STATE OF MICHIGAN

COURT OF APPEALS

GARY COOLEY and BAN MICHIGAN FRACKING, Plaintiffs-Appellants, v DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee.	UNPUBLISHED March 16, 2017 No. 334133 Court of Claims LC No. 16-000050-MZ

Before: CAVANAGH, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

In this action brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiffs appeal as of right the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim). We affirm.

Marathon Oil Company applied under Part 625 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.62501 *et seq*., for a permit to drill a test well. Part 625 is applicable to mineral wells. Defendant granted the permit. Roughly three months later, plaintiffs' sought under FOIA numerous documents, including the application and permit, correspondence, testing data, and any notes taken of conversations had. Defendant refused to provide plaintiffs with information that they requested, citing MCL 324.62508(d) and MCL 324.62509(5), the confidentiality rules applicable to wells permitted under Part 625. Plaintiffs' subsequent appeal of that decision to the agency was also rejected because of the confidentiality rules.

Plaintiffs thereafter filed the present action in the Court of Claims, arguing in relevant part that the well was not drilled "solely for purposes related to minerals or mineral exploration" but, rather, "was drilled partially or completely to explore for oil and gas." They argued that therefore defendant should have issued the permit under Part 615 of NREPA, MCL 324.61501 *et seq*., and that the confidentiality provisions applicable to wells permitted under Part 625 did not apply. The Court of Claims found that the information requested by plaintiffs was confidential under Part 625 and that defendant was obligated to deny plaintiffs' FOIA request. The Court of Claims also found that plaintiff failed to allege facts sufficient to demonstrate that the well was not entitled to the protections of Part 625, even assuming that Marathon hoped to find oil at the

site as plaintiffs alleged. The court noted that Mich Admin Code, R 299.2323(1) allowed an applicant seeking to convert a well drilled under Part 625 to a use allowed under Part 615 to apply for and obtain a permit as provided in Part 615, and that the permit issued under Part 625 would remain in effect until issuance of a permit under Part 615. Rule 299.2323(2). Thus, the Court of Claims held that unless and until a permit issued under Part 615, the confidentiality provisions of Part 625 applied and that plaintiffs failed to state a claim upon which relief could be granted.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Johnson v Pastoriza*, 491 Mich 417, 428; 818 NW2d 279 (2012). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Id.* at 434-435. A motion is properly granted under MCR 2.116(C)(8) where "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant" and "the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. To the extent that this Court's review requires the proper application and interpretation of the FOIA, review is de novo. *Rataj v City of Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014). Review of any discretionary determination made by the trial court is for an abuse of discretion, *Herald Co*, *Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 467; 719 NW2d 19 (2006), which "occurs when the decision results in an outcome falling outside the principled range of outcomes," *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

The Michigan FOIA "provides for the disclosure of 'public records' in the possession of a 'public body.' " *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff*, 463 Mich 353, 360; 616 NW2d 677 (2000). "A policy of full disclosure underlies the FOIA." *Herald Co*, *Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 271; 568 NW2d 411 (1997). "[O]nce a request under the FOIA has been made, a public body has a duty to provide access to the records sought or to release copies of those records unless the records are exempted from disclosure." *Pennington v Washtenaw Co Sheriff*, 125 Mich App 556, 564; 336 NW2d 828 (1983). "MCL 15.243(1) sets forth certain exemptions available to public bodies to protect certain types of records from disclosure." *Landry v City of Dearborn*, 259 Mich App 416, 419-420; 674 NW2d 697 (2003). These exemptions must be construed narrowly, and the burden of proof rests with the party asserting an exemption. *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997).

Pursuant to MCL 324.62508(d), the supervisor of mineral wells[1] may:

> 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

[1] " 'Supervisor of mineral wells' means the state geologist." MCL 324.62501(m).

> 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.

Under MCL 324.6509(5), "[a]ll 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." Thus, the information sought by plaintiffs would therefore be confidential for a period of ten years after completion of the well.

Plaintiffs argue that their complaint stated a FOIA claim by simply stating that "D4-11 is not a mineral well." They maintain that this factual allegation must be accepted as true and that "all DEQ defenses premised on D4-11 being a mineral well" are therefore irrelevant when deciding a motion for summary disposition under MCR 2.116(C)(8). The Court of Claims concluded that plaintiffs failed "to allege facts sufficient to demonstrate that the well is not entitled to the protections of Part 625." As the court properly observed, under Rule 299.2323(1), which applies to mineral wells, "[a]n 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." Upon issuance of the permit under Part 615, "a permit issued under [Part 625] shall terminate and be without force and effect." Rule 299.2323(2). Unless and until such an occurrence, the confidentiality protections of Part 625 apply and plaintiff's assertion that its bare allegation that D4-11 is not a mineral well is sufficient to withstand summary disposition is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Deborah A. Servitto