STATE OF MICHIGAN

COURT OF APPEALS

BLAKEWOODS SURGERY CENTER, JACKSON MEDICAL SERVICES, INC., PAUL ERNST, M.D., KEVIN LAVERY, M.D., ANTHONY SENSOLI, M.D., SIGMUND ANCEREWICZ, M.D., KHAWAJA IKRAM, D.O., SHARON ROONEY-GANDY, D.O., ARTHUR WIERENGA, M.D., MARTIN PATRIAS, M.D., MICHAEL E. CHAMES, M.D., GHULUM DASTGIR, M.D. and KABINDRA MISHRA, M.D.,

Plaintiffs-Appellants,

v

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
July 14, 2000

No. 213666
Wayne Circuit Court
LC No. 98-811953-CZ

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiffs appeal by right from the order denying their motion for partial summary disposition and granting defendant's motion for summary disposition under MCR 2.116(I)(2). We affirm.

Plaintiff Blakewoods Surgery Center is a freestanding ambulatory surgical center. When plaintiffs' application for participating provider status with defendant was denied, plaintiffs filed suit seeking a declaratory judgment that defendant had violated the Nonprofit Health Care Corporation Reform Act ["NHCCRA"], MCL 550.1501 *et seq*.; MSA 24.660(101) *et seq*. Specifically, plaintiffs alleged that defendant's criteria for participation were unauthorized by statute and constituted an ultra vires imposition of an additional tier of need in conflict with the certificate of need issued by the state before licensure. Plaintiffs also contended that defendant's criteria for participation, even if authorized by statute, were an unconstitutional delegation of state power to a private entity. Finally, plaintiffs claimed that their facility had been illegally excluded from participation because it was physician-owned.

After plaintiff moved for partial summary disposition, the trial court rejected these arguments and granted summary disposition to defendant under MCR 2.116(I)(2). The court based its ruling, in part, on the fact that the NHCCRA does not provide for a private cause of action in circuit court to enforce the act by health care providers.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment for the opposing party under MCR 2.116(I)(2).

In *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698; 552 NW2d 919 (1996), this Court, citing MCL 550.1619(2) and (3); MSA 24.660(619)(2) and (3), held that "[o]nly the Attorney General and the Insurance Commissioner are entitled to enforce the [NHCCRA] directly against a health care corporation." The panel further ruled that "[t]he only private right of action directly against a health care corporation authorized by the [NHCCRA] is an action by a subscriber against a health care corporation for damages." *Id*., citing MCL 550.1402(11); MSA 24.660(402)(11). If a health care provider claims that a health care corporation has violated the act, the recourse provided in the statute is to "commence an action in the Ingham Circuit Court to compel the Insurance Commissioner to enforce the act." *Id*. Additionally, a health care provider can petition the attorney general to commence an action to enjoin violations of the act. See MCL 550.1619(1) and (2); MSA 24.660(619)(1) and (2). The act contains no provision, however, for a private right of action such as that brought in the instant case.

Moreover, the NHCCRA created new rights and duties that did not exist at common law. In such situations, this Court has held:

> Where a new right or a new duty is imposed by statute, the remedy provided by the statute for enforcement of the right or for nonperformance of the duty is exclusive unless the remedy is plainly inadequate. Plaintiff was not precluded from communicating its concerns to the Attorney General's office or to the local prosecutor. These parties, being specifically designated by the Legislature to act in situations such as these, are sufficiently capable of forwarding plaintiff's grievance in the appropriate forum when the circumstances so dictate. Because plaintiff is not without an adequate remedy, we conclude that it lacked standing to raise the . . . issue in the trial court. [*Detroit Area Agency on Aging v Office of Services to the Aging*, 210 Mich App 708, 716-717; 534 NW2d 229 (1995) (citations omitted).]

In this case, plaintiffs were not subscribers and were seeking equitable relief rather than damages. Plaintiffs were not without an adequate remedy because they could have brought an action in Ingham Circuit Court to compel the Insurance Commissioner to enforce the act or petitioned the Attorney General's office to investigate their claim of discrimination. Consequently, the trial court did not err in dismissing plaintiffs' claims because, under *BPS Clinical Laboratories*, *supra* at 698, and *Detroit Area Agency on Aging*, *supra* at 716-717, plaintiffs did not have standing to bring a cause of action directly against defendant to enforce the act.

Plaintiffs claim that their arguments could not be reasonably dealt with by the Insurance Commissioner – and that a private right of action in circuit court was therefore appropriate – because the NHCCRA effectively precludes a thorough review by the Insurance Commissioner of defendant's provider plans for two to three years after their implementation. See MCL 550.1509; MSA 24.660(509). This statutory review scheme was validly enacted by the Legislature, however, and we are not at liberty to alter it. Moreover, plaintiffs could have petitioned the attorney general to undertake an earlier review of defendant's allegedly illegal actions. See MCL 500.1619; MSA 24.660(619).

Plaintiffs further contend that a private right of action in circuit court was appropriate in this case because the Insurance Commissioner does not have the power to review a claim that defendant acted unconstitutionally but is instead strictly limited to determining whether defendant met the statutory goals of the NHCCRA. However, administrative agencies are empowered to consider arguments framed in constitutional terms as long as they relate to the agency's authorized powers. See, e.g., *Wikman v Novi*, 413 Mich 617, 646-647; 322 NW2d 103 (1982), *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989), and *Jackson Co Education Assn v Grass Lake Bd of Education*, 95 Mich App 635, 641; 291 NW2d 53 (1979). The Insurance Commissioner has been delegated the power to regulate and review defendant's provider class plans and can therefore, in the context of assessing whether defendant has achieved the NHCCRA's statutory goals, entertain allegations that such plans are unconstitutional in light of other existing laws. See *In re 1987-88 Medical Doctor Provider Class Plan*, 203 Mich App 707, 713; 514 NW2d 471 (1994) (Insurance Commissioner, in reviewing provider class plans, is to consider the effect of other legislation). Moreover, the attorney general may seek an injunction to prohibit defendant from "transacting business, receiving, collecting, or disbursing money, or acquiring, holding, protecting, or conveying property if that corporate activity is not authorized under [the NHCCRA]." MCL 550.1619(1); MSA 24.660(619)(1). Therefore, plaintiffs' contention that their allegations could never be reviewed absent a private right of action is without merit. The fact remains that plaintiffs' arguments ultimately derived from the NHCCRA, and, under existing case law, the NHCCRA provides no authority for plaintiffs to bring a private cause of action against defendant under the act.[1] *Clinical Laboratories*, *supra* at 698, and *Detroit Area Agency on Aging*, *supra* at 716-717.

Plaintiffs suggest that certain of their arguments did not involve an alleged violation by defendant of the NHCCRA but rather an allegation that aspects of the NHCCRA itself are unconstitutional. Specifically, plaintiff states: "If [defendant's] separate, independent [evidence of need] determination is authorized by [the NHCCRA], this would be an unconstitutional delegation of licensure power to a quasi-public entity without sufficient standards [or] an unconstitutional amendment by reference or implication in violation of [the Michigan constitution]." While plaintiffs are correct that an action

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[1] We note that plaintiffs' reliance on *Smith v Globe Life Ins Co*, 223 Mich App 264; 565 NW2d 877 (1997), reversed in part 460 Mich 446 (1999), and related cases is without merit because the cited authorities dealt with the Michigan Consumer Protection Act ["MCPA"], MCL 445.901 *et seq*.; MSA 19.418(1) *et seq*., a statute unrelated to the issues presented in this case. Unlike the NHCCRA, the MCPA expressly provides for a private right of action for violations of the act.

challenging the constitutionality of the NHCCRA itself would be subject to a private right of action in circuit court, the aforementioned argument is not truly a challenge to the constitutionality of the NHCCRA but is merely an argument for why defendant's evidence of need determination should be rejected. In other words, plaintiffs do not contend that the standards of the NHCCRA are unconstitutional standing alone; they simply argue that if the NHCCRA is applied in a certain way, an unconstitutional result would occur. Accordingly, plaintiffs had no private right of action in circuit court with respect to this argument. Indeed, the Insurance Commissioner or the attorney general, in assessing whether defendant has complied with the NHCCRA, is free to entertain such arguments regarding how the NHCCRA should be applied. See *Johnston, supra* at 207-208 (an action involving the Tax Tribunal wherein this Court stated "while the circuit court has been recognized to have jurisdiction over purely constitutional claims affecting taxation, the mere fact that a particular issue might be framed in constitutional terms does not grant jurisdiction to the circuit court to the exclusion of the Tax Tribunal").[2]

Even if plaintiffs *did* have a private right of action with respect to their allegation that the allowance of defendant's evidence of need determination was unconstitutional, we would find no basis for reversal. Indeed, this Court has previously indicated that a determination of need made by the state serves a different purpose than a determination of need made by defendant. See *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185-186; 375 NW2d 382 (1985). Defendant's determination of need focuses only on the needs of defendant's subscribers, as opposed to the needs of the public as a whole, and defendant has the authority to establish standards to limit the number of participating providers where necessary to keep costs down and quality high. See MCL 550.1504; MSA 24.660(504). Therefore, plaintiffs' argument that defendant should not be allowed to impose an additional tier of need is unavailing.

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[2] In their complaint, plaintiffs indicated that "[I]f the provider class plan is, substantively, non-reviewable by any entity for a three year period, then [the delayed review period] is a due process violation." Although this was arguably a constitutional challenge to the statute that was properly subject to a private right of action in circuit court, the circuit court did not address this argument. The trial court's failure to address this argument, however, was harmless, since the basis tenet of plaintiffs' argument – that the provider class plan is not reviewable by any entity for a three-year period – is incorrect. Indeed, MCL 500.1619; MSA 24.660(619) allows the attorney general to sue for an enforcement of the NHCCRA and does not impose any time delays on such a suit. Moreover, plaintiffs effectively waived any argument relating to the alleged unconstitutionality of the delayed review period by giving it only cursory treatment in their appellate brief. See *In re Coe Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999). Indeed, plaintiffs do not even argue that the trial court erred in failing to address this issue; they merely state at one point in their brief that "the Legislature could not have intended that the power it has delegated to [defendant] . . . be non-reviewable for a three year period" and that "[c]onstitutional requirements . . . dictate that the [circuit court] maintains primary jurisdiction for substantive review."

Plaintiffs' remaining issues are rendered moot in view of our conclusion that plaintiffs lacked standing to bring suit directly against BCBSM to enforce the NHCCRA; consequently, we decline to address them.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens