STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL, DEPARTMENT OF NATURAL RESOURCES, NATURAL RESOURCES COMMISSION, and WATER RESOURCES COMMISSION,

Plaintiffs-Appellees,

and

CITY OF ANN ARBOR, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER, HURON RIVER WATERSHED COUNCIL, and SCIO TOWNSHIP,

Intervening Plaintiffs-Appellees,

v

GELMAN SCIENCES, INC.,

Defendant-Appellant.

UNPUBLISHED
September 15, 2022

No. 357599
Washtenaw Circuit Court
LC No. 88-034734-CE

Before: GLEICHER, C.J., and GADOLA and YATES, JJ.

PER CURIAM.

Defendant, Gelman Sciences, Inc. (Gelman), appeals by leave granted the trial court's June 1, 2021 order modifying the prior consent judgment between the original parties in this case. We vacate the trial court's June 1, 2021 order, reinstate the parties' prior consent judgment, and remand to the trial court. On remand, the trial court shall require intervening plaintiffs, the City of Ann Arbor, Washtenaw County, Washtenaw County Health Department, the Washtenaw County Health Officer, Huron River Watershed Council (HRWC), and Scio Township either to file complaints or be dismissed from the case.

I. FACTS

This case arises from 1,4-dioxane (dioxane) contamination in Washtenaw County. In the 1960s, Gelman began manufacturing a medical filter known as cellulose triacetate membrane in Washtenaw County. This manufacturing process involved the use of dioxane, which resulted in wastewater containing dioxane. In 1965, Gelman obtained state approval to discharge this wastewater into treatment ponds in Scio Township. In 1970, Gelman also received permission to discharge wastewater from a facility in Ann Arbor, using a spray irrigation method. As a result of Gelman's wastewater disposal, soil and water in Washtenaw County were contaminated with dioxane. At the time these approvals were sought and obtained, dioxane was not on Michigan's critical materials register. It has since been recognized, however, that dioxane constitutes a possible or probable human carcinogen.

In 1988, the Attorney General, on behalf of the Department of Natural Resources, Natural Resources Commission, and Water Resources Commission,[1] initiated this lawsuit against Gelman, alleging that Gelman's activities (1) violated the former water resources commission act, MCL 323.1 *et seq*.; (2) violated the former environmental protection act, MCL 691.1201 *et seq*.; (3) violated the former environmental response act, MCL 299.601 *et seq*., and (4) constituted a common-law public nuisance.[2] The state sought injunctive and monetary relief to abate and remedy the alleged illegal releases of dioxane into the environment by Gelman.

In 1991, the trial court dismissed many of the state's claims, finding that the majority of Gelman's activities did not constitute an unauthorized release of water waste in violation of the environmental statutes and that the state could not maintain a claim for nuisance when the majority of Gelman's activities were lawfully carried out with a permit.[3] The trial court also concluded that any claim that Gelman violated its spray-irrigation permit was time-barred. The trial court declined to dismiss claims relating to "the unpermitted discharge of processed wastewater in the late 1960s," however, finding that there was evidence of "unauthorized overflows from Pond 2 to the marshy area, beyond the permit."

The state and Gelman later reached a settlement agreement regarding the claims not dismissed by the trial court, and in 1992 the trial court entered the parties' proposed consent judgment as an order of the court. As part of the consent judgment, Gelman agreed to implement

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[1] The relevant state environmental agencies have changed names and configurations several times since the inception of this case. Currently, the pertinent agency is the Department of Environment, Great Lakes, and Energy (EGLE). See Executive Order No. 2019-06.

[2] The environmental statutes cited in the 1988 complaint have since been repealed and replaced by the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. See 1994 PA 451, art VII.

[3] The trial court reasoned that "[t]he proofs establish that the great majority of groundwater contamination was caused by Gelman's compliance with its wastewater discharge permits. Plaintiffs cannot seek to hold Gelman responsible for complying with permits issued by Plaintiffs, especially where, as here, Plaintiffs made the determination that issuance of said permits was consistent with protection of human health and the environment."

certain remedial actions to address groundwater and soil contamination. The agreement specified, however, that the consent judgment was not an admission of fault by Gelman, nor was it a waiver of Gelman's rights or defenses with respect to any person, including the state.

The consent judgment provided a dispute resolution process as the exclusive mechanism for resolving disputes arising under the consent judgment, and also contained covenants not to sue and reservations of rights to sue if certain criteria were met. Specifically, the state could reopen litigation to bring additional claims against Gelman in certain limited circumstances. In the event that the state pursued additional claims or proceedings as allowed by the consent judgment, Gelman reserved "all other rights, defenses, or counterclaims that it may have with respect to such matters." The agreement also provided that the consent judgment could not be modified "unless such modification is in writing, signed by all Parties, and approved and entered by the Court."

Since entry of the consent judgment in 1992, the state and Gelman have followed the dispute resolution procedures of the agreement to resolve various disputes. At times, the state has also moved for enforcement of the consent judgment when it perceived Gelman was failing to comply with the agreement. The parties also by agreement amended the consent judgment in 1996, 1999, and 2011. Generally, the amendments related to changes in environmental standards or laws, as well as additions to the scope of the work, as new information emerged about the site conditions.

In 2016, the Michigan Department of Environmental Quality promulgated emergency rules related to the cleanup criteria for dioxane relevant to the groundwater contamination in Washtenaw County. Regarding residential drinking water cleanup, the rules provided that the new cleanup criterion for dioxane in groundwater was 7.2 parts per billion; the criterion was changed because it was determined that the old criterion (established in 2002 at 85 parts per billion) was not protective of public health.

In light of the new criteria, Gelman and the state began negotiations for a fourth amendment to the consent judgment to reflect the new standards. In 2017, Gelman and the state reached a tentative agreement for a fourth amended consent judgment. As of 2017, however, the parties had not yet presented the draft agreement to the trial court as the proposed fourth amended consent judgment; the parties had not submitted any filings or motions to the trial court, and neither Gelman nor the state sought judicial intervention to resolve any disputes or to bring new claims.[4]

In 2016 and 2017, although there was no dispute between the state and Gelman pending before the trial court, the City of Ann Arbor, Washtenaw County, Washtenaw County Health Department, the Washtenaw County Health Officer, HRWC, and Scio Township moved to intervene in the case, seeking to participate in the out-of-court negotiations taking place between the state and Gelman. Over Gelman's objections, the trial court permitted the entities to intervene under MCR 2.209(B). The trial court ordered that the intervenors were permitted to participate in the negotiations but were to "refrain from filing their proposed complaints at this time." The trial

[4] The last request by the parties for judicial intervention had been resolved by the trial court's order of dismissal on July 7, 2014.

court ordered that "[s]hould any of the Intervenors, after participating in negotiations on a proposed Fourth Amended Consent Judgement, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, they may file their complaint(s) after providing notice to the other parties."[5]

For the next four years, the parties and intervenors engaged in negotiations to amend the consent judgment. At a status conference in November 2020, the parties and intervenors reported that Gelman and the state had agreed to a global settlement. The years of negotiations had resulted in a settlement package consisting of three components: (1) a fourth amended consent judgment, (2) a stipulated order, and (3) a settlement agreement. The fourth amended consent judgment under discussion in 2020 differed from the 2017 draft agreement between Gelman and the state and included heightened responsibilities for Gelman. But although Gelman and the state were willing to enter into this three-part global settlement, Ann Arbor and the Washtenaw intervenors ultimately rejected the settlement, while Scio Township and HRWC were only willing to accept the settlement subject to additional conditions. Gelman reiterated its previous objections to the intervenors' participation because the intervenors had not filed complaints and therefore were not parties to the action. Noting that the negotiations had proved unsuccessful after almost four years, Gelman requested that the trial court require the intervenors to file complaints.

The trial court did not order the intervenors to file complaints, but rejected the possibility of more time for negotiations. Instead, the trial court determined that because an agreement had not been reached, the trial court would unilaterally decide whether to modify the consent judgment. The trial court informed the parties that it would hold a hearing to consider "the science" from the experts in terms of "what should be done legally and why," and to consider the parties' and the intervenors' various viewpoints on the proposed settlement. The trial court entered a scheduling order for a Hearing on Modification of the Consent Agreement. Gelman objected to the trial court's proposed hearing, challenging the trial court's authority to modify the consent judgment and the propriety of the intervenors' role in this case. The trial court denied Gelman's request to move for reconsideration of the scheduling order.[6]

On May 3, 2021, the trial court held a hearing on modification of the consent judgment. The trial court began the proceedings by asking the lawyers and experts to "explain to me the problem and what can be done, what should be done, how it can be done, and then for the parties to tell what they think should be appropriate." Opening remarks were made by Gelman and the state. During the intervenors' opening remarks, however, the trial court interrupted and proposed to resolve the matter by entering the fourth amended consent judgment (one part of the three-part

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[5] This Court denied Gelman's application for leave to appeal the trial court's order granting intervention. *Attorney General v Gelman Sciences, Inc*, unpublished order of the Court of Appeals, entered July 14, 2017 (Docket No. 337818), as did our Supreme Court. *Attorney General v Gelman Sciences, Inc*, 501 Mich 960 (2018).

[6] This Court denied Gelman's application for leave "without prejudice to Defendant-Appellant reasserting its substantive claims after the Washtenaw Circuit Court enters an order or a judgment amending the existing consent judgment." *Attorney General v Gelman Sciences, Inc*, unpublished order of the Court of Appeals, entered April 29, 2021 (Docket No. 356859).

negotiated settlement) subject to ongoing review by the trial court. Neither the parties nor the intervenors agreed to the trial court's proposal, and Gelman expressly objected.

Following the attorneys' remarks regarding the trial court's proposal, and before making a final ruling, in what could fairly be characterized as an "open mic night" procedure the trial court opened the matter for public comment from members of the community and media who happened to be in the courtroom that day observing the hearing. After listening to comments from several individuals in the audience, the trial court indicated that it would enter the fourth amended consent judgment. The consent judgment would be subject to quarterly review by the trial court, and the intervenors would retain their status as intervenors going forward. On June 1, 2021, the trial court entered an "order to conduct response activities to implement and comply with revised clean up criteria." Gelman sought leave to appeal the trial court's order, which this Court granted.[7]

II. DISCUSSION

On appeal, Gelman contends that the trial court erred by modifying the parties' existing consent judgment without their consent. Gelman also contends that the intervenors should not be permitted to continue in this case without filing complaints. We agree.

A. STANDARD OF REVIEW

A consent judgment is treated as a contract between the parties; the interpretation of a consent judgment therefore poses a question of law that is reviewed de novo. *Hein v Hein*, 337 Mich App 109, 115; 972 NW2d 337 (2021). A trial court's decision to modify a consent judgment is reviewed for an abuse of discretion. See *Clohset v No Name Corp (On Remand)*, 302 Mich App 550, 558; 840 NW2d 375 (2013). The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes; the trial court also necessarily abuses its discretion when it makes an error of law. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016). We review de novo the trial court's construction and application of the court rules. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006).

B. MODIFICATION OF CONSENT JUDGMENT

Generally, "a judgment is a court's final determination of the rights and obligations of the parties in a case." *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 351; 852 NW2d 22 (2014) (quotation marks, citation, and alteration omitted). A consent judgment, however, is not a determination by the trial court of the rights and obligations of the parties; rather, a consent judgment is a settlement or a contract between the parties that becomes a court judgment when the trial court sanctions it. *Id*. at 354. "Although a consent judgment gains the enforcement

[7] This Court also granted in part Gelman's motion to stay the trial court proceedings, staying the trial court's quarterly hearings under the June 2021 order pending resolution of this appeal. *Attorney General v Gelman Sciences, Inc*, unpublished order of the Court of Appeals, entered July 26, 2021 (Docket No. 357599).

power of a court judgment, it remains a contract in which the parties negotiated an agreement, rather than the kind of judicial act in which the court determined the rights and obligations of the parties." *Hein*, 337 Mich App at 115.

Settlement agreements are favored by law, and generally are considered to be final and not subject to modification. *Clark v Al-Amin*, 309 Mich App 387, 395; 872 NW2d 730 (2015). In the absence of fraud, mistake, illegality, or unconscionability,[8] a consent judgment can be modified only with the consent of the parties. *Andrusz v Andrusz*, 320 Mich App 445, 453; 904 NW2d 636 (2017). A court cannot force a party to enter into a settlement, nor can a court enter a consent judgment that deviates materially from the parties' agreement. *Kloian*, 273 Mich App at 461. Once entered, "[a] judgment by consent cannot ordinarily be set aside or vacated by the court without consent of the parties thereto, for the reason it is not the judgment of the court, but the judgment of the parties." *Goldberg v Trustees of Elmwood Cemetery*, 281 Mich 647, 649; 275 NW 663 (1937).

In this case, the state and Gelman agreed to a settlement, and a consent judgment reflecting that settlement was entered in 1992. On three occasions, pursuant to the terms of the settlement agreement, the state and Gelman chose to modify their agreement, and with the parties' consent the trial court entered amended consent judgments in 1996, 1999, and 2011. The 1992 consent judgment, as subsequently amended, was final and binding, and in the absence of fraud, mistake, illegality, or unconscionability, the consent judgment could not be modified or set aside without the parties' consent. See *Andrusz*, 320 Mich App at 453. The trial court entered its June 1, 2021 order without the parties' consent and over Gelman's repeated objections, substantially modifying the parties' prior agreement and imposing new obligations upon Gelman. By modifying the consent judgment and forcing new terms on the parties without their consent, the trial court erred as a matter of law. See *id.*

On appeal, the state contends that the trial court's order fell within the trial court's authority to enforce the existing consent judgment. We disagree. Although the trial court has the authority to "make any order proper to fully effectuate" its judgments, see MCL 600.611, this power does not extend to modifying an existing consent judgment without the parties' consent or forcing new obligations on the parties without their agreement. See *Goldberg*, 281 Mich at 649. Although the trial court had authority to enforce the existing consent judgment, the trial court could not modify that judgment without the parties' consent. See *id*. The June 1, 2021 order, which calls for the implementation of the remediation plans in the fourth amended consent judgment, goes beyond enforcement of an existing judgment and instead modifies those terms by imposing new cleanup criteria.

The intervenors assert that the trial court's June 1, 2021 order was authorized by the consent judgment itself, which afforded the trial court a role in dispute resolution between the parties in certain circumstances. Again, we disagree. The consent judgment provides a dispute

[8] In this case, there was no assertion of fraud, mistake, illegality, or unconscionability, and no party moved for relief under MCR 2.612. The trial court's authority to act sua sponte under MCR 2.612 is generally limited to correction of clerical errors, see MCR 2.612(A), which would not support the substantive modifications imposed by the trial court in this case.

resolution process by which the parties may seek judicial intervention; a prerequisite to the trial court's involvement in a dispute between Gelman and the state arising under the consent judgment is a request by a party for the trial court's intervention. Since the last order entered by the trial court in 2014, neither party had sought the trial court's involvement under the consent judgment. Further, the dispute resolution procedures apply solely to disputes "arising under the consent judgment," not to requests for new relief not contemplated by the consent judgment. And although the consent judgment permitted the state to reopen litigation by filing new claims if certain criteria were met, the state did not invoke its right to bring additional claims in this case.

In sum, the trial court lacked authority to unilaterally modify the consent judgment when (1) Gelman and the state did not consent to modification of their consent judgment, (2) neither Gelman nor the state sought the trial court's intervention under the dispute resolution procedures to resolve a pending dispute arising under the consent judgment, and (3) the state did not file any new claims and Gelman was not afforded an opportunity to defend against any new claims. Consequently, the trial court erred by modifying the consent judgment without the parties' consent. See *Clark*, 309 Mich App at 395.

Notwithstanding the procedural irregularities in this case, the state urges this Court to leave in place the remedies imposed by the trial court's June 1, 2021 order pending resolution of any additional issues on remand because the remedies were proposed in the negotiated settlement. We observe, however, that although Gelman and the state reached a tentative, bilateral agreement in 2017 to amend the consent judgment, that agreement was never presented to the trial court for entry as a fourth amended consent judgment. Later, after the intervenors participated in negotiations, the state and Gelman were willing to agree to a three-part, global settlement. However, Gelman and the state did not submit this three-part agreement to the trial court for approval, presumably because the intervenors did not agree. As a result, despite Gelman and the state apparently agreeing on a proposed fourth amended consent judgment, the trial court's June 1, 2021 order does not implement that agreement. Because a court cannot force a settlement upon parties or enter a consent judgment that deviates in any material respect from the agreement of the parties, *Kloian*, 273 Mich App at 461, the trial court lacked authority to enter an amended consent judgment that deviated from the parties' agreement.

C. INTERVENORS

Gelman does not challenge whether the trial court abused its discretion by permitting the intervenors to intervene, but contends that the intervenors are not permitted to participate in the lawsuit unless they file complaints. We agree.

By intervening, a third party becomes a party in a lawsuit that is pending between others. *Hill v LF Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008). MCR 2.209(C) provides that a party seeking to intervene must apply to the court by motion, and the motion must "be accompanied by a pleading stating the claim or defense for which intervention is sought." MCR

2.209(C). In other words, a pleading[9] is a requirement of intervention. "The logic of requiring such a pleading when intervention is sought is obvious. Absent a complaint setting forth the intervening plaintiff's claim, the claim is never technically before the trial court so as to vest jurisdiction in the court to render a judgment upon the claim." *Kolar v Hudson*, 55 Mich App 114, 119; 222 NW2d 53 (1974).

An intervenor's role as a party to the action thus differs from that of, for example, amicus curiae. See *Grand Rapids v Consumers' Power Co*, 216 Mich 409, 415; 185 NW 852 (1921). Unlike amicus curiae, who merely provide briefing to cast light on issues of important public interest, an intervenor is an actual party to the litigation. See *Hill*, 277 Mich App at 508. Once permitted to intervene, an intervenor is subject to the normal rules of pleading and other incidents of litigation, see 59 Am Jur 2d Parties § 225, and is required to plead and prove its theory of the case. See *Scott v Cleveland*, 360 Mich 322, 331; 103 NW2d 631 (1960).

Here, rather than being made to plead and prove their claims, the intervenors were allowed to participate in a hybrid "intervening-amicus" capacity, offering opinions, naysaying the settlement agreement, and making additional remediation demands without filing complaints or facing the normal incidents of litigation, such as defenses raised by Gelman. Having intervened as plaintiffs, the intervenors must file their complaints and thereby subject themselves to the incidents of litigation, or face dismissal.

We also observe that when deciding to hold an evidentiary hearing, the trial court stated that this case was at the "remedial stage" and that the case was "decades beyond litigation of whether or not Gelman polluted the water." The trial court's statement inaccurately suggests that there has been a finding of Gelman's liability. In 1991, the trial court dismissed the majority of the claims against Gelman, and the state and Gelman settled the remaining claims. The intervenors have yet to assert any claims, and consequently Gelman has yet to be heard on the intervenors' purported claims. See *Bonner v Brighton*, 495 Mich 209, 238; 848 NW2d 380 (2014) ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.") (Quotation marks, citation, and brackets omitted). Thus, there has also been no determination in this case that Gelman is liable to anyone.

We vacate the trial court's June 1, 2021 order in this matter, reinstate the parties' prior consent judgment, and remand to the trial court. The state and Gelman are free to negotiate a fourth amended consent judgment as they see fit, which they may present to the trial court for entry as a new consent judgment. If the parties find it necessary, they may seek the trial court's involvement as permitted in the consent judgment. Unless Gelman or the state seek the trial court's involvement, their third amended consent judgment remains in effect, and the trial court should play no role in their negotiation of a possible fourth amended agreement. See generally *In re Knight*, 333 Mich App 681, 691; 963 NW2d 676 (2020) ("[C]ourts do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.") (Quotation marks and

[9] The term "pleading" includes only a complaint, cross-claim, counterclaim, third-party complaint, an answer to a complaint, cross-claim, counterclaim, or third-party complaint, or a reply to an answer. MCR 2.110(A).

citation omitted). On remand, the trial court shall require the intervenors either to file complaints or be dismissed from the case. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael F. Gadola
/s/ Christopher P. Yates