STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN OPTOMETRIC ASSOCIATION and JOHN NAMETZ, OD, Plaintiffs-Appellants, v BLUE CARE NETWORK, Defendant-Appellee.	UNPUBLISHED May 20, 2010 No. 289705 Ingham Circuit Court LC No. 07-000239-CK

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the dismissal of a portion of their complaint under MCR 2.116(C)(4) (lack of subject matter jurisdiction), and the remainder of their complaint under MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiffs brought this action to challenge defendant's alleged discrimination in favor of ophthalmologists and against optometrists.[1] Although the trial court erred when it held that it lacked subject matter jurisdiction to decide the entire case, because defendants were entitled to summary disposition on all counts in any event, we affirm.

I

Plaintiff Michigan Optometric Association (MOA) is a voluntary trade association representing the business interests of Michigan optometrists. Plaintiff Nametz is an optometrist.

[1] Ophthalmologists are physicians specializing in the treatment of the eye. *The American Heritage Dictionary of the English Language* (3rd Ed); see also *Bates v Gilbert*, 479 Mich 451, 460; 736 NW2d 566 (2007). Optometrists are licensed professionals who also treat the eye and have been trained by accredited optometry schools. MCL 333.17401-17437; see also *Bates*, 479 Mich at 459-461. Ophthalmologists may perform more services than optometrists; for example, ophthalmologists may perform eye surgery, while optometrists may not. *Bates*, 479 Mich at 459-461; MCL 333.17432.

Defendant Blue Care Network (BCN) is a health maintenance organization (HMO).[2] Counts I, II, and V of the complaint sought declaratory and injunctive relief and money damages, respectively, for defendant's alleged practices of: (1) "discriminating against optometrists in favor of ophthalmologists in the formation of provider networks," and (2) placing a Provider Search Directory on its website that includes ophthalmologists but not optometrists.[3] Counts III and IV of the complaint sought declaratory and injunctive relief, respectively, for defendant's alleged practice of reimbursing optometrists at a lower rate than ophthalmologists for the same procedures.

As an HMO, BCN contracts with a number of health care providers (referred to collectively as a "provider network"). MCL 500.3501(f). When a BCN enrollee (a consumer of health services) receives services from a provider within BCN's provider network, BCN is responsible for paying the provider. Plaintiffs allege that Nametz meets BCN's criteria for joining BCN's provider network, but that he was denied admission because he is an optometrist and not an ophthalmologist. Plaintiffs further claim that BCN's policies on adding providers have a discriminatory effect against optometrists in favor of ophthalmologists. According to Alison Pollard, BCN's vice president for provider affairs, BCN's policy favors providers who affiliate with other providers who are already in BCN's network over providers who do not. Because, plaintiffs allege, there are more ophthalmologists than optometrists in the network already, and because it is easier for ophthalmologists to affiliate with other ophthalmologists, the effect of the policy is to make it easier for ophthalmologists to join the network than for optometrists.

Plaintiffs also challenge BCN's policies with respect to paying optometrists. The BCN Commercial Professional Fee Schedule (the fee schedule) lists medical services with prices and provides the basis for how much BCN will pay providers for performing those services. For a given service that may be performed by an optometrist or an ophthalmologist, plaintiffs allege that BCN will pay an optometrist 80 to 85 percent of the amount listed on the fee schedule, but will pay an ophthalmologist the full fee schedule amount.

The trial court interpreted plaintiffs' claim regarding BCN's alleged discrimination in the formation of its provider network as an attack on the adequacy of the network. The trial court held that such a challenge was within the jurisdiction of the insurance commissioner, and, as a result that the trial court did not have jurisdiction over the subject matter. Accordingly, the trial court dismissed the first two counts under MCR 2.116(C)(4). The trial court further found that BCN was entitled to summary disposition on the remaining counts because the statute did not prohibit the discrimination plaintiffs alleged.

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[2] An HMO "[d]elivers health maintenance services . . . to enrollees under the terms of its health maintenance contract, directly or through contracts with affiliated providers, in exchange for a fixed prepaid sum or per capita prepayment" and "[i]s responsible for the availability, accessibility, and quality of the health maintenance services provided." MCL 500.3501(f).

[3] It appears that BCN has addressed this latter issue to plaintiffs' satisfaction, as it was not raised in plaintiffs' motion for summary disposition or in this appeal.

II

This Court reviews a trial court's disposition of a motion for summary disposition de novo. *Potter v McCleary*, 484 Mich 397, 410; 774 NW2d 1 (2009). This Court also reviews the legal question of whether the trial court had subject matter jurisdiction over a claim de novo. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999).

III

Plaintiffs first argue on appeal that the trial court erred when it held that it lacked subject matter jurisdiction over the matter when the Insurance Code of 1956, MCL 500.100 *et seq*., does not grant the insurance commissioner exclusive jurisdiction over plaintiffs' claims regarding defendant's discriminatory practices in the formation and maintenance of its provider network. Plaintiffs specifically contend that although the circuit court would not have jurisdiction over a challenge to the adequacy of BCN's provider network, plaintiffs made no such challenge, rather, they were challenging BCN's discriminatory practice of favoring ophthalmologists over optometrists in forming its network. In response, defendant characterizes plaintiffs' suit as a challenge to the adequacy of BCN's provider network, and therefore it falls within the range of claims to which the statute gives exclusive authority to the Office of Financial and Insurance Regulation (OFIR) Commissioner. In the alternative, defendant asserts that even if the circuit court does have jurisdiction over the claim, defendant is entitled to judgment as a matter of law because it has not violated the statute.

A

"The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Churella v Pioneer State Mut Ins Co*, 463 Mich 993, 993; 624 NW2d 725 (2001). This Court has found such "unmistakable language" in, for example, the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq*. *Papas v Michigan Gaming Control Bd*, 257 Mich App 647, 659-661; 669 NW2d 326 (2003). "Reviewing the act under the above referenced rules of construction," *Pappas* reasoned, "we conclude that the Legislature vested the [Michigan Gaming Control] board with exclusive jurisdiction over all matters relating in any way to the licensing, regulating, monitoring, and control of the non-Indian casino industry." *Id*. *Pappas* noted the Legislature had not only invested the board with a nonexhaustive list of powers, including investigative powers, but also specifically addressed the issue of jurisdiction: "'[t]he board shall have jurisdiction over and shall supervise all gambling operations governed by this act. The board shall have all powers necessary and proper to fully and effectively execute this act. . . .'" *Id*. at 660, quoting MCL 432.204a(1) (alteration by *Pappas*).

The language in the health maintenance organization act, MCL 500.3501, *et seq*., is not as "clear" or as "unmistakable." The act sets forth the powers of the commissioner in several sections. See MCL 500.3507, MCL 500.3509(3), MCL 500.3513, MCL 500.3529, MCL 500.3530, and MCL 500.3531. Clearly, the statutory scheme provides the OFIR Commissioner with considerable authority over HMOs. The commissioner is empowered to regulate the "delivery aspects" of HMOs to, in part, assure that an "acceptable quality of health care" is being provided, MCL 500.3513(1), and to determine the sufficiency of the "numbers and [] types of

affiliated providers" under contract with an HMO to provide timely "covered services" offered by the HMO, MCL 500.3530(1). Nonetheless, even though ophthalmology and optometry are, arguably, different but associated "health-related disciplines,"[4] see *Stedman's Medical Dictionary* (26th ed), pp 1253, 1256 (defining ophthalmology as a "medical specialty" and optometry as a "profession"), the commissioner is only empowered to "encourage [HMOs] to utilize a wide variety of health-related disciplines." MCL 500.3513(1). Further, the statutory scheme does not contain a broad grant of authority to the commissioner to ensure that an HMO is complying with the act, in order to effectuate the purposes of the act. In contrast to the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq*., the act at issue, by its terms, does not state that the commissioner "shall have jurisdiction over and shall supervise" HMOs like BCN, nor does it grant the commissioner "all powers necessary and proper" to carry out his duties. For these reasons, because the statute did not use the clear and unmistakable language required to grant exclusive jurisdiction to the commissioner, the circuit court did have subject matter jurisdiction over the matter.[5]

B

Although the trial court erred in finding that it lacked jurisdiction over the subject matter, it nevertheless should have dismissed the case under MCR 2.116(C)(10). Where the question presented is one of law, and the necessary facts are before this Court, this Court "can resolve the issue without the benefit of a ruling by the trial court." *Paul v Wayne Co Dep't of Public Serv*, 271 Mich App 617, 620; 722 NW2d 922 (2006).

Plaintiffs' challenge to BCN's policy is based on several sections of the Insurance Code, MCL 500.100, *et seq*. MCL 500.2243, which plaintiffs read as broadly prohibiting discrimination against optometrists, provides that, "if the policy or contract provides for reimbursement for any optometric service that is within the lawful scope of practice of a duly licensed optometrist, a subscriber . . . shall be entitled to reimbursement for such service, whether the service is performed by a physician or a duly licensed optometrist." MCL 500.2243(1). By its terms, this section does not prohibit discrimination in general, nor does it prohibit the specific discrimination of which plaintiffs complain. Rather, it simply provides that an individual receiving certain optometric services is entitled to reimbursement regardless if the service is provided by an ophthalmologist or an optometrist.

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[4] Discipline is defined, in part, as "A branch of knowledge or teaching." *The American Heritage Dictionary of the English Language* (3rd ed).

[5] Plaintiffs did not ask the trial court to find that BCN's discrimination was contrary to public policy, or that it rendered BCN's network inadequate, only that the discrimination violated the HMO act. The circuit court is competent to decide this type of action. While determination of the adequacy of BCN's network would require both technical expertise and a consideration of public policy, deciding plaintiffs' claim, however, requires only reading and applying statutes, a quintessentially judicial task.

MCL 500.3529(1) provides that an HMO "shall not discriminate solely on the basis of the class of health professionals to which the health professional belongs" in deciding whether to contract with a provider. In their complaint, plaintiffs allege that BCN based its denial solely on the class of health professional to which he belonged—optometrists. In its answer, BCN denied that plaintiff Nametz's class was the sole reason for his denial. In her deposition, Pollard said that BCN's decisions on contracting with providers is not based on the provider's class but on the type of services provided. BCN claims that Nametz was not rejected solely because he is an optometrist but because the only services he provides are optometric services, and BCN has enough providers of optometric services in Nametz's area. MCL 500.3529(1) provides that an HMO "may contract with . . . health professionals on the basis of cost, quality, availability of services to the membership, conformity to the administrative procedures of the health maintenance organization, and other factors relevant to delivery of economical, quality care."

Defendant argued below that it was entitled to summary disposition pursuant to MCR 2.116(I)(2). But Nametz's rejection letter from BCN dated December 5, 2006 clearly states, "We are not currently adding Optometry providers in your area." This letter plainly supports the notion that it was service type, rather than provider class, that was the basis of BCN's decision not to contract with Nametz. Further, deposition testimony showed that BCN rejected applicants from its network because of the range of services they could provide and because of their ability to affiliate with providers already in the network. Although both of these policies may have had the effect of making it more difficult for optometrists to join the network than for ophthalmologists, neither runs afoul of the prohibition of discrimination based solely on licensure set forth in MCL 500.3529. Because plaintiffs have not responded to BCN's evidence with "affidavits, depositions, admissions, or other documentary evidence" that serve to show that an issue of fact remains, defendant was entitled to summary disposition in its favor on this issue. MCR 2.116(G). Accordingly, we will not reverse when, as here, the trial court reached the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

IV

Plaintiffs also argue that the trial court erred when it ruled that defendant's practices and policies of reimbursing optometrists at a lower rate than ophthalmologists for performing the identical service did not violate the Insurance Code of 1956, MCL 500.100 *et seq*. Defendant responds that no section of the insurance code requires equal pay for optometrists and ophthalmologists, and further, the insurance code does not restrict BCN's ability to negotiate different rates of pay with different providers, nor does it prevent BCN from paying some classes of providers a lower rate than others.

In deciding this issue, the trial court relied in part on a 1968 opinion of the attorney general discussing this issue. The attorney general said that, "by virtue of the distinctions between the practice of ophthalmology and optometry, different fee schedules for similar services are permissible." OAG, 1968, No 4497, p 214 (March 19, 1968). Plaintiffs assert that the opinion is now inapplicable for two reasons: first, because the attorney general used the word "similar," but the disparity in pay in this case is for identical procedures, and second, because the practice of optometry has changed significantly since 1968, when optometrists generally measured people for eyeglasses. But the attorney general apparently contemplated unequal pay for identical procedures because the opinion specifically states, "Differences arise not only from procedures employed, *which may or may not be identical,* but also from

differences in knowledge, skill, training, approach and professional responsibility." OAG, 1968, No 4497, p 214 (March 19, 1968) (emphasis added). The attorney general also found that "[t]he statutory requirement that these professions be treated on a parity relates to the employment of the services of members of the profession, not to the payment of fees." *Id.* The attorney general's findings are relevant today because MCL 500.2243, to which the attorney general was referring, has not been substantively amended since 1968.

Furthermore, plaintiffs identify no statute that contains a broad prohibition of discrimination against optometrists, nor do they identify any statute that specifically prohibits unequal pay for equal work. Plaintiffs refer to MCL 500.2243, but MCL 500.2243 only requires that BCN reimburse the provider, whether the provider is an optometrist or physician. It does not require that BCN reimburse the same amount to an optometrist as it would to a physician. Plaintiffs cannot prevail in the courts merely by arguing that disparate reimbursement is bad policy or unfair, instead, they must establish that it is unlawful. Now as in 1968, MCL 500.2243 does not apply to the comparative fees paid to optometrists and ophthalmologists. Nor is it a broad prohibition of discrimination against optometrists. It requires only that BCN reimburse for optometric procedures, whether performed by an optometrist or an ophthalmologist. The trial court properly granted defendant summary disposition on this issue.

V

In sum, while the trial court erred when it held that it lacked jurisdiction to decide plaintiffs' first two counts, since it should have dismissed the counts under MCR 2.116(C)(10), plaintiffs have not established error. Also, with respect to plaintiffs' complaint of unequal reimbursement, the trial court properly granted summary disposition.

Affirmed. Costs to defendant.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio