STATE OF MICHIGAN

IN THE SUPREME COURT

PETER BORMUTH,

Plaintiff - Appellant,

v.

GRAND RIVER ENVIRONMENTAL ACTION TEAM & KENNY PRICE, PRESIDENT

Defendant - Appellee

Supreme Court Case No. 153007

Court of Appeals Docket No. 321865

4th Judicial Circuit Court No. 14-279-CE

Oral Argument Requested

Peter Bormuth, Appellant
In Pro Per
142 West Pearl Street
Jackson, Michigan 49201
(517) 787-8097
earthprayer@hotmail.com

G.R.E.A.T. & Kenny Price, Appellee
Joseph A. Starr
Starr, Butler & Stoner, PLLC
20700 Civic Center Cr. Ste. 290
Southfield, Michigan 48076
(248) 554-2700

PLAINTIFF-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

Submitted By: Peter Bormuth

In Pro Per

142 West Pearl St.

Jackson, MI 49201

(517) 787-8097

earthprayer@hotmail.com

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STATEMENT OF ORDER APPEALED FROM AND REQUEST FOR RELIEF

Plaintiff/Appellant Peter Bormuth hereby appeals the Order of the Michigan Court of Appeals of December 2, 2015 denying the Plaintiff/Appellant's Motion for Reconsideration under MCR 7.215(I)(1) and the Opinion (UNPUBLISHED) of the Michigan Court of Appeals of October 22, 2015 and requests that this Honorable Court reverse the opinion of the Court of Appeals which absurdly held that non-profit corporations do not have beneficiaries and ruled that Plaintiff/Appellant Peter Bormuth did not have standing as a third party beneficiary to bring this action against GREAT and their Directors for violating the duties of good faith and obedience.

Plaintiff/Appellant Peter Bormuth requests that this Honorable Court reverse the Court of Appeals decision and acknowledge the Plaintiff/Appellant's legal standing as a third party beneficiary to bring this action. This Honorable Court should require GREAT as a non-profit corporation to uphold their mission statement to preserve and protect the Grand River. The Plaintiff/Appellant's request for access to GREAT property for the purpose of taking sediment samples must be granted, and Kenny Price and Jack Ripstra should be removed from the GREAT Board of Directors.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by holding that non-profit corporations such as GREAT do not have beneficiaries?

Plaintiff/Appellant answers **"Yes"**

Defendant/Appellee answers **"No"**

2. Did the Court of Appeals err by ruling that the Plaintiff/Appellant lacked standing to bring this action for breach of fiduciary duties?

Plaintiff/Appellant answers **"Yes"**

Defendant/Appellee answers **"No"**

3. Did the Appellate panel fail to adhere to the appearance of impropriety standard and violate the Plaintiff/Appellant's Due Process rights?

Plaintiff/Appellant answers "**Yes"**

Defendant/Appellee answers **"No"**

STATEMENT OF JUSRIDICTION

The Court has jurisdiction over this Application for Leave to Appeal pursuant to MCR 7.303(B)(1).

APPLICATION FOR LEAVE TO APPEAL

Plaintiff/Appellant appeals the Michigan Court of Appeals Order of December 2, 2015 denying the Plaintiff/Appellant's Motion for Reconsideration under MCR 7.215(I)(1) and the Michigan Court of Appeals Opinion (UNPUBLISHED) of October 22, 2015 denying the Plaintiff/Appellant standing to bring this action on the basis that non-profit corporations such as GREAT are not trusts, but corporations, and thus do not have beneficiaries.

Plaintiff/Appellant also raises the issue of whether the Appellate panel failed to adhere to the appearance of impropriety standard.

INTRODUCTION AND GROUNDS FOR APPEAL

This appeal seeks to determine whether non-profit corporations have beneficiaries under Michigan law and whether a third party beneficiary can bring an action to require the Directors of non-profit corporations to abide by their mission statement and promote the purposes for which the non-profit was chartered or whether Directors are free to violate the fiduciary duties of good faith, obedience, and loyalty.

This appeal also raises the issue of whether the Appellate panel failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. (see MCR 2.003(C)(1)).

The Michigan Court Rules, MCR 7.302(B) dictate that an application for leave to appeal show sufficient grounds for the Supreme Court to accept the application. Plaintiff/Appellant relies upon MCR 7302 (B)(3) ("the issue involves legal principals of major significance to the state's jurisprudence"); and MCR 7302(B)(5) ("the decision is clearly erroneous and will cause material injustice"). In particular, the Court of Appeals decision provides the following specific grounds to justify the grant of leave to appeal:

1) <u>The Decision of the Court of Appeals that GREAT is a corporation, not a trust, and consequently has no beneficiaries is clearly erroneous and contrary to all common law principals.</u> See RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f ("Ordinarily the principals and rules applicable to charitable trusts are applicable to charitable corporations"); see also *Adelman v. Conotti Corp*., 215 Va. 782, 789, 213 S.E.2d 774 (1975) **("The directors of a not-for-profit corporation hold the assets in trust for the**

beneficiaries, and their duties are identical to those imposed on trustees of a trust.") In the case of a charitable non-profit corporation, ("the public as represented by Complainant is the beneficiary") *Id* ; see also *Wallad v. Access BIDCO, Inc.,* 236 Mich. App. 303, 307, 600 N.W.2d 664, 666 (Mich. Ct. App. 1999) (The officers of a non-profit are "duty-bound to act for someone else's benefit"). The absurdity of the Court of Appeals ruling should be clear to this Court. A tax exempt non-profit corporation must have beneficiaries in order to receive non-profit status under Federal and Michigan tax codes. Whether a non-profit corporation has beneficiaries is an issue of major significance to our State's legal jurisprudence and the Court of Appeals ruling departs from common law and common sense.

2) The Court of Appeals clearly erred by ruling that the Plaintiff/Appellant was not a beneficiary of GREAT and lacked standing to bring this action for breach of fiduciary duties. A beneficiary of the benevolence of a nonprofit has been defined as one who will be "'the recipient of another's bounty; one who received a benefit or advantage.'" *Kolb v. Monmouth Memorial Hospital, E. & A*., (1936), 116 N.J.L. 118, 120, 182 A. 822, 823. "In order to sue…, a plaintiff must have either direct privity or third party beneficiary status." *Alpine County, California v. United States*, 417 F.3d 1366, 1368 (Fed. Cir. 2005) (citing *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003)). "Third-party beneficiary status requires that the contracting parties had an express or implied intention to benefit directly the party claiming such status." *Id.* Obviously the State of Michigan and GREAT had an express intention to directly benefit canoeists and kayakers when they contracted to transfer the six acre parcel in question for the purpose of building a non-motorized

public boat launch. The Plaintiff/Appellant is distinguished from an ordinary citizen by being an avid canoeist who directly benefited from this property transfer to GREAT for the construction of a dock and non-motorized boat launch. GREAT entered into contract with the State and received this property. A plaintiff in Michigan can bring suit on a contract to which he is not a party, if it is determined that the plaintiff was an intended third-party beneficiary of the contract. To be an intended beneficiary, the promisor must have undertaken to do something to or for the benefit of the party asserting status as an intended beneficiary. *Rieth-Riley Construction Co, Inc v Dep't of Transportation,* 136 Mich App 425, 430; 357 NW2d 62 (1984), *lv den* 425 Mich 911 (1985). A court must use an objective standard in determining the plaintiff's status. *Id*., p 430. The contract itself reveals the party's intentions. *Frick v Patrick*, 165 Mich App 689, 694; 419 NW2d 55 (1988); *lv den* 431 Mich 872 (1988). The transfer of this 6 acre parcel conferred the status of intended beneficiary on the Appellant and thus he has standing to sue. "[A] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." RESTATEMENT, § 304.

3) The Appellate panel failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. "Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). A judge must be disqualified when he or she cannot hear a case impartially, including when a judge is biased or prejudiced against a party or when circumstances lead to the appearance of impropriety. MRE 2.003(C)(1)(a)(b); *Cain v Dep't of Corrections*, 451 Mich 470, 494-496; 548 NW2d 210 (1996). The

appearance of impropriety exists when judicial conduct "would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Caperton v A T Massey Coal Co, Inc,* 556 U.S. 868, 888; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). Accordingly, judges must disqualify themselves when they have "failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR 2.003(C)(1)(b)(ii). The Michigan Code of Judicial Conduct, Canon 2 provides that, among other things, the judge may not (1) engage in irresponsible or improper conduct, (2) fail to respect the law, (3) treat persons unfairly on the basis of race, gender, or other protected personal characteristics (such as religious belief or lack thereof), or (4) allow family, social, or other relationships to influence judicial conduct. On October 7, 2015 at 10:00 am the Plaintiff/Appellant attended the oral argument hearing scheduled in this case. The Appellant's item was Case Call Item #26, which was the last item at the 10:00 am session. In every case called, the panel of Judges listened to counsel, asked intelligent questions, and did not reveal their predisposition. When the Appellant's case was called, one of the Judges can be heard whispering "it's the Druidist" and then shuffling papers and asking "Do you agree with this?" After Counsel for the Appellee Daniel Waslawski introduced himself and the case, the Court cut him off saying: "I might help you along a little bit, I think the panel is in agreement with your position….You can argue and possibly persuade us otherwise." Then the Court asked Mr. Waslawski the one question they had in this case: "or you can explain what a Pagan Druist is?" Another Judge chimed in stating: "I had to look it up in the dictionary." And as they left the courtroom, a third Judge made

a comment about using a cell phone to take a picture of him in his robes to send to his grandchildren for a Christmas present. The Appellate panel's comments and behavior clearly indicate an inability to treat the Plaintiff/Appellant fairly because of his religious beliefs, which are protected personal characteristics under the Michigan and the Federal Constitution. For the Appellate panel to openly mock the Plaintiff/Appellant's religion is the most straightforward appearance of impropriety imaginable and this Honorable Court should agree to hear this case on that basis alone.

STATEMENT OF FACTS

On June 17, 1994, GREAT incorporated as a nonprofit corporation pursuant to the Michigan Nonprofit Corporation Act of 1982, MCL 450.2100 *et seq* (Amended Complaint #2; Appendix B to Amended Complaint). GREAT was incorporated *"to preserve, protect, and promote the Grand River in Jackson County."* (Amended Complaint #9; Appendix B to Amended Complaint)

On March 7, 2013, the State of Michigan conveyed a parcel of land, which abuts the Grand River and is located in Blackman Township, Michigan, the surveyed boundaries of said parcel being described in Liber 2006, Page 0819, to GREAT for consideration in the amount of one dollar. This parcel was conveyed *"subject to…the public trust in the waters of the Grand River."* (Amended Complaint #7 & #8; Appendix D to Amended Complaint). GREAT has stated that their purpose in acquiring the property is to construct a canoe/kayak launch and dock on the conveyed property open to the general public. (Amended Complaint #10; Appendix B to Amended Complaint).

On September 11, 2013 the Appellant had a chloracne outbreak after pushing his canoe over a partially submerged log in the Grand River offshore from GREAT property. On September 30, 2013, the Appellant contacted GREAT and requested permission to enter GREAT property for the purpose of taking three sediment core samples from the Grand River. (Amended Complaint #12; Appendix E to Amended Complaint). Jim Seltz, GREAT's secretary, responded by e-mail on October 1, 2013, and requested the identities of individuals and organizations involved in the proposed sampling. The Appellant responded that he was financing the proposed sampling and that he had contracted with Ann Arbor Technical Services to take the samples and with Vista Analytical Laboratory to analyze the samples. The Appellant informed GREAT that he planned to test the samples for dioxins and furans using EPA Method 1613B, and to test the samples for mercury using the appendix to EPA Method 1631. (Amended Complaint #13; Appendix F to Amended Complaint). Subsequently Seltz asked further questions on behalf of GREAT, which the Appellant did his best to answer. *Id*

GREAT allocated five minutes to the Appellant at their October 8, 2013 Board meeting to explain his request. (Amended Complaint #14; Appendix G to Amended Complaint). At the meeting, GREAT treasurer Jack Ripstra, blatantly lied in the Appellant's face in front of the entire board. (Amended Complaint #15; Appendix H to Amended Complaint). The Appellant provided the GREAT Board with evidence that a reasonable person would accept showing there was a strong probability of dioxin/furan contamination in the Grand River offshore the GREAT property and that this contamination originated from the Jackson County Resource Recovery Facility. GREAT President Kenny Price created a subcommittee (on which Kenny Price, Jack Ripstra, and Jim Seltz sat) to consider the Appellant's request. (Amended Complaint #16)

Thereafter, on November 13, 2013, Kenny Price reported that the subcommittee made the recommendation to deny the Appellant's request. Subsequently, the GREAT Board of Directors unanimously voted to deny the Appellant's request to enter GREAT property for the purpose of taking samples. (Amended Complaint #17; Appendix I to Amended Complaint). When the Appellant contacted Kenny Price to learn the reason for the denial, Price responded on November 16, 2013 by stating: "Mr. Bormuth, the committee believed you did not have the scientific background to develop a valid dioxin test format for a study." (Amended Complaint #18; Appendix I to Amended Complaint).

On February 10, 2014 the Appellant filed suit against GREAT and President Kenny Price in Jackson County Circuit Court. The case was assigned to the Hon. John G. McBain. On March 10, 2014 the Appellant filed his Amended complaint with the Court. On March 25, 2014 the Appellees, through their attorney Joseph A. Starr, filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8). On April 17, 2014 the Court heard oral argument on the Appellee's motion. On April 23, 2014 the Circuit Court entered an order granting summary disposition with prejudice for the Appellee Grand River Environmental Action Team. On May 1, 2014 the Appellant filed a Motion for Reconsideration under MCL 2.119(F). On May 8, 2014 the Court denied the Appellant's Motion for Reconsideration. On May 14, 2014 the Appellant filed a timely appeal. On October 7, 2015 at 10:00 am the Plaintiff/Appellant attended the oral argument hearing scheduled for this case. The Appellant's item was Case Call Item #26, which was the last item at the 10:00 am session. In every case called, the panel of Judges listened to counsel, asked intelligent questions, and did not reveal their predisposition. When the Appellant's case was called, one of the Judges can be heard whispering "it's the Druidist" and then shuffling papers

and asking "Do you agree with this?" After Counsel for Appellee Daniel Waslawski introduced himself and the case, the Court cut him off saying: "I might help you along a little bit, I think the panel is in agreement with your position….You can argue and possibly persuade us otherwise." Then the Court asked Mr. Waslawski the one question they had in this case: "or you can explain what a Pagan Druist is?" Another Judge chimed in stating: "I had to look it up in the dictionary." And as they left the courtroom, a third Judge made a comment about using a cell phone to take a picture of him in his robes to send to his grandchildren for a Christmas present. On October 22, 2015 the Court of Appeals issued an (Unpublished) Opinion affirming the Circuit Court order. On November 12, 2015 the Plaintiff/Appellant filed a Motion for Reconsideration under MCR 7.215(I)(1). On December 2, 2015 the Court of Appeals, without comment, denied the Plaintiff/Appellant's Motion for Reconsideration. On January 13, 2016 the Plaintiff/Appellant filed his Notice of Appeal.

STANDARD OF REVIEW

A trial court's grant or denial of summary disposition is reviewed de nova. *Maiden v. Rozwood*, 461 Mich. 109, 118, 597 NW2d 817 (1999). A motion for summary disposition based on the failure to state a claim under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). A motion should be granted under MCR 2.116(C)(8) "only if no factual development could possibly justify recovery." *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). In reviewing the decision on the motion, the Court must consider only the pleadings and "accept the factual allegations in the complaint as true." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).

Courts have a duty to "extend extra consideration" to pro se plaintiffs and "pro se parties are to be given special latitude on summary judgment motions." *Bennett v. Goord*, 2006 U.S. Dist. LEXIS 69157, 2006 WL 2794421, at *3 (W.D.N.Y. August 1, 2006) (quoting *Salahuddin v. Coughlin*, 999 F. Supp. 526, 535 (S.D.N.Y. 1998)), [*7] aff'd, 2008 U.S. App. LEXIS 24441, 2008 WL 5083122 (2d Cir. 2008); see also *McPherson v. Coombe,* 174 F.3d 276, 280 (2d Cir. 1999) (pro se party's pleadings should be read liberally and interpreted "to raise the strongest arguments that they suggest").

LEGAL ARGUMENT

I. THE APPELLATE COURT CLEARLY ERRED BY RULING THAT NON-PROFIT CORPORATIONS DO NOT HAVE BENEFICIARIES

The Decision of the Court of Appeals that GREAT is a corporation, not a trust, and consequently has no beneficiaries is clearly erroneous and contrary to all common law principals. The RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f states: “Ordinarily the principals and rules applicable to charitable trusts are applicable to charitable corporations” showing that common law does not distinguish between trusts and non-profit corporations. *Adelman v. Conotti Corp*., 215 Va. 782, 789, 213 S.E.2d 774 (1975) directly addresses this question and clearly holds that **“The directors of a not-for-profit corporation hold the assets in trust for the beneficiaries, and their duties are identical to those imposed on trustees of a trust.”** (bold emphasis added). Non-profit corporations are duty bound to act for someone else’s benefit, even if it is only for their members benefit and not the general public. See *Wallad v. Access BIDCO, Inc.,* 236 Mich. App. 303, 307, 600 N.W.2d 664, 666 (Mich. Ct. App. 1999) (The officers of a non-profit are “duty-bound to act for someone else's benefit"). The absurdity of the Court of Appeals ruling should be clear

to this Court. A tax exempt non-profit corporation must have beneficiaries in order to receive non-profit status under Federal and Michigan tax codes. Whether a non-profit corporation has beneficiaries is an issue of major significance to our State's legal jurisprudence and the Court of Appeals ruling departs from common law, case law, and common sense.

II. THE APPELLATE COURT CLEARLY ERRED BY RULING THAT PLAINTIFF/APPELLANT LACKED STANDING TO SUE FOR BREACH OF FIDUCIARY DUTIES BECAUSE HE WAS NOT A BENEFICIARY OF G.R.E.A.T.

The Court of Appeals clearly erred by ruling that the Plaintiff/Appellant was not a beneficiary of GREAT and lacked standing to bring this action for breach of fiduciary duties. A beneficiary of the benevolence of a nonprofit has been defined as one who will be "'the recipient of another's bounty; one who received a benefit or advantage.'" *Kolb v. Monmouth Memorial Hospital, E. & A.*, (1936), 116 N.J.L. 118, 120, 182 A. 822, 823. "In order to sue…, a plaintiff must have either direct privity or third party beneficiary status." *Alpine County, California v. United States*, 417 F.3d 1366, 1368 (Fed. Cir. 2005) (citing *Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003)). "Third-party beneficiary status requires that the contracting parties had an express or implied intention to benefit directly the party claiming such status." *Id.* Obviously the State of Michigan and GREAT had an express intention to directly benefit canoeists and kayakers when they contracted to transfer the six acre parcel in question for the purpose of building a non-motorized public boat launch. The Plaintiff/Appellant is distinguished from an ordinary citizen by being an avid canoeist who directly benefited from this property transfer to GREAT for the construction of a dock and non-motorized boat launch. GREAT entered into contract with the State and received this property. A plaintiff in Michigan can bring suit on a contract to which he

is not a party, if it is determined that the plaintiff was an intended third-party beneficiary of the contract. To be an intended beneficiary, the promisor must have undertaken to do something to or for the benefit of the party asserting status as an intended beneficiary. *Rieth-Riley Construction Co, Inc v Dep't of Transportation,* 136 Mich App 425, 430; 357 NW2d 62 (1984); *lv den* 425 Mich 911 (1985). A court must use an objective standard in determining the plaintiff's status. *Id*., p 430. The contract itself reveals the party's intentions. *Frick v Patrick*, 165 Mich App 689, 694; 419 NW2d 55 (1988); *lv den* 431 Mich 872 (1988). The transfer of this 6 acre parcel conferred the status of intended beneficiary on the Appellant and thus he has standing to sue. "[A] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." RESTATEMENT, § 304.

Visitors to hospitals and nursing homes are in fact considered beneficiaries of charitable works. See *Gray v. St. Cecilia's School*, 217 N.J. Super. 492, 494-95, 526 A.2d 264 (App. Div. 1987). In *Peacock v. Burlington County Historical Society*, 95 N.J. Super. 205, 208-09, 230 A.2d 513 (App. Div.), certif. denied, 50 N.J. 290, 234 A.2d 399 (1967), the Court held the plaintiff's casual viewing of exhibits, while waiting for her husband to finish his research in the library was sufficient to characterize plaintiff as a beneficiary of the organization's charitable works. In *Pomeroy v. Little League Baseball of Collingswood*, 142 N.J. Super. 471, 475, 362 A.2d 39 (App. Div. 1976), the plaintiff was deemed a beneficiary when she was injured after the bleachers collapsed because, as a spectator, she benefited from the Little League's performance of the charitable objectives it was organized to advance. Following this logic, the Appellant is clearly a third party beneficiary of GREAT. In March 2013, the State transferred the six-acre parcel in Blackman Township to GREAT for the purpose of building a public boat launch. In GREAT's master plan for the site, the

organization said it will provide **"public river access to launch non-motorized boats."** The Appellate Court has erred. As an avid canoeist and member of the general public, the Appellant is a legal beneficiary of GREAT.

As a canoeist, the Appellant has a real interest in the cause of action and material injustice will result if he is not granted standing to pursue his claim. The Appellant and all other beneficiaries of GREAT are being exposed to potential harm by the lack of testing of the Grand River for dioxins, furans, and mercury offshore from the GREAT property. As a former canoe instructor for the Massachusetts Audubon Society, the Appellant can testify that 90% of all canoe capsizes occur while entering or exiting the craft. On September 11, 2013 the Appellant had a chloracne outbreak after placing his foot in the water and pushing his canoe over a partially submerged log offshore from the GREAT property. Serious harm awaits any canoeist or kayaker who capsizes (or swims) in these waters.

A. Directors Kenny Price & Jack Ripstra violated their fiduciary duties.

The mission of GREAT is "to preserve, protect, and promote the Grand River in Jackson County." This mission statement determines the scope of GREAT's fiduciary duty. GREAT's specific beneficiaries are people who paddle the Grand River in Jackson County. In *Manhattan Eye, Ear & Throat Hospital v. Spitzer*, 186 Misc. 2d 126, 152 (N.Y. Sup. Ct. 1999) the Court required that proposed actions **"promote the purposes"** for which the non-profit was chartered. The Court held "it is axiomatic that the Board of Directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. This duty has been referred to as the duty of obedience." *Manhattan Eye, Ear & Throat Hospital v. Spitzer*, 186 Misc. 2d 126, 152 (N.Y. Sup. Ct.

1999); *Simon v. ASIMCO Techs., Inc. (In re Am. Camshaft Specialties, Inc.),* 410 B.R. 765, 777 (Bankr. E.D. Mich. 2009) (holding the board of directors in a nonprofit organization must advance the missions and objectives of the nonprofit corporation). GREAT operates under the Michigan NonProfit Corporation Act, Act 162 of 1982 and the Revised Model Non-profit Corporation Act (2008). Section 541 of the Michigan Nonprofit Corporation Act provides in part that a director or an officer shall discharge the duties of that position in good faith and with that degree of diligence, care, and skill which an ordinarily prudent person would exercise under similar circumstances in a like position. Mich. Comp. Laws § 450.2541 (Mich. Stat. Ann. § 21.197(541).[1]

Michigan Courts have imposed the fiduciary duties of honesty, loyalty, restraint from self-interest and good faith on Directors. See *In re Green Charitable Trust*, 172 Mich App 298, 313; 431 NW2d 492 (1988) "[T]ransactions involving self-dealing should be closely scrutinized . . . to see whether the trustee's actions indicate any fraud, bad faith or overreaching on the part of the trustee." *Green*, 172 Mich App at 314. "Bad faith is not a specific act in itself, but defines the character or quality of a person's actions." *Green*, 172 Mich App at 314. "[B]ad faith has been defined as 'arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.'" *Green*, 172 Mich App at 314.

Directors Kenny Price and Jack Ripstra acted in bad faith and Ripstra committed a gross violation of the duty of loyalty. See *Gearhart Industries, Inc. v. Smith Intern., Inc.*, 741 F.2d 707 (5th Cir. 1984), "the duty of loyalty dictates that a director must act in good faith and must not

[1] The Appellant filed this action on February 10, 2014. On January 15, 2015 Governor Snyder signed Public Act No. 557 into law which made numerous substantive amendments to the Michigan Nonprofit Corporation Act (1982 PA 162).

allow his personal interests to prevail over the interests of the corporation." *Id.* at 719. GREAT is a non-profit incorporated "to preserve, protect, and promote the Grand River in Jackson County." Jack Ripstra is the Treasurer of GREAT. Ripstra owes a duty of loyalty to GREAT and to all beneficiaries of GREAT and must pursue that purpose. See *Summers v. Cherokee Children & Family Serv., Inc*., 112 S.W.3d 486 (Tenn. Ct. App. 2002) *Id.* at 504, "[A] director's duty of loyalty lies in pursuing or ensuring pursuit of the charitable purpose or public benefit which is the mission of the corporation."); *Simon v. ASIMCO Techs., Inc. (In re Am. Camshaft Specialties, Inc.),* 410 B.R. 765, 777 (Bankr. E.D. Mich. 2009) (holding the board of directors in a nonprofit organization must advance the missions and objectives of the nonprofit corporation).

Jack Ripstra is also the Blackman Township engineer. As Blackman Township engineer, Jack Ripstra never responded to the Plaintiff's numerous requests to test effluent in the Blackman Township sewer line. The Blackman Township sewer line conveyed 65,000gpd of ash quench water from the Jackson County Resource Recovery Facility to the City of Jackson Wastewater Treatment Plant for 30 years. As the August 16, 1990 letter from attorney Alan Weatherwax Jr. to James E. Shotwell shows, Blackman Township is legally liable for the effluent that passed through their sewer system.

Jack Ripstra was in a classic conflict of interest situation (see *Globe Woolen Co. v. Utica Gas & Elec. Co*., 121 N.E. 378 (N.Y. 1918) (discussing the duty of loyalty generally and, in particular, the need for full disclosure in conflict of interest transactions). In a conflict of interest situation, a Director must recuse themselves *(*see *Karris v. Water Tower Trust & Sav. Bank*, 389 N.E.2d 1359 (Ill. App. Ct. 1979) (holding interested directors cannot be included in quorum); *Am. Disc. Corp.*

v. Kaitz, 206 N.E.2d 156 (Mass. 1965) (same); *Davis v. Heath Dev. Co*., 558 P.2d 594 (Utah 1976) (same); *Rocket Mining Corp. v. Gill*, 483 P.2d 897 (Utah 1971) (same). Jack Ripstra resolved this situation by lying in the Appellant's face before the GREAT Board on October 8, 2013 in an act which violated the duty of loyalty which requires good faith (see *Pepper v. Litton*, 308 U.S. 295 (1939) (requiring director to show good faith).

Jack Ripstra then failed to recuse himself as required by law and instead was appointed to the subcommittee which considered the Appellant's request. (see *N. Confidence Mining & Dev. Co. v. Fitch*, 208 P. 328 (Cal. Ct. App. 1922) (holding that a director with an adverse interest in the settlement of a claim could not vote on a resolution of the settlement). But Jack Ripstra voted in the subcommittee and on the full board to deny the Appellant's request to enter GREAT land for the purpose of testing, thus violating his duty of loyalty. (See *Berkman v. Rust Craft Greeting Cards, Inc*., 454 F. Supp. 787 (S.D.N.Y. 1978) (noting that some directors failed to disclose to their fellow directors their knowledge that the investment banker whose fairness opinion the board would rely upon had a material financial interest in the outcome of the transaction thus violating the duty of loyalty); *Ryan v. Gifford*, 935 A.2d 258 (Del. Ch. 2007) discussing failure of director to report knowledge to fellow directors thus violating duty of loyalty).

All factual allegations of the Appellant regarding Ripstra must be accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and must be construed in a light most favorable to the nonmoving party (see *Johnson v. Pastoriza*, 491 Mich 417, 435; 818 NW2d 879 (1994). The Circuit Court failed to construe the Appellant's factual allegations and failed to draw reasonable conclusions in a light favorable to the Appellant. Ripstra acted to protect Blackman Township from possible lawsuit, not to advance the mission of GREAT.

Ripstra clearly and convincingly violated his fiduciary duty of loyalty and as a beneficiary, the Plaintiff/Appellant has standing to bring this action, contrary to the ruling of the Appellate panel.[2]

III. THE APPELLATE PANEL FAILED TO ADHERE TO THE APPEARANCE OF IMPROPRIETY STANDARD AND VIOLATED THE PLAINTIFF/APPELLANT'S DUE PROCESS RIGHTS

The Appellate panel failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. "Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). A judge must be disqualified when he or she cannot hear a case impartially, including when a judge is biased or prejudiced against a party or when circumstances lead to the appearance of impropriety. MRE 2.003(C)(1)(a) and (b); *Cain v Dep't of Corrections*, 451 Mich 470, 494-496; 548 NW2d 210 (1996). The appearance of impropriety exists when judicial conduct "would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Caperton v A T Massey Coal Co, Inc,* 556 U.S. 868, 888; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). Accordingly, judges must disqualify themselves when they have "failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR

[2] In a footnote on page 3 of the October 22, 2015 opinion the Court of Appeals suggested that the Plaintiff/Appellant had failed to allege sufficient facts to overcome the business judgement rule. In light of the facts of this case, this is clear error. In *Wayne Co Prosecuting Attorney v Nat'l Memorial Gardens, Inc,* 366 Mich. 492, 496; 115 N.W.2d 312 (1962) the Court held the business judgment rule "applies only to cases where there has been no fraud, misconduct, or abuse of discretion by the officers and directors." In *Dodge v Ford Motor Co*, 204 Mich. 459, 500; 170 NW 668 (1919), quoting 2 Cook on Corporations (7th Ed.), § 545, the Court held: "'The discretion of the directors will not be interfered with by the courts, unless there has been bad faith, wilful neglect, or abuse of discretion.'" The violation of the fiduciary duties of obedience and loyalty by the directors of GREAT constitutes misconduct, bad faith and abuse of discretion. Given that breach, the business judgment rule cannot be applied by the Court to this case.

2.003(C)(1)(b)(ii). The Michigan Code of Judicial Conduct, Canon 2 provides that, among other things, the judge may not (1) engage in irresponsible or improper conduct, (2) fail to respect the law, (3) treat persons unfairly on the basis of race, gender, or other protected personal characteristics (such as religious belief or lack thereof), or (4) allow family, social, or other relationships to influence judicial conduct.

On October 7, 2015 at 10:00 am the Plaintiff/Appellant attended the oral argument hearing scheduled in this case. The Appellant's item was Case Call Item #26, which was the last item at the 10:00 am session. In every case called, the panel of Judges listened to counsel, asked intelligent questions, and did not reveal their predisposition. When the Appellant's case was called, one of the Judges can be heard whispering "it's the Druidist" and then shuffling papers and asking "Do you agree with this?" After Counsel for the Appellee Daniel Waslawski introduced himself and the case, the Court cut him off saying: "I might help you along a little bit, I think the panel is in agreement with your position….You can argue and possibly persuade us otherwise." Then the Court asked Mr. Waslawski the one question they had in this case: "or you can explain what a Pagan Druist is?" Another Judge chimed in stating: "I had to look it up in the dictionary." And as they left the courtroom, a third Judge made a comment about using a cell phone to take a picture of him in his robes to send to his grandchildren for a Christmas present.[3] The Appellate panel's comments and behavior clearly indicate an inability to treat the Plaintiff/Appellant fairly because of his religious beliefs, which are protected personal characteristics under the Michigan

[3] The Appellant made a Motion for Access to the digital audio recording of the October 7, 2015 oral argument hearing which contains the Judge's comments on the Appellant's religion. The Appellant's Motion was granted by Order of the Court on November 4, 2015. The Appellant presumes that the Supreme Court has access to this recording as the hypertext link sent to the Appellant was temporary.

and the Federal Constitution. For the Appeals Court panel to openly mock the Plaintiff/Appellant's religion is the most straightforward appearance of impropriety imaginable and this Honorable Court should agree to hear this case on that basis alone.

RELIEF REQUESTED

The Appellant requests that this Honorable Supreme Court overrule the Appellate Court (and determine whether the Appellate panel failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct), reverse the Circuit Court order granting GREAT and Kenny Price summary disposition in this matter and grant the Appellant standing to bring this action. Environmental non-profit organizations should be required to serve their beneficiaries and to uphold their mission statements.

Respectfully submitted by,

Peter Bormuth
142 West Pearl St.
Jackson, MI 49201
(517) 787-8097
earthprayer@hotmail.com

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