STATE OF MICHIGAN

COURT OF APPEALS

AQUATIC MANAGEMENT SERVICES, INC., and WILLIAM KRAUS,

Plaintiffs-Appellants,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY, STEVEN CHESTER, RICHARD HOBRLA, and LAURA ESMAN,

Defendants-Appellees.

UNPUBLISHED
December 21, 2010

No. 292365
Court of Claims
LC No. 07-000111-MK

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Plaintiffs Aquatic Management Services, Inc. (Aquatic), and William Kraus appeal as of right the trial court's orders granting summary disposition in favor of defendants. We affirm, holding that plaintiffs' suit fails on the basis of procedural and jurisdictional deficiencies.

Pursuant to MCL 324.8312, a provision of the pesticide control act, MCL 324.8301 *et seq.*, contained in part 83 of the Natural Resources and Environmental Protection Act (NREPA), 324.101 *et seq.*, Kraus had obtained and held a category 5 (aquatic) commercial pesticide applicator certificate. In general, and upon procuring the necessary permit under the aquatic nuisance control act (ANCA), MCL 324.3301 *et seq.*, contained in part 33 of the NREPA, Kraus's certification permitted him to chemically treat waters of the state with pesticides in order to control aquatic nuisances, i.e., organisms that live or propagate within the aquatic environment that impair the use or enjoyment of state waters, MCL 324.3301(a).[1] Pursuant to MCL

[1] Part 33 or the ANCA was made effective October 1, 2004, pursuant to 2004 PA 246. This same public act also repealed MCL 333.12561 to 12563, effective October 1, 2004, which provisions previously addressed aquatic nuisances and permit applications to treat and control such nuisances. The events at issue here occurred both before and after October 1, 2004. Therefore, depending on the nature of our discussion and the timeframe involved, we shall refer to either the ANCA or MCL 333.12561 to 12563.

324.8313, Aquatic had obtained and held a license to operate a business as a commercial applicator of pesticides, and it operated an aquatic nuisance control (ANC) business under part 33 of the NREPA.[2] As reflected in MCL 324.8313(2), in order to be licensed as a commercial applicator and to provide services to the public, it is necessary to have the certification identified in MCL 324.8312, which Kraus had acquired, and Kraus was the sole shareholder in Aquatic. Thus, Kraus's certification enabled Aquatic to obtain its business license as a commercial applicator of pesticides and to conduct ANC activities with the use of pesticides.

In January 2006, plaintiffs submitted a couple of permit applications to defendant Department of Environmental Quality (DEQ) relative to ANC projects. Pursuant to a letter dated February 10, 2006, defendant Richard Hobrla informed plaintiffs that the DEQ would henceforth deny all ANC permit applications submitted by plaintiffs until November 29, 2009, because of two misdemeanor convictions and a history of violations regarding chemical treatment of state waters. Hobrla was chief of the Aquatic Nuisance Control and Remedial Action Unit, Surface Water Assessment Section. In the letter, Hobrla cited 2006 AC, R 323.3108(3),[3] which provides:

> The department shall deny a permit application or an application for a certificate of coverage if an applicant has committed 2 or more violations of other permits previously issued under the act, conditions of a permit, or these rules within 1 calendar year. For purposes of this subrule, "violation" means conviction in a court of law . . . .

The letter cited a conviction on May 5, 2004, for chemically treating some canals absent an ANC permit, and a conviction on November 30, 2004, for chemically treating a lake without permission from bottomland owners, without properly posting signs notifying riparians of the treatment, and without providing written notice of the treatment to certain riparians prior to treating the lake. Records of the criminal proceedings contained in the lower court file indicate that Kraus alone incurred these two convictions, not Aquatic. The letter further reflected that the November 29, 2009, end date for permit denials was set predicated on a five-year time span beginning with the date of the second conviction on November 30, 2004. The letter proceeded to cite 12 additional instances, beginning in 1997 and running through 2005, in which plaintiffs

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[2] Under MCL 324.3305(1), "[a] chemical shall not be used in waters of the state for aquatic nuisance control unless it is registered with the EPA, pursuant to section 3 of the federal insecticide, fungicide, and rodenticide act, 7 USC 136a, and the Michigan department of agriculture, pursuant to part 83 [under which plaintiffs are certified and licensed on pesticide use], for the aquatic nuisance control activity for which it is used."

[3] The DEQ is authorized to promulgate rules for purposes of part 33 (ANCA). MCL 324.3312. Prior to October 1, 2004, "[t]he department of natural resources . . . promulgate[d] rules" with respect to treating aquatic nuisances. MCL 333.12561(3). Rule 323.3108 was promulgated under MCL 333.12561(3).

failed to comply with statutes and rules relative to treating aquatic nuisances. According to criminal records, aside from the two convictions alluded to above, there was a guilty plea conviction against Aquatic on May 7, 2001, for applying chemicals to ponds without an ANC permit, a guilty plea conviction against Aquatic on October 20, 2005, for chemically treating a canal without an ANC permit, a bench trial conviction against Kraus on October 19, 2006, on two counts of ANC violations, and a bench trial conviction against Kraus on November 17, 2006, for an ANC violation. The DEQ's letter to plaintiffs was sent in order to comply with MCL 324.3307, which requires written notice of a permit denial, including the reasons for the denial.

On February 23, 2006, the DEQ mailed numerous letters to persons and entities who had submitted applications to control aquatic nuisances and obtain permits and who had indicated an intent to hire plaintiffs to perform the work. The letter stated that, due to a significant history of noncompliance, the DEQ was required to deny ANC permits to plaintiffs and that permits issued to other parties will prohibit those parties "from contracting with [plaintiffs] to chemically treat regulated waters of the state until November 29, 2009." The letter informed the recipients that they could either change the applicant's mailing address on the permit applications[4] or withdraw the permit applications.

The DEQ also issued a general notice which indicated that plaintiffs were prohibited from obtaining ANC permits and included such information on its website.

Hobrla testified in his deposition that, before preparing and mailing the letter of February 10, 2006, to plaintiffs, he had a meeting with defendant Laura Esman[5] and two other DEQ officials regarding the proper course of action to take against plaintiffs. The sanctions contained in the letter sent to plaintiffs represented the position that the DEQ decided to take after discussions at the meeting and consultation with the Attorney General's office. Plaintiffs did not participate in this meeting, nor did they have notice of the meeting. Plaintiffs were not aware of the meeting or the consultation with the Attorney General's office; the DEQ acted without any input from plaintiffs. Plaintiffs quote deposition testimony by Esman that the decision to deny permits to plaintiffs for the five-year time span was based on a conclusion that a permanent denial of permits was too harsh and that five years was adequate in relationship to the nature of the compliance failures at issue. We note that, while parts of Esman's deposition testimony are included in the lower court record, the transcript pages cited by plaintiffs are not included. That being said, R 323.3108(3) simply provides that the DEQ "shall deny a permit application" when

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[4] Apparently, the permit applications were submitted through plaintiffs and included authorizations from persons and entities giving plaintiffs the power to process the applications. Under MCL 324.3303(4), permit applications can only be submitted by impacted bottomland owners, lake boards for affected waterbodies, state or local governmental entities, or a "person who has written authorization to act on behalf of" such owners, boards, or entities.

[5] Esman was a DEQ analyst and one of Hobrla's subordinates in the Aquatic Nuisance Control and Remedial Action Unit. We also note that defendant Steven Chester was director of the DEQ.

two or more violations are committed "within 1 calendar year." The rule does not expressly address the length of time that the DEQ can deny permits. Indeed, R 323.3108(3) could be interpreted in myriad ways, some of which would not support the DEQ's action, e.g., the rule could be construed as requiring a permit application denial only when two or more convictions occur within the calendar year of the application.[6] In light of our ultimate ruling in this case, we need not resolve the questions regarding the legal soundness of R 323.3108(3) and whether the rule was properly applied by the DEQ.

Plaintiffs did not attempt to pursue any avenues available under the NREPA and within the DEQ to challenge the determination to deny permits. Instead, plaintiffs filed suit against defendants in the Oakland Circuit Court, alleging the following counts: (I) claims under 42 USC 1983 and the state constitution; (II) action for injunctive relief; (III) action for declaratory relief; (IV) mandamus to compel issuance of permits; (V) administrative appeal; (VI) gross negligence; (VII) defamation; (VIII) false light; (IX) tortious interference with contractual relations; and (X) fraud-misrepresentation. The circuit court granted summary disposition in favor of defendants. The circuit court found that it lacked jurisdiction with respect to counts I, VI, VII, VIII, IX, and X, and that said counts had to be pursued in the Court of Claims. In regard to the remaining counts, the circuit court ruled that the Court of Claims and the circuit court had concurrent jurisdiction, but the counts should be transferred to the Court of Claims "in the interest of judicial economy."

Plaintiffs did not seek to transfer the action to the Court of Claims, nor did they appeal the ruling of the Oakland Circuit Court. Instead, plaintiffs filed the instant suit as a new action in the Court of Claims, alleging the same counts, except for the cause of action predicated on fraud-misrepresentation. After hearing multiple motions for summary disposition, the Court of Claims, for a variety of reasons, dismissed all of the counts in plaintiffs' complaint.[7]

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[6] Defendants also refer to MCL 324.3309(2) and 324.3313(9) as providing the DEQ with broad discretionary power relative to permit applications. Section 3309(2) of the ANCA states that the DEQ "may impose . . . conditions on a permit . . . to protect the natural resources or the public health, to prevent economic loss or impairment of recreational uses, to protect nontarget organisms, or to help ensure control of the aquatic nuisance." Section 3313(9) of the ANCA provides that, "[i]f a person knowingly commits a violation of . . . part [33], the department may revoke a permit . . . issued to the person under this part." We fail to see how these provisions are relevant to the action taken here.

[7] On an initial motion for summary disposition brought by all defendants, the Court of Claims granted summary disposition in favor of Hobrla and Esman on all counts, finding that it did not have jurisdiction over them in their individual capacity, nor did the court have jurisdiction over them in their official capacity because they were not state officials. The Court of Claims next ruled that defendant Chester was entitled to summary disposition on counts IV, V, VI, and IX, along with count I to the extent that this count sought monetary damages against him for state constitutional violations. The court also granted summary disposition in favor of the DEQ with

We review de novo a trial court's ruling on a motion for summary disposition. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008). Questions of law are also reviewed de novo on appeal, *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998), including issues of statutory construction, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), and the interpretation of administrative rules, *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). We likewise review de novo constitutional issues, *Hanlon v Civil Service Comm'n*, 253 Mich App 710, 717; 660 NW2d 74 (2002), declaratory judgment rulings, *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008), matters pertaining to injunctive relief,

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respect to counts IV, V, and IX, along with count I to the extent that this count was based on 42 USC 1983. The court reasoned that Chester could not be held liable for a state constitutional violation because no damage remedy exists against individual governmental employees for such a claim, but he could be held liable for purposes of 42 USC 1983. On the other hand, the Court of Claims found that the DEQ could be held liable for a state constitutional violation, but was not subject to liability under 42 USC 1983. The court found that the DEQ and Chester were entitled to summary disposition on the mandamus count because the decision to issue a permit was discretionary and because plaintiffs failed to allege actions that were so arbitrary as to evidence a total failure to exercise discretion. The administrative appeal count was dismissed with respect to Chester and the DEQ on the basis that the Court of Claims lacked jurisdiction over the appeal. Finally, the court ruled that the tortious interference claim brought against the DEQ and Chester failed because plaintiffs failed to sufficiently plead allegations of tortious acts as contemplated in the applicable case law.

In a second motion for summary disposition brought by Chester and the DEQ and a cross-motion for summary disposition pursued by plaintiffs, the Court of Claims dismissed the counts that had survived the first motion for summary disposition. With regard to the state constitutional claim against the DEQ, the court ruled that, assuming the right to participate in the field of commercial ANC is a constitutionally protected due process right, plaintiffs failed to show that they were deprived of this right or denied due process of law. The Court of Claims reasoned that because Kraus retained his certification and Aquatic retained it license, neither were entirely prevented from continuing to engage in the business of ANC despite the permit prohibition. The court stated that Aquatic could retain another certified commercial pesticide applicator in place of Kraus and that Kraus could continue working in the industry if he worked under another commercial applicator. As to due process and plaintiffs' assertion that it was not given any opportunity to challenge the charges leveled by the DEQ or to contest the DEQ's interpretation of the relevant statutes and rules, the court concluded that the proper way to raise these challenges was through an administrative appeal. And plaintiffs properly filed an administrative appeal in the circuit court, which was a matter not within the jurisdiction of the Court of Claims, despite the circuit court's ruling; however, plaintiffs chose not to appeal that decision. With respect to the claim under 42 USC 1983 against Chester and the request for injunctive relief against Chester and the DEQ, the court found that plaintiffs failed to adequately brief the issues in response to the summary disposition motion and that plaintiffs failed to establish a constitutional violation. In regard to the request for declaratory relief, the Court of Claims found that R 323.3108(3) had not been abrogated by the enactment of the ANCA.

Dyball v Lennox, 260 Mich App 698, 703; 680 NW2d 522 (2004), and jurisdictional issues, *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003).

We begin and end with the count labeled an administrative appeal because in fully analyzing this count and applicable underlying issues, we are able to resolve the entire appeal. The Court of Claims ruled that it lacked jurisdiction to hear an administrative appeal, and plaintiffs contend that this ruling was erroneous. A court is required to dismiss an action if it lacks subject-matter jurisdiction. *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989). The ANCA itself does not provide any procedural mechanism to challenge the DEQ's decision to deny a permit, let alone a decision to deny any future permit applications for a set period of time. The NREPA, however, does contain a general provision addressing appellate rights, MCL 324.1101, which indicates in subsection (1) as follows:

> If a person has legal standing to challenge a final decision of the department under this act regarding the issuance, denial, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a permit or operating license, the commission,[8] upon request of that person, shall review the decision and make the final agency decision. A preliminary, procedural, or intermediate decision of the department is reviewable by the commission only if the commission elects to grant a review. If a person is granted review by the commission under this section, the person is considered to have exhausted his or her administrative remedies with regard to that matter. The commission may utilize administrative law judges or hearing officers to conduct the review of decisions as contested case hearings and to issue proposals for decisions as provided by law or rule. [9]

"MCL 324.1101 governs general appellate rights of matters under the NREPA." *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 566; 777 NW2d 1 (2009). "MCL 324.1101 is general in scope, in that it applies to *all permits* and

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[8] In 1995, an executive reorganization order, MCL 324.99903, created the DEQ and transferred the power to hear certain administrative appeals by the Commission of Natural Resources to the Director of the DEQ, including matters involving surface water quality. See paragraphs 3(d) and 7 of MCL 324.99903.

[9] Subsection (2) of MCL 324.1101 provides that "[i]n all instances, *except those described in subsection (1)*, if a person has legal standing to challenge a final decision of the department under this act, that person may seek direct review by the courts as provided by law. Direct review by the courts is available to that person as an alternative to any administrative remedy that is provided in this act." (Emphasis added.) As we are concerned with a permit denial, subsection (2) is inapplicable. See *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 569; 777 NW2d 1 (2009). MCL 324.1101 was enacted pursuant to 1994 PA 451 and made effective March 30, 1995.

licenses that may issue under the NREPA[.]" *Id.* at 570 (emphasis added). We hold that MCL 324.1101(1) was applicable here, yet plaintiffs failed to exhaust the administrative remedy provided therein. As plaintiffs had standing to challenge the decision to deny permits, they were entitled to a review and contested case hearing on request. While the parties do not and did not explore MCL 324.1101(1), we find that it is necessary to do so in order to properly analyze and resolve this case.

The doctrine of exhaustion of administrative remedies generally requires that where an administrative agency provides a remedy, an aggrieved party must seek such relief before petitioning a court of law. *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009); *Bonneville v Michigan Corrections Org, Service Employees Int'l Union, Local 526M, AFL-CIO*, 190 Mich App 473, 476; 476 NW2d 411 (1991). Where a plaintiff has not exhausted his or her administrative remedies, the plaintiff's claim is not ripe for review. *Hendee v Putnam Twp*, 486 Mich 556, 573; 786 NW2d 521 (2010). "When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law." MCL 24.301. Indeed, MCL 324.1101(1) expressly contemplates the issue of remedy exhaustion by providing that when a person obtains review of a permit decision, "the person is considered to have exhausted his or her administrative remedies with regard to that matter."[10] Here, plaintiffs failed to request agency review of the permit decision made by the DEQ's Aquatic Nuisance Control and Remedial Action Unit before plaintiffs filed suit in court.[11] Moreover, as will be discussed below, plaintiffs not only failed to exhaust their administrative remedies, they did not effectively appeal the matter to the courts.

In regard to exhaustion of remedies in relationship to the claim under 42 USC 1983, we acknowledge the United States Supreme Court's decision in *Felder v Casey*, 487 US 131; 108 S Ct 2302; 101 L Ed 2d 123 (1988). In *Felder*, the petitioner was allegedly beaten by police, and he brought an action pursuant to 42 USC 1983 without first complying with a Wisconsin notice-of-claim statute, which required, prior to filing suit against a governmental entity or officer, notice of the alleged injury within 120 days and the submission of an itemized statement of desired relief that the government would process and then either grant or deny. *Id.* at 134-137. The latter provision was described by the Court as a type of administrative exhaustion

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[10] With respect to DEQ decisions that do not pertain to permits or licenses, direct court review is an available alternative without the need to pursue an administrative remedy, and where a person opts for and obtains direct court review, "the person is considered to have exhausted his or her administrative remedies[.]" MCL 324.1101(2).

[11] The record reflects that counsel for plaintiffs prepared a letter on February 24, 2006, which was mailed to Hobrla, and which challenged the validity of the actions taken by Hobrla. However, there was no request for a hearing or review under MCL 324.1101(1). Instead, plaintiffs' counsel simply threatened "immediate legal action" if the matter could not be amicably resolved to everyone's satisfaction.

requirement. *Id.* at 142. On the basis of federal preemption principles, the Court held that a plaintiff who brings a § 1983 suit need not exhaust state administrative remedies before commencing suit. *Id.* at 146-150. The problem with applying this principle here is that the gist of the § 1983 claim was that plaintiffs were denied procedural due process because they did not have notice and an opportunity to be heard at a hearing before an impartial decisionmaker who would issue findings. However, plaintiffs did not seek the review available to them in MCL 324.1101(1), which would have satisfied their due process rights.[12] Stated otherwise, had plaintiffs exercised their entitlement to agency review, i.e., exhausted their administrative remedies, they would have no claim under 42 USC 1983. The exhaustion issue is inextricably intertwined with the procedural due process claim that was raised. Accepting that plaintiffs, under *Felder*, did not have to exhaust their administrative remedies before bringing the § 1983 claim, we hold that the claim substantively fails as a matter of law because any lack of due process was of plaintiffs' own making, and not the fault of defendants. See *Mollett v City of Taylor*, 197 Mich App 328, 345; 494 NW2d 832 (1992) (the plaintiff's failure to avail himself of state-created remedial administrative procedures supported conclusion that there was no violation of his due process rights for purposes of a § 1983 claim).

"[J]udicial review of an administrative decision is available under the following statutory schemes: (1) the review process prescribed in the statute applicable to the particular agency, (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 *et seq.*" *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 519; 684 NW2d 847 (2004) (citation omitted). MCL 324.1101(1), the statute discussed above providing for an agency remedy, does not describe any particular appellate review process. With respect to the APA, which plaintiffs asserted in their complaint was applicable, and which is implicated when a contested case hearing is available as it was here, MCL 324.1101(1), the APA provides an aggrieved person with direct appellate review by the courts of an agency's final decision. MCL 24.203(3) and 24.301. Under MCL 24.303(1), "a petition for review *shall be filed* in the *circuit court* for the county where petitioner resides or has his or her principal place of business in this state, or in the *circuit court* for Ingham county." (Emphasis added.) This language precludes filing an administrative appeal in the Court of Claims. Finally, under the RJA, MCL 600.631 provides:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules *from which an appeal or other judicial review has not otherwise been provided for by law*, to the *circuit court* of the county of which the appellant is a resident or to the *circuit court* of Ingham county, which court *shall have and exercise*

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[12] While plaintiffs did not have notice before the permit decision was made, any procedural due process concerns could have been alleviated by resort to MCL 324.1101(1). See *Mollett v City of Taylor*, 197 Mich App 328, 344-345; 494 NW2d 832 (1992) (availability of administrative remedies satisfied the requirements of due process owed under the federal constitution).

> *jurisdiction* with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court. [Emphasis added.]

Because the APA otherwise provides for an appeal or judicial review under the circumstances here, the RJA is not implicated, but even if the RJA applied, it too would preclude filing an administrative appeal in the Court of Claims. We find nothing in the jurisdictional statutes governing the Court of Claims, MCL 600.6419 to 600.6421, that would dictate a contrary conclusion. In *Bays v Dep't of State Police*, 89 Mich App 356, 362-363; 280 NW2d 526 (1979), this Court, interpreting the jurisdictional provisions applicable to the Court of Claims, held that they cannot "be construed so as to deprive circuit courts of jurisdiction over review of state agency determinations."

To the extent that plaintiffs assert that we should invoke the Court of Claims' jurisdiction because the Oakland Circuit Court also summarily dismissed their administrative appeal on jurisdictional grounds, the argument lacks merit. Plaintiffs failed to appeal the circuit court's ruling to this Court. We cannot authorize and give jurisdiction to the Court of Claims to hear an appeal on the basis that the circuit court may have erred in its jurisdictional ruling, where the Legislature did not provide the Court of Claims with jurisdiction over administrative appeals, opting instead to give such jurisdiction exclusively to the circuit courts.

Accordingly, we are faced with a situation in which plaintiffs did not exhaust their administrative remedies and effectively failed to pursue to the full extent of the legal process an appeal in a circuit court, which pursuit and process may have necessitated an appeal to this Court from the potentially flawed ruling of the Oakland Circuit Court, but which was not undertaken. As part of an administrative appeal to a circuit court under the APA, the court can entertain the matters set forth in MCL 24.306, which provides as follows:

> (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
>
> (a) In violation of the constitution or a statute.
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> (b) In excess of the statutory authority or jurisdiction of the agency.
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> (c) Made upon unlawful procedure resulting in material prejudice to a party.
>
> (d) Not supported by competent, material and substantial evidence on the whole record.
>
> (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
>
> (f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

All of the complaints voiced by plaintiffs, including but not limited to alleged constitutional violations, actions in excess of statutory authority, unlawful procedure, and material errors of law, are encompassed by MCL 24.306 and could have been resolved in a circuit court appeal.

In *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483; 586 NW2d 563 (1998), the appellants, foreign insurance companies, appealed the circuit court's appellate ruling that affirmed three orders issued by the Commissioner of Insurance, and the appellants also appealed the circuit court's order that dismissed their original action challenging the statute on which the commissioner had relied. One of the arguments posed to this Court by the appellants was that the circuit court improperly dismissed their attempt to initiate an original action. This Court held that the commissioner's decisions could only be challenged under the APA, that the APA provides for direct review by a circuit court, and that, "[c]learly, an independent action attacking the agency's decision is not contemplated." *Id.* at 495-496. Here, the APA was applicable, as acknowledged by plaintiffs below and on appeal, and direct review by a circuit court was available under the APA. Thus, in general, plaintiffs could not pursue an independent action.

In *Womack-Scott v Dep't of Corrections*, 246 Mich App 70; 630 NW2d 650 (2001), the plaintiff was employed by the DOC and later discharged, and after a grievance hearing in the Department of Civil Service, the hearing officer reinstated the plaintiff. However, the Michigan Civil Service Commission (CSC) subsequently reversed the hearing officer and reinstated the termination. The plaintiff filed suit in the circuit court, alleging that she was wrongfully discharged and discriminated against by the DOC. The circuit court summarily dismissed her wrongful discharge claims on the basis that it lacked subject-matter jurisdiction. *Id.* at 72-74. This Court stated that the internal administrative procedures had been exhausted by the parties, with the DOC ultimately prevailing. Given that the DOC had prevailed in the administrative review process, the question became, as framed by the panel, what recourse the plaintiff had against the DOC to pursue her claims. The plaintiff answered the question by filing the independent action for wrongful discharge; she did not seek a timely administrative appeal of the CSC's decision. The DOC maintained that the plaintiff's only avenue of relief was a direct appeal under the APA. *Id.* at 75-79. This Court held:

> Considering the function that the CSC serves to resolve employment disputes of state employees and the availability of a direct appeal to the circuit court from a CSC decision, we hold that a party aggrieved by a ruling of the CSC cannot file an independent action to seek redress of the claims made during the administrative process, but rather must pursue those claims through a direct appeal to the circuit court pursuant to the APA. See MCR 7.104(C). Here, plaintiff did not appeal the CSC decision to the circuit court within the sixty-day period mandated by the APA, see MCL 24.304(1), but instead she filed a separate action in the circuit court. Plaintiff's failure to initiate a timely appeal is fatal. [*Womack-Scott*, 246 Mich App at 80.]

Although our case concerns the DEQ and the NREPA, we find that the reasoning in *Womack-Scott* should be applied here where a direct appeal to the circuit court was available to plaintiffs. There is no language contained in MCL 324.1101(1) or (2) suggesting that the Legislature contemplated the filing of an original action; rather, the references in subsection (1) to "contested case hearings" and in subsection (2) to "direct review by the courts" indicate an intent to have decisions subjected to appellate review only. Were we to allow plaintiffs to proceed with their suit in the Court of Claims minus the administrative appeal count, we would effectively be giving our blessing to collateral attacks against agency decisions absent a properly filed administrative appeal. Given that the issues raised in the properly-dismissed administrative appeal count would have to be litigated in relation to the other counts alleged by plaintiffs, we would also, in essence, be giving the Court of Claims jurisdiction over an administrative appeal.

The fact that plaintiffs raised a state constitutional claim does not call for a different analysis. In *Womack-Scott*, 246 Mich App at 80-81, this Court stated:

> To the extent that plaintiff suggests that she is entitled to file a separate cause of action in the circuit court to address the constitutional issue over which the administrative agency had no jurisdiction, we find her claim without merit. This Court has explained that when a constitutional issue is intermingled with issues properly before an administrative agency, exhaustion of administrative remedies is not excused:
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> "[T]he exhaustion requirement is displaced only when there are no issues in controversy other than the constitutional challenge. 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."
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> Constitutional issues not within the administrative agency's jurisdiction can be raised in the circuit court through the review procedure in the APA; no separate action is contemplated or allowed. Indeed, MCR 24.304(3) provides that "[t]he court, on request, shall hear oral arguments and receive written briefs." Moreover, the APA and the applicable court rule provide a method for taking additional evidence if necessary. Further, when there is an appeal from an administrative agency, the circuit court "may affirm, reverse, remand, or modify the decision of the agency and may grant the petitioner or the respondent further relief as appropriate based on the record, findings, and conclusions." This procedure is sufficient to provide plaintiff relief from an administrative agency decision and for claims not decided by the administrative agency. Plaintiff failed to utilize this procedure and is therefore not entitled to relief on her alleged constitutional issue. [Citations omitted; alteration in original.]

Here, plaintiffs' state constitutional arguments formed only part of their suit and the constitutional issues could have been addressed under the APA's review procedure, MCL 24.306(1)(a) (decision violated the constitution). Moreover, as indicated earlier when addressing

the federal constitutional claim, 42 USC 1983, considering that the premise of plaintiffs' constitutional claims was the failure to provide procedural due process by way of notice and a hearing, and given that plaintiffs had a right of review in a contested case hearing but failed to pursue this remedy, we find that the constitutional claims necessarily fail on a substantive level.

Additionally, "[c]ollateral estoppel applies to unappealed administrative determinations that are adjudicatory in nature and where . . . a method of appeal is provided." *Champion's Auto Ferry, Inc v Public Service Commission*, 231 Mich App 699, 712; 588 NW2d 153 (1998). Application of this principle would defeat an original action because a plaintiff aggrieved by an agency's decision who did not appeal could not re-litigate a matter adjudicated by the agency. Here, even assuming that there was no administrative determination that was "adjudicatory in nature," this was because plaintiffs failed to request a contested case hearing under MCL 324.1101(1). Had plaintiffs sought agency review and a hearing, lost, and then improperly sought an appeal in the Court of Claims, the accompanying counts would fail on estoppel grounds. Therefore, it would defy logic to allow plaintiffs to pursue original counts simply on the presumed basis that there was no agency adjudication, as the lack of adjudication was caused by plaintiffs' own failure to pursue the remedy of a contested case.[13] Reversal is unwarranted.

Affirmed. Defendants, having prevailed in full, are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher

[13] Because all of plaintiffs' claims, whether brought against the individual defendants or the DEQ, ultimately concerned the denial of permits under R 323.3108(3), our analysis and decision to affirm applies equally to the individual defendants.