

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Michigan Court of Appeals,
Peter D. O'Connell (Presiding Judge), Patrick M. Meter, and Michael F. Gadola**

CLAM LAKE TOWNSHIP, a Michigan
general law township; and HARING
CHARTER TOWNSHIP, a Michigan charter
township,

Appellants,

v

DEPARTMENT OF LICENSING AND
REGULATORY AFFAIRS (THE STATE
BOUNDARY COMMISSION), a state
administrative agency; TERIDEE LLC, a
Michigan limited liability company; and, THE
CITY OF CADILLAC, a Michigan home rule
city,

Appellees.

Supreme Court Docket No. 151800

Court of Appeals Case No. 325350

Wexford County Circuit Case No. 14-25391-AA
Honorable William M. Fagerman

State Boundary Commission Docket 13-AP-2

**APPELLANTS' REPLY BRIEF
IN RESPONSE TO APPELLEE'S BRIEF OF TERIDEE, LLC**

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Clam Lake Township and Haring Charter Township (the “Townships”) submit this Reply Brief, pursuant to MCR 7.312(E)(3), in rebuttal to the Appellee’s Brief filed by TeriDee, LLC.

REPLY TO COUNTER-STATEMENT OF FACTS

TeriDee incorrectly alleges that the SBC denied TeriDee’s first annexation petition, in 2012, “without explanation.” TeriDee Brief at p. 9. That is not true. The 2012 denial was supported by the SBC’s factual finding that the proposed annexation area was both zoned and planned by the County for Forest Recreation use (Appendix, 1117a [¶4]), which still remains true to this day.

TeriDee also engages in a form of obfuscation that should not be tolerated by the Court. Specifically, TeriDee engages in the cute trickery of blurring the distinction between Haring’s contractual obligation to provide sewer/water services to the Transferred Area (which is within Haring, under the Agreement) vs. the remainder of Clam Lake. TeriDee Brief at p. 13. This is improper. The plain terms of Act 425 require that an “economic development project” be planned *only* for the lands that are transferred. MCL 124.22(1). Therefore, for the purpose of considering the validity of the Agreement, it is not relevant whether or not Haring is required to provide utility services to other areas of Clam Lake. Haring is required to provide sewer and water services to the Transferred Area (Appendix, pp. 728a-729a) – a fact which is so self-evident that, in the companion case pending in S Ct Docket No. 153008, TeriDee has expressly pled, in its Complaint, that the Townships’ Agreement “requires Haring . . . to provide public wastewater and public water supply services to the Transferred Area for the entire term of the . . . Agreement.” Pls’ Amd Compl at ¶59.

REPLY ARGUMENTS

I. THE COURT SHOULD OVERRULE *CASCO TWP*

TeriDee implicitly accuses the Townships of hypocrisy, for reason that the Townships previously relied on *Casco Twp*¹ as a basis for having the SBC consider the validity of the Act 425

¹ *Casco Twp v SBC*, 243 Mich App 392; 622 NW2d 332 (2000), *app den*, 465 Mich 855 (2001).

Agreement, but now argue that the SBC has no jurisdiction to consider the validity of Act 425 agreements. TeriDee Brief at pp. 4-6; 22-26. That criticism is fair, to a degree, for the reason that the criticism's underlying factual premise is true, to wit, that the Township did previously invoke *Casco Twp* for that purpose. But the criticism is nonetheless irrelevant, for the reason that the Townships cannot create subject matter jurisdiction where none exists. *Hillsdale County Sr Services, Inc v Hillsdale County*, 494 Mich 46, 51 n3; 832 NW2d 728 (2013). And more important, the Townships' inconsistent arguments have the beneficial impact of placing this dispute in precisely the right context, so that the Court can observe, up close, the precise type of mischief that necessarily ensues when an agency is given authority to administer a statute it knows nothing about.

In that regard, what we have here is a situation where *Casco Twp* endowed the SBC with jurisdiction to administer a statute, when this was clearly not intended by the Legislature. And worse yet, the *Casco Twp* decision did this with a statute that, by its express terms, was *expressly intended* by the Legislature to interfere with the SBC's authority to approve annexation petitions (MCL 124.29), and thereby prevent the SBC from exercising that which is basically the only authority it has – to approve annexations. And so quite predictably, the SBC is now administering Act 425 in a way that, contrary to MCL 124.29, instead ensures its annexation powers are *never* impinged upon by Act 425.² As shown by the undisputed facts of this appeal, the SBC is doing this by literally “making up” extra-statutory reasons to invalidate agreements that, like the Townships' Agreement, obviously satisfy the express statutory requirements of Act 425, whenever the SBC subjectively believes that annexation would be more beneficial to private development interests.

In contrast, however, the *Casco Twp* case did not provide this type of appropriate factual

² See Justice Levin's dissenting opinion (Justice Riley, concurring) in *Shelby Charter Twp v SBC*, 425 Mich 50, 80; 387 NW2d 792 (1986) (noting that the Court should not rely on the SBC's interpretation of a statute that restricts its authority to approve annexations, because the SBC actively opposes legislation that would limit its annexation authority).

platform for Supreme Court review. That is because, in *Casco Twp*, the Court was presented with Act 425 agreements that were obviously invalid: (a) they did not include any economic development project whatsoever, in violation of MCL 124.22; and, (b) they were entered by townships that did not have their own sewer or water systems and therefore had no independent ability to provide such services to the transferred areas. Appendix, 678a-721a. There was little to be gained, therefore, by granting leave in *Casco Twp*, inasmuch as the *Casco* agreements were on an inevitable march toward invalidation, no matter who did the invalidating.

But now, in this appeal, the Court can see just how widely the SBC has veered outside the statutory contours of Act 425, by invalidating a fully-compliant Act 425 Agreement on preposterous extra-statutory grounds such as, *inter alia*, the existence of public comment (a) in favor of a conditional transfer that would preserve the regional land use plan, and (b) in opposition to an annexation that would violate the regional land use plan. This needs to stop. And this appeal presents the right platform for the Court to slam on the breaks. *Casco Twp* should be overruled.

II. TERIDEE WRONGLY INVOKES *STARE DECISIS*

TeriDee attempts to invoke *stare decisis* as a reason that the Court should affirm *Casco Twp*. TeriDee Brief at pp. 18-22. There are multiple legal flaws in this argument. First, the Court's denial of leave in *Casco Twp* [465 Mich 855 (2001)] does not establish any precedent because the Court's reasons for denial of applications "are not to be published, and are not to be regarded as precedent." MCR 7.321(4). This rule has been a part of our state's law for at least a century. *See, e.g., Malooly v York Heating & Ventilating Corp*, 270 Mich 240, 247; 258 NW 622 (1935); *Tebo v Havlik*, 418 Mich 350, 363, n2; 343 NW2d 181 (1984). Thus, *stare decisis* is not even implicated here.

Similarly, TeriDee incorrectly relies on the Court of Appeals' *Casco Twp* decision as a basis for invoking *stare decisis*. In this respect, TeriDee erroneously cites case law that deals with the factors that should be considered when the Supreme Court decides whether to overrule *its own* prior

precedents. TeriDee Brief at pp. 18.³ But those cases have no applicability to the situation presented here, where the Court would be overruling the decision of an inferior court, which the Court may do in any case where leave has been granted, without any compelling justification.

And finally, TeriDee is legally incorrect when it argues that the Court would be overruling *Shelby Twp* if it were to hold that the SBC does not have jurisdiction to invalidate an Act 425 agreement. TeriDee Brief at pp. 19-21. In *Shelby Twp*, the Court disavowed the notion that it was reviewing the SBC's jurisdiction by expressly stating that the "question before this Court is whether *the lower courts* correctly construed §34(1)(f) [of the Charter Township Act] to require only the provision of any water or sewer services." *Shelby Twp* at 72 [emphasis added]. Thus, *Shelby Twp* did not involve the question of an agency's subject matter jurisdiction; it involved only a run-of-the-mill review of a *judicial* interpretation of a statute.

That is a far cry from the situation presented here, where, through reliance on *Casco Twp*, the SBC has unilaterally endowed upon itself the subject matter jurisdiction to invalidate a statutorily-authorized contract that was undisputedly "in effect" (MCL 124.29) between the Townships⁴, but which the SBC subjectively believed was ineffective at promoting the specific type of economic development that TeriDee desires. This is unprecedented. The Michigan courts have never given an agency the implied authority to invalidate a contract, nor recognized that an agency has *any* implied

³ For example, TeriDee cites *Peterson v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009), which dealt with the question of whether the Court should overrule *its own* earlier decision in *Lansing Mayor v MPSC*, 470 Mich 154; 680 NW2d 840 (2004). Similarly, TeriDee cites *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), which dealt with the question of whether the Court should overrule *its own* earlier decision in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d (2004).

⁴ It is undisputed that (a) all population of the Transferred Area had been transferred to Haring; (b) all tax records had been transferred to Haring; (c) all voter registrations had been transferred to Haring; (c) the transferred population has already voted in a Haring election; and (d) Haring had already built (water system) or had already begun to build (WWTP) the infrastructure to serve the Transferred Area with public utilities. Appendix, 1355a-1362a; 1517a-1521a; 1665a-1806a.

powers under a statute that fails to even mention the agency.⁵ By holding otherwise, *Casco Twp* is properly characterized as a naked attempt at judicial legislation. And far from being “settled precedent” (TeriDee Brief at p. 27), *Casco Twp*’s jurisdictional holding has never been followed by a single panel of the Court of Appeals in the 16 years since it was decided.⁶ *Casco Twp* actually runs afoul of the venerable body of law that has been “settled” by this Court for over a century, regarding the narrow authority of an agency. It should be overruled, as “bad law.”

III. TERIDEE MIS-STATES THE APPLICABLE STANDARD OF REVIEW

TeriDee acknowledges that SBC decisions are subject to review under the Administrative Procedures Act (“APA”) (TeriDee Brief at p. 15), but then wrongly argues that a court’s review is limited to considering whether substantial, competent and material evidence supports the SBC’s factual findings (*id.* at pp. 15-17). That is legally incorrect. SBC decisions are subject to review under *all* six of the standards of §106 of the APA, MCL 24.306, including, in particular, the standard requiring that an SBC decision not be “in excess of the statutory authority or jurisdiction” of the SBC. *See* MCL 123.1018 and MCL 24.306(1)(b).⁷

TeriDee’s initial legal error about the proper standard of review propagates and multiplies itself when TeriDee thereafter side-steps the fact that the Townships do not so much challenge

⁵ TeriDee erroneously relies on a number of cases for the incorrect proposition that an agency has implied powers “by necessary or fair implication.” TeriDee Brief at p. 21 [citing *Ranke v Corp & Secs Comm’n*, 317 Mich 304 (1947); *Coffman v State Board of Examiners in Optometry*, 331 Mich 582 (1951); *Ghidotti v Barber*, 459 Mich 189 (1998); and, *Clonara v State Bd of Ed*, 442 Mich 230 (1993)]. Those cases do not so hold. They hold only that an agency may have implied *rulemaking authority* under a statute that grants the agency other express authority. Those cases have no applicability here, where it is undisputed that the SBC has no express authority under Act 425.

⁶ It was cited by the Court of Appeals, in an unpublished opinion, but for a proposition that actually supports the Townships’ position. *See Tab 1, A&D Development v Michigan Commercial Ins Mut*, Docket No. 301296 (Mich Ct App, Feb., 28, 2012) (“[A]gencies cannot exceed the statutory authority granted by the Legislature.”), *lev den*, 492 Mich 855; 817 NW2d 89 (2012).

⁷ TeriDee’s mistake is that it erroneously conflates the review standard for “annexation orders” (i.e., substantial evidence) (TeriDee Brief at p. 16) with the review standard for separate legal issues, such as whether the SBC has jurisdiction to invalidate an Act 425 agreement, which is *de novo*.

SBC’s factual findings (save a few, which are undisputedly false), but are instead arguing that those undisputed facts are not a statutory basis for invalidating an Act 425 agreement. To avoid this inconvenient fact, TeriDee argues in same spirit as the erroneous *Casco Twp* dictum, and thus *invents* a supposed SBC finding of fact that was not made. Specifically, TeriDee argues that “the SBC made the factual finding that the Township entered into the Act 425 Agreement solely as a means to bar annexation.” TeriDee Brief at p. 17 [emphasis in original]. It is undisputed, however, that the SBC never made such a finding of fact. Appendix, 12a-14a (“Findings of Fact”)⁸. The SBC’s actual factual finding was that the Townships’ Agreement was “[n]ot being used to promote economic development,” as supported by five sub-findings, none of which state that the Townships intended to interfere with annexation. *Id.* Thus, TeriDee has not offered a single disputed SBC factual finding against which the substantial evidence test could even be applied.

As the Townships have demonstrated, the SBC’s error is a *legal* one, stemming from the fact that the SBC wrongly *exercised* its jurisdiction (assuming, *arguendo*, it had jurisdiction in the first instance) by invalidating the Townships’ Agreement on extra-statutory grounds that are not supported by the plain language of Act 425. *De novo* review therefore applies.

IV. TERIDEE TACITLY ADMITS THAT *CASCO TWP* IS MOSTLY DICTUM

TeriDee refuses to acknowledge that the majority of *Casco Twp* is dictum. But then, by way of its own arguments, TeriDee accidentally ends-up admitting it is dictum. This is made most obvious at p. 30 of TeriDee’s Brief, where TeriDee lists the various “findings” that the SBC supposedly made to invalidate the *Casco* agreements. The problem with these supposed “findings” is that the SBC *did not make any of them*, except that a “transfer of land has not occurred.” Appendix, 1367a-1368a. All of the other supposed “findings” that TeriDee cites were invented

⁸ And so here we see again, more evidence of the serious mischief that has been caused by *Casco Twp* – giving members of the bar tacit approval to invent supposed findings of fact to justify SBC decisions, whenever the *actual* findings of fact are insufficient to do so.

rationales that the *Casco Twp* court hypothesized *might have existed* for the purpose of supporting the SBC's decision. But since these supposed SBC "findings" did not actually exist (*id.*), and because the *Casco* court was reviewing a case where the SBC's *actual* findings were not being disputed (*Casco Twp* at 402), anything the *Casco Twp* decision said about applying the substantial evidence test to the *legal* question of whether a contract complies with Act 425 is obiter dictum.

V. THE GIFTOS E-MAILS ARE IRRELEVANT

TeriDee has made the Giftos e-mails the thematic centerpiece of its Brief. TeriDee Brief at pp. 10-13. Yet, throughout its diatribe, TeriDee cannot explain how the personal opinions of one neighborhood gadfly – who undisputedly had nothing to do with developing the Agreement and who, by his own admission, was relying only on incorrect, secondhand knowledge – can be used to impugn the motives of 12 different Board members, only one of whom (Supervisor Rosser) even read Giftos' e-mails. *See* Appellants' Brief at pp. 6-7.

The most pertinent observation that can be made about the Giftos e-mail is this: *Of course* he wanted the Agreement to prevent annexation! Why would anyone (including TeriDee) think otherwise? Mr. Giftos resides in a subdivision directly across from the TeriDee property, at 5908 Evergreen Drive (Appendix, 1011a), and is the leader of the neighborhood opposition group. He and his neighbors purchased their homes in reliance on the long-established land use plan, which the annexation would destroy, but the Agreement preserves. Mr. Giftos thus had every right to petition his government on his own personal views, and to "e-rally" his neighbors to assemble at public meetings in support of the same cause. But his personal views do not magically become those of the Township Board members, simply because he expressed them in a *one-way* e-mail communication to 32 neighbors, and which was simply cc'd to a township official.

On that point, the Court should carefully note how TeriDee has subtly distorted the truth by characterizing the situation as one where Township officials "exchange[d]" e-mails with Mr. Giftos.

TeriDee Brief at p. 11. The subtle non-truth that is being perpetuated by the word “exchanged” is that Township officials were allegedly plotting with Mr. Giftos, by e-mail, in support of some sort of conspiracy. In this respect, TeriDee forgets that e-mail is a two-way form of communication: you can either *send* e-mail, or *receive* it. And another important aspect of e-mail communication is that no one, including elected officials, can control what e-mails they might receive. With these very simple technological observations in mind, it is incorrect for TeriDee to say that incriminating e-mails were being “exchanged” between Township officials and Mr. Giftos.

To this day, neither TeriDee nor the SBC can offer a plausible explanation for how a disgruntled neighborhood resident magically became the official spokesman for the Township Boards of each Township, simply by sending these one-way e-mails. This is just another example of mischief that *Casco Twp* has perpetuated, where the mere existence of public opposition to annexation is now a magic wand that can be used to erase a fully-compliant Act 425 Agreement.

VI. THE SBC IS SUBJECT TO COLLATERAL ESTOPPEL

TeriDee is legally incorrect when it argues that the Court of Appeals already decided, in *Avon Twp v State Boundary Comm*, 96 Mich App 736; 293 NW2d 691 (1980) and *Twp of St Joseph v State Boundary Comm*, 101 Mich App 407; 300 NW2d 578 (1981), that the SBC is not subject to collateral estoppel. TeriDee Brief at p. 40. *Avon Twp* involved the limited question of whether the two-year waiting period of MCL 117.9(6) runs from the *filing* of a prior petition, or a *decision* on a prior petition – a distinction not relevant in this case. The *Twp of St Joseph* decision is equally inapposite. That case stands only for the proposition that the two-year waiting period of MCL 117.9(6) is not implicated when the SBC denies a petition on grounds of legal insufficiency. The applicability or possibility of collateral estoppel was not even raised in either of those cases.

TeriDee otherwise unsuccessfully attempts to argue in avoidance of the administrative collateral estoppel doctrine. First, TeriDee incorrectly argues that SBC decisions are not final

because reapplications are allowed. TeriDee Brief at p. 39. TeriDee is miscomprehending what “final” means in this context. For purposes of administrative collateral estoppel, “finality” exists when the underlying statute provides no method to challenge a particular decision other than by way of direct appeal to court. **Tab 2**, *William Beaumont Hosp v Wass*, __ Mich App __; __ NW2d __ (Docket No. 323393, May 17, 2016). And in this respect, the Legislature has expressly declared that an SBC annexation decision is “final” and subject to judicial review, with no other remedy provided to challenge that particular decision. MCL 117.9(12); MCL 123.1018. And with regard to the requirement that an administrative decision-making process be “adjudicatory,” the SBC has, itself, declared that its decision-making process is “adjudicatory.” MAC R 123.20-123.23. TeriDee’s contrary argument is that the SBC is not adjudicatory because, “[h]aving come from the legislature itself, there can be no question that the power to decide annexation petitions is a legislative function.” TeriDee Brief at p. 42. This statement reflects a conspicuous misunderstanding of administrative law. All agency powers come directly from the legislature, including adjudicative powers. *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 582; 810 NW2d 110 (2011). Thus, there is nothing special about the SBC having received its annexation authority from the Legislature. The SBC is adjudicatory because, by its own rules, it conducts what are quintessentially “adjudicative” hearings on annexation petitions.⁹

Nor can TeriDee avoid collateral estoppel by invoking the “political question” doctrine. TeriDee Brief at p. 43. Whatever deference the courts might give to SBC fact-finding when reviewing an annexation decision, such decisions are not subject to the “political question” doctrine. The “political question” doctrine applies only to decisions that are not judicially reviewable, *at all*, because they are constitutionally committed to another branch of government. *Makowski v*

⁹ The adjudicative nature of SBC proceedings is demonstrated more fully in the Townships’ Reply to the Appellee’s Brief of the SBC.

Governor, 495 Mich 465, 472; 852 NW2d 61 (2014). That doctrine cannot apply to the SBC because the Legislature has expressly declared that SBC annexation decisions *are* subject to judicial review under the APA. MCL 117.9(12); MCL 123.1018. By doing so, the Legislature placed SBC decisions squarely within the category of decisions to which collateral estoppel applies.

TeriDee's last-ditch effort to avoid collateral estoppel is to argue that they allegedly provided more evidence about City utilities in the 2013-2014 proceedings. TeriDee Brief at p. 43. That is a legally incorrect position. The application of collateral estoppel does not depend on the identity of proffered evidence in the first and second proceedings; rather, the doctrine applies to the re-litigation by the same parties of the same *issue* (i.e., whether TeriDee's property should be annexed into the City), unless there has been an intervening "material change in circumstances." *Winchester v WA Foote Memorial Hosp, Inc*, 153 Mich App 489; 396 NW2d 456 (1986). The Seventh Circuit cogently explained this same point in *Sahara Coal Co v Office of Workers' Compensation Programs*, 946 F2d 554, 556 (CA7, 1991), holding that new evidence cannot act in avoidance of collateral estoppel, where conditions have not materially changed. In the most recent SBC proceedings, TeriDee was acting in derogation of this principle by simply presenting a few additional facts about the exact same circumstances that had already existed at the time its first petition was denied. Collateral estoppel should have been applied so as to prevent this.

REQUEST FOR RELIEF

For the additional reasons stated herein, the Townships respectfully request that this Honorable Court reverse and vacate the SBC's decisions in their entirety.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Appellants

Dated: August 25, 2016

By: /s/Ronald M. Redick
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TAB 1

STATE OF MICHIGAN
COURT OF APPEALS

A&D DEVELOPMENT, POWELL
CONSTRUCTION SERVICES, L.L.C., DICK
BEUTER d/b/a BEUTER BUILDING &
CONTRACTING, JIM'S PLUMBING &
HEATING, JEREL KONWINKSI BUILDER, and
KONWINSKI CONSTRUCTION, INC.,

UNPUBLISHED
February 28, 2012

Plaintiffs-Appellants,

V

MICHIGAN COMMERCIAL INSURANCE
MUTUAL, and ELEANOR POWELL-YODER,

No. 301296
Ingham Circuit Court
LC No. 10-000879-NI

Defendants-Appellees.

Before: HOEKSTRA, P.J., AND CAVANAGH AND BORRELLO, JJ.

PER CURIAM.

In this class action lawsuit challenging the use of surplus funds after the conversion of a worker's compensation self-insurance fund into a mutual insurance company, plaintiffs appeal as of right the trial court's order dismissing their complaint without prejudice and granting defendants' motion to transfer the case to the Worker's Compensation Agency (WCA) based on primary jurisdiction grounds. Because we conclude that the WCA does not have concurrent original jurisdiction over plaintiffs' claims or specialized knowledge in regard to the issues raised, we reverse.

This case arises out of the conversion of a self-insurance fund into a mutual insurance company. The conversion was effective January 1, 2000. The self-insurance fund that was converted was the Michigan Construction Industry Self-Insurance Fund (MCISIF), the MCISIF was a group self-insurance fund formed pursuant to the Michigan Worker's Disability Compensation Act, MCL 418.611; the act regulates the creation and operation of self-insurance funds. The self-insurance fund was regulated by the Worker's Compensation Agency (WCA).¹ The self-insurance fund was converted into a mutual insurance company now known as

¹ Previously named the Michigan Bureau of Workers' Disability Compensation.

Michigan Commercial Insurance Mutual (MCIM).² Mutual insurance companies are regulated by the Office of Financial Insurance Regulation (OFIR).³

MCISIF members paid premiums into the fund in order to receive workers disability compensation coverage. Surplus premiums, funds paid by members that were not used for administrative costs or payment of claims, were returned to members as dividends. The MCISIF was supervised by an elected board of trustees that was responsible for hiring professionals to manage the fund. Defendant Eleanor Powell-Yoder was the fund administrator.

MCISIF began considering conversion to a mutual insurance company in 1998. MCISIF and its counsel met with regulators from the WCA and the OFIR regarding the feasibility and process of conversion. The WCA ultimately approved a procedure by which MCISIF members would vote on whether MCISIF should convert to a mutual insurance company. The WCA required that a trust to set aside funds in order to cover the liabilities of MCISIF be an element of the conversion process. On July 19, 1999, a special meeting was held for MCISIF members to vote on whether the fund should convert to a mutual insurance company; 383 total votes were cast, 357 of which were in favor of conversion to a mutual insurance company.

On September 16, 1999, the OFIR accepted MCISIF's application to become a mutual insurance company. The MCISIF board of trustees became MCIM's board of directors and Powell-Yoder became the president of MCIM. After the conversion was approved, the Michigan Construction Industry Fund Worker's Disability Compensation Trust ("trust agreement") was enacted in order to secure funds to cover MCISIF's liabilities. Pursuant to the trust agreement, any surplus funds in the trust would be distributed to MCIM and not to the former members of the now-dissolved MCISIF. The disclosure statement that was sent to MCISIF members before the vote explained that "all assets and liabilities" would be transferred to MCIM if the conversion was approved. Powell-Yoder requested approval from the WCA in regard to the transfer of \$10,000,000 of MCISIF's assets to MCIM in order to capitalize the new insurance company on November 24, 1999. The transfer was authorized by the WCA. Thereafter, the WCA authorized additional transfers of surplus funds from the trust to MCIM pursuant to the trust agreement.

Plaintiffs filed a complaint with seven counts on July 23, 2010, alleging conversion pursuant to MCL 600.2919a, negligence, breach of fiduciary duty, violation of MCL 500.2016, fraud and misrepresentation. The complaint further requested equitable relief in the form of a constructive trust and declaratory relief. Plaintiffs also requested class certification. Plaintiffs essentially alleged in their complaint that defendants gained approval for the conversion and for the transfer of MCISIF's surplus funds to MCIM through misrepresentation, fraud and other illegal action. In lieu of answering plaintiffs' complaint, defendants filed a motion to dismiss for lack of jurisdiction on August 25, 2010.

² The company was originally named Michigan Construction Industry Mutual.

³ Previously named the Michigan Insurance Bureau.

On November 3, 2010, the trial court held a hearing regarding defendants' motion to dismiss. After hearing arguments from both parties, the trial court stated that it agreed with plaintiffs that the WCA's administrative rules did not specifically cover conversion of a self-insurance fund to a mutual insurance company, and that more than one agency would govern such a conversion, i.e. the WCA and the OFIR. Nevertheless, the trial court granted defendants' motion because it determined that the issues raised by plaintiffs fell within the WCA's specialized and expert knowledge "as evidenced by the statutory and regulatory scheme," and that consequently, the WCA had primary jurisdiction over plaintiffs' claims. The trial court accordingly dismissed plaintiffs' complaint without prejudice. On November 8, 2010, the trial court issued a conforming order.

On appeal, plaintiffs argue that the trial court erred when it dismissed their claims without prejudice and deferred the case to the WCA on primary jurisdiction grounds. Specifically, plaintiffs first argue that the WCA does not have jurisdiction because it has no statutory authority over defendants or the claims raised by plaintiffs' complaint.

We review de novo the applicability of the primary jurisdiction doctrine because it is a question of law. *Psychosocial Serv Assoc, PC v State Farm Mut Auto Ins Co*, 279 Mich App 334, 336; 761 NW2d 716 (2008).

"The doctrine of primary jurisdiction is grounded in the principle of separation of powers." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 196; 631 NW2d 733 (2001). Accordingly, the doctrine is founded on concerns regarding the properly limited role of the courts in a democratic society and respect for the legislatively imposed regulatory duties of agencies. *Id.* at 197. "As a threshold issue, before invoking the doctrine of primary jurisdiction, a court must find that the administrative agency to which referral is sought has concurrent original jurisdiction over the issues raised." *Attorney General v Blue Cross Blue Shield of Mich*, 291 Mich App 64, 88; ___ NW2d ___ (2010).

"A question of primary jurisdiction arises when a claim may be cognizable in a court but initial resolution of issues within the special competence of an administrative agency is required." *Travelers Ins Co*, 465 Mich at 197 (citation and quotation omitted). Accordingly, the question whether judicial review should be postponed "in favor of the primary jurisdiction of an administrative agency necessarily depends on the agency rule at issue and the nature of the declaration being sought in the particular case." *Id.* at 198 (citation and quotation omitted).

There is no fixed formula for determining whether an administrative agency has primary jurisdiction over a dispute; however, courts should consider: "(1) whether the matter falls within the agency's specialized knowledge, (2) whether the court would interfere with the uniform resolution of similar issues, and (3) whether the court would upset the regulatory scheme of the agency." *City of Taylor v Detroit Edison Co*, 475 Mich 109, 122; 715 NW2d 28 (2006).

First, we address whether the WCA has jurisdiction in this case. In order for an administrative agency such as the WCA to properly exercise primary jurisdiction, it must possess "concurrent original jurisdiction over the issues raised." *BCBSM*, 291 Mich App at 88. Further, administrative agencies may create rules and regulations that are necessary for the efficient exercise of the powers expressly granted by the Legislature, but agencies cannot exceed the

statutory authority granted by the Legislature. See *Casco Twp v State Boundary Comm*, 243 Mich App 392, 397; 622 NW2d 332 (2000); *Czymbor's Timber, Inc v Saginaw*, 478 Mich 348, 356; 733 NW2d 1 (2007).

The statutory scheme of the WCA demonstrates that its director is authorized by MCL 418.611(2) to determine the procedures and conditions by which a self-insurance group fund such as MCISIF may be created. The WCA director is also charged with approving applications for such group funds, and with terminating group funds when a fund is no longer able to meet all present and future obligations. MCL 418.611(5). Therefore, according to the plain statutory language, the duties of the WCA director's office include the regulation of self-insurance group funds, and pursuant to MCL 418.205, the director is granted authority to make administrative rules necessary for the performance of the duties of his or her office. Accordingly, the WCA is authorized by statute to promulgate rules regarding self-insurance group funds, including the creation and termination of such funds. But defendant MCIM is a mutual insurance company regulated by the OFIR, and defendant Powell-Yoder, MCIM's president, is an individual who is in no way affiliated with an existing self-insurance group fund. Accordingly, even if the WCA held a hearing regarding plaintiffs' claims, it could not award plaintiffs' any relief because it has no authority over defendants. Consequently, we conclude that the WCA has no concurrent regulatory authority over either defendant.

Further, the WCA is not authorized to address the claims raised by plaintiffs. Plaintiffs allege conversion pursuant to MCL 600.2919a, negligence, breach of fiduciary duty, violation of MCL 500.2016, fraud and misrepresentation. Plaintiffs request equitable relief in the form of a constructive trust, and declaratory relief. Plaintiffs also request class certification. State agencies do not possess the authority to hear class action claims in an administrative proceeding, absent an explicit statutory grant of powers or administrative rules permitting the agency to do so. *Stein v Dir, Bureau of Workmen's Compensation*, 77 Mich App 169, 176; 258 NW2d 179 (1977). It is not disputed that the WCA does not have the requisite statutory authority to hear a class action claim. Similarly, the WCA does not have authority to grant equitable relief. *Bd of Ed of Benton Harbor Area Sch v Wolff*, 139 Mich App 148, 156; 361 NW2d 750 (1984). Consequently, we conclude that because the WCA does not have concurrent original jurisdiction over the issues raised, the doctrine of primary jurisdiction is not applicable. *BCBSM*, 291 Mich App at 88.

Plaintiffs also challenge the trial court's conclusion that the WCA possesses specialized knowledge in regard to their claims. Defendants maintain that the trial court correctly considered the primary jurisdiction factors set forth in *Detroit Edison Co*, 475 Mich at 122, and properly concluded that the WCA has specialized knowledge and primary jurisdiction over plaintiffs' claims. In support of their argument that the WCA possess special expertise in regard to plaintiffs' claims, defendants cite 1999 AC, R 408.43a (requirement of surety bond or letter of credit, excess liability insurance, and guaranty), 1999 AC, R 408.43f (WCA has authority to approve the creation of self-insurance group funds and demand evidence regarding finances of a prospective fund), 1999 AC, R 408.43g (setting forth requirements for the addition of new members to a fund or termination of fund members), 1999 AC, R 408.43h (setting forth required reporting by a fund to the WCA), 1999 AC, R 408.43i (setting forth the powers of a fund's board of trustees), and 1999 AC, R 408.43j (addressing group self-insurance funds, advance premium discounts, surplus monies, surplus investment income and premiums, and unfunded claims).

Contrary to supporting defendants' position that the WCA has special knowledge in regard to plaintiffs' claims, examination of the WCA's administrative rules cited by defendants demonstrates that the WCA's primary expertise is related to ensuring that self-insurance funds maintain adequate funds to cover payment of all worker's compensation claims and related liabilities. Plaintiffs' claims are primarily focused on the use of MCISIF's surplus funds to capitalize MCIM; specifically, plaintiffs believe the surplus funds were wrongly appropriated by defendants based on tort and statutory theories. The WCA's administrative rules are concerned with surplus funds only to the extent that "sufficient monies are retained so that total assets are greater than total liabilities for each fund year." 1999 AC, R 408.43j(2). The WCA's administrative rule regarding surplus funds does not require return of surplus funds to fund members; it states only that surpluses *may* be returned to fund members. 1999 AC, R 408.43j(2). The WCA's administrative rules do not otherwise provide guidance regarding how surpluses may or may not be appropriated. The WCA's administrative rules have no bearing on the claims plaintiffs raise in this case. Accordingly, it is clear that the WCA has expertise in ensuring self-insurance funds are adequately funded in order to cover all liabilities, but not in regard to the claims raised by plaintiffs. The WCA is not in the business of regulating the use of surplus funds, and would have no specific knowledge in regard to plaintiffs' claims alleging the misappropriation of surplus funds by defendants in this case.

Further, the WCA does not have experience with resolving allegations of fraud, negligence, misappropriation, and the other claims raised by plaintiffs. This Court has explained that trial courts should defer to agencies based on the doctrine of primary jurisdiction in "cases raising issues of fact not within the conventional experience of judges, or cases requiring the exercise of administrative discretion." *Travelers Ins Co*, 465 Mich at 201, quoting *Attorney General v Diamond Mtg Co*, 414 Mich 603, 612; 327 NW2d 805 (1982). Plaintiffs' claims raise issues that trial courts, not the WCA, are accustomed to resolving. Accordingly, the WCA does not possess any specialized knowledge in regard to plaintiffs' claims that would weigh in favor of deferring to the agency on primary jurisdiction grounds.

The final two factors, whether the court would interfere with the uniform resolution of similar issues, and whether the court would upset the regulatory scheme of the agency, *Detroit Edison Co*, 475 Mich at 122, similarly do not support deferring to the WCA on primary jurisdiction grounds in this case. The uniform resolution of similar issues by the WCA will not be affected because the WCA's regulatory authority does not include the resolution of the type of claims that plaintiffs raise. Further, the WCA's regulatory scheme will not be impacted because the WCA's regulatory scheme does not address the issues raised by plaintiffs. Consequently, we conclude that the trial court erred when it dismissed plaintiffs' case without prejudice and deferred the issues to the WCA on primary jurisdiction grounds because the primary jurisdiction factors do not support application of the doctrine in this case.⁴

⁴ In light of our resolution of plaintiffs' first issues on appeal, we need not address the final issue raised by plaintiffs regarding whether the trial court should have dismissed their complaint without prejudice.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

TAB 2

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM BEAUMONT HOSPITAL,
Plaintiff,

FOR PUBLICATION
May 17, 2016
9:05 a.m.

v

JON WASS,

No. 323393
Oakland Circuit Court
LC No. 2013-136932-CK

Defendant/Third-Party Plaintiff-
Appellant,

v

TIME INSURANCE COMPANY,

Third-Party Defendant-Appellee.

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

Defendant/third-party plaintiff Jon Wass appeals from a trial court order granting third-party defendant Time Insurance Company (Time) summary disposition of Wass's breach of contract claim. The trial court concluded that because the Office of Financial and Insurance Regulations (OFIR), an administrative agency, had already issued a decision pursuant to the external review procedures in MCL 550.1915(1), the breach of contract claim was barred by res judicata and collateral estoppel. MCL 550.1915(3), however, provides that subsection (1) does not preclude Wass from seeking other remedies available under state and federal law. And because Wass was not entitled to an evidentiary hearing at any level of the administrative proceedings, the administrative decision rendered under MCL 550.1915(1) does not have preclusive effect in this case. Accordingly, we reverse and remand for further proceedings.

I. BACKGROUND

On June 28, 2011, Time issued a certificate of insurance to Wass that provided major medical coverage. Pertinent to this dispute, the policy contained a preexisting conditions limitation. After Wass was diagnosed with and began receiving treatment for colon cancer, Time denied his claim for benefits, asserting that the colon cancer was a preexisting condition. Wass appealed the denial to Time's internal grievance panel, which also concluded that the colon

cancer was a preexisting condition. Time informed Wass that the grievance panel's decision was the last avenue available for an internal review, but advised him that he could seek an external review by the OFIR pursuant to the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq.*

Wass requested an external review of Time's denial of coverage from the OFIR, which assigned the review to an Independent Review Organization (IRO). Under MCL 550.1911(9), (11), and (13), the IRO was required to review "all of the information and documents" that Time used in making its adverse determination, "any other information submitted in writing" by Wass or Wass's representative, and, to the extent it was available and appropriate, the IRO could also consider additional documentary evidence listed in the statute, such as medical records and practice guidelines. The IRO was not authorized to conduct an evidentiary hearing or hear testimony.¹ The IRO concluded that the colon cancer was a preexisting condition,² thereby precluding Wass from receiving benefits. The OFIR adopted the IRO's recommendation that Wass be denied coverage.

Wass appealed the OFIR's decision to the Oakland Circuit Court pursuant to the provision providing for such review in MCL 550.1915(1). The trial court's review of the OFIR decision was limited to determining whether the decision was authorized by law. See *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 455; 688 NW2d 523 (2004). "[A]n agency's decision that 'is in violation of statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious,' is a decision that is *not* authorized by law." *Id.* (quotation omitted; alteration and emphasis in original). The trial court did not conduct an evidentiary hearing. Instead, it reviewed the OFIR record and opinion and concluded that the ruling "was not contrary to law or arbitrary and capricious." Wass did not appeal the circuit court's decision to this Court.

¹ See *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 460-462; 688 NW2d 523 (2004) (recognizing that PRIRA's external review procedure does not require an evidentiary hearing).

² MCL 500.3406f(1)(a) provides:

(1) An insurer may exclude or limit coverage for a condition as follows:

(a) For an individual covered under an individual policy or certificate or any other policy or certificate not covered under subdivision (b) or (c), only if the exclusion or limitation relates to a condition for which medical advice, diagnosis, care, or treatment was recommended or received within 6 months before enrollment and the exclusion or limitation does not extend for more than 12 months after the effective date of the policy or certificate.

We agree with the trial court that this definition, rather than the definition in the insurance policy, applies in this case.

On January 3, 2013, plaintiff William Beaumont Hospital filed a complaint against Wass in district court, seeking payment from Wass for the reasonable and necessary medical services it had provided. After Wass answered and filed a motion to stay the proceedings, the case was transferred to the circuit court. Wass then filed a third-party complaint against Time, alleging breach of contract and asserting that Time was responsible for the amounts sought by Beaumont Hospital. Time asserted in its answer that it had no contractual duty to pay Wass's health care expenses because the contract did not cover his preexisting condition during the pertinent time frame. The insurance company then filed a motion for summary disposition under MCR 2.116(C)(7), asserting that Wass's claims were barred by res judicata and collateral estoppel because of the June 2012 decision by the OFIR. The trial court agreed and granted the motion for summary disposition in Time's favor. Wass now appeals that decision.

II. ANALYSIS

PRIRA contemplates an aggrieved party being able to pursue both an administrative review and a claim in circuit court. MCL 550.1915 provides:

(1) An external review decision and an expedited external review decision are the final administrative remedies available under this act. A person aggrieved by an external review decision or an expedited external review decision may seek judicial review no later than 60 days from the date of the decision in the circuit court for the county where the covered person resides or in the circuit court of Ingham county.

(2) Subsection (1) does not preclude a health carrier from seeking other remedies available under applicable state law.

(3) *Subsection (1) does not preclude a covered person from seeking other remedies available under applicable federal or state law.*

(4) A covered person or the covered person's authorized representative may not file a subsequent request for external review involving the same adverse determination or final adverse determination for which the covered person has already received an external review decision under this act. [emphasis added.]³

³ The purpose of statutory interpretation is to determine the Legislature's intent, beginning with the statutory language. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). When the statutory language clearly expresses the Legislature's intent, "no further construction is required or permitted." *Id.* In giving meaning to a statutory provision, this Court considers the provision within the context of the whole statute and "give[s] effect to every word, phrase, and clause . . . [to] avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Subsection (1) provides that the final administrative remedies under PRIRA are an external review by the OFIR followed by a review by the circuit court. However, subsection (3) plainly provides that subsection (1) does not preclude an aggrieved party from pursuing other remedies under state and federal law, which would include the right to bring an original and separate action in circuit court for breach of contract. There is, notably, no election of remedies language in the statute, nor will we read such a requirement into the statute. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011). Accordingly, the statutory language does not preclude Wass's suit.

Nevertheless, we must determine whether his suit is precluded by the common law doctrines of res judicata and collateral estoppel.⁴

The preclusion doctrines of res judicata and collateral estoppel "serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *Nummer v Dep't of Treasury*, 448 Mich 534, 541; 533 NW2d 250 (1995). Res judicata applies if "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotations and alterations omitted).

In *Standard Auto Parts Co v Employment Security Comm*, 3 Mich App 561, 570; 143 NW2d 135 (1966), this Court explained:

In general, the answer given by the courts to the question whether decisions of administrative tribunals are capable of being *res judicata* depends upon the nature of the administrative action involved. *The doctrine of res judicata has been applied to administrative action that is characterized by the courts as "judicial" or "quasi judicial"*, while to administrative determinations of "administrative", "executive", or "legislative" nature, the rules of *res judicata* have been held to be inapplicable. 42 Am Jur, Public Administrative Law, § 161, p 520. [second emphasis added.]

The preclusion doctrines are applicable to administrative decisions (1) that are "adjudicatory in nature," (2) where a method of appeal is provided, and (3) where it is clear that the legislature

⁴ We review de novo a circuit court's decision on a motion for summary disposition and questions of law, including the application of a legal doctrine such as res judicata. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). The application of collateral estoppel is also a question of law that we review de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

“intended to make the decision final absent an appeal.” *Nummer*, 448 Mich at 542; see also *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 29, 38; 620 NW2d 657 (2000).

“To determine whether an administrative agency’s determination is adjudicatory in nature, courts compare the agency’s procedures to court procedures to determine whether they are similar.” *Natural Resources Defense Counsel v Dep’t of Environmental Quality*, 300 Mich App 79, 86; 832 NW2d 288 (2013). “Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents.” *Id.*

The Restatement of Judgments, 2d, § 83, p 266, provides in pertinent part:

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication

The Comments provide that “[w]here an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication.” Restatement of Judgments, § 8, comment *b*, p 268. Further, “[i]n the performance of adjudicative functions . . . administrative agencies are generally required by law to employ procedures substantially similar to those used in courts.” Restatement of Judgments, § 8, comment *b*, p 269. Additionally, in *Holton v Ward*, 303 Mich App 718, 734; 847 NW2d 1 (2014), this Court held that an administrative decision by the Department of Environmental Quality, had preclusive effect. In that case, an evidentiary hearing was held during which an administrative law judge “heard testimony from additional witnesses and reviewed a large body of evidence.” *Id.* at 732.

In this case, the OFIR’s decision was not adjudicatory in nature because no level of the proceedings provided for an evidentiary hearing. Although a plaintiff or his representative was entitled to present a written statement and documentary evidence, MCL 550.1911(11), PRIRA’s external review procedure is not substantially similar to the procedure employed by courts. Specifically, although the parties are free to submit documentary evidence, no witnesses may be produced or compelled to appear for examination by the parties or by the factfinder, and the parties cannot cross-examine the individuals responsible for the insurer’s decision or any medical experts on whose opinion those individuals relied.

In *English*, 263 Mich App at 463, we upheld PRIRA’s administrative process against a due process challenge. We recognized that the review process was limited in that it did not provide for an evidentiary hearing or other procedures typical to courts. *Id.* at 460-462. We listed several reasons why PRIRA’s limited process was constitutional, one of which was the fact “that although the external review decision constitutes the final administrative remedy under PRIRA, the act ‘does not preclude a health carrier from seeking other remedies available under applicable state law.’ ” *Id.* at 463, quoting MCL 550.1915(2). Likewise the external review decision does not preclude a covered person from seeking other remedies available under applicable state law. MCL 550.1915(3). To preclude those other remedies based on the limited

administrative process provided for by PRIRA would require us to reconsider the constitutionality of that process.

In support of its argument that preclusion applies, Time cites four cases where an administrative decision was given preclusive effect. However, each of those cases involved administrative procedures far more extensive than those provided for in PRIRA. In *Nummer*, the plaintiff challenged a decision by the Michigan Civil Service Commission that denied his claims for breach of contract and discrimination on the basis of race and gender. *Nummer*, 448 Mich at 539-540. In that case, the plaintiff “was represented by counsel before the agency; had the opportunity to, and did in fact, call witnesses; and had a full hearing on the merits of his claim.” *Id.* at 542-543. In addition, the *Nummer* Court made clear that its decision to give administrative decisions preclusive authority would only “affect agency decisions by formal hearing.” *Id.* at 543, 543 n 7.⁵ Next, in *Minicuci*, the plaintiff challenged a decision by the Michigan Department of Labor that he was not entitled to additional wages under the wages and fringe benefits act, MCL 408.471 *et seq.* *Minicuci*, 243 Mich App at 30. However, in that matter the plaintiff had a right to an evidentiary hearing on administrative appeal. *Id.* at 38. Time’s reliance on *Dearborn Hts Sch Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120; 592 NW2d 408 (1998) is also unavailing. In that case, the issue of whether the administrative proceedings were adjudicatory in nature was never even raised. Moreover, the parties in that case were permitted to call and question witnesses. *Id.* at 125. Finally, in *Senior Accountants, Analysts and Appraisers Ass’n v City of Detroit*, 60 Mich App 606, 613; 231 NW2d 479 (1975), this Court held that a decision against the plaintiff by the Michigan Employment Relations Commission (MERC) had preclusive effect. However, under MCL 423.216, the parties to a proceeding before MERC are entitled to an evidentiary hearing before a hearing officer.

Accordingly, given that the proceedings before the OFIR were not adjudicatory in nature, the first element required to give an administrative decision preclusive effect is not satisfied. Thus, the preclusion doctrines do not apply to the decision of the OFIR. See *Nummer*, 448 Mich at 542; *Minicuci*, 243 Mich App at 38.

Additionally, the third element required to apply the preclusion doctrines to an administrative decision, i.e., that it is clear that the legislature intended to make the determination final when no appeal is taken, is also not satisfied in this case. In *Nummer*, our Supreme Court concluded that, in enacting the Civil Rights Act, MCL 37.2101 *et seq.*, “the Legislature [clearly] intended to make the Civil Rights Commission’s findings final in the absence of an appeal[.]” *Nummer*, 448 Mich at 551. The Court explained that the Legislature had explicitly provided only one remedy from an adverse agency determination: a direct appeal to the circuit court. *Id.* The statute did not contain any other language concerning the preclusive effect of the Civil Rights Commission’s findings or conclusion. *Id.* at 547, 551. The Court concluded that if the

⁵ Moreover, in *Nummer* the administrative decision was subject to a de novo review by the circuit court, requiring his claim to be reviewed under “a competent, material, and substantial evidence standard.” *Nummer*, 448 Mich at 543-544. In contrast, the review provided by the circuit court in this case was not de novo and the OFIR decision was only reviewed to determine if it was contrary to law.

Legislature intended “a new, original action . . . it would have said so more directly.” *Id.* at 551. Similarly, in *Dearborn Hts.*, this Court held:

[E]ven if the teacher tenure act is silent concerning whether a determination by the [State Tenure C]ommission is to be given preclusive effect, in the absence of legislative intent to the contrary, the applicability of principles of preclusion is presumed. . . . [I]t is instructive that, pursuant to the Administrative Procedures Act, the only procedure available to a party aggrieved by a final decision of the commission is direct review by the courts. MCL 24.301; MSA 3.560(201). Because the appeal process, by its very nature, does not contemplate a new, original action, the commission’s decision is clearly intended to be a final decision on the merits. [*Dearborn Hts.*, 233 Mich App at 129-130.]

Finally, in *Minicuci*, we reached the same conclusion when interpreting the Legislature’s intent in enacting the wage act. In *Minicuci*, the wage act only provided “for appellate judicial review of the hearing referee’s determinations.” *Minicuci*, 243 Mich App at 40. As a result, we concluded that the Legislature intended to make the department’s administrative determination final absent an appeal. *Id.* at 40-41.

Unlike the statutes in *Nummer*, *Dearborn Hts.*, and *Minicuci*, the statutory language in PRIRA explicitly provides that other remedies under state and federal law are not precluded by a party’s decision to pursue an external review before the OFIR under subsection (1). MCL 550.1915(3). As such, the OFIR’s decision is not entitled to preclusive effect because the legislature did not clearly intend to make the determination of the OFIR final when no appeal is taken. Instead, the legislature contemplated, and statutorily provided that, a plaintiff could file an action in circuit court even if such an action touches upon issues or claims raised during the external review procedure in subsection (1). See MCL 550.1915(3). Accordingly, because it is not clear that the legislature intended to make the OFIR’s determination final when no appeal is taken, the preclusion doctrines do not apply.

III. CONCLUSION

MCL 550.1915 provides that a party aggrieved of a decision by the OFIR can pursue both an external review before the OFIR and a claim in circuit court. Further, Wass’s circuit court claim is not barred by *res judicata* or collateral estoppel. Both doctrines only apply to administrative decisions that are adjudicatory in nature and in cases where it is clear that the legislature intended to make the administrative decision final in the absence of an appeal. *Nummer*, 448 Mich at 542; *Minicuci*, 243 Mich App at 38. Here, the proceedings were not adjudicatory in nature because no evidentiary hearing was held. Moreover, given that the statute provided for an aggrieved party to proceed with both an external review under MCL 550.1915(1) and to pursue other actions under MCL 550.1915(3), it is plain that the legislature did not intend a decision under subsection (1) to be final in the absence of an appeal.⁶ For these reasons, we

⁶ We note that a contrary ruling could, at least in some cases, run afoul of the Employee Retirement and Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq.* See *Rush*

conclude that the trial court erred when it held that Wass's claim was barred by res judicata and collateral estoppel.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher

Prudential HMO, Inc v Moran, 536 US 355; 122 S Ct 2151; 153 L Ed 2d 375 (2002); see also Wexler, *A Patient's Right to Independent Review: Has Michigan's Act Changed after Rush Prudential HMO, Inc v Moran?*, 81 Mich B J 19, 21-22 (Nov, 2002).