In the Missouri Public Service Commission

In the matter of
Janice Shands et al
Complainant)
V WC 2015-0030
MAWC
Respondent

_____

In the matter of
Janice Shands et al
Complainant)
V EC 2015-0043
Ameren
Respondent

____

In the matter of
Janice Shands et al
Complainant
V GC 2015-0045
LaClede Gas
Respondent

Comes now complaintants and on the amended complaint where

as noted all that is sought is a confirmation that PSC does not have and/or

is declining jurisdiction and deferring to the courts. PSC is not to be a mini

Adminstrative Hearing Commission, that the reason the statute is written the way

it is is because it is intended to be primarily a legislative body.It is not intended to

review issues of common law or equity . It is not just that no PSC expertise

and record is not needed, it is that its statute limits its complaints to to

complaints based on its rates and orders.

It is submitted this was confirmed in May v Union Electric, 107 SW2d

__ (Mo App194__), Board of Public Works of Rolla v Sho-Me Power , 244 SW2d 65 (Mo en banc1951), Katz Drug v Kansas City Power, 303 SW2d 672 (Mo App WD 1967) , WilshireConstruction v Union Electric, 463 SW 2d 903 (Mo 1971), State ex rel Fee Fee Trunk Sewer v Litz et al 596 SW2d 466 (No WD 1980), and Gaines v Gibbs, 709 SW 541 (Mo App 1986).

This was also confirmed in STATE EX REL. UTIL. CONSUMERS COUNCIL, ETC. v. P.S.C. No. 60848. 85S.W.2d 41 (1979)

where even on what was essentially a rate case in allowing a fuel adjustment clause where the court found PSC exceeded its jurisdiction, it was confirmed

.. we need not defer to the commission, which has no authority to declare or enforce principles of law or equity, Bd. of Public Works of Rolla v. Sho-Me Power Corp., 362 Mo. 730, 244 S.W.2d 55 (banc 1952).

..

...

.... While this statute gives the PSC general supervisory power over electric utilities, as discussed supra, it gives the PSC broad discretion only within the circumference of the powers conferred on it by the legislature; the provision cannot in itself give the PSC authority to change the ..scheme set up by the legislature.....

...

B This is confirmed in the regulation and statute

The CSR regulation expressly limits complaints to when aggrieved by a violation of a tariff,order or decision of the commission:

Here there is no rule, or decision or order of PSC that is the source of the complaint or any apparent procedure for the individual unit owners whereby the individual plaintiffs who have suffered the damage having no right to a complaint would not be subject to any primary jurisdiction which is premised on there being adequate remedy at commission level.

The CSR states:

4 CSR 240-2.070 Complaints
PURPOSE: This rule establishes the procedures
for filing formal and informal complaints
with the commission.
(1) Any person or public utility **who feels aggrieved by an alleged violation of any tariff, statute, rule, order, or decision within the commission's jurisdiction** may file a complaint.
.. end of quote

. This is especially so on a formal complaint :

This is in 4 CSR 240-2.070(4)
(4) Formal Complaints. A formal complaint
may be made by petition or complaint in writ-ing, setting forth any act or
thing done or omitted to be done by any person, corporation,
or public utility, including any rule or
charge established or fixed by or for any person,
corporation, or public utility, **in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission.**
emphasis added

This is especially so where an agency is a creature

of statute, its authority is limited to what is in its enabling statute.

For the PSC , its complaint jurisdiction instead is set out in RS

386.390,which states:

Complaint, who may make--procedure to hear--service of process, how had--time and place of hearing, how fixed:
386.390. 1. Complaint may be made by the commission of its own motion, or by the publiccounsel or any corporation or person, chamber of commerce, board of trade, or any civic,commercial, mercantile, traffic, agricultural or manufacturing association or organization, or anybody politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation,person or public utility, **in violation, or claimed to be in violation, of any provision of law,or of any rule or order or decision of the commission;** provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any

rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twentyfive consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.
...(emphasis added)

As in the highlighted section : the complaint is limited to only those that are

based in violation, of any provision of law, or of any rule or order or decision

of the commission.

The key term is “of the commission”.

C. This statute (unlike with Ch 213) does not create a claim, does not require or mandate any filing,(as with other agencies such as the MHRC which requires a discrimination charge and right to sue letter before filing in court)

The statute does not use any mandatory claims such as must or shall file with

the commission.It uses the term “may” which is permissive

It expressly does not extend to all complaints of any kind; only those where

the grievance is based on a violation of rule,regulation or charge heretofore

established or fixed by or for any corporation, person or public utility, in

violation, or claimed to be in violation, of any provision.
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DAs in Turner v Clayton, _318_ SW3d_600_, (Mo 2010), on statutory construction must follow statute as written and terms and language used .

As in Turner, supra:
...The seminal rule of statutory construction is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning. State ex rel. Unnerstall v. Berkemeyer, 298 S.W.3d 513, 519 (Mo. banc 2009)..This Court enforces statutes as they are written, not as they might have been written. City of Wellston v. SBC Commc'ns, Inc. , 203 S.W.3d 189, 192 (Mo. banc 2006).

...It is presumed that the General Assembly legislates with knowledge of existing laws.State ex rel. Broadway-Washington Assocs., Ltd. v. Manners , 186 S.W.3d 272, 275 (Mo.banc 2006).

Here the key terms are “may”, “of commission” and even the fact the term

“provision of law” is used whcih has its own definition is for parts of a

written statute or contract, not for common law or equity or tort. If it was

intended to cover all instances, it would have said , all instances , arising out

of common law, tort or statute; it would not have used the

phrase “provision of law”.

E. The claims of utilities would be contrary to law in seeking to supplant common law claims by implication .

This was confirmed in RASTER v AMERISTAR CASINOS, INC. 280

SW 3d 487 (Mo App 2010) where the Eastern District Court of Appeals

reversed a finding of primary jurisdiction on a contract claims against a

regulated casino subject to general supervision and correctly found that if

common law remedies are to be supplanted, cannot do so by implication it

has to be expressly set out in the statute holding :

. **The defendants effectively argue that the plaintiffs' statutory and common-law remedies are repealed by implication. Repeals of statutory provisions by implication, however, are disfavored. See StopAquila.org v. City of Peculiar, 208 S.W.3d 895, 905 n.14 (Mo. banc 2006)**. Furthermore, "where the legislature intends to preempt a common law claim, it must do so clearly." Overcast v. Billings Mutual Insurance Company, 11 S.W.3d 62, 69 (Mo. banc 2000). "[U]nless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid." In re Estate of Parker, 25 S.W.3d 611, 614 (Mo.App. W.D. 2000). Nothing in the statute creating the Gaming Commission expressly or implicitly abrogates the plaintiffs' common-law and statutory remedies.

The entire portion of the holding being:

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The plaintiffs appeal the judgment of the trial court dismissing their two

claims brought under the Missouri Merchandising Practices Act (MMPA) and their two breach-of-contract claims against the defendants Ameristar Casinos, Inc. and Ameristar Casino St. Charles Inc. ..
. plaintiffs brought suit, contending that the defendants' actions violated the MMPA and constituted a breach of contract. For their MMPA claim, the plaintiffs alleged that the defendants' representation regarding the changes in the point-award formulas, and the defendants' failure to timely and adequately disclose its falsity, was an "unlawful practice" within the meaning and scope of the MMPA. .., the defendants also contended that plaintiffs' petition should be dismissed because the Missouri Gaming Commission had primary jurisdiction over the matter.:
Before addressing the plaintiffs' final point on appeal, we pause to address a challenge to the trial court's jurisdiction. The defendants contend that, in the event we conclude the petition states a claim, the court should nevertheless dismiss the petition and defer the issues raised by the plaintiffs' petition to the Missouri Gaming Commission under the doctrine of primary jurisdiction. The defendants argue that the plaintiffs' cause of action falls under the Commission's jurisdiction because the Commission has promulgated specific regulations controlling the advertisement and promotional activities of casinos. We are not persuaded. The plaintiffs should not be deprived of their statutory and common-law remedies merely because the defendants' activities are regulated. There are many regulatory bodies in this state.
The establishment of the Board of Healing Arts does not deprive an injured patient of his medical-malpractice claim. Likewise, the establishment of the Gaming Commission does not deprive a casino customer of statutory and common-law remedies. We conclude that strict regulation exists due to the checkered history of legalized gambling, not to deprive casino customers of their legal remedies. **The defendants effectively argue that the plaintiffs' statutory and common-law remedies are repealed by implication. Repeals of statutory provisions by implication, however, are disfavored. See StopAquila.org v. City of Peculiar, 208 S.W.3d 895, 905 n.14 (Mo. banc 2006)**. Furthermore, "where the legislature intends to preempt a common law claim, it must do so clearly." Overcast v. Billings Mutual Insurance Company, 11 S.W.3d 62, 69 (Mo. banc 2000). "[U]nless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid." In re Estate of Parker, 25 S.W.3d 611, 614 (Mo.App. W.D. 2000). Nothing in the statute creating the Gaming Commission expressly or implicitly abrogates the plaintiffs' common-law and statutory remedies.
Moreover, we fail to perceive how the doctrine of primary jurisdiction applies. Under the doctrine of primary jurisdiction, courts generally will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered

its decision. Killian v. J & J Installers, Inc., 802 S.W.2d 158, 160 (Mo. banc 1991). This policy of restraint applies (a) where administrative knowledge and expertise are demanded to determine technical,intricate fact questions, and (b) where uniformity is important to the regulatory scheme.
Id.; MCI Metro Access Transmission Services, Inc. v. City of St. Louis, 941 S.W.2d 634, 644 (Mo.App. E.D. 1997). The instant case does not fall within these circumstances.
end of quote emphasis added.

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F.Even more so, under current law , for primary jurisdicvtion need to have a need for an adminstrative record and expertise.

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As quoted above from Raster, supra, the rule is that for there to be primary jurisdiction, there has to be demonstrated need for administrative expertise.

This same principle as confirmed in Cooper v Chrysler 361 S.W.3d 60 (MO App ED 2011) where the court described primary jurisdiction:

The primary jurisdiction doctrine provides that "courts will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision." Killian v. J & J Installers, Inc., 802 S.W.2d 158, 160 (Mo. banc 1991). Pursuant to this doctrine, the Commission has original jurisdiction to determine the fact issues that establish whether or not a claim is subject to the jurisdiction of the Commission. Hannah v. Mallinckrodt, Inc., 633 S.W.2d 723, 726 (Mo. banc 1982) (citing Sheen v. DiBella, 395 S.W.2d 296, 303 (Mo.App.1965)); see also State ex rel. Ford Motor Co. v. Nixon, 219 S.W.3d 846, 849 (Mo.App.2007); Deckard v. O'Reilly Automotive, Inc., 31 S.W.3d 6, 14 (Mo.App. 2000), overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. banc 2003); State ex rel. FAG Bearings Corp. v. Perigo, 8 S.W.3d 118, 121 (Mo.App.1999). These questions arise "(1) where administrative knowledge and expertise are demanded; (2) to determine technical, intricate fact questions; (3) where uniformity is important to the regulatory scheme." Killian, 802 S.W.2d at 160. See Deckard, 31 S.W.3d at 14. In other words, the primary jurisdiction doctrine applies to questions involving "administrative expertise, technical factual situations and regulatory systems in which uniformity of administration is essential." Jones v. Jay Truck Driver Training Center, 709 S.W.2d 114, 115 (Mo. 64*64 banc 1986), overruled on other grounds by McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473, 479, 479 n. 3 (Mo. banc 2009)...
Their claims are contrary to the holding , in Mainline Hauling v PSC , 577 SW2d 50 (MOApp WD 1978) how primary jurisdiction is the exception and not available where there are no issues requiring adminstrative expertise :

...This doctrine is based on a judicial policy of self-restraint and calls upon a court to defer to and give an administrative agency the first right to consider and act upon a matter which calls for factual analysis or the employment of special expertise within the scope of the agency's responsibility entrusted to it by the legislature. 2 Am.Jur.2d, Administrative Law, Sec. 788, p. 688 et seq.; 73 C.J.S. Public Administrative Bodies and Procedure § 40, p. 347; State ex rel.Cirese v. Ridge, 345 Mo. 1096, 138 S.W.2d 1012 (banc 1940). However, where there are nofactual questions or issues **requiring administrative expertise**, but instead only questions of law which fall within the conventional competency of the courts, there is no reason for judicial deference to the administrative agency and the doctrine of primary jurisdiction has no application. 2 Am.Jur.2d, Administrative Law, Sec. 793, p. 696; 73 C.J.S. Public Administrative Bodies and Procedure, § 41, p. 351; Smith v. Thompson, 234 Mo.App. 1151, 137 S.W.2d 981 (1940). See also Klicker v. Northwest Airlines, Inc., 563 F.2d 1310 (9th Cir. 1977).

In the instant case, the substantive issue presently for consideration can be resolved as a pure question of law,... Therefore, the doctrine of primary jurisdiction did not preclude exercise of jurisdiction by the Circuit Court.

This is also confirmed in Premium Standard Farms v Lincoln Township 946 S.W.2d 234

(1997) where the actual holding there was :

Exhaustion of administrative remedies is generally required before a court may assume jurisdiction of a matter where a remedy is available through administrative procedures. Council House Redevelopment Corp. v. Hill, 920 S.W.2d 890, 892 (Mo. banc 1996) ("As a general rule,courts will refrain from acting until the litigants have exhausted all available administrative remedies provided by statute."). This principle is founded upon the theory that agencies have special expertise and a factual record can be developed more fully by pursuing the designated channels for relief within the agency. The issue also may be resolved through the procedures set forth by the agency for resolution of complaints, thereby rendering unnecessary review by the courts.
Nevertheless, several exceptions to the general requirement of exhaustion have been recognized by the courts of this state. Where no adequate remedy lies through the administrative process, the court will not require exhaustion. Glencoe Lime & Cement Co. v. City of St. Louis, 341 Mo 689, 108 S.W.2d 143, 144 (1937); City of St. Ann v. Elam, 661 S.W.2d 632 (Mo.Ct.App.1983).
Where the authority of the political subdivision to impose particular regulations is challenged, the courts may review the issue, although the

parties have not pursued their complaint through
the administrative process set forth in the zoning regulations. Missouri Rock, Inc. v. Winholtz,614 S.W.2d 734, 738 (Mo.Ct.App.1981). And where the validity of agency rules or the threatened application thereof is at issue, an action for a declaratory judgment may be maintained against agencies "whether or not the plaintiff has first requested the agency to pass upon the question presented." Rule 87.02©). This Court has held that exhaustion of administrative remedies is unnecessary when the authority of a municipal corporation to enact certain regulations under the statutory enabling acts granting it the power to zone is challenged. State ex rel. Kramer v. Schwartz, 336 Mo. 932, 82 S.W.2d 63, 69 (Mo.1935).
Township argues that Westside Enterprises, Inc. v. City of Dexter, 559 S.W.2d 638 (Mo.Ct.App.1977), and similar cases stand for the proposition that attacks on the application or validity of zoning regulations must be pursued in the first instance through the administrative
procedures set forth by the zoning authority. The preliminary issue in Westside Enterprises, however, was whether the land at issue was actually zoned residential as opposed to commercial.
The court observed that if the issue had been appealed through the administrative procedures set forth by statute, determination of the classification could have been made and might have
resolved the entire controversy without resort to the courts. The factual issue of whether the zoning authority had placed the tract in a residential or commercial zone was a key question presented. The precise purpose underlying the requirement of exhaustion of administrative
remedies would have been served by pursuing an appeal through the administrative channels set forth by statute.
Unlike that case, however, the issue presented in this case is not at all dependent upon further development of the record through administrative procedures. The facts have been admitted as to the nature of the hog confinement facilities and sewage lagoons. Moreover, Township has made clear in Count I of its counterclaim that feedlots and lagoons like those of Premium fall within the purview of its zoning regulations. Premium challenges the authority of 238*238 Township to impose such regulations. The only issue to be determined is whether regulation of such structures is regulation of farm structures or farm buildings, an action township's are specifically not authorized to take under section 65.677, RSMo.
This is a legal issue. "Because the question... poses no factual questions or issues requiring the special expertise within the scope of the [administrative agency's] responsibility, but instead proffers only questions of law clearly within the realm of the courts, the doctrine of exhaustion does not apply in the present case. See 73 C.J.S. Public Administrative Law and Procedure Section 40 (`A failure to exhaust administrative remedies may be justified when the only or controlling question is one of law, at least where there is no issue essentially administrative, involving agency expertise and discretion,

which is in its nature peculiarly administrative....')."
Council House Redevelopment Corporation v. Hill, 920 S.W.2d 890, 895 (Mo. banc 1996). This issue requires no exhaustion of administrative remedies. Cf. Cervantes v. Bloom, 485 S.W.2d 446, 448 (Mo.Ct.App.1972); N.G. Heimos Greenhouse, Inc. v. City Of Sunset Hills, 597 S.W.2d 261, 263, n. 4 (Mo.Ct.App.1980) End of quote .
Their claims are contrary to other cases such as Pretsky v. Southwestern Bell Tel. Co.396 S.W.2d 566 (Mo.1965), - for collection of amounts that are not due and unfair means of collection against telephone regulated company the tort of outrageous conduct was adopted in MO..

This is especially so where there was no complaint based on

any PSC tariff or rule or anything adopted by the Commission, there is no need for administrarive

expertise and it is not an expert on real estate or common law.

This is not like Ahalabli vDOR, 300 SW2d 508 (Mo 2009) , where per Ch 213 MHRA, the

claims there are statutory claims that do not exist in common law or tort, and for such statutory

claims must file a charge.Even more so, the actual holding was do not have to file a charge on

each event in issue and prefiling requirement it is met by notice. As io Ahalabli, supra:
...
The Missouri Supreme Court has indicated that it takes a liberal approach to the fulfillment of procedural requirements under the MHRA. See Hill v. Ford Motor Co., 277 S.W.3d 659, 670 (Mo. banc 2009) (where the Court noted the importance of "the availability of complete redress of legitimate grievances without undue encumbrance by procedural requirements especially [in cases where] demanding full and technical compliance would have no relation to the purposes for requiring those procedures in the first instance."). In other words, exhaustion requires a claimant to give notice of all claims of discrimination in the administrative complaint, but administrative complaints are interpreted liberally in an effort to further the remedial purposes of legislation that prohibits unlawful employment practices. Tart, 31 F.3d at . As a result, administrative remedies are deemed exhausted as to all incidents of discrimination that are like or reasonably related to the allegations of the administrative charge. Id. Further, the scope of the civil suit may be as broad as the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination.

6. Instead it is submitted the claims of the utilities should be seen for what they are bad faith smoke and mirrors , where they not only seek to
cite cases such as WD Evans it know it was effectively overruled by Raster,

left out the major cases such as May, Rolla, Katz Drug,. Fee Fee Trunk and Gailes,

seek to have PSC ignore its own statute and regulations with string cites of cases Where

jurisdiction was found in the first).

Wherefore for these reasons well LCTCA and Janice Shands submit the relief sought of an order finding

properly before the court is proper .

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A copy was sent by email to P.C. Office of General Counsel at staff counsel@psc.mo.gov, to Dustin Allen (Public Counsel) at opscervice@ded.mo.gov, and counsel for the utilities on10/29/14 /s/ Susan H Mello