

STATE OF MICHIGAN
COURT OF APPEALS

DIMITRIOS PAPAS, TED GATZAROS, VIOLA
PAPAS and MARIA GATZAROS,

Plaintiffs-Appellees,

v

MICHIGAN GAMING CONTROL BOARD,

Defendant-Appellant.

FOR PUBLICATION

August 5, 2003

9:00 a.m.

No. 243989

Wayne Circuit Court

LC No. 02-203605-CZ

Updated Copy

September 12, 2003

Before: Cooper, P.J., and Sawyer and Zahra, JJ.

ZAHRA, J.

Defendant, the Michigan Gaming Control Board, a state agency having regulatory authority over the non-Indian casinos located in the city of Detroit, appeals by leave granted from an order of the circuit court denying defendant's motion for summary disposition and granting plaintiffs' motion for partial summary disposition. Plaintiffs are owners of several Detroit restaurants, a conference center, and a hotel. Plaintiffs' businesses provided casino patrons with food or hotel accommodations in exchange for casino-issued coupons. Plaintiffs' businesses would present the coupons to the casinos for payment for the goods or services provided to the casinos' patrons. The issue presented in this case is whether defendant has exclusive jurisdiction over matters involving the licensing and regulation of the gaming industry, including the determination whether plaintiffs are casino "suppliers" subject to regulation and licensing under the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq.* We conclude that defendant does have exclusive jurisdiction over the matters involved in this case. We reverse.

I. Facts and Procedure

Plaintiffs were at one time part-owners of the entity that owns and operates the Greektown Casino. As prospective casino owners, plaintiffs applied for licensing as required by the act. When doubt arose regarding whether plaintiffs' application was going to be approved, plaintiffs arranged to sell their interest in the casino to their partner, the Sault Ste. Marie Tribe of Chippewa Indians. Plaintiffs retain ownership, however, of several businesses near the Greektown Casino, including Pegasus Taverna, Fishbone's Rhythm Kitchen Café, the International Business and Conference Center, and the Atheneum Hotel.

The act requires that any person or business providing goods or services to a casino must be licensed as a casino supplier. MCL 432.207a. However, the act also provides some exemptions from the supplier licensing requirements. One of the exemptions is the "field of commerce" exemption adopted by the board in Resolution and Order No. 2000-02, adopted June 13, 2000. In that resolution, the board acknowledged that it is a common marketing practice of casinos to reward their patrons with complimentary amenities such as lodging and other related hospitality and entertainment services in order to attract business. However, because the casinos are initially housed in temporary facilities that do not permit them to provide such amenities, casinos are forced to rely on outside vendors. Resolution 2000-02 indicates that the board has the discretion to exempt these vendors from the ordinary supplier licensing requirements until permanent casino facilities are completed. Among the vendors listed as eligible for the exemption are "theatres, ballrooms, halls, arenas, parks, stadia, golf courses, and other entertainment, recreational and sports facilities located in the State of Michigan." In addition, the resolution indicates that the board may exempt the following:

Hotels, motels or other lodging facilities, located within the State of Michigan, which regularly offer rooms to the general public to the extent that they provide lodging and other hospitality facilities and services to casino patrons that are directly purchased or reimbursed by a licensed casino. This exemption includes all goods and services ordinarily available to the provider's customers, including, but not limited to, food and beverage services, . . . [and] convention and banquet services.

In order to qualify for the field of commerce exemption, a business is required to file a written request and related disclosure forms with the board. The board reserves the right to evaluate each request and to deny a request whenever it determines that denial is necessary to protect the public interest or accomplish the purposes of the act.

In August 2000, plaintiffs submitted field of commerce exemption requests for each of their four businesses. Plaintiffs represented that they were supplying goods and services to casinos and provided copies of agreements between themselves and Greektown Casino. On February 7, 2001, the board denied the exemption requests on the ground that plaintiffs failed to pass their background checks when they applied for a casino license, and this fact could require the board to find them unsuitable for licensure. Because plaintiffs represented that they were supplying goods and services to a casino on a regular basis, the board directed them to apply for supplier licenses within thirty days.

Plaintiffs did not appeal this decision, nor did they submit the required supplier license applications within thirty days. As a result, their vendor identification numbers were inactivated and the casino operators were prohibited from doing business with them. A March 9, 2001, letter advised plaintiffs that their businesses could be placed back on the active vendor list if they submitted completed applications for supplier licenses. Plaintiffs never did so. Instead, two of plaintiffs' businesses, the Atheneum Hotel and International Market Place, contracted with Detroit Hospitality, L.L.C., a licensed casino supplier, to provide hospitality, entertainment, and other complimentary services to Detroit casinos.

On July 25, 2001, the Atheneum submitted another field of commerce exemption request, which included a copy of the agreement entered into between the Atheneum and Detroit Hospitality. In its request, the Atheneum explained that it did not have a contract with any Detroit casino and that it did not consider itself to be a casino supplier under the terms of the act. The Atheneum further stated that it had a contract with Detroit Hospitality, under which it provided hotel, lodging, banquet, food, beverage, conference facilities, and other related goods and services to customers referred to it by Detroit Hospitality, and that it had no control over whether those customers were casino patrons.

Plaintiffs, through the Atheneum and International Market Place, performed under their contracts with Detroit Hospitality until July 31, 2001, at which time Detroit Hospitality notified plaintiffs that the contracts were being terminated on the basis of a directive from defendant. On August 2, 2001, the Atheneum and International Market Place sent letters to defendant, which included a "Vendor Notification and Disclosure Form." Each of the Vendor Notification and Disclosure Forms indicated that the form must be completed by any vendor providing nongaming related goods or services for a casino or casino enterprise. The forms noted that they should not be sent to defendant, but that the information must be submitted to the casino or casino enterprise for processing, and that the casino or casino enterprise was responsible for forwarding the requested information to defendant. Although neither form identified which of the casino or casino enterprises were to be provided services, each form included Greektown; Detroit Entertainment, L.L.C.; and MGM Grand Detroit, L.L.C., and questioned whether the vendor had a direct contract with the casino or casino enterprise. In the forms, both the Atheneum and International Market Place indicated that there was not a direct contract with either a casino or a casino enterprise.

On September 5, 2001, defendant sent a letter to International Market Place acknowledging that defendant received the submission of a Vendor Notification & Disclosure Form for International Market Place. The letter also indicated that the "request" would not be processed further because Detroit Hospitality had terminated its agreement with International Market Place on August 1, 2001.¹

On January 10, 2002, defendant sent the Atheneum a letter, which included a copy of a January 9, 2002, order denying the Atheneum's request for an exemption from the supplier licensing requirements. Defendant found that Detroit Hospitality entered into the agreement with the Atheneum in order to acquire hotel, lodging, and related hospitality services from the Atheneum for the complimentary use and benefit of Greektown Casino patrons, and that such services were reimbursed and paid for by the casino through Detroit Hospitality. Defendant determined that the Atheneum was a supplier of hotel, lodging, and related hospitality services to Greektown Casino and that the Atheneum was subject to the supplier licensing requirements. Defendant further determined that licensing was deemed necessary because the individuals having an ownership interest and the officers and directors of the Atheneum were previously investigated and found to have several "serious apparent deficiencies" that could require

¹ It is not apparent from the letter what "request" was no longer being processed.

defendant to find them unsuitable for licensure, and that the individuals withdrew their application for a casino license before defendant made a final determination regarding the "alleged apparent deficiencies" and lack of suitability for a license. Defendant also found that the Atheneum offered no evidence that the "alleged apparent deficiencies" were corrected.

Thereafter, plaintiffs initiated a lawsuit in circuit court entitled "Complaint for Declaratory Judgment, Injunctive Relief, Mandamus and/or Superintending Control[.]" Plaintiffs claimed, in part, that because all the goods and services at issue were supplied to casino patrons outside the casino, and there was no contract between plaintiffs' businesses and the casino, they were not subject to the jurisdiction of the board. The board moved for summary disposition, challenging the jurisdiction of the circuit court to decide whether plaintiffs were "suppliers" as defined by the act, and asserting that the board was the proper forum for determining licensing issues. Plaintiffs moved for partial summary disposition on the issue regarding the coupon program, asking the court to declare that restaurants and hotels are not suppliers of goods or services to a casino when they participate in coupon redemption programs. The trial court concluded that participation in a coupon program through which plaintiffs supplied goods and services to casino patrons did not make plaintiffs' businesses suppliers to the casinos, and granted plaintiffs' motion for partial summary disposition. The board's motion for summary disposition was also denied. In so ruling, the trial court relied on *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209, 217; 516 NW2d 54 (1994), in which the Supreme Court stated that the circuit court is the proper venue for claims seeking equitable or declaratory relief against the state. We granted defendant's application for leave to appeal.

II. Analysis

The board contends that the circuit court should not have exercised jurisdiction over this matter until the issue regarding whether plaintiffs are required to be licensed as casino suppliers is fully and finally resolved through administrative proceedings. The board maintains that plaintiffs have participated in administrative proceedings relating to casino and casino supplier licensing and in each instance plaintiffs have either abandoned the process or declined to pursue other administrative avenues of relief available to them. The board further claims that plaintiffs have failed to establish that exhaustion of administrative remedies would be futile. The board contends that if this evasive bypass of the board's jurisdiction is allowed to stand, it will create chaos in what the Legislature intended to be a highly regulated industry with a single forum for the control of activities related to casino gaming.

Plaintiffs contend that they are not challenging any specific agency decision, but, instead, are contending that the board had no statutory jurisdiction to take action in regard to a hotel or restaurant's acceptance and redemption of coupons. Plaintiffs maintain that the circuit court is the appropriate forum to determine the scope of the agency's jurisdiction—not the agency itself, as alleged by the board. Plaintiffs further allege that the board's actions, as they relate to the plaintiffs, involve a series of torts involving constitutional violations over which the circuit court has plenary jurisdiction. Plaintiffs argue that they need not exhaust administrative remedies before the very agency that committed the alleged constitutional violations. Finally, plaintiffs maintain that exhaustion of administrative remedies would be futile because the board is predisposed to rule against them.

A. Standard of Review

"This Court reviews decisions on motions for summary disposition de novo." *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 556; 655 NW2d 304 (2002). Motions for summary disposition involving questions of subject-matter jurisdiction are properly brought under MCR 2.116(C)(4). *Manning v Amerman*, 229 Mich App 608, 610, 615; 582 NW2d 539 (1998). Additionally, "[s]ummary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are also reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001).

B. The Exclusive Jurisdiction of The Michigan Gaming Control Board

Circuit courts are courts of general jurisdiction, vested with original jurisdiction over all civil claims and remedies "except where exclusive jurisdiction is given in the constitution or by statute to some other court" MCL 600.605; *Bowie v Arder*, 441 Mich 23, 50; 490 NW2d 568 (1992). In *Citizens for Common Sense in Gov't, supra* at 50, this Court explained:

The circuit courts of this state have subject-matter jurisdiction to issue declaratory rulings, injunctions, or writs of mandamus. Const 1963, art 6, § 13; MCL 600.605 However, if the Legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, then the circuit court cannot exercise jurisdiction over those same areas. MCL 600.605

This Court has not required the phrase "exclusive jurisdiction" to appear in a statutory provision in order to find that jurisdiction has been vested exclusively in an administrative agency. *Capital Region Airport Auth v DeWitt Charter Twp*, 236 Mich App 576, 590-591; 601 NW2d 141 (1999). As long as the statutory language chosen by the Legislature establishes the intent to endow the state agency with exclusive jurisdiction, courts must decline to exercise jurisdiction until all administrative proceedings are complete. *Id.* Thus, a determination whether defendant has exclusive jurisdiction over the issues presented in this case requires an interpretation of the act.

In interpreting the act, we must ascertain and give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999); *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). To determine the intent of the Legislature, we must first review the language of the statute itself. *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning plainly expressed and further judicial interpretation is not permitted. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

"Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). An ambiguity of statutory language does not exist merely because a

reviewing court questions whether the Legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning. *Frame v Nehls*, 452 Mich 171, 176; 550 NW2d 739 (1996). Thus, where common words used in their ordinary fashion lead to a single reasonable interpretation, the statute is not ambiguous.

Reviewing the act under the above referenced rules of construction, we conclude that the Legislature vested the board with exclusive jurisdiction over all matters relating in any way to the licensing, regulating, monitoring, and control of the non-Indian casino industry. MCL 432.204(1) provides that defendant has "the powers and duties specified in this act and all other powers necessary and proper to fully and effectively execute and administer this act for the purpose of licensing, regulating, and enforcing the system of casino gambling established under this act." The act specifically addresses the board's jurisdiction. MCL 432.204a(1) provides that "[t]he board shall have jurisdiction over and shall supervise all gaming operations governed by this act. The board shall have all powers necessary and proper to fully and effectively execute this act" The act provides a nonexhaustive list of powers granted to the board. For example, MCL 432.204a(1)(a) provides defendant with the investigative powers over applicants for casino licenses as well as the ability to grant and deny licenses under the act.² Additionally,

² MCL 432.204a(1) provides, in relevant part:

The board shall have jurisdiction over and shall supervise all gambling operations governed by this act. The board shall have all powers necessary and proper to fully and effectively execute this act, including, but not limited to, the authority to do all of the following:

(a) Investigate applicants and determine the eligibility of applicants for licenses or registration and to grant licenses to applicants in accordance with this act and the rules promulgated under this act.

* * *

(e) Adopt standards for the licensing of all persons under this act, as well as for electronic or mechanical gambling games or gambling games, and to establish fees for the licenses.

* * *

(k) Revoke or suspend licenses, impose fines and penalties as the board considers necessary and in compliance with applicable laws of the state regarding administrative procedures, and review and decide applications for the renewal of licenses. The board may suspend a casino license, without notice or hearing upon a determination that the safety or health of patrons or employees is jeopardized by continuing a casino's operation. If the board suspends a license under this

(continued...)

MCL 432.204a(1)(e) confers jurisdiction to "[a]dopt standards for the licensing of all persons under this act" Subsections 4a(1)(k) and (m) empower the board to revoke, restrict, or suspend licenses. Further, subsection 4a(1)(v) permits the board to "[t]ake any other action as may be reasonable or appropriate to enforce this act and rules promulgated by the board." Finally, in the definition of "supplier" found in MCL 432.202(gg), the Legislature expressed its intention that the board be the arbiter of who fits within that definition.³ A supplier is "a person

(...continued)

subdivision without notice or hearing, a prompt postsuspension hearing shall be held to determine if the suspension should remain in effect. The suspension may remain in effect until the board determines that the cause for suspension has been abated. The board may revoke the casino license upon a determination that the owner has not made satisfactory progress toward abating the hazard.

* * *

(m) Suspend, revoke, or restrict licenses and require the removal of a licensee or an employee of a licensee for a violation of this act or a rule promulgated by the board or for engaging in a fraudulent practice, and impose civil penalties of up to \$5,000.00 against individuals and up to \$10,000.00 or an amount equal to the daily gross receipts, whichever is greater, against casino licensees for each violation of this act, any rules promulgated by the board, any order of the board, or for any other action which the board determines is a detriment or impediment to casino gambling operations.

* * *

(s) Perform a background check, at the vendor's expense, of any vendor using the same standards that the board uses in determining whether to grant a supplier's license.

* * *

(v) Take any other action as may be reasonable or appropriate to enforce this act and rules promulgated by the board.

³ MCL 432.202(gg) defines "supplier" as follows:

[A] person who the board has identified under rules promulgated by the board as requiring a license to provide casino licensees or casino enterprises with goods or services regarding the . . . business of a proposed or existing casino . . . on a regular or continuing basis, including, but not limited to, junket enterprises, . . . food purveyors, and construction companies.

(continued...)

who the board has identified under rules promulgated by the board as requiring a license to provide . . . goods or services" MCL 432.202(gg) (emphasis added). Accordingly, on the basis of the above referenced statutory provisions, it is evident that the Legislature conferred exclusive jurisdiction on defendant regarding not only matters of licensing, but also with respect to the factual issue whether a person or entity is a casino supplier so that licensing is required under the act.⁴

Plaintiffs rely on *Huggett v Dep't of Natural Resources*, 232 Mich App 188; 590 NW2d 747 (1998), aff'd 464 Mich 711; 629 NW2d 915 (2001), as authority for the proposition that the circuit court may assume jurisdiction over the matter. The statute at issue in *Huggett* is distinguishable from the statute at issue in this case. *Huggett* involved a matter of statutory interpretation "that did not call for extensive findings of fact or technical expertise." *Id.* at 193. Rather, *Huggett* dealt with the question whether the plaintiff was subject to the jurisdiction of the Department of Natural Resources in light of a statutory exception to the agency's jurisdiction. *Id.* at 192-193. There is no comparable statutory exception to the board's jurisdiction in this case.

We further reject plaintiffs' contention that the undisputed facts presented in this case require the conclusion that plaintiffs' conduct falls outside the jurisdiction of the board as a matter of law. Plaintiffs maintain that they are supplying goods and services to casino patrons and that they supply nothing to casinos. We agree that if plaintiffs' businesses participated in the described coupon program, these businesses would be providing goods and services to casino patrons. However, this conclusion and the conclusion that plaintiffs' businesses are also providing services to the casinos issuing the coupons are not mutually exclusive. The use of such coupons is merely an alternative way for the casinos to obtain these goods and services for their patrons. This accommodation is itself a service to the casinos. Casinos provide these amenities to keep casino patrons in or near the casino as long as possible. Thus, by accepting the casino coupons, the restaurant or hotel supplier provides the issuing casino the service of keeping the casino patrons near the casino while the patrons enjoy food or lodging "on the house."

Moreover, plaintiffs represented themselves as suppliers to casinos in their applications for field of commerce exemptions from the supplier licensing requirements and provided the board with copies of contracts outlining the coupon program. This documentation constitutes an

(...continued)

MCL 432.207a requires suppliers to be licensed and sets forth the requirements for licensure. Subsection 7a(6) provides, in pertinent part, that "[a]ny person . . . that supplies equipment, devices, . . . or services to a licensed casino shall first obtain a supplier's license."

⁴ The reasons for the board's primacy in this regard are apparent when one considers that the state's share of the proceeds under MCL 432.212 is based on casino revenues and could be substantially diminished by cash payments for goods or services that artificially diminish the casino's gross receipts. Thus, vendors for whom the board requires a supplier license must meet eligibility requirements and must agree to audits of their books and records. MCL 432.207a(1), (6), (7), and (11); MCL 432.214.

admission that plaintiffs' businesses are suppliers of services or goods to the casinos with respect to their participation in the coupon program.

As the board points out, even in the absence of a written bilateral contract, the coupon program constitutes a unilateral contract; the coupon is an offer of compensation for performance of a particular act, in this case providing casino patrons with food, lodging, or other amenities. Performance of the act constitutes acceptance of the offer, entitling the party to compensation. Thus, the fact that there may not be a written contract between the casino and plaintiffs' businesses is irrelevant, because an enforceable contract exists nonetheless. Reasonable minds viewing the facts presented in this case can reach differing conclusions whether plaintiffs are "suppliers" under the act. Therefore, the resolution of whether plaintiffs are "suppliers" rests in the exclusive jurisdiction of the board, as clearly intended by the Legislature. MCL 432.202 (gg).

C. Plaintiffs Failed to Exhaust their Administrative Remedies and Failed to Establish that Exhaustion of Such Remedies Would be Futile

Finally, we find no merit in the argument that plaintiffs need not exhaust their administrative remedies. Plaintiffs' conclusory allegations of constitutional violations are insufficient as a matter of law to avoid the regulatory scheme created by the Legislature for the monitoring, licensing, and control of the non-Indian casino industry in Michigan. In *Michigan Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 578-579; 531 NW2d 790 (1995), Judge Taylor (now Justice Taylor) explained:

[T]his "constitutional violation" exception to the exhaustion requirement seems to be an outgrowth of the "futility" exception. There is no sense in forcing a plaintiff to plod through the lengthy administrative process when only the courts have the authority to resolve the controlling constitutional issue. Accordingly, the exhaustion requirement is displaced only when there are no issues in controversy other than the constitutional challenge. *Jones v Dep't of Corrections*, 185 Mich App 134, 138-139; 460 NW2d 575 (1991). The mere presence of a constitutional issue is not the decisive factor in avoiding the exhaustion requirement. If there are factual issues for the agency to resolve, the presence of a constitutional issue, or the presence of an argument couched in constitutional terms, does not excuse the exhaustion requirement even if the administrative agency would not be able to provide all the relief requested. *Universal Am-Can [Ltd v Attorney General]*, 197 Mich App 34, 38; 494 NW2d 787 (1992)]; *Jones, supra* at 138-139; *O'Keefe v Dep't of Social Services*, 162 Mich App 498, 506; 413 NW2d 32 (1987); see also *Hardy v State Personnel Director*, 392 Mich 1, 5, n 1; 219 NW2d 61 (1974); accord *Yakus v United States*, 321 US 414, 435; 64 S Ct 660; 88 L Ed 834 (1944).

In the present case, plaintiffs allege that as a result of the licensing process, plaintiffs suffered constitutional violations. However, it is significant that plaintiffs never pursued any licensing determinations to finality. Consequently, the board never denied plaintiffs any license (either a casino license or a casino supplier license). Thus, the board was not afforded the opportunity to correct any errors that may have occurred in the preliminary proceedings. It is

presumed that an administrative agency will correct its errors if given a chance to do so. *Citizens for Common Sense in Gov't, supra* at 52. We therefore conclude that plaintiffs were required to exhaust administrative remedies notwithstanding their claims of constitutional violations.

For similar reasons, we conclude that plaintiffs have failed to establish that exhaustion of administrative remedies would be futile. Plaintiffs maintain that the board is biased against them. Whether the board is biased against plaintiffs or whether the board otherwise wrongfully denied plaintiffs a supplier license is impossible to determine because plaintiffs have failed to pursue or obtain a final decision on licensure from the board. Futility is not established merely because it may appear at the preliminary stages of administrative proceedings that a litigant would be unable to prevail. The Legislature created an elaborate process whereby the board has the authority and duty to develop rules and decide matters involving the monitoring, licensing, and control of the non-Indian casino industry. The administrative record, through no fault of the board, was not developed and no final determinations have been rendered relating to plaintiffs. Under these circumstances, we cannot conclude that further administrative proceedings would be futile.

III. Conclusion

The circuit court erred in assuming jurisdiction over this matter because the board has exclusive jurisdiction to determine whether plaintiffs are "suppliers" under the act. Plaintiffs are required to exhaust their administrative remedies before being afforded limited judicial review pursuant to the Administrative Procedures Act.⁵ There exists no evidence in this record to support the conclusion that the exhaustion of administrative remedies by the plaintiffs would have been futile. The judgment of the circuit court is reversed.

Cooper, P.J., concurred.

/s/ Brian K. Zahra
/s/ Jessica R. Cooper

⁵ Under the Michigan Gaming Control and Revenue Act, the circuit court's role is limited to judicial review of the board's final decisions under the Administrative Procedures Act, MCL 24.201 *et seq.* MCL 432.217.