

STATE OF MICHIGAN
COURT OF APPEALS

CURT NOWACKI,

Petitioner-Appellee,

v

STATE EMPLOYEES' RETIREMENT SYSTEM
and OFFICE OF RETIREMENT SERVICES,

Respondents-Appellants.

UNPUBLISHED

May 14, 2009

No. 285630

Court of Claims

LC No. 08-000010-MZ

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Respondents appeal by right the denial of their motion for summary disposition based on their claim of governmental immunity, MCR 2.116(C)(7). We reverse and remand for proceedings consistent with this opinion.

While working for the Department of Corrections, petitioner sustained disabling injuries for which he was awarded duty disability retirement benefits. However, instead of being paid the proper amount of \$500 a month, less certain deductions, petitioner was paid about \$6,000 a month for almost two years. When the Office of Retirement Services (ORS) discovered its error, it reduced petitioner's benefit payment to \$1.00 a month. The ORS also notified petitioner that he had to reimburse the overpayment of \$157,357.50, plus pay interest in the amount of \$20,464.03. Petitioner requested a hearing before the State Employees' Retirement Board ("Retirement Board"). The Retirement Board affirmed the decision, and further ordered that petitioner's future retirement allowance could be reduced to \$1.00 a month until the entire overpayment and interest were recovered.

Thereafter, petitioner filed in the Court of Claims a petition for review of the Retirement Board's decision, as well as a complaint for negligence and breach of contract. Respondents filed a motion for summary disposition. First, respondents argued that the Court of Claims did not have jurisdiction to review petitioner's appeal of the Retirement Board's decision. Although by operation of MCL 600.6419 the court had jurisdiction over the tort and contract claims, MCL 600.6419a only provides jurisdiction over ancillary claims for equitable and declaratory relief and the appeal of the Board's decision was neither. Thus, respondents requested that the appeal be dismissed for lack of jurisdiction. Second, respondents argued that they were entitled to governmental immunity because the purported tort occurred while respondents were engaged in

a governmental function. Third, respondents argued that petitioner failed to state a breach of contract claim.

On May 19, 2008, the Court of Claims issued its opinion and order granting in part and denying in part respondents' motion for summary disposition. The court held that, by MCL 600.6419a, it had concurrent jurisdiction over petitioner's administrative appeal because petitioner's negligence claim was valid. Petitioner's negligence claim was valid because he set forth allegations of fact that would support a finding that respondents' conduct was grossly negligent; thus, petitioner pleaded a claim in avoidance of governmental immunity. The court dismissed petitioner's breach of contract claim on the grounds that he failed to provide a copy of any employment contract and failed to identify any term of the alleged contract that was breached. This appeal by respondents followed.

Respondents argue that petitioner's tort claim should have been dismissed on the ground that, as state agencies, they were entitled to immunity under MCL 691.1407. We agree, in part. "The applicability of governmental immunity is a question of law that is reviewed de novo on appeal." *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004).

Tort immunity is granted to governmental agencies in MCL 691.1407(1), which provides:

Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

A "governmental function" is an activity expressly or impliedly mandated or authorized by constitution, statute, or other law. MCL 691.1401(f). Whether an activity was a governmental function is determined by considering the general activity, not the specific conduct involved at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

Here, it is undisputed that respondents are state agencies. Respondent State Employees' Retirement System was created by MCL 38.2(1) and is a statewide public employee retirement plan that is administered by the ORS. After petitioner was granted a duty related disability retirement by the Retirement Board pursuant to MCL 38.21, payment of retirement benefits was mandated by the retirement act, MCL 38.1 *et seq.* Thus, the payment of such retirement benefits constituted an activity expressly mandated by law, i.e., a governmental function. And, contrary to petitioner's claim, respondents did not engage in ultra vires activity when it overpaid petitioner's specific benefits because the general activity of paying benefits was authorized by law. See *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 631; 363 NW2d 641 (1984).

There are, however, several exceptions to governmental immunity. Petitioner argued that grossly negligent conduct is one such exception that applies in this case. But, as respondents argue here, the gross negligence exception to immunity applies only to governmental officers, employees, members, and volunteers, and not to governmental agencies directly. MCL 691.1407(2); *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled in part on other grounds *American Transmission, Inc v AG*, 454 Mich 135, 143; 560 NW2d 50 (1997). Only two state agencies are named parties to this action. But, respondents did

not challenge petitioner's tort claim on this ground until oral argument on their motion for summary disposition. Petitioner responded by arguing that the issue had not been previously raised and, if it had, he would have requested to amend his complaint to add named individual governmental employees who were involved in the overpayment of his benefits—they, in fact, had testified at the administrative hearing. The court did not address petitioner's request to amend his complaint, but held that petitioner pleaded a claim in avoidance of governmental immunity based on the gross negligence exception. This holding is erroneous and is reversed, but we remand the issue of petitioner's request to amend his complaint for consideration and resolution by the Court of Claims.¹ See MCR 7.216(A)(7).

Respondents also argue on appeal that the Court of Claims erred in denying their motion for summary disposition premised on the ground that the court lacked subject-matter jurisdiction over petitioner's appeal of the Retirement Board's decision. After de novo review of the court's order denying summary disposition under MCR 2.116(C)(4), we agree and order the appeal transferred to the circuit court. See MCR 2.227(A); *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004). We note that, contrary to petitioner's claim, challenges to subject-matter jurisdiction can be raised at any time. *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 97-98; 693 NW2d 170 (2005).

MCL 600.6419(1)(a) provides that the Court of Claims has power and jurisdiction to "hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies." Except as provided by MCL 600.6419a and 600.6440, such jurisdiction is exclusive. See *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 772; 664 NW2d 185 (2003). MCL 600.6419a provides that the Court of Claims has concurrent jurisdiction of "any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to section 6419."

Here, it is undisputed that petitioner's tort-based claim falls within the exclusive jurisdiction of the Court of Claims. Petitioner, however, argues that his appeal of the Retirement Board's decision qualifies as an ancillary action to that tort claim under MCL 600.6419a. But, as respondents have consistently argued, petitioner's challenge to the Retirement Board's decision is neither a demand for equitable relief nor a demand for a declaratory judgment—it is an administrative appeal brought under MCL 24.301 *et seq.* When the plain and ordinary meaning of statutory language is clear, judicial construction is not necessary or permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The Court of Claims, which is a court of limited jurisdiction, has no power of judicial review of an administrative action. See *Bays v Dep't of State Police*, 89 Mich App 356, 362-363; 280 NW2d 526 (1979); see, also, *Kroon-Harris v State of Michigan*, 477 Mich 988; 725 NW2d 467 (2007). Thus, the Court of Claims should have: (1) concluded that it lacked subject-matter jurisdiction over petitioner's appeal of the Retirement Board's decision, and (2) pursuant to MCR 2.227(A), transferred the

¹ Petitioner references a "counter-appeal" in his brief on appeal and sets forth an argument related to the dismissal of his breach of contract claim. To raise this issue, however, petitioner was required to file a cross appeal under MCR 7.207; thus, we will not review this issue.

matter to the circuit court for continued proceedings. On remand, the court is directed to do the same. See MCR 7.216(A)(9).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering