STATE OF MICHIGAN

COURT OF APPEALS

VISION INSTITUTE OF MICHIGAN, LAURENCE LOEWENTHAL, M.D. and JAY NOVETSKY, M.D.,

Plaintiffs-Appellants,

v

BLUE CROSS & BLUE SHIELD OF MICHIGAN and COMMISSIONER OF THE OFFICE OF FINANCIAL & INSURANCE SERVICES,

Defendants-Appellees.

UNPUBLISHED
July 17, 2001

No. 217541
Ingham Circuit Court
LC No. 98-089017-CZ

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(4), (8) and (10). We affirm.

Plaintiff Vision Institute of Michigan is a freestanding ambulatory surgical facility licensed by the State of Michigan. The individual plaintiffs are Michigan licensed physicians who practice at Vision Institute. Plaintiffs applied to defendant Blue Cross & Blue Shield of Michigan (BCBSM) seeking for Vision Institute to become a participating provider member of BCBSM's ambulatory surgical facility provider class.[1] BCBSM denied plaintiffs' application on the basis that, due to an excess of operating capacity in Macomb County, plaintiffs failed to meet BCBSM's evidence of necessity (EON) requirement.

Plaintiffs sued BCBSM and the Commissioner of the Office of Financial & Insurance Services (Commissioner) seeking various forms of declaratory and injunctive relief. Plaintiffs asserted numerous violations of the Nonprofit Health Care Corporation Reform Act (NHCCRA), MCL 550.1101 *et seq*., including illegal discrimination "against physician-owned freestanding ambulatory surgical facilities in favor of more costly hospital-owned facilities." Plaintiffs also

[1] Vision Institute's status as a participating provider would entitle it to direct reimbursement from BCBSM for covered health services that Vision Institute provided to BCBSM subscribers.

alleged that BCBSM's EON determination violated the NHCCRA and illegally usurped the state's licensing authority. With respect to the Commissioner, plaintiffs argued that he had the authority and a duty to prevent BCBSM's violations of the NHCCRA. The trial court, however, granted defendants' separate motions for summary disposition of plaintiffs' complaint.

We first conclude that the trial court correctly granted BCBSM summary disposition of plaintiffs' claims against it pursuant to MCR 2.116(C)(8) because plaintiffs, health care providers, possessed no private right of action against BCBSM for its alleged violations of the Nonprofit Health Care Corporation Act, MCL 550.1101 *et seq*. *Genesis Center, PLC v Blue Cross & Blue Shield of Michigan*, 243 Mich App 692, 694-695; 625 NW2d 37 (2000) (concluding that the plaintiff health care providers "did not have standing to bring a cause of action directly against BCBSM to enforce the act").

With respect to plaintiffs' claims that defendant Commissioner ought to have enjoined BCBSM's allegedly discriminatory, ultra vires violations of the NHCCRA, we find that the trial court properly dismissed these claims pursuant to MCR 2.116(C)(4) and (10). The recent case of *Genesis Center, PLC v Financial & Insurance Services Commissioner*, ___ Mich App ___; ___ NW2d ___ (Docket No. 219867, issued 6/29/01), contains facts strikingly similar to those involved in the instant case and governs our decision here.

The individual plaintiffs in *Genesis Center v Comm'r* were Michigan licensed physicians who owned plaintiff entity Genesis Center. The State of Michigan licensed Genesis Center as a freestanding outpatient surgical facility. Genesis Center applied to BCBSM for participating provider status, but BCBSM rejected Genesis Center's request because it failed to satisfy the EON requirement of BCBSM's ambulatory surgery facility provider class plan. *Id*., slip op pp 1, 2. Genesis Center initially sued BCBSM, alleging violations of the NHCCRA. See *Genesis Center v BCBSM*, *supra*, 243 Mich App 693. After Genesis Center's action against BCBSM was dismissed, Genesis Center sued the Commissioner seeking "equitable relief and a declaratory judgment compelling the insurance commissioner to issue a cease and desist order enjoining BCBSM from ultra vires and illegal conduct," *Genesis Center v Comm'r*, *supra* at 2-3, essentially the same relief sought here.

This Court affirmed the trial court's grant of summary disposition to the Commissioner "because plaintiffs failed to exhaust their administrative remedies, and no case of actual controversy existed." *Id*. at 5. This Court observed that the NHCCRA vested the Commissioner with authority to determine at specific times whether BCBSM's provider class plans had substantially achieved the goals of the NHCCRA, MCL 550.1509, and that while the appeal before the Court was pending the Commissioner had conducted a review of BCBSM's ambulatory surgical facility provider class plan. The Commissioner issued a lengthy, detailed report agreeing that BCBSM improperly manipulated the EON criterion to exclude nonhospital owned ambulatory surgical facilities from becoming participating providers. *Genesis Center v Comm'r*, *supra* at 4, 6.

With the Commissioner's actions in mind, the Court continued in relevant part as follows:

[W]e conclude that the [trial] court lacked jurisdiction over the matter because plaintiffs failed to exhaust their administrative remedies. . . . *[T]he Legislature explicitly directed the insurance commissioner to regulate and supervise nonprofit health care corporations like BCBSM*. MCL 550.1102(2) . . . . Although plaintiffs are correct in stating that [MCL 550.1]619(3) allows them to bring an action in Ingham Circuit Court, we do not believe that § 619(3) allows the circuit court to conduct the same type of review that the insurance commissioner has authority to conduct under the NHCCRA. The circuit court would be exceeding its authority if it were to conduct a comprehensive review of the provider class plan as plaintiffs requested in this case. . . . Instead, we read § 619(3) as presenting an appropriate avenue by which the circuit court can compel the insurance commissioner to enforce the NHCCRA . . . .

Requiring the exhaustion of administrative remedies in the present case fulfills several purposes of the doctrine: (1) an untimely resort to court may result in delay and disruption of an administrative scheme; (2) any type of appellate review is best made after the agency has developed a full record; (3) resolution of the issues may require the technical competence of the agency, and (4) the administrative agency's settlement of the dispute may render a judicial resolution unnecessary. For example, as demonstrated in the insurance commissioner's determination report of BCBSM's provider class plan, *the expertise and technical competence of the insurance commissioner's office was required to resolve the issues in this matter. . . . Any action by the circuit court in this matter may have delayed the insurance commissioner's review process and interfered with the commissioner's duty under the NHCCRA to prepare a determination of the provider plan that ultimately serves as a record for subsequent appeals*. Further, contrary to plaintiffs' assertion, *the insurance commissioner's report did address the substantive issues raised by plaintiffs concerning BCBSM's alleged misconduct, including BCBSM's denial of participating provider status to non-hospital owned ambulatory surgical facilities*.

We also conclude that no actual controversy existed in this case. . . . If no actual controversy exists, the circuit court lacks subject matter jurisdiction to enter a declaratory judgment.

Plaintiffs claimed that BCBSM was discriminating against non-hospital owned ambulatory facilities and that defendant's provider plan review would not address this discrimination. However, as stated previously, defendant specifically considered plaintiffs' comments regarding BCBSM's discrimination and found that BCBSM, indeed, was manipulating its EON criteria to discriminate against ambulatory surgical facilities . . . that were not owned by hospitals. *Plaintiffs failed to prove an actual controversy because the provider plan review process set out in MCL 550.1509 through 1518 . . . provides plaintiffs with the ability to preserve their legal rights. A further declaration by the circuit court was unnecessary to protect plaintiffs' rights*. [*Genesis Center v Comm'r, supra* at 6-8 (citations and footnotes omitted) (emphasis added).]

In this case, plaintiffs likewise failed to exhaust their administrative remedies before the Commissioner and independent hearing officer before resorting to the instant suit. Furthermore, no actual controversy existed because the record reflects that the Commissioner had undertaken the review of BCBSM's provider class plan that the Legislature prescribed. Moreover, as the opinion in *Genesis Center v Comm'r* indicates, the Commissioner agreed with plaintiffs that BCBSM improperly discriminated against nonhospital owned ambulatory surgical facilities.[2]

Lastly, we reject plaintiffs' request for an order compelling the Commissioner to issue a cease and desist order to prevent BCBSM's further violations of the NHCCRA because "the commissioner had no clear legal duty under the NHCCRA to issue a cease and desist order and because the statutory review proceedings present an alternate and adequate remedy." *Genesis Center v Comm'r, supra* at 9.

We conclude that the trial court properly granted BCBSM summary disposition pursuant to MCR 2.116(C)(8), and correctly granted the Commissioner summary disposition pursuant to MCR 2.116(C)(4) and (10).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

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[2] As of March 29, 2001, the Commissioner had reviewed a revised ambulatory surgical facility provider class plan prepared by BCBSM. The Commissioner found that BCBSM's revised plan remedied the previous plan's deficiencies stemming from its EON requirements and that the revised plan now satisfied the NHCCRA's health care access and quality goals. The Commissioner therefore retained the plan. No indication exists whether anyone has appealed the Commissioner's determination to an independent hearing officer pursuant to MCL 550.1515.