

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Kathleen Jansen, Presiding Judge

MICHIGAN ASSOCIATION OF HOME BUILDERS; ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN; and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION, Michigan nonprofit corporations,

Supreme Court No. 149150

Court of Appeals No. 313688

Lower Court No. 10-115620-CZ

Plaintiffs/Appellants,

v

CITY OF TROY,
a Michigan Home Rule City,

Defendant/Appellee.

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FILED

OCT 29 2014

LARRY S. ROYSTER
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MICHIGAN SUPREME COURT

149150
PLAT'S SUB

SUPPLEMENTAL BRIEF

ON BEHALF OF PLAINTIFFS/APPELLANTS
MICHIGAN ASSOCIATION OF HOME BUILDERS,
ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,
and MICHIGAN PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION

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I. INTRODUCTION

On April 23, 2014, Plaintiffs/Appellants, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association (collectively, the "Builders") filed their Application for Leave to Appeal the March 13, 2014 judgment of the Court of Appeals (the "Application"). By Order dated September 17, 2014, this Court directed the scheduling of oral argument on whether to grant the Application or take other action. This Supplemental Brief is filed in accordance with this Court's September 17, 2014 Order and provides additional reasons for this Court to peremptorily reverse the judgment of the Court of Appeals and remand to the Oakland County Circuit Court for a decision on the merits of the Builders' Motion for Summary Disposition or, alternatively, grant the Application.

In their Complaint, the Builders charged Defendant/Appellee, City of Troy (the "City") with violating Section 22 of the State Construction Code Act ("CCA") by failing to use fees generated under the CCA solely for the operation of the "enforcing agency" or the construction board of appeals, or both; specifically, by depositing fees into the general fund. At issue in this appeal is whether the Builders were required to exhaust administrative remedies under Section 9b of the CCA before filing this lawsuit. For the reasons discussed by the Builders in their Application, Reply Brief, Supplemental Authority and this Supplemental Brief, the answer is "No."

II. STATEMENT OF FACTS

Section 22 of the CCA requires that "User Fees" paid by individuals for services performed by the City's Building Department (here, outsourced to Safe Built of Michigan, Inc.)

or the City's Construction Board of Appeals be: (1) "reasonable;" (2) "bear a reasonable relation to the cost" of Building Department services; and (3) be used only for "operation of" the Building Department. MCL 125.1522(1). Section 31 of the Headlee Amendment prohibits local governments from unlawfully taxing its residents without voter approval. Const 1963, Art IX, §31. Here, the City violated both Section 22 of the CCA and the Headlee Amendment by generating a \$414,648.12 surplus of User Fees for 2010-2011 ("Surplus User Fees"), which it then deposited into its general fund for general use.

The Builders do not seek a money judgment – just declaratory and injunctive relief. Specifically, the Builders request a judgment prohibiting the City's future violations of Section 22 of the CCA (both in the amount of the fees charged and the use of the fees collected) and the Headlee Amendment and requiring the City to return the Surplus User Fees deposited in the general fund to a discrete fund dedicated solely to the purpose allowed under Section 22(1) of the CCA.

The City claims that Section 9b of the CCA required the Builders to exhaust the administrative remedies found in Section 9b before filing this lawsuit. Specifically, the City focuses on the following language:

Sec. 9b(1) The director, as prescribed in this section, may conduct a performance evaluation of an enforcing agency to assure that the administration and enforcement of this act and the code is being done pursuant to either section 8a or 8b. A performance evaluation may only be conducted either at the request of the local enforcing agency or upon the receipt of a written complaint.

MCL 125.1509b. The Builders claim, in part, that Section 9b of the CCA does not apply to actions for the redress of violations of Section 22 of the CCA but, rather, by its express terms, applies only to actions for the redress of violations of Sections 8a and/or 8b of the CCA.¹

III. ARGUMENT

A. Update - Case Law

After researching the doctrine of exhaustion of administrative remedies, except as discussed below, the Builders are not aware of any recent opinions of the Michigan Appellate Courts, issued since the date of the filing of the Application (April 23, 2014), which would impact upon this case.

B. Expansion of Argument Submitted By Supplemental Authority

On July 31, 2014, the Builders filed their Supplemental Authority in which they advanced the argument that Section 9b of the CCA, by its express terms, does not apply to Section 22 and its requirements regarding fees. The Builders now offer the following as further support for this argument.

As a matter of Michigan law, statutory language must be enforced according to its plain meaning and cannot be judicially revised. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005). As recently stated by this Court:

. . . the goal of construction and interpretation of [a statute] is to discern and give effect to the intent of the legislative body. The most reliable evidence of that intent is the language of the [statute]

¹In general, Sections 8a and 8b impose certain requirements upon governmental subdivisions such as the City for its administration and enforcement of the building code. MCL 125.1508a and 125.1508b.

itself and, therefore, the words used in [a statute] must be given their plain and ordinary meanings.

Bonner v City of Brighton, 495 Mich 209, 222; 848 NW2d 380 (2014). The Court may consider not only the plain meaning of the words or phrases, but also their placement and purpose in the statutory scheme. *Andrie Inc v Dept of Treasury*, 496 Mich 161, 167; 819 NW2d 920 (2014), quoting *Sun Valley Foods v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1996). If statutory language is unambiguous, no further judicial construction is required or permitted. *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014), citing *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

When drafting legislation, the Legislature is presumed to be familiar with this State's principles of statutory construction. *People v Gaston (In re: Forfeiture of Bail Bond)*, 496 Mich 320, 329; 852 NW2d 747 (2014), quoting *Nation v W D E Electric Co*, 454 Mich 489, 494-495; 563 NW2d 233 (1997). A core principle applicable to this case is that where no express reference by one statute is made to another statute, none should be implied.

It is well established rule of statutory construction that *where powers are specifically conferred they cannot be extended by inference*, but the inference is that it was intended that no other or greater power was given than that specified.

Alan v County of Wayne, 388 Mich 210, 257; 200 NW2d 628 (1972), quoting *Sebewaing Industries, Inc v Sebewaing*, 337 Mich 530, 546; 60 NW2d 444 (1953). Otherwise stated, "*expressio unius est exclusio alterius*" – inclusion by specific mention excludes what is not mentioned. *Dave's Place v Liquor Control Com*, 277 Mich 551, 555; 269 NW 594 (1936).

As relevant here, this principle was recently applied by the Michigan Court of Appeals in *Melson v Botas*, 2014 WL 2867197, unpublished opinion *per curiam* of the Court of Appeals, June 19, 2014 (Exhibit A), wherein the Court analyzed the Individuals with Disabilities Education Act ("IDEA"), 20 USC §1400 *et seq*, relative to defendants' claim that, in addition to their federal claim brought under the IDEA, plaintiffs' state tort claims were barred by plaintiffs' failure to exhaust administrative remedies. The Court of Appeals reviewed the following statute:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Melson, **8-9, citing 20 USC 1415(l). The Court of Appeals held that the statute did not require plaintiffs to exhaust their administrative remedies prior to bringing their state law tort claims, stating:

However, contrary to *Botas*' arguments, nothing in 20 USC 1415(l) can be construed as restricting plaintiffs' ability to seek state tort remedies or to require exhaustion of administrative remedies before pursuing action on a state law claim. Fairly read, as recognized in *Covington*, 20 USC 1415(l) provides for exhaustion of administrative remedies before pursuing relief under IDEA, or before pursuing relief under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws that protect the rights of children with disabilities. **[20 USC 1415(l)] makes no reference to the exhaustion of administrative remedies before pursuing a state tort claim such as IED.**

Melson, **9-10 (emphasis added).

Similarly, in this case, Section 9b of the CCA, and its administrative review procedures, are expressly made applicable to Sections 8a and 8b of the CCA – and only to Sections 8a and 8b. In relevant part, Section 9b states:

The director, as prescribed in this section, may conduct a performance evaluation of an enforcing agency to assure that the administration and enforcement of this act and the code is being done **pursuant to either section 8a or 8b.**

MCL 125.1509b (emphasis added). Because the Legislature is presumed to be familiar with the rules of statutory construction, this Court may presume that by making Section 9b of the CCA expressly applicable only to Sections 8a and 8b, the Legislature intended to exclude all other sections of the CCA from the administrative procedures of Section 9b. As a result, Section 9b does not apply to Section 22, does not apply to claims brought for violations of Section 22 and does not apply to this case.

This interpretation of the CCA's exhaustion of remedies provision in Section 9b comports with the one published case on the subject. In *Winter Bldg Corp v City of Novi*, 119 Mich App 155; 326 NW2d 409 (1982), the Court of Appeals held that the administrative remedies of Section 9a (now Section 9b) did not apply to plaintiff's claims that local governments were preempted by the CCA from enacting ordinances governing the construction of curbs, approaches, sidewalks, driveways and other concrete exterior flatwork. Instead, the Court of Appeals held that Section 9a (now Section 9b) "applies only to an evaluation of an agency's performance in enforcing [the] building codes." *Winter Bldg*, 119 Mich App at 156-157.

The Sections of the CCA which govern how an agency is to enforce the building code are Sections 8a and 8b. In general, Section 8a sets forth the procedure by which governmental

subdivisions, currently administering and enforcing a nationally recognized model building code other than the state construction code established by the CCA, or currently administering and enforcing no code at all, may elect, or reverse its election, to assume responsibility for the administration and enforcement of the CCA and the state construction code. MCL 125.1508a(1)-(6). Section 8b contains similar provisions applicable to governmental subdivisions already administered and enforcing the CCA and the state construction code. MCL 125.1508b(4), (6) and (7). Section 8b also: (1) requires governmental subdivisions to assume responsibility for the administration and enforcement of the CCA and state construction code by ordinance; (2) provides the governmental subdivision with enforcement powers; (3) defines an “enforcing agency” which must be appointed by the governmental subdivision to discharge its responsibilities under the CCA; and (4) delineates how enforcement responsibilities are determined as between counties and governmental subdivisions. MCL 125.1508b(1), (2), (3) and (5). The director is given responsibility for all administration and enforcement of the CCA and state construction code for buildings and structures not under the responsibility of an enforcing agency of those governmental subdivisions that elect to administer and enforce the CCA and state construction code, such as State owned buildings. MCL 125.1508b(8).

The scope of these Section 8a and 8b activities – how to administer and enforce – is in accord with the purpose of Section 9b – to allow “[t]he director . . . [to] conduct a performance evaluation of an enforcing agency to assure that administration and enforcement of this act and code is being done pursuant to section 8a or 8b.” The statutes function together. Sections 8a

and 8b provide the “how to” and Section 9b provides the oversight. Yet, neither statute applies to Section 22. Viewed in this proper context, the limited remedy afforded by Section 9b, revocation of the responsibility for the administration and enforcement of the CCA and state construction code, appears adequate where it was previously inadequate as a remedy for Section 22 violations. That is, an obvious and cogent remedy for a governmental subdivision found to have failed to properly apply for and/or then administer and enforce the CCA and the state construction code through ordinances and the enforcing agency, is revocation of the right to do so. Similarly, Section 9b’s limitation on who is provided notice, opportunity to respond and opportunity to appeal to the “enforcing agency” makes sense where the evaluation at issue is solely focused on the enforcement activities of the enforcing agency – the exclusion of independent third-parties like the Builders.

The constitutional infirmities of Section 9b, the lack of adequate remedy and the conflict between the Court of Appeal decision in this case versus its decision in *Winter Bldg*, discussed by the Builders in their Application, disappear when Section 9b is interpreted according to its plain language and its application is limited to Sections 8a and 8b. And, limiting the exhaustion requirement to instances of evaluations of enforcing agencies’ compliance with Sections 8a and 8b, furthers the policies served by an exhaustion requirement – there is a cohesive administrative scheme (in 8a and 8b) for the election and subsequent actions to administer and enforce the CCA and the state construction code; there is a means by which the enforcing agency may develop a record for appellate review; resolution of issues of noncompliance could be enhanced by the director’s expertise in the area of administration and

enforcement requirements; and the director and enforcing agency may resolve matters prior to judicial intervention. *Mollett v City of Taylor*, 197 Mich App 328, 337; 494 NW2d 832 (1992).

In sum, as presumably recognized by the Legislature when it restricted Section 9b's application to Sections 8a and 8b, imposing the administrative procedural requirements and remedies upon other sections of the CCA, such as Section 22, constitutes the proverbial "square peg in a round hole" and contradicts the well-established rules of statutory interpretation of this State. Therefore, the judgment of the Court of Appeals should be reversed.

IV. CONCLUSION

In conclusion, as discussed herein, the administrative procedures and remedy in Section 9b of the CCA do not apply to the Section 22 claims made by the Builders and the decision of the Court Appeals should be peremptorily reversed. In addition, reversal of the lower courts is required for the following reasons:

1. Existing, published Court of Appeals' case law, *Winter Bldg*, discussed *supra*, is directly to the contrary of its opinion in this case. Again, the *Winter Bldg* Court held: Section 9a (now Section 9b) did not apply to plaintiff's claims that local governments were preempted by the CCA from enacting ordinances governing the construction of curbs, approaches, sidewalks, driveways and other concrete exterior flatwork. Instead, the Court of Appeals held that Section 9a (now Section 9b) "applies only to an evaluation of an agency's performance in enforcing [the] building codes." *Winter Bldg*, 119 Mich App at 156-157.
2. The Builders have no "adequate" administrative remedy under Section 9b of the CCA, the only remedy available being the discretionary removal of the City's authority to enforce the CCA and the state building code. Therefore, the Builders are not required to exhaust administrative remedies. *Mich Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 577; 531 NW2d 790 (1995).

3. The CCA's procedural provisions do not provide the constitutionally mandated due process protections of an opportunity for a party to present arguments and evidence in support of its position before a decision is rendered and a chance to respond before final action is taken. *Hughes v Almena Twp*, 284 Mich App 50, 69; 771 NW2d 453 (2009). For example, there is no right to a hearing and, in fact, no right for anyone to even request a hearing other than the enforcing agency. There is no right to submit evidence other than perhaps with the filing of an initial complaint. There is no right to develop a record, no opportunity to examine and cross-examine witnesses, no chance to offer exhibits and no occasion to make legal arguments. And, the only right to appeal is from a decision to withdraw the responsibility for the administration and the enforcement of the CCA. There is no appeal from a decision to not withdraw that responsibility. As a result, any appeal rights are limited solely to the governmental subdivision to the exclusion of all other parties.
4. The CCA's procedural provisions do not apply to the Builder. Rather, the vast majority of the provisions of Section 9b of the CCA pertain solely to the "enforcing agency" or the "chief elected official of the governmental subdivision." Only the provision regarding the initial filing of a complaint is not so limited. And, even that provision is not expressly made applicable to parties such as the Builders.
5. The policies behind the exhaustion of administrative remedies are furthered by NOT requiring exhaustion. *Mollett v City of Taylor*, 197 Mich App 328, 337; 494 NW2d 832 (1992). In this case, there is no cohesive administrative scheme regarding investigations into a municipality's use of fees which would be disrupted should exhaustion not be required. Nor does Section 9b of the CCA provide for a means by which the Builders could develop a full factual record prior to judicial review – they may not submit evidence, may not examine/cross-examine witnesses and may not submit briefs offering legal theories and precedent. Further, there does not appear to be any "technical competence" possessed by the Director or Commission in the field of municipal accounting which weighs in favor of addressing the Builders' issues to these administrative personnel. And, finally, there could be no "successful agency settlement" which would render judicial resolution unnecessary since neither the Director nor the Commission have the authority to grant the Builders any of the relief they have requested. To the contrary, the only possible relief that can be granted under the CCA is to withdraw the municipality's authority to administer and enforce the CCA.

6. The APA does not require the exhaustion of administrative remedies. MCL 24.301 does not mandate resort to any administrative remedy. Instead, MCL 24.301 merely allows for court review of administrative orders affecting parties that participated in an administrative process that was imposed by operation of some other law.
7. There is no administrative remedy for Headlee Amendment violations under Michigan law. *Durant v State*, 413 Mich 862; 317 NW2d 854 (1982) (plaintiffs “not required to exhaust administrative remedies before local government review board” prior to court resolution of issues), rev’g 110 Mich App 351; 313 NW2d 571 (1981) (incorrectly dismissing mandamus action based on Headlee Amendment violation in favor of administrative remedy under MCL 21.240 before local government claims review board). Therefore, the circuit court has original jurisdiction over the Builders’ Headlee Amendment claims.

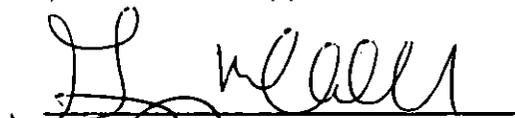
As a result, the lower courts’ opinions should be peremptorily reversed.

V. RELIEF REQUESTED

The lower courts were wrong in their application of the exhaustion of administrative remedies doctrine. Accordingly, this Court should peremptorily reverse the March 13, 2014 Opinion of the Court of Appeals and remand this case to the Oakland County Circuit Court for a decision on the merits of the Builders’ Motion for Summary Disposition or, alternatively, grant the Builders’ Application for Leave to Appeal.

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(A)

Melson v. Botas

Court of Appeals of Michigan

June 19, 2014, Decided

No. 315014

Reporter

2014 Mich. App. LEXIS 1144; 2014 WL 2867197

NATHAN MELSON, a Minor, by PAMELA MELSON, Next Friend and Individually, and BRIAN MELSON, Next Friend and Individually, Plaintiffs-Appellants, v MARY BOTAS, Defendant-Appellee, and LAWTON COMMUNITY SCHOOLS and JOSEPH TRIMBOLI, Defendants.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Van Buren Circuit Court. LC No. 12-620436-CZ.

Core Terms

outrageous, summary disposition, exhaustion, exhaustion of administrative remedies, disabilities, federal law, state tort, allegations, plaintiffs', remarks, trial court, distress

Case Summary

Overview

HOLDINGS: [1]-Summary disposition was erroneously granted to a teacher in a student's claim of intentional infliction of emotional distress, as reasonable minds could differ as to the extreme and outrageous nature of the alleged conduct by the teacher, who made remarks to the student while in a classroom setting that were demeaning, humiliating, and potentially threatening; [2]-The minor did not have to exhaust administrative remedies under the Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400 et seq., prior to initiating suit because 20 U.S.C.S. § 1415(l) did not apply to pursuit of a state tort claim.

Outcome

Judgment reversed; matter remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1 An appellate court's review of a trial court's decision on a motion for summary disposition is de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2 A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone, and is properly granted where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3 A motion under MCR 2.116(C)(8) may not be supported by documentary evidence. Rule 2.116(G)(5). Further, when reviewing a motion under Rule 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

HN4 To state a claim of intentional infliction of emotional distress, a plaintiff must allege: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. Whether the alleged conduct may reasonably be regarded as extreme and outrageous generally presents a question of law for the court. However, if reasonable minds may differ regarding whether the conduct

was extreme and outrageous, the issue constitutes a question for the jury.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

Evidence > Burdens of Proof > Allocation

HN5 The test to determine whether a person's conduct was extreme and outrageous for purposes of a claim of intentional infliction of emotional distress is whether recitation of the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! This test is a demanding one, and indeed, the necessary threshold for establishing that conduct is extreme and outrageous has been described as "formidable."

Evidence > Weight & Sufficiency

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

HN6 For purposes of a claim of intentional infliction of emotional distress, it has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

Evidence > Weight & Sufficiency

HN7 For purposes of a claim of intentional infliction of emotional distress, liability will not result from "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Rather, the law recognizes that there must be "freedom to express an unflattering opinion" and to allow individuals to "blow off relatively harmless steam." Indeed, people are expected to endure "a certain amount of rough language" and "occasional acts that are definitely inconsiderate and unkind."

Evidence > Weight & Sufficiency

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

HN8 For purposes of a claim of intentional infliction of emotional distress, whether the offending behavior rises to

the level of extreme and outrageous conduct must be assessed within the context in which the remarks or conduct occurred. This includes consideration of the position of the actor and his or her relationship to the distressed party. For example, extreme or outrageous conduct might occur through an abuse of a relationship which puts the defendant in a position of actual or apparent authority over a plaintiff or gives a defendant power to affect a plaintiff's interest. School authorities, landlords, collecting creditors, and police officials are among those whose position may work to render conduct or remarks extreme and outrageous.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

HN9 Pursuant to MCR 2.116(C)(4), summary disposition is proper when a court lacks subject-matter jurisdiction, including instances in which a court lacks subject-matter jurisdiction because a plaintiff has failed to exhaust required administrative remedies. A party may support a motion under Rule 2.116(C)(4) with affidavits, depositions, admissions, or other documentary evidence. Rule 2.116(G)(5).

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN10 To the extent resolution of an argument requires statutory interpretation, an appellate court's review is de novo. The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent as expressed in the language of the statute. To accomplish this goal, courts read the statute as a whole, giving each word its plain and ordinary meaning unless a term has been otherwise defined. Clear and unambiguous language must be enforced as written.

Governments > Courts > Judicial Precedent

Governments > Legislation > Interpretation

HN11 In construing federal law, state courts must follow the decisions of the United States Supreme Court, but the decisions of lower federal courts are merely persuasive.

Education Law > Students > Disabled Students > Scope of Protections

Education Law > Students > Disabled Students > State Plans

HN12 The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S. § 1400 et seq., is a federal statutory scheme providing funding to states for special education programs provided that states implement policies and procedures assuring a free appropriate public education to all children with disabilities residing in the State between the ages of three and 21. 20 U.S.C.S. § 1412(a)(1)(A). Michigan has implemented legislation to comply with IDEA. MCL 380.1701 et seq.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Education Law > Students > Disabled Students > Compliance Enforcement

HN13 Pursuant to 20 U.S.C.S. § 1415(l), an individual filing suit under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S. § 1400 et seq., or other federal laws protecting the rights of children with disabilities, must first exhaust administrative remedies available under IDEA.

Education Law > Students > Disabled Students > Compliance Enforcement

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

HN14 See 20 U.S.C.S. § 1415(l).

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Education Law > Students > Disabled Students > Compliance Enforcement

HN15 20 U.S.C.S. § 1415(l) has been construed as requiring a plaintiff to exhaust his or her administrative remedies before bringing suit in federal court to obtain relief that is also available under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S. § 1400 et seq. This requirement has been held to apply even when the plaintiffs do not rely exclusively on IDEA for the source of their claims, as when, for example, they bring a 42 U.S.C.S. § 1983 suit based on violations of IDEA, and even in cases where a federal claim falls within the purview of IDEA but it has not been labeled as involving IDEA. In other words, exhaustion has been required before plaintiffs may file an action under any other federal law seeking relief that is also available under IDEA.

Education Law > Students > Disabled Students > Compliance Enforcement

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Torts > Procedural Matters > Commencement & Prosecution > General Overview

HN16 Nothing in 20 U.S.C.S. § 1415(l) can be construed as restricting plaintiffs' ability to seek state tort remedies or to require exhaustion of administrative remedies before pursuing action on a state law claim. Fairly read, § 1415(l) provides for exhaustion of administrative remedies before pursuing relief under the Individuals with Disabilities Education Act, 20 U.S.C.S. § 1400 et seq., or before pursuing relief under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other Federal laws that protect the rights of children with disabilities. It makes no reference to the exhaustion of administrative remedies before pursuing a state tort claim such as intentional infliction of emotional distress.

Judges: Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

Opinion

PER CURIAM.

In this tort action involving claims of intentional infliction of emotional distress (IIED), plaintiffs appeal as of right the order granting summary disposition to defendants pursuant to MCR 2.116(C)(8), specifically challenging the grant of summary disposition to defendant Mary Botas. Because the trial court erred in concluding that plaintiffs' allegations of IIED failed to state a claim on which relief could be granted, we reverse the trial court's grant of summary disposition to Botas and remand for further proceedings.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition on their claim of IIED related to allegations that Botas intentionally inflicted emotional distress on plaintiff Nathan Melson. In particular, plaintiffs assert that reasonable minds could differ as to the extreme and outrageous nature of the alleged conduct, and that the trial court thus erred in taking the issue from the jury. We agree.

HN1 Our review of a trial court's decision on a motion for summary disposition is de novo. Johnson v Recca, 492 Mich 169, 173; 821 NW2d 520 (2012). **HN2** A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim [*2] based on the pleadings alone, Bailey v Schaaf, 494 Mich 595, 603; 835 NW2d 413 (2013), and is properly granted where "the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify

recovery," *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). **HN3** A motion under *MCR 2.116(C)(8)* may not be supported by documentary evidence. *MCR 2.116(G)(5)*. Further, when reviewing a motion under *MCR 2.116(C)(8)*, all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Johnson*, 491 Mich at 435.

HN4 To state a claim of IIED, a plaintiff must allege: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). At issue in the present case is whether Botas' remarks and conduct, as alleged in the complaint, were sufficiently extreme and outrageous so as to state a claim of IIED. Whether the alleged conduct may reasonably be regarded as extreme and outrageous generally presents a question of law for the court. *Van Vorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). However, if reasonable minds may differ regarding whether the conduct was extreme and outrageous, the issue constitutes a question for the jury. *Lewis v LeGrow*, 258 Mich App 175, 197; 670 NW2d 675 (2003).

HN5 "The test to determine whether a person's conduct was extreme and outrageous is whether recitation of the facts of the case to an average member of the community would arouse [*3] his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id.* at 196 (citations and quotations omitted). This test is a demanding one, and indeed, the necessary threshold for establishing that conduct is extreme and outrageous has been described as "formidable." *Atkinson v Farley*, 171 Mich App 784, 789; 431 NW2d 95 (1988).

HN6 It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. [*Id.*, quoting *Restatement Torts*, 2d, § 46, comment d.]

HN7 Liability will not result from "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Mino v Clio Sch Dist*, 255 Mich App 60, 80; 661 NW2d 586 (2003) (citation omitted). Rather, the law recognizes that

there must be "freedom to express an unflattering opinion" and to allow individuals to "blow off relatively harmless steam." *Atkinson*, 171 Mich App at 789, quoting *Restatement Torts*, 2d, § 46, comment d. Indeed, people are expected to endure "a [*4] certain amount of rough language" and "occasional acts that are definitely inconsiderate and unkind." *Id.*, quoting *Restatement Torts*, 2d, § 46, comment d.

However, **HN8** whether the offending behavior rises to the level of extreme and outrageous conduct must also be assessed within the context in which the remarks or conduct occurred. *Margita v Diamond Mtg Corp*, 159 Mich App 181, 189-190; 406 NW2d 268 (1987). This includes consideration of the position of the actor and his or her relationship to the distressed party. *Id.* at 189. For example, extreme or outrageous conduct might "occur through an abuse of a relationship which puts the defendant in a position of actual or apparent authority over a plaintiff or gives a defendant power to affect a plaintiff's interest." *Id.* School authorities, landlords, collecting creditors, and police officials are among those whose position may work to render conduct or remarks extreme and outrageous. See *Restatement of Torts*, 2d, § 46, comment e.

In the present case, plaintiffs' complaint alleged that Nathan Melson was a student at Lawton Community Schools, and in particular a student in a home economics class taught by Botas. According to plaintiffs' complaint, Botas became enraged when Melson stopped working on an art project, and she asked why he had ceased activity on the project. When Melson informed Botas that [*5] he had stopped due to pain in his fingers, Botas allegedly yelled "why don't you just go kill yourself." She purportedly then ripped the art project from Melson's hands and, at some point, threatened to lock Melson in a room.

In many contexts, Botas' remarks and conduct would correctly be characterized as involving mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. However, in this case, given Botas' position as Melson's teacher and the classroom setting in which the offending conduct is alleged to have occurred, reasonable minds could conclude that her remarks were extreme and outrageous. That is, accepting as true plaintiffs' well-pleaded allegations and construing them in a light most favorable to plaintiffs, their complaint indicates that an adult educator, in a position of authority, made demeaning, humiliating, and potentially threatening remarks to a minor child in her care, in the presence of other children, and that she did so in a classroom setting where it could reasonably be concluded that children should not be expected to endure such treatment from a teacher. In these circumstances, an average member

of the community, cognizant of [*6] Botas' position of authority over Melson, could reasonably experience resentment against Botas and exclaim "Outrageous!" upon learning of her conduct. Because reasonable minds could differ regarding whether Botas' comments and behavior rose to the level of the extreme and outrageous, the issue could not be decided as a matter of law by the trial court, and plaintiffs alleged a claim sufficient to survive a motion under MCR 2.116(C)(8).¹

On appeal, Botas presents this Court with an alternative argument for the affirmance of the trial court's grant of summary disposition. In particular, she maintains that plaintiffs' allegations relate solely to her failure to properly discipline Melson, an issue which she maintains falls within the scope of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S. 1400 et seq., because [*7] Melson has a learning disability. Noting that IDEA requires exhaustion of administrative remedies, Botas argues that plaintiffs were required to exhaust administrative remedies before initiating the present suit. We disagree.

As noted, our review of a trial court's decision on a motion for summary disposition is de novo. Johnson, 492 Mich at 173. Relevant to Botas' arguments, HN9 pursuant to MCR 2.116(C)(4), summary disposition is proper when a court lacks subject-matter jurisdiction, including instances in which a court lacks subject-matter jurisdiction because a plaintiff has failed to exhaust required administrative remedies. Papas v Mich Gaming Control Bd, 257 Mich App 647, 656; 669 NW2d 326 (2003). A party may support a motion under MCR 2.116(C)(4) with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(5).

HN10 To the extent resolution of Botas' argument requires statutory interpretation, our review is de novo. In re Receivership of 11910 South Francis Rd (Price v Kosmalski), 492 Mich 208, 218; 821 NW2d 503 (2012). The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent as expressed in the language of the statute. Id. at 222. To accomplish this goal, we read the statute as a whole, giving each word its plain and ordinary meaning unless a term has been otherwise defined. Id. Clear and unambiguous language must be enforced as written. In re Moukalled Estate, 269 Mich App 708, 715; 714 NW2d 400 (2006). HN11 In construing [*8] federal law, state

courts must follow the decisions of the United States Supreme Court, but the decisions of lower federal courts are merely persuasive. Abela v Gen Motors Corp, 469 Mich 603, 606; 677 NW2d 325 (2004).

At issue in this case is HN12 IDEA, a federal statutory scheme providing funding to states for special education programs provided that states implement policies and procedures assuring "[a] free appropriate public education . . . to all children with disabilities residing in the State between the ages of 3 and 21." 20 USC 1412(a)(1)(A). Michigan has implemented legislation to comply with IDEA. See MCL 380.1701 et seq.; Miller ex rel Miller v Lord, 262 Mich App 640, 645; 686 NW2d 800 (2004). HN13 Pursuant to 20 USC 1415(l), an individual filing suit under IDEA, or other federal laws protecting the rights of children with disabilities, must first exhaust administrative remedies available under IDEA. Specifically, the relevant provision provides:

HN14 Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, [*9] the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter. [20 USC 1415(l).]

HN15 This provision has been construed as requiring a plaintiff to exhaust his or her administrative remedies "before bringing suit in federal court to obtain relief that is also available under the IDEA." Covington v Knox Co Sch Sys, 205 F3d 912, 915 (CA 6, 2000). This requirement has been held to apply even when the plaintiffs do not rely exclusively on IDEA for the source of their claims, as when, for example, they bring a § 1983 suit based on violations of IDEA, and even in cases where a federal claim falls within the purview of IDEA but it has not been labeled as involving IDEA. Id. at 915-916. In other words, exhaustion has been required "before plaintiffs may file an action under any other federal law seeking relief that is also available under"

¹ We note that in granting the motion for summary disposition under MCR 2.116(C)(8), the trial court discussed materials outside the pleadings, including information related to Botas' record as a teacher and the disciplinary action pursued by the school district. To the extent, if at all, these materials informed the trial court's decision, consideration of this evidence was in error as a motion pursuant to MCR 2.116(C)(8) is based on the pleadings alone. See Bailey, 494 Mich at 603.

IDEA. See Waterman v Marquette-Alger Intermediate Sch Dist, 739 F Supp 361, 365 (WD Mich, 1990) (emphasis added).

However, contrary to Botas' arguments, *HNI6* nothing in 20 USC 1415(l) can be construed as restricting plaintiffs' ability to seek state tort remedies or to require exhaustion of administrative remedies before pursuing action on a state law claim. Fairly read, as recognized in *Covington*, 20 USC 1415(l) provides for exhaustion of administrative remedies before pursuing relief [*10] under IDEA, or before pursuing relief under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws that protect the rights of children with disabilities. It makes no reference to the exhaustion of administrative remedies before pursuing a state tort claim such as IIED.

Further, in the cases on which Botas now relies, the claims discussed in the context of the administrative exhaustion required by IDEA were premised on federal law. See, e.g., *Covington*, 205 F3d at 915 (considering exhaustion related to allegations of substantive due process violations); *Franklin v Frid*, 7 F Supp 2d 920, 924 (WD Mich, 1998) (holding exhaustion of administrative remedies was required in relation to § 1983 claim implicating IDEA); *Hayes v*

Unified Sch Dist No 377, 877 F2d 809, 813 (CA 10, 1989) (finding exhaustion required in relation to federal due process claim); *Waterman*, 739 F Supp at 365 (requiring exhaustion of administrative remedies for actions under the Rehabilitation Act and § 1983 which could have been brought under IDEA's predecessor). Botas fails to draw our attention to any authority holding that dismissal of a state tort claim is similarly appropriate merely because it presents facts which might arguably give rise to a claim under IDEA.² Because Botas fails to present us with such authority and [*11] we do not read 20 USC 1415(l) as requiring exhaustion of administrative remedies before a plaintiff may pursue state tort remedies, we concluded Botas' argument is without merit and she is not entitled to summary disposition on this basis.

We reverse the trial court's grant [*12] of summary disposition to defendant Botas and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Joel P. Hoekstra

/s/ William C. Whitbeck

² Indeed, while not expressly addressing the issue, federal cases relied on by Botas may be read to suggest that state tort claims have not been subjected to the same administrative exhaustion requirement. For example, in *Waterman*, 739 F Supp at 364, the plaintiffs asserted several claims under federal law and Michigan tort law. Finding administrative exhaustion was required before the plaintiffs could pursue the federal claims, the court remanded for administrative proceedings related to the federal claims, but it held the state law claims in abeyance pending the outcome of the administrative proceedings. *Id.* In doing so, the court differentiated between federal and state claims in a manner suggesting that administrative exhaustion pursuant to IDEA is not required for state tort claims. See also *Franklin*, 7 F Supp 2d at 927 (finding federal claims required exhaustion of administrative remedies and thereafter declining to exercise supplemental jurisdiction over state tort claims).