

STATE OF MICHIGAN
IN THE COURT OF APPEALS

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, ET AL.

Plaintiffs-Appellees,

and

MICHIGAN COUNCIL OF TROUT
UNLIMITED AND PIGEON RIVER
COUNTRY ASSOCIATION,

Intervening Plaintiffs-Appellees,

v

GOLDEN LOTUS, INC.,

Defendant-Appellant.

Court of Appeals Case No. 306116

Otsego County Circuit Court
Case No. 09-12933-CE(m)

Hon. Dennis F. Murphy

**INTERVENING PLAINTIFFS-
APPELLEES' RESPONSE TO
DEFENDANT-APPELLANT'S
MOTION FOR LEAVE TO
SUPPLEMENT ITS APPLICATION
FOR LEAVE TO APPEAL AND
FOR LEAVE TO FILE A REPLY TO
PLAINTIFF-APPELLEES'
OPPOSITION TO APPLICATION
FOR LEAVE TO APPEAL**

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INTRODUCTION

This case arises out of serious environmental damage caused by Defendant-Appellant Golden Lotus, Inc.'s ("Golden Lotus") private dam on the Pigeon River in Otsego County. Following the most recent disaster in June 2008, the Michigan Department of Natural Resources and Michigan Department of Environmental Quality, et al. filed an enforcement action against Golden Lotus seeking removal of the dam. The Michigan Council of Trout Unlimited and the Pigeon River Country Association (collectively, the "Intervening Plaintiffs") intervened.

Following mediation and confidential settlement negotiations, the parties entered into a comprehensive settlement agreement incorporated into an Interim Order entered by the trial court on April 5, 2010 (the "Interim Order"). The Interim Order requires removal of the dam, and outlines numerous steps that the parties must accomplish, under the trial court's continuing jurisdiction, for planning, permitting, and implementation of dam removal. During the planning process, Golden Lotus attempted to shirk its obligation to remove the dam, and, instead, proposed to remove only "selected dam infrastructure." The Intervening Plaintiffs objected and filed a motion to clarify the Interim Order so as to require Golden Lotus to submit a plan for removal of the dam (not just removal of selected dam infrastructure). The trial court granted the motion and directed Golden Lotus to revise its conceptual plan to provide for the dam's removal. Both the Interim Order and the trial court's ruling on Intervening Plaintiffs' motion are interlocutory. Under the Interim Order, a Consent Judgment resolving the claims in the case will not enter until dam removal planning and permitting are completed.

Following the trial court's ruling, Golden Lotus filed a timely application for leave to appeal to this Court. Intervening Plaintiffs filed their brief in opposition. Later, on November 21,

2011, the trial court granted Golden Lotus' motion for a stay pending this Court's decision on Golden Lotus' application for leave.

Golden Lotus now seeks leave from this Court to file a reply brief and "to supplement its original Application." (Appellant's Mot 2.) This Court should deny Golden Lotus' motion. The parties have thoroughly briefed the issues in this matter, and nothing about the trial court's grant of a stay justifies additional attorney commentary.

ARGUMENT

MCR 7.205 controls what the parties may file in connection with an application for leave to appeal to this Court. The appellant may file an application for leave to appeal, concisely explaining why this Court should grant leave. MCR 7.205(B). The appellee may then file an answer opposing the application. MCR 7.205(C). The Michigan Court Rules make no provision for a reply brief or later supplementing the issues included in the application. See MCR 7.205.

Golden Lotus' request to "supplement" its application by adding additional issues to be appealed or additional arguments is wholly improper. It is impossible to determine exactly what new items Golden Lotus seeks to raise, because it did not file its proposed "supplement" with its motion. But Golden Lotus should not be permitted to take a second bite at the appellate apple. This Court has long prohibited such gamesmanship. See *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 251–252; 673 NW2d 805 (2004) (appellant must raise all issues it wishes this Court to consider in its initial brief). If Golden Lotus wishes to seek leave to appeal new issues, it may file a late application for leave to appeal under MCR 7.205(F). Golden Lotus

cannot now bootstrap additional items into its first appeal, now that briefing has been completed.¹

Golden Lotus also requests leave to file a reply brief. The Michigan Court Rules make no provision for a reply in application for leave. Here, Golden Lotus has filed its application and Intervening Plaintiffs have filed their answer. All told this Court has received seventy-six pages of briefing and hundreds of pages of exhibits. No further attorney submissions are necessary for this Court to resolve whether it should grant Golden Lotus' application. Golden Lotus vaguely declares that it wishes to rebut "misstatements of fact and law" made in Intervening Plaintiffs' brief in opposition to the application. (Appellant's Mot 3.) But Golden Lotus fails to identify what those might be. (See *id.*) This Court has received ample briefing in this matter, as well as the underlying documents and pleadings. Further attorney comment is unwarranted.

Golden Lotus emphasizes that it wishes to address the effect of the trial court's recent stay on the application for leave. (Appellant's Mot 3-4.) But Golden Lotus already provided this Court with copies of both the trial court's order and the hearing transcript. (*Id.* at 2.) There is no need for additional filings. Furthermore, the trial court's stay ruling does not affect the issues presented in this matter. The trial court's entire ruling encompasses little more than a page of the transcript:

I am going to grant the request for the stay, because "interim order" is -- does have a ring of finality to it. It pretty much maps out subsequent steps to be taken, so it does have some importance beyond its label. It says "interim," but really if -- if the order is upheld -- which, of course, that's the way I wrote up the original opinion. I still believe that was correct -- correctly decided on the plain language of the order and has that ring of finality. So I think they're entitled to a stay, 'cause otherwise it would set out a series of steps that would be pretty much irreversible. And so I'll let you pursue that on your appeal. I think that justice

¹ If this Court should grant Golden Lotus' improvident request, Intervening Plaintiffs request that this Court also grant them an answer. Golden Lotus should not be permitted to inject issues into this application without a response from Intervening Plaintiffs.

requires that. It's fair. It's not the ideal resolution. It is going to be a lot of substantial delay, which is not favorable. It's not the best scenario. **I'm very concerned about the status of the dam, but I believe you are entitled to a stay. I typically do grant stays in civil matters, unless there's some -- some different reason not to.** So it's better to have Court of Appeals look at it, review it, and stay proceedings in the meantime. So I'll sign an order to that effect.

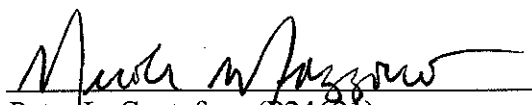
(Ex 2 to Appellant's Mot, 11/9/11 Hr'g Tr 40-42 (emphasis added).) There is no extensive legal analysis or detailed findings of fact. (*Id.*) Indeed, the trial court notes that he "typically" grants stay requests in civil matters, unless there is some compelling reason not to do so. (*Id.*) Nothing about this stay ruling requires additional attorney explanation.

CONCLUSION AND REQUESTED RELIEF

Golden Lotus has requested to file a "supplement" to its application for leave to appeal, and to file a reply brief. Neither is necessary in this matter. This Court has already received hundreds of pages of materials; it does not need more. Accordingly, the Intervening Plaintiffs respectfully request that this Court deny Golden Lotus' Motion for Leave to Supplement its Application for Leave to Appeal and for Leave to File a Reply. If this Court should grant Golden Lotus' motion, Intervening Plaintiffs request that this Court permit them to file an answer to Golden Lotus' supplement and reply.

Dated: December 21, 2011

WARNER NORCROSS & JUDD LLP

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PROOF OF SERVICE

The undersigned states that she is an employee of Warner Norcross & Judd LLP, and that on December 21, 2011, she served Intervening Plaintiffs-Appellees' Response to Defendant-Appellant's Motion for Leave to Supplement Its Application for Leave to Appeal and for Leave to File a Reply to Plaintiff-Appellees' Opposition to Application for Leave to Appeal on Pamela J. Stevenson, William M. Schlecte, and Harry Ingleson II at their above-indicated addresses, by depositing copies of same in first-class U.S. mail, postage prepaid.



Roxann S. Shier

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