

STATE OF MICHIGAN
COURT OF APPEALS

COUNTY OF IONIA,

UNPUBLISHED
November 1, 2012

Defendant-Appellee,

and

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Defendant-Amicus Curiae,

v

No. 302163
Ionia Circuit Court
LC No. 06-024599-CZ

PITSCH RECYCLING & DISPOSAL, INC. and
PITSCH SANITARY LANDFILL, INC.,

Plaintiffs-Appellants,

and

MICHIGAN WASTE INDUSTRIES
ASSOCIATION,

Amicus Curiae.

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

SHAPIRO, J. (*concurring*).

I agree with the majority opinion's analysis of the relevant statutes and the authority of the county to issue the challenged waste disposal plan and so join in its resolution of the merits of this case.

I write separately, however, to note that this case could also have been resolved on procedural grounds as Pitsch failed to take the action necessary to include the Department of Environmental Quality (DEQ), as a party. As the prior panel of this court recognized, the DEQ is a necessary party to this action. While the plaintiff seeks to couch its claim as merely a challenge to a county waste disposal plan, the challenge is equally directed at the state as the

county plan in question was adopted by the DEQ on January 19, 2001 and thereby incorporated into the state waste management plan:

the parties do not dispute that the DEQ has a significant role in the oversight and approval of county waste management plans or that the county waste management plans are incorporated into the state waste management plan overseen by the DEQ. Consequently, *the DEQ would be affected by any decision in this case [t]herefore, the DEQ is a necessary party to this case*”

* * *

“[B]ecause this issue would affect the implementation of both the county and the state plans, the inclusion of the DEQ *as a party* in this case is necessary. . . . [*Ionia County v Pitsch Recycling & Disposal, Inc*, unpublished opinion per curiam of the Court of Appeals issued August 6, 2009 (Docket No 284230) (slip op, p6) (italics added)].

It is therefore law of the case that the DEQ is a necessary party whose “interest is of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.” *Mather Investors v Larson*, 271 Mich App 254, 257-258; 720 NW2d 575 (2006).

Count I of Pitsch’s complaint challenges the Ionia solid waste management plan as outside the scope of Part 115 and seeks to overturn the DEQ’s approval of that plan and incorporation of it into the statewide plan. This claim, however, has been brought well after the deadline for such challenges. A party seeking review of a decision rendered by a state agency has three potential avenues to seek relief: (1) the type of review provided in the statutes applicable to the particular agency; (2) the method of review provided by the Administrative Procedures Act; or (3) an appeal pursuant to MCL 600.631, which allows appeals from an agency decision to the circuit court in all instances where review has not otherwise been provided for by law. See *BCBSM v Comm’r of Ins*, 155 Mich App 723, 728-729; 400 NW2d 638 (1986).

Part 115 does not provide a basis for judicial review directly from MDEQ decisions approving or denying solid waste management plans or updates to those plans. It does not appear that the APA provides a basis for review under these circumstances, but even if it did, a request for such review must be made within 60 days after the agency decision. MCL 24.304(1). Lastly, while MCL 600.631 does provide a basis under which Pitch could have sought review, an appeal of right to the circuit court from an agency decision must be taken within the time limits set by the court rules, which in this case is 21 days. MCR 7.101(B)(1) as in force in 2001 (and now codified in MCR 7.104(A)). *Preserve the Dunes v DEQ*, 471 Mich 508, 520; 684 NW2d 847 (2004); *Davis v Department of Corrections*, 251 Mich App 372, 374-375; 651 NW2d 486 (2002). An application for leave to appeal under section 631 may be made, but no later than six months after the date of the administrative decision. Here, Pitsch did not bring its challenge to the DEQ’s decision until more than 5 years after it was made.

Plaintiff argues that because the DEQ was permitted to file amicus briefs below and to this Court, that the failure to name DEQ as a party is of no consequence. However, had our predecessor panel sought only an amicus brief it could have invited one itself or remanded for that purpose. Instead, we remanded for the state to be added as a party and this action was necessary given that Pitsch was seeking to invalidate the decision of a state agency and to seek damages from a county for following a solid waste management plan that was approved by the DEQ and formed a portion of the statewide plan.

The other counts in Pitsch's complaint against the state sought damages and injunctive relief for violation of Pitsch's constitutional rights. These counts, as properly noted by the trial court, may not be brought against the state in the circuit court, but must be brought in the Court of Claims as they are *ex delictu* and seek money damages as well as equitable relief. See *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 765; 664 NW2d 185 (2003) (holding Court of Claims has exclusive subject-matter jurisdiction over contract or tort claims seeking solely declaratory relief against a state agency). Nevertheless, Pitsch made no attempt to file suit in the Court of Claims after we remanded the case nor even after the claims were dismissed from the circuit court for lack of jurisdiction.¹ Pitsch also did not appeal the circuit court's ruling that it lacked jurisdiction.²

Having failed to timely challenge the DEQ's action and having failed to sue the DEQ in the Court of Claims, Pitsch has failed to comply with this court's directive and has failed to name a necessary party to its action against the county. Accordingly, dismissal was proper.

/s/ Douglas B. Shapiro

¹ After filing against the state in the court of claims, the matter could readily have been joined with the circuit court claim. MCL 600.6421.

² As noted, this Court held that the DEQ was a necessary party and directed that it be added on remand. However, this court cannot confer jurisdiction where none exists. By remanding the case, this Court gave plaintiff an opportunity to establish jurisdiction over the DEQ; it did not and could not waive the need for jurisdiction. While this Court may have assumed in its prior opinion that the DEQ could properly be added as a party on remand, it did not analyze the point. Accordingly, any such prior assumption by this Court is not binding "for it is well-established in this state that 'a point thus assumed without consideration is of course not decided.'" *In re Apportionment of State Legislature—1982*, 413 Mich 96, 113-114; 321 NW2d 565 (1982), quoting *Allen v Duffie*, 43 Mich 1, 11; 4 NW 427 (1880).