STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hons. M. J. Kelly, P.J., and Hoekstra and Stephens, JJ.

STATE OF MICHIGAN *ex rel.* MARCIA GURGANUS,

Plaintiff-Appellee,

v.

CVS CAREMARK CORPORATION; CVS PHARMACY, INC.; CAREMARK, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY HOLDING, LLC; CVS MICHIGAN, LLC; WOODWARD DETROIT CVS, LLC; REVCO DISCOUNT DRUG CENTERS, INC.; KMART HOLDING CORPORATION; SEARS HOLDINGS CORPORATION; SEARS HOLDINGS MANAGEMENT CORPORATION; SEARS ROEBUCK AND CO.; RITE AID OF MICHIGAN INC.; PERRY DRUG STORES INC.; TARGET CORPORATION; THE KROGER CO. OF MICHIGAN; THE KROGER CO.; WALGREEN CO.; and WAL-MART STORES INC.,

Defendants-Appellants.

Docket No. 146791

CITY OF LANSING and DICKINSON PRESS INC.,

Plaintiffs-Appellees/
Cross-Appellants,

v.

RITE AID OF MICHIGAN INC. and PERRY DRUG STORES INC.,

Defendants-Appellants/
Cross-Appellees.

Docket No. 146792

CITY OF LANSING, DICKINSON PRESS INC., and SCOTT MURPHY, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees/
Cross-Appellants,

v.

CVS CAREMARK CORPORATION; CVS PHARMACY, INC.; CAREMARK, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY, LLC; CAREMARK MICHIGAN SPECIALTY PHARMACY HOLDING, LLC; CVS MICHIGAN, LLC; WOODWARD DETROIT CVS, LLC; REVCO DISCOUNT DRUG CENTERS, INC.; KMART HOLDING CORPORATION; SEARS HOLDINGS CORPORATION; SEARS HOLDINGS MANAGEMENT CORPORATION; SEARS ROEBUCK AND CO.; TARGET CORPORATION; THE KROGER CO. OF MICHIGAN; THE KROGER CO.; WALGREEN CO.; and WAL-MART STORES INC.,

Defendants-Appellants/
Cross-Appellees.

Docket No. 146793

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INTRODUCTION

In reversing the circuit court's orders dismissing the three lawsuits at issue in this appeal, the Court of Appeals adopted principles of statutory interpretation that run counter to this Court's precedent and parted ways with a series of persuasive federal court decisions. As a result, the Court of Appeals permitted plaintiffs to circumvent the exclusivity of administrative remedies for alleged violations of the Substitution Statute,[1] dramatically expanded the scope of potential liability under the HCFCA and MFCA, rewrote the Substitution Statute in ways that the Legislature would not recognize, and permitted an out-of-state individual to wield the power of the State in a *qui tam* action based on publicly available information. Left to stand, the Court of Appeals' decision would result in a judicial displacement of the Legislature's policy judgments in several areas. Plaintiffs' opposition brief—which incorrectly labels the issues as "narrow," limited to "a unique statute," and not "requir[ing] the Court to pronounce any new rule of law" (Plaintiffs' Opposition Brief ("Opp Br") 11-12)—fails to defend such a harmful result. For the following reasons, and the reasons explained in defendants' opening brief, the Court of Appeals' decision should be reversed on the issues that are the subject of defendants' appeal.

ARGUMENT

I. PLAINTIFFS MAY NOT CIRCUMVENT THE ABSENCE OF A PRIVATE RIGHT OF ACTION UNDER THE SUBSTITUTION STATUTE BY ALLEGING VIOLATIONS OF THAT SAME STATUTE UNDER THE HCFCA OR MFCA.

When provided, administrative remedies are exclusive, especially when, as here, they are attached to a right having no common-law counterpart. (See Defendants' Opening Brief ("Br") 13-16.) This rule makes a great deal of sense because "[s]ubjection to private suit . . . would take responsibility for suit out of the hands of public officials, who will presumably exercise their

[1] All capitalized terms are as defined in defendants' opening brief, unless otherwise noted.

discretion in the public interest, and place it in the hands of those who would use it for private gain." Scalia & Garner, Reading Law: The Interpretation of Legal Texts, p 316. Contrary to plaintiffs' argument, defendants do not "request that this Court engraft a judicial exception onto the plain language of the MFCA and HCFCA." (Opp Br 21.) Rather, defendants request only that the Court continue to enforce the exclusivity of the administrative remedies applicable to the Substitution Statute and not endorse plaintiffs' attempt to bootstrap a claim for violation of the Substitution Statute by bringing it under the MFCA or HCFCA. See *McClements v Ford Motor Co*, 473 Mich 373, 382; 702 NW2d 166 (2005) (rejecting a similar bootstrapping attempt).

Plaintiffs offer a number of unpersuasive responses. *First*, they argue that defendants' argument is waived. (Opp Br 23-24.) That discretionary doctrine does not apply; the Court specifically instructed the parties to "include among the issues to be briefed" the question "whether use of the remedies provided by the MFCA and the HCFCA is available when Part 177 of the Michigan Public Health Code, MCL 333.17701 *et seq.* provides administrative remedies for violations of MCL 333.17755." (Sept 18, 2013 Order 2-3.) Regardless, though, defendants argued at the circuit court that, "[b]ecause there is no express or implied private right of action under Part 177, Plaintiffs cannot seek to enforce Section 17755(2) through the common law or through another statute." (*City of Lansing v CVS Caremark Corp*, No 10-619-CZ, Defs' Br in Support of Joint Motion for Summary Disp 14 (March 24, 2010).) The issue was also subsumed in the argument before the Court of Appeals that the Substitution Statute is to be enforced, if at all, only through the prescribed administrative mechanism.

Second, plaintiffs advance a circular argument—the exclusivity principle supposedly does not apply because other statutes supply causes of action. (Opp Br 21-23, 24-27.) That the MFCA and HCFCA provide their own causes of action is of no moment when plaintiffs'

allegations under those statutes depend entirely on the alleged violations of the Substitution Statute. If the alleged violation of the Substitution Statute is removed, nothing remains of plaintiffs' MFCA and HCFCA counts. Plaintiffs realize this, which is why they have to argue that "*they seek a remedy under the MFCA and HCFCA for violations of the MFCA and HCFCA.*" (*Id.* at 26 (original emphasis).) But that is plainly incorrect. Plaintiffs seek a remedy under the MFCA and HCFCA *for violations of the Substitution Statute*. (See, e.g., Gurganus-CVS SAC ¶¶ 135-138, JA 263a; Lansing-CVS SAC ¶¶ 167-70, JA 360a-361a; Lansing-Rite Aid SAC ¶¶ 128-131, JA 428a-429a.) They do not attempt to state any violation of the MFCA or HCFCA independent of an alleged violation of the Substitution Statute.

Far from conceding this point in proceedings before the Minnesota Supreme Court (Opp Br 21 n13), defendants there made the same argument—that the conduct must "independently meet[] the elements of liability under both statutes" (i.e., Minnesota's pharmacy statute and the consumer fraud statute) before a pharmacy can be held liable under both. (Pls' 2d Supp App 189.) Here, plaintiffs cannot say that the alleged MFCA and HCFCA violations exist *independently* of any alleged violations of the Substitution Statute. As pled by plaintiffs, an alleged violation of the Substitution Statute is a necessary predicate to all of their claims, which is why any attempt at enforcement must be before the board of pharmacy, if at all.

Other courts, most directly the Second Circuit in *Conboy v AT&T Corp*, 241 F3d 242, 257-58 (CA 2, 2001), recognize this principle. Plaintiffs do not address, and thus concede, *Conboy*'s holding that prohibited the same bootstrap plaintiffs are attempting here, and instead focus on an alternate holding that has nothing to do with this issue. (Opp Br 26.) The part of *Conboy* on which defendants relied in their opening brief is undisputedly persuasive. (Br 14-15.)

Finally, plaintiffs respond to a primary jurisdiction argument that defendants did not

make and need not defend here. (Opp Br 27.) It is noteworthy, however, that even there plaintiffs incorrectly ignore numerous complexities that their interpretation of the Substitution Statute creates. (See Amicus Br of the Nat'l Ass'n of Chain Drug Stores ("NACDS Amicus") 5-6.) It is because of these and myriad other complexities that the Legislature left these matters to the board of pharmacy. The Legislature's decision should not be circumvented by judicial resort to the MFCA and HCFCA, and the Court of Appeals' ruling to this effect should be reversed.

II. THE ALLEGED MISCONDUCT DOES NOT AMOUNT TO A "FALSE CLAIM" UNDER THE MFCA AND HCFCA.

Departing from the plain text of the HCFCA and MFCA, the Court of Appeals dispensed with the "false claim" requirement in favor of a watered-down version of the so-called "implied certification" theory. (Br 16-23.) Plaintiffs respond that this is, instead, "a straightforward False Claims Act case." (Opp Br 20.) Plaintiffs are incorrect.

To begin, nowhere do plaintiffs allege, nor can they, that defendants' claims misrepresented the goods or services provided. See, e.g., *In re Wayne County Prosecutor*, 121 Mich App 798, 802; 329 NW2d 510 (1982). Rather, plaintiffs' allegations rest entirely on the alleged violations of the Substitution Statute. No other Michigan court has interpreted the fundamental falsity requirement of the acts as broadly as plaintiffs would like, extending it to stand-alone alleged violations of laws, rules, or regulations. Indeed, this Court has already rejected a similar argument in the context of the Telecommunications Act's definition of "false statements." *SBC Michigan v Pub Svc Comm'n*, 482 Mich 90, 114; 754 NW2d 259 (2008).

Plaintiffs continue by arguing that "Defendant Pharmacies submitted claims that overstated the amount that was owed by the Plaintiffs." (Opp Br 20.) That argument is wrong because, even under plaintiffs' interpretation of the Substitution Statute, plaintiffs are not entitled to any fixed price for the substituted generics. Plaintiffs argue that "the pharmacy cannot make a

greater profit on the sale of the generic drug than it makes on the sale of the brand-name equivalent drug." (*Id.* at 4.) It follows from this that a pharmacist may comply with plaintiffs' interpretation of the Substitution Statute by either lowering the price of the generic or *raising the price of the brand-name equivalent drug*. And if the pharmacist chooses the latter option, plaintiffs would pay the same supposedly "overstated" amounts, which of course means that there is no overstatement in the first place.

No doubt recognizing that plaintiffs do not allege any factual falsity or deception, the Court of Appeals resorted to the implied certification theory—that Defendants made an implied representation of compliance with the Substitution Statute so as to create a supposed "legal" falsehood where no factual falsehood, indeed, no actual representation, exists. (Op 20, JA 567a.) In their opening brief, defendants explained why the Court of Appeals' reasoning expanded the false claims acts beyond anything the Legislature intended. Plaintiffs offer no substantive response, arguing that the implied certification issue is "a straw man." (Opp Br 18.) It is not; it was critical to the Court of Appeals' holding and is inconsistent with Michigan law.

For the HCFCA, plaintiffs also argue that no falsity is required, as the statute provides that "[a] person who receives a health care benefit or payment from a health care corporation or health care insurer which the person knows that he or she is not entitled to receive or be paid . . . shall be liable to the health care corporation or health care insurer for the full amount of the benefit or payment made." (*Id.* at 15-16 (quoting MCL 752.1009).) This argument is irrelevant because plaintiffs' allegations under the HCFCA were limited to the purported submission of *false claims*. (See, e.g., Lansing-CVS SAC ¶¶ 167-70, JA 360a-361a.) Far from "[c]onceding this" new theory (Opp Br 16), defendants saw no need to address an unpled claim. In any event, the new theory does not fit this case because, even under plaintiffs' interpretation of the

Substitution Statute, defendants were entitled to receive some payment on each claim submitted. Plaintiffs pled under the part of the HCFCA dealing with claims that contain false statements—not the part dealing with claims for unentitled payments. Contrary to plaintiffs' rhetoric, there is nothing "tortured" about the HCFCA's differentiation between two types of claims—only one of which requires a false statement—nor does defendants' argument "largely eviscerate the HCFCA." (*Id.* at 16 n10.) It is what the Legislature intended by the very words that it chose.

III. PLAINTIFFS DID NOT AND CANNOT PLEAD A VIABLE THEORY OF VIOLATION UNDER THE SUBSTITUTION STATUTE.

A. The Substitution Statute Does Not Prohibit Defendants' Alleged Conduct.

Directed by the Court's order granting review to brief this issue, defendants demonstrated why the Substitution Statute, taken as a whole, does not support plaintiffs' interpretation. (Br 23-29.) Defendants also explained that the reference to "the difference between the wholesale cost to the pharmacist of the 2 drug products" in MCL 333.17755(2) is a relic of the prescription drug pricing model prevalent in the 1970s, when the Substitution Statute was enacted. The reference made sense when drugs were priced based on acquisition costs plus a dispensing fee. (Br 28-29.) Plaintiffs do not respond to this point, thereby conceding it.

Instead, plaintiffs' argument confirms why their interpretation of the Substitution Statute fails. Plaintiffs begin by disputing that their approach requires any "recalculation" at the point of sale, only to abandon that argument in the very next paragraph, where they contend that "[a] failure by the Defendant Pharmacies to adjust their pre-negotiated prices for generic prescription drugs to ensure that the final price charged passes on the statutorily required savings in cost can result in unlawful overcharges." (Opp Br 33-34.) Moreover, plaintiffs fail to acknowledge that there would be no need for subsection (4) if their reading of subsection (2) were correct, because there would be no such thing as a substituted drug "with a total charge that exceeds the total

charge of the drug product originally prescribed." They fail to acknowledge the resulting surplusage because there is no answer to it under their interpretation of the Substitution Statute.

As between the two interpretations offered by the parties, only defendants' makes sense of all subsections of MCL 333.17755, especially when viewed in light of the circumstances that prevailed at the time the Substitution Statute was enacted. But the Court need not affirmatively rule on which interpretation is correct. As one amicus brief argues, the Substitution Statute, as interpreted by plaintiffs, is unconstitutionally vague and cannot be enforced for that reason. (NACDS Amicus 4-6.) Thus, and notwithstanding the lack of a private cause of action, plaintiffs lose either because the Substitution Statute means what defendants say it means, or because it is unconstitutionally vague under plaintiffs' interpretation. And even without having to interpret the Substitution Statute, all of the erroneous rulings made by the Court of Appeals can be reversed, and the circuit court's well-reasoned orders reinstated.

B. The Substitution Statute Does Not Apply To Transactions Involving No Substitution.

The Substitution Statute applies only when a generic drug is substituted for a prescribed brand name drug. (Br 29-31.) To read it otherwise—as extending even to transactions where a generic drug is prescribed in the first place—would require divorcing MCL 333.17755(2) from the context provided by subsections (1), (3), and (4). That is not how this Court reads statutes.

Plaintiffs argue that the meaning of MCL 333.17755(2) is plain, and so they do not even address defendants' arguments. (Opp Br 29.) But without the context that subsections (1), (3), and (4) provide, there is no meaning to the key phrase in subsection (2)—"the 2 drug products." What "2 drug products," introduced by the definite article "the", must one compare in transactions where no substitution is involved? Plaintiffs offer no response, and none is possible, for there is no "plain meaning" here without some context. See *SBC*, *supra* at 114 ("words and

clauses will not be divorced from those which precede and those which follow"). And the context unambiguously points to substitution.

Plaintiffs' unsupported invention of the Substitution Statute's "obvious purpose . . . to pass on the savings in cost of lower-cost generic prescription" (Opp Br 30) and the related argument that defendants' interpretation undermines that purpose fare no better. Instead of inventing legislative intent out of whole cloth, "we must assume that the thing the Legislature wants is best understood by reading what it said." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 63; 718 NW2d 784 (2006). The undisputed context reveals that "the obvious purpose" is to encourage substitution when a brand name drug is prescribed, which defendants' statutory interpretation advances. But even plaintiffs' version of "the obvious purpose" is not in danger by defendants' interpretation, because if a physician prescribes a generic in the first place, a low-cost generic drug will be dispensed, without requiring any additional recalibration of prices potentially necessary under plaintiffs' interpretation of the Substitution Statute.

Lastly, plaintiffs cannot avoid dismissal by arguing that their complaints permit an inference that there must have been substitution transactions because "over 79 percent of prescriptions are written using the brand name." (Opp Br 31 n15.) "[P]leading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with" the heightened pleading requirements. *United States ex rel Bledsoe v Cmty Health Sys, Inc*, 501 F3d 493, 504 (CA 6, 2007). Relying on vague, nationwide statistics regarding prescription practices falls far short of pleading an actual substitution transaction for each defendant, during the relevant time period, in Michigan.

C. The Heightened Pleading Standard Prohibits Plaintiffs From Relying On A Critical Inference Contradicted By Plaintiffs' Own Complaints.

Plaintiffs' complaints fail to meet the heightened pleading standard. (Br 31-33.) A key

inference in each complaint is contradicted by an attached affidavit. Plaintiffs now attempt to limit the scope of the affidavit and to change what it says. (Opp Br 37-38.) Both arguments fail.

Attempting to brush aside the affidavit's harmful portions, plaintiffs argue that they are not "alleged as part of Plaintiffs' Complaints." (*Id.* at 38.) In support of their à la carte approach, plaintiffs cite only two federal court decisions, both of which actually contradict plaintiffs' argument. (*Id.* at 38 n17.) While the federal courts are split on whether an affidavit attached to a complaint can be considered at all on a motion to dismiss, courts agree that either the entire affidavit can be or none of it can. See *Rose v Bartle*, 871 F2d 331, 340 n3 (CA 3, 1989) (either exclude the affidavit or convert motion to dismiss proceedings into summary judgment); *In re Empyrean Biosciences, Inc Sec Litig*, 219 FRD 408, 410-11 (ND Ohio, 2003) (analyzing a circuit split on this issue). Plaintiffs do not cite any authority countenancing their attempt to benefit from the parts of the affidavit that they like and need while prohibiting defendants from pointing out that the rest of the affidavit defeats critical allegations.

Contrary to plaintiffs' argument, the affidavit firmly contradicts their key allegation that acquisition costs are industry-wide, country-wide, and temporally uniform. The affidavit states that each defendant achieves a unique pricing structure, which is not the equivalent of "*minor* differences" among the defendants and does not support the assertion that the acquisition costs for them "are *materially the same*." (Opp Br 38 (original emphases).) Thus, because plaintiffs refuse to let go completely of their affidavit, they must defend their complaints without relying on the critical inference of acquisition cost uniformity. That, of course, they cannot do.

IV. GURGANUS IS NOT AN ORIGINAL SOURCE OF THE PUBLICLY DISCLOSED INFORMATION ON WHICH HER COMPLAINT IS BASED.

Plaintiff Gurganus cannot be permitted to prosecute a *qui tam* action on behalf of the State because she is not an original source of information contained in various public disclosures

attached to her complaint, which sufficiently put the State on notice of Gurganus's theory of fraud. (Br 34-41.) Choosing not to address defendants' argument that the public disclosures put the State on notice, Gurganus argues that the "critical facts alleged in Plaintiffs' Complaints are not from such 'public' sources." (Opp Br 40.) The response is flawed because "'based upon' means 'supported by,' which includes any action based even *partly* upon public disclosures." *United States ex rel Bledsoe v Cmty Health Sys, Inc*, 342 F3d 634, 646 (CA 6, 2003) (emphasis added, citation omitted). Information in public sources attached to Gurganus's complaint revealed pharmacies' alleged ability to earn higher profits on generic drugs than they do on the brands, which Gurganus alleges to be a clear violation of the Substitution Statute. The public disclosures thus indisputably put the State on notice and enabled it to investigate on its own. That Gurganus does not address this argument speaks volumes.

Nor does Gurganus qualify as the original source. Defendants explained that the original source exception must be satisfied as to each defendant (Br 40), a point Gurganus concedes by not disputing. She argues instead that she brings to the table "the national prescription drug acquisition cost information." (Opp Br 43.) Far from "national," however, her data is a snapshot for *one* defendant, from outside of Michigan, for an isolated time period. She has no data of any allegedly fraudulent transaction by any defendant in Michigan, or by any of the non-Kroger defendants anywhere. She thus cannot even satisfy her own cited cases by offering "direct and independent knowledge of an essential element of the underlying fraud transaction." (*Id.* at 44.)

RELIEF REQUESTED

With respect to the questions addressed in this brief, the decision of the Court of Appeals should be reversed and the circuit court's judgments dismissing each of the three underlying lawsuits with prejudice should be reinstated.

Dated: January 8, 2014

Respectfully submitted,

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