STATE OF MICHIGAN
IN THE COURT OF APPEALS

GARY COOLEY AND BAN MICHIGAN FRACKING,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellee.
/

Court of Appeals No. 334133

Court of Claims No. 16-000050-MZ

BRIEF OF APPELLEE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

As correctly set forth in the opening brief of the Plaintiffs–Appellants Gary Cooley and Ban Michigan Fracking (hereafter Cooley), this Court has jurisdiction over this appeal pursuant to MCR 7.203(A)(1).

COUNTER-STATEMENT OF THE QUESTION PRESENTED

1. Michigan's Freedom of Information Act (FOIA) provides that a public body may withhold information "specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). Part 625, Mineral Wells, of the Natural Resources and Environmental Protection Act, MCL 324.62501 *et seq*., provides that all information and records pertaining to the application for and issuance of a mineral well permit must be held confidential by the Michigan Department of Environmental Quality until 10 years after the permitted well is completed. MCL 324.62508(d); MCL 324.62509(5). Did the DEQ correctly deny Mr. Cooley's FOIA request for information related to the application for and issuance of a mineral well permit when the governing statute specifically forbids disclosure of such information?

   Appellants' answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Yes.

STATUTES AND RULES INVOLVED

MCL 15.243

(1) A public body may exempt from disclosure as a public record under this act any of the following:

. . .

(d) Records or information specifically described and exempted from disclosure by statute.

MCL 324.62508

The supervisor of mineral wells, acting directly or through his or her deputy or authorized representative, may do any of the following:

. . .

(d) Require on all wells the keeping and filing of logs containing data that are appropriate to the purposes of this part. Logs on brine and test wells shall be held confidential for 10 years after completion and shall not be open to public inspection during that time except by written consent of the owner or operator. Logs for test wells drilled for exploratory purposes shall be held confidential until released by the owner or operator. The logs on all brine and test wells for exploratory purposes shall be opened to public inspection when the owner is no longer an active mineral producer, mineral lease holder, or owner of mineral lands in this state.

MCL 324.62509

(5) All information and records pertaining to the application for and issuance of permits for wells subject to this part shall be held confidential in the same manner as provided for logs and reports on these wells.

Mich Admin Code, R 299.2323

(1) An applicant seeking to convert a well drilled under this part to a use allowed under part 615 of the act shall apply for and obtain a permit as provided in that part.

(2) Upon issuance of the permit under part 615 of the act, a permit issued under this part of the act shall terminate and be without force and effect.

INTRODUCTION

This matter arises from Mr. Cooley's misguided assertion that the Michigan Department of Environmental Quality (DEQ) acted improperly when it refused to disclose information which it was forbidden, by law, from disclosing.

Michigan's FOIA statute provides that a public body may refuse to disclose any material that is exempted from disclosure by statute. MCL 15.243(1)(d). And Michigan's statute that governs mineral wells—Part 625, Mineral Wells, of the Natural Resources and Environmental Protection Act, MCL 324.62501 *et seq*.—specifically requires that all information related to the application for and issuance of mineral well permits shall be held confidential by the DEQ until 10 years after the permitted well is completed. MCL 324.62508(d); MCL 324.62509(5). In other words, the DEQ is *forbidden* from disclosing information related to mineral well permits and permit applications unless a well is permitted, drilled to completion, and a decade has passed.

Here, Mr. Cooley submitted a FOIA request seeking information related to the State Beaver Creek D4-11 mineral test well. The DEQ correctly denied the FOIA request—and the Court of Claims correctly affirmed that denial—on the grounds that such disclosure is plainly forbidden by Part 625.

Mr. Cooley now asks this Court to reverse the well-reasoned decision of the Court of Claims and order the DEQ to violate Part 625 by publicizing a permit applicant's confidential information. For the reasons set forth below, the DEQ respectfully requests that this Court deny the relief sought by Mr. Cooley and affirm the opinion of the Court of Claims.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

On June 10, 2015, Marathon Oil Company (Marathon) applied to the DEQ for a permit to drill a test well, known as the State Beaver Creek D4-11, pursuant to Part 625. (Ex A to DEQ's 5/2/2016 Br in Supp of Mot for Summ Disp.) In August and September of 2015, counsel for Mr. Cooley exchanged a series of emails with DEQ staff members, seeking information about the State Beaver Creek D4-11. (Exs 5-11 to Cooley's 2/16/2016 Comp.)

DEQ's Denial of the FOIA Request

On September 23, 2015, Mr. Cooley's counsel emailed FOIA request # 6723-15 to the DEQ. (Ex B to DEQ's 5/2/2016 Br in Supp of Mot for Summ Disp.) On October 1, 2015, DEQ FOIA coordinator Susan Vorce denied FOIA request #6723-15 on the grounds that the request sought information that the DEQ is required to keep confidential pursuant to Part 625. (Ex C to DEQ's 5/2/2016 Br in Supp of Mot for Summ Disp.) The denial informed Mr. Cooley's counsel that, if he wished to contest the denial of the FOIA request, his options were to appeal the decision in writing to the DEQ Director or to commence a civil action in circuit court within 180 days. (*Id*.)

On October 21, 2015, Mr. Cooley's counsel submitted an email appealing the denial of his FOIA request to the DEQ Director. (Ex D to DEQ's 5/2/2016 Br in Supp of Mot for Summ Disp.) The appeal stated that it was being made on behalf of Ban Michigan Fracking and Gary Cooley. (*Id*.) In the appeal, Mr. Cooley alleged

that the State Beaver Creek D4-11 was actually an oil and gas well and therefore not properly regulated under Part 625.[1] (*Id.*)

The DEQ Director, acting through the DEQ's Chief of the Office of Environmental Assistance Mr. Jack Schinderle, denied the appeal. (Ex E to DEQ's 5/2/2016 Br in Supp of Mot for Summ Disp.) The DEQ determined that the appeal had neither accurately described the well itself nor the relevant language of Part 625, and informed Mr. Boal that the only remaining option was to file an action in the relevant court. (*Id.*)

Litigation in the Court of Claims

Mr. Cooley filed a complaint in the Court of Claims on February 16, 2016. (2/16/2016 Cooley's Comp.) After a series of procedural mishaps, Mr. Cooley served the complaint on the DEQ on April 27, 2016.

The DEQ responded with a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) on May 2, 2016. (DEQ's 5/2/2016 Mot for Summ Disp and Br in Supp.) The DEQ argued, in relevant part, that it was forbidden by Part 625 from disclosing the material requested by Mr. Cooley. (DEQ's 5/2/16 Br in Supp of Mot for Summ Disp, pp 5–7.) Additionally, the DEQ argued that whether Marathon intended to drill the State Beaver Creek D4-11 as a mineral test well and

[1] Mr. Cooley's appeal to the DEQ Director also alleged that the DEQ had misinterpreted Part 625's confidentiality requirements. (*Id.*) This was, in fact, Mr. Cooley's primary argument on appeal to the DEQ Director and to the Court of Claims. However, Mr. Cooley has not raised this argument on appeal to this Court, and so it will not be addressed in this brief.

potentially convert it to an oil well later on was legally irrelevant, because Michigan law specifically allows that practice. (*Id.*, pp 7–9.)

On June 23, 2016, the Court of Claims issued its opinion granting the DEQ's motion for summary disposition pursuant to MCR 2.116(C)(8). (7/23/2016 Opinion, p 1, copy attached as Ex A to this Brief on Appeal.) The Court of Claims held that Part 625 forbade the DEQ from disclosing information related to Marathon's permit and permit application. (*Id.*, pp 2–4.) The Court of Claims additionally held that Michigan law specifically allows operators to obtain a mineral well permit, drill a mineral well, and subsequently convert that mineral well to an oil and gas well (at which time any and all necessary oil and gas well permits must be obtained). (*Id.*, pp 3–4.)

On July 13, 2016, Mr. Cooley filed a motion for reconsideration in which, by his own acknowledgment, he merely reiterated the arguments that he had already raised. (Cooley's 7/13/2016 Mot and Br for Recon of Summ Disp for Failure to State a Claim.) Additionally, Mr. Cooley speculated that the Court of Claims must have misplaced or otherwise failed to consider one of his briefs before issuing its opinion. (*Id.*) The very next day, on July 14, 2016, the Court of Claims denied Mr. Cooley's motion for reconsideration pursuant to MCR 2.119(F)(3). (7/14/2016 Order.)

Mr. Cooley now appeals to this Court from the June 23, 2016 opinion of the Court of Claims.

STANDARD OF REVIEW

The grant or denial of summary disposition is reviewed *de novo* to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118–119 (1999).

A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded allegations are accepted as true and considered in a light most favorable to the non-movant. Unlike a motion under MCR 2.116(C)(10), the moving party is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Id*. (internal citations omitted.)

ARGUMENT

I. The Court of Claims correctly affirmed the DEQ's decision to deny Mr. Cooley's FOIA request because the DEQ is legally forbidden from disclosing the requested information.

A. Analysis

The permit at issue in this matter is for a mineral test well, regulated under Part 625. (Ex A to DEQ's 5/2/2016 Br in Supp of Mot for Summ Disp.) Part 625 provides that, "*All information and records* pertaining to the application for and issuance of permits for wells subject to this part shall be held confidential in the same manner as provided for logs and reports on these wells." MCL 324.632509(5) (emphasis added).

The manner "provided for logs and reports on these wells" is also set forth in Part 625. Specifically, the statute provides that, "Logs on brine and test wells *shall be held confidential for 10 years after completion and shall not be open to public inspection during that time except by written consent of the owner or operator*." MCL 324.62508(d) (emphasis added).

The Part 625 administrative rules define "well completion" as "the time when a well has been tested and found to be incapable of being put to the use for which it was intended and has been plugged or has been found capable of being put to the use for which it was intended or when the well has been equipped to perform the service for which it was intended." Mich Admin Code, R 299.2304(l).

In other words, Part 625 requires the DEQ to hold all information and records pertaining to the application for and issuance of permits under Part 625 confidential until 10 years after the permitted well has been equipped to perform the service for which it was intended, or has been found to be incapable of being put to that use and has been plugged. It is undisputed that this confidentiality period has not yet passed for the State Beaver Creek D4-11. As such, the information sought by Mr. Cooley is "specifically described and exempted from disclosure by statute," and therefore exempt from Michigan's FOIA requirements. MCL 15.243(1)(d).

II. The sole argument raised by Mr. Cooley on appeal—that the State Beaver Creed D4-11 well is actually an oil well cleverly disguised as a mineral well—is both legally irrelevant and devoid of factual support.

A. Analysis

In their brief on appeal, Mr. Cooley and BMF allege that the State Beaver Creek D4-11 is not entitled to the confidentiality protections of Part 625 because it is not actually a mineral well at all, but rather is an oil and gas well. (Cooley's Opening Br, pp 6, 14–16.) This argument was considered and properly rejected by the Court of Claims because Michigan law specifically allows an operator to obtain a mineral well permit under Part 625, drill a mineral well, and later convert said mineral well into an oil and gas well. (6/23/2016 Opinion, pp 3–4.)

1. Whether Marathon has contemplated converting the State Beaver Creek D4-11 from a mineral test well into an oil or gas well is legally irrelevant, because Michigan law specifically allows this to happen.

Michigan law allows a permittee under Part 625 to drill a mineral test well and later convert that test well into an oil and gas well. Mich Admin Code, R 299.2323. Unlike mineral wells, which are regulated under Part 625, oil and gas wells are regulated under Part 615, Supervisor of Wells, of the Natural Resources and Environmental Protection Act, MCL 324.61501 *et seq*. The law is clear that, if an operator wishes to convert a Part 625 mineral test well into a Part 615 oil and gas well, the Part 625 permit is terminated (along with its confidentiality protections), and the operator must obtain a Part 615 permit for the well conversion. Mich Admin Code, R 299.2323.

In other words, even if Mr. Cooley's allegations of deception on the part of Marathon were factually meritorious (which, as set forth below, they are not), this alleged "deception" *would not be illegal*. A complaint premised on allegations of *legal* conduct fails to state a claim upon which relief can be granted, and therefore the Court of Claims correctly granted the DEQ's motion for summary disposition pursuant to MCR 2.116(C)(8).

2. In his attempt to demonstrate that the State Beaver Creek D4-11 is actually an oil well disguised as a mineral well, Mr. Cooley relies entirely on inadmissible hearsay and new exhibits which were not admitted in the Court of Claims and are improperly proffered for the first time here on appeal.

Even if Mr. Cooley had stated a claim upon which relief could be granted (which he did not), the allegation that the State Beaver Creek D4-11 is not a mineral well is premised entirely on inadmissible evidence and unchecked speculation.

Mr. Cooley's opening brief includes 22 attached exhibits, which are listed in an attachment titled "Appellants' Exhibit List." As indicated in Mr. Cooley's own exhibit list, exhibits 12-22 were not attached to the complaint that was filed in the Court of Claims, nor were they attached to any responsive briefs. (9/27/17 Cooley Br on Appeal, Appellants' Ex List ¶¶ 12–22.) Mr. Cooley seeks to introduce, and rely on, 11 new exhibits on appeal which were not introduced in the Court of Claims. This Court's review is limited to the record established by the lower court, and may not be expanded. *Sherman v Sea Ray Boats*, 251 Mich App 41, 56 (2002),

citing *Reeves v KMart Corp*, 229 Mich App 466, 481 n 7 (1998). So Mr. Cooley's inclusion of exhibits 12-22 is improper, and these materials should be disregarded.

Additionally, Mr. Cooley claims to know that the State Beaver Creek D4-11 is an oil well, not a mineral well, because a Marathon employee allegedly said so. (Cooley Opening Br, pp 6, 16.) This is inadmissible hearsay. The Michigan Rules of Evidence define "hearsay" as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The rules provide that hearsay is inadmissible in court. MRE 802. Here, Mr. Cooley relies on a statement attributed to a random Marathon employee to prove the truth of his assertion. This statement could not have been offered into evidence in the Court of Claims. Accordingly, it should not be considered by this Court.

CONCLUSION AND RELIEF REQUESTED

The DEQ correctly denied Mr. Cooley's FOIA request, and the Court of Claims correctly affirmed that denial, because disclosure of the requested information is expressly forbidden by Part 625. The speculation by Mr. Cooley that Marathon may intend to convert its mineral test well into an oil and gas well is legally irrelevant, because such a practice is perfectly legal. For these reasons, the DEQ respectfully requests that this Court affirm the order of the Court of Claims granting the DEQ's motion for summary disposition.

Respectfully submitted,

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