

**STATE OF MICHIGAN  
IN THE COURT OF APPEALS**

CITIZENS FOR HIGGINS LAKE LEGAL LEVELS, ERIC OSTERGREN, STEVE RICKETTS, THOMAS THOMSON, CAROL THOMSON, GLENN R. FAUSZ, ROBERT OBRYAN, DRU OBRYAN, THOMAS THOMSON, CAROL THOMSON, and JANICE JAMESON as trustee of the JANICE JAMESON TRUST  
Petitioners/Plaintiffs/Appellants,

Court of Appeals Case No.: 353969  
Circuit Court Case No.: 19-724711-AW

**\*\* ORAL ARGUMENT REQUESTED \*\***

v.

BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON,  
Respondent/Defendant/Appellee

and

DEPARTMENT OF ENVIRONMENT, GREAT LAKES & ENERGY,  
Intervening-Defendant/Appellee

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**APPELLANTS' BRIEF ON APPEAL**

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## STATEMENT OF JURISDICTION

This Court has jurisdiction to adjudicate this appeal pursuant to MCR 7.203(A). A copy of the final order is attached as **Appendix #181-183**.

## STATEMENT OF QUESTION(S) PRESENTED

- I. Did the Circuit Court error granting summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10)?
- II. Did the Circuit Court error in not dismissing intervenor Department of Environment, Great Lakes & Energy for lack of subject matter jurisdiction and striking its summary disposition motion?

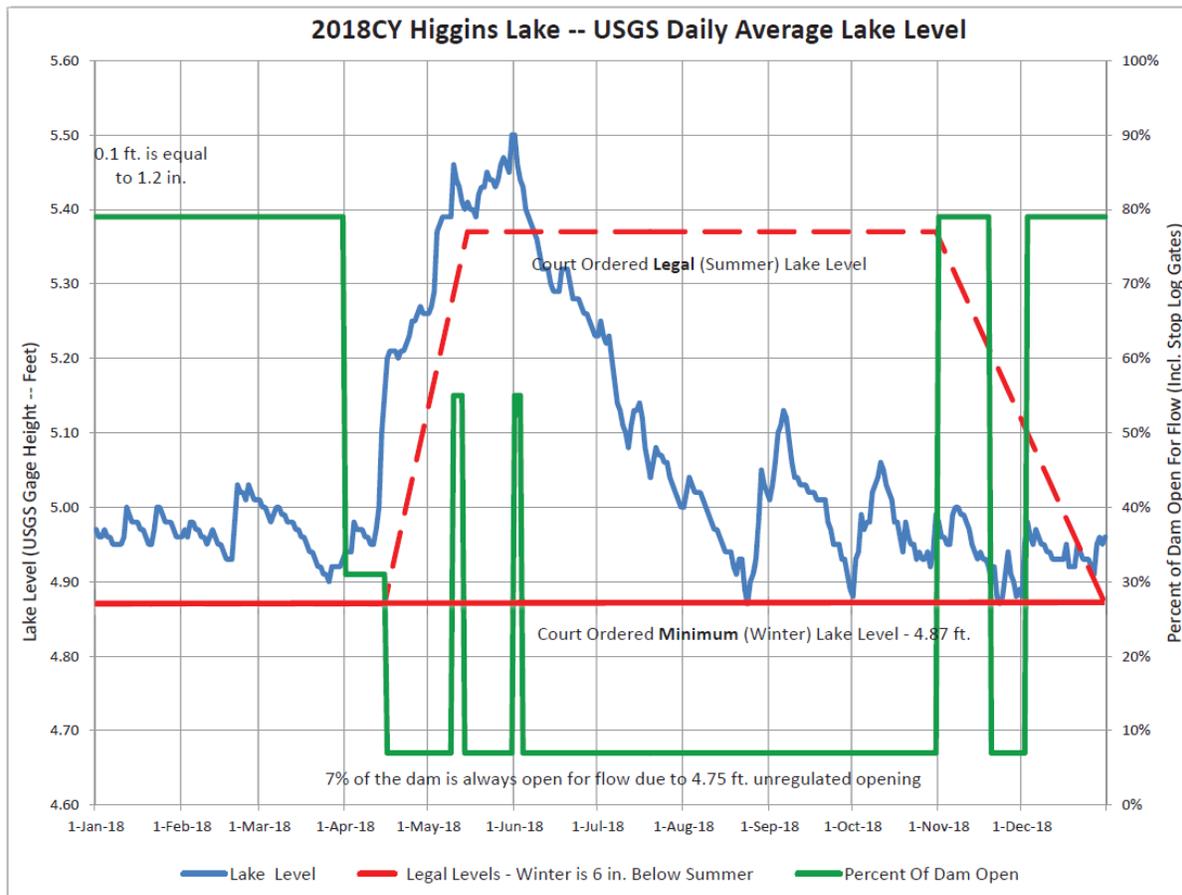
## INTRODUCTION

In Michigan, the levels of inland lakes are controlled by statute after being established by a circuit court judicial order. Such orders create legal duties which must be obeyed. On February 24, 1982, the Roscommon County Circuit Court established the legal lake levels for Higgins Lake “at” (not around) 1154.11 feet above mean sea level for the summer months. “After the [circuit] court determines the normal level of an inland lake in a proceeding initiated by the county, the [County’s] delegated authority... shall provide for and maintain that normal level.” MCL 324.30708(1). If that were not clear enough, the Legislature said it again—“the delegated authority of the county or counties in which the lake is located shall maintain that normal level.” MCL 324.30702(3). When the Legislature uses the term “shall,” there is no discretion by government officials to simply ignore it.

The central disputed issue in this matter is whether the County and its delegated authority are improperly maintaining and supporting the legal lake level when utilizing all known reasonable practices and available technology, and thereby is intentionally causing the mid to later summer lake levels of Higgins Lake to repeatedly drop below the level of 1154.11 feet above mean sea level to the detriment of the users of Higgins Lake. **First Am Compl, ¶19** (Appendix #9); see also **Ostergren Affidavit, ¶¶1-3** (Appendix #177). As such, the County and its delegated authority have not properly maintained “that normal level” at 1154.11 feet above mean sea level and failed to do everything it reasonably can to fulfill its mandatory public duty. **First Am Compl, Exhibit H, p. 3** (Appendix #28) (“this study has found that the level of Higgins Lake has averaged below the court established legal lake level during the summer months in typical years”); see

also **Ostergren Affidavit, ¶4** (Appendix #177); **First Am Compl, Exhibits E, F, G, M and N** (Appendix #22-24; #79-94).

To assist this Court, here is a graphic depicting the water levels of 2018—



(Appendix #94). The summer months regularly lose six inches of water. For the certain parts of Higgins Lake, that means damaging shallows. **Sworn Declarations** (Appendix #139-176).

In response, the County moved to dismiss this lawsuit at the pre-discovery stage on a variety of excuses Appellants were not allowed to challenge in discovery. The Circuit Court concluded, after making flip findings, that there was nothing that could be done for the County's breaches of its public duty. This appeal now follows.

## FACTS

Higgins Lake is 9,990-acre lake containing twenty-one miles of shoreline located in Roscommon County, Michigan. Pure Michigan, Higgins Lake, <https://www.michigan.org/city/higgins-lake>. The crystal-clear waters have been noted as part of one of the world's most beautiful lakes and is Michigan's tenth largest lake. *Id.*

Michigan law regulates the process of establishing, constructing, and maintaining a legal lake levels for Michigan's in-land lakes. In February 1982, the Roscommon County Circuit Court established the "legal lake level" for various county lakes via what is now codified as Part 307 of the Natural Resources and Environmental Protection Act, Public Act 451 of 1994. **First Am Compl, ¶6** (Appendix #8). The Circuit Court, by then-presiding Judge Carl L. Horn, memorialized the order<sup>1</sup> as to Higgins Lake on February 24, 1982 (hereafter "Legal Lake Level Order"). *Id.*, ¶7 (Appendix #9); **First Am Compl, Exhibit A** (Appendix #13-14).<sup>2</sup> The court decreed that the legal lake level of Higgins Lake is "established at 1154.11 feet above mean sea level" for the summer months. *Id.*; see also **First Am Compl, ¶8** (Appendix #8).

Once that level was established by court order, Respondent/Defendant Board of Commissioners of the County of Roscommon, by and through its selected delegated authority (the "County"), had and has the legal duty to "provide for and maintain *that* normal level." MCL 324.30708(1); see also MCL 324.30702(3).

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<sup>1</sup> Part 307 was formerly the *Inland Lake Level Act*.

<sup>2</sup> Two additional orders were issued since 1982 which temporarily changed the legal lake level but have expired of their own accord. See **First Am Compl, Exhibits B and C** (Appendix #15-18).

For the last several years, however, the County has regularly and systematically failed to abide by the Legal Lake Level Order, MCL 324.30708(1), and MCL 324.30702(3) for huge percentages of the year, particularly during the summer months when Higgins Lake is used the most for various recreational pursuits. **First Am Compl, ¶10** (Appendix #8). A review of compiled and organized data from the United States Geological Survey<sup>3</sup> (**First Am Compl, Exhibits E, F, G, M and N** (Appendix #22-24; #79-94)) shows that the County has been generally compliant with the lower winter levels for many years, but been generally non-compliant during the normal (summer) months, especially the period during “Michigan Summer”—that timeframe from Memorial Day to Labor Day when many residents recreationally use Higgins Lake. **First Am Compl, ¶¶12-14** (Appendix #8); see also **Ostergren Affidavit, ¶5** (Appendix #177). During the desirable and important recreation times of Michigan’s summertime (i.e. Memorial Day through Labor Day), the County was in regular violation of (i.e. below) the Legal Lake Level Order. **First Am Compl, ¶16** (Appendix #9); see also **Ostergren Affidavit, ¶6** (Appendix #178). The public data confirms the failure. The County is simply not properly maintaining and supporting sufficient lake levels year-round.

Each Appellant has suffered adverse, negative, and loss-causing effects by the failure of the County to comply within the Legal Lake Level Order. *Id.*, **¶18** (Appendix #9); see also **Ostergren Affidavit, ¶10** (Appendix #178). Appellants, via their complaint for mandamus<sup>4</sup>, allege the County is not utilizing all known reasonable practices and

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<sup>3</sup> The data is publicly available at [https://waterdata.usgs.gov/mi/nwis/dv?referred\\_module=sw&format=gif&period=60&site\\_no=442805084411001](https://waterdata.usgs.gov/mi/nwis/dv?referred_module=sw&format=gif&period=60&site_no=442805084411001)

<sup>4</sup> Recognizing mandamus as the appropriate cause of action. *Anson v Barry Co Drain Comm’n*, 310 Mich App 322; 533 NW2d 332 (1995). A private owner of lakefront property can file an action to enforce

available technology to properly maintain the Legal Lake Level, and thereby is “intentionally causing the mid to later summer lake levels to repeatedly drop below the level mandated by the Legal Lake Level Order to the detriment of the users of Higgins Lake.” **First Am Compl, ¶19** (Appendix #9); see also **Ostergren Affidavit, ¶¶6** (Appendix #177).

In further support of the harm being suffered, Appellants attached sworn declarations from thirty-six (36) other property owners and users on and around Higgins Lake cataloging the harm being suffered as a result of the County’s failure to comply—as best as possible—with the legal levels mandated by Part 307 and the Circuit Court’s February 24, 1982 Legal Lake Level Order. **First Am Compl, Exhibit A** (Appendix #13-14). Examples include—

- requiring additional or new docks (which cuts off boating areas for others);<sup>5</sup>
- boating and using watercraft is more difficult or prematurely ended;<sup>6</sup>
- damage to boating equipment;<sup>7</sup> and
- new navigation and congestion hazards appear.<sup>8</sup>

Prior public and political pleas have been ignored. See **Appendix #71-78, #140, #180.**<sup>9</sup>

In response to the First Amended Complaint, the Court allowed the Department of Environment, Great Lakes & Energy to intervene. **Appendix #101-102.** It later denied its

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an existing lake level order. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass’n*, 264 Mich App 523, 530-531; 695 NW2d 508 (2005).

<sup>5</sup> Appendix #141, 144, 145, 148, 150, 159, 160, 161, 163, 165, 167, 170, 171, 175, 176

<sup>6</sup> Appendix #142, 149, 151, 153, 154, 155, 157, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176

<sup>7</sup> Appendix #143, 148, 150, 152, 157, 159, 161, 172

<sup>8</sup> Appendix #147, 163, 171, 174

<sup>9</sup> Attached at **Appendix #180** is a single example signed copy of a “Petition to Roscommon Commissioners to File Permit with DEQ to Improve the [Lake Level Control Structure] on Higgins Lake.” Approximately two hundred seventy more copies signed by Higgins Lake residents are in the lower court record.

sought involuntary dismissal for lack of subject matter jurisdiction.

The County also filed a pre-discovery motion to summarily dispose of this case pursuant to MCR 2.116(C)(5), (C)(8), and (C)(10). The County argued that Appellants lack standing to pursue this suit. It also argued that it had discretion whether to comply with the summer level mandated by the February 24, 1982 Legal Lake Level Order. However, it never disputed that Higgins Lake was below the required 1154.11 ft level during the summer months as alleged. It could not; such has been confirmed by both data and firsthand/historical observations. **First Am Compl, Exhibits E, F, G, M and N** (Appendix #22-24; #79-94); **Sworn Declarations** (Appendix #141-176).

The Circuit Court denied the County's motion pursuant to MCR 2.116(C)(5)<sup>10</sup> but granted summary disposition pursuant to MCR 2.116(C)(8) and later (C)(10). After conducting oral argument, the Circuit Court first rejected that Appellants lack standing. **June 6, 2020 Transcript, p. 73**. Second, the Court then explained that it must define the County's scope of duty to determine whether there is a clear duty to perform and whether plaintiff has a clear legal right to the performance of that that. **Id. at 73-74**. It concluded, after improperly utilizing non-pleadings evidence, that the complaint fails to state a claim because Appellants "failed to satisfy prongs 1 and 2 for mandamus relief and granted relief under MCR 2.116(C)(8)." **Id. at 79**.

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<sup>10</sup> The Circuit Court here made the analysis far more complicated than it needed to be. There is no an individualized, private cause of action to establish a normal lake level. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 397-398; 651 NW2d 756 (2002). However, an abutting landowner has an interest in an already established lake level and has standing to invoke the circuit court's continuing jurisdiction over a matter that is already covered by a previous lake level order. *Glen Lake*, 264 Mich App at 530-531.

Later in the hearing, Appellants, by counsel, questioned how the Court could dismiss the mandamus action pursuant to MCR 2.116(C)(8) when looking to and utilizing evidence outside the pleadings. *Id.* at 84. The Court then explained that relief under MCR 2.116(C)(10) is “potentially appropriate for dismissal.” *Id.* The Court then granting relief under MCR 2.116(C)(10) was done over the objection of Appellants as premature. *Id.* at 85. This timely appeal followed.

## ARGUMENT

The Circuit Court erred in finding it had subject matter jurisdiction over the claim intervened upon by Michigan EGLE. The Circuit Court also erred in dismissing this case without discovery pursuant to MCR 2.116(C)(8) and (C)(10). The Circuit Court confused the role of each motion and both wrongly and prematurely granted summary disposition in favor of the County. Reversal is required.

### I. Appellants sufficiently pled a mandamus claim.

#### A. Standard of Review

Under MCR 2.116(C)(8), summary disposition is only proper when a claim is unenforceable as a matter of law and no factual development could lead to the claim’s enforceability. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Plaintiffs’ allegations are accepted as true, and facts are taken in the light most favorable to that party. *Id.* at 119. When considering a motion under (C)(8), a circuit court “must accept all factual allegations as true, deciding the motion *on the pleadings alone.*” *El-Khalil v Oakwood Healthcare Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). It is reversible error to evaluate the plaintiff’s allegations under MCR 2.116(C)(10) when the motion was brought under MCR 2.116(C)(8). *Id.* at 164.

#### B. All the elements of a mandamus claim were sufficiently pled.

Our Supreme Court recently admonished against the very thing the Circuit Court did in this case—it erroneously conducted “what amount[s] to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support for plaintiff’s allegations rather than accepting them as true.” *El-Khalil*, 504 Mich at 166. The trial court was required to “accept all factual allegations as true, deciding the motion on the pleadings alone.” *Id.* at 160.

When seeking relief under mandamus, a plaintiff must plead (1) that he has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. *Tuggle v Dep’t of State Police*, 269 Mich App 657, 668; 712 NW2d 750 (2005). All four elements were properly pled.

As pled in Appellants’ First Amended Complaint—

25. When “a court-determined normal level is established pursuant to this part, the delegated authority of the county or counties in which the lake is located shall maintain that normal level.” MCL 324.30702(3).
26. A county, by its Board of Commissioners, may delegate the county’s responsibilities of the Legal Lake Level Order to an agent as provided by Part 307 of the Natural Resources and Environmental Protection Act, Public Act 451 of 1994.
27. However, “after the court determines the normal level of an inland lake in a proceeding initiated by the county, the delegated authority of any county or counties In which the inland lake is located shall provide for and maintain that normal level.” MCL 324.30708(1).
28. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON has the clear legal duty, pursuant to Part 307, to maintain or have its delegated authority maintain the lake level of Higgins Lake during the summer months at 1154.11 feet above mean sea level.

29. Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON has breached that clear legal duty.
30. The obligation of compliance is ministerial and, in accordance with prior dicta explanations of this Court, no other remedy exists that might achieve the same result.

**First Am Compl, ¶¶25-30** (Appendix #10-11). As the owners of property on or near Higgins Lake, each Appellant has a legal right to enjoy and expect Higgins Lake to be at 1154.11 feet above mean sea level given its established legal lake level via the February 24, 1982 Legal Lake Level Order. The County (and its delegated authority) breached its clear legal duty to “provide for and maintain that normal level,” MCL 324.30708(1); MCL 324.30702(3), by regularly and systematically failing to abide by the Legal Lake Level Order for huge percentages of the year. The obligation of compliance **is ministerial** as the County has no discretion to deviate from that legal lake level or determine that it could ignore the same.<sup>11</sup> Appellants have pled that no other remedy exists.<sup>12</sup>

Appellants also specifically pled—again, which must be accepted as true—the County is “not properly maintaining and supporting sufficient lake levels in the matter utilizing all known reasonable practices and available technology, and thereby is intentionally causing the mid to later summer lake levels to repeatedly drop below the level mandated by the Legal Lake Level Order to the detriment of the users of Higgins Lake.” **First Am Compl, ¶19** (Appendix #19). Attached to the First Amended Complaint

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<sup>11</sup> Ministerial acts “constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice.” *Odom v Wayne County*, 482 Mich 459, 475-476; 760 NW2d 217 (2008). Roscommon County and its delegated authority have no choice; they “shall provide for and maintain that normal level.” MCL 324.30708(1); see also MCL 324.30702(3).

<sup>12</sup> This is Appellants’ second case on this matter. A prior action attempted to hold the County in contempt for violating the February 24, 1982 Legal Lake Level Order. The Circuit Court (same judge) held that mandamus was the proper process.

is the engineering report from Spicer which confirms the same. **First Am Compl, Exhibit H** (Appendix #25-70).

With all factual allegations deemed as true, all the elements were plead and Appellants have properly stated a claim for mandamus relief. The Circuit Court erred under *El-Khalil* by requiring evidentiary support for plaintiff's allegations rather than accepting them as true." *El-Khalil*, 504 Mich at 166.<sup>13</sup> As such, the Circuit Court's granting of summary disposition pursuant to MCR 2.116(C)(8) for failing to state a claim was clearly erroneous and must be reversed.

**C. The Circuit Court otherwise erred and wrongfully utilized a motion under MCR 2.116(C)(8) to reach issues outside the legal sufficiency of the pleadings.**

Confusing the role of a motion under MCR 2.116(C)(8), the Circuit Court also made other findings and cited to case law far outside the permissible scope of the motion. For example, the Court concluded "there is no legal authority to support the notion that any deviation from a normal lake level is illegal or a breach of duty per se." But that is not true. MCL 324.30708(1); MCL 324.30702(3). The Circuit Court also concluded that practices which account for seasonal fluctuations and precipitation are not breaches of the duty under MCL 324.30708(1) and MCL 324.30702(3). **June 18, 2020 Transcript, p. 74.** While that is likely untrue as well (as the Legislature did not enact a statute requiring

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<sup>13</sup> The best example of this error is on page 73 of the June 18, 2020 hearing transcript (**June 18, 2020 Transcript, p. 73**) wherein the Court states "[t]he plaintiffs [sic] complaint *does not demonstrate* how ah, they can ah, are, that they are somehow blocked from swimming, that they are blocked or unable to put in docks, that they can't access the lake for ingress and egress, that they' can't operate a boat, that they can't operate a hoist." That is not the standard. Appellants actually and correctly alleged in their First Amended Complaint (and it must be treated as true) that "[e]ach Plaintiff has suffered adverse, negative, and loss-causing effects by the failure of Respondent/Defendant BOARD OF COMMISSIONERS OF THE COUNTY OF ROSCOMMON and its delegated authority to comply within the Legal Lake Level Order."

counties to “provide for and maintain that normal level *except as to seasonal fluctuations and precipitation*”<sup>14</sup>), the key allegations in this case are not premised on seasonal fluctuations and precipitation but rather on the failure of the utilization of known practices and available technology to better or fully comply with the duty to “maintain that normal level.” The latter is the gist of the claim being pursued here.<sup>15</sup> Reversal is required.

**II. The Circuit Court erred in granting summary disposition pursuant to MCR 2.116(C)(10) prior to discovery.**

**A. Standard of Review**

Under MCR 2.116(C)(10), summary disposition is only proper when there is no genuine issue of material fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). “A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.” *Id.* Courts are “liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

Critical for this appeal, a trial court may not determine facts on a motion for summary disposition, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), or generally grant such a motion prematurely before discovery on a disputed issue is

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<sup>14</sup> Courts adding words to statutes under the guise of a judicial gloss is improper. *People v Davis*, 468 Mich 77, 89; 658 NW2d 800 (2003) (“judicial gloss on statutory language is neither required nor permitted”).

<sup>15</sup> The Circuit Court concluded that requiring the County to comply with the Legal Lake Level Order, together with MCL 324.30708(1) and MCL 324.30702(3), would violate the separation of powers. **June 18, 2020 Transcript, p. 78-79.** It is unclear how a trial court requiring a political subdivision to comply with a statute enacted by the Michigan Legislature would violate the doctrine of separation of powers.

complete, *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). Even more critically, “there is a great difference between an inquiry to determine whether or not there is an issue of fact and a trial to decide a disputed issue of fact.” *Skinner*, 445 Mich at 161. “Instead, the court’s task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial.” *Id.*

**B. The Court granted summary disposition pursuant to MCR 2.116(C)(10) after an objection from Appellants’ counsel.**

After using record evidence and granting summary disposition pursuant to MCR 2.116(C)(8), Appellant’s counsel raised the same as an error before the Court—

MR. ELLISON: Judge, just, I want to be clear for my record, naturally of course, we’re gonna appeal.

THE COURT: I know.

MR. ELLISON: Um, naturally. Um, we want to be clear for the record, we have not ever asked this Court and I want to make clear; we are not asking this Court to change the legal level in any way.

THE COURT: I know you’re not.

MR. ELLISON: Okay. I want to be clear about that cuz that — that last part. The second part is is you did grant the motion under C(8) as I understood it, you also denied the motion under C(5) as to the issue

THE COURT: I have.

MR. ELLISON: — for standing. But you also utilized records that would be outside the pleadings as part of your fact recitation.

THE COURT: Well I thought about that, Mr. Ellison and — and I can go on on a C(10) and I don’t know if it was necessary in light of my ruling but I think, if that, if you want the record to complete I can address that.

MR. ELLISON: I — I — I just, my only concern is is that you know, to the extent I — I I guess I want to be clear, as I understand your ruling you went to the legal issues about whether there was a duty and the scope of that duty which would not — would not have encompassed the reports that and the — the other materials.

THE COURT: Correct.

MR. ELLISON: But I want to be clear, so those weren't I mean, to be clear for the record you didn't utilize those as the basis for your C(8) motion, you're just kind of reiterating them because that was what was presented to you?

THE COURT: Correct.

**June 18, 2020 Transcript, pp. 83-84.** Perhaps then realizing that dismissal under MCR 2.116(C)(8) when using materials and exhibits outside the pleadings was on shaky ground, the Court asserted "I mean I can clear that up if you wish me to on a C(10)." *Id.* **at 85.** Appellants declined the offer but the County requested the same. *Id.* **at 85.** Appellants reraised their objections to the same as being premature. *Id.* However, the Court then proceeded—

THE COURT: On the C(10) portion, the Court ah, finds that there is no genuine issue of material fact and in order for the County to reliably achieve the goal set forth in the 1982 lake level orders that the County must alter the dam by restricting low flow channel which is a clear violation of the law and potential violation of the permit for bank water in the spring causing Higgins Lake to be well above the normal le ah, legal level set out in the order. In light of this conflict and over the breaches that I indicated, the over and under, the legal level ah, with regard to the legal level, there is no question of fact that the County ah, did not breach that duty based on those circumstances. Looking at the Spicer Report in its conclusions it is clear that the low flow channel and the dam as it currently operates almost makes it an impossibility, not quite, cuz it's at 15%. Ah, but that is all but, that's what, 80, 87%, 85% or yeah, something of that order, I have it written down, 85% unfeasible to achieve without a monsoon in the summer.

MR. ELLISON: Was that, that was the ecology study though —

THE COURT: Yeah.

MR. ELLISON: — I believe, yeah.

THE COURT: But the Spicer Report drew on the same drew on the same conclusion that the — the low flow um, with that 30% added loss of water makes it almost an impossibility to keep the lake at that level. That's their implication anyway by their

conclusion, they need to block the low flow and/or bank water. You've attached and argued those ah, in fact your relief seeks the Court adopt as part of it's ruling on mandamus, the Spicer Report and on the C(10) no one is in dispute as to those conclusions and the ramifications thereof. And that's why I don't think there's a genuine issue of material as to — as to how that Spicer Report is laid out and the conclusion it draws which are consistent with the conclusion of the Muskegon Water Shed Report. The waters of [inaudible] dove into it a little deeper with regard to the probability of success. No one has indicated in their responses on these motions that those issue are in dispute. And the Court ah, does not find that there's a need for further discovery on those points. Um, which is why for the purpose of the record, C(10) is potentially appropriate for dismissal on that basis as well for purposes of the record.

***Id.* at 85-87.**

**C. Summary disposition pursuant to MCR 2.116(C)(10) was improper.**

When the motion for summary disposition was heard, no discovery had been permitted. Viewing the facts in the light most favorable to Appellants, the following facts were undisputed—

1. The February 24, 1982 Legal Lake Level Order established the legal lake level in the summer for Higgins Lake “at” (not around) 1154.11 feet above mean sea level.
2. The County and its delegated authority “shall provide for and maintain that normal level.” MCL 324.30708(1); see also MCL 324.30702(3).
3. Throughout the summers of prior years, the lake level of Higgins Lake was not maintained at and fell below the required level at 1154.11 feet above mean sea level.
4. The lake level being below 1154.11 feet was and is causing substantial damage to the boats, docks, and equipment of Appellants (and others) and precluded recreational activities that could be pursued if Higgins Lake was properly maintained at or closing to 1154.11 feet above mean sea level.
5. Engineering experts from Spicer Engineering confirmed that methods utilized by the County regularly resulted in the level of Higgins Lake being below the court established legal lake level during the summer months in typical years.

6. Engineering experts from Spicer Engineering confirmed the Higgins Lake structure at the Cut River is in need of repairs and modifications to maintain and reach legal level through the later summer months, including that a restrictor [plate] be placed in the low flow channel to reduce the amount of water flow from Higgins Lake to the Cut River in late summer.

The County's assertions have not been tested in discovery as to why it refuses to be compliant with the required level at 1154.11 feet above mean sea level or why it refuses to adhere to the Spicer Engineering report for the small changes can result in compliance (or at least closer compliance) that as currently operated. Reviewing these all these facts in light most favorable to Appellants, it is clear that the County has breached its statutory duty to "provide for and maintain that normal level" of "1154.11 feet above mean sea level" during the summer months as required by Michigan lake law.

Instead determining that a material question of fact exists needing a finder of fact at a trial, the Circuit Court made findings contrary to *Skinner*. However, it based its granting of summary disposition on the conclusion that "restricting low flow channel which is a clear violation of the law" and "potential violation of the permit for bank water in the spring." **June 18, 2020 Transcript, p. 86.** Neither is true.

**i. A restrictor plate is lawful and needed.**

For its first conclusion, the Circuit Court's reference to "restricting low flow channel is a clear violation of the law" seems to be a reference to the County's argument that reducing water discharge from Higgins Lake to the Cut River to maintained the court-mandated water levels would violate the Part 301 permit issued by the Michigan Department of Environmental Quality (now EGLE). However, that is simply not true. The Part 301 permit itself expressly provides that the permit issued "does not eliminate managing Higgins Lake and the Cut River in accordance with the Court Ordered Lake

Level.” **Part 301 Permit, p. 2, ¶2** (Appendix #2). Complying with the Legal Lake Level Order is complying with the Part 301 permit. As such, making adjustments (or seeking to make needed adjustment) in the form of a needed restrictor plate to reduce the amount of water flow from Higgins Lake to the Cut River would not “violate the law” or the Part 301 permit. In fact, requiring the same, would make the County both in compliance with the permit and in more compliance with the February 24, 1982 Legal Lake Level Order.<sup>16</sup>

**ii. Banking water is also a possibility.**

The Circuit Court also faulted Appellants for even suggesting the idea of banking water in the spring as recommended by Spicer. It is difficult to logically understand how a reduction of six or more inches of Higgins Lake water in the summer time is not a violation of February 24, 1982 Legal Lake Level Order (as implicitly made by the Circuit Court) yet temporarily banking up to two inches of water in the spring of each year is a violation. However, the question is whether “not banking water” is a breach is a “question of fact” for the finder of fact to decide, not the judge as a matter of law on the County’s motion.

**D. The County and the Circuit Court confused the difference between what “is” the duty versus what “breaches” a duty.**

In the lower court proceedings, there was great confusion and excuses given about what was the County’s duty under the February 24, 1982 Legal Lake Level Order and

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<sup>16</sup> The availability of the restrictor plate is the proof that County and its delegated authority are not fully maintaining the legal lake level utilizing all known reasonable practices and available technology, and thereby is intentionally causing the mid to later summer lake levels of Higgins Lake to repeatedly drop below the level of 1154.11 feet above mean sea level to the detriment of the users of Higgins Lake. While the Circuit Court could order this be done (and Appellants would be pleased with the same), the remedy the Circuit Court needs to impose is to require the delegated authority to comply with the duties imposed by MCL 324.30708(1) and MCL 324.30702(3).

Michigan’s Part 307 in-land lake statutes. See e.g. **Appendix #116-118**. Appellants wants to be clear for this appeal. The County has a clear legal duty to “provide for and maintain that normal level” of “1154.11 feet above mean sea level” for Higgins Lake. MCL 324.30708(1); see also MCL 324.30702(3). Appellants have put forth undisputed evidence that maintenance at that exact level is not happening as required in the desirable summer. The question becomes in this case is whether the County is breaching its duty. The County has put forth all sorts of reasons why Higgins Lake is not being maintained at 1154.11 feet above mean sea level. Excuses range from DEQ permit obligations, evaporation, political difficulty, water loss by the Cut River, and more. Those proffered excuses do not *define the duty*. The Legislature has already done that. MCL 324.30708(1); MCL 324.30702(3). The question is whether its actions, including the non-implementation of the Spicer recommendations, is a breach of that duty. And whether there is a breach is a question of fact for the finder of fact. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) (“It is the province of the jury to determine questions of fact and assess the credibility of witnesses.”).

The County is acting illegally each summer—it is not maintaining the legal lake level of 1154.11 feet above mean sea level during the summer months and has the ability to become compliant (or at least less non-compliant) by the Spicer recommendations. It is simply refusing to fulfill its express and mandatory legal duty under MCL 324.30708(1) and MCL 324.30702(3). The County has not asserted—because it cannot—that it is doing the best possible job in fulfilling its legal duty to keep the waters of Higgins Lake at 1154.11 feet above mean sea level from mid-April through November every year. It is failing and it is harming people. **Sworn Declarations** (Appendix #139-176). The error in

the County’s thinking is that it has discretion in whether to comply and maintain the legal level. It does not; the Legislature told them there is no discretion. MCL 324.30708(1); MCL 324.30702(3). It is flouting its legal obligations—and lacks sufficient justification for its failure to do so other than to say “aw gee, we kinda tried.”<sup>17</sup> Reveal is required.

**III. Intervenor EGLE should have been dismissed from this case.**

For the last issue, Appellants challenge the participation of the Michigan Department of Environment, Great Lakes & Energy (EGLE). The Circuit Court permitted EGLE to intervene over objections. Thereafter, Appellants moved to dismiss EGLE for lack of subject matter jurisdiction and to strike its filed summary disposition motion.<sup>18</sup> This lawsuit is about the actions and inactions of Roscommon County, not Intervenor MI-EGLE. A party must assert its own legal rights and interests and cannot rest their claims to and arguments for relief on the legal rights or interests of third parties. *Fieger v Ins Comm’r*, 174 Mich App 467, 471; 437 NW2d 271 (1988).

**A. Standard of Review**

Summary disposition is proper under MCR 2.116(C)(4) when “[t]he court lacks jurisdiction of the subject matter.” Whether a circuit court has subject-matter jurisdiction is a question of law reviewed de novo. *In re Tuscola Co Treasurer*, 317 Mich App 688, 694; 895 NW2d 569 (2016).

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<sup>17</sup> It is acknowledged that the legal level is a target and likely impossible to maintain at an exact level—meaning withing tiny fractions of an inch. **Ostergren Affidavit, ¶19** (Appendix #179). Seasonal differences will occur. Sometimes the levels will be *slightly* higher than the legal level and sometime the levels will be *slightly* lower. However, levels *consistently* managed well-above or well-below the legal level are not acceptable when tools and technology are available to help maintain them closer to that target level. *Id.*

<sup>18</sup> The Court never actually decided EGLE’s motion for summary disposition by deeming it moot. See **June 18, 2020 Transcript, p. 82**. EGLE never cross-appealed in this Court.

**B. The Circuit Court lacks subject matter jurisdiction over EGLE, a state agency.**

Subject-matter jurisdiction is the right of the particular court to exercise judicial power over a class of cases. *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992). As a general matter, a circuit court in Michigan has subject-matter jurisdiction in all civil matters when exclusive jurisdiction over the matters in a complaint have not been specifically precluded or conferred on some other court by our Legislature or our Constitution. See *O’Connell v Director of Elections*, 316 Mich App 91, 101; 891 NW2d 240 (2016). The Court of Claims Act provides that “the jurisdiction of the court of claims, as conferred upon it by [Chapter 600 of the Revised Judicature Act of 1991], is exclusive” and is set “[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments... notwithstanding another law that confers jurisdiction of the case in the circuit court.” MCL 600.6419(1), (1)(a). The Court of Claims has jurisdiction over writ requests against EGLE. *O’Connell*, 316 Mich App at 98 (“At issue here is whether the Court of Claims can properly exercise subject-matter jurisdiction over such writs when mandamus is sought against a state officer or department” and concluding jurisdiction rests in the Court of Claims).

Challenges to subject-matter jurisdiction cannot be waived, and a court must entertain such challenges regardless of when they are raised, or even raise such challenges sua sponte. *In re Contempt of Dorsey*, 306 Mich App 571, 581; 858 NW2d 84 (2014). “A court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford.” *Yee*, 251

Mich App at 399. “When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void.” *Fox v Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965).

Intervenor EGLE cannot seek to dismiss a mandamus claim when it is not expressly sued; it would be resting its arguments for judicial relief on the legal rights or interests of third parties (i.e. Roscommon County) which it cannot do. Intervenor EGLE also cannot step into the shoes of the County. Properly, any action involving EGLE is outside the Circuit Court’s subject matter jurisdiction anyways and exclusively belongs in the Court of Claims. The Circuit Court erred in not dismissing EGLE from this suit post-intervention and striking its motion for summary disposition.

### CONCLUSION

Courts are not policymakers. They must apply the standards enacted by our representative branch of government—the Legislature. The Michigan Legislature has commanded that Roscommon County and its delegated authority “shall provide for and maintain that normal level,” MCL 324.30708(1) and MCL 324.30702(3), “at [not around] 1154.11 feet above mean sea level” for the summer months. The County is in breach of that duty and mandamus provides the required relief. The dismissal must be reversed.

### RELIEF REQUESTED

This Court is requested to reverse final order of the Roscommon County Circuit Court which dismissed this case pursuant to MCR 2.116(C)(8) and (C)(10); reverse the denial of summary disposition for lack of subject matter jurisdiction as to Intervenor EGLE pursuant to MCR 2.116(C)(4); and remand this matter back to the Circuit Court for further proceedings.

Date: January 12, 2021

RESPECTFULLY SUBMITTED:

*Philip L Ellison*

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