STATE OF MICHIGAN
IN THE COURT OF APPEALS

JAMES R. HOLTON and
NANCY M. HOLTON,

Plaintiffs/Appellants/
Cross-appellees,

v.

CAROLE L. WARD,

Defendant/Appellee/
Cross-appellant.

Docket No. 308454

Oakland Circuit Case No. 11-121522-CH
Hon. Rae Lee Chabot

_____/

APPELLEE'S COMBINED BRIEF ON APPEAL AND CROSS-APPEAL

ORAL ARGUMENT REQUESTED

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Dated: June 29, 2012

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Did the trial court properly grant summary disposition for Ms. Ward on the basis of collateral estoppel where appellant James Holton, as part of his 2004 petition in a contested-case DEQ hearing, based his position in part on the damage that supposedly would be done to his riparian rights in public waters, rights that he asserted at the administrative hearing and which the ALJ specifically noted in rejecting his claim, did not exist?

Plaintiffs-Appellants Holtons Answer: "No"
Defendant-Appellee Ward Answers: "Yes"
The Trial Court Answered: "Yes"

II. Should summary disposition for Ms. Ward be affirmed on the alternate ground of res judicata where this action is between the same parties (or their privies) involved in Mr. Holton's 2004 contested-case hearing and where when the facts or evidence essential to it, namely the Holtons' alleged "right of riparian owner of public waters" are identical to those already decided in contested-case hearing?

Plaintiffs-Appellants Holtons Answer: "No"
Defendant-Appellee Ward Answers: "Yes"
The Trial Court Answered: "No"

III. Did the trial court properly grant summary disposition for Ms. Ward where longstanding Michigan law bars riparian rights in a man-made body of water, and where the Holtons' statutory argument is newly raised on appeal and also lacks merit?

Plaintiffs-Appellants Holtons Answer: "No"
Defendant-Appellee Ward Answers: "Yes"
The Trial Court Answered: "Yes"

QUESTION INVOLVED ON CROSS-APPEAL

I. Did the trial court clearly err in declining to declare the Holtons' lawsuit frivolous given Michigan's longstanding refusal to recognize riparian rights in a man-made body of water?

Plaintiffs-Cross-Appellees Holtons Answer: "No"
Defendant-Cross-Appellant Ward Answers: "Yes"
The Trial Court Answered: "No"

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STATEMENT OF JURISDICTION

The Holtons' statement of jurisdiction as to the appeal is complete and correct. Regarding the cross-appeal, Ms. Ward timely filed her claim of cross-appeal on February 27, 2012, 20 days after the claim of appeal was filed. Jurisdiction over the cross-appeal exists under MCR 7.207(B)(1).

BRIEF ON APPEAL

There is nothing new under the Sun, and that includes the 20-acre patch of rural Oakland County that plaintiffs-appellants James and Nancy Holton have once again made the subject of litigation. Defendant-appellee Carole Ward owns 60 acres in Rose Township. Her neighbors, the Holtons, wrongfully claim riparian rights in a "body of water," a mixed area of water and wetland vegetation that on occasion straddles a shared boundary between the two properties, and they charge Ms. Ward with impeding those rights. Specifically, the Holtons claim that a fence on Ms. Ward's property that was approved in 2006 by the Michigan Department of Environmental Quality over their objection prevents them from accessing the 20-acre area of water and wetland vegetation on Ms. Ward's property, and that the DEQ-approved fence therefore must be removed. But as the trial court properly found, the Holtons are simply trying to re-litigate their failed previous attempt to claim riparian rights in a man-made body of water, contrary to longstanding Michigan law, by forcing removal of the fence. None of their arguments, including one raised for the first time on appeal, has merit, and the Circuit Court properly rejected them.

STATEMENT OF FACTS

I. The properties

Through the mid-20th century the properties of both Ms. Ward and the Holtons were owned by the Clark family, who in 1953 installed an earthen dam that floods an area of wetland vegetation of up to 20 acres. 10/12/11 motion for summary disposition (MSD), Ex 1 - aerial photograph; *see also* Affidavit of Junior Clark, Ex 3 to 11/14/11 MSD Response; Complaint, ¶ 10.[2] Clark also dug a pond "to control runoff and [which] was used to water his cattle." *Holton v Bone*, unpublished per curiam opinion of the Court of Appeals, decided December 27, 2007 (Docket No. 272113),

[2] In the aerial photo, Ms. Ward's property is in the middle and the Holton property is adjacent to the south, or bottom.

Ex 3 to Holtons' brief on appeal, at *1. In the late 1990s the Clarks sold to the Holtons that portion of their property including the pond; their successor in title in 1976 had sold the other 60 acres to Ms. Sharon Bone. Complaint, ¶ 4, 10; TR 7/19/06, p 59.[3] Eventually, defendant Carole Ward came to co-own the 60 acres, and Ms. Bone in 2007 quitclaimed her interest to Ms. Ward. *Id*, ¶ 6.

In 2004, when Ms. Bone and Ms. Ward still owned the property jointly, they decided to make certain improvements to access their upland agricultural field on the easterly portion of the 60 acres. *See* 10/12/11 MSD, Ex 1. Ms. Bone sought permission from the DEQ to construct a farm road on the property, along its boundary with the Holton parcel, under an exemption from wetland permitting requirements, and at the same time applied for a wetland permit to construct a fence alongside that farm road. The DEQ granted both the road exemption and the fence permit, and Ms. Bone and Ms. Ward built both. It is this fence that the Holtons claim impedes their alleged "riparian" right to access Ms. Ward's property: they wish to access Ms. Ward's property to boat and otherwise make recreational use of it, despite her express denial of such access to them.

II. The DEQ contested-case proceeding

In 2006, several years before filing this action, James Holton filed a contested-case petition with the DEQ under MCL 324.30319(2), challenging both the DEQ's determination that the farm road was exempt from permitting requirements, and its issuance of the permit to erect the fence in a wetland. Ms. Bone, then co-owner of the property, intervened on behalf of herself and Ms. Ward, and the ALJ heard testimony from Ms. Ward, Mr. Holton, and others.

[3] Below, the Holtons attached to their response opposing the summary-disposition motion a single page from the 142-pp transcript of the July 19, 2006 DEQ hearing, as its Ex 8. Because the full transcript is necessary to properly analyze the Holtons' argument on appeal, since it contains material that directly refutes their contention that "[t]here is no evidence that the ALJ reviewed or considered the history of use, or the longtime presence of standing water feet deep in the area," Brief on Appeal, p 9, Ms. Ward with this brief is filing a motion to include the full hearing transcript in the record.

Just as this action does, Mr. Holton's DEQ contested-case proceeding alleged that he had riparian rights over the Ward/Bone Property, with which the fence interfered. 10/12/11 MSD & Ex B, DEQ Final Determination and Order/Proposal for Decision, p 4 ("Regarding the fence, [Mr. Holton] contends it is not an appropriate use of the wetland and that it will prevent him from accessing the wetland from his property"). Though the Holtons *now* try to avoid application of collateral estoppel by portraying the DEQ proceeding as "not adjudicating the private property and water rights of these parties....," Brief, p 9, the 2006 DEQ hearing transcript is replete with testimony from Mr. Holton and others relating to his supposed riparian rights. On both direct and cross-examination, Mr. Holton testified at length regarding the pond and wetlands, and the water on his property and Ms. Ward's, including his assertion that, when he bought the property in 1999, he could have navigated a boat from his area of it through hers. TR 7/19/06, pp 11-16, 30-31, 34-39.

As Mr. Holton testified:

> Q. Okay. And then we see where there's a little bit of some water between the pond. We can see the pond. We see the delineation between the pond and we see a small parcel of the wetland.
>
> A. Correct.
>
> Q. Is that what you're referring to --
>
> A. Yes.
>
> Q. --that you could pop a canoe in there and then you could take your canoe all the way partially and have riparian rights through the wetland?
>
> A. Yes.
>
> Q. All right. Now, is it your testimony that this wetland in your experience would be -- contain water that was deeper than 3 or 4 feet?
>
> A. Yes. [TR 7/19/06 DEQ proceeding, p 33].

And:

Q. Okay. So it's your testimony here that, as of the time you purchased the property in 1999, you actually had the ability to, it's your belief, get in a canoe somewhere in this area and canoe across Sharon Bone's property -- what is now Sharon Bone's property?

A. Yeah; oh, yes.

Q. Okay. And none of the vegetation that we've looked at in the aerial photos interfered with your ability to do that?

A. Well, there were years of water -- you know, high water. It depends on the rain or the snow that existed. [*Id*, p 40].

Most critically for these purposes, Mr. Holton insisted on drawing a direct link between the fence at issue in the proceedings and his purported riparian rights:

Q. I think your objection to the fence is that you feel it has an impact on the wetland?

A. And my rights.

Q. And your water rights?

A. Yes. [*Id* at 51].

Mr. Holton in his case-in-chief also elicited testimony from Ms. Bone regarding the nature and character of the wetlands, *Id* at 70-72, to which other witnesses testified, as well. *Id* at 88 (Losee); 117-118, 121-123, 130 (Martin); 135-136 (Ward).

DEQ Administrative Law Judge Richard A. Patterson issued his finding of facts and proposed determination on August 31, 2006, holding that Mr. Holton had no riparian rights that would allow him access to the Ward/Bone Property and that the DEQ properly had issued the permit to erect the fence. 10/12/11 MSD, Ex 2. The ALJ considered and categorically rejected Mr. Holton's claim to riparian rights, and his rejection had nothing to do with the level of water in Mr. Holton's pond, or whether it was fed by surface water, but rather, with the fact that no public body of water was involved to which riparian rights could attach. Indeed, ALJ Patterson went so

far as to say that even if it were physically possible for Mr. Holton to access the wetlands, he could not do so without trespassing:

> The gravaman [*sic*] of the Petitioner's complaint is that, in some manner, the fence will impede his "water rights" and his ability to access the wetland on the [Ward/Bone] property. He did not specify the precise nature of his perceived "water rights," but the fence could not conceivably impact free flow of water to his detriment. He also testified the fence will prevent him from accessing the wetland on the [Ward/Bone] property. This concern is misplaced in that *he has no right to access the wetland on private property and could not do so even if physically possible without trespassing*. In fact preventing such activity is the express purpose of the fence. *In his petition for contested case he characterized it as "[limiting] my right of riparian owner of public waters."* Again, this assertion is misplaced as no public waters are involved. [*Id*, p 8 (emphasis added)].

The ALJ recommended that the road be exempted as a farm road under MCL 324.30305(2)(i) and that the fence be permitted under MCL 324.30311. 10/12/11 MSD, Ex 2, p 13. The DEQ Director adopted that recommendation in an October 16, 2006 Final Determination and Order, 10/12/11 MSD, Ex 3, which Mr. Holton appealed to the Circuit Court as to the road, only. *Id*, Ex 4. Judge Chabot – the same judge who presided over this action – rejected that appeal on June 28, 2007, *Id* & Ex 5, and he did not appeal further.

Thus, the DEQ's Final Determination and Order declaring Mr. Holton's lack of riparian rights and lawful propriety of the fence became final and binding, and the established, adjudicated, and indisputable material facts are as follows:

- The "pond" on the Holtons' property by which they claim a right to access the wetlands on Ms. Ward's property is man-made. *See*, 2/24/06 Opinion and Order of the Court in *Holton v Bone*, Oakland Circuit Case No. 03-050009-CH, pp 3, 7, Ex 2 to Holtons' 11/14/11 Response to MSD.

- Likewise, even the Holtons admit the 20-acre mixed area of water and wetland vegetation also was man-made. *Id* & Ex 7, Affidavit of James R. Holton and Nancy M. Holton, pp 1-2.[4]

[4] Significantly, both affidavits the Holtons submitted with their 11/14/11 MSD Response, that of Junior Clark and their own "joint" affidavit, Exs 2 and 7 respectively, suffer flaws that should bar their consideration in support of the Holtons' claim. Leaving aside the irregularity of two

- The increased level of water on the wetlands is the result of a man-made earthen dam. *Id.*

- "There is no evidence that the subject wetland is contiguous to or hydraulically connected to any other body of water" which might give rise to riparian rights. See, 10/12/11 MSD & Ex 2, DEQ Final Order & Determination, p 11.

Separately, Mr. Holton in 2003 filed a lawsuit seeking an order directing Ms. Bone to remove a culvert they alleged had lowered the water level on their property; the Circuit Court ordered that relief and this Court in 2007 affirmed. *Holton v Bone*, Ex 3 to the Holtons' Brief.

III. Despite their earlier failure at the DEQ, the Holtons again seek "riparian rights" via this action.

In late 2010, the Holtons' lawyer wrote to Ms. Ward, asserting that the couple was "seeking access to the body of water contained on your property and bordering their property *for purposes of riparian rights*." 11/30/10 Letter of Carol D. Birnkrant, Esq., Ex D to Complaint (emphasis added). The letter said the Holtons were "seeking reasonable use of the entire body of water," but were not able to access it due to the fence. *Id.* When Ms. Ward did not respond, the Holtons filed a complaint for declaratory and injunctive relief, asserting repeatedly that they were entitled to removal of the fence so they could exercise "riparian rights":

> 2. The Plaintiffs claim access rights, *as riparian owners*, to the entirety of a body of water that is on their property and the property of Defendant....
>
> * * *
>
> 11. Defendant SHARON M. BONE in the prior lawsuit built an access road and a fence after draining the water out of the wetlands improperly through the installation of the culvert through the dam which resulted in the water levels significantly dropping and *the Plaintiffs' riparian rights* being interrupted.

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individuals attesting under oath in one affidavit, as Mr. and Mrs. Holton did, neither affidavit indicates that the witness is testifying as to personal knowledge and is competent to do so. MCR 2.119(B)(1)(a)-(c). Indeed, as to the Holtons, it seems highly unlikely either has personal knowledge of the 1953 damming, 46 years before they bought their property.

Nonetheless, the fact that Junior Clark and his father in the early 1950s created both the pond and, via the earthen dam, the mixed area of water and wetland vegetation, is undisputed.

* * *

13. Plaintiffs requested the right to use the entire body of water *for purposes of riparian rights* by letter dated November 30, 2010 that was denied because it was never responded to. **(See Plaintiffs' Exhibit D attached hereto).**

* * *

17. Plaintiffs are seeking access to the portion of the body of water contained on Defendant's property and bordering their property *for purposes of exercise of their riparian rights* by boating on the watercourse and other uses.

18. Plaintiffs are seeking reasonable use of the entire body of water, *and the ability to exercise their riparian rights*, which is impossible now due to the fencing installed on Defendant's property.

19. Plaintiffs are unable to access the body of water that is contained on Defendant's property and bordering their property because of the fence that blocks their ingress and egress.

20. Plaintiffs are seeking the removal of the fencing, *so that they can enjoy their full riparian rights* to the entire body of water, including the area that is on Defendant's parcel. [9/6/11 Complaint, pp 2-4 (italics added; bold in original)].

The Holtons requested a permanent injunction ordering Ms. Ward to remove the fence and preventing her from "interfering with the rights of Plaintiffs and others" to use the entire body of water. *Id*, p 5.

In lieu of answering, Ms. Ward moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that the action was barred by res judicata and collateral estoppel. 10/12/11 MSD, pp 3-4.[5] She specifically argued that "reasonable minds cannot differ that Plaintiffs do not have riparian rights and therefore cannot either legally object to the fence on the Ward/Bone Property, nor lawfully access the Ward/Bone Property via the wetlands (or any other means)," without her permission, *Id*, p 2, and sought an award of fees and costs for a frivolous action.

[5] The Holtons' assertion that Ms. Ward's original motion provided no argument under MCR 2.116(C)(10), Brief on Appeal, p 4 n1, is incorrect. *See* 10/12/11 MSD, p 4; TR 1/11/12, p 13.

The Holtons responded that neither res judicata nor collateral estoppel applied because "material facts had dramatically changed" since the DEQ proceedings, claimed that the ALJ had not made a determination of their riparian rights and that, in any event, his ruling "contradicted" those of the Circuit Court in the culvert litigation. 11/14/11 Response to MSD. They made no argument under the ILSA. *Id.* Ms. Ward in reply noted not only that the ALJ *had* made an express determination as to "riparian rights," but that one fact remained constant throughout all proceedings: since the pond and area of water and wetland vegetation were man-made, riparian rights simply could not attach under Michigan law. 11/23/11 MSD Reply, pp 1-5.

IV. The Circuit Court grants summary disposition.

The court heard oral argument on the motion; foreshadowing their claim on appeal, the Holtons argued that they were blindsided by Ms. Ward's reply brief. TR 1/11/12, pp 11-12. Of course, the issue of "riparian rights" to the water on Ms. Ward's property had been raised not only in Ms. Ward's motion, p 4, but also in the Holtons' counsel's 2010 letter, and in their own Complaint.

The court granted summary disposition on two different bases. It first held that collateral estoppel barred the Holtons' claims, though it rejected Ms. Ward's argument that res judicata also applied. TR 1/11/12, pp 13-15. It went on to hold that while the issue of the Holtons' riparian rights was not litigated in the culvert litigation, it had been in the DEQ administrative proceeding. *Id* at 15. The court specifically found that the body of water was man-made and that, under plain, binding precedent, it could not give rise to riparian rights under Michigan law. *Id* at 15-16, *citing Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967) and *Persell v Wertz*, 287 Mich App 576; 791 NW2d 494 (2010). It denied Ms. Ward's request to deem the action frivolous. *Id* at 16.

The court memorialized its ruling in an order entered on January 19, 2012, after which the Holtons appealed and Ms. Ward cross-appealed the denial of sanctions.

STANDARD OF REVIEW

This Court reviews the grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion for summary disposition based on collateral estoppel or res judicata is properly brought under MCR 2.116(C)(7). The court must consider the pleadings as well as any affidavits, depositions, admissions, or other documentary evidence submitted by the parties, and determine whether the moving party is entitled to judgment as a matter of law. *Coleman v Kootsillas*, 456 Mich 615, 618**;** 575 NW2d 527 (1998).

In evaluating a motion for summary disposition under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions and other evidence in the light most favorable to the non-moving party, to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Importantly with regard to both MCR 2.116(C)(7) and (C)(10), the evidence "shall only be considered to the extent that the content or substance would be admissible...." MCR 2.116(G)(6).

"If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart." *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997) (citation omitted).

ARGUMENT

I. Summary disposition was appropriately granted under MCR 2.116(C)(7).

A. The court correctly applied collateral estoppel to bar the Holtons' claim.

"Generally, for collateral estoppel to apply three elements must be satisfied: 1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and

final judgment, 2) the same parties must have had a full and fair opportunity to litigate the issue, and 3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004) (footnotes, internal brackets, and quotations omitted), *citing Storey v Meijer, Inc*, 431 Mich 368, 373 n3; 429 NW2d 169 (1988). Where (as here) a party wields collateral estoppel defensively, to prevent the opposing party from relitigating an issue it already had a chance to fully and fairly litigate in a prior proceeding, Michigan law omits the mutuality requirement. *Monat*, 469 Mich at 691-692. And where the earlier proceeding was administrative, three additional requirements exist: collateral estoppel will preclude relitigation if 1) the administrative proceeding was adjudicatory in nature, 2) a method of appeal was provided, and 3) the Legislature intended the administrative determination to be final absent an appeal. *Dearborn Hgts Sch Dist No 7 v Wayne County MEA-NEA*, 233 Mich App 120, 129; 592 NW2d 408 (1998), *citing Nummer v Dept' of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995); *see also Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 33-34; 620 NW2d 657 (2000).

The Circuit Court held the Holtons' lawsuit barred by collateral estoppel, finding that the issue of riparian rights was litigated in the DEQ proceeding and that the same parties were involved. TR 1/11/12, p 14. Indeed, the court went on to find that mutuality of estoppel also existed (since Ms. Ward would have been bound by an adverse DEQ holding), *Id*, even though *Monat* makes clear that mutuality is not required. The Holtons on appeal do not challenge the privity element, instead arguing that the facts on which they base this action were not "actually litigated and determined" before the DEQ, and further that the "material facts" have been changed by subsequent rulings in the civil litigation. Brief, pp 8-13. Both positions lack merit.

As to the first, the Holtons' attempt to cabin the DEQ ruling as a mere permitting decision that applied "Michigan environmental laws and public interest in the preservation of wetlands,"

as opposed to resolving their riparian rights, Brief at 9, is insupportable. The issue of "water rights" was present in the DEQ contested-case proceeding from the very beginning, because Mr. Holton himself insisted on raising it:

> Q. I think your objection to the fence is that you feel it has an impact on the wetland?
>
> A. And my rights.
>
> Q. And your water rights?
>
> A. Yes. [TR 7/19/06, p 51].

Specifically, he testified that the fence would remove from him the choice to exercise riparian rights on the body of water:

> Q. Even though, as you sit here today, you have no photos of you actually getting in a canoe in the area where the fence is; right? "No"?
>
> A. That would be like living on a lake and saying you don't have rights to the water. I mean, the water was there for me to use.
>
> Q. Well, --
>
> A. My choice if I wanted to use it or not. [*Id* at 51-52].

Mr. Holton thus put riparian rights directly at issue by linking them with the fence, obligating the ALJ to address the issue of those supposed rights in his Proposal for Decision:

> Regarding the fence, the Petitioner contends it is not an appropriate use of the wetland and that it will prevent him from accessing the wetland from his property. [10/12/11 MSD & Ex 2, Proposal for Decision, p 4].

Analyzing Mr. Holton's challenge to the fence, the ALJ stated that its very gravamen was that, "in some manner, the fence will impede his 'water rights' and his ability to access the wetland on the [Ward/Bone] property." *Id*, p 8. The ALJ went on to note that while Mr. Holton never specified the precise nature of the "water rights" he was claiming the fence impeded, that was irrelevant because "he has no right to access the wetland on private property and could not do so

even if physically possible without trespassing." *Id.* Finally, the ALJ noted that Mr. Holton's claim to riparian rights to public waters was misplaced "as no public waters are involved." *Id.* In sum, Mr. Holton's attempt now to restrict the ALJ's decision to having merely allowed a fence, and not adjudicating claimed "water rights," ignores that the ALJ rejected his challenge to the fence *precisely because Mr. Holton has no "water rights" in Ms. Ward's property*.

For collateral-estoppel purposes, an issue in the first proceeding "is necessarily determined only if it is 'essential' to the judgment." *People v Gates*, 434 Mich 146, 158; 452 NW2d 627 (1990). Further, "collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally." *Id.* Here, the resolution of Mr. Holton's claim to riparian rights *was* essential to deciding the fence-permit issue, since Mr. Holton wanted to block the fence specifically because it would interfere with his "water rights" in the Ward/Bone property. And the ALJ resolved that issue clearly, definitively, and unequivocally, by noting that Mr. Holton has no such rights. Proposal for Decision, p 8. The water-rights issue was essential to the DEQ's resolution of the fence challenge and thus was "necessarily determined" in it. Moreover, Mr. Holton could have appealed on the fence issue, but didn't. The Circuit Court correctly held that the Holtons are collaterally estopped from re-litigating the issue of riparian rights now. [6]

The Holtons' other argument against collateral estoppel, that facts have "materially changed" due to the subsequent culvert litigation, rests on a subtle yet significant sleight-of-hand. They claim that due to the decisions of the Circuit Court and this Court in the culvert litigation, the remedial steps Ms. Ward was ordered to take have caused the wetland area to be filled with standing water

[6] The full DEQ hearing transcript fleshes out the genesis of the ALJ's Proposal for Determination, shedding light on how that ruling came to address the Holtons' purported water rights and debunking their claim now that it did not. But even if this Court denies Ms. Ward's motion to include the full transcript, the 2006 Proposal for Determination on its own was a sufficient basis for the trial court's ruling that the DEQ "necessarily determined" that issue.

"year round, constituting a lake or large pond to which both parties have lake or pond frontage." Brief, p 11. Even accepting that as true – though it is unsupported by citation to record evidence – it wholly misses the point. No matter how large the body of water was, is, or will become, and whether any change in its size or depth is due to an act of God or of a Circuit Court judge, for all time it will remain a man-made body of water, incapable of giving rise to "riparian rights" as a matter of hornbook Michigan law. *Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967); *Persell v Wertz*, 287 Mich App 576; 791 NW2d 494 (2010).

The Holtons' attempted use of *Kernen v Homestead Dvpmt Co*, 232 Mich App 503; 591 NW2d 369 (1999) underscores the error of their position. They cite *Kernen* for the proposition that wetlands that do not merely hold surface water and are not "of a casual or vagrant character having no substantial or permanent existence," are "watercourses" to which riparian rights apply. Brief p 12. But that mischaracterizes both the facts and holding of that case. In *Kernen*, the question was whether the wetlands were *part of* the natural watercourse they were adjoining, which consisted of a lake, which ran into a river, which in turn ran into one of the Great Lakes – it was not whether isolated wetlands could, in and of themselves, be considered natural water courses to which riparian rights applied. Here, in contrast, the ALJ correctly determined "there is no evidence that the subject wetland is contiguous to or hydraulically connected to any other body of water." 10/12/11 MSD & Ex 2, p 11. Contrary to the Holtons' assertions, the pond and 20-acre mixed area of water and wetland vegetation have been adjudicated to be unconnected to any public watercourse.

The Circuit Court expressly recognized this:

> This Court finds it was a manmade body of water. It wasn't a wetland that somebody dammed up and then un-dammed and it flooded once again. There was a pond dug out by a man and then it was dammed and then it was undammed and allowed to flood. [TR 1/11/12, p 15].

Even the Holtons' own authority states that for any change in facts to relieve a party from collateral estoppel, it must be one that furnishes a new basis for the claim:

> The estoppel of a judgment extends only to the facts and conditions as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts or conditions intervene before a second suit, *furnishing a new basis for the claims and defenses of the parties respectively*, the issues are no longer the same, and hence the former judgment cannot be pleaded in bar to the subsequent action. [*Local 98 of the United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus of the US and Canada, AFL-CIO v Flamegas Detroit Corp*, 52 Mich App 297, 303-304; 217 NW2d 131 (1974) (citations and internal quotation marks omitted), *cited in* Holtons' Brief at 11].

Thus, while various ancillary facts may have been changed in the post-DEQ litigation, the fact that is central and dispositive to this dispute, the man-made status of the body of water that Junior Clark and his father created in 1953, has not. No riparian rights can attach, as the ALJ found years ago, and the trial court correctly applied collateral estoppel in barring the Holtons from continuing to litigate the point.

B. Alternatively, res judicata also applies to bar the Holtons' claim.

This Court will not reverse a trial court if it reached the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). Further, it normally will affirm on alternate grounds where the trial court reaches the correct result. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Here, the trial court rejected res judicata as inapplicable but did so erroneously, apparently based on its misunderstanding of the basis for Ms. Ward's assertion of it. Properly applied, res judicata stands as an alternate basis for affirming summary disposition.

Res judicata is "broadly applied" by Michigan courts. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). It "generally bars subsequent relitigation based upon the same transaction or

events, regardless whether a subsequent litigation is pursued in a federal or state forum." *Pierson Sand and Gravel v Keeler Brass*, 460 Mich 372, 379; 596 NW2d 153 (1999). Res judicata was judicially created to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id* at 381 (citations omitted).

Res judicata bars a second action when the first action was decided on the merits, the matter contested in the second action was or could have been resolved in the first, and both actions involve the same parties or their privies. *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991); *Wayne County v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). It precludes a subsequent claim when the evidence or facts supporting both actions are the same. *Sewell v Clean Cut Management*, 463 Mich 569, 575; 621 NW2d 222 (2001). As with collateral estoppel, res judicata may apply where the first proceeding was a quasi-judicial administrative decision. *Wayne County*, 233 Mich App at 277-278 (citations omitted).

Each of those requirements was met here. Mr. Holton had every opportunity in the DEQ contested-case proceeding to present his case, through relevant evidence and testimony, and through his able counsel, he fully availed himself of it. He chose to appeal to Circuit Court only the issue of the road, thereby waiving any challenge to the DEQ's Final Order with respect to the fence and the finding of "no riparian rights" on which it rested. This action thus is barred by res judicata.

The trial court evidently was confused about the nature of Ms. Ward's res judicata argument. Its comments reflected a belief that Ms. Ward was relying on the culvert litigation, and not the DEQ contested-case proceeding, and it rejected res judicata because the issue of "riparian rights" was not litigated in the civil case. TR 1/11/12, p 15. The court was indeed correct that "riparian rights" were not litigated in the culvert litigation – but, as shown above,

they *were* litigated in the DEQ proceeding, which was the basis for Ms. Ward's assertion of res judicata. *See* 10/12/11 MSD, pp 8-11. Indeed, even the court recognized riparian rights were litigated at the DEQ, TR 1/11/12, p 15, though it then focused its discussion on the culvert litigation.

> The preclusion doctrines of collateral estoppel and res judicata
>
> ...serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims. By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation. [*Minicuci*, 243 Mich App at 33].

This case exemplifies that: Mr. Holton previously challenged Ms. Ward's fence specifically because it would frustrate his "water rights," and the ALJ in rejecting his claim determined that he didn't have any. That ruling was not appealed though it could have been; the rest of the ruling was appealed, and affirmed. Both collateral estoppel and res judicata bar this action, and the latter stands as an alternate basis on which this Court may affirm.

II. The Circuit Court correctly applied Michigan law in finding that plaintiffs cannot have riparian rights in a manmade body of water, warranting summary disposition under MCR 2.116(C)(8) and/or (10).

The Holtons also complain about the grant of summary disposition based on Michigan's unequivocal, longstanding prohibition on riparian rights arising in a manmade body of water. Brief, pp 13-19. But their complaints, both procedurally and substantively, are misplaced.

A. The Holtons' claim of unfair surprise lacks merit because Ms. Ward's motion referenced riparian rights, as the Holtons themselves did prior to and in their Complaint.

Procedurally, the Holtons complain that the riparian-rights issue was not properly before the trial court because it was first raised in Ms. Ward's summary-disposition reply. Brief, pp 13-16. That assertion is contrary to the facts. Ms. Ward's motion for summary disposition asserted

plainly that "reasonable minds cannot differ that Plaintiffs do not have riparian rights," 10/12/11 MSD, p 2, putting the issue squarely on the table. Far earlier, the Holtons themselves injected the issue of "riparian rights" into this dispute, first in their counsel's 2010 letter to Ms. Ward ("Mr. and Mrs. Holton are seeking access to the body of water contained on your property and bordering their property *for purposes of riparian rights*"), 11/30/10 Letter of Carol D. Birnkrant, Esq., Ex D to Complaint (emphasis added), and then repeatedly, in their 2011 Complaint. *See*, ¶¶ 2, 11, 13, 17-20. Finally, at the summary-disposition hearing, the Holtons' counsel agreed with the court that "this whole thing rests on your client having riparian rights." TR 1/11/12, p 10.

This case is nothing at all like the concurrence in *Haji v Prevention Ins Agency*, 196 Mich App 84, 88-89; 492 NW2d 460 (1992), which decried the grant of summary disposition without notice, and on which the Holtons rely. Having demanded access to Ms. Ward's property based on their purported riparian rights even before filing suit, then made it a cornerstone of their Complaint, then received Ms. Ward's motion raising the issue, the Holtons cannot credibly assert that they were sandbagged when the point came up a fourth time, in Ms. Ward's reply.[7]

[7] Even if the issue had been only raised in reply, this Court has affirmed summary disposition in the absence of any motion at all. *In re Duane V Baldwin Trust*, 274 Mich App 387; 733 NW2d 419; *aff'd as to result*, 480 Mich 915 (2007) (summary disposition granted *sua sponte*); *Hover v Chrysler Corp*, 209 Mich App 314, 317; 530 NW2d 96 (1995); *Boulton v Fenton Twp*, 272 Mich App 456, 463; 726 NW2d 733 (2006) ("[t]he rule does not expressly require a motion under MCR 2.116(C) in order to grant summary disposition; nor does the rule in question expressly forbid summary disposition absent a motion under MCR 2.116(C)" (footnote omitted)). As this Court has made clear, "if no factual dispute exists, a trial court is *required* to dismiss an action when a party is entitled to judgment as a matter of law, and a motion for summary disposition is unnecessary." *In re Duane V Baldwin Trust*, 274 Mich App at 398-399 (emphasis added) (citation omitted). If summary disposition may not only be granted but *mandated* in the complete absence of a motion, it goes without saying that the procedure here was proper.

B. The Circuit Court correctly held that the Holtons cannot obtain riparian rights in the body of water, since it is man-made.

As noted, the trial court found that the body of water is man-made, TR 1/11/12, p 15. The Holtons on appeal protest that the Circuit Court "ruled with little information on the origins of the body of water" and that, properly informed, the court would hold that "the body of water was created by damming water flow, which does not create a 'manmade' body of water and does create riparian rights for owners of frontage." Brief on Appeal, pp 8, 16-18. But the Holtons through their own affidavit and brief concede facts that, under longstanding Michigan law, decide the issue against them. No amount of factual development can change that.

The Holtons take a misguided approach to riparian rights under Michigan law, describing various types of water bodies that do not to give rise to such rights, and inferring from that that other types *do*. Brief, p 17. But Michigan law takes precisely the opposite approach, defining riparian land exclusively as "any parcel of land which includes therein a part of or is bounded by a natural water course," *Persell*, 287 Mich App at 579, *citing, inter alia*, *Thompson*, 379 Mich at 674, and excluding from its definition everything else. Thus, "an artificial pond does not create riparian lands with riparian rights." *Persell*, 287 Mich App at 580. And, "[a]rtificial water courses are waterways that owe their origin to acts of man, such as canals, drainage and irrigation ditches, aqueducts, flumes and the like." *Id* at 580, *citing Thompson*, 379 Mich at 679 and 4 Restatement, Torts, § 841, subd h, p 321. And, "[l]and abutting on an artificial water course has no riparian rights." *Ibid.* The rule is straightforward: if land in this State includes or borders a natural water course, it has riparian rights; if it doesn't, it doesn't.[8]

[8] "Riparian" technically refers to land that includes or abuts a river, while land including or abutting a lake is "littoral," but Michigan case law often uses "riparian" to include both. *2000 Baum Family Trust v Babel*, 488 Mich 136, 138 n1; 793 NW2d 633 (2010) (citations omitted).

The Holtons' attempt to finesse the water's origin and yearly fluctuations into something from which riparian rights may arise, Brief at 17-18, is unavailing. As their own brief admits:

> In the 1950s, Junior Clark, then owner of both parcels, built an earthen dam to create a pond. He dug out a deeper pond area on what is now the Holtons' land, but the dam flooded a large area that included the pond. Clark testified in the prior Circuit Court suit that what had been swampy became "similar to a lake." [Brief on appeal, p 1, citing Clark Affidavit].

Thus, the water at issue here undisputedly "owes it origins to acts of man" – while the glaciers carved out many bodies of water as they retreated northward thousands of years ago, this particular one was the handiwork of Junior Clark and his dad. And under Michigan law, neither the Holtons nor anyone else has, or ever can have, riparian rights in it.

Similarly, the changes wrought by the culvert litigation cannot give rise to riparian rights. When Ms. Bone installed the culvert in the earthen dam that resulted in the water level dropping on the Holtons' property, they sued for an injunction and an order directing its removal. The Circuit Court ordered that relief, this Court affirmed, and the culvert was removed, "result[ing] in the body of water being restored." Holtons' brief, p 2; *see also* its Tab 3, *Holton v Bone*, p 2. But the removal of that man-made feature (the culvert) simply restored the effectiveness of another man-made feature, the earthen dam, for the precise purpose of maintaining water levels in the existing wetlands, Clark Affidavit, p 1. It put the area back to what it had been before: 20 acres of mixed water and wetland vegetation, created when one man-made item (a dam) collected surface water and augmented a second man-made item, the pond, beyond its edges.

The Holtons admit, as they must, that artificially created lakes do not give rise to riparian rights on adjoining property "unless they form part of a watercourse"....[*i.e.* were formed] by artificial obstruction of a stream or by the diversion of a stream into a dry depression." Brief, p 17, *citing* Restatement (2d) of Torts, § 842. They go on to assert (without citation) that, if not

reversed, the ruling here would impact property owners "on thousands of lakes in this state." *Id.* But they simply ignore the fact that here, no "natural flowage", i.e., "water course" was dammed to create a lake on their property. As the ALJ specifically found, "there is no evidence that the subject wetland *is contiguous to or hydraulically connected to any other body of water*." *See* 10/12/11 MSD & Ex 2, Proposal for Decision, p 11 (emphasis added).

In fact, the Restatement section preceding the one on which the Holtons rely contains an express definition of "watercourse" that they fail to cite for this Court:

> (1) The term "watercourse," as used in this Chapter, means a stream of water of natural origin, flowing constantly or recurrently on the surface of the earth in a reasonably definite natural channel.
>
> (2) The term "watercourse" also includes springs, lakes or marshes *in which a stream originates or through which it flows*. [Restatement (2d) of Torts, § 841 (emphasis added).

Likewise, Michigan law defines a "watercourse" as "[a] natural stream of water fed from permanent or periodical natural sources and usually flowing in a particular direction in a defined channel, having a bed and banks or sides, and usually discharging itself into some other stream or body of water." *Kernen*, 232 Mich App at 511 n5, *citing Grand Rapids & I R Co v Round*, 220 Mich 475, 478; 190 NW 248 (1922). In contrast, "surface waters" are "waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence." *Kernen* at n7, *citing Fenmode, Inc v Aetna Cas & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942).

The Holtons' factual assertions establish the seasonal nature of the body of water and the fact that it is created from surface water: its water level is 2-3 feet higher in the spring and summer than at other times of the year, and depends heavily on precipitation. *See* 11/10/11 Affidavit of James R. and Nancy M. Holton, Ex 6 to Brief on appeal, ¶¶ 16-18; *also* Brief, p 4

(["the fence] now sits in water two to three feet deep depending on the amount of precipitation that varies during the year"); *Id* at 12 ("[w]ith water drained out by the culvert, the wetlands held only surface water. With the culvert moved after 2008, Plaintiffs' riparian rights [*sic*] have been restored. That is why Plaintiffs seek access to the body of water now"); TR 7/19/06 DEQ hearing, p 40 ("Well, there were years of water -- you know, high water. It depends on the rain or the snow that existed"). Junior Clark did not dam a creek or stream – themselves natural watercourses – and the Holtons' property is not attached to or hydraulically connected to any other body of water, natural or otherwise. The mere act of stopping the natural flow of seasonal runoff, and creating seasonal flooding on one's property, does not a "lake" make, and the wetland is not a "watercourse" to which riparian rights may attach.[9]

Riparian laws do not apply to such wetlands; rather, the laws related to surface waters do. *See Kernen*, 232 Mich App at 511-512. Consistent with this distinction, this Court in the culvert litigation looked to surface water laws in finding that Mr. Holton had a prescriptive easement to have the dam maintained so as to restore the artificial water levels in his wetlands. It did not look to the body of riparian water-rights law, and did not base its decision upon any finding of riparian rights vested in Holton. *Holton v Bone*, Ex 3 to Plaintiff's brief on appeal. The Holtons' property at no time past or present has been a watercourse to which riparian rights could attach. And even assuming the pond could be deemed a "watercourse," it undisputedly is man-made. The fact that it floods its banks as a result of the artificially elevated water levels dammed up does not change the fact that it is an artificially created body of water. *See, Ruggles v Dandison*, 284 Mich 338; 279 NW 851 (1938) (adjoining landowner gains no riparian rights from artificial

[9] The Holtons' admission that the culvert, prior to its removal, left "only surface water" in the wetlands, Brief at 12, underscores that their elevated water levels are simply created by blocking the flow of surface water that otherwise would have drained off their higher ground onto Ms. Ward's lower ground – as occurred when the culvert was in place.

channel it dug from its property through bog land to defendant's lake). The Supreme Court has spoken to this factual situation, and has said no riparian rights are created.

C. The Holtons' argument under the Inland Lakes and Streams Act fails.

No doubt realizing that case law forecloses their common-law claim to riparian rights, the Holtons assert that even if the body of water is "man-made," they still enjoy such rights under the Inland Lakes and Streams Act, MCL 324.30101 *et seq*. This Court should reject that argument.

1. The statutory argument is newly raised on appeal.

This Court need not even consider the ILSA argument, since it is newly raised. The Holtons in response to the motion for summary disposition made no argument under the ILSA, nor even cite the statute. 11/14/11 Response, pp 6-11. They did not raise it at oral argument. TR 1/11/12, pp 1-16. In short, the trial court never was even presented the argument; it is raised for the first time now. Where an appellant fails to present a legal argument below, it is unpreserved for appellate review. *AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 147; 809 NW2d 444 (2011) (citation omitted); *see also Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (citations omitted).

2. The statutory argument lacks merit, since the ILSA does not create riparian rights.

Under the Holtons' view, the ILSA, not common law, may create riparian rights. But they divine that position from an unpublished, 2-1 per curiam opinion of this Court whose central analysis has been rejected by a subsequent published opinion, and whose reasoning on the pertinent point has never even been cited, much less adopted, by any other court in the more than 15 years since its issuance. The Holtons' interpretation of the ILSA would radically upset Michigan riparian law, and should be rejected.

With the lone exception of the 2-1 decision on which the Holtons rely, *Parsons v Whittaker*, unpublished per curiam opinion of the Court of Appeals, decided August 23, 1996 (Docket No. 170274), Appendix to Holtons' brief, no Michigan decision of which Ms. Ward is aware has recognized riparian rights as a creature of anything other than common law. In *Parsons*, the majority concluded that, because the ILSA defines "inland lakes and streams" to exclude lakes and ponds with surface water less than 5 acres in size, and defines "riparian rights" as "those rights which are associated with the ownership of the bank or shore of an inland lake or stream," riparian rights attach to property along any natural or artificial inland lake or stream with a surface area greater than 5 acres. Op at *2. The majority found the statute's language to be "clear" and enforced what it viewed as its "plain meaning," *Id* at *3, disregarding both the circularity of the statutory language and the breadth and depth of riparian law developed by Michigan courts throughout the past 100 years.

Nowhere does the ILSA create or grant riparian rights; instead it simply says, in circular fashion, that riparian rights are "those associated with the ownership of the bank or shore of an inland lake or stream." The Act's definition of inland lake or stream simply serves to provide a jurisdictional threshold over which water bodies are to be governed by it, which then-Judge White recognized in her dissent:

> The majority, in effect, concludes that the question whether defendant has riparian rights in the surface waters of the artificial lake is governed and decided by the Inland Lakes and Streams Act of 1972, MCL 281.951 et seq,; MSA 11.475 (1) et seq. I do not agree. While the lake is clearly subject to the act, and plaintiffs cannot take certain action without a permit, nothing in the act reveals a legislative intent to grant or enlarge riparian rights. The definition of "riparian owner" and "riparian rights" do no more than explain the general meaning of the terms. The phrase "those rights which are associated with the ownership of the bank or shore of an inland lake or stream "cannot be understood to grant rights where none already exist." [*Id* at *4 (White, J, concurring in part and dissenting in part)].

Under the *Parsons* majority's reasoning, the ILSA creates an alternate means by which a property owner may obtain riparian rights. Pre-ILSA, such rights were created only by common law: a landowner whose property surrounded a watercourse had exclusive riparian rights to that watercourse and could exclude all others from such waters, and a neighboring owner could not obtain riparian property rights by creating an artificial watercourse, channel, or flooding pond connecting to such natural watercourse. *Thompson*, 379 Mich 667; *Ruggles*, 284 Mich 338. Indeed, the riparian rights of the landowner bordering the natural watercourse were constitutionally protected. US Const, Am V; Const 1963, art 18, § 14, and art 13, § 1.

However, under the *Parsons* majority view, a neighbor creating on his property an artificial connection to the natural water course gains riparian rights to the whole water body, vitiating the once-exclusive rights of the original riparian owner and depriving that owner of a valuable property right, without just compensation. Such an interpretation makes no sense and would imply a legislative intent to take such property unconstitutionally, an interpretation of legislative intent the Supreme Court has rejected:

> We cannot properly hold that the Legislature designed to commit such an act of injustice as to take away vested rights and destroy valuable existing interests. We are bound, if possible, so to construe statutes as to give them validity and a reasonable operation. [*Pigorsh v Fahner*, 386 Mich 508; 194 NW 2d 343 (1972), *citing Van Fleet v Van Fleet*, 49 Mich 610; 14 NW 566 (1883)].

While the Holtons urge this Court to follow the *Parsons* majority and read the ILSA as creating riparian rights where the common law would not, no other court has done so. In the other unpublished case the Holtons cite and attach, *Helmer v Leff*, unpublished per curiam opinion of the Court of Appeals, decided October 20, 2009 (Docket No. 288684), this Court neither followed nor endorsed the *Parsons* majority, but simply pointed out that the pond at issue conferred no riparian rights under the ILSA or common law. Op at *2. *Helmer* also cited

Thompson, supra, which *is* controlling, and which stated (without restricting its statement to any parcel size), that "[l]and abutting on an artificial watercourse has no rights." *Id* at *2, *citing Thompson*, 379 Mich at 679-681.

Ms. Ward's research indicates only one decision has so much as even mentioned *Parsons*, this Court's published decision in *Persell*. But that opinion refused to extend riparian rights to an artificially created pond, relying on *Thompson* and criticizing as "incorrect" the *Parsons* majority's attempt to distinguish that case. 287 Mich App at 580-581. It also rejected as irrelevant to the case *sub judice* the *Parsons*' majority's ILSA discussion. *Id.* In short, the Holtons try to lure this Court to go where few others have tread; the Court should decline their (newly raised) invitation.

Even the statutory language does not support the Holtons' claim. They read the ILSA as bestowing riparian rights "to include owners of property along 'artificial' lakes and ponds, as long as they exceed 5 acres in size." Brief, p 18, *citing* MCL 324.30101(i). But just as the wetlands on their property are not watercourses as defined under the common law, neither are they "inland lakes or streams" as defined by the Act. The cited provision of the ILSA follows common law in defining "inland lakes" and "streams," and requires "definite banks, a bed, and visible evidence of a continued flow or continued occurrence of water." MCL 324.30101(i). As discussed above, impounding water so as to seasonally elevate water levels in a wetland does not create a watercourse or "water body" as defined by the common law, or the ILSA.

The Circuit Court correctly granted summary disposition to Ms. Ward.

BRIEF ON CROSS-APPEAL

STANDARD OF REVIEW

A trial court's determination whether to impose sanctions under MCR 2.114 and/or MCL 600.2591 for a frivolous document or claim is reviewed for clear error. *Feick v Monroe County*, 229 Mich App 335, 345; 582 NW2d 207 (1998) (citation omitted). A decision is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake was made. *Id.*

ARGUMENT

I. The Holtons' own evidence showed the body of water was man-made, rendering their case devoid of legal merit and intended only to harass and injure Ms. Ward.

Under MCR 2.114(D), the signature of a party or any attorney on a paper filed with the court certifies that it is "well grounded in fact and...warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law" and that it "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Guerrero v Smith*, 280 Mich App 647, 677-678; 761 NW2d 723 (2008), *citing* MCR 2.114(D). The filing of a signed document not well grounded in fact and law subjects its filer to sanctions, and they "shall" be imposed – in other words, in the event of a violation, they are mandatory. *Id* at 678, *citing* MCR 2.114(E) and *Contel Sys Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990).

Similarly, MCL 600.2591(3)(a) includes three definitions of "frivolous," two of which Ms. Ward asserted here: where the party's "primary purpose in initiating the action...was to harass, embarrass, or injure the prevailing party," or where the party's position was devoid of arguable legal merit. 10/12/11 MSD, p 12, *citing* MCL 600.2591(3)(a)(i) and (iii). As with the

court rule, sanctions are mandatory if a violation of MCL 600.2591 is established. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996) (citation omitted).

Application of those principles here is straightforward. As noted above, it is indisputable that the Holtons sought "riparian rights" in the water on Ms. Ward's property; they did so not only in their Complaint, but even prior to filing it, *see* 11/30/10 Letter of Carol D. Birnkrant, Esq., to Carole Ward, Ex D to Complaint. It also is indisputable that under Michigan law, riparian rights cannot arise in a man-made body of water – even the Holtons do not contest that, or at least they did not in the Circuit Court, before conjuring their new ILSA-based argument on appeal. Which leaves a single issue: can the mixed area of water and wetlands vegetation on Ms. Ward's property arguably be deemed a natural watercourse, such that the Holtons had a colorable basis for seeking "riparian rights" in it?

The answer to that lies in *Persell* and *Thompson*, and in the Affidavit of Junior Clark and the Affidavit and testimony of the Holtons themselves. As Mr. Clark averred, in 1953 he and his father "installed an earthen dam to flood the wetland area...." *See* Ex 3 to 11/14/11 MSD Response. The entire wetland area as it existed in 1997 "was caused by the dam." *Id*. Meanwhile the Holtons testified the water is 2-3 feet deeper in spring and summer and depends heavily on precipitation. Affidavit of James and Nancy Holton, Ex 7 to 11/14/11 MSD Response, ¶¶ 16-18; *also* Brief, p 4 (["the fence] now sits in water two to three feet deep depending on the amount of precipitation that varies during the year"). Which confirms Mr. Holton's 2006 testimony to the DEQ:

> Well, there were years of water -- you know, high water. It depends on the rain or the snow that existed. [TR 7/19/06, p 40].

No reasonable interpretation of the facts could deem the area of water and wetlands vegetation resulting from the man-made dam and man-made pond a natural watercourse, or anything other than "man-made." And because of that, it should have been plain to the Holtons even before their

Complaint was filed that riparian rights could not possibly arise in relation to it, and that a Complaint that asserted them on these facts was devoid of arguable legal merit. They knew that as far back as August 2006, when the DEQ told them as much. Ex 2 to 10/12/11 MSD, p 8.

The trial court denied Ms. Ward's motion for sanctions almost as an afterthought, stating, "You know, I think it's an arguable issue...." TR 1/11/12, p 16. And there is no doubt that, given their complexity, the preclusion doctrines of collateral estoppel and res judicata often do present debatable points. But one central, controlling fact didn't change from 1953 to 2006 to today, and will *never* change, regardless of what was ordered in the prior court litigation in terms of culvert removal, etc. The body of water at issue was "man-made," by Junior Clark and his father, who erected a dam, dug a pond, and then watched as the runoff collected by the former expanded beyond the edges of the latter. *See* 11/23/11 MSD reply, pp 2-4 and materials cited therein. There simply is no disputing that. The central issue in this matter, that of riparian rights, was not "arguable."

Where a plaintiff knows from an earlier proceeding that its claim is without merit, yet sues anyway, the second action properly is deemed frivolous. *Vermilya v Dunham*, 195 Mich App 79, 84; 489 NW2d 496 (1992). In *Vermilya*, plaintiff sued over a playground injury to her son; her motion to add the school principal as a defendant was denied as futile. Plaintiff then filed a second action against the principal, bringing the same claims. This Court affirmed the lower court's ruling that the action was frivolous, because plaintiff knew the allegations were without merit but sued anyway. 195 Mich App at 84. The same is true here. The DEQ told the Holtons they had no "riparian rights" in the water on Ms. Ward's property, and basic research would have confirmed that no one in Michigan has such rights, in any man-made body of water. Yet they sued anyway. The issue was not "arguable," and the trial court's statement to the contrary was clearly erroneous.

The Holtons' case also is vexatious under MCL 600.2591(3)(a)(i) in that its primary purpose is to harass or injure Ms. Ward. "[A]s to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Nollan v Calif Coastal Comm'n*, 483 US 825, 831; 107 S Ct 3141; 97 L Ed 2d 677 (1987) (citations, internal brackets and quotation marks omitted). Ms. Ward lives on a 60-acre parcel of land in the country; she does not want the Holtons or anyone else coming onto it with their canoes or fishing gear or duck guns; a position Michigan law fully entitles her to take. Yet the Holtons persist in trying to help themselves to one of the sticks in her bundle of rights – to take away her right to exclude the world. This latest effort can only be deemed an intent to harass and injure; Ms. Ward should be left alone to enjoy her property, free from the disruption and attorney bills the Holtons continue to cause her.

"You may talk of the tyranny of Nero and Tiberius, but the real tyranny is the tyranny of your next-door neighbour." Bagehot, *Biographical Studies - Sir Robert Peel* (Kessinger, 2010 ed). A tyranny that becomes even worse when assisted by capable and tenacious legal counsel provided as a fringe benefit of UAW membership. The best way to stop this nearly decade-long attempt to harass Ms. Ward and injure her in her property rights, is to declare that the Holtons' action met the standard for an award of fees and costs under MCR 2.114 and MCL 600.2591. The trial court reversibly erred in declining to do so.

CONCLUSION/RELIEF REQUESTED

For the foregoing reasons, Ms. Ward asks that this Court affirm the trial court's grant of summary disposition in her favor. On cross-appeal, she asks that this Court reverse the trial court's denial of her motion for sanctions, award her costs and reasonable attorneys' fees under

MCR 2.114 and MCL 600.2591 as a sanction for this frivolous action, and remand for the trial court to determine the amount of that award.

Respectfully submitted,

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