

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,

Plaintiffs-Appellees,

Court of Appeals Docket No. 357599

and

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

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,

vs.

GELMAN SCIENCES, INC., a Michigan
corporation,

Defendant-Appellant.

**INTERVENORS-APPELLEES' ANSWER TO DEFENDANT-APPELLANT
GELMAN SCIENCES, INC.'S MOTION FOR LEAVE TO FILE
POST-ARGUMENT SUPPLEMENTAL BRIEF**

Intervenors-appellees the City of Ann Arbor, Washtenaw County, Washtenaw County Health Department, Washtenaw County Health Officer Jimena Loveluck, the Huron River Watershed Council, and Scio Township state as follows for their answer to defendant-appellant Gelman Sciences, Inc.'s Motion for Leave to File Post-Argument Supplemental Brief:

Gelman has not proffered any new authority nor shown good cause justifying leave to file a supplemental, post argument, brief. Its motion should be denied.

Gelman says that its new brief simply clarifies issues that arose during oral argument. That is untrue. First, Gelman’s brief addresses the issue of intervention. But intervention is not an issue on appeal and is otherwise unimportant for a decision on this appeal. Next, Gelman asserts that the trial court lacked authority to enter the Response Activity Order. That argument presents nothing new – Gelman merely reiterates the arguments already made in the three briefs that it already has filed. Gelman has had ample opportunity during the briefing and oral argument phases of this appeal to present its arguments. Finally, Gelman’s proposed supplemental brief improperly seeks relief different from and in addition to what Gelman sought in its appellant brief. The Court should deny leave.

ARGUMENT

I. Intervention is not an issue on appeal. And Gelman mischaracterizes the Response Activity Order as granting Intervenors “full party status.”

The trial court’s orders granting intervention more than five years ago are not at issue on appeal. Gelman did not identify those orders in its jurisdictional statement in either its application for leave or in its appellant brief. Though Gelman purported to raise the issue of intervention in its issues presented, Gelman did not brief the merits of this issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) (“It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court. And, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned”); see also *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997) (“A mere statement of position is insufficient to bring an issue before this Court”). Gelman’s attempt to oppose the

intervention orders at this stage in the appeal is improper, particularly where Gelman unsuccessfully sought appellate review of those orders at the time they were entered.

Gelman’s statement that the Response Activity Order elevated Intervenors to “full party status” is flatly untrue. The Response Activity Order did not grant any relief to the Intervenors or otherwise rule on the merits of their potential claims. As explained in Intervenors’ Appellee Brief, the Response Activity Order was based on the existing Consent Judgment, and only addressed claims that the State has asserted against Gelman.

Lastly, consideration of the orders granting intervention is not necessary for a proper determination of this appeal. As the Panel recognized during oral argument, intervention is a “red herring” and not material to the main issue on appeal – whether the trial court abused its discretion in entering the Response Activity Order. It therefore follows that the Court should reject Gelman’s attempt to reargue the issue of intervention.

II. Gelman’s brief repeats arguments already made in its appellant brief.

The second issue Gelman raises is the scope of the trial court’s authority under Section 16 (Dispute Resolution) of the Consent Judgment to modify the Consent Judgment without the consent of Gelman or EGLE. As Gelman admits in its motion seeking leave, this issue has been thoroughly briefed. Gelman’s proposed supplemental brief even cites the specific pages and briefs that previously addressed this issue. Gelman’s motion should be denied because: (1) Gelman’s supplemental brief is not authorized by court rule; and (2) the brief does not address new authority or add anything of value for the Court’s determination.

III. Gelman’s brief improperly seeks new relief.

The Court also should deny Gelman’s motion for leave because Gelman improperly requests different (and new) relief than the relief requested in its appellant brief.

Gelman sought the following relief in its brief on appeal:

[A]n order of this Court of Appeals: 1) vacating the trial court’s June 1, 2021 Order and remanding this matter to the trial court with instruction to terminate the tolling of the applicable statutes of limitation and direct the Intervenors to file their complaints so that the merits of their claims (which must establish that Intervenors’ interests are not being adequately addressed and protected by EGLE), and Gelman’s defenses thereto, may be fully tested before any remedy for those claims is considered; 2) reinstating the Third Amended Consent Judgment; and 3) remanding this matter to the trial court with direction to (consistent with the terms of the Consent Judgment as amended from time to time by the Parties thereto) consider entry of any bilateral amended Consent Judgment as submitted jointly by EGLE and Gelman

Gelman’s proposed supplemental brief would seek an order terminating Intervenors’ status as intervening parties and prohibiting them from filing their proposed complaints “or to otherwise pursue claims in this case.” It also would ask that this Court direct the trial court to “enter an order dismissing Former Intervenors’ intervention, with prejudice, but without prejudice to their rights to pursue claims against the parties in separate actions or the parties’ rights to defend against those claims.” As explained above, though, intervention is not an issue on appeal or relevant to the merits of this appeal. So any relief sought from this Court on such grounds is improper.

Gelman’s proposed supplemental brief also newly requests that this Court order that “the trial court shall not modify the terms of the Consent Judgment without the consent of Plaintiffs and Defendant.” As explained at length in Intervenors’ appellee brief, the parties to the Consent Judgment – including Gelman – authorized the trial court to resolve disputes through the Consent Judgment. In fact, the trial court did resolve previous disputes between the State and Gelman without any objection from Gelman that the trial court lacked authority due to lack of consent between the parties. The request that Gelman now seeks to add contradicts that previously granted authority.

Most importantly, it is completely improper post-oral argument for Gelman to seek relief different from and in addition to what it sought in its brief on appeal. Gelman cites no authority allowing it to do so.

CONCLUSION

For the foregoing reasons, Intervenors-Appellees respectfully request that the Court deny Gelman's Motion for Leave to File Post-Argument Supplemental Brief. If the Court is inclined to grant the Motion, Intervenors-Appellees request that they be granted an opportunity to more fully respond to Gelman's Supplemental Brief, as provided in IOP 7.212(F)-2.

Respectfully submitted,

/s/ Nathan D. Dupes
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
fdindoffer@bodmanlaw.com
ndupes@bodmanlaw.com

Dated: July 22, 2022

/s/ Robert Charles Davis
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
rdavis@dbsattorneys.com

Dated: July 22, 2022

/s/ Atleen Kaur
Atleen Kaur (P66595)
Timothy Wilhelm (P67675)
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
spostema@a2gov.org

Dated: July 22, 2022

/s/ William J. Stapleton
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
bwallace@hooperhathaway.com
wstapleton@hooperhathaway.com

Dated: July 22, 2022

/s/ Erin E. Mette
Erin E. Mette (P83199)
GREAT LAKES ENVIRONMENTAL LAW
CENTER
Attorneys for Intervenor/Appellee HRWC
4444 2nd Avenue
Detroit, MI 48201
(313) 782-3372
erin.mette@glelc.org

Dated: July 22, 2022