State of Michigan
Court of Appeals

Deanna Hughes, Heather Schiele, and Ban Michigan Fracking,
Plaintiffs-Appellants

v

Ingham County Case No 12-497-CE
CA Case No _____

Michigan Department of Environmental Quality,
Defendant-Appellee

_____/

Application for Leave to Appeal

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Table of Contents

Table of Authorities

I. Introduction and jurisdiction

On September 25, 2012, the Ingham County Circuit Court, by Hon William E. Collette, on cross motions for summary disposition of plaintiffs' second amended complaint, resolved the claims and closed the case below by granting defendant's motion and denying plaintiffs' motion. See page 5 of the decision, attached as exhibit 1.

The second amended complaint raised claims under:

(a) MCL 24.264 for a declaratory judgment as to the applicability of certain of defendant's administrative rules to uncontested facts,

(b) MCL 324.1704(2) for temporary relief ancillary to the first claim, and

(c) MCL 600.631 for rescission of certain permits issued by defendant.

This pleading is attached as exhibit 2.

Plaintiffs ask leave to appeal under MCR 7.203(B) the disposition only of claim (a). Claim (a) challenged an interpretation, given by defendant's director Dan Wyant on June 28, 2012, of the definition of "injection well," R 324.102(x) in appellee's regulations. The Wyant letter is attached as exhibit 3.

In a separate pleading filed this day, plaintiffs simultaneously appeal the same claim by right under MCR 7.203(A)(1). The present application for leave is filed only provisionally, should the court determine not to allow the appeal by right.

A transcript of the oral argument of September 19, 2012, was ordered on October 5, 2012. See confirmation of order attached as exhibit 4. A copy of the transcript will be provided to the court and opposing counsel immediately on receipt.

A copy of the administrative record before defendant MDEQ has been ordered. See today's letter to opposing counsel, attached as exhibit 5.

A copy of the register or actions before the circuit court has been ordered by today's letter to the clerk, attached as exhibit 6. It will be provided to this court and opposing counsel immediately on receipt.

II. Questions presented

1. Where plaintiffs submitted a request for a declaratory ruling as to applicability of agency rules to uncontested facts, where an administrative rule says the agency "shall" make its ruling within 60 days, where the agency failed to rule within 60 days, and where the agency chief purported to rule on day 62, did violation of the "shall" word deprive the ruling of the deference ordinarily accorded by courts to agencies' interpretations of their own rules?

   Appellants say "yes." The circuit court and appellee say "no."

2. Where the language of an administrative rule is unambiguous and contains ordinary non-technical English words, may a court search the rule's surrounding context to ascertain its intent?

   Appellants say "no." The circuit court and appellee say "yes."

3. Where the MDEQ accepted evidence that the top national industry expert on fracking opined at a Michigan industry conference attended by the MDEQ's second-in-command that a frack well fits the wording of Michigan's definition of an injection well, but in an alternative holding discounted the opinion as unpersuasive, can a court ignore the opinion altogether on grounds of hearsay?

   Appellants say "no." The circuit court and appellee say "yes."

4. Should the court declare under MCL 24.264 that a fracked gas well is an "injection well," subject to all rules and practices applicable to injection wells, in light of uncontested facts that (a) a frack well is completed by injecting millions of gallons of water and chemicals, (b) a significant fraction of the injectate remains intentionally disposed in the well forever, (c) the rules define "operation of oil and gas wells" to include both "injecting" and "disposal" of brine as part of the process of "producing oil or gas," and (d) the top national gas industry expert agrees with appellants that the operation of a frack well fits the wording of Michigan's definition of "injection well"?

Appellants say "yes." The circuit court and appellee say "no."

III. Uncontested facts

Plaintiffs filed a petition, affidavits, and exhibits (collectively "the petition") advocating their position to the MDEQ on April 27, 2012. Included in the petition were statements of prominent local and national industry leaders agreeing with plaintiffs that a frack well fits the wording of Michigan's definition of an injection well.

By rule defendant had 60 days to respond. But the end date came and went with no answer. Two days later on June 28, 2012, MDEQ chief Dan Wyant wrote, purportedly on the agency's behalf, rejecting plaintiffs' and the industry's interpretation.[1]

The Wyant letter made no claim that plaintiffs' position would create an undue burden on the industry. The industry, for itself, was notified of the administrative and court proceedings, and chose not to intervene, seemingly indifferent to the outcome.[2]

As the case was ending in the circuit court in September 2012, two prominent

1 Letter, Dan Wyant to Ellis Boal, 6/28/12 (attached exhibit 3).

2 See communications collected in exhibit 4 to plaintiffs' motion for summary disposition in the circuit court.

wells on Sunset Trail in the Mackinaw Forest in Kalkaska County were about to be fracked. One of plaintiffs' claims, brought under MCL 600.631, sought to rescind the permits for those wells. At this writing the wells are in the process of being fracked. They will soon be completed, so that claim is moot and appellants do not appeal it. Nor do they appeal the denial of temporary relief sought under MCL 324.1704(2).

While Michigan has had thousands of shallow vertical frack wells for decades, deep-shale horizontal fracking is relatively new here. As the case started a company was threatening to spud a horizontal frack well near the homes of the individual appellants in Gladwin County. They feared for their water and began this litigation.

Fracking is an industry-originated colloquialism for hydraulic fracturing. The terms are interchangeable and non-pejorative. The administrative rules also refer to a broader term, "stimulation," which includes fracking but also includes "acidizing," a different method of completion not in dispute today.[3]

The uncontested facts about fracking on page 2 of the Wyant letter are taken from a DEQ white paper on its website. According to the paper, fracking is a one-time procedure that:

> is part of the completion of some types of oil or natural gas wells. More recently, horizontal drilling is being utilized, particularly in the deeper gas reservoirs. The purpose of both of these technologies is the same: to increase exposure of more reservoir rock formation to the well bore to maximize gas production.... In Michigan, since the 1960s, more than 12,000 wells have been hydraulically fractured. Most of these are Antrim Shale Formation gas wells in the northern

3 See e.g. R 324.103(s).

> Lower Peninsula. [The process] involves pumping water at high pressure to create fractures in reservoir rock that allow the oil or natural gas to flow more freely to the well bore.... Some of the chemical additives can have adverse health or environmental impacts if they are not properly handled and contained.... Typically 25 to 75 percent of the hydraulic fracturing fluid is recovered initially as "flowback" water. The rest remains in the gas-bearing formation or is recovered over time along with the gas that is produced.... A fracture treatment of a typical Antrim gas well requires about 50,000 gallons of water. In the emerging Utica/Collingwood Shale gas development, the amount of water needed to fracture a horizontal well may be up to 5,000,000 gallons or more.[4]

As the paper notes, high-pressure fracking has been done vertically for decades in Michigan. In recent years it has been extended to deep horizontal bores, which use 100 times the amount of injectate as is used in vertical wells. Some of the chemical additives can have adverse health or environmental impacts if they are not properly handled or contained. Importantly, the purpose of fracking is to increase exposure of more reservoir rock formation to the well bore to maximize gas production.

Queried during Q&A after a speech last April to a Michigan conference of 100 industry and DEQ leaders, the industry's leading national expert David Miller agreed with plaintiffs that a frack well fits the wording of Michigan's definition of an injection well. No one dissented.

The discussion with Miller is described in detail in an affidavit of counsel which is part of the administrative record. At ¶¶ 7, 11, 14-23, and 31 the affidavit relates

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4 "Hydraulic Fracturing of Natural Gas Wells in Michigan", *http://www.michigan.gov/documents/deq/Hydrofrac-2010-08-13_331787_7.pdf* . The Wyant letter's uncontested facts also cited a second website page, "High Volume Hydraulic Fracturing Well Completions," *http://www.michigan.gov/documents/deq/SI_1-2011_353936_7.pdf* .

counsel having been invited into an industry meeting for a speech by Miller, on April 18, 2012. Miller is the standards director for the American Petroleum Institute, the American industry leader for developing standards to promote reliability and safety. Michigan regulations cite API standards 38 times. About 100 people were present. In his speech Miller said hydraulic fracturing is a priority issue for API. He called on counsel during Q&A, who began by thanking the organization for permitting him in the room. The affidavit continues:

> I asked what I termed was a very basic question: What is the purpose of hydraulic fracturing? Is the main purpose, or the only purpose, to "increase the ultimate recovery of hydrocarbons" (again using the phrase [from R 324.102(x)]). Miller explained generally to the effect that horizontal drilling allows the operator to drill one hole instead of several vertical holes, so it's more efficient. I followed up: "So the answer to my question is yes, the purpose of hydraulic fracturing is to increase the ultimate recovery of hydrocarbons?" Miller answered "Yes."

The affidavit adds that Rick Henderson, appellee's field operation chief, was also in the audience. Henderson was alert to the frack well/injection well issue, having been copied on a series of previous emails on the subject. Neither Henderson, nor any of the executives present dissented as to Miller's answer.

On these facts, little contemplation is needed to conclude a frack well is an injection well as Michigan defines the term. Or so it would seem. But appellee disagrees.

IV. Argument

A. Appeal by right or by leave?

Simultaneous with the present application appellants are also filing a claim of appeal by right of the same claim, for a declaratory judgment under MCL 24.264.

Appellants claim both by right and by leave because it is unclear which is the appropriate mode, given the exception of MCR 7.203(A)(1)(a) for circuit court orders "on appeal from any other court or tribunal."

The present case seems like a hybrid. On the one hand MCL 24.264 says in absolute terms the "applicability of a rule … may be determined in an action for declaratory judgment...." The statute requires that plaintiffs attempt administrative exhaustion, but allows them to forgo exhaustion if the agency does not act expeditiously. Though the circuit court did not recognize it as such, a failure to act expeditiously is what happened here. Thus in a strict sense – so appellants contend – their second amended complaint was not an appeal from a lower tribunal. Hence it did not fall within the exception of MCR 7.203(A)(1)(a), and the appeal is by right.

On the other hand, on page 2 of its decision the circuit court treated the case as a "challeng[e to a] final decision of the Defendant agency." If accepted, this would bring case within MCR 7.203(A)(1)(a), and the appeal would be only by leave.

Hence appellants are appealing both ways, and leave it to the court to decide the better course.

B. The standard of review.

It needs no citation to say the standard of review of a circuit court's summary disposition is *de novo*, particularly as here where the case involves uncontested facts and the circuit court's declaration was purely legal.

Even so, before showing the correctness of plaintiffs' interpretation of R 324.102(x) as it pertains to frack wells, we note several errors by the circuit court.

1. At pages 1-2, the court stated "On April 29, 2012, a hard copy of the petition was filed with the Defendant." No record evidence supports this. The Wyant letter does not say it. No witness affidavit says it. The only place anything about hard copies appears is in several unverified statements in MDEQ's counsel's circuit court brief, at pages 3, 4, 10, and 11.

Contrary to the circuit court, the cover of the Wyant letter relates as an uncontested fact that plaintiffs "submitted" their petition on April 27, 2012. Similarly, paragraph 4 of defendants' answer admits plaintiffs "filed" their petition on April 27.

This disposes of the contention that the date of April 29 is relevant in any way.

2. The circuit court mis-stated the question before it.

The Wyant letter correctly described the issue as whether R 324.102(x) "appl[ies] to all ... applications for and operations of oil and gas wells intended to be *hydraulically fractured*" (emphasis added). This is what this court must affirm or reject.[5]

5 "It is true, at least in the federal context, that an agency must typically defend its actions on the basis of justifications contained in the administrative record rather than post hoc rationalizations developed during litigation. See, e.g., *Securities &*

Instead the circuit court said at page 1 the issue was whether "injection well [rules] should be applied to oil and gas wells ... which would employ *horizontal drilling* in the initial recovery" (emphasis added).

The court thus confused drilling (whether vertically or horizontally) and fracking. They are not the same. Drilling is completed when a well has reached its permitted depth (or drilling has ceased).[6] Fracking is then conducted using different rigs and equipment as part of the well completion process.[7] Drilling is governed by part 4 of the regulations,[8] after which certain records are to be filed.[9] Completion is governed by part 5 of the regulations,[10] after which different records are to be filed.[11]

Of course it is the recent onset of fracking combined with horizontal drilling in Michigan which has motivated public controversy[12] and led to plaintiffs' bringing this suit. But as was explained to the court during oral argument,[13] the case's end result – whichever way it goes – will apply to both vertical and horizontal wells, and the legal issue has nothing to do with horizontal drilling. The circuit court just misapprehended

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Exchange Comm v Chenery Corp, 332 U.S. 194, 196-197; 67 S.Ct 1575; 91 L Ed 1995 (1947)." *Michigan Farm Bureau v Department of Environment Quality*, 292 Mich App 106, 145-46, 807 NW2d 866 (2011).

6 R 324.102(l).

7 R 324.103(r), (s).

8 R 324.401-22

9 R 324.418(a).

10 R 324.501-11.

11 R 324.418(b).

12 See page 2 of appellants' motion in the circuit court.

13 The transcript has been ordered.

it.

Additionally, the circuit court's reference to “initial recovery” – repeated on page 4 of the decision[14] – has no place in resolving the case. The phrase is not defined or even found in the statute or regulations. It is not in the Wyant letter, and particularly not at pages 1-2 where the issue of the case is stated. The only place where “initial recovery” is found is at pages 4 and 8 of defendant's brief to the circuit court, and in colloquy between the court and defendant's counsel at oral argument.[15] “Initial recovery” is not involved here.

3. The circuit court held at page 4 the permit for “the wells in question does not involve ... disposal of any materials...." But the Wyant letter and the MDEQ website in the uncontested facts quoted above, found just the opposite, that a significant part of the injectate remains in the ground forever. This disposal is by intention per the ancient maxim that we intend the natural and foreseeable consequences of our acts.[16] At page 6, the Wyant letter admits a disposal well is one type of injection well. The circuit court did not realize this.

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14 “...initial drilling or recovery....”

15 The transcript has been ordered.

16 *Massachusetts v Feeney*, 442 US 256, 278 (1979) (“. . . the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions.”); *Monroe v Pape*, 365 US 167, 187, 207 (1961) (“a man is responsible for the natural consequences of his acts.”).

C. Where plaintiffs submitted a request for a declaratory ruling as to applicability of agency rules to uncontested facts, where an administrative rule says the agency "shall" make its ruling within 60 days, where the agency failed to rule within 60 days, and where the agency chief purported to rule on day 62, violation of the "shall" word deprived the ruling of the deference ordinarily accorded by courts to agencies' interpretations of their own rules.

According to R 324.81(2), the department "shall" rule within 60 days of receipt of the petition. Particularly if the department needs extra time:

> *Within 60 days* of receipt of the request, the department *shall* take 1 of the following actions . . . (c) advise the person requesting the ruling that further clarification of the facts must be provided, or that the department requires additional time to conduct a review, including, but not limited to, an on-site investigation.

(emphasis added) Defendant's brief to the circuit court claimed at page 11 without benefit of affidavit that MDEQ staff members "operated under the mistaken belief" the Wyant letter was due 60 days from when he received a hard copy of plaintiffs' petition. The brief argued by analogy from MCR 2.108(E) that a court may permit a missed deadline if the mistake was the result of excusable neglect.

But even if the explanation were verified by affidavit, how the mistake could possibly be "excusable" in the face of Wyant's express acknowledgment that *he* considered the petition submitted on April 27, is not explained.

R 324.81(2) uses the word "shall." Just last summer in an election case our supreme court emphasized the mandatory nature of that word. The second paragraph of the lead opinion holds:

> However, because MCL 168.482(2) uses the mandatory term "shall" and does not, by its plain terms, permit certification of deficient petitions with regard to form or content, a majority of this Court holds that the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification.[17]

There is no such thing as substantial compliance when it comes to timeliness. The word "shall" means that when the 60th day rolled around, the department opted to *say nothing*. The Wyant letter coming out two days later was therefore not an agency ruling under MCL 24.263. The court need give it no heed in an action under MCL 24.264. The views expressed are only Wyant's personally, in the nature of an *amicus* position. A director's personal views are not presumed to be lawful and reasonable.[18] The court has to decide the issue on a clean sheet.

Any other ruling would in effect repeal the "shall" word, and license the agency to ignore all manner of deadlines, to the consternation of the business and environmental community it is to serve.

D. Where the language of an administrative rule is unambiguous and contains ordinary non-technical English words, a court may not search the rule's surrounding context to ascertain its intent.

Plaintiffs are asking this court to construe R 324.102(x) literally. The rule defines an "injection well" to include:

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17 *Stand Up For Democracy v Secretary Of State*, Case No SC 145387 (8/3/12).

18 Cf *Great Wolf Lodge of Traverse City v Public Service Commission*, 489 Mich 27, 37-38, 199 NW2d 155 (2011); *Sibel v Department of State Police*, 154 Mich App 462, 465, 397 NW2d 828 (1986).

> a well used to inject water, gas, air, brine, or other fluids for the purpose of increasing the ultimate recovery of hydrocarbons from a reservoir....

None of the words in this definition is jargon or a term of art. None has a special definition in the statute or regulations. The Wyant letter said at page 11 that the definition is "not ambiguous." Not only do plaintiffs agree, but so do industry leaders, as discussed below. When three of them were asked if frack wells fit the definition's wording, none hesitated or asked for clarification or context. None said the question was ambiguous. All just listened to the literal words and said "yes" unequivocally. Under longstanding Michigan precedent, this court should do the same. To understand the definition, just look at the words themselves without resort to surrounding context.[19]

Despite the longstanding rule, the Wyant letter argued the definition should be read in the context of other oil/gas rules, particularly R 324.103(j), 201, and 612. The circuit court agreed, saying at pages 4-5 these other rules:

> demonstrate[] that an injection well is not defined as being used in the initial drilling or recovery for oil, gas, or both.

The problem with the "demonstration" is it is a demonstration only by implication. Thus the circuit court noted parallel wording about "increasing the ultimate recovery of

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19 *People v Jackson*, 487 Mich 783, 791, 790 NW2d 340 (2010) ("In determining the legislative intent, we must first look to the actual language of the statute."); *Herman v Berrien County*, 481 Mich 352, 366, 750 NW2d 570 (2008) ("... in statutory interpretation, if the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written."); S*un Valley Foods Co v Ward*, 460 Mich 230, 236, 596 NW2d 119 (1999) ("Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.").

hydrocarbons" in the definitions of both "injection well" and "secondary well." But in this case implication proves too much, as the state's policy of increasing and maximizing "ultimate recovery" applies to *all* wells.[20]

More importantly, if the context surrounding R 324.102(x) is to be considered, the right context to look at is R 324.103(c)(viii) and (xi). There we see that "Operation of oil and gas wells" is defined to include "injecting" and "brine ... disposal" as part of the process of "producing oil or gas." In other words injecting and disposal are *explicitly* part of the process of "producing" gas.

The Wyant letter asserted on page 6 "a well is either an 'oil or gas well' or an 'injection well' ; it cannot be both." In its central holding, the court affirmed the point at page 4.

But the definition of "operation of oil and gas wells" says just the opposite. That it does so explicitly rather than merely implicitly obliterates the Wyant letter's reasoning.

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20 "It is accordingly the declared policy of the state to protect the interests of its citizens and landowners from unwarranted waste of *gas and oil* and to foster the development of the industry along the most favorable conditions and with a view to the *ultimate recovery of the maximum production* of these natural products. To that end, this part is to be construed liberally to give effect to sound policies of conservation and the prevention of waste and exploitation." (emphasis added) MCL 324.61502.

E. Where the MDEQ accepted evidence that the top national industry expert on fracking opined at a Michigan industry conference attended by the MDEQ's second-in-command that a frack well fits the wording of Michigan's definition of an injection well, but in an alternative holding discounted the opinion as unpersuasive, a court may not ignore the opinion altogether on grounds of hearsay.

At oral argument, echoing appellee's brief at footnote 1, the circuit judge said the court would give no heed to the industry experts' opinions because they were hearsay.[21]

The opnions would not have been hearsay had the involved industry entities and associations intervened in the administrative hearing or the circuit court, as they were invited to.[22] Even so, the Wyant letter accepted them as part of the record, and relied on them in an alternative holding.[23]

Unlike court rules, the rules governing administrative proceedings do not bar hearsay. MCR 24.275 allows evidence of the type "commonly relied upon by reasonably prudent men in the conduct of their affairs." Particularly in this case, where the national expert spoke to an audience which included 100 Michigan industry executives plus the MDEQ's second-in-command, where none of them disagreed with his observation, and where the other two experts are well-counseled industry veterans who could easily have said so if they were misquoted or taken out of context, the Wyant letter was "reasonably prudent" in accepting their evidence in the record. The letter

21 The transcript has been ordered.
22 See communications collected in exhibit 4 to plaintiffs' motion for summary disposition in the circuit court.
23 Wyant letter, page 1 note 1, 11.

having done so, the court should too.[24]

The letter went on to argue at page 11 that the industry leaders' opinions were "not persuasive" because the questions put to them did not remind them of Michigan's definition of "injection well" or spell out the regulatory consequences of their answers.

This is so. The questions did not make reference to R 324.102(x). Rather, they were simply factual questions containing ordinary English words. But contrary to the letter it is more persuasive, not less, to ask straightforward questions without explanation or gloss, because the answers will then be of like kind. When unsullied facts are in the record, an agency or a court is best able to evaluate them.

F. The court should declare under MCL 24.264 that a fracked gas well is an "injection well," subject to all rules and practices applicable to injection wells, in light of uncontested facts that (a) a frack well is completed by injecting millions of gallons of water and chemicals, (b) a significant fraction of the injectate remains intentionally disposed in the well forever, (c) "operation of oil and gas wells" includes both "injecting" and "disposal" of brine as part of the process of "producing oil or gas," and (d) the top national gas industry expert agrees with appellants that the operation of a frack well fits the wording of Michigan's definition of "injection well."

Environmental benefits to plaintiffs and other landowners who live near frack

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24 MCL 24.275; *City of Grosse Pointe Park v Detroit Historic District Commission*, Court of Appeals Case No 298802 (4/19/12, unpublished), at footnote 3, citing MCL 24.275 and *Becker-Witt v. Board of Examiners of Social Workers*, 256 Mich App 359, 663 NW2d 514 (2003) ("The review board's reliance on the statements of the [non-expert] witnesses in question was not improper under this somewhat relaxed standard [of MCL 24.275].")

wells will flow if their literal interpretation of R 324.102(x) is adopted, as opposed to the convoluted reasoning of the two-day-late Wyant letter. These include chemical pre-disclosure which would enhance the precision of baseline water testing before drilling starts, enforcement of a formula for maximum frack pressure, and other benefits. Appellants will not elaborate the point here, as they are discussed in their motion in the circuit court.[25]

It offends the English language for a frack well, in which millions of gallons of fluids are injected, not to be considered an injection well. No terms of art are used in the term's definition. Without hesitation or cavil, top industry experts agreed with plaintiffs about the definition when asked. One uncontested fact is that a frack well is in part a permanent disposal well. Disposal wells are admittedly injection wells. If the definition's surrounding context is to be considered at all, the rules' explicit inclusion of injecting and disposing as part of the process of gas well operations destroys any claim that a gas well cannot also be an injection well.

Accordingly appellants ask the court to declare that frack wells, as defined in the uncontested facts, are injection wells subject to all rules and practices for injections wells.

25 See pages 11-13, 18-19.

V. Conclusion

Wherefore, should the court not decide that appellants are entitled to a claim of appeal by right, they ask the court to grant leave.

Respectfully submitted,

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Dated: October 15, 2012

Certificate of Service

I certify that on the 15th day of October, 2012, I served the above pleading on the following counsel by regular mail:

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