

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Court of Appeals No. 357599

Plaintiff-Appellee,

Washtenaw County Circuit Court
No. 88-034734-CE

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.

**BRIEF OF PLAINTIFF-APPELLEE ATTORNEY GENERAL FOR THE
STATE OF MICHIGAN *EX REL* MICHIGAN DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY**

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

Index of Authorities ii

Statement of Jurisdiction iv

Counter-Statement of Questions Presented v

Introduction 1

Counter-Statement of Facts and Proceedings 3

 2015–2016: EGLE and Gelman Negotiate to Modify the Consent
 Judgment 3

 2017: Intervenors Join Negotiations for a Revised Consent Judgment 4

 2020: Local Governments’ Elected Officials Reject Fourth Consent
 Judgment, and the Trial Court Orders Remedy Hearings 6

 May 3, 2021: Evidentiary Hearing Addressing Response Activities 6

Standard of Review 8

Argument 9

I. The Intervenors must follow the Court Rules and the Intervention
 Orders by filing their complaints. 9

II. The ordered Fourth Consent Judgment should remain in effect..... 10

Relief Requested 13

INDEX OF AUTHORITIES

Page

Cases

Brownell v Widdis, 219 Mich 167 (1922) 10
Gleason v Mich Dept of Transp, 256 Mich App 1 (2003) 12
Irish v Treasurer of State of Mich, 158 Mich App 337 (1987) 10
Kolar v Hudson, 55 Mich App 114 (1974) 9
Ligdon v Detroit, 276 Mich App 120 (2007) 8
Maldonado v Ford Motor Co, 476 Mich 372 (2006) 8
Schaeffer v Schaeffer, 106 Mich App 452 (1981) 8
Woodard v Custer, 476 Mich 545 (2006) 8

Statutes

MCL 24.201 et seq. 3
MCL 324.20101 et seq. 3
MCL 600.611 10

Other Authorities

2016 MR 20 (Nov 15, 2016) 3
2017 MR 20 (Nov 15, 2017) 3

Rules

MCR 2.209(B)..... 1, 4

STATEMENT OF JURISDICTION

Plaintiff-Appellee Attorney General for the State of Michigan *ex rel.*,
Michigan Department of Environment, Great Lakes, and Energy (EGLE), (the
State) states that Defendant-Appellant, Gelman Sciences, Inc.'s (Gelman) Brief on
Appeal correctly states the jurisdictional basis for its appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Following the local government Intervenor’s rejection of the Fourth Amended and Restated Consent Judgment, the trial court permitted the Intervenor to continue to participate in the proceedings without filing their complaints. Do the court rules require the Intervenor to file a complaint to participate as parties in the trial court proceedings?

Appellant’s answer: Yes.

State Appellee’s answer: Yes.

Intervenor’s-Appellees’ answer: No.

Trial court’s answer: No.

2. Should the Fourth Amended and Restated Consent Judgment ordered to be implemented by the trial court’s June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria remain effective?

Appellant’s answer: No.

State Appellee’s answer: Yes.

Intervenor’s-Appellees’ answer: Yes.

Trial court’s answer: Yes.

INTRODUCTION

Gelman's appeal raises issues regarding the propriety of the trial court's order implementing the Fourth Amended and Restated Consent Judgment (Fourth Consent Judgment). The Fourth Consent Judgment was negotiated by the Intervenors,¹ Gelman, and the State, but was ultimately rejected by the Intervenor Local Governments' elected officials. The trial court's June 1, 2021 order implemented the Fourth Consent Judgment and did not require the Intervenors to file complaints. Although there may have been other paths the trial court could have taken to arrive at the updated Order, the circumstances call for allowing the Fourth Consent Judgment to remain in effect.

Remedial activities for the Gelman Site have been overseen by the State pursuant to a Consent Judgment since 1992, and that judgment was subsequently amended three times by agreement of the State and Gelman. Gelman's appeal questions the procedural propriety of the trial court's June 1, 2021 order. Gelman's procedural concerns are not without merit, but even if the trial court should have required the Intervenors to file their complaints, the Fourth Consent Judgment should remain in place in order to maintain the effectiveness of the important improvements to the outdated operative authority last updated a decade ago. The improvements to the 1992 Consent Judgment (as amended) include requirements

¹ The Intervenors are, collectively, the City of Ann Arbor, Scio Township, three Washtenaw County entities (the Local Governments) and the Huron River Watershed Council. The State did not object to the trial court's grant of permissive intervention under MCR 2.209(B) to the Local Government Intervenors and no longer objects to the Watershed Council's intervention.

for expanded treatment of the contamination by Gelman and imposition of more protective cleanup standards. These improvements are not disputed by the parties or the Intervenors. The State's priority is to protect public health and the environment by ensuring that the additional treatment requirements and stricter standards continue to be implemented, and the State urges the Court to allow the parties and the Intervenors to address any remaining issues through appropriate channels without invalidating the portion of the trial court's June 1, 2021 Order implementing the Fourth Consent Judgment.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The State continues to fully support the response activities in the Fourth Consent Judgment along with the companion Stipulated Order and Settlement Agreements. Gelman correctly describes the order appealed from. Gelman's statement of the proceedings below is generally accurate but argumentative in presentation. The State provides the following information to provide the context for the State's position seeking to preserve the updates to the 1992 Consent Judgment (as amended) that governs the cleanup of the Gelman Site contamination.

2015–2016: EGLE and Gelman Negotiate to Modify the Consent Judgment

In late 2015, EGLE and Gelman began negotiations to revise the Third Amended Consent Judgment (entered March 8, 2011) in expectation of EGLE's promulgation of a substantially lowered revised drinking water cleanup criterion for 1,4-dioxane, the contaminant of concern for the Gelman Site. The revised 1,4-dioxane drinking water cleanup criterion (then 85 parts per billion (ppb)) of 7.2 ppb was established on October 27, 2016, under Part 201, Environmental Remediation of the Michigan Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*, the statute that primarily governs the remediation of the Gelman Site. 2016 MR 20, p 55 (Nov 15, 2016). On October 27, 2017, EGLE promulgated the 7.2 ppb drinking water cleanup criterion as a stand-alone final rule through the Administrative Procedures Act's, MCL 24.201 *et seq.*, notice and public participation and comment process. 2017 MR 20 (Nov 15, 2017).

In late 2016, nearly a year before the revised drinking water cleanup criterion for 1,4-dioxane was promulgated as a final rule, EGLE and Gelman reached agreement on revisions to the Third Amended Consent Judgment providing for response activities to address the revised 7.2 ppb criterion.²

2017: Intervenors Join Negotiations for a Revised Consent Judgment

In late 2016 and early 2017, the Intervenors filed motions to intervene in this action to seek more input on Gelman's work and to present directly to the Court their unique perspectives and concerns as water suppliers and public health agencies in the communities affected by the Gelman Site contamination. The State did not object to the Local Governments seeking permissive intervention under MCR 2.209(B). To be clear, however, the State strongly rejects any assertion, whether explicitly or implicitly made, that the State is not enforcing the requirements of prior consent judgments, Part 201 or other provisions of the NREPA, or is otherwise not acting to protect public health, safety, or welfare, or the environment.

² Although the remedy under the Third Amended Consent Judgment included the outdated 1,4-dioxane drinking water cleanup criterion (85 ppb), the State and Gelman took steps at the time the criterion was updated to ensure that the remedy protected public health. In early March 2016, prior to promulgation of the 7.2 ppb criterion on October 27, 2016, Gelman connected to the municipal water supply the sole residence and associated commercial buildings that utilized a single well for drinking water that exceeded the new criterion, and the 7.2 ppb criterion has not been exceeded in any drinking water wells since then.

The trial court's Intervention Orders (Appx, pp 189 (Jan 19, 2017 Order) and 192 (Feb 6, 2017 Order)) specifically directed that the Intervenors would file their proposed complaints if negotiations for the Fourth Consent Judgment failed:

[The Intervenors] shall refrain from filing their proposed complaints at this time. 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.

The proposed revisions to the Consent Judgment that EGLE and Gelman reached agreement on in late 2016 served as the starting point for negotiations with the Intervenors. In August 2020, after nearly four years of negotiations, the parties and the Intervenors informed the trial court that they had reached agreement on a proposed Fourth Consent Judgment, pending approval by the Local Governments' elected officials. The proposed Fourth Consent Judgment provided for substantial and important remedial activities and investigations and put into place additional safeguards to ensure continued protection of public health and the environment. The content of the proposed Fourth Consent Judgment was published and subject to public comment periods held by EGLE and local governments.³

³ See EGLE Public Comment responsiveness Summary, [Gelman Sciences, Inc - Department of Environment, Great Lakes, and Energy \(EGLE\) Public Comment Responsiveness Summary, November 9, 2020, for the proposed Fourth Amended and Restated Consent Judgment \(4th Amended CJ\) for the Gelman Sciences Site of Environmental Contamination \(michigan.gov\)](#) (last visited on October 12, 2021).

2020: Local Governments’ Elected Officials Reject Fourth Consent Judgment, and the Trial Court Orders Remedy Hearings

Despite the agreement reached by lawyers for the Local Governments on the terms of the proposed Fourth Consent Judgment, in late 2020, the Local Governments’ elected officials rejected the proposed Fourth Consent Judgment and companion Stipulated Order and Settlement Agreements.⁴ Following this development, at a November 19, 2020 status conference, the trial court ordered the parties and the Intervenors to participate in a remedy hearing that would “open up” the consent judgment to receive scientific reports and hear legal argument on the appropriate remedy for the Gelman Site. (11/19/20 Hr’g Tr, pp 25–32; Appx, pp 24–231.)

Although the trial court’s own Intervention Orders required that Intervenors file and prosecute their complaints if negotiations for the Fourth Consent Judgment failed, the trial court did not require the Intervenors to do so.

May 3, 2021: Evidentiary Hearing Addressing Response Activities

The State, Gelman, and the Intervenors⁵ filed briefs and expert reports regarding proposals for response activities for the Gelman Site as directed by the

⁴ The elected officials expressed a desire to obtain a better cleanup through litigation and also to seek U.S. Environmental Protection Agency listing of the Gelman site as a federal “Superfund” site. *See, e.g., [In drama-filled meeting lasting past 2 a.m., Ann Arbor council rejects deal with polluter - mlive.com](#), [Washtenaw County joins Ann Arbor in rejecting pollution cleanup deal with unanimous vote - mlive.com](#), [Sciio Township rescinds vote to approve Gelman cleanup deal - mlive.com](#)* (last visited on October 12, 2021).

⁵ The Intervenors filed a joint brief and expert report.

trial court on April 30, 2021. The State’s brief and expert report explained the legal and technical bases for the State’s support for the Fourth Consent Judgment.⁶ On May 3, 2021, the first day of the evidentiary hearing, after opening statements by Gelman and the State, the trial court interrupted the Intervenors’ opening statement to announce that the court was considering ordering implementation of the rejected Fourth Consent Judgment (but not the companion Stipulated Order and Settlement Agreements) and requiring “a yearly review” with the parties and the Intervenors. (5/3/21 Hr’g Tr, p 69; Appx, p 1162.) In the end, the trial court ordered implementation of the Fourth Consent Judgment without the companion agreements between Gelman and the Intervenors, and adjusted the annual review to “a quarterly review of where things stand.” (5/3/21 Hr’g Tr, p 121; Appx, p 1214.) The trial court’s June 1, 2021 Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria ultimately provided for quarterly reviews in the form of hearings that could also consider “the implementation of additional or modified Response Activities and other actions.” (Appx, p 1325.)

This Court granted Gelman’s June 21, 2021 application for leave to appeal the trial court’s June 1, 2021 Order in a July 26, 2021 Order, which also stayed the quarterly hearings pending resolution of Gelman’s appeal.

⁶ As stated previously, the State continues to support the Fourth Consent Judgment.

STANDARD OF REVIEW

“A court has the inherent authority to enforce its own orders and directives.” *Schaeffer v Schaeffer*, 106 Mich App 452, 457 (1981). “An exercise of the court’s ‘inherent power’ may be disturbed only upon a finding that there has been a clear abuse of discretion.” *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006). “The trial court’s decision on a motion to amend its judgment is reviewed for an abuse of discretion.” *Ligdon v Detroit*, 276 Mich App 120, 124 (2007). “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 557 (2006).

ARGUMENT

I. The Intervenors must follow the Court Rules and the Intervention Orders by filing their complaints.

The State did not oppose the intervention and does not believe that the trial court's grant of intervention was an abuse of discretion. However, the trial court's failure to require the Intervenors to file their complaints raises questions regarding the Intervenors' continued role in these proceedings and whether the trial court has the authority to consider any future relief sought by the Intervenors absent the filing of a complaint.

Michigan case law indicates that, although a trial court has discretion to permit intervention, an intervening party must file a complaint in order to participate in the underlying action. In *Kolar v Hudson*, 55 Mich App 114, 118 (1974), this Court held that an intervening plaintiff must file its complaint in order to “perfect [its] status as an intervening plaintiff.” In *Kolar*, the purported intervenor filed a petition to intervene in a case in the trial court but did not include with it a proposed complaint setting forth his claim. This Court explained that “[a]bsent a complaint setting forth the intervening plaintiff's claim, the claim is never technically before the trial court so as to vest jurisdiction in the court to render a judgment upon the claim.” *Id.* at 119. This Court further explained that “[s]ince [the proposed intervenor] at no time filed a complaint setting forth his claim, he never exercised his bare ‘right’ to intervene, and thus never became a party to the action prior to the settlement.” *Id.*

Consistent with *Kolar*, the current status of the Intervenors in the case before the trial court is at best unclear. In exercising its inherent authority to enforce its orders, the trial court did not require the Intervenors to file their complaints and thus, following *Kolar*, the Intervenors may not be parties to the action pending before the court. The failure may be an abuse of discretion.

But, to the extent that the trial court abused its discretion by not requiring the Intervenors to file their complaints, the trial court's error can be readily cured by the Intervenors simply filing their complaints on remand if they seek to continue their participation in the case. Therefore, to the extent that this Court determines it is necessary, the State requests that this matter be remanded to require the Intervenors to file their complaints and become parties to this action, or otherwise be dismissed.

II. The ordered Fourth Consent Judgment should remain in effect.

MCL 600.611 provides that “[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts’ jurisdiction and judgments.” “Every court of superior jurisdiction has, in the absence of statutory limitations, power to control its own orders and to direct when and under what conditions they shall be operative.” *Brownell v Widdis*, 219 Mich 167, 169 (1922). Where the trial court retains jurisdiction in the judgment, the general equitable powers of the court permit it to later amend its judgment. *Irish v Treasurer of State of Mich*, 158 Mich App 337 (1987).

The trial court's order implementing the Fourth Consent Judgment was within its inherent authority and was contemplated by the very language of the original October 1992 consent judgment. The trial court, on three previous occasions, had entered orders amending the consent judgment between Gelman and the State. Further, the October 1992 consent judgment envisioned a continuing role for the trial court and stated that the trial court "shall retain jurisdiction over the Parties and the subject matter of this action" (Appx, p 32.)

The trial court did not abuse its discretion when it ordered that the Fourth Consent Judgment be implemented. As discussed above, the State, Gelman, and the Intervenors supported the additional remedies agreed to be implemented under the Fourth Consent Judgment. The State continues to strongly do so. The additional remedies are necessary, go a long way towards implementing the new cleanup criteria, and ensure continued and additional protection of the public health and the environment. The Fourth Consent Judgment ensures:

(i) implementation of the updated cleanup criteria; (ii) new investigations, in particular where contaminated groundwater may be entering surface water bodies; (iii) expanded groundwater monitoring; (iv) increased contaminated groundwater pumping and treatment; and (v) expansion of the "prohibition zone" institutional control ensuring municipal drinking water use in certain areas where contamination may be present.

Further, there are no environmental or public health reasons for undoing any of the previously agreed upon remedies in the Fourth Consent Judgment, all of

which are currently progressing towards full implementation with EGLE's oversight. Maintaining the current status quo with respect to implementation of the Fourth Consent Judgment will allow these important remedies supported by the State, and agreed to by the State, Gelman, and the Intervenors, to continue to move forward without interruption or further delay while the Intervenors prosecute their complaints.⁷ The litigants or this Court may be able to identify different procedures, or even preferable procedures, that the trial court could have taken to arrive at the implementation of the improved Fourth Consent Judgment, but that does not provide a basis for reversal. *Cf. Gleason v Mich Dept of Transp*, 256 Mich App 1, 3 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.") Given the benefits to public health and the environment, implementing the Fourth Consent Judgment does not result in an outcome outside the principled range of outcomes. The trial court did not abuse its discretion.

⁷ If this Court grants Gelman's request to vacate the trial court's June 1, 2021 Order, or in lieu of a possibly more limited remand to excise certain bargained-for Fourth Consent Judgment settlement-related provisions, the State reaffirms its previously-stated willingness to enter into a "bilateral" amended Consent Judgment with Gelman for entry by the trial court to ensure that an enforceable and protective remedy for the Gelman Site remains in place while the intervention litigation plays out. (EGLE Feb 1, 2021 Response to Gelman Motion for Stay, Appx, pp 557–562; 6/17/21 Hr'g Tr, pp 19–20; Appx, p 1997.)

RELIEF REQUESTED

The State respectfully requests that this Court maintain the Fourth Consent Judgment in effect in the interest of protecting public health and the environment and, if this Court deems it appropriate, the State requests that this matter be remanded to require the Intervenors to file their complaints and become parties to this action.

Respectfully submitted,

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