ADMINISTRATIVE LAW

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I. INTRODUCTION

Michigan appellate courts rendered decisions on administrative law during the 2011 *Survey* period that clarified the jurisdiction, statutory interpretation authority, and rule-making authority of government agencies and reversed agency misinterpretation of statutes and rules.

II. THE MICHIGAN SUPREME COURT CASE

In *King v. State*,[1] the Michigan Supreme Court held that the Commissioner of the Office of Financial and Insurance Services ("OFIS")[2] incorrectly interpreted the Insurance Code[3] as it existed in 2004 and also misinterpreted the 2008 amendments to the Code—which now require the Commissioner to automatically deny an insurance license to any applicant who has committed a felony—by attempting to revoke the license of an insurance agent on the basis of a prior felony that was previously disclosed to OFIS and committed years before the

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1. 488 Mich. 208, 793 N.W.2d 673 (2010), *reh'g denied*, 489 Mich. 872, 795 N.W.2d 817 (2011).

2. OFIS is now the Office of Financial and Insurance Regulation ("OFIR"). *Id.* at 211 n.3.

3. MICH. COMP. LAWS ANN. §§ 500.100-.8302 (West 1957).

amendments were enacted.[4] The court also held that revocation of an insurance agent's license based on an erroneous reading of the Insurance Code would be an impermissible abuse of the Commissioner's discretion.[5]

In 2000, the "plaintiff was convicted of operating a motor vehicle under the influence of liquor," which is a felony in Michigan.[6] In 2004, the plaintiff applied to OFIS for an insurance license and disclosed his felony conviction.[7] The Insurance Code had been amended in 2002, replacing the "good moral character" requirement in the licensure provisions with a requirement in section 1205 that an application "shall not be approved" if the applicant has "committed any act that is a ground for denial, suspension, or revocation" under section 1239.[8] "While this [provision] seems mandatory when read in isolation, [section] 1239 (1) provided that 'the commissioner *may* place on probation, suspend, revoke, or refuse to issue' a license for a list of possible reasons, including an applicant's 'having been convicted of a felony.'"[9] Thus, while section 1205 left the Commissioner with no discretion concerning the issuance of an insurance license, section 1239 provided the Commissioner with some discretion, setting up a potential conflict that would prove pivotal in the case.

Shortly before the plaintiff applied for his license in 2004, the Commissioner rendered an unpublished decision addressing this conflict and concluded that the Insurance Code "removed the discretion to permit felons to receive licenses."[10] In spite of this decision, OFIS acknowledged the plaintiff's conviction, provided the plaintiff with a felony waiver, and granted the plaintiff an insurance license.[11] In 2008 the Insurance Code was amended so that if "a convicted felon [were] to apply for an insurance producer license *today*, the commissioner *would* be required to deny it," thereby eliminating any possible discretion that the Commissioner may have had prior to 2008.[12] In 2008, the defendants—the State of Michigan, the Commissioner of OFIS, and the Michigan Department of Labor and Economic Growth—began

4. *King*, 488 Mich. at 211.

5. *Id.* at 216-17.

6. *Id.* at 211. *See also* MICH. COMP. LAWS ANN. § 257.625 (West 1992).

7. *King*, 488 Mich. at 211.

8. *Id.* at 213. *See also* MICH. COMP. LAWS ANN. §§ 500.1205(1)(b) and 500.1239 (West 2009).

9. *King*, 488 Mich. at 213. *See also* MICH. COMP. LAWS ANN. § 500.1239.

10. *King*, 488 Mich. at 214. The Commissioner's decision was rendered in Mazur v. Office of Fin. & Ins. Servs., No. 03-384-L, Docket No. 2003-1515 (May 14, 2004).

11. *King*, 488 Mich. at 211-12.

12. *Id.* at 215.

proceedings to revoke the plaintiff's license based on the belief that the "change to the Insurance Code in 2002 had required the Commissioner to deny [the] plaintiff's application for his insurance license, that failing to do so was a mistake, and that the [2008 amendments to] the Insurance Code required the Commissioner to correct that mistake.[13] In response, the plaintiff filed suit, seeking an injunction."[14]

The three questions before the Michigan Supreme Court were:

> (1) whether in 2004 the [c]ommissioner . . . was *required* by [the Insurance Code] to deny plaintiff's application for a resident insurance producer license on the basis of plaintiff's fully disclosed prior felony conviction, (2) whether the commissioner [was] now *required* by [the 2008 amendments to the Insurance Code] to affirmatively revoke plaintiff's license on the basis of the same prior felony, and (3) whether the commissioner [was] now *permitted* to revoke plaintiff's license on the basis of the same prior felony

as a matter of discretion.[15]

The trial court granted the plaintiff's request for an injunction, ruling that "even if the commissioner had made a mistake in granting [the] plaintiff's license, equity precluded [the] defendants from revoking it now . . . ."[16] The court of appeals affirmed.[17] The supreme court also affirmed, answering "all three questions in the negative."[18] The court found that the defendants' reading of the Insurance Code as it existed in 2004 was erroneous and not to be given deference; that revocation under the 2008 amendments was still discretionary in the case of a prior felony, even if the decision whether to grant an insurance license was not; and that exercise of the Commissioner's discretionary revocation powers based on an erroneous reading of the Insurance Code would itself be an abuse of discretion.[19]

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13. *Id.* at 212.
14. *Id.*
15. *Id.* at 210-11.
16. *Id.* at 212.
17. *King*, 488 Mich. at 212.
18. *Id.* at 211.
19. *Id.* at 217 ("Plaintiff's license was properly granted by the commissioner in 2004. The Insurance Code does not require plaintiff's license to be revoked now. The commissioner could have exercised reasonable discretion and decided to pursue revocation of plaintiff's license; however, in this case, the commissioner necessarily

A. The Lead Opinion

The Michigan Supreme Court reached a 4-3 decision.[20] Justice Davis wrote the lead opinion, which was joined by Justice Hathaway. Justice Cavanagh wrote a concurring opinion which was joined by Chief Justice Kelly. Justice Young wrote a dissent, which was joined by Justice Corrigan and Justice Markman.[21] The split in the court was essentially due to a disagreement over how to resolve the conflict between sections 1205 and 1239 of the Insurance Code and the deference to be given the Commissioner's opinion on the matter.[22]

The lead opinion by Justice Davis concluded that sections 1205 and 1239 were to be read together as providing the Commissioner with limited discretion because these sections "replaced the ambiguous judgment call of 'good moral character' with a more rigorously defined judgment call that entailed consideration of enumerated scenarios under which adverse action *may* be found appropriate," thereby requiring the Commissioner to "make a discretionary judgment call when reviewing an application and deny the application if he or she concludes—in the exercise of that discretion—that denial, suspension, or revocation would be appropriate."[23] After noting that the Commissioner's unpublished decision in 2004 reached an opposite conclusion of no discretion, Justice Davis went on to state that "[a]n agency's interpretation of a statute is entitled to deference, but generally only if that interpretation has been relied on for a long time, and in any event no such interpretation may overcome the plain meaning of the statute itself."[24] Because the Commissioner's opinion was unpublished, was not "extensively relied on or applied consistently, . . . was not even widely circulated internally," and "was clearly not relied on when the commissioner considered plaintiff's application and granted his license," the Commissioner's

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abused that discretion by proceeding on the basis of an erroneous belief that he was *required* to revoke plaintiff's license.").

20. *Id.* at 209.

21. *Id.* at 209.

22. *Id.* at 223-24 (Young, J., dissenting) ("[T]he primary dispute here is whether OFIS was mandated by statute to reject plaintiff's application in 2004, or whether OFIS had discretion to approve or reject the application at that time. If defendants' statutory interpretation is correct and the Insurance Code mandated that OFIS not grant licenses to former felons, then there exists a clear statutory mandate that neither equity nor this Court can avoid. In that situation, OFIS must be allowed to retract the license that should not have been issued in the first place.").

23. *King*, 488 Mich. at 213-14.

24. *Id.* at 214 (citing Ludington Serv. Corp. v. Acting Ins. Comm'r, 444 Mich. 481, 505 n.35, 511 N.W.2d 661 (1994)).

opinion was afforded no deference.[25] The lead opinion also stated that the Commissioner's decision "was incorrect," making clear its view that the Commissioner's reading did not comport with the "plain meaning" of the Insurance Code.[26] As a result of its interpretation, the lead opinion held that in 2004 the Commissioner had not been required to deny the plaintiff's application and the decision to grant the plaintiff an insurance license was a valid exercise of discretion.[27]

Justice Davis interpreted the 2008 amendments to the Insurance Code as resolving the conflict between sections 1205 and 1239, making the statutes "consistent."[28] Under "the general rule of construction that changes to a statute should only apply prospectively," he concluded that the plaintiff's license should not be revoked because of the 2008 amendments.[29] While denial of an insurance license application was mandatory, revocation of an existing license remained discretionary as before.[30] That is, while the Insurance Code gave "the commissioner the discretion to pursue revocation of plaintiff's resident insurance producer license for . . . plaintiff's having been convicted of a felony," the Commissioner was not required to revoke the plaintiff's license and, in fact, had discretion not to.[31] Revocation of an insurance license must be a "reasonable exercise of discretion,"[32] and the Commissioner's mistaken belief that he had no discretion amounted to an "erroneous abdication of discretion [that was], in itself, an abuse of discretion" in violation of this requirement.[33] In correcting this error, the lead opinion held "that the commissioner may not revoke a license on the basis of the erroneous belief that he must do so when, in fact, he has discretion . . . . [T]his result is mandated by the plain terms of the Insurance Code . . . ."[34] However, the lead opinion made "no pronouncement about whether equity applies . . . or what effect it might have" on the Commissioner's

25. *Id.* at 214-15.

26. *Id.*

27. *Id.* at 215.

28. *Id.*

29. *King*, 488 Mich. at 214.

30. *Id.* at 215-16 ("Although the current statutes require denial of a license, they do not require an existing license to be revoked . . . . Denial is mandatory if any of a number of enumerated conditions is satisfied; however, *revocation* is still as discretionary as it was in 2004. Therefore, we answer the second question, whether defendant is currently required by statute to revoke plaintiff's license, in the negative.").

31. *Id.* at 216.

32. MICH. COMP. LAWS ANN. § 500.205 (West 1992).

33. *King*, 488 Mich. at 216 ("[I]n this case, the commissioner cannot be said to be engaging in a 'reasonable exercise of discretion.'").

34. *Id.*

discretion to revoke the plaintiff's license in the future based on his prior felony.[35]

B. The Concurring Opinion

Justice Cavanagh concurred with the lead opinion in its resolution of the three questions at issue but wrote separately to express his views that OFIS "may not—in the absence of additional cause—revoke plaintiff's license solely on the basis of the fully disclosed and waived felony conviction known to OFIS when it issued plaintiff's license in 2004" and "a governmental licensing agency is estopped from revoking a license solely on the basis of the same fully disclosed and accurate facts for which it had previously granted an express waiver if the licensee has reasonably relied to his detriment on the license issued."[36] Thus, while the lead opinion would have allowed the Commissioner to exercise discretion and revoke the plaintiff's insurance license because of his prior felony, Justice Cavanagh would have denied the Commissioner this right because of equitable considerations and the resultant harm to the plaintiff.[37]

C. The Dissenting Opinion

Justice Young issued a lengthy dissent consisting of a response to the lead opinion and a detailed analysis in which he arrived at vastly different conclusions from the four affirming justices, chiding them for "fail[ing] to consider the entire structure of the Insurance Code when coming to their respective conclusions . . . ."[38] First, he resolved the conflict between sections 1205 and 1239 based on the fact that section 1205 applied to resident insurance agents and section 1239 applied to resident *and* nonresident insurance agents, ultimately concluding that "the Legislature wished to provide *no discretion* to the commissioner when licensing individuals from Michigan, but allow[ed] the

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35. *Id.* at 216-17.

36. *Id.* at 217 (Cavanagh, J., concurring).

37. *Id.* at 220 ("[E]quitable estoppel may be an appropriate remedy where one party has changed its position in reasonable reliance on a governmental mistake . . . . There is no question here that plaintiff has reasonably relied on the license issued to develop a career and that revocation would cause plaintiff an extreme detriment.").

38. *Id.* at 228 (Young, J., dissenting). Many of Justice Young's arguments are repeated, in condensed form, in his dissent to the court's subsequent order denying a motion for rehearing. By the time the order was issued, Justice Young had become Chief Justice and his dissent was joined once again by Justice Markman. *See* King v. State, 489 Mich. 872, 795 N.W.2d 817 (2011) (Young, C.J., dissenting).

commissioner to retain *some* discretion in taking disciplinary action or in licensing a nonresident applicant."[39] As a result, OFIS "failed to discharge its statutory duties and enforce relevant statutory mandates when it granted plaintiff an insurance license in 2004, despite plaintiff's previous conviction of a felony," because "[g]overnmental administrators, like those in OFIS, cannot act in derogation or contravention of their statutory authority when issuing licenses."[40] However, because of prior case law, OFIS was required to correct this mistake by revoking the plaintiff's insurance license.[41] Accordingly, no equitable considerations could alter this result.[42]

In addition to criticizing the lead opinion for "fail[ing] to distinguish (or even discuss) any of the relevant caselaw holding that a license issued in violation of a statute should be revoked," Justice Young also pointed out the questionable implications of the majority opinions.[43] For example, he hypothesized "a dangerous felon who was inappropriately and illegally provided a license to carry a firearm, contrary to the clear statutory mandate preventing such licensure," and asked the rhetorical question with an implied negative answer, "Would the majority justices here allow the felon to retain his firearm license?"[44] His animating

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39. *King*, 488 Mich. at 227. Justice Cavanagh thought this to be an absurd result and concluded that sections 1205 and 1239 were ambiguous:

> It would indeed be an absurd result to conclude that the Legislature intended to allow discretionary licensing of out-of-state felons to sell insurance in Michigan while mandating that no licenses could be issued to resident felons. Such an intention would provide *less* protection to Michigan policyholders, in direct conflict with the purposes animating the Insurance Code . . . . I therefore decline to adopt an absurd interpretation of the licensing provisions in order to avoid a finding of ambiguity.

Id. at 219 (Cavanagh, J., concurring).

40. *Id.* at 222.

41. *Id.* at 231-33 ("This Court has long held in cases involving similar licensing decisions that revocation procedures must be invoked if a license was granted in excess of an agency's statutory authority . . . . When an agency does not act in accordance with its limited statutory powers, its decision should not stand, even if that action will result in a harsh outcome.").

42. *Id.* at 233 ("In this case, because the statute as written at the time of plaintiff's licensing in 2004 mandated that OFIS decline to license anyone who had been convicted of a felony, OFIS should not have licensed plaintiff, and this Court *cannot* use equity to displace the *statutory mandate* or otherwise validate that improper decision.").

43. *Id.* at 239.

44. *Id.* at 240. Justice Cavanagh disagreed: "It is beyond cavil that . . . the need to protect society from dangerous felons would outweigh any interest the felon has in keeping such a license. Any arguments posited that the rule I would apply to this case could allow such absurd results is pure hyperbole." *Id.* at 221 (Cavanagh, J., concurring).

concern was that the exercise of administrative agency discretion in the face of a purposely inflexible statute such as the Insurance Code violated the separation of powers among the three branches of government[45] and had "the potential to establish an untenable state of affairs in which every bureaucrat would become a king unto himself whose decisions—no matter how contrary to established law—are insulated from challenge."[46]

III. THE COURT OF APPEALS CASES

A. Jurisdiction of the Michigan Tax Tribunal and the Michigan Court of Claims

In *MJC/Lotus Group v. Township of Brownstown*,[47] the Michigan Court of Appeals held that the Michigan Tax Tribunal ("Tribunal") lacked subject matter jurisdiction to review the accuracy of a property's taxable value in years not directly under appeal notwithstanding that such value is used as a starting point to calculate the property's taxable value in a year properly under appeal.[48] In *MJC/Lotus Group* the court of appeals heard three consolidated cases, all of which involved, inter alia, a challenge to the application of the mathematical formula used to compute a property's taxable value.[49] The mathematical formula in question provided that a "property's taxable value in a given year equal[ed] '[t]he property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, *plus all additions*.'"[50] The petitioners in this case argued that "the immediately preceding year's taxable values include[d] 'additions' for public service improvements, which the Michigan Supreme Court declared to be unconstitutional" in *Toll Northville Ltd. v. Township of Northville*.[51] Therefore, according to the petitioners, the Tribunal was required to correct this unconstitutional miscalculation by subtracting the value of public service improvements from the assessments made by the defendant townships in preceding years, use these "corrected taxable values to recalculate the taxable values in the first year under appeal, and

45. *King*, 488 Mich. at 233-36.

46. *Id.* at 240.

47. 293 Mich. App. 1, -- N.W.2d -- (2011) (per curiam).

48. *Id.* at 5.

49. *Id.* at 4-5.

50. *Id.* at 7 (emphasis added). *See also* MICH. COMP. LAWS ANN. § 211.27a(2)(a) (West 1999).

51. *MJC/Lotus Group*, 293 Mich. App. at 7; *see also* Toll Northville, Ltd. v. Twp. Of Northville, 480 Mich. 6, 13-14, 743 N.W.2d 902 (2008).

similarly adjust the taxable values in subsequent years under appeal."[52] However, the Tribunal refused to do that recalculation, finding that it lacked subject matter jurisdiction to review the taxable value of property in a year not under appeal, and affirmed the assessments made by the townships.[53]

The court of appeals upheld the Tribunal's decision[54] based in part on the "long-held principle" that "the law prohibits the Tribunal from revisiting the accuracy of assessments and other evaluations that have become 'unchallengeable,' whether because a final judgment has been entered regarding the values (collateral estoppel), or the window for filing a petition to challenge those values has lapsed (lack of jurisdiction)."[55] The court also relied on the statute granting the Tribunal jurisdiction,[56] the "foreshadowing" in *Toll Northville*, and the court's previous decision in *Leahy v. Orion Township*[57] to conclude that the Tribunal was forbidden "from hearing a constitutional argument regarding an invalid action occurring in the preceding year used to calculate the tax assessment for the current year."[58] The court was concerned that permitting property owners "to reach back into the past and 'correct' values where they failed to appeal the taxable value during the designated statutory time period" would "permit a second bite at the apple to contest the taxable value from tax years that were not timely appealed."[59]

In *Oakland County v. Department of Human Services*,[60] the Michigan Court of Appeals clarified the jurisdiction of the Michigan Court of Claims and held that the exclusive subject matter jurisdiction of the court of claims turns entirely on whether a claim is *ex contractu* or *ex delicto* in nature; it is irrelevant whether a plaintiff seeks money damages or other monetary relief because it is the essential nature of the claim—

52. *MJC/Lotus Group*, 293 Mich. App. at 7.

53. *Id.* at 10.

54. *Id.* at 16.

55. *Id.* at 9 (citing Auditor Gen. v. Smith, 351 Mich. 162, 168, 88 N.W.2d 429 (1958)).

56. MICH. COMP. LAWS ANN. § 205.735(3) (West 2006) (the Tribunal's jurisdiction "is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved.").

57. 269 Mich. App. 527, 531, 711 N.W.2d 438 (2006) ("[O]nce a[] [real property] assessment appeals period [has] run[], the assessed value is no longer subject to change" and therefore the fixed assessment value has to be used where "a statutory assessment formula calls for the use of a [later] unchallengeable assessed value.").

58. *MJC/Lotus Group*, 293 Mich. App. at 10 (citations omitted).

59. *Id.* at 12.

60. Oakland Cnty. v. Dep't of Human Servs., 290 Mich. App. 1, 799 N.W.2d 566 (2010), *rev'd by* 489 Mich. 978, 799 N.W.2d 13 (2011).

and not the particular type of relief sought—that determines whether the court of claims possesses exclusive subject matter jurisdiction.[61] The defendant agency in *Oakland County*—the Department of Human Services ("DHS")—was responsible for the care and custody of children who are permanent wards of the state.[62] Under section 5 of the Youth Rehabilitation Services Act ("YRSA"),[63] the county from which a public ward is committed "is liable to the state for 50% of the cost of his or her care."[64] Michigan Administrative Rule 400.341 provides that the daily rate for the cost of caring for wards of the state must be established in September of the year before the rate is put into effect.[65] However, the DHS sought to retroactively establish the daily rate for the cost of caring for wards in 2007, an adjustment that increased Oakland County's costs by $150,765.62.[66] Oakland County filed suit in the court of claims, seeking a declaration that, inter alia, the DHS was not entitled to retroactively establish or increase such rates.[67] Because the DHS normally reimbursed Oakland County for its expenses and had withheld the disputed amount of $150,765.62, Oakland County also sought a refund in the court of claims.[68] The DHS argued that the court of claims did not have subject matter jurisdiction over the controversy because the action had not arisen out of contract or tort.[69] The court of claims disagreed, concluding that its exclusive jurisdiction was not limited to those actions arising in contract or tort, but also included claims grounded in "declaratory relief *and* monetary damages."[70]

The court of appeals agreed that the court of claims had subject matter jurisdiction, but it disagreed with the court of claims' legal reasoning.[71] The court of appeals first noted that the court of claims' exclusive subject matter jurisdiction is defined by section 6419 of the Revised Judicature Act of 1961, which provides for jurisdiction to "hear and determine all claims and demands . . . ex contractu and ex delicto" but makes no mention of claims for money damages or declaratory relief.[72] Relying on *Parkwood Ltd. Dividend Housing Association v.*

61. *Id.* at 8-9.
62. *Id.* at 1.
63. MICH. COMP. LAWS ANN. §§ 803.301-09 (West 1999).
64. MICH. COMP. LAWS ANN. § 803.305(1).
65. *Oakland Cnty.*, 290 Mich. App. at 3.
66. *Id.* at 4.
67. *Id.* at 5.
68. *Id.* at 5-6.
69. *Id.* at 6.
70. *Id.*
71. *Oakland Cnty.*, 290 Mich. App. at 7.
72. *Id.* at 7-9. *See also* MICH. COMP. LAWS ANN. § 600.6419(1)(a) (West 1984).

State Housing Development Authority[73] and the language of section 6419, the court of appeals concluded that the exclusive subject matter jurisdiction of the court of claims is limited to claims that are ex contractu or ex delicto in nature.[74] It held that, under *Parkwood*, it is irrelevant whether a plaintiff seeks money damages or other monetary relief for purposes of determining whether the court of claims possesses jurisdiction under section 6419(1)(a).[75] The court of appeals explained that the term "ex delicto" "describes claims that grow out of or are founded upon a wrong or tort."[76] Furthermore, "the term 'ex contractu' describes 'civil actions arising out of contract.' But the term . . . does not merely describe traditional breach-of-contract claims and claims arising from express contracts; it also encompasses quasi-contract claims and causes of action arising from contracts implied in fact and law."[77] The court of appeals held that the court of claims had subject matter jurisdiction because Oakland County's claim for reimbursement constituted a quasi-contractual claim.[78]

"[I]n lieu of granting leave to appeal," the Michigan Supreme Court reversed "the judgment of the Court of Appeals and [remanded the] case to the Court of Claims for entry of an order granting summary disposition to the [DHS]."[79] The court affirmed "[t]he Court of Appeals [for] correctly holding that the Court of Claims erred in holding that [it was vested with jurisdiction because Oakland County's] claim involve[d] a request for money damages from the state."[80] Citing *Parkwood*, the court reaffirmed that, pursuant to section 6419, "the Court of Claims has

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73. 468 Mich. 763, 772, 664 N.W.2d 185 (2003) ("The plain language of § 6419(1)(a), the primary source of jurisdiction for the Court of Claims, does not refer to claims for money damages or to claims for declaratory relief. Rather, in broad language, this provision grants the Court of Claims exclusive jurisdiction of 'all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state . . . .' Because the present case involves a contract-based claim for declaratory relief against a state agency, we conclude that it falls within the exclusive jurisdiction of the Court of Claims under the plain language § 6419(1)(a).").

74. *Oakland Cnty*, 290 Mich. App. at 9.

75. *Id.* at 9-10. The determination that a plaintiff seeking money damages from a state agency is irrelevant for purposes of determining the court of claims' jurisdiction was not unanimous. *Id.* at 15 (Shapiro, J., concurring) ("I write separately because I conclude that the Court of Claims had jurisdiction because plaintiff sought monetary damages from a state agency.").

76. *Id.* at 12 (citation omitted).

77. *Id.* at 11-12.

78. *Id.* at 13.

79. Oakland Cnty. v. Dep't of Human Servs., 489 Mich. 978, 799 N.W.2d 13 (2011). The decision of the court was five-two; Justice Kelly and Justice Hathaway would have granted leave to appeal. *Id.* at 14.

80. *Id.* at 13.

jurisdiction over tort and contract-based claims against the state, regardless of whether the claims are for money damages or declaratory relief."[81] However, the court held that "the Court of Appeals erred in holding that jurisdiction [was] nonetheless vested in the Court of Claims because [Oakland County's] claim was a contract-based claim."[82] "Instead, because [Oakland County]'s claim [was] a statutory and administrative rule-based claim, grounded respectively in [section 5 of the YRSA and Administrative Rule 400.341]," and not a contract-based claim, "jurisdiction [was] not properly vested in the Court of Claims."[83]

B. Agency Authority to Promulgate Rules

In *Michigan Farm Bureau v. Department of Environmental Quality*,[84] the Michigan Court of Appeals was called upon to review a circuit court grant of summary disposition regarding the authority of an administrative agency to promulgate a rule requiring various agricultural businesses to obtain permits if they or their members discharged or potentially could discharge pollutants through their concentrated animal feeding operations ("CAFO").[85]

At issue in *Farm Bureau* was Rule 2196 (or the "Michigan CAFO Rule"), promulgated by the Michigan Department of Environmental Quality ("Department") under Part 31 of the Michigan Natural Resources and Environmental Protection Act ("NREPA"),[86] which required all CAFOs to obtain a National Pollutant Discharge Elimination System ("NPDES") pollution permit or obtain a determination from the Department that the CAFO has no potential to discharge pollutants.[87] In 1973 the EPA granted Michigan the authority to administer its own NPDES program under state law, as permitted under section 402 of the federal Clean Water Act ("CWA"),[88] which envisions "state-administered program[s] . . . function[ing] 'in lieu of the Federal program.'"[89] The permit requirements under Rule 2196 were nearly identical to those under the 2003 Federal CAFO Rule issued by the EPA.[90] However, the permit requirements of the 2003 Federal CAFO

81. *Id.*
82. *Id.*
83. *Id.*
84. 292 Mich. App. 106, 807 N.W.2d 866 (2011).
85. *Id.* at 109, 111.
86. MICH. COMP. LAWS ANN. §§ 324.101-90106 (West 1995).
87. *Farm Bureau*, 292 Mich. App. at 109.
88. 33 U.S.C. § 1342 (2006).
89. *Farm Bureau*, 292 Mich. App. at 110 (citation omitted).
90. *See* 40 C.F.R. § 122.23.

Rule were ultimately invalidated in *Waterkeeper Alliance, Inc. v. EPA*[91] as exceeding the scope of the EPA's statutory rulemaking authority conferred by the CWA.[92]

After this decision, the plaintiffs challenged Rule 2196 and argued that, just like the permit requirements that were struck down in *Waterkeeper*, Rule 2196 purported to require "all CAFOs to either (1) seek and obtain a NPDES permit (irrespective of whether they actually discharge pollutants), or (2) demonstrate that they have no potential to discharge."[93] "Relying on the rationale of *Waterkeeper*, plaintiffs alleged that the [Department] was without authority to promulgate any regulation requiring them to seek and obtain NPDES permits because they did not actually discharge any pollutants into the waters of Michigan" and, "like the CWA, Part 31 of the NREPA authorizes administrative rulemaking with regard to *actual discharges only*."[94] In response, the Department argued that the reasoning of the *Waterkeeper* decision was inapplicable because "the validity of Rule 2196 was purely a matter of state law."[95] "The [Department] claimed it had full authority to promulgate Rule 2196 pursuant to [sections] 3103 and 3106 of the NREPA, and that these sections authorized it 'to establish permit requirements that are more stringent and have greater specificity than [the] federal regulations.'"[96]

The court of appeals affirmed the trial court's decision to grant summary disposition for the Department.[97] Citing the Department's duties to "protect and conserve the water resources of the state," "establish pollution standards for lakes, rivers, streams, and other waters," "issue permits that will assure compliance with state standards," and "take all appropriate steps to prevent any pollution the [Department] considers to be unreasonable and against public interest" under sections 3103(1) and 3106 of the NREPA,[98] as well as "the plain language of section 3103(2)" granting the Department authority to "promulgate rules as it considers necessary to carry out its duties,"[99] the court of appeals held that "Rule 2196 does not exceed the scope of the [Department]'s

91. 399 F.3d 486 (2d Cir. 2005).

92. *Farm Bureau*, 292 Mich. App. at 115 (citing *Waterkeeper Alliance*, 399 F.3d at 505).

93. *Id.* at 116.

94. *Id.* at 116-17.

95. *Id.* at 120.

96. *Id.* The NREPA can be found at MICH. COMP. LAWS ANN. §§ 324.3103 AND 324.3106 (West 2005).

97. *Farm Bureau*, 292 Mich. App. at 108.

98. *Id.* at 133-34.

99. MICH. COMP. LAWS ANN. § 324.3103(2) (West 1994).

statutory rulemaking authority."[100] The court of appeals concluded that Rule 2196 fell "squarely within the scope of Part 31 of the NREPA, [was] consistent with the underlying legislative intent, and [was] not arbitrary or capricious."[101] Because federal law and *Waterkeeper* were inapplicable,[102] "the [Department] was fully authorized to require CAFOs to either (1) seek and obtain a NPDES permit (irrespective of whether they actually discharge pollutants), or (2) satisfactorily demonstrate that they have no potential to discharge."[103]

C. Agency Authority to Interpret Statutes

In *Attorney General v. Blue Cross Blue Shield*,[104] the Michigan Court of Appeals reaffirmed that "it is the courts," and not government agencies, that have the final and ultimate authority over statutory interpretation.[105] In this case, the court of appeals heard two consolidated actions in which the Attorney General alleged that Blue Cross Blue Shield of Michigan ("BCBSM") violated section 207 of the Nonprofit Health Care Corporation Reform Act[106] when (1) "its subsidiary, the Accident Fund Insurance Company of America (the Accident Fund), purchased three for-profit insurance companies" and (2) when BCBSM made a $125 million capital "contribution to the Accident Fund" which was used for purposes of the acquisitions.[107] The trial court concluded that section 207 did not apply to subsidiaries and granted BCBSM's motion for summary disposition on the Attorney General's first claim, a decision that the court of appeals subsequently affirmed.[108] The trial court also granted BCBSM's motion for summary disposition on the Attorney General's second claim, deferring to an opinion of the Commissioner of the Office of Financial and Insurance Regulation ("OFIR") that the capital contribution did not violate section 207.[109] Finding error and a misapplication of the doctrine of primary jurisdiction,[110] the court of appeals reversed and remanded.[111] The court

100. *Farm Bureau*, 292 Mich. App. at 146.
101. *Id.*
102. *Id.* at 130-31.
103. *Id.* at 146.
104. 291 Mich. App. 64, -- N.W.2d -- (2010).
105. *Id.* at 91-92.
106. MICH. COMP. LAWS ANN. § 550.1101-.1704 (West 2002).
107. *Blue Cross*, 291 Mich. App. at 68, 70.
108. *Id.* at 75.
109. *Id.*
110. Primary jurisdiction
> is a concept of judicial deference and discretion. The doctrine exists as a recognition of the need for orderly and sensible coordination of the work of

of appeals held that "[i]t is the courts, not the OFIR, that have the ultimate authority over the statutory interpretation of the Act, and any statutory interpretation rendered by the [c]ommissioner in this case is not binding on the court . . . . Therefore, the trial court erred when it failed to make an independent interpretation of the statute at issue."[112] Although the doctrine of primary jurisdiction permitted the trial court to seek out the commissioner for an advisory opinion, "the trial court erred" by failing to make a "de novo determination of the [statutory interpretation of section 207]."[113]

D. Correcting Agency Errors

In *Schreur v. Department of Human Services*,[114] the Michigan Court of Appeals had to decide whether the DHS failed to provide proper notice of the petitioner's "right to request a hearing regarding a denial of her application for Medicaid benefits."[115] The petitioner "filed an application for Medicaid disability benefits" on April 29, 2005 after undergoing surgery to remove a spinal tumor.[116] DHS denied this application because the petitioner's "disability was not 'expected to last

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> agencies and of courts . . . . [T]he doctrine of primary jurisdiction does not preclude civil litigation; it merely suspends court action . . . . Primary jurisdiction is not a matter of whether there will be judicial involvement in resolving issues, but rather of when it will occur and where the process will start. A court of general jurisdiction considers the doctrine of primary jurisdiction whenever there is concurrent original subject matter jurisdiction regarding a disputed issue in both a court and an administrative agency . . . . Primary jurisdiction . . . applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . . [It] reflects the courts' recognition that administrative agencies, created by the Legislature, are intended to be repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field. Thus, whether judicial review will be postponed in favor of the primary jurisdiction of an administrative agency necessarily depends on the agency rule at issue and the nature of the declaration being sought in a particular case.

Id. at 85-86 (internal citations and quotation marks omitted).

111. *Id.* at 92.

112. *Id.*

113. *Id.*

114. 289 Mich. App. 1, 795 N.W.2d 192 (2010) (per curiam), *aff'd in part and vacated in part*, 488 Mich. 1042, 795 N.W.2d 124 (2011).

115. *Id.* at 3.

116. *Id.*

for at least 12 consecutive months' . . . ."[117] DHS mailed the petitioner a notice of its decision on June 10, 2005; the reverse side of the notice informed the petitioner that she had ninety days to request a hearing regarding her application.[118] However, the citations to the DHS manual contained in the notice were incorrect and "did not pertain to disability determinations."[119] Instead of requesting a hearing within ninety days, the petitioner "waited until June 13, 2006 to mail her request for review of the [DHS] decision to deny her application."[120] As a result, the petitioner's request was filed "278 days after expiration of the 90-day period for requesting a hearing."[121]

"On December 14, 2006, an administrative hearing was held regarding [the petitioner]'s substantive claim of disability and to determine whether [the petitioner]'s hearing request was timely."[122] The petitioner "argued that her hearing request was timely because the . . . denial notice contained incorrect citations to the [DHS] administrative and eligibility manuals, which, she contended, made the notice inadequate and ineffective to start the 90-day period to request a hearing."[123] DHS "argued that the notice was adequate because it explained the reason for the denial of the application" and informed the petitioner "of her right to a hearing and the 90 days she had to request a hearing."[124] DHS also "argued that the incorrect manual citations should have prompted [the petitioner] to request a hearing if she was confused about the reason for the denial of her application."[125] Citing Michigan Administrative Code Rules 400.902 through 400.904,[126] the hearing referee rejected the petitioner's arguments and "issued an order dismissing [her] request for a hearing as untimely."[127] The circuit court "vacated the hearing referee's order and reinstated [the petitioner]'s request for a hearing," concluding "that because the notice did not

117. *Id.* at 4.
118. *Id.* at 4-5.
119. *Id.* at 5.
120. *Schreur*, 289 Mich. App. at 5.
121. *Id.* (emphasis omitted).
122. *Id.*
123. *Id.*
124. *Id.* at 6.
125. *Id.*
126. Rule 400.902(1)(c) requires notice of a "proposed action to discontinue, terminate, suspend, or reduce public assistance or services" to provide "[t]he specific regulations supporting the action." MICH. ADMIN. CODE. r. 400.902(1), (1)(c). Under Rule 400.904(4), a claimant has "90 days from the mailing of the notice in [Rule] 400.902 to request a hearing." *Id.* § 400.904(4).
127. *Schreur*, 289 Mich. App. at 16-17, 21.

conform to the requirements of 42 C.F.R. [sections] 431.210 and 431.221,[128] the statutory 90-day period had not begun to run."[129]

The court of appeals reversed,[130] concluding after a detailed analysis of administrative regulations that "any information an applicant receive[d] with regard to his or her Medicaid application need not conform with the notice requirements of 42 C.F.R. [section] 431.210 [or Rule 400.902] because those requirements appl[ied] only to recipients [of benefits]."[131] Thus, DHS "was not required to cite the specific provisions supporting its denial" and "its failure to do so did not affect the validity of the denial [notice] that it sent or the timing for a request for a hearing."[132] The court also concluded that neither the federal nor the state regulations defined an applicant's "reasonable time" to request a hearing, and so the court determined that the ninety-day timeframe in 42 C.F.R. section 431.221(d) and Rule 400.904(4) that applied to recipients was "a useful guide to gauge what constitute[d] a reasonable time for an applicant to request a hearing."[133] Using that timeframe as a guide, the court deferred to the determination by DHS "that 90 days from the date of the denial decision was a reasonable time limit on requests for a hearing" and concluded that there was "no legitimate argument that 368 days . . . after the date of the denial decision was a reasonable time" for the petitioner to bring her request.[134]

In a 5-2 decision, the Michigan Supreme Court issued an order affirming the result reached by the court of appeals in lieu of granting leave to appeal, but vacated the portion of the court of appeals' judgment holding "that because [petitioner] was an *applicant* for benefits, not a *recipient* of benefits, [DHS] was not required to cite the specific provision supporting its denial."[135] The court pointed to 42 C.F.R. section 435.912,[136] a regulation not considered by the court of appeals, in

128. 42 C.F.R. § 431.210 (1992) (specifying the required content of a notice denying Medicaid benefits); *id.* § 431.210(c) (requiring DHS to include in a notice "[t]he specific regulations that support" its denial of Medicaid benefits); *id.* § 431.221(d) (requiring DHS to allow a Medicaid applicant or recipient "a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing[].").

129. *Schreur*, 289 Mich. App. at 8.

130. *Id.* at 3.

131. *Id.* at 16-17, 21.

132. *Id.* at 10-11.

133. *Id.* at 18, 21-22 (emphasis omitted).

134. *Id.* at 18, 22.

135. *Schreur v. Dept. of Human Servs.*, 488 Mich. 1042, 795 N.W.2d 124 (2011).

136. 42 C.F.R. § 435.912 requires DHS to "'send each applicant a written notice of [its] decision on his application, and, if eligibility is denied, the reasons for the action, the specific regulation supporting the action, and an explanation of his right to request a hearing.'" *Schreur*, 488 Mich. at 1043, n.1 (quoting 42 C.F.R. § 435.912).

concluding that DHS was in fact required to cite the specific provisions supporting its denial of Medicaid benefits.[137] However, the failure of DHS "to cite the correct regulations on which its denial of benefits was based did not accord [the petitioner] the right to file her hearing request . . . 278 days after expiration of the 90-day hearing request period."[138] "The fact that the wrong regulations were cited in [the] notice did not alter [the petitioner]'s obligation, pursuant to 42 [C.F.R. section] 431.221(d), to request a hearing within 90 days."[139]

Justice Kelly wrote a brief dissent which Justice Hathaway joined.[140] Justice Kelly would have granted leave to appeal because she felt that the court's order left "important questions unanswered" regarding the triggering of the ninety-day period when the applicant has not been provided with the regulations relied upon by DHS.[141] On June 28, 2011, the court issued an order denying the petitioner's motion for reconsideration.[142] Justices Kelly and Hathaway indicated their desire to grant reconsideration so that they could grant leave to appeal.[143]

In *Nason v. State Employees' Retirement System*,[144] the Michigan Court of Appeals confronted whether the State Employees' Retirement Board ("Board") was correct in denying retirement benefits to the petitioner after he suffered an injury that resulted in a permanent disability.[145] The "[p]etitioner, a corrections officer," had shattered his "right heel bone while on vacation and subsequently submitted an application for retirement benefits" pursuant to section 24 of the State Employees' Retirement Act ("SERA"),[146] with "the Office of Retirement Services, which denied the application."[147] The petitioner disputed this denial and "filed a request for a hearing with the State Office of Administrative Hearings and Rules."[148] The hearing came before an administrative law judge who issued a proposal for decision, finding that the "petitioner had suffered a total and permanent disability, that the disability rendered the petitioner unable to adequately and safely perform

137. *Schreur*, 488 Mich. at 1042.
138. *Id.*
139. *Id.*
140. *Id.* at 1042-44 (Kelly, J., dissenting).
141. *Id.* at 1043-44.
142. Schreur v Dep't. of Human Servs., 489 Mich. 977, 798 N.W.2d 771 (2011).
143. *Id.*
144. 290 Mich. App. 416, 801 N.W.2d 889 (2010).
145. *Id.* at 417-18.
146. MICH. COMP. LAWS ANN. § 38.24 (West 2005).
147. *Nason*, 290 Mich. App. at 418.
148. *Id.*

his job as a corrections officer, and that [he] was entitled to benefits."[149] The administrative law judge "recommended that the Board adopt her findings of fact and conclusions of law."[150] The State Employees' Retirement System ("SERS") filed "exceptions to the proposal for decision" challenging the administrative law judge's recommendation.[151]

The Board, relying on *Knauss v. State Employees' Retirement System*,[152] found that the petitioner was not entitled to retirement status and benefits under section 24 because the petitioner, based on "his past experience and training, was still able to perform jobs other than a corrections officer."[153] On the petitioner's appeal to the circuit court, "the court reversed and remanded the case to the Board for entry of a decision awarding petitioner non-duty-related disability retirement benefits."[154] "The circuit court placed the focus on petitioner's experience and training as a corrections officer, reasoning that the Board had 'reached too far back into [the petitioner's] employment history . . . before he had any real training and experience . . . .'"[155]

The court of appeals held that, "when read in context, the plain and unambiguous language of [section 24(1)(b)]," which refers to an employee's "'total[] incapacitat[ion] for further performance of duty,' only allows consideration of whether [an employee] can perform the state job from which the [employee] seeks retirement because of the non-duty-related injury or disease, not other employment positions or fields for which the [employee] may be qualified by experience and training."[156] The court of appeals disavowed *Knauss* to the extent that it conflicted with its holding, noting that the decision in *Knauss* was not binding under Michigan Court Rule 7.215(J)(1).[157] Because it was unclear from the Board's decision whether it found the petitioner to be totally incapacitated relative to his job as a corrections officer, the court of appeals vacated the circuit court's order and remanded the case to the

149. *Id.* at 418.
150. *Id.*
151. *Id.*
152. 143 Mich. App. 644, 650, 372 N.W.2d 643 (1985) (adopting the "intermediate view" of "total disability" under which the question of whether a person is totally disabled is examined by looking at whether the person is able to engage in employment reasonably related to his or her past experience, without limiting the examination to looking only at the job that was held when the disability arose, but not being so expansive as to allow consideration of any job whatsoever).
153. *Nason*, 290 Mich. App. at 419.
154. *Id.*
155. *Id.*
156. *Id.* at 419.
157. *Id.* at 432.

Board to directly address that issue.[158] On June 3, 2011, the Michigan Supreme Court granted leave to appeal in order to "address whether [an employee] is eligible for non-duty disability retirement under [section 24 of the SERA] if he is totally incapacitated from performing the state job from which he seeks to retire, but he is not totally incapacitated from performing other work within his education, experience, or training."[159]

IV. CONCLUSION

During the 2010-2011 *Survey* period, the Michigan Supreme Court corrected an interpretation of the Insurance Code rendered by the Commissioner of the Office of Financial and Insurance Regulation, clarified the jurisdiction of the Court of Claims, corrected an interpretation of Medicaid regulations made by the Department of Human Services, and granted leave to appeal in a case in which the court will decide a question involving the retirement benefits available under the State Employees' Retirement Act to a state employee who becomes disabled from a non-duty related injury.

The Michigan Court of Appeals clarified the jurisdiction of the Michigan Tax Tribunal, affirmed a rule promulgated by the Department of Environmental Quality to regulate pollution by concentrated animal feeding operations, and reaffirmed that it is the courts, not government agencies, that have the ultimate and final authority over statutory interpretation.

158. *Id.* at 433.

159. *Nason v. State Emp. Ret. Sys.*, 489 Mich. 941, 798 N.W.2d 26 (2011).