STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS FOR ENVIRONMENTAL INQUIRY, BYRON DELONG, THOMAS HARKLEROAD, WILLIAM LEWIS, JOHN PLATH, JEAN VESELENAK, and CHARLES WINTERS,

Plaintiffs-Appellants,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellee,

and

MID MICHIGAN ENERGY, LLC, WOLVERINE POWER SUPPLY COOPERATIVE, INC., and CONSUMERS ENERGY COMPANY,

Intervening Defendants-Appellees.

UNPUBLISHED
February 9, 2010

No. 286773
Ingham Circuit Court
LC No. 08-000114-AW

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's grant of summary disposition in favor of defendants. We affirm.

On August 27, 2007, as authorized by MCL 24.238 of the Administrative Procedures Act (APA), counsel for plaintiffs sent a letter to the director of defendant Department of Environmental Quality (DEQ) requesting that the DEQ promulgate a rule regulating emissions of CO_2. After the 90-day period set forth in the statute had elapsed, plaintiffs filed this case.

Plaintiffs' amended complaint contained three counts. The first count sought mandamus relief requiring the DEQ to promulgate rules regulating CO_2 emissions as set forth under MCL 324.5512 of the Natural Resources and Environmental Protection Act (NREPA), which mandates that the DEQ "promulgate rules for purposes of . . . [c]ontrolling or prohibiting air pollution." *Id.* The second count sought mandamus relief requiring the DEQ to comply with MCL 24.238 of the APA, either by initiating the rulemaking requested, or by issuing "a concise

written statement of its principal reasons for denial of the request." The third count sought to enjoin the DEQ from issuing any air quality permits until they had complied with either MCL 324.5512 of the NREPA or MCL 24.238 of the APA.

Shortly after the lawsuit was filed, the DEQ sent a letter to plaintiffs' counsel denying the rulemaking request, and explaining why. The DEQ then moved for summary disposition under MCR 2.116(C)(4). The DEQ argued that they had complied with MCL 24.238, rendering the second and third counts of the complaint moot. Further, the DEQ argued that the first count should be dismissed because it was effectively an effort by plaintiffs to seek judicial review of the DEQ's denial of the rulemaking request, which is explicitly disallowed under MCL 24.238.

Subsequently, the motion for summary disposition was granted. With regard to the first count of plaintiffs' complaint, the trial court held that plaintiffs failed to state a valid claim for mandamus because (1) plaintiffs did not demonstrate a clear legal right to the promulgation of specific rules regarding CO_2 emissions, (2) MCL 324.5512 does not impose upon the DEQ a "clear legal duty" to regulate CO_2 emissions, (3) MCL 324.5503(a) grants the DEQ discretion as to whether to promulgate rules controlling and prohibiting various emissions, and (4) plaintiffs were given what they were entitled to under the APA.

With regard to the second and third counts of plaintiffs' complaint, the court noted that MCL 24.238 unambiguously provides that the agency's denial of a request to promulgate a rule "is not subject to judicial review." Because the DEQ denied the request with a concise written statement of the principle reasons, the counts that sought compliance with MCL 24.238 were moot and the court lacked jurisdiction to review the DEQ's denial. Thus, the DEQ's motion for summary dismissal was granted and plaintiffs' complaint was dismissed. Plaintiffs moved for reconsideration, and sought leave to amend the complaint a second time, seeking declaratory and injunctive relief under MCL 324.1701 of the Michigan Environmental Protection Act (MEPA). The motion was denied and this appeal followed.

Plaintiffs argue that the trial court's summary dismissal of their complaint was erroneous because they were entitled to a writ of mandamus. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). Whether a defendant has a clear legal duty to perform, and whether a plaintiff has a clear legal right to that performance present legal questions subject to de novo review. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006).

To establish a right to mandamus relief, the plaintiffs must prove that (1) they have a clear legal right to the performance of the specific duty sought to be compelled, (2) the defendant has a clear legal duty to perform it, (3) the act is ministerial in nature, and (4) the plaintiffs have no other adequate legal or equitable remedy. *Inglis v Public School Employees Retirement Bd*, 374 Mich 10, 13; 131 NW2d 54 (1964); *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999). As a general rule, mandamus only lies when the plaintiffs have "a specific right . . . not possessed by citizens generally." *Wilson v Cleveland*, 157 Mich 510, 511; 122 NW 284 (1909). Thus, the plaintiffs generally have to demonstrate some special injury beyond what would be suffered by the public at large. *Inglis*, *supra* at 12.

Here, as the trial court held, plaintiffs did not establish that they have a clear legal right to the promulgation of specific rules regarding CO_2 emissions. The only injury alleged in

plaintiffs' amended complaint arising from unregulated CO_2 emissions is "[g]lobal warming and/or climate change," which, in plaintiffs' own words, "imposes upon all the people of Michigan a severity of injury that is indivisible and at once a substantial concrete injury personal to every citizen." Thus plaintiffs have not alleged a special injury distinct from the injury suffered by the general public; in fact, they have alleged the opposite. And in their brief on appeal plaintiffs have not set forth any such special injury. "[I]t has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Univ Medical Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143; 369 NW2d 277 (1985), citing *Inglis*, *supra*. Accordingly, we affirm the trial court's summary dismissal of plaintiffs' request for a writ of mandamus.

In light of our conclusion that plaintiffs failed to establish that they had a clear legal right to the promulgation of specific rules regarding CO_2 emissions, we need not consider (1) whether the DEQ had a clear legal duty to promulgate specific rules regarding CO_2 emissions, and (2) whether MCL 24.238 prohibited plaintiffs' claim for mandamus.

Next, plaintiffs challenge the trial court's denial of their motion for reconsideration. A motion for reconsideration should be granted only when the court has made "a palpable error by which the court and parties have been misled," and when correction of that error would have led to a different disposition of the motion. MCR 2.119(F)(3). Plaintiffs argue that the trial court's error was in overlooking plaintiffs' claim under MCL 324.1701 of the MEPA as set forth in their proposed second amended complaint. We disagree. Because plaintiffs did not state a claim under MEPA, the trial court did not abuse its discretion in denying plaintiffs' motion. See *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

In their proposed second amended complaint, plaintiffs alleged that the DEQ air permit regulatory regime was deficient under the MEPA because it "includes no standard for the protection of natural resources against likely pollution, impairment, or destruction resulting from unregulated CO_2 emissions." Plaintiffs further alleged that the DEQ's "consideration of air permit applications under a regime that does not consider CO_2 emissions at all is contrary to the Department's mandatory obligation under MEPA to determine the likely pollution, impairment, and destruction of air, water, and other natural resources, or the public trust in those resources." Thus, plaintiffs sought to enjoin the issuance of air quality permits until the DEQ complied with its legal duties set forth in the MEPA.

In *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), our Supreme Court, held:

> To prevail on a MEPA claim, the plaintiff must make a "prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources . . . ." [*Id*. at 514, quoting MCL 324.1703(1).]

In that case, the plaintiff sued the DEQ alleging that the DEQ violated the MEPA when it approved a sand dune mining permit for a sand mining operation. *Preserve the Dunes, Inc*, *supra* at 511-512. Our Supreme Court rejected that claim, holding that the "MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determination of

permit eligibility. . . . An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id*. at 519. In other words, the MEPA authorizes suits against regulated or regulable actors who are specifically engaged in "wrongful conduct" that harms the environment.

Here, plaintiffs' proposed second amended complaint failed to allege that "conduct of the [DEQ] has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." See *Preserve the Dunes, Inc*, *supra* at 514. Instead plaintiffs have challenged the DEQ's decision not to promulgate specific rules regarding the regulation of CO_2 emissions. This administrative decision does not constitute "wrongful conduct" within the contemplation of the MEPA. See *id*. at 519; see, also *Anglers of Ausable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 128-129; 770 NW2d 359 (2009). Because plaintiffs' proposed second amended complaint did not state a claim under the MEPA, the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration. See *In re Beglinger Trust*, *supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro