STATE OF MICHIGAN

COURT OF APPEALS

STEVEN EDWARD KING, Plaintiff-Appellee,	UNPUBLISHED January 21, 2010
v	No. 288290 Ingham Circuit Court
STATE OF MICHIGAN; MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC GROWTH, an Executive agency of the State of Michigan, and KENNETH ROSS, solely in his Capacity as Commissioner of the Office of Financial and Insurance Regulation, Defendant-Appellant.	LC No. 08-814-CZ

Before: Bandstra, P.J. and Sawyer and Owens, JJ.

PER CURIAM.

In this insurance producer licensing case, defendants appeal as of right from the trial court's order granting plaintiff's motion for summary disposition on his requests for an injunction and for declaratory relief following defendants' revocation of his resident insurance producer license. We affirm.

I. Facts

Both parties agree upon the facts of this case. In 2000, plaintiff Steven King was convicted of felony Operating Under the Influence of Liquor (OUIL), third offense. In 2004, plaintiff applied for a Michigan license as a resident insurance producer.[1] At the time, he fully disclosed his prior felony conviction. The Michigan Office of Financial and Insurance Services[2]

[1] An insurance producer is typically called an insurance agent. In Michigan, there are two types of insurance producers that may be licensed: resident insurance producers, who reside in Michigan, and nonresident insurance producers, who reside and are licensed in another state but transact some business here. MCL 500.1205, MCL 500.1206a.

[2] In 2008, this office was reorganized and its name changed to the Michigan Office of Financial and Insurance Regulation (OFIR). We will use the acronym OFIS to refer to this agency because (continued…)

(OFIS) reviewed plaintiff's application, and, in spite of his felony conviction, granted him a resident insurance producer license.

Plaintiff engaged in insurance sales from 2004 until March 19, 2008 when he received notification that OFIS would be rescinding his insurance producer license because of his felony OUIL conviction.

OFIS claimed that the licensing staff who reviewed plaintiff's application for licensure in 2004 were using review standards that were no longer supposed to be effective. Before the Insurance Code, MCL 500.101, *et seq*. was amended in 2002, the Commissioner of the OFIS had the discretion to determine whether a felony conviction indicated a lack of good moral character. According to defendants, the 2002 amendment prohibited licensing anyone convicted of a felony.[3] Although then-Commissioner Linda Watters issued an unpublished administrative decision[4] that interpreted the 2002 amendments to the Insurance Code and determined that they had removed the Commissioner's discretion and replaced it with an outright ban on licensing individuals convicted of a felony, plaintiff's application and several others were nonetheless reviewed under the former standard and approved.

An internal investigation at OFIS revealed that the *Mazur* decision was never published or communicated to the public by way of rule, new guideline, or OFIS letter or directive. Various OFIS employees reported that this decision was never formally communicated internally and that even following the decision, the administrative procedure for deliberating upon and considering applications for waiver under 18 USC § 1033 remained in place.

OFIS claims that once it discovered that a mistake had been made in granting plaintiff a license, it immediately began administrative proceedings to revoke the license. OFIS sent plaintiff a letter revoking his license in March, 2008 as a result of his OUIL conviction. Plaintiff contends that this was not simply a case of a bureaucratic mistake, but rather a case of intradepartmental politics gone awry.

Plaintiff filed the present action seeking a declaration that defendants violated MCL 338.41 (Michigan's Former Offenders Act) and seeking an injunction to prevent defendants from rescinding plaintiff's insurance producer license. Plaintiff also asked the trial court to declare that defendants failed to comply with Michigan's Insurance Code, MCL 500.100, *et seq* and

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most of the events that occurred giving rise to this case happened when the agency was still called OFIS.

[3] Although this is how OFIS claims to have interpreted the amendment to the statute, a document complied by OFIS in 2007 detailing several other states' interpretations of identical statutes and the interplay between the language of other states' statutes equivalent to MCL 500.1205 and MCL 500.1239 indicates that Michigan was the only state in 2007 to interpret the statue in a manner that gave the Commissioner absolutely no discretion to issue insurance controller licenses to felons.

[4] *Mazur v OFIS*, Case No. 03-384-L, Docket No. 2003-1515 (May 14, 2004). "The *Mazur* Decision" or *Mazur*.

asked that defendants be enjoined from rescinding plaintiff's insurance producer license based solely on his fully disclosed conviction for OUIL.

Both plaintiff and defendants moved for summary disposition and the trial court ruled in favor of plaintiff.

II. Standard of Review

We review a trial court's decision to grant injunctive relief for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). "The trial court abuses its discretion when its decision falls outside [the] range of principled outcomes." *Id.* This Court reviews de novo the findings of fact supporting the decision in an equitable action for clear error. *Maatta v Dead River Campers, Inc*, 263 Mich App 604, 607; 689 NW2d 491 (2004).

III. Analysis

The following sections of the 2004 Insurance Code are at issue in this case: MCL 500.205; MCL 500.1205; and, MCL 500.1239.

MCL 500.205 governs decisions of the Insurance Commissioner and provided:

> Orders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in this act shall be made or reached in the reasonable exercise of discretion.

MCL 500.1205 provided, in relevant part:

> (1) A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:
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> * * *
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> (b) Has not committed any act that is a ground for denial, suspension, or revocation under section 1239.[5]

[5] In 2004, MCL 500.1205(b) stated that the individual "has not committed any act that is a ground for denial, suspension, or revocation under section 1239." In January 2009, Governor Granholm signed into law two bills amending the Insurance Code. The bills specifically barred issuance of an insurance producer's license to individuals with prior felony convictions. (*See* (continued…)

MCL 500.1239 provided, in relevant part:

> (1) In addition to any other powers under this act, the commissioner may place on probation, suspend, revoke, or refuse to issue an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions for any 1 or more of the following causes:
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> * * *
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> (f) Having been convicted of a felony.

The crux of this case is whether defendants could rescind plaintiff's license after the agency had already granted the license when the agency was fully cognizant of plaintiff's prior OUIL felony conviction when it issued the license in 2004. When and whether the agency actually did or did not have the authority to use its discretion to grant the license is beside the point in light of the fact that the license was issued under full disclosure and utilized by plaintiff for a period of years. If plaintiff were to attempt to obtain a license today, the agency could properly deny the request pursuant to existing statutes because current language declares that the Commissioner *shall* deny a license to an applicant convicted of a felony. MCL 500.1205.

In addition, there is no dispute that one possible interpretation (the one advocated in the *Mazur* decision) of the interplay between the statutes, as they existed in 2004, would have allowed the agency to deny plaintiff's request for a license. The agency did not, however, deny the application. Because the agency granted plaintiff his license in 2004, plaintiff had no reason to seek to challenge the interpretation of MCL 500.1205 that the agency now claims it should have utilized back in 2004. Plaintiff has relied upon the issuance of that license to pursue a career that is contingent upon his retention of the license.

(…continued)

Plaintiff's Exhibit 5). The new law made the following changes to the wording of the statue: in the introductory language, it substituted "suspend, or revoke" for "suspend, revoke, or refuse to issue", and inserted ", and the Commissioner shall refuse to issue a license under section 1205 or 1206a"; and inserted "under section 1205 or 1206a". MCL 500.1239(1) now reads, in relevant part:

> In addition to any other powers under this act, the Commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, and the Commissioner *shall* refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes [emphasis added]:
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> * * *
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> (f) Having been convicted of a felony. [MCL 500.1239]

The statue has been revised in such a way so as to eliminate the element of discretion that may have existed in 2004.

Although this Court could engage in an analysis of the statute as written in 2004, and make a determination regarding the correct interpretation at that time, this would be a waste of judicial resources, as defendants already granted plaintiff a license with full knowledge of plaintiff's felony conviction and plaintiff's criminal record has not changed in the last five years.

Furthermore, as MCL 500.1205 is currently written, it prohibits the insurance Commissioner from *issuing* a license to a convicted felon, but it does not prohibit a convicted felon from *being* a licensed insurance producer, nor does it, as defendants argue, require that a license previously granted to a felon, be revoked. MCL 500.1239(1) states that the Commissioner *may* revoke an insurance producer's license if an individual is convicted of a felony. This is permissive, not mandatory language. Therefore, all of defendants' arguments that it was or is "required" to revoke plaintiff's license are without merit. It is statutorily permissible for plaintiff to retain his license.

We conclude that the present case is akin to *Kern v City of Flint*, 125 Mich App 24; 335 NW2d 708 (1983). In *Kern*, this Court reviewed the issuance of declaratory relief to a retired police officer based on the equitable principle of estoppel. The plaintiff Kern retired from the Flint police force after the City represented to him that his retirement benefit would exceed $700 per month. He received such benefits for a period of two years, until the City claimed error and reduced payment. This Court upheld the trial court's declaratory relief requiring the City to reinstate the higher payment.

> We agree with defendant's contention that generally the rule in this jurisdiction is that where one pays money to another by mistake, that person is entitled to recover the amount of the overpayment even if the mistake is due to lack of investigation. *Montgomery Ward & Co v Williams*, 330 Mich 275, 284, 47 NW2d 607 (1951); *Couper v Metropolitan Life Ins Co*, 250 Mich 540, 544, 230 NW 929 (1930). However, an exception to the rule exists where the party receiving the money has changed his position in reliance upon his receipt of it so that it would be inequitable to permit recovery. *Lake Gogebic Lumber Co. v Burns*, 331 Mich 315, 319, 49 NW2d 310 (1951). This exception comports with the general principles of estoppel which apply to the actions of municipal officials.
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> > " 'If under all the circumstances, the acts of the public body have created a situation where it would be inequitable and unjust to permit it to deny what it has done or permitted to be done, the doctrine of estoppel will be applied to the municipality.' 2 Antieau, Municipal Corporation Law, § 16A.01, p 16A-6." *Parker v West Bloomfield Twp*, 60 Mich App 583, 591-592, 231 NW2d 424 (1975). [*Kern*, 125 Mich App 28-29.]

Here we also uphold the trial court's application of principles of equity. There is no question that plaintiff has relied on defendants' issuance of an insurance producer license to pursue and establish a career over the last five years. The license was not issued because of any mutual or factual mistake. Defendants are the ones who claim to have made a "mistake" in their

application of their own internal procedures. However, even at the time the license was issued, there is ample evidence that the "mistake" was actually an unresolved internal dispute over the proper application of the statute, rather than a simple clerical error. As the old equitable maxim states "equity regards that as seen which ought to be seen and having so seen, as done that which ought to be done." See *Warren Tool Co v Stephenson,* 11 Mich App 274; 161 NW2d 133 (1968).

Defendants argue that this is not an appropriate case in which to apply equitable principles because equity cannot override the legal statutory mandates in the Insurance Code. As we previously concluded, the current Insurance Code does not require that a license already issued to one convicted of a felony, when the agency had full knowledge of that felony when the license was issued, be revoked. Therefore, the equitable decision involved in this case does not contradict the statute.

Defendants also argue that the trial court erroneously issued a writ of mandamus. However, the trial court record indicates that the court never issued such a writ. The order granting summary disposition in favor of plaintiff clearly states that it is "an order granting summary disposition on counts II and III of plaintiff's complaint." Plaintiff's request for a writ of mandamus was in count IV of the complaint and the trial court's records indicate that the parties stipulated to the dismissal of "the Remaining Counts of Plaintiff's Complaint" without prejudice on September 26, 2009.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens