

STATE OF MICHIGAN  
IN THE SUPREME COURT

DESIREE E. ROSS FOR THE ESTATE  
OF DOUGLAS G. ROSS,

Petitioner-Appellee,

v.

BLUE CARE NETWORK OF MICHIGAN,

Respondent-Appellant.

Docket No. 131711

Court of Appeals No. 266240

Wayne County Circuit Court  
LC No. 05-516054-AV

WACHLER & ASSOCIATES P.C.  
Andrew B. Wachler (P29293)  
Adrienne Dresevic (P65873)  
Attorneys for Petitioner-Appellee  
210 East Third Street, Suite 204  
Royal Oak, MI 48067  
(248) 544-0888

COLLEEN C. COHAN (P47044)  
Attorney for Respondent-Appellant Blue  
Care Network of Michigan  
600 Lafayette East, Suite 1925  
Detroit, MI 48226  
(313) 225-5611

DICKINSON WRIGHT PLLC  
Joseph A. Fink (P13428)  
Phillip J. DeRosier (P55595)  
Trent B. Collier (P66448)  
Attorneys for Respondent-Appellant Blue  
Care Network of Michigan  
500 Woodward Avenue, Suite 4000  
Detroit, MI 48226-3425  
(313) 223-3500

131711'  
Reply

**RESPONDENT-APPELLANT BLUE CARE NETWORK  
OF MICHIGAN'S REPLY BRIEF IN SUPPORT  
OF ITS APPLICATION FOR LEAVE TO APPEAL**

**FILED**

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## I. INTRODUCTION

The central issue in this case is whether the Patient's Right to Independent Review Act, MCL 550.1901, *et seq.* ("PRIRA"), allows the Commissioner of the Office of Financial and Insurance Services (the "Commissioner") to depart from an independent review organization's ("IRO") recommendation on medical or clinical issues. The Court of Appeals' published opinion held that PRIRA is ambiguous and should be judicially construed as precluding the Commissioner from departing from an IRO recommendation on medical issues.

As shown below, none of Petitioner's arguments in response to BCN's Application for Leave to Appeal rebut BCN's assertions that (1) PRIRA delegates final authority – even on issues that involve medical or clinical judgment – to the Commissioner; (2) *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449; 688 NW2d 523 (2004), was binding on the courts below; (3) the Court of Appeals' reading of PRIRA leads to the very due process concerns that *English* sought to avoid; (4) the Commissioner acted within her statutory authority in rejecting the IRO recommendation; and (5) BCN's application raises jurisprudentially significant issues. Accordingly, this Court should grant BCN's Application for Leave to Appeal.

## II. ARGUMENT

### A. **The Court of Appeals Erred in Interpreting PRIRA.**

As discussed in BCN's Application, the Commissioner is not bound by an IRO recommendation on medical or clinical issues because, *inter alia*, (1) PRIRA only authorizes IROs to provide "recommendations," a term which connotes a *non-binding* suggestion, and (2) PRIRA expressly recognizes that the Commissioner can depart from an IRO's recommendation, and the only cases referred to IROs are those that involve medical or clinical issues. Petitioner opposes this analysis, citing a number of factors that, in her view, indicate that the Commissioner is bound by an IRO recommendation on medical or clinical issues.

As an initial matter, it is important to note that neither BCN nor Petitioner apparently agrees with the Court of Appeals' conclusion that PRIRA is ambiguous.<sup>1</sup> This fact alone speaks volumes about the jurisprudential significance of this appeal. Turning to the substance of Petitioner's arguments, she repeatedly states that PRIRA cannot be read as allowing the Commissioner to depart from an IRO recommendation because the Commissioner lacks medical or clinical expertise. *See, e.g.*, Petitioner's Brief at 16, 18. For example, Petitioner argues that BCN's analysis of the language would lead to "preposterous results" because the Commissioner could "substitute her unqualified lay judgment for that of the IRO medical expert." Petitioner's Brief at 31. This is nothing more than an "absurd results" argument. It is, in other words, precisely the kind of argument that this Court has rejected in cases like *People v McIntyre*, 461 Mich 147; 599 NW2d 102 (1999), as an invalid approach to statutory construction – and for good reason. In this case, Petitioner's absurd results argument asks this Court to weigh the relative qualifications of the Commissioner and the IRO in order to determine to whom the Legislature *should* have delegated final authority over medical or clinical issues. That is a far cry from the task constitutionally assigned to this Court: that of discerning to whom the Legislature *actually* delegated final authority over medical and clinical issues. Accordingly, Petitioner's attempt to inject non-statutory considerations into this inquiry must be rejected.

Next, Petitioner argues that the Commissioner is limited to reviewing "contractual issues" based on language in PRIRA stating that "the commissioner immediately shall review the recommendation to ensure that it is not contrary to the terms of coverage under the covered person's health benefit plan with the health carrier." MCL 550.1911(15) (emphasis added).

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<sup>1</sup> Whereas the *Ross* panel concluded that PRIRA was ambiguous and subject to "judicial construction," *Ross, supra* at 10, Petitioner argues that PRIRA is "clear on its face," and "unambiguous as to the Commissioner's limited authority with respect to her review of the IRO's medical determination." *See* Petitioner's Brief at 1, 16.

Petitioner argues that, if the Commissioner can only "review the recommendation to ensure that it is not contrary to the terms of the coverage under the covered person's health benefit plan with the health carrier," then the Commissioner has no authority to review medical or clinical issues. The obvious flaw in this argument, however, is that there is no clean divide between "contractual" and "medical" issues when it comes to the scope of coverage under a health care plan. When a plan's coverage depends on the determination that a condition is an "emergency" or that a procedure is "medically necessary," for instance, the Commissioner must determine (with, as required by PRIRA, the assistance of an IRO "recommendation") whether the insured was in a state of medical emergency or whether a procedure was medically necessary in order to determine whether the charges at issue are covered. "Contractual" and "medical" issues are one and the same in this context.<sup>2</sup>

Petitioner also contends that BCN's interpretation of PRIRA takes the term "recommendation" out of context, thereby violating the familiar maxim that statutory terms cannot be read in a vacuum but must instead derive meaning from their context. See *Mayor of Lansing v Michigan Public Service Commission*, 470 Mich 154, 167-68; 680 NW2d 840 (2004), and *G C Timmis & Company v Guardian Alarm Co*, 468 Mich 416, 420-21; 662 NW2d 710 (2003). Although BCN agrees that words must be read according to their context, Petitioner's reliance on these cases is nevertheless misplaced. In order for Petitioner to claim that the IRO is somehow authorized to bind the Commissioner, the Petitioner must show that the statutory context allows the Court to read "recommendation" as "binding decision." But

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<sup>2</sup> In any event, § 1911(15) can only be read in the manner proposed by Petitioner if other language – e.g., the statute's use of the term "recommendation" – is ignored. This violates the well-established rule that a court must give effect to every word, phrase, or clause in a statute, and therefore must be rejected. *Shinholster v Annapolis Hospital*, 471 Mich 540, 549; 685 NW2d 275 (2004).

"recommendation" *never* has this meaning in the English language, and neither *Mayor of Lansing* nor *Timmis* state that a word may acquire a wholly unique meaning based on its context. Rather, a word's context allows the court to determine which among a word's *generally accepted* meanings is most appropriate.<sup>3</sup> Hence, "recommendation" can neither be ignored nor defined as a decision that is binding on the Commissioner. The Legislature's use of this term, which has a common and ordinary meaning, indicates that the IRO can *never* bind the Commissioner.

**B. The Court of Appeals' Decision Conflicts with *English*.**

BCN's Application demonstrated that the Court of Appeals' analysis was not only incorrect but unnecessary: the Court of Appeals had already resolved these issues two years ago in *English*. *English, supra* at 464 (holding that the respondent's due process concerns were misplaced because the IRO recommendation is not binding on the commissioner). Although the

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<sup>3</sup> In *Timmis*, for example, the majority and dissent considered the application of the doctrine *noscitur a sociis* to the word "pig" in the following list: Duck, Goose, Pig, Swan, Heron. *Timmis, supra* at 430 n 12 (majority opinion); *id.* at 440-41 (YOUNG, J., dissenting). Although the majority and dissent differed in how they believed the doctrine would apply to "pig" in this hypothetical, both assumed that the Court's task was to determine which among the *accepted* meanings of "pig" was appropriate in this context. In fact, when the dissenting opinion suggested that the majority had adopted a construction that would permit "pig" to be read as "waterfowl," the majority responded by insisting that its application of *noscitur a sociis* would not force the Court to define "pig" in this wholly unique way. See *Timmis, supra* at 430 n 12 (majority opinion); *id.* at 440-41 (YOUNG, J., dissenting). This exchange shows that neither the majority nor the dissent believed that "pig" could be read as "waterfowl" when "waterfowl" is not among the generally accepted definitions of "pig."

In asking this Court to construe "recommendation" as "binding advice," Petitioner has asked this Court to construe a "pig" as a "waterfowl." This Court will search in vain for a dictionary that defines a "recommendation" as mandatory or binding; to the contrary, a "recommendation," in all its accepted uses, is non-binding *advice*. Thus, Petitioner's reliance on *Mayor of Lansing* and *Timmis* does not advance her cause, given that "recommendation" is not capable of being defined as "binding decision" in *any* context. And lest the Petitioner argue that this issue is of little importance, it must be recalled that the Court must give effect to each and every word, phrase or clause in PRIRA.

Court of Appeals below dismissed the governing language in *English* as *dicta*, the panel's analysis is erroneous for the reasons stated in BCN's application. BCN's Application at 24-25.

Rather than actually respond to BCN's arguments, Petitioner instead simply repeats the Court of Appeals' conclusion that the *English* court was never presented with the issue of whether an IRO was truly binding on the Commissioner because the Commissioner in that case agreed with the IRO. Petitioner's Brief at 22-23. Petitioner also adopts the Court of Appeals' assertion that the *English* panel's statement concerning the non-binding nature of an IRO recommendation "was merely made to support the panel's observation that a party has no due process rights to discover the individual IRO's identity in a given case." Petitioner's Brief at 23.

Again, these assertions are not borne out by a careful reading of *English*. One of the issues specifically addressed by *English* was respondent Blue Cross & Blue Shield of Michigan's ("BCBSM") contention that "its due process rights were violated because it did not know the identity of and could not challenge the recommendation issued by the IRO before the commissioner rendered the commissioner's decision." *English, supra* at 463. BCBSM further asserted "that permitting the commissioner to consider a report to which respondent has not had an opportunity to respond constitutes impermissible 'secret decision-making,'" and cited a number of cases in support of that argument. The *English* panel concluded that these cases were "readily distinguishable," and then offered the following analysis:

Unlike the unknown information in these cases, the IRO's recommendation does not constitute evidence. The recommendation merely assists the commissioner in reaching a decision and serves as a tool to alleviate the administrative burden the act places on the commissioner. Moreover, the recommendation is not binding on the commissioner. In fact, on receipt of the recommendation, the commissioner must independently review the recommendation to confirm that it does not contradict the terms of the health plan.

*Id.* at 464. *English* therefore rejected BCBSM's constitutional argument, but only because of the Court's view that IRO recommendations are not binding.

In short, (1) BCBSM argued that PRIRA was unconstitutional for the reasons stated in certain cases; (2) the Court of Appeals panel in *English* concluded that those cases were distinguishable in part because the IRO recommendation is not binding on the Commissioner; and (3) the Court of Appeals therefore rejected the respondent's challenge. This analysis shows quite plainly that the *English* Court's conclusion concerning the non-binding nature of an IRO recommendation was essential to its rejection of one of BCBSM's due process challenges. Had it concluded that the IRO recommendation was binding on the Commissioner, the Court would have been unable to conclude that BCBSM was not entitled to relief on its due process challenge. Accordingly, *English's* conclusion regarding the Commissioner's ultimate prerogative to reject an IRO recommendation is non-binding should have been given precedential force by the panel in this case under MCR 7.215(J)(1).

Petitioner also contends that, even if *English* is binding, it is nevertheless distinguishable because the *English* panel did not expressly state that the Commissioner "has the authority to disregard purely medical necessity [sic] or clinical review criteria." Petitioner's Brief at 24. It is hard to square this contention with the actual language of *English*. The *English* panel did not distinguish between purely "contractual" issues and purely "medical" issues. In the final analysis, if the IRO recommendation were truly binding on medical issues, it is hard to see how the *English* court could have still concluded that BCBSM's due process concerns in that case were unfounded because of the Commissioner's independent review of those recommendations. Moreover, Petitioner's argument disregards the fact that the *English* panel went on to review the Commissioner's finding that the blood tests at issue in that case were "necessary to diagnose a disease, illness, pregnancy or injury" to determine if it was arbitrary and capricious. *English, supra* at 472. That was a "medical finding," yet the *English* panel never suggested that the

Commissioner was somehow bound by the IRO's recommendation. That the Commissioner happened to agree with the IRO in *English* is beside the point.

**C. The Court of Appeals' Interpretation of PRIRA Raises Due Process Concerns.**

Petitioner has requested that this Court "refuse to consider" the due process concerns raised in BCN's Application, asserting that this is the first time they are being raised. What Petitioner's argument overlooks, however, is the fact that no due process concerns existed in this case until the Court of Appeals disregarded its prior decision in *English*.<sup>4</sup> Prior to the panel's decision in this case, the law in Michigan was that an IRO recommendation was not binding on the Commissioner and that this fact, along with other procedural guarantees, ensured that the procedure set forth in PRIRA was consistent with constitutional due process guarantees. That law was undone when the Court of Appeals erroneously dismissed the relevant language in *English* as dicta and adopted a reading of PRIRA that led to the very due process concerns that *English* sought to avoid. BCN never raised its due process concerns before the Court of Appeals' published opinion because there were no due process concerns before that opinion.

Moreover, it is well-established that the Court can always address dispositive legal issues, even when those issues have not been addressed by the parties. As this Court stated in *Mack v City of Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002), "addressing a controlling legal issue

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<sup>4</sup> Petitioner also appears to misunderstand the nature of the due process concerns raised by BCN. The argument set forth on pages 25-26 of BCN's Application is not a "due process claim," as asserted by Petitioner, but rather an argument concerning the proper construction of PRIRA. Statutes must be construed in a manner that assumes the Legislature acted constitutionally. *Silver Creek Drain Dist v Extrusions Division, Inc*, 468 Mich 367, 379; 663 NW2d 436 (2003). Yet in the wake of the Court of Appeals' previous decision in *English*, the panel below walked directly into a constitutional quagmire, undoing the very protections that the *English* panel cited in rejecting a due process claim. These concerns can and should be considered by this Court in construing the governing language in PRIRA.

despite the failure of the parties to properly frame the issue is a well understood judicial principle." Thus, this Court is free to invoke the well-established principle that a statute must be construed in a manner that assumes the Legislature acted constitutionally, and BCN respectfully suggests that this case is a prime example of when it should be applied.<sup>5</sup>

As for the merits of BCN's due process concerns, Petitioner contends that BCN's due process concerns are misplaced for the reasons stated in *English*. Petitioner's Brief at 28-29. In particular, Petitioner relies on the *English* panel's conclusion that "PRIRA provides adequate safeguards with respect to the IRO's credentials and qualifications." *Id.* This argument overlooks the *English* panel's reliance on the very rule that the Court of Appeals, at Petitioner's urging, has now overruled – namely, the *English* panel's conclusion that "the IRO's recommendation does not constitute evidence" and "merely assists the commissioner in reaching a decision and serves as a tool to alleviate the administrative burden the act places on the commissioner." *English, supra*, at 464. It is doubtful that the *English* court could have rejected the due process challenge raised by BCBSM in that case if it had also concluded that the IRO recommendation *was*, in fact, binding on the Commissioner.

Indeed, Petitioner's response to the due process concerns raised by BCN is plainly inconsistent with the rest of her argument: Petitioner contends that the relevant language in *English* was properly overruled by the Court of Appeals, but also maintains that BCN's due process concerns are unfounded because of *English*. Clearly, Petitioner cannot have it both

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<sup>5</sup> Petitioner also argues that the Court must not "reach constitutional issues that are not necessary to resolve a case." Petitioner's Brief at 26. This assertion again misses the point. BCN readily agrees that the Court should avoid constitutional issues if possible – indeed, that is precisely the reason why the Court should be concerned about the Court of Appeals' strained interpretation of PRIRA in this case. The plain language of PRIRA limits the IRO to providing a "recommendation" and authorizes the Commissioner to depart from the recommendation. Consequently, the Court could simply avoid the due process concerns raised by the Court of Appeals' contrary interpretation by enforcing PRIRA as written.

ways. The position adopted by the Court of Appeals and Petitioner completely overturns the *English* panel's due process analysis; accordingly, it is inherently contradictory for Petitioner to now seek to rely on *English* to address BCN's due process concerns.

**D. The Commissioner Acted Within Her Authority and Issued a Decision That Was Neither Arbitrary Nor Capricious.**

The Court of Appeals held below that the Commissioner's decision was not authorized by law because the Commissioner "was not authorized to reach independent conclusions on the pertinent medical issues in this case." Slip op at 12. BCN's Application details the flaws with this conclusion, including the Court of Appeals' failure to apply the plain language of PRIRA, which delegates final authority to the Commissioner. See BCN's Application at 27-29. In rebuttal, Petitioner repeats her "absurd/preposterous results" argument, and again offers a statutory analysis that ignores key statutory language (e.g., the statute's use of the term "recommendation"). These arguments are without merit for the reasons stated *supra* and in BCN's Application.<sup>6</sup>

**E. The Court of Appeals' Published Opinion Raises Issues of Jurisprudential Significance.**

Petitioner fails to address the judicial significance of this case in any depth. Yet it is apparent that this case is jurisprudentially significant for a host of reasons. Although the Court of Appeals' opinion is published, and therefore of precedential force in Michigan, neither BCN

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<sup>6</sup> Petitioner also attempts to inject new considerations into the Court's analysis of this issue – *viz.*, the Commissioner's failure to provide written notice to Petitioner within seven days of receipt of the IRO recommendation and her alleged failure to provide a written explanation for her departure from the IRO recommendation. Petitioner's Brief at 34; 37-38. The latter contention (that the Commissioner failed to set forth reasons for her disagreement with the IRO) is completely false, see, e.g., Petitioner's Brief, Ex. D at 10-11, and the former is simply irrelevant. The question before the lower courts was not whether the Commissioner's review was procedurally deficient in any respect but whether she exceeded her authority by *departing from the IRO recommendation*. The delay between her receipt of the IRO recommendation and her final written decision is irrelevant to that issue.

nor Petitioner agree with the Court of Appeals' conclusion that the key statutory language at issue in this appeal is ambiguous. Thus, the Court of Appeals' opinion not only sanctions a departure from the clear statutory language in this case, but also opens the door for future decisions that reject clear expression of legislative intent based on erroneous findings of ambiguity. Indeed, the Court of Appeals even applied the "whether reasonable minds could differ" approach to ambiguity, despite the fact that this Court expressly rejected that test in *Mayor of Lansing, supra* at 166.

The Court of Appeals also dismissed controlling language in *English* as *dicta* when, in fact, that language was plainly necessary to the *English* panel's analysis of the due process claim in that case. This opinion will therefore allow courts to dismiss controlling language as *dicta* in other cases, leading to conflict and confusion in Michigan law.

It is equally significant that the Court of Appeals' opinion failed to apply the plain language of PRIRA, thereby spurning the policies deliberately enacted by the Legislature. Consequently, BCN's appeal is about more than merely correcting an opinion that unlawfully imposes liability on BCN for medical costs that are excluded under the plain terms of its agreement with Petitioner. It is about the constitutional role assigned to the judiciary under Michigan's constitution. By disregarding the plain language of PRIRA, the Court of Appeals has usurped the Legislature's law-making authority, and has done so through an analysis that will now invite future judicial usurpations of that authority. It is therefore necessary for this Court to intervene by granting BCN's Application for Leave to Appeal.

### III. CONCLUSION

For the foregoing reasons, as well as those stated in BCN's Application, BCN respectfully requests that this Court grant its Application for Leave to Appeal.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: Phillip J. DeRosier

Joseph A. Fink (P13428)

Phillip J. DeRosier (P55595)

Trent B. Collier (P66448)

Attorneys for Respondent-Appellant Blue

Care Network of Michigan

500 Woodward Avenue, Suite 4000

Detroit, MI 48226-3425

(313) 223-3500

COLLEEN C. COHAN (P47044)

Attorney for Respondent-Appellant Blue

Care Network of Michigan

600 Lafayette East, Suite 1925

Detroit, MI 48226

(313) 225-5611

Dated: August 28, 2006

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