

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD J. BAKER,

Plaintiff-Appellant,

v

THE DETROIT EDISON COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 9, 2004

No. 246401
Oakland Circuit Court
LC No. 02-037242-CZ

Before: Owens, P.J., and Talbot and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(4). We affirm.

The material facts are not in dispute. On February 25, 2001, a thunderstorm blew tree branches onto a high tension power wire, which then fell on plaintiff's office building starting a fire and causing substantial damage. The local fire department responded to the fire, but, because of the downed power line, the firefighters could not enter the building until one of defendant's employees arrived to turn off the power. The fire department's records indicated that defendant was called at 12:13 a.m. and their employee arrived on the scene at 2:09 a.m..

Plaintiff filed a two-count complaint in circuit court alleging negligence and negligence per se against defendant. In plaintiff's negligence claim, he alleged that defendant breached its duty to (1) maintain and protect its power lines, which included maintaining, inspecting, and trimming trees that were in close proximity to "their customers" property, and (2) respond to a call from a local fire department in a reasonable time. In plaintiff's negligence per se claim, he alleged that "Michigan Statutes and Regulations governing safety rules" for overhead power lines and the trimming of trees around power lines imposed specific duties for the safety and protection of the general public, and defendant breached its duty when it failed to maintain, trim, and remove trees that were in close proximity to power lines. Defendant filed a motion for summary disposition under MCR 2.116(C)(8)¹ alleging that the doctrine of primary jurisdiction

¹ Although defendant raised the issue of primary jurisdiction in its motion for summary disposition, it is not a party to this appeal. (continued...)

required that the action be referred to the Michigan Public Service Commission (MPSC) and the trial court granted this motion.

Plaintiff argues on appeal that the trial court improperly referred the matter to the MPSC because plaintiff's complaint sounded in tort independent of contract. We review de novo a trial court's grant or denial of a motion for summary disposition. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). Similarly, the applicability of the primary jurisdiction doctrine presents a question of law, which this Court also reviews de novo. *Michigan Basic Property Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 528; 618 NW2d 32 (2000).

The primary jurisdiction doctrine pertains to matters "whereby a court defers its own jurisdiction to the jurisdiction of an administrative agency better suited to handle the parties' dispute." *Michigan Basic Property Ins Ass'n*, *supra* at 529, citing *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 70; 559 NW2d 647 (1997). "[T]he doctrine of primary jurisdiction is one that requires 'referral,' but not necessarily dismissal of an action" and therefore a party may seek judicial review of the MPSC's decision after it has considered a referred claim. *Travelers Ins Co v Detroit Edison*, 465 Mich 185, 208; 631 NW2d 733 (2001). Our Supreme Court, in *Rinaldo's*, *supra* at 71-72, listed the following factors as guidance for a trial court's decision whether to suspend an action in favor of agency review:

First, a court should consider "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue" Second, it should consider "the need for uniform resolution of the issue" Third, it should consider "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." Where applicable, courts of general jurisdiction weigh these considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body. [Quoting *Davis & Pierce*, 2 Administrative Law (3d ed), § 14.1, p 272.]

In this case, the trial court determined that the MPSC was the proper forum to hear the matter in light of a 1991 Stipulation and Agreement that defendant entered into with the MPSC after the agency held public hearings regarding performance standards for electric distribution systems. The Stipulation and Agreement established standards regarding defendant's communications, reliability of service (which included tree clearance services), and ability to respond to major storms; it also established that defendant would respond to downed wire calls within four hours. Further, the Stipulation and Agreement reflected the MPSC's ongoing interest in defendant's performance by requesting quarterly reports and annual meetings with the MPSC. As such, we find that the trial court properly determined that the MPSC should hear and decide if

(...continued)

disposition under MCR 2.116(C)(8), the trial court determined that it should be considered as a motion under MCR 2.116(C)(4). However, the Michigan Supreme Court has held that the standard of review is unaffected even where primary jurisdiction doctrine is "raised improperly under MCR 2.116(C)(4), [and] the plaintiff's pleadings [do] not affect the standard of review that [is] applied in reviewing the circuit court, or the analysis of the substantive decision." *Travelers Ins Co v Detroit Edison*, 465 Mich 185, 205-206 n 18; 631 NW2d 733 (2001).

plaintiff's property damage was a result of defendant's failure to abide by the standards set forth in the agreement. *Dominion Reserves, Inc v Michigan Consolidated Gas Co*, 240 Mich App 216, 218-222; 610 NW2d 282 (2000).

Furthermore, plaintiff's negligence claims were dependent on the allegation that defendant had breached "Michigan Statutes and Regulations governing safety rules" for overhead power lines and the trimming of trees around power lines that imposed specific duties for the safety and protection of the general public. The meaning and application of rules governing maintenance of overhead power lines, and tree trimming around those lines, by a public utility are matters of specialized knowledge best considered first by the MPSC. *Travelers Ins Co, supra* at 207 ("The MPSC "possesses the degree of expertise with regard to the purpose and effect of the governing tariffs to decide whether the presumptively valid tariff provisions apply to particular facts that do not constitute tortious conduct or a violation of the code or tariff."), quoting *Michigan Basic Property Ass'n, supra* at 533.

The second consideration, the need for uniformity, also favors referring the matter to the MPSC. We are persuaded that exposing defendant to unanticipated liabilities from storms, which are uncontrollable and cause differing degrees of damage, would affect its ability to provide affordable service. We similarly find that the MPSC's ability to regulate electric utilities would be frustrated if liability based on different judicial determinations of appropriate response times to downed wires from storms were established, particularly where the MPSC has already approved a response time of up to four hours.

The third consideration, "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities," also favors referring the matter to the MPSC. In this case, defendant has continuing obligations under the Stipulation and Agreement regarding the maintenance of overhead power wires and is bound to respond to emergency situations within a particular time frame. Its obligations under that agreement with the MPSC are continuously monitored by the agency. Judicial resolution of the claims raised in this case will potentially adversely impact the MPSC's performance of its regulatory responsibilities with regard to its agreement with defendant. The trial court therefore properly determined that while plaintiff's claims may sound in tort, they nonetheless fall within the MPSC regulatory scheme and that the doctrine of primary jurisdiction was properly invoked.

Plaintiff also argues that the trial court improperly denied his motion for reconsideration. We disagree. This Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000), citing *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609-610; 450 NW2d 6 (1989).

Plaintiff argues that the trial court improperly denied his motion for reconsideration because he presented evidence that an independent contractor, who was hired by defendant to perform tree clearance services, may also be liable for plaintiff's property damage. Plaintiff asserts that at the time defendant filed its motion for summary disposition, he was unable to specifically argue that referring the matter to the MPSC was improper because he did not receive any information regarding the specific contractual relationship between defendant and the independent contractor until after the trial court granted the motion.

Based on our review, we find that the record does not support plaintiff's assertion. Defendant submitted evidence that it informed plaintiff, in response to plaintiff's Interrogatory #25 almost three weeks before it filed the motion, that it hired an outside vendor to perform tree clearance duties. Even without the contract, plaintiff was not prevented from arguing, in his brief in opposition to defendant's motion, that a question of fact remained regarding the MPSC's jurisdiction over a third-party vendor. A motion for reconsideration is used to correct "a palpable error by which the court and the parties have been misled," and not to present new evidence. See MCR 2.119(F)(3); *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999); *Quinto v Cross & Peters*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996). Consequently, we decline plaintiff's invitation to determine whether the MPSC had jurisdiction over the independent contractor.²

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly

² Plaintiff filed a complaint against the independent contractor in circuit court. *Baker v Asplundh Tree Expert Company*, Case No. 03-047707.