STATE OF MICHIGAN

COURT OF APPEALS

ROSEWOOD LIVING CENTER,

Petitioner-Appellee,

v

BUREAU OF HEALTH SYSTEMS, DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES,

Respondent-Appellant.

UNPUBLISHED
October 7, 2004

No. 253018
Wayne Circuit Court
LC No. 03-334600-AA

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Respondent appeals by leave granted an order of the Wayne Circuit Court which reversed an order of the Administrative Law Judge (ALJ) barring petitioner from taking discovery depositions of various state employees in an administrative proceeding. We reverse the decision of the Wayne Circuit Court and remand this matter back to the ALJ.

Petitioner operates a skilled nursing facility which was the subject of an emergency license revocation order by respondent on August 6, 2003. Respondent's Director, Walter Wheeler III, found that petitioner was "subject to extended periods of noncompliance with state and federal law and regulation for long term nursing homes . . . and that this noncompliance put the residents' health, safety, and welfare at risk." Petitioner requested a hearing and served subpoenas duces tecum for depositions on a number of individuals mentioned in the order of revocation, including Wheeler. Respondent filed a motion to quash the subpoenas and asked for a protective order, claiming (1) that the subpoenas duces tecum would impose an undue burden on respondent's safety functions, (2) that certain individuals lacked personal knowledge, and (3) that petitioner could gain all the information from Wheeler through historical information. Respondent further claimed that the depositions would annoy and unduly burden the state employees and were unnecessary because the factual observations that resulted in the issuance of the revocation order were contained in more than two hundred pages of documentation that were attached to the revocation order. Petitioner responded that the depositions were necessary to ensure that petitioner was accorded its due process rights and contended that quashing the subpoenas would cause substantial prejudice to petitioner.

Following a hearing on the matter, the ALJ issued an opinion and order granting respondent's motion to quash the subpoena for the deposition of Wheeler. The ALJ also granted

respondent's motion for a protective order, ruling that petitioner could take oral depositions of the surveyors, the licensing officer, the fire safety inspector and others for use as evidence only and not for purposes of discovery. In his opinion, the ALJ noted that the discovery depositions were "likely to interfere with the efficient conduct of the hearing" and that they were "unnecessary" given the volume of documentation respondent had provided petitioner.

Petitioner filed a petition for interlocutory appeal of the ALJ's order with the Wayne Circuit Court, arguing that the ALJ's limitation on discovery was improper. Petitioner contended that it was entitled to an interlocutory appeal because an appeal after a final decision of the ALJ would not provide an adequate remedy because the discovery ruling would be difficult or impossible to remedy on appeal because it was unlikely that a discovery ruling error would be shown to be so prejudicial as to justify reversal of a decision on the merits after the fact.

The Wayne Circuit Court granted petitioner's petition for interlocutory review and reversed the ALJ's order quashing the subpoenas and denying discovery depositions, holding that the ALJ did not articulate any facts to support the conclusion that the depositions would impose an undue burden on respondent's employees. The court also found that it would be difficult, if not impossible, for a reviewing court to say what would or would not have been revealed during discovery unless discovery had actually occurred. Respondent thereafter filed an application for leave to appeal with this Court, which this Court granted. *Rosewood Living Center v Bureau of Health Systems*, unpublished order of the Court of Appeals, entered February 4, 2004 (Docket No. 253018).

On appeal, respondent argues that the Wayne Circuit Court lacked subject matter jurisdiction over petitioner's interlocutory appeal because petitioner had an adequate remedy at the administrative level that it had not exhausted. According to respondent, even with the protective order limiting the depositions for use as evidence and not for discovery, there would still be a hearing at which petitioner could present evidence, cross-examine witnesses, introduce exhibits, make objections and present legal arguments. Moreover, respondent contends, even if petitioner did not prevail at the administrative hearing, petitioner could appeal the discovery issue as part of the final order. Therefore, according to respondent, petitioner had an adequate remedy available at the administrative hearing level. We agree.

Whether a court has subject matter jurisdiction is a question of law which this Court reviews de novo. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999); *W A Foote Memorial Hospital v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995). The interpretation and application of court rules is also a question of law that we review de novo. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

Generally, the doctrine of exhaustion of administrative remedies requires that if a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. *Munson Medical Center v Local 395, Hotel, Hospital, Restaurant Employees & Bartenders Union, AFL-CIO*, 43 Mich App 711, 713; 204 NW2d 744 (1972). However, there are exceptions to this rule. *BCS Life Ins Co v Comm'r of Ins*, 152 Mich App 360, 368; 393 NW2d 636 (1986). One such exception is found in the Administrative Procedures Act, MCL 24.201 *et. seq.*, and MCR 7.105(E). MCR 7.105(E) provides that interlocutory review

of a "preliminary, procedural, or intermediate" administrative decision is available if the party seeking review can show "that review of the final decision would not be an adequate remedy." Similarly, MCL 24.301 contains the following provision regarding interlocutory review of an administrative decision:

> A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

In granting petitioner's petition for interlocutory appeal, the circuit court stated:

> In this case I agreed with Rosewood that after the fact it will be difficult if not impossible for a reviewing Court to say what would or would not have been revealed during the course of discovery or to say whether or not [petitioner] had adequate information with which to aggressively advocate on behalf of his client. I also look at the fact that the administrative law judge did not give any facts or reasons upon which he based his conclusion that discovery by way of deposition would be an undue burden on those to be deposed or would have some kind of chilling effect on the process. Generally, for those reasons, the decision of the administrative law judge with respect to discovery depositions is reversed, those depositions will be had.

We disagree with the circuit court's finding that review of its final decision or order would not be an adequate remedy because it would be difficult for a reviewing court to find what would have been revealed during the course of discovery after an administrative decision on the merits. The proper inquiry in this case is whether an administrative hearing would have "adequately" protected petitioner's rights as that term is utilized in MCL 24.301 and MCR 7.105(E). In *Bennett v Royal Oak School District*, 10 Mich App 265; 159 NW2d 245 (1968), this Court defined and explained what constitutes an adequate remedy. In that case, we stated:

> A remedy is not 'inadequate' so as to authorize judicial intervention before exhaustion of the remedy merely because it is attended with delay, expense, annoyance, or even some hardship . . . . There must be something in the nature of the action or proceeding that indicates to the court that it will not be able to protect the rights of the litigants or afford them adequate redress otherwise than through the exercise of this extraordinary jurisdiction. [*Bennett*, *supra*, 269 (internal citations omitted).]

We conclude that an administrative hearing would "adequately" protect petitioner's rights in this case. During an administrative hearing, petitioner would be permitted to conduct

discovery[1] through methods other than discovery depositions, examine and cross-examine witnesses, offer exhibits, and make legal arguments. Following the hearing, petitioner could appeal the agency's final order, including the ALJ's order limiting discovery. Therefore, nothing indicates that such a hearing would not protect plaintiff's rights or afford it adequate redress. *Id.*

Furthermore, while we express no opinion on this issue, to the extent that the ALJ may have erred in issuing its protective order limiting discovery, "[i]t is presumed that an administrative agency will correct its errors if given a chance to do so." *Papas v Gaming Control Bd*, 257 Mich App 647, 664; 669 NW2d 326 (2003). Moreover, we observe that nothing in the record indicates that the ALJ would have precluded petitioner from requesting additional discovery if the trial depositions revealed the need for further discovery. Our review of the record indicates that the ALJ was open to allowing additional discovery if petitioner had demonstrated that additional discovery was essential to "prevent prejudice or injustice to the petitioner."

In sum, for the reasons stated above, we conclude that an administrative hearing and, if petitioner so desired, an appeal from the final decision or order of the administrative agency, would have adequately protected petitioner's rights. MCL 24.301; MCR 7.105(E). Therefore, we hold that the Wayne Circuit Court did not have jurisdiction to hear petitioner's interlocutory appeal.

Our resolution of respondent's first issue on appeal renders it unnecessary to consider respondent's remaining issue on appeal.

Reversed. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

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[1] MCL 24.274(1) allows an administrative agency to "adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings." Pursuant to this statutory authority, respondent promulgated Administrative Rule 325.21916, which provides for the same discovery afforded to civil litigants in the Michigan Court Rules, unless the discovery is likely to interfere with the efficient conduct of the hearing and substantial prejudice will not result to the party seeking discovery. There is no constitutional right to discovery in administrative proceedings. *In re Del Rio,* 400 Mich 665, 687 n 7; 256 NW2d 727 (1977).