October 26, 1992. Pursuant to that Consent Judgment, there was no finding of liability on Gelman's part, which liability Gelman specifically denied. Thus, Gelman agreed to undertake the cleanup responsibilities specified by the Consent Judgment but reserved the right to defend itself against any attempt to impose expanded or modified cleanup duties.

The Consent Judgment was amended by the Parties three times, most recently by stipulation of EGLE and Gelman on March 11, 2011, to reflect changing cleanup standards and the Parties' evolving understanding of the site geology and nature and extent of the contamination. Each time, it was modified in accordance with and consistent with the terms set forth therein. By July 2014, all outstanding disputes between the Parties to the Consent Judgment had been resolved. No claim or matter was pending before the court after entry of that stipulation.

By September 2016, EGLE and Gelman had reached agreement on the additional response actions needed to address long-anticipated changes in the applicable state-wide dioxane cleanup criteria and were in the process of finalizing the terms of what would have been a Fourth Amended

[3] EGLE and Gelman are from time to time referred as "the Parties."

Consent Judgment.[4] Consequently, neither party had reason to petition the trial court to amend the existing judgment (as required by the provisions of that judgment, as amended). But before that bilateral agreement could be entered, in January and February 2017, over Gelman's objections, the trial court, over Gelman's objections, allowed six non-parties to the lawsuit and Consent Judgment to "intervene" in the case[5] – and did so without even requiring those entities to file complaints against which Gelman had the right to defend itself. The trial court justified its actions by allowing intervention for the limited purpose of giving the Intervenors a seat at the bargaining table for negotiations between EGLE and Gelman regarding an amended Consent Judgment. If those negotiations failed for any reason, the trial court's orders granting intervention ("Intervention Orders") were clear: the Intervenors would have to file their complaints, and their claims would be subject to the standard Rules of Civil Procedure and Evidence applicable to all lawsuits brought in Michigan.[6]

---

[4] EGLE and Gelman negotiated the draft bilateral Fourth Amended and Restated Consent Judgment (hereinafter the "Bilateral Amendment") and reduced its terms to writing by early 2017. A copy of the Bilateral Amendment is included in the Appellant's Appendix at 1925-1989. At the June 17, 2021 hearing regarding Gelman's motion to stay enforcement of the court's June 1, 2021 Order, EGLE confirmed that it would not have agreed to the terms of the Bilateral Amendment unless it was adequate to protect the public's safety and welfare, stating: "EGLE would not agree to enter into a consent decree that it did not believe was protective of public health and the environment, and that is the case with the 2017 draft that we have." *See* June 17, 2021 Hearing Transcript, (hereinafter "6/17/21 Hrg Tr"), pp. 19-20, Appendix 1997.

[5] Appendix 189-191 and 192-194. These entities (The City of Ann Arbor, Washtenaw County, The Washtenaw County Health Department, Washtenaw County Health Officer, The Huron River Watershed Council, and Scio Township) are referred to herein as the "Intervenors."

[6] For its part, Gelman opposed intervention, and sought this Court's leave to appeal the trial court's decision – a request for interlocutory review which this Court denied on July 14, 2017. As a result, despite its serious misgivings about the prospects for success of the court's negotiation process, Gelman participated in those court-supervised negotiations in good faith for nearly four years.

Gelman sought to appeal the trial court's Intervention Orders to both the Michigan Court of Appeals and this Court. Both attempts were denied, with the Court of Appeals stating that there was no "need for immediate appellate review" and this Court finding that it was "not persuaded that the questions presented should be reviewed by this Court." Thus, Gelman's interlocutory efforts to obtain review of the attempt by non-parties to intervene in – and modify the terms of – the 25 year-old "final" Consent Judgment were rejected, and those non-parties were allowed to participate in negotiations over the terms of the proposed Fourth Amended Consent Judgment even without having filed their complaints, let alone demonstrating an entitlement to relief thereunder.

When those negotiations failed nearly four years later, the trial court abruptly changed course and *sua sponte* announced that all of the entities would proceed straight to a "remedy hearing," where – despite no finding of liability against Gelman and again without any demonstration of an entitlement to relief by Intervenors – the trial court would hear from both the Parties' and the Intervenors' technical consultants and counsel, and then decide what modifications would be made to the Consent Judgment between Gelman and EGLE.

Gelman once again sought intercession from the Court of Appeals on an emergency basis, seeking to prevent the trial court's ill-conceived and entirely improper "evidentiary hearing" from taking place as scheduled on May 3, 2021. In an Opinion dated April 29, 2021, the Court of Appeals denied Gelman's *Emergency Application* in an Order that explicitly left the appellate door open if the trial court proceeded as Gelman predicted it would, stating (in pertinent part):

> The application for leave to appeal is DENIED without prejudice to Defendant-Appellant reasserting its substantive claims after the Washtenaw Circuit Court enters an order or a judgment amending the existing consent judgment. Nothing in this order precludes an interlocutory appeal from any order entered during or subsequent to the evidentiary hearing. (Appendix 1002).

After the Court of Appeals denied Gelman's emergency appeal, the trial court proceeded with its plan to unilaterally replace the existing consent judgment in a manner entirely unencumbered by

even rudimentary due process considerations,[7] ordering the parties to prepare for the May 3, 2021 "evidentiary hearing."

As it turned out, the "evidentiary hearing" was not an "evidentiary hearing" at all, taking fewer than three hours (rather than the ordered three days), and involving the presentation of no evidence or sworn testimony. Thereafter, on June 1, 2021, the trial court entered an Order even more one-sided against Gelman than what it had announced at the May 3, 2021 hearing.[8] The Order expressly overturned and replaced the Third Amended Consent Judgment between Gelman and EGLE, replacing it with an "Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria" that disposed of the claims and adjudicated the rights and liabilities of all of the parties (Gelman and EGLE) and non-parties (the Intervenors, who to this day still have not filed their complaints) in the lawsuit.

On June 22, 2021, Gelman filed a Claim of Appeal with the Court of Appeals, seeking to challenge the now-final judgment adjudicating the claims of the Intervenors, whose entry into this lawsuit Gelman continuously claimed should never have been allowed.[9] On June 29, 2021, the

---

[7] Before the hearing, there were no expert witness designations, and the Parties had no chance to depose any expert who would be called to testify. Moreover, the Court adopted a briefing schedule that required all entities to submit their briefs and technical reports concerning how to properly remediate a complex groundwater contamination plume on Friday, April 30 (less than 72 hours before the hearing was scheduled to begin at 9:00 a.m. on Monday, May 3). The Parties and Intervenors complied with the Court's briefing schedule, submitting nearly 1,300 pages of legal argument, technical reports and exhibits on Friday, April 30, in preparation for the "evidentiary hearing" set to begin just three days later. Given the timing and volume of these submissions, *the trial court admitted that it had not even had time to read all of the submissions before the hearing began*, despite reading all weekend. 5/3/21 Hrg Tr, p. 134. (Appendix 1227).

[8] There is no dispute that the trial court's order replaced in full the prior Consent Judgment, as amended. (5/27/21 Hrg Tr at 26; Appendix 1317).

[9] In an abundance of caution, Gelman also filed an Application for Leave to Appeal the June 1 Order. However, that Application was limited by operation of MCR 7.205(A)(4)(a) and did not seek leave to appeal the 2017 orders granting intervention given the passage of more than six months following entry of those orders. Therefore, Gelman could not contest the decision to permit

Court of Appeals rejected Gelman's claim of appeal, concluding, *inter alia*, that the June 1, 2021 Order is not a final order because it was not the first judgment or order disposing of all the claims and adjudicating the rights and liabilities of all the parties.

On July 26, 2021, the Court of Appeals granted Gelman's application for leave to appeal entry of the June 1, 2021 Order. However, pursuant to MCR 7.205(E)(4), the appeal was "limited to the issues raised in the application and supporting brief." Thus, Gelman is limited in that appeal to challenging the trial court's authority to amend the Consent Judgment and contesting the June 1 Order as improper and inadequately supported by the evidence on the record, but it may not challenge the validity of the Intervention Orders. In other words, the various orders issued by the Court of Appeals and by this Court to date have fully and permanently insulated the Intervention Orders from ever receiving any level of appellate review.

This appeal ensued.

II. BACKGROUND

This case has an extensive factual background which has been exhaustively briefed below. For purposes of this appeal, which is limited to the issue of whether the trial court's June 1, 2021 Order was final and appealable of right, Gelman will focus its discussion only to those facts most pertinent to that limited inquiry.

A. IN 1991, THE TRIAL COURT DISMISSED MOST OF THE CLAIMS IN THE UNDERLYING LAWSUIT, MAKING NO FINDING OF LIABILITY AGAINST GELMAN

In 1966, Gelman began utilizing 1,4-dioxane ("dioxane") in its production of medical-grade filters in Scio Township. This process generated wastewater containing dioxane. Pursuant

---

intervention without the filing of complaints, as those Intervention Orders had been entered in 2017.

to a series of State-issued wastewater discharge permits, Gelman disposed of its wastewater in treatment ponds which – by design and with the relevant authorities' permission – allowed treated wastewater to seep into the ground. These discharges were legal and authorized. However, unbeknownst to Gelman and the State, the treatment systems could not successfully treat dioxane due to its unique resistance to biodegradation. Unfortunately, Gelman's *permitted and legal* waste disposal practices resulted in the unintended release of dioxane into the groundwater.

The State filed this case in 1988 to require Gelman to remediate the dioxane contamination. Trial of the case against Gelman began in 1990 and lasted almost a year. At the close of the State's evidentiary proofs, the trial court ***granted*** Gelman's Motion for Involuntary Dismissal, holding that Gelman's disposal of dioxane was authorized by discharge permits issued by the State. *See* the July 25, 1991 *Opinion and Order* pp 19-27. (Appendix 19-27). The only portion of the State's case allowed to proceed were claims arising from minor overflows from Gelman's treatment ponds – but that portion of the trial was never completed. Thus, Gelman was never found liable to the State under state law and the current trial court's finding at page 45 of the March 22, 2021 hearing (Appendix 947) that "… [W]e're already in the remedial stage. … We're decades beyond litigation of whether or not Gelman polluted the water," was simply wrong.

B. THE 1992 CONSENT JUDGMENT IDENTIFIED THE RESPONSE ACTIVITIES GELMAN AGREED TO IMPLEMENT IN ORDER TO REMEDIATE THE CONTAMINATION, BUT SPECIFICALLY DENIED GELMAN'S FAULT OR LIABILITY

The State and Gelman subsequently negotiated an extensive and detailed 63-page Consent Judgment dated October 26, 1992. (Appendix 30-92). The Consent Judgment, which explicitly states at page 2 that Gelman "does not admit any fault or liability under any statutory or common law," sets forth the environmental response actions required to address the contamination. The Consent Judgment provides that it can be modified only in writing signed by the Parties and entered

by the court. *Id*., Section XXIV.[10] Section XVI.D. of the Consent Judgment provides a detailed, exclusive dispute resolution process that must be initiated by one of the Parties (EGLE or Gelman) and which is the sole method of resolving disputes regarding enforcement of the Consent Judgment's terms. Section XVIII of the Consent Judgment restricts the State's right to sue or take any administrative action against Gelman except in limited circumstances. *Id.*, Section XVIII. This section has been referred to by the Parties as the "reopener" section, as it lists the circumstances in which EGLE would be able to "reopen" the litigation – and Gelman would be able to "reopen" its defenses thereto.

Since entry of the initial Consent Judgment in 1992, the State and Gelman successfully negotiated three amendments thereto, to address changing cleanup standards and to reflect the Parties' evolving understanding of the nature and extent of the contamination at this geologically complex site. The agreed-upon response actions Gelman has undertaken pursuant to the Consent Judgments have dramatically reduced the contaminant mass present in the environment and successfully protected the public from any unacceptable exposures.

C. THE PARTIES TO THE CONSENT JUDGMENT ANTICIPATED AND PROVIDED FOR MODIFICATIONS TO THE CONSENT JUDGMENT BASED ON ADOPTION OF MORE STRINGENT DIOXANE STANDARDS, AND MODIFIED THE "REOPENER" SECTION ACCORDINGLY

Pursuant to the process outlined above, the Consent Judgment was amended by stipulation of the Parties and Order of the trial court on September 23, 1996 and again on October 20, 1999, to reflect changed cleanup standards and the Parties' evolving understanding of the site conditions.

[10] Appendix 88 ("This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered by the Court.").

None of the modifications to the Consent Judgment allowed for anyone other than the State or Gelman to modify – with the other's consent – the terms of the Consent Judgment.

In 2010, the United States Environmental Protection Agency ("EPA") reevaluated dioxane's toxicity, issuing a Toxicological Review in August of that year. During subsequent discussions, EGLE notified Gelman that it anticipated adopting more restrictive dioxane criteria based on the EPA's reevaluation. Thus, when Gelman and EGLE negotiated new amendments to the Consent Judgment in 2011, they included new language addressing this anticipated circumstance in the Third Amended Consent Judgment's "reopener" provision.

The most recent amended agreement (the Third Amended Consent Judgment) was entered in March 2011. Appendix 152-188. Subsection XVIII.E identifies the *only* circumstances in which the State can initiate further litigation against Gelman outside of enforcing the existing Consent Judgment terms, including but not limited to if the State adopted more restrictive dioxane cleanup criteria which causes a situation in which the existing Remedial Action plan "is not protective of the public health, safety, welfare, and the environment." (Section XVIII.E.1; Appendix 180-181). Thus, the Parties specifically recognized and addressed what would happen if EGLE adopted more stringent dioxane cleanup criteria: either they would negotiate new protocols addressing how to meet the new standards and modify the Consent Judgment by stipulation pursuant to Section XXIV, or EGLE could "re-open" its lawsuit against Gelman (subject to the same rules and procedures applicable to any other lawsuit filed in the State of Michigan, including Gelman's assertion of any applicable defenses).

Nothing in the Consent Judgment, as amended by the Parties and approved by the court, allows anyone other than the Parties to re-open the Consent Judgment or institute proceedings to amend or replace its terms.

D. THE INTERVENORS WERE ALLOWED A SEAT AT THE TABLE TO NEGOTIATE A FOURTH AMENDED CONSENT JUDGMENT

Gelman and EGLE began negotiating an amendment to the Consent Judgment in 2015 in anticipation of the adoption of new, more stringent statewide dioxane cleanup standards. In October 2016, EGLE utilized an emergency administrative rule to adopt the long-anticipated new standards. Significantly, EGLE did *not* petition the court to reopen the Consent Judgment based on the new standards. Rather, because they had anticipated the new criteria, EGLE and Gelman had already agreed by that time on the additional response actions needed to address that change and were far along in negotiating a fourth amendment to the Consent Judgment's terms that would address the more stringent cleanup levels.

By late 2016, Gelman and EGLE had agreed in principle on a Fourth Amended Consent Judgment (the "Bilateral Amendment") and reduced that amendment to writing in early 2017. *See*, Appendix 1925-1889. EGLE confirmed at a hearing regarding entry of the Court's June 1, 2021 Order that it would not have agreed to the terms set forth in the Bilateral Amendment if it was not satisfied that the agreement adequately protected the public health and environment. (6/17/21 Hrg Tr, pp. 19-20; Appendix 1997).

Just as those negotiations were nearly complete and the Parties were ready to seek entry of the fourth amendment to the Consent Judgment, but before Gelman or EGLE had petitioned the court to enter the Bilateral Amendment, the trial court granted Intervenors' motions to intervene by Orders dated January 18 and February 6, 2017. The Intervention Orders were unusual – the Intervenors were not required to bring suit against Gelman and Gelman was not allowed to defend against any of their claims.[11] Indeed, without even requiring Intervenors to prove that they had

[11] The January 18, 2017 order is included in the Appendix at 189-191 and the February 6, 2017 order is included in the Appendix at 192-194.

standing – or how, in the City's case, its claims were not precluded by the City's prior settlement[12] – the Intervention Orders allowed the new entities to participate in the nearly-concluded negotiations between Gelman and EGLE regarding the terms of the proposed Fourth Amended Consent Judgment. However, the Intervention Orders provided that "Should any of the Intervenors, after participating in negotiations on a proposed Fourth Amended Consent Judgment, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, they may file their complaint(s) after providing notice to the other parties." (January 18, 2017 Order Granting Intervention, ¶ 1.a., Appendix 189-190). To date, none of the Intervenors has filed a complaint in this matter.

Importantly, under the Intervention Orders, the Intervenors were not granted party status: they were given a "seat at the table" for the Consent Judgment negotiations. Otherwise, it would not have been necessary for the Intervention Orders to toll the statute of limitations until such time as Intervenors' complaints were filed.[13] Thus, having not filed their complaints, Intervenors are neither parties to the lawsuit nor Parties to the Consent Judgment – and yet, the trial court afforded them that status by allowing them to participate in the "remedy hearing" without filing their complaints, and the applicable statutes of limitation remain tolled.

In short, the unorthodox procedure that the trial court adopted allowed entities that had no prior involvement in the decades-old lawsuit and were not parties to the Consent Judgment to nevertheless participate in the negotiations to modify that agreement between Gelman and the State. But at least Gelman knew that if the negotiations failed, the Intervenors would have to file

[12] *See* footnote 17, below.

[13] *Id.*, ¶ 1.e, Appendix 190; February 6, 2017 order, ¶ 1.d, Appendix 193. *See also* MCL 600.5856 (tolling statute of limitations when copy of summons and complaint are filed and served on defendant); MCL 600.1901 (civil action is commenced by filing a complaint with the court).

their proposed complaints and Gelman would be able to defend itself against their claims before being ordered to accede to their demands.

E. AFTER NEARLY FOUR YEARS OF NEGOTIATIONS, THE INTERVENORS REJECTED A SETTLEMENT RECOMMENDED BY THEIR ATTORNEYS AND RETAINED EXPERTS

Over the course of the next nearly four years, Gelman, EGLE and the Intervenors held a series of meetings involving the parties, their attorneys and experts to discuss how to structure a revised Consent Judgment in a manner satisfactory to everyone involved. Eventually, in late summer 2020, all of the various constituencies, and all of their attorneys and technical experts, reached consensus on a settlement. The settlement consisted of a series of negotiated compromises and bargained-for exchanges, including concessions and agreements by the Intervenors beyond the scope of the proposed amended Consent Judgment previously negotiated between EGLE and Gelman. The resultant proposed Fourth Amended Consent Judgment was only one document in the larger three-part settlement package.[14]

Sadly, bowing to the pressure of a small but vocal band of their constituents, the elected officials representing the local units of government among the Intervenors defied the recommendations of their attorneys and experts and rejected the proposed modifications to the

[14] *See* City of Ann Arbor, "Gelman Proposed Settlement Documents," https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx, last visited October 1, 2021 (listing "repository of proposed settlement documents" under consideration, including Proposed Fourth Amended and Restated Consent Judgment, Stipulated Order, and Proposed Settlement Agreements); Fred Dindoffer, "Legal Issues in Public Comments/Questions" Presentation (Sept. 24, 2020), https://www.a2gov.org/departments/water-treatment/PublishingImages/Pages/Gelman-1,4-Dioxane-Litigation/DindofferGelmanPresentation09242020.pdf at 2, last visited October 1, 2021, (listing "three proposed documents" as comprising settlement and stating "***[t]hese documents should not be viewed in isolation***"). (Emphasis added).

Consent Judgment. [15] In so doing, the Intervenors scuttled the years-long process that had already prevented entry of the 2017 Bilateral Amendment that Gelman and EGLE had negotiated, reduced to writing, and which EGLE agreed would provide a fully protective and reliable remedy. [16]

F. THE TRIAL COURT ABANDONED ITS INTERVENTION ORDERS AND ORDERED AN "EVIDENTIARY HEARING" WITHOUT REQUIRING INTERVENORS TO FILE THEIR COMPLAINTS OR ALLOWING GELMAN TO DEFEND AGAINST THEIR CLAIMS

On November 19, 2020, Intervenors' counsel notified the trial court that the Intervenors had rejected the recommended settlement and suggested further negotiations in the form of facilitated mediation utilizing a court-appointed "environmental mediation expert." (Appendix 201). Recognizing that further negotiation would be fruitless, Gelman asked the trial court to set a date for the Intervenors to file their complaints, as expressly provided in the Intervention Orders.

Inexplicably, the trial court rejected Gelman's request. Instead, defying the terms of its own Intervention Orders, the court fashioned an unprecedented "remedy hearing" at which it would hear evidence and argument from each of the entities' attorneys and experts, and then issue an Order announcing what remediation efforts would be required under the new "consent"

---

[15] *See* Transcript of the November 19, 2020 Status Conference, (Appendix pp. 200-264), where one of the City's attorneys explained the settlement's rejection as: "This is stepping back from all of us having recommended the settlement documents to our clients." (11/19/20 Hrg Tr., p. 8; Appendix 207). The City's attorney said "[W]e as attorneys think that there's a lot of comment from the community that our clients believe comes from experts but doesn't come from experts, and there needs to be a diplomatic way to diffuse that perceived expertise." (11/19/20 Hrg. Tr., pp. 7-8; Appendix 206-207).

[16] Gelman's full performance of the remedial work required by the Third Amended Consent Judgment has continuously protected public health and the environment, even under the revised cleanup standards, while the intervention-related machinations played out. However, Gelman agrees with EGLE that Gelman's implementation of the response activities provided for in the 2017 Bilateral Amendment is appropriate and will increase the long-term reliability of the cleanup. Thus, Gelman did not seek to stay those activities even while seeking appellate review of the overbroad and unsupportable aspects of the trial court's June 1, 2021 Order.

judgment, explaining "If we don't have an agreement, I have to make a decision." (Appendix 220). The trial court thus wrongly believed it could act as a "factfinder" and unilaterally impose remedial terms other than those to which the Parties to the Consent Judgment, as amended, had agreed.

The trial court clearly understood that the Intervenors had not filed any complaints and Gelman had not been given the opportunity to defend against those complaints.[17] The trial court also understood that it had unilaterally decided to allow the Intervenors to participate in negotiations to change the terms and conditions of a contract to which they were not parties, and as a result of that action, now purported to have the authority to impose new terms on EGLE and Gelman arising out of the Consent Judgment.[18] And the trial court incorrectly presumed that its decision to move directly to the remedy hearing (without giving Gelman any opportunity to defend itself against the Intervenors' claims) was appropriate, apparently based on its mistaken belief that Gelman had already been found legally liable for the remediation, finding "… ***[W]e're already in***

[17] Appendix 230-231 ("I don't want them filing a complaint. I don't want an answer to a complaint. I don't want discovery. I don't want all that."). As a result, for example, Gelman was barred from challenging the City of Ann Arbor's right to bring *any* claims against Gelman in light of the settlement in prior litigation. More specifically, after it found dioxane in one of its little-used municipal wells in 2001, the City filed three separate but related actions against Gelman in 2004 and 2005 seeking to force Gelman to undertake more rigorous (and technically infeasible) cleanup efforts. On November 20, 2006, Ann Arbor and Gelman settled all of those claims through a Release of Claims and Settlement Agreement (the "City's Settlement"). (Appendix 112-151). Under the City's Settlement, the City released the very claims for additional response activity it now asserts, rendering those claims substantively and procedurally invalid. The City also agreed to cooperate with Gelman's implementation of the institutional control-based cleanup remedy that it has sought to challenge. The City Settlement thus forbids the City from challenging remediation protocols approved by EGLE and set forth in the Consent Judgment – which is exactly what the City is doing with its intervention.

[18] Appendix 230-231 ("So, from my process, I've opened up a consent judgment, I've legally been saying I can have the Intervenors give me your voice of what you think and why, and I'll make the call. Then you have an appellate record. * * * Now I think it's time that I do my job and simply say, give me the science, give me the proposal, give me your legal reasons what you think I should do and why, and I'll make a call.").

the remedial stage. We're past all that. ***We're decades beyond litigation of whether or not Gelman polluted the water***."[19]

In short, the trial court determined that it was appropriate to proceed with a hearing to consider Intervenors' demands and "make the finding of fact given [the] change of acceptable levels of what the cleanup program will be." (3/22/2021 Hr. Tr., p 46; Appendix 947). The court noted: "The purpose of the hearing is to hear what is the proposal for the cleanup; why; how I can do it; why; and then I'm going to order it. And it will be an evidentiary hearing." (*Id.*, pp. 46, 48-49; Appendix 947-948). Thus, the court asserted the authority to revisit the remedial action plan developed by EGLE and Gelman in the Consent Judgment and to change its terms to address the Intervenors' claims – even though they were neither parties to the Consent Judgment nor the underlying lawsuit.

G. GELMAN SOUGHT EMERGENCY LEAVE TO APPEAL THE TRIAL COURT'S ANNOUNCED PLANS TO REOPEN AND AMEND THE CONSENT JUDGMENT

The trial court's abandonment of the process outlined in its Intervention Orders, clear disregard for the requirements of due process and civil procedure, and manifest intent to issue an order amending the existing Consent Judgment without the consent of the Parties thereto prompted Gelman to file an *Emergency Application for Leave to Appeal* with this Court. Gelman sought to prevent enforcement of the trial court's scheduling orders that, combined with the trial court's announced plan for the "evidentiary hearing," would improperly open EGLE and Gelman's Consent Judgment, as amended, to changes to which they – the only Parties thereto and to the underlying case – did not consent.

[19] 3/22/21 Hrg Tr, p. 45; Appendix 947 (Emphasis added). As noted above, Gelman has *not* been found liable to the State in this case, let alone to the Intervenors, who have yet to even file their complaints.

In an Opinion dated April 29, 2021, this Court denied Gelman's *Emergency Application* in an Order that stated (in pertinent part):

> The application for leave to appeal is DENIED without prejudice to Defendant-Appellant reasserting its substantive claims after the Washtenaw Circuit Court enters an order or a judgment amending the existing consent judgment. Nothing in this order precludes an interlocutory appeal from any order entered during or subsequent to the evidentiary hearing.

The very next day, on April 30, 2021, Intervenors submitted their 83-page brief setting forth their position on the issues to be addressed in the May 3, 2021 "evidentiary hearing." The Intervenors summarized what was to occur in that hearing as follows:

> The Intervenors jointly request entry of a new Gelman Response Activities Order ("2021 Order") which would implement revised cleanup criteria set by the State of Michigan and ***which would modify and largely replace the existing orders and judgments in the case*** that govern response activities, actions, obligations and duties related to 1,4 dioxane that continues to spread from defendant's … facility located on Wagner Road in Scio Township.[20]

Thus, the Intervenors acknowledge that the sole purpose of the May 3, 2021 hearing was to replace the existing Consent Judgment – the "final judgment" that was entered in 1992.

H. THE MAY 3, 2021 "EVIDENTIARY HEARING" WAS ENTIRELY IMPROPER

After this Court denied Gelman's emergency application for leave to appeal, the trial court proceeded with the May 3, 2021 "evidentiary hearing" – a hearing that in fact considered no evidence, exhibits, or sworn fact or expert witness testimony. After brief opening statements from Gelman and EGLE regarding the lack of precedent or legal basis to proceed with the hearing,[21]

---

[20] Intervening Plaintiffs' Joint Brief in Support of an Additional Response Activities Order ("2021 Order") to Implement Revised Cleanup Criteria and to Modify Existing Response Activity Orders and Judgments, at p. 1 (Appendix 1009) (emphasis added).

[21] 5/3/21 Hrg Tr, pp. 14-22. Gelman's attorney noted the absence of any dispute between EGLE and Gelman (the only parties to the Consent Judgment), which was a prerequisite to the court's exercise of power to interpret the Consent Judgment. *Id.*, p. 15. He further noted that while EGLE

Intervenors began to offer not an opening statement but a detailed, lengthy summary of the purported basis for their remedial demands as outlined in their extensive 603-page prehearing briefing. But after just over an hour of opening statements from the first of Intervenors' counsel, the trial court interrupted that presentation to explain that – rather than completing the scheduled three-day "evidentiary hearing" – it was considering simply ordering into effect a portion of the settlement package that the Parties and Intervenors had reached before the Intervenors rejected it.

After a short recess, based only on this manifestly incomplete record – two brief opening statements expressing doubt as to the validity of the hearing and one longer-but-incomplete opening statement, and with absolutely no evidence offered or admitted into the record – the court announced its intention to "order the consent agreement with review, and the Intervenors will still be there, and so, you know, we can do all that appellate review, but at least we take one step forward." (*Id.*, p. 82).

Before finalizing its order, though, the trial court announced that he wanted to "hear from the people who are in the waiting room."[22] All told, the trial court listed to nearly an hour of statements from 14 members of the public and media,[23] *none* of whom was even offered by a party

had the right to seek additional response activities beyond the Third Amended Consent Judgment, but had not done so. *Id.*, pp. 15-16. And he noted that while the court had the ability to enforce its own orders, the evidentiary hearing was not concerning "enforcement" of the existing Consent Judgment, but "is a hearing to either create a new or modify an existing order." *Id.*, at p. 16. Appendix 1109.

[22] *Id.*, p. 83. Due to COVID-related restrictions, the hearing was being conducted via Zoom, so was attended by more than a dozen people other than counsel, including members of the general public, elected officials and at least two members of the media.

[23] *Id.*, pp. 83-118, 125, 129, 132-133, and 137. The court also considered additional comments from the public in the midst of its attempt to formulate its order. *See, e.g.*, page 132 of the transcript, where the court asked local politicians to comment on his proposed order, and pages 137-139, where the court asked members of the media covering the hearing whether they intended to be fair about how they reported the day's events.

to the proceedings or by the Intervenors, let alone provided testimony under oath or subject to cross-examination.

At that point, the court ruled that it would "put into effect right now the proposed Consent Judgment." (*Id.*, p. 121). The court acknowledged that what it was entering was *not* a consent order, but its own order, which would *not* include any of the other related documents that all participants in the hearing agreed were part of the negotiated settlement that had been rejected by the Intervenors:

> THE COURT: * * * No. I am absolutely just saying I'm ordering the proposed Consent Judgment, and then I want to say on it every quarter, and the Court of Appeals, you know, can decide whether that's appropriate or not. And then I'd like the Court of Appeals to weigh in frankly before I take any additional steps. Are you with me? (*Id*., p. 122.)

The court also ruled that the Intervenors would now obtain ongoing rights to have a say regarding the remediation and be treated as if they had full Intervenor status, even though they never filed any complaints. (*Id.*, p. 121) After discussion, the court agreed with Gelman that it was issuing a "final order," and Intervenors' counsel (whom the court tasked with drafting the proposed order) agreed to include that language in what it would submit to the court for entry. (*Id.,* pp. 131-132).

In sum, after ordering an "evidentiary hearing" to "open up" a Consent Judgment between EGLE and Gelman – expressly to allow non-parties to the agreement or the underlying lawsuit to offer testimony, evidence and argument concerning the existing Consent Judgment – the trial court ruled that it would enter an order replacing the Consent Judgment without the consent of the Parties thereto, based upon a fundamentally improper remedy hearing that the trial court lacked the authority to hold and at which the court considered no evidence or sworn testimony.

I. OVER GELMAN'S OBJECTIONS, THE TRIAL COURT ENTERED AN ORDER THAT CHANGED AND FURTHER EXPANDED WHAT HAD BEEN ORDERED AT THE "EVIDENTIARY HEARING"

After the hearing concluded, on Wednesday, May 5, 2021, Intervenors' counsel circulated a proposed Order to EGLE and Gelman. (Appendix 1235-1238). Gelman believed that proposal to be flawed in several ways. (Appendix 1239-1245). Among other things, the proposed order failed to specify that the existing (Third Amended) Consent Judgment was being replaced by the trial court's new Order. Gelman therefore objected to entry of the proposed Order, explained the basis for its objections, and submitted its own proposed Order consistent with what the court had ordered. In response, Intervenors agreed that "for clarity, the Court's order should state that it replaces the Third Amended Consent Judgment." (*See* Appendix 1259-1262).

At the May 27, 2021 hearing on Gelman's objection to entry of the proposed Order, Gelman reiterated its positions set forth in its objections. (5/27/21 Hrg Tr, pp. 6-15; Appendix 1297-1306). For its part, EGLE agreed with Gelman and the Intervenors that the order should clarify that it replaced the Third Amended Consent Judgment "so we don't have … two conflicting orders basically there." (*Id*. p. 15). Despite this consensus, the court concluded that it was "comfortable" with the order proposed by the Intervenors as submitted – even though Intervenors had *agreed with Gelman* that it should have clarified that the order replaced the Third Amended Consent Judgment. The trial court entered Intervenors' proposed order, without change, on June 1, 2021.

J. GELMAN'S APPEAL BY RIGHT WAS DENIED BECAUSE THE COURT OF APPEALS DETERMINED THAT THE JUNE 1 ORDER DID NOT REVERSE THE EXISTING CONSENT JUDGMENT

On June 22, 2021, Gelman filed a Claim of Appeal with the Court of Appeals, seeking to challenge the now-final judgment adjudicating the Intervenors' claims. As noted above, on June

29, 2021, the Court of Appeals rejected Gelman's claim of appeal, concluding that the June 1, 2021 Order was not the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties, and that the October 26, 1992 consent judgment was the first such judgment. The Court of Appeals further observed that, "although the October 26, 1992 consent judgment was amended or modified several times, it was not reversed and it remains the final order pursuant to MCR 7.202(6)(a)(i)."

Thus, even though the parties (EGLE and Gelman) and the Intervenors all acknowledge that the June 1, 2021 Order replaced the existing Consent Judgment and materially altered its terms and conditions, the Court of Appeals concluded that the original Consent Judgment was not reversed and therefore was the only "final judgment" from which Gelman could appeal by right. The Court of Appeals reached this determination despite the fact that none of the original Consent Judgment's terms remained applicable, as they were superseded by the June 1, 2021 Order, which replaced in full the original Consent Judgment. Stated simply: the June 1, 2021 Order rendered the 1992 Consent Judgment void and unenforceable.

LAW AND ARGUMENT

I. THE JUNE 1, 2021 ORDER IS A FINAL ORDER APPEALABLE AS OF RIGHT TO THE MICHIGAN COURT OF APPEALS

A. INTRODUCTION

A Consent Judgment was entered in the underlying case on October 26, 1992.[24] The Consent Judgment is a "final judgment" because it is the "first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). The parties to the 1992 Consent Judgment – EGLE and Gelman – amended the judgment by stipulation

[24] Appendix 030 – 092.

on three occasions, the most recent of which was the Third Amended Consent Judgment entered on March 8, 2011.[25]

In 2017, Gelman and EGLE reached agreement on an amendment to the Consent Judgment to reflect the adoption of new, more stringent statewide dioxane cleanup standards. Before that amendment could be entered, however, Intervenors-Appellees were permitted to intervene in this action by the Intervention Orders.[26] Each order allowed Intervenors to participate in this matter in a limited capacity – specifically, to have a "seat at the table" as Gelman and EGLE negotiated a revised environmental remedy and consent judgment amendment – and to file their respective complaints should those negotiations fail.[27]

Gelman timely sought leave to appeal the trial court's decision to allow the untimely intervention of new parties roughly 24 years after the 1992 Consent Judgment was entered, arguing not only that the intervention was untimely (by decades), but also that the court-mandated inclusion of local units of government and an environmental group in negotiations over an environmental remedy would delay and possibly prevent entry of an amended consent judgment and modified remedy addressing the new cleanup standards (like Gelman and EGLE had already negotiated). The Court of Appeals denied Gelman's application by Order dated July 14, 2017 – only a few months into the negotiations – concluding that Gelman had not persuaded the court "of the need

[25] Appendix 152-188. The first amendment to the 1992 Consent Judgment was entered on September 23, 1996, and the second amendment to the 1992 Consent Judgment was entered on October 20, 1999. See Appendix 093-105, and 106-111.

[26] The Intervention Orders entered on January 18, 2017 and February 6, 2017 are included in the Appendix at 189-191 and 192-194, respectively.

[27] Those complaints – new claims by new parties – sought relief in the form of ordering additional remedial activities to address the underlying environmental contamination.

for *immediate* appellate review."[28] This wording suggests that appellate review could be obtained upon entry of a final order.

The ensuing four years of negotiations eventually culminated in a global settlement package that was ultimately rejected by each of the Intervenors. But instead of having Intervenors file their complaints, the trial court scheduled an evidentiary hearing for the purpose of fashioning a modified consent judgment setting forth a revised environmental remedy, over Gelman's strenuous objections.[29] Ultimately, the trial court entered the June 1, 2021 Order replacing the existing Consent Judgment with a new remedial plan requiring remediation activities to which Gelman has not agreed and which the responsible regulator, EGLE, does not view as necessary to protect the public health or environment.

Gelman filed its claim of appeal with the Michigan Court of Appeals on June 22, 2021. On June 29, 2021, the Court of Appeals entered its order dismissing Gelman's claim of appeal for lack of jurisdiction on the grounds that the June 1, 2021 Order was a post judgment order not appealable as of right.

The June 29, 2021 order of the Court of Appeals concludes that the addition of new complaining parties to these proceedings thirty years after its inception, and the modification of the existing final judgment without the consent of the parties thereto, do not alter the fact that the 1992 Consent Judgment "was '*the first*' judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case."[30]

---

[28] Appendix 2036.

[29] Gelman filed an emergency application for leave to appeal the trial court's order scheduling the evidentiary hearing, but the Court of Appeals denied the application as premature. A copy of the April 29, 2021 Order of the Court of Appeals denying leave to appeal is included in the Appendix at 1002.

[30] Appendix 2034.

Gelman respectfully submits that the June 1, 2021 Order is the first order which disposed of all the claims and adjudicated the rights and liabilities of all the parties to this case; that adding the Intervenors to this case changes the jurisdictional outcome; and that the 1992 Consent Judgment, as amended, was "reversed" by the trial court within the meaning of the court rule.

B. STANDARD OF REVIEW

The question presented involves the interpretation of the Michigan Court Rules governing the appellate jurisdiction of the Michigan Court of Appeals and the finality of orders entered by the circuit court. The interpretation of a court rule is a question of law, and the standard of review is *de novo*. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

In construing a court rule, this Court applies the legal principles that govern the construction and application of statutes. *Grievance Adm'r v Underwood*, 462 Mich 188, 193; 612 NW2d 116 (2000). The interpretation of court rules, as with statutes, begins with the plain language of the rule, and when the language is unambiguous, this Court enforces the meaning expressed without further judicial construction or interpretation. In addition, common words must be understood to have their everyday, plain meaning.

> [W]e begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135; 545 NW2d 642 (1996). Similarly, common words must be understood to have their everyday, plain meaning. See M.C.L. § 8.3a; MSA 2.212(1); see also *Perez v. Keeler Brass Co.,* 461 Mich 602, 609; 608 NW2d 45 (2000).

Underwood, 462 Mich at 194.

Gelman respectfully submits that under the plain and unambiguous language of MCR 7.202(6)(a)(i), the June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria is a final order appealable as of right.

C. THE MICHIGAN COURT OF APPEALS HAS APPELLATE JURISDICTION ON APPEALS FROM ALL FINAL JUDGMENTS AND FINAL ORDERS FROM THE CIRCUIT COURT AS DEFINED BY LAW AND SUPREME COURT RULE

Under the Michigan Constitution of 1963, the jurisdiction of the Michigan Court of Appeals is to be established by the legislature. Const. 1963, art. 6, § 10 ("The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by rules of the supreme court."). The Michigan Legislature has conferred appellate jurisdiction in the Court of Appeals over all final judgments and final orders entered in the circuit court as those terms are defined by law and supreme court rule. MCL 600.308(1) provides:

> The court of appeals has jurisdiction on appeals from all final judgments and final orders from the circuit court, court of claims, and probate court, as those terms are defined by law and supreme court rule, except final judgments and final orders described in subsections (2) and (3). A final judgment or final order described in this subsection is appealable as a matter of right.[31]

Pertinent to the present appeal, the Michigan Supreme Court has defined the terms "final judgment" or "final order" entered in a civil case to mean:

> the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order.

MCR 7.202(6)(a)(i).

Accordingly, the question of whether the Court of Appeals has jurisdiction to consider Gelman's claim of appeal from the June 1, 2021 Order as a matter of right involves the interpretation of a court rule. Court rules are subject to the same rules of interpretation as statutes. *Underwood*, *supra*, and *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010). The goal in interpreting a court rule is to give effect to the intent of the drafters, and the first step is to

[31] Subsection 2, referenced in the quotation, addresses orders and judgments that are appealable by leave to appeal, and subsection 3 addresses orders concerning the assignment of cases to the business court which are not appealable to the court of appeals.

examine the language used in the rule and to give every word its plain and ordinary meaning. *Id*. If the language is clear and unambiguous, it must be applied as written, and construction is neither necessary nor permitted. *Id*.

Under the plain and ordinary meaning of the rule, the Court of Appeals has appellate jurisdiction to review all final judgments and final orders from the Circuit Court – including the June 1, 2021 Order entered here.

D. THE MICHIGAN COURT OF APPEALS ERRED IN DISMISSING GELMAN'S CLAIM OF APPEAL FROM THE JUNE 1, 2021 ORDER OF THE TRIAL COURT

The Court of Appeals dismissed Gelman's appeal as of right on the grounds that the June 1, 2021 Order was not the "first" order or judgment that disposed of all of the claims and adjudicated the rights and liabilities of all the parties to the case, reasoning as follows:

> [T]he October 26, 1992 consent judgment was "the first" judgment that disposed of the claims and adjudicated the rights and liabilities of all the parties to the case. MCR 7.202(6)(a)(i) contemplates that only the first judgment or order meeting the definition will be considered final under that provision unless that judgment or order is reversed. See *Varran v Granneman (On Remand)*, 312 Mich App 591, 600-601; 880 NW2d 242 (2015). The postjudgment addition of intervening parties into the case does not change this outcome. *Id*. Moreover, although the October 26, 1992 consent judgment was amended or modified several times, it was not reversed and it remains the final order pursuant to MCR 7.202(6)(a)(i). [32]

Gelman respectfully submits that the June 1, 2021 Order is the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of *all* the parties to this case—including the Intervenors, the postjudgment addition of whom as parties changes the jurisdictional outcome.

[32] Appendix 2034.

1. The Postjudgment Addition of Intervenors to this Action Necessarily Means that the June 1, 2021 Order is the First Judgment or Order that Disposed of all the Claims and Adjudicated the Rights and Liabilities of All the Parties.

Court rules, like statutes, should be construed as a whole, and a rule must be read in conjunction with other relevant rules to ensure that the intent of the drafter, the Michigan Supreme Court, is correctly ascertained. See *In re MKK*, 286 Mich App 546, 556–57; 781 NW2d 132, 139 (2009), which addressed statutory construction and stated as follows:

> In determining the Legislature's intent, we must first look to the language of the statute itself. Moreover, when considering the correct interpretation, the statute must be read as a whole. A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language, and to have considered the effect of new laws on all existing laws. [Citations omitted.]

MCR 2.604(A) is one such rule, which must be read to carry its plain meaning and in conjunction with other relevant rules. It provides:

> [A]n order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.

The corollary to the principles set forth in MCR 2.604(A) is that an order or other form of decision which *does* adjudicate all the claims and the rights and liabilities of *all* the parties *does* terminate the action as to the claims and the parties. Moreover, reading MCR 2.604(A) in conjunction with MCR 2.612, which addresses relief from judgments or orders, a final order or judgment is not subject to revision except as provided in MCR 2.612.

Here, no motion for relief from the 1992 Consent Judgment, as amended, was ever filed, nor did any party thereto request that it be revised. Instead, Intervenors moved to intervene in this action notwithstanding the passage of some 24 years since entry of the Consent Judgment as to EGLE and Gelman. Intervention is defined in the civil law as "an action by which a third party becomes party in a suit pending between others." *Ferndale School District v Royal Oak Twp*, 293 Mich 1, 12; 291 NW 199 (1940). This Michigan Supreme Court, quoting with approval from an annotation appearing in 123 Am St Rep 294, stated:

> An intervention in the exercise of an intelligent discretion by the trial court will not be granted where the intervener has been guilty of laches after knowledge of the pendency of the suit, if any part of the same is thereby retarded, rendered nugatory, or changes the position of the original parties to their detriment, although the original action has not resulted in a judgment. * * * ***Only under circumstances where such intervention may be granted in furtherance of justice and in no wise affects injuriously the original litigants will it be granted after final judgment.***'
>
> In *Watkins v. Donnell*, 189 Mo App 617, 175 SW 280, 282, the court said: 'Appellant was not a party to the proceeding, but sought to intervene therein, i. e., to become, by leave of court, a party thereto for the protection of a right or interest alleged to be affected thereby. ***The general rule is that one coming in as an intervener must take the case as he finds it, and cannot delay the trial of the cause, and that intervention comes too late after trial begins, and a fortiori after judgment***. See 17 Am & Eng Enc of Law (2d Ed.) 185; 11 Enc.Pl & Pr 510, 503.'

Sch Dist of City of Ferndale, 293 Mich at 11-12.

In the present case, Intervenors entered this matter following a final judgment. Due to their demands, the 1992 Consent Judgment, as amended, was replaced with the June 1, 2021 Order, which requires Gelman to comply with the requirements of the proposed (but rejected) Fourth Amended and Restated Consent Judgment attached to the Order. Quite literally, Intervenors were permitted to intervene in this case after entry of the final 1992 Consent Judgment, as amended, which had already terminated the action as to the original parties: EGLE and Gelman. Yet no motion for relief from judgment was filed by any party, contrary to the fundamental legal principle that final judgments and final orders are binding on the parties and the court and may not be

modified or amended in the absence of the consent of the parties. It thus can only be the June 1, 2021 Order which "disposes of all the claims and adjudicates the rights and liabilities of all the parties" ***including Intervenors***.

The Court of Appeals cites to *Varran v Granneman (On Remand)*, 312 Mich App 591, 600-601; 880 NW2d 242 (2015), for the proposition that only the first judgment or order meeting the definition of final judgment or final order will be considered final under the court rule, and the postjudgment addition of intervening parties into a case does not change this outcome. *Varran* involved a dispute between the father of a minor child and the child's paternal grandparents over visitation. The grandparents, exercising their statutory right under MCL 722.27(b)(3), filed a motion seeking grandparenting time in an existing action originally commenced by the now-deceased mother who had sought custody of the minor child.

Varran is distinguishable from the present case, because the law does not contemplate that the final judgment entered in the custody case fully and finally resolves *all* visitation issues involving the minor child. Rather, the statute expressly provides a vehicle for grandparents to seek grandparenting time subject to the requirements of the statute, regardless of whether there is a divorce judgment or a final judgment addressing custody of the minor. In other words, a party seeking grandparenting time is not required to first seek relief from any existing judgment under MCR 2.612 in order to amend the judgment to obtain grandparenting time.

Unlike the grandparents in *Varran*, Intervenors here are not bringing a claim specifically authorized by statute and created by the legislature with the intent that it may be maintained regardless of an existing final judgment. Rather, their complaints are under environmental laws that require them to prove standing to bring their claims and liability on the part of Gelman in order to obtain the relief sought in their complaints. The June 1, 2021 Order is the first order

disposing those claims and is thus the first order which adjudicates the rights and liabilities of *all* the parties, including Intervenors.

This is the only logical treatment of the June 1, 2021 Order. To find otherwise would mean that Gelman never was entitled to appellate review as of right of the improper 2017 Intervention Orders that allowed Intervenors' untimely intervention in this action, as Intervenors appear to argue at page 11 of their Answer to Application in Docket No. 357599. Gelman respectfully suggests that this Court should not, having denied Gelman's timely 2017 application because immediate appellate review of the Intervention Orders was not required, now apply the final judgment rule in a manner that prevents any appellate review of those intervention decisions as of right at any time.

The June 1, 2021 Order is a final order appealable as of right, and the Court of Appeals has jurisdiction to consider Gelman's appeal thereof.[33]

[33] The final judgment rule is intended to eliminate piecemeal appeals. *City of Detroit v State*, 262 Mich App 542, 545; 686 NW2d 514 (2004). That purpose is frustrated by characterizing the June 1, 2021 Order as a postjudgment nonfinal order, because all rulings entered by the trial court will be unreviewable upon the passage of six months following their entry. See MCR 7.205(A)(4)(a). In other words, the addition of intervenors to pursue their own independent theories and causes of action against Gelman in these proceedings notwithstanding the 1992 Consent Judgment, as amended, means that all orders that could have been entered in these proceedings such as discovery orders, summary disposition rulings, and possibly evidentiary rulings brought in advance of trial would be required to be appealed on a piecemeal basis. Gelman respectfully submits that the June 1, 2021 Order is final and is the only order which resolves Intervenors' claims, and that all orders entered by the trial court – including the 2017 Intervention Orders – are appealable as of right to the Court of Appeals. *Green v. Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009) (A party appealing a final judgment as of right may challenge on appeal orders entered by the trial court prior to final judgment.).

2. The Trial Court Reversed Itself by Vacating the 1992 Consent Judgment, as Amended, and Replacing the Consent Judgment with the June 1, 2021 Order.

The Court of Appeals also ruled that, "Moreover, although the October 26, 1992 consent judgment was amended or modified several times, it was not reversed and it remains the final order pursuant to MCR 7.202(6)(a)(i)." The court rule defines final order to mean "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order." To the extent that this statement by the Court of Appeals is intended to communicate that the term "reversal" is limited to reversal on appeal, Gelman would respectfully point out that the language of the rule does not so state. The Merriam-Webster Dictionary defines the term "reverse" as follows:

1 a : to turn completely about in position or direction

b : to tum upside down : invert

c : to cause to take an opposite point of view reversed herself on the issue

2 : negate, undo: such as

a: to overthrow, set aside, or make void (a legal decision) by a contrary decision

b : to change to the contrary reverse a policy

c : to undo or negate the effect of (something, such as a condition or surgical operation) had his vasectomy reversed

3 : to cause to go in the opposite direction especially: to cause (something, such as an engine) to perform its action in the opposite direction

The plain and ordinary meaning of the word "reverse" is not confined to reversal on appeal, and in fact, both this Court and the Court of Appeals have oftentimes characterized the setting aside of rulings and orders of the trial court by the trial court as a "reversal." *See Grange Ins Co of Michigan v Lawrence*, 494 Mich 475, 487 n 13; 835 NW2d 363 (2013) (stating that, "The Wayne Circuit Court later reversed itself on January 7, 2008, vacating the ex parte order and declaring it

void *ab initio*."), *Spiek v Michigan Dept of Transp*, 456 Mich 331, 335; 572 NW2d 201 (1998) ("Plaintiffs sought reconsideration, and the trial court reversed itself, ruling from the bench that a fifteen-year-period controlled."), *Smith v LuLu Lemon, LLC*, Docket No. 349440 (Mich App October, 29, 2020) (Unpublished) (stating that the "trial court reversed its April 3, 2018 order"); *Deboer v Strickland*, Docket No. 329765, (Mich App April 28, 2016) (Unpublished) ("[O]n February 29, 2012, the trial court reversed itself and entered an order vacating its January 5, 2012 order."); and *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 513; 847 NW2d 657 (2014) ("After a bench trial, the trial court reversed its earlier initial grant of summary disposition in favor of Elizabeth and granted summary disposition in favor of Auto–Owners.").

Had this Court, the drafter of the court rule, intended to limit final orders to orders following reversal on appeal of a prior final order, the Court could have so stated. It has not done so, and as such, a reversal of the Consent Judgment, as amended, on appeal is not required for Gelman's claim of appeal as a matter of right to proceed.

II. THE ISSUE PRESENTED INVOLVES A PRINCIPLE OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE, AND THE DECISION OF THE COURT OF APPEALS IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE

The issue presented concerns the jurisdiction of the Michigan Court of Appeals as proscribed by the Michigan Legislature over all final judgments and final orders entered in the circuit court as those terms are defined by law and supreme court rule. As this Court has recently and expressly found, the deprivation of a party's right to appeal an issue decided against it by a trial court is a manifest injustice. *Rott v Rott*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 161051). While not as extreme as the risk of manifest injustice in a death penalty habeas corpus case, this Court found that the deprival of the right to appeal is at least as much an injustice as holding a party to an erroneous concession of law.

> Invocation of the law-of-the-case doctrine in a manner that would effectively deprive a party of its right to appeal an issue decided against it by a trial court would be a manifest injustice. While not as extreme as the risk of manifest injustice in a death penalty habeas corpus case, see *Dobbs v. Zant*, 506 US 357, 113 S Ct 835, 122 LEd2d 103 (1993), the deprival of the right to appeal is at least as much an injustice as holding a party to an erroneous concession of law, see *United States v. Miller*, 822 F2d 828, 831-833 (9th Cir. 1987).

Rott, 2021 WL 3234466, at *7.

Here, Gelman has been deprived of its right to appeal the determinations of the trial court resolving the claims brought by Intervenors, as well as the propriety of the Intervention Orders themselves. While Gelman is able to seek – and was granted – leave to appeal the June 1, 2021 Order to the Michigan Court of Appeals, such a remedy is entirely inadequate in circumstances such as the present case where numerous parties were permitted to intervene in an action "finally" disposed of and controlled by the entry of a Consent Judgment twenty-five years prior. Intervention of parties who are asserting their own, independent causes of action against Gelman is vastly different both procedurally and substantively than a more limited and narrowly tailored motion for relief from judgment brought by a party to the judgment seeking relief under the grounds permitted under MCR 2.612(C). The former requires adjudication of the rights and liabilities of the parties and disposal of their claims and defenses raised in a cause of action independent from the action resolved by the final judgment, while the latter requires resolution of one of the far more limited grounds for relief enumerated in the court rule brought by an existing party to the judgment who must demonstrate why the judgment should not be enforced against that party.

These procedural and substantive differences also demonstrate why the issue presented is of major significance to this state's jurisprudence. Typically,[34] intervening parties file their

[34] Gelman respectfully submits that due process and fundamental fairness requires that intervening parties actually file their complaints so that the merits may be tested both legally and factually.

complaints setting forth their claims, and a defendant such as Gelman is afforded an opportunity to test the merits of those claims by raising its defenses to those claims.[35] The parties engage in discovery and motion practice, and the trial court is called upon to issue orders resolving discovery disputes, summary disposition motions, evidentiary issues regarding the admission and proper use of evidence among other matters. Ultimately, genuine issues as to any disputed material facts are resolved through a trial, and the matter is concluded by the entry of a judgment or order disposing of all the claims and adjudicating the rights and liabilities of the parties.

If the judgment or order entered in the usual situation is not final and appealable as a matter of right, two significantly adverse and highly discommodious consequences necessarily follow. First, litigants aggrieved by the trial court's rulings will be forced to seek appellate review on a piecemeal basis for literally every order meriting appellate review, because every order entered in the proceedings becomes unreviewable upon the passage of six months following entry. MCR 7.205(A)(4)(a). Ironically, the elimination of piecemeal appeals is the very purpose of the final judgment rule. *City of Detroit v State*, 262 Mich App 542, 545; 686 NW2d 514 (2004).

Second, given time, the fact that the resources of the court and the parties are finite, and the fact that fallible humans are charged both with representation of the parties and with the adjudication of their disputes, mistakes will certainly be made, and a party will inevitably be deprived of its right to appeal an issue decided against it by a trial court. The trial court will issue a ruling – whether regarding discovery, the admissibility of evidence, or the application of law to one or more claims or defenses of a party – which will ultimately prove controlling of the trial court's disposition following trial. More than six months will have passed between that critical

[35] For instance, had the City of Ann Arbor been required to file its Complaint, Gelman could have sought summary disposition of the lawsuit, barred by the City's Settlement of prior lawsuits as set forth more fully in footnote 18, above.

ruling and the entry of the judgment or order following trial. As a result, should the Court of Appeals' approach here be applied, effective review by the error-correcting Court of Appeals would be entirely prevented for lack of jurisdiction from reviewing the earlier ruling.

Both of these consequences are avoided by proper application of MCR 7.202(6)(a)(i) to the judgment or order following trial and recognition that such judgment or order is indeed the "first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties" – including Intervenors. Piecemeal appeals need not be taken, and the Court of Appeals has jurisdiction to review all orders entered by the trial court prior to the entry of final judgment. *Green v. Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009) (A party appealing a final judgment as of right may challenge on appeal orders entered by the trial court prior to final judgment.)

In the present case, the trial court did not require the filing of Intervenors' complaints, did not permit discovery, purported to hold an evidentiary hearing during which no evidence was presented, and concluded the proceedings by entering the June 1, 2021 Order. Absent a determination by this Court that the June 1, 2021 Order is a final order appealable as of right, the Court of Appeals will almost certainly consider the trial court's Intervention Orders entered on January 18, 2017 and February 6, 2017 to be entirely unreviewable due to lack of jurisdiction given the passage of more than six months following their entry. Should the Court of Appeals so determine, the resolution of Gelman's pending appeal in Docket No. 357599 may result in a remand to the trial court with direction to have the Intervenors file their complaints as provided in the Intervention Orders.

Moreover, under such a regime, Gelman, EGLE and Intervenors will then be in the position of having to seek leave to appeal every order of the trial court or risk forever losing the opportunity

for appellate review. Suppose, for example, the trial court enters an order denying or limiting discovery. Both the parties and the Court of Appeals are in the difficult position of having to address the issue without any context concerning how the issue is material to the ultimate disposition of the case, because the case will not have been decided. The issue may prove inconsequential or to be harmless error in light of the trial court's future disposition, but neither the parties nor the Court of Appeals will be able to accurately make that determination at the time leave to appeal is sought. They will either have to seek interlocutory appeal within six months, or find themselves barred from appealing by MCR 7.205(A)(4)(a).

The same is true regarding every other ruling that the trial court may make in this matter following remand, and our system of justice is simply not designed to accommodate such proceedings. The parties, the trial court, and the appellate court all have finite resources and limited time to devote to any given proceeding, and justice itself suffers when extraordinary demands are unnecessarily placed upon the parties and the courts. If the Court of Appeals denies leave to appeal a ruling and order of the trial court, that ruling will be unassailable following the passage of six months. If the Court of Appeals grants leave to appeal, the parties and the trial court will have the additional burden of possibly having ongoing proceedings stayed during the pendency of the appeal, having the ongoing proceedings disrupted by a determination of the Court of Appeals following appeal, or having to redo all or a part of the proceedings following resolution of all appeals and an assessment of the impact of rulings of the trial that have become binding and unreviewable do to the denial of leave to appeal or the failure to seek leave to appeal. A more

dissatisfactory, uneconomical, inconvenient and unjust proceeding is hard to imagine, even considering what has transpired since the entry of the Intervention Orders.[36]

It cannot be the intent of this Court that such a circuitous and wasteful process be followed. Rather, Gelman respectfully suggests that the plain language of MCR 2.604(A) demonstrates that the June 1, 2021 Order – which *does* adjudicate all the claims and the rights and liabilities of *all* the parties – must be reviewable as of right.

RELIEF REQUESTED

Defendant-Appellant Gelman Sciences, Inc. respectfully requests an order of this Honorable Supreme Court reversing the June 29, 2021 Order of the Michigan Court of Appeals and remanding this matter to the Michigan Court of Appeals with direction to permit Gelman's claim of appeal from the June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria to proceed as a matter of right.

[36] Another manifestly unjust, unintended consequence of the Court of Appeals' denial of Gelman's right to appeal becomes apparent in light of the fact that the Intervenors never filed their complaints or any other pleading in this matter. MCR 2.110 provides that the term "pleading" includes only: a complaint; a cross-claim; a counterclaim; a third-party complaint; an answer; or a reply. The Intervenors have filed no "pleadings" even though the trial court said that they could, and its Intervention Orders tolling the statutes of limitation remain in place.

As a result, because the Intervenors never filed their complaints, they lack standing to challenge any of the trial court's orders (*Am States Ins Co v Albin*, 118 Mich App 201, 210; 324 NW2d 574, 578 (1982)), and could argue that they are not bound by those rulings. Yet they have been permitted to submit briefs and reports, make hearing appearances and arguments, and object to actions taken by the legitimate parties to the lawsuit – Gelman and EGLE – while those actual, original and only parties to the lawsuit are barred from challenging on appeal the Intervention Orders which undeniably and improperly changed the course of this lawsuit from what had worked for a quarter century to a complete kangaroo court proceeding where Rules are ignored, precedent is irrelevant, and Gelman's due process rights are discarded.

Respectfully submitted,

RHOADES McKEE PC
Attorneys for Defendant-Appellant

Date: October 4, 2021

By: /s/ Gregory G. Timmer
Bruce A. Courtade (P41946)
Gregory G. Timmer (P39396)
Business address:
55 Campau Avenue NW, Suite 300
Grand Rapids, MI 49503
Telephone: (616) 235-3500