STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL WENNERS, and
DAVID CROSS and SALLY CROSS,
Plaintiffs/Appellees,

v.

MATTHEW D. CHISOLM and AMY C. (VOGEL) CHISOLM, husband and wife,
Defendants/Appellants

and

MICHELLE SHAUGHNESSY,
Defendants/Appellees
_____/

Supreme Court No.: _____
Court of Appeals No.: 314938
Lower Court Case No.: 12-1197-CH

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APPLICATION FOR LEAVE TO APPEAL
TO THE MICHIGAN SUPREME COURT

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STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain this application for leave to appeal pursuant to MCR 7.301(A)(2) from the Michigan Court of Appeals. The Michigan Court of Appeals had jurisdiction to grant leave to appeal pursuant to MCR 7.203(B)(1) as the Circuit Court's *Order Denying Defendants' Motion for Summary Disposition* was not a final order. The order was signed on February 5, 2013 in the Twenty-Second (22nd) Circuit Court for the County of Washtenaw, the Honorable Carol A. Kuhnke, presiding. A copy of Court of Appeals' unpublished order and a copy of the trial court order are attached hereto as required by MCR 7.302(A)(1)(f), (g).

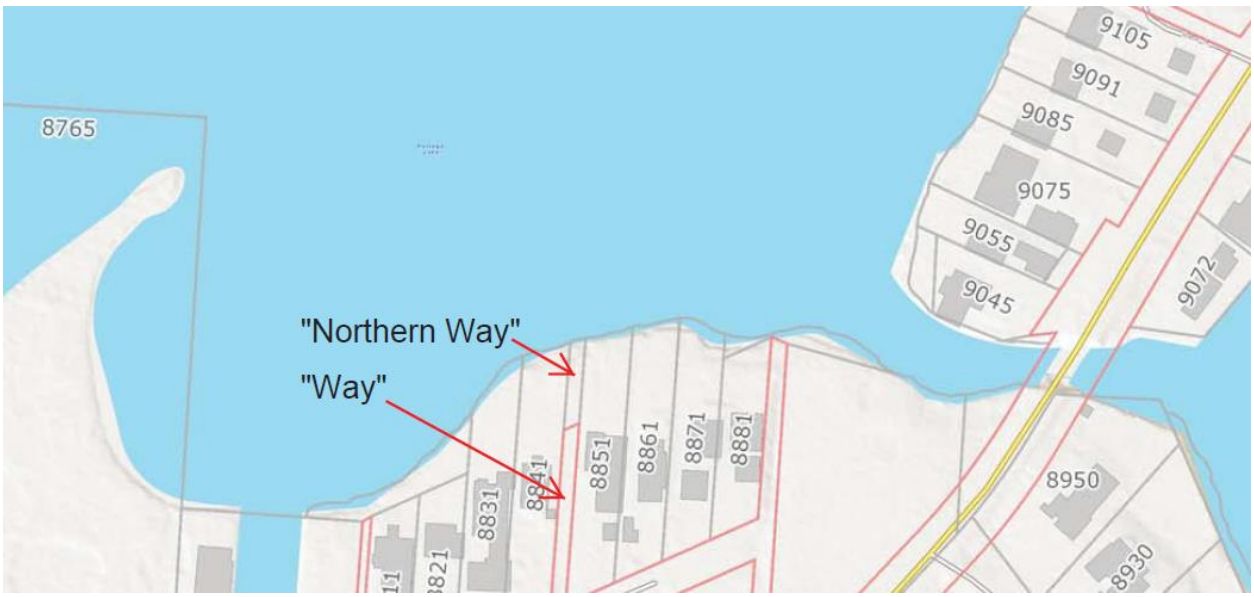
STATEMENT OF QUESTION PRESENTED

I. Do Plaintiffs have standing to request declaratory relief affecting uses of land for which Plaintiffs have no legal interest and have no resulting harm, and whose interests are no different than members of the general public?

Chisolm Defendants say:	No
Other defendant would likely say:	No
Plaintiffs say:	Yes
Lower Court says:	Yes

BRIEF STATEMENT OF FACTS

Plaintiffs brought a legal action requesting the Washtenaw County Circuit Court to enter a declaratory judgment to define the scope and uses of certain property of which Plaintiffs neither have ownership interest nor is controlled by Plaintiffs. Plaintiffs are the owners of property on either side of a private way (labeled as Property Nos. 8841 and 8851 in Exhibit A). Plaintiffs properly acknowledge the Way "was conveyed to the Defendants." Compl., ¶11.



Partial screenshot of Exhibit A, in the record as Exhibit A attached Appellants' Brief

At issue in the filed Complaint, Plaintiffs complain of the Defendants' use of the lands existing just ***north*** of the Way, a strip of land starting at the northern edge of the Way and then extending to the water's edge of Portage Lake (hereinafter and labelled above as "Northern Way"). Plaintiffs are undisputedly ***not*** the owners of the Northern Way or have ***any*** legal interest in the Northern Way.[1] By the complaint, Plaintiffs seek to

[1] In their response to the motion in the Circuit Court, Plaintiffs did not dispute or offer any evidence they have or had any legal interest to the lands being the Northern Way.

have the Circuit Court determine that Defendants have no rightful uses of the Northern Way, even though Plaintiffs have no legal interest in the Northern Way.

On January 3, 2013, the Chisolm Defendants filed a motion for summary disposition arguing Plaintiffs lack standing to even bring such a lawsuit. A hearing was held and the Circuit Court denied the motion without analysis or substantive explanation. Following entry of the denial order, the Chisolm Defendants filed an application for leave to appeal to the Michigan Court of Appeals. After pending for nearly a year, the Court of Appeals denied the application "for failure to persuade the Court of the need for immediate appellate review." *Wenners v Chisolm*, unpublished order of the Court of Appeals, issued Nov 27, 2013 (Docket No. 314938). This was dispite this Court's direction that standing issues should be resolved early in the case being it is a threshold issue. *Shavers v Attorney General*, 402 Mich 554, 586; 267 NW2d 72 (1978). This application for leave to appeal now follows.

STANDARD OF REVIEW

Applications for leave, just as interlocutory appeals, are granted by leave only. MCR 7.302(A)(1); MCR 7.203(B)(1). Were this Court to grant the application, this Court would then review the denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a party has standing is a question of law that is also reviewed de novo. *Manuel v Gill*, 481 Mich 637, 642-643; 753 NW2d 48 (2008). A motion brought pursuant to MCR 2.116(C)(5) and (C)(8) is an appropriate basis to challenge standing. See *Heritage in the Hills Homeowners Ass'n v Heritage of Auburn Hills*, unpublished decision of the Court of Appeals, issued Feb 2, 2010 (Docket No. 286074); but see *Cotter v Britt*, unpublished decision of the Court of Appeals, issued May 31, 2007 (Docket No. 274776)(our Supreme Court in *Leite v Dow Chemical*

Co held a "defense based on a claim that a party was not a real party in interest; i.e., that the party lacked standing, is not the same as a claim that the party lacked the legal capacity to sue..." and "indicated that a motion for summary disposition alleging the real party in interest defense is properly brought under MCR 2.116(C)(8).").

A motion brought pursuant to MCR 2.116(C)(5) tests plaintiffs' legal capacity to sue. Under a (C)(5) motion, the Court reviews the pleadings, admissions, affidavits and other relevant documentary evidence to determine whether as a matter of law the plaintiffs lack the capacity to even bring the lawsuit. MCR 2.116(G)(5); *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003)(discussing (C)(5) standard of review).

A (C)(8) motion, on the other hand, tests the legal sufficiency of plaintiff's claim. MCR 2.116(C)(8); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Such a motion should be granted if no factual development could possibly justify discovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). The Court may only consider the pleadings, which includes all documents attached to the complaint. MCR 2.116(G)(5); MCR 2.113(F)(2).

ARGUMENT

I. Plaintiffs lack standing to challenge Defendants' actions because Plaintiffs do not have or have alleged to have suffered any actual, particularized impairment of a legally protected interest.

Without standing, a court will not and cannot hear a person's complaint — the doors to the court are closed. *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608, 658; 684 NW2d 800 (2004)(Weaver, J., concurring in result only) lead opn overruled by *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010). "Where a cause of action is not provided at law,… a court should, in its discretion, determine whether a litigant has standing." *Lansing*, *supra* at 372. Standing

requires that "the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing*, *supra*. Requests for declaratory relief under MCR 2.605 do not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness. *Moses, Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 416; 716 NW2d 278 (2006). The purpose of the standing doctrine is to require that litigation be brought "only by a party [or parties] having an interest that will assure sincere and vigorous advocacy." *City of Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997) (emphasis added). To have standing however, a party must demonstrate ***more*** than the ability to vigorously advocate; the party must also demonstrate it has a substantial interest that will be detrimentally affected in a manner different from the public at large. *Moses, supra* at 412. Standing requires that a plaintiff have a "real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." *Id.*, at 414. Mere geographic proximity is not enough to create standing where no separate cognizable interests exist. *Labelle Limited Partnership v Central Mich Univ Bd of Trustees*, unpublished decision of the Court of Appeals, issued August 14, 2012 (Docket No. 305626); *Greenstein v Farmington Pub Schs*, unpublished decision of the Court of Appeals, issued Sept 20, 2012 (Docket No. 306268) (no impact, negative or otherwise, on his home, life, or activities because of the close proximity of home).

A. Standing requires an actual, particularized impairment of a legally protected interest

To have standing, Plaintiffs must have suffered or be suffering an actual, particularized impairment of a *legally protected* interest. *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008) (emphasis in original). Water front property owners have three general cognizable interests in riparian/littoral[2] properties: 1.) the use of the lake water itself; 2.) the Plaintiffs' own shore property; and 3.) the Plaintiffs' own subaquatic lands under the water.

The easiest interest to resolve is the first interest, the use of lake water itself. Portage Lake is a public, not private, lake. See *Boating Access Site Detail: Portage Lake*, Michigan Department of Natural Resources, http://www.mcgi.state.mi.us/mrbis/BASDetail.aspx?basid=A-81-020 (last visited Jan 24, 2013). "As to a public lake, a mutual right of enjoyment exists between and is shared by riparian owners and the public generally." *Thompson v Enz*, 379 Mich 667, 683; 154 NW2d 473 (1967) (emphasis added). "Insofar as such recreational benefits as boating, hunting, and fishing therein, the riparian proprietor has no exclusive privileges." *Id*. (emphasis added). In reference to Defendants' use the waters of Portage Lake, there is no actual, particularized impairment of Plaintiffs' lake water usage interest as they have to share Portage Lake waters with the entire public.

As to the second interest, Plaintiffs' interests in their own shore property have not been impaired or have been alleged to be impaired in any way. See Compl. There is no allegation of trespass or interference with the use and enjoyment of their own property.

[2] Technically speaking, a lake-front property owner has littoral rights while a river-front property owner has riparian rights. *McCardel v Smolen*, 404 Mich 89, 93, n 3; 273 NW2d 3 (1978). However, Michigan courts use these terms interchangeably.

As such, there is no allegation or suggestion of harm to the *legally protected* interest of shore-land property.

The last interest is the subaquatic lands interest. Plaintiffs, as riparian/littoral property owners, own those portions of the subaquatic land (i.e. lake bottom) determined via the "thread" determination method. See *Heeringa v Petroelje*, 279 Mich App 444; 760 NW 2d 538 (2008). The process can be generally described as a pie-slice from the edge of where Plaintiffs' property touches Portage Lake extending to the center-point of Portage Lake. *Heeringa, supra.* The right to install a dock derives from the ownership of their respective portions of the lake bottom via shore ownership. Yet again, there is no allegation of interference by any defendant with the Plaintiffs' use and enjoyment of their own lake-bottom property and has not alleged any impairment of that legally protected interest. Mere proximity is not enough. See *Labelle*, *supra*; *Greenstein, supra*. When faced with lack of standing, this Court has directed trial courts across the state that "judicial self-restraint is warranted." *Detroit Fire Fighters Ass'n v City of Detroit*, 449 Mich 629, 648; 537 NW2d 436 (1995).

Given all this, no permissible basis of standing exists for Plaintiffs in this case as Plaintiffs have no legally cognizable interest in the property in dispute. Neither the Circuit Court nor the Court of Appeals provided any analysis; the Circuit Court had no basis to hold that Plaintiffs fit in either standard under *Lansing.* Plaintiffs cannot show any special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large (see *Lansing, supra*); and Plaintiffs merely complain of the use of land owned by another (which Plaintiffs have no real interest, see

Moses, *supra*). Plaintiffs lack standing to bring their singular request for declaratory relief.

II. Defendants will suffer real harm in needlessly defending an action that will likely result in a judgment that will be unenforceable even if Plaintiffs prevail.

In cases involving property disputes, certainty is critical. See *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982). Considerable wealth and fortunes are expended on property and property development based upon the rules and standards of law involving property rights. In this case, substantial sums and time will need to be spent in conducting and defending a case that will lead to a judgment which will be forced to be vacated on standing grounds no matter who prevails. Courts have held that standing issues should be resolved early in the case being it is a threshold issue. *Shavers, supra at* 586 ("A crucial threshold question concerns plaintiffs' standing to raise certain issues."). This is because courts have long recognized and attempted to minimize the high cost of needless litigation including being lengthy, expensive, and stressful. See *Brucker v McKinlay Transp*, 454 Mich 8, 17; 557 NW2d 536 (1997). Civil litigation involving property will include substantial discovery, massive title search projects, and developing the case to reach a judgment that could effortlessly be thrown out. This Court has also directed pre-trial motions are favored as promoting judicial economy and avoiding expensive litigation for both parties. See *Horvath v Delida*, 213 Mich App 620, 630; 540 NW2d 760 (1995). The logic is easily extended to the necessity of interlocutory appeal in this case. Given these extreme and substantial costs, this issue should be reviewed immediately before needlessly thrusting the high cost of litigation which will likely be for naught.

RELIEF REQUESTED

WHEREFORE, the Chisolm Appellants/Defendants request the Court, after consideration of this application and in lieu of granting leave to appeal, to remand this case to the Court of Appeals for consideration as if on leave granted pursuant to MCR 7.302(H)(1). See *Omian v Chrysler Group LLC*, __ Mich __; 836 NW2d 68 (2013) (granting this type of relief). Alternatively, this Court is requested to grant leave for full briefing and presentation to this Court involving the need for special injury before a party has standing under *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010).

RESPECTFULLY SUBMITTED:

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