STATE OF MICHIGAN

COURT OF APPEALS

A&D DEVELOPMENT, POWELL CONSTRUCTION SERVICES, L.L.C., DICK BEUTER d/b/a BEUTER BUILDING & CONTRACTING, JIM'S PLUMBING & HEATING, JEREL KONWINKSI BUILDER, and KONWINSKI CONSTRUCTION, INC.,	UNPUBLISHED February 28, 2012
Plaintiffs-Appellants,	
V	No. 301296 Ingham Circuit Court
MICHIGAN COMMERCIAL INSURANCE MUTUAL, and ELEANOR POWELL-YODER,	LC No. 10-000879-NI
Defendants-Appellees.	

Before: HOEKSTRA, P.J., AND CAVANAGH AND BORRELLO, JJ.

PER CURIAM.

In this class action lawsuit challenging the use of surplus funds after the conversion of a worker's compensation self-insurance fund into a mutual insurance company, plaintiffs appeal as of right the trial court's order dismissing their complaint without prejudice and granting defendants' motion to transfer the case to the Worker's Compensation Agency (WCA) based on primary jurisdiction grounds. Because we conclude that the WCA does not have concurrent original jurisdiction over plaintiffs' claims or specialized knowledge in regard to the issues raised, we reverse.

This case arises out of the conversion of a self-insurance fund into a mutual insurance company. The conversion was effective January 1, 2000. The self-insurance fund that was converted was the Michigan Construction Industry Self-Insurance Fund (MCISIF), the MCISIF was a group self-insurance fund formed pursuant to the Michigan Worker's Disability Compensation Act, MCL 418.611; the act regulates the creation and operation of self-insurance funds. The self-insurance fund was regulated by the Worker's Compensation Agency (WCA).[1] The self-insurance fund was converted into a mutual insurance company now known as

[1] Previously named the Michigan Bureau of Workers' Disability Compensation.

Michigan Commercial Insurance Mutual (MCIM).[2] Mutual insurance companies are regulated by the Office of Financial Insurance Regulation (OFIR).[3]

MCISIF members paid premiums into the fund in order to receive workers disability compensation coverage. Surplus premiums, funds paid by members that were not used for administrative costs or payment of claims, were returned to members as dividends. The MCISIF was supervised by an elected board of trustees that was responsible for hiring professionals to manage the fund. Defendant Eleanor Powell-Yoder was the fund administrator.

MCISIF began considering conversion to a mutual insurance company in 1998. MCISIF and its counsel met with regulators from the WCA and the OFIR regarding the feasibility and process of conversion. The WCA ultimately approved a procedure by which MCISIF members would vote on whether MCISIF should covert to a mutual insurance company. The WCA required that a trust to set aside funds in order to cover the liabilities of MCISIF be an element of the conversion process. On July 19, 1999, a special meeting was held for MCISIF members to vote on whether the fund should covert to a mutual insurance company; 383 total votes were cast, 357 of which were in favor of conversion to a mutual insurance company.

On September 16, 1999, the OFIR accepted MCISIF's application to become a mutual insurance company. The MCISIF board of trustees became MCIM's board of directors and Powell-Yoder became the president of MCIM. After the conversion was approved, the Michigan Construction Industry Fund Worker's Disability Compensation Trust ("trust agreement") was enacted in order to secure funds to cover MCISIF's liabilities. Pursuant to the trust agreement, any surplus funds in the trust would be distributed to MCIM and not to the former members of the now-dissolved MCISIF. The disclosure statement that was sent to MCISIF members before the vote explained that "all assets and liabilities" would be transferred to MCIM if the conversion was approved. Powell-Yoder requested approval from the WCA in regard to the transfer of $10,000,000 of MCISIF's assets to MCIM in order to capitalize the new insurance company on November 24, 1999. The transfer was authorized by the WCA. Thereafter, the WCA authorized additional transfers of surplus funds from the trust to MCIM pursuant to the trust agreement.

Plaintiffs filed a complaint with seven counts on July 23, 2010, alleging conversion pursuant to MCL 600.2919a, negligence, breach of fiduciary duty, violation of MCL 500.2016, fraud and misrepresentation. The complaint further requested equitable relief in the form of a constructive trust and declaratory relief. Plaintiffs also requested class certification. Plaintiffs essentially alleged in their complaint that defendants gained approval for the conversion and for the transfer of MCISIF's surplus funds to MCIM through misrepresentation, fraud and other illegal action. In lieu of answering plaintiffs' complaint, defendants filed a motion to dismiss for lack of jurisdiction on August 25, 2010.

[2] The company was originally named Michigan Construction Industry Mutual.

[3] Previously named the Michigan Insurance Bureau.

On November 3, 2010, the trial court held a hearing regarding defendants' motion to dismiss. After hearing arguments from both parties, the trial court stated that it agreed with plaintiffs that the WCA's administrative rules did not specifically cover conversion of a self-insurance fund to a mutual insurance company, and that more than one agency would govern such a conversion, i.e. the WCA and the OFIR. Nevertheless, the trial court granted defendants' motion because it determined that the issues raised by plaintiffs fell within the WCA's specialized and expert knowledge "as evidenced by the statutory and regulatory scheme," and that consequently, the WCA had primary jurisdiction over plaintiffs' claims. The trial court accordingly dismissed plaintiffs' complaint without prejudice. On November 8, 2010, the trial court issued a conforming order.

On appeal, plaintiffs argue that the trial court erred when it dismissed their claims without prejudice and deferred the case to the WCA on primary jurisdiction grounds. Specifically, plaintiffs first argue that the WCA does not have jurisdiction because it has no statutory authority over defendants or the claims raised by plaintiffs' complaint.

We review de novo the applicability of the primary jurisdiction doctrine because it is a question of law. *Psychosocial Serv Assoc, PC v State Farm Mut Auto Ins Co*, 279 Mich App 334, 336; 761 NW2d 716 (2008).

"The doctrine of primary jurisdiction is grounded in the principle of separation of powers." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 196; 631 NW2d 733 (2001). Accordingly, the doctrine is founded on concerns regarding the properly limited role of the courts in a democratic society and respect for the legislatively imposed regulatory duties of agencies. *Id.* at 197. "As a threshold issue, before invoking the doctrine of primary jurisdiction, a court must find that the administrative agency to which referral is sought has concurrent original jurisdiction over the issues raised." *Attorney General v Blue Cross Blue Shield of Mich*, 291 Mich App 64, 88; __ NW2d __ (2010).

"A question of primary jurisdiction arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required." *Travelers Ins Co*, 465 Mich at 197 (citation and quotation omitted). Accordingly, the question whether judicial review should 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 the particular case." *Id.* at 198 (citation and quotation omitted).

There is no fixed formula for determining whether an administrative agency has primary jurisdiction over a dispute; however, courts should consider: "(1) whether the matter falls within the agency's specialized knowledge, (2) whether the court would interfere with the uniform resolution of similar issues, and (3) whether the court would upset the regulatory scheme of the agency." *City of Taylor v Detroit Edison Co*, 475 Mich 109, 122; 715 NW2d 28 (2006).

First, we address whether the WCA has jurisdiction in this case. In order for an administrative agency such as the WCA to properly exercise primary jurisdiction, it must possess "concurrent original jurisdiction over the issues raised." *BCBSM*, 291 Mich App at 88. Further, administrative agencies may create rules and regulations that are necessary for the efficient exercise of the powers expressly granted by the Legislature, but agencies cannot exceed the

statutory authority granted by the Legislature. See *Casco Twp v State Boundary Comm*, 243 Mich App 392, 397; 622 NW2d 332 (2000); *Czymbor's Timber, Inc v Saginaw*, 478 Mich 348, 356; 733 NW2d 1 (2007).

The statutory scheme of the WCA demonstrates that its director is authorized by MCL 418.611(2) to determine the procedures and conditions by which a self-insurance group fund such as MCISIF may be created. The WCA director is also charged with approving applications for such group funds, and with terminating group funds when a fund is no longer able to meet all present and future obligations. MCL 418.611(5). Therefore, according to the plain statutory language, the duties of the WCA director's office include the regulation of self-insurance group funds, and pursuant to MCL 418.205, the director is granted authority to make administrative rules necessary for the performance of the duties of his or her office. Accordingly, the WCA is authorized by statute to promulgate rules regarding self-insurance group funds, including the creation and termination of such funds. But defendant MCIM is a mutual insurance company regulated by the OFIR, and defendant Powell-Yoder, MCIM's president, is an individual who is in no way affiliated with an existing self-insurance group fund. Accordingly, even if the WCA held a hearing regarding plaintiffs' claims, it could not award plaintiffs' any relief because it has no authority over defendants. Consequently, we conclude that the WCA has no concurrent regulatory authority over either defendant.

Further, the WCA is not authorized to address the claims raised by plaintiffs. Plaintiffs allege conversion pursuant to MCL 600.2919a, negligence, breach of fiduciary duty, violation of MCL 500.2016, fraud and misrepresentation. Plaintiffs request equitable relief in the form of a constructive trust, and declaratory relief. Plaintiffs also request class certification. State agencies do not possess the authority to hear class action claims in an administrative proceeding, absent an explicit statutory grant of powers or administrative rules permitting the agency to do so. *Stein v Dir, Bureau of Workmen's Compensation*, 77 Mich App 169, 176; 258 NW2d 179 (1977). It is not disputed that the WCA does not have the requisite statutory authority to hear a class action claim. Similarly, the WCA does not have authority to grant equitable relief. *Bd of Ed of Benton Harbor Area Sch v Wolff*, 139 Mich App 148, 156; 361 NW2d 750 (1984). Consequently, we conclude that because the WCA does not have concurrent original jurisdiction over the issues raised, the doctrine of primary jurisdiction is not applicable. *BCBSM*, 291 Mich App at 88.

Plaintiffs also challenge the trial court's conclusion that the WCA possesses specialized knowledge in regard to their claims. Defendants maintain that the trial court correctly considered the primary jurisdiction factors set forth in *Detroit Edison Co*, 475 Mich at 122, and properly concluded that the WCA has specialized knowledge and primary jurisdiction over plaintiffs' claims. In support of their argument that the WCA possess special expertise in regard to plaintiffs' claims, defendants cite 1999 AC, R 408.43a (requirement of surety bond or letter of credit, excess liability insurance, and guaranty), 1999 AC, R 408.43f (WCA has authority to approve the creation of self-insurance group funds and demand evidence regarding finances of a prospective fund), 1999 AC, R 408.43g (setting forth requirements for the addition of new members to a fund or termination of fund members), 1999 AC, R 408.43h (setting forth required reporting by a fund to the WCA), 1999 AC, R 408.43i (setting forth the powers of a fund's board of trustees), and 1999 AC, R 408.43j (addressing group self-insurerance funds, advance premium discounts, surplus monies, surplus investment income and premiums, and unfunded claims).

Contrary to supporting defendants' position that the WCA has special knowledge in regard to plaintiffs' claims, examination of the WCA's administrative rules cited by defendants demonstrates that the WCA's primary expertise is related to ensuring that self-insurance funds maintain adequate funds to cover payment of all worker's compensation claims and related liabilities. Plaintiffs' claims are primarily focused on the use of MCISIF's surplus funds to capitalize MCIM; specifically, plaintiffs believe the surplus funds were wrongly appropriated by defendants based on tort and statutory theories. The WCA's administrative rules are concerned with surplus funds only to the extent that "sufficient monies are retained so that total assets are greater than total liabilities for each fund year." 1999 AC, R 408.43j(2). The WCA's administrative rule regarding surplus funds does not require return of surplus funds to fund members; it states only that surpluses *may* be returned to fund members. 1999 AC, R 408.43j(2). The WCA's administrative rules do not otherwise provide guidance regarding how surpluses may or may not be appropriated. The WCA's administrative rules have no bearing on the claims plaintiffs raise in this case. Accordingly, it is clear that the WCA has expertise in ensuring self-insurance funds are adequately funded in order to cover all liabilities, but not in regard to the claims raised by plaintiffs. The WCA is not in the business of regulating the use of surplus funds, and would have no specific knowledge in regard to plaintiffs' claims alleging the misappropriation of surplus funds by defendants in this case.

Further, the WCA does not have experience with resolving allegations of fraud, negligence, misappropriation, and the other claims raised by plaintiffs. This Court has explained that trial courts should defer to agencies based on the doctrine of primary jurisdiction in "cases raising issues of fact not within the conventional experience of judges, or cases requiring the exercise of administrative discretion." *Travelers Ins Co*, 465 Mich at 201, quoting *Attorney General v Diamond Mtg Co*, 414 Mich 603, 612; 327 NW2d 805 (1982). Plaintiffs' claims raise issues that trial courts, not the WCA, are accustomed to resolving. Accordingly, the WCA does not possess any specialized knowledge in regard to plaintiffs' claims that would weigh in favor of deferring to the agency on primary jurisdiction grounds.

The final two factors, whether the court would interfere with the uniform resolution of similar issues, and whether the court would upset the regulatory scheme of the agency, *Detroit Edison Co*, 475 Mich at 122, similarly do not support deferring to the WCA on primary jurisdiction grounds in this case. The uniform resolution of similar issues by the WCA will not be affected because the WCA's regulatory authority does not include the resolution of the type of claims that plaintiffs raise. Further, the WCA's regulatory scheme will not be impacted because the WCA's regulatory scheme does not address the issues raised by plaintiffs. Consequently, we conclude that the trial court erred when it dismissed plaintiffs' case without prejudice and deferred the issues to the WCA on primary jurisdiction grounds because the primary jurisdiction factors do not support application of the doctrine in this case.[4]

[4] In light of our resolution of plaintiffs' first issues on appeal, we need not address the final issue raised by plaintiffs regarding whether the trial court should have dismissed their complaint without prejudice.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello