

STATE OF MICHIGAN
IN THE SUPREME COURT

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.

Case Nos. 146791, 146792, 146793

Lower Court Case No. 09-03411-CZ
Honorable James R. Redford

Michigan Court of Appeals #299997

PLAINTIFFS/CROSS-APPELLANTS'
REPLY BRIEF IN SUPPORT OF
CROSS-APPEAL IN DOCKET NOS.
146792 AND 146793

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

Plaintiffs/Appellees/Cross-Appellants,

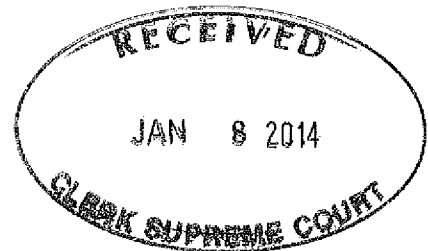
v

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

Defendants/Appellants/Cross-
Appellees,

Lower Court Case No. 09-07827-CZ
Honorable James R. Redford

Court of Appeals # 299998



and

Lower Court Case No. 10-000619-CZ

CITY OF LANSING; DICKINSON PRESS
INC.; and SCOTT MURPHY,

Court of Appeals # 299999

Plaintiffs/Appellees/Cross-Appellants,

v

CVS CAREMARK CORPORATION; CVS
PHARMACY INC.; CAREMARK L.L.C.;
CAREMARK MICHIGAN SPECIALTY
PHARMACY L.L.C.; CAREMARK
MICHIGAN SPECIALTY PHARMACY
HOLDING L.L.C.; CVS MICHIGAN L.L.C.;
WOODWARD DETROIT CVS L.L.C.;
REVCO DISCOUNT DRUG CENTERS INC.;
KMART HOLDINGS CORPORATION;
SEARS HOLDINGS CORPORATION;
SEARS HOLDINGS MANAGEMENT
CORPORATION; SEARS, ROEBUCK &
COMPANY; TARGET CORPORATION;
KROGER COMPANY OF MICHIGAN;
KROGER COMPANY; WALGREEN
COMPANY; and WAL-MART STORES
INC.,

Defendants/Appellants/Cross-
Appellees.

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I. INTRODUCTION

The Defendants emphasize that Michigan courts require a showing that "the text of the act demonstrates an *implicit* intent to provide for a private cause of action." See Cross-Appellees' Br at 4–5, 9 (quoting *Office Planning Group Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 504; 697 NW2d 871 (2005))(emphasis in original). Plaintiffs agree. But unlike Defendants, Plaintiffs do not ignore the text of the statute from which the legislature's intent is determined.

The Generic Drug Pricing Law provides that "[i]f a pharmacist dispenses a generically equivalent drug product, *the pharmacist shall pass on the savings in cost to the purchaser* or to the third-party payment source if the prescription is covered by a third-party payee contract." MCL 333.17755(2)(emphasis added). As the Michigan Court of Appeals unanimously concluded below, this statute confers a direct, beneficial right to specific monetary savings on a defined class of persons. See *Gurganus*, slip op at 9, Joint App 566a (concluding that the Generic Drug Pricing Law "by its plain language . . . creates a beneficial right in favor of a purchaser or payee of generic drugs"). It is implicit in the language of the statute itself, coupled with the legislature not providing an alternative means for purchasers to secure their monetary savings, that the legislature intended purchasers to be able to sue to recover their property. See *B F Farnell v Monahan*, 377 Mich 552, 556; 141 NW2d 58 (1966); *Thompson v Thompson*, 484 US 174, 179 (1988)("We therefore have recognized that Congress' '*intent may appear implicitly* in the language or structure of the statute'" (emphasis added, citation omitted)).

Inferring a right of action for purchasers of generic prescription drugs does not usurp the legislative intent; it effectuates it. With respect to the legislature's intent, one thing is known for certain: the legislature intended purchasers of generic prescription drugs to receive specific monetary savings. See MCL 333.17755(2). That is this state's established public policy.

Contrary to the legislature's will, Defendants misappropriated those savings for themselves. To honor and effectuate the legislature's intent that purchasers (not pharmacies) receive the savings in cost from generic prescription drugs, a right of action under the Generic Drug Pricing Law must be inferred.

II. ARGUMENT

A. DEFENDANTS' ATTEMPT TO NULLIFY THE LEGISLATURE'S INTENT THAT PLAINTIFFS RECEIVE SPECIFIC MONETARY SAVINGS MUST BE REJECTED.

"In interpreting a statute, a court's obligation is to discern the legislative intent that may reasonably be inferred from the words actually used in the statute." *Smitter v Thornapple Twp*, 494 Mich 121, 129; 833 NW2d 875 (2013). Focusing on the text of the statute, and giving effect to the legislature's intent, this Court's precedents reveal the following doctrinal framework for determining when a plaintiff has an implied right of action to sue for violation of a statute.

Where a statute does not confer a direct, beneficial right on a class of persons, no civil action will be inferred, for there is no individual right to secure through a private suit. See, e.g., *Office Planning Group*, 472 Mich at 500 n46 (noting that the statute did not "confer[] rights on individuals"). However, where a statute confers a beneficial right on a class of persons, and the legislature provides no alternative means to secure that right, a private action will be inferred to give effect to the legislature's intent. See, e.g., *St John v Gen Motor Corp*, 308 Mich 333, 555; 13 NW2d 840 (1966). The Generic Drug Pricing Law confers a direct, beneficial right to specific monetary savings on purchasers of generic prescription drugs, and it provides no

alternative means to secure that property right. Applying this Court's established jurisprudence, a civil action must be inferred.¹

The Defendants suggest a different approach, one that is divorced from the language of the statute and ignores legislative intent. They argue that (1) inferring a right of action violates the separation of powers principle, and (2) the existence of any enforcement mechanism for violation of a statute precludes inferring a right of action. Neither argument withstands scrutiny.

1. **Inferring a Right Action Does Not Violate the Separation of Powers.**

The Defendants argue that inferring a private right of action would violate the separation of powers principle by substituting the court's policy preferences for that of the legislature's. They are wrong. By enacting the Generic Drug Pricing Law, the legislature has determined that it is the public policy of this state that the savings in cost of generic prescription drugs shall be passed to the purchaser. See MCL 333.17755(2). Permitting purchasers to sue in court to recover the monetary savings that *the legislature* mandated they receive does not displace the legislature's policy choice. It effectuates it. See *Sparks v Auditor Gen*, 292 Mich 58, 66; 290 NW 327 (1940)("It is our duty to ascertain the meaning of and to give full force and effect to the statute. We must not overlook the purpose of its enactment").

The Court has the duty to infer a right of action for violation of a statute where that is what the legislature intended. *Sparks*, 292 Mich at 67 ("inferences and implications are as much a part of the law as what is distinctly expressed therein"). However, the Defendants request that

¹ Defendants argue that the legislature must "add some indication that it meant to exclude a private right of action when it did not provide for one." Cross-Appellees' Br at 2. They are wrong. When a statute contains rights-creating language, it is implicit in the language of the statute itself that there be a private action to secure that right, unless the legislature provided an alternative means to securing that right. See *Office Planning*, 472 Mich at 504 ("the question . . . [is] whether the text of the act demonstrates an *implicit* intent to provide for a private cause of action" (emphasis in original)); *Alexander v Sandoval*, 532 US 275, 288 (2001)(noting the critical importance of "rights-creating" language" for inferring a right of action).

the Court ignore this duty and effectively veto the legislature's determination that purchasers (not pharmacies) *shall* receive the savings in cost of generic prescription drugs. This the Court may not do. See *Mason County Civic Research Council v County of Mason*, 343 Mich 313, 331; 72 NW2d 292 (1955)("With the wisdom or policy thereof courts are not concerned. Rather, the statutes must be construed as enacted, in the light of the purpose to be accomplished").

2. **The Existence of an Enforcement Mechanism for the Violation of a Statute Does Not Preclude the Finding of an Implied Right of Action.**

The Defendants propose that this Court adopt a new rule of law providing that no right of action may be implied whenever there is an enforcement mechanism for violation of a statute. No court has adopted such an approach. This Court should not be the first.

If the existence of an enforcement mechanism were sufficient to preclude the inference of a civil action, a civil action would never be inferred, for there is always some enforcement mechanism for violation of a statute. In every case in which this Court has inferred a civil action, there was also an enforcement mechanism for the violation of the statutes. See, e.g., *B F Farnell*, 377 Mich at 554 (punishable by fine or prosecution); *St John*, 308 Mich at 336 (punishable as misdemeanor); *Bolden v Grand Rapids Operating Corp*, 239 Mich 318, 320; 214 NW 241 (1927)(punishable as misdemeanor and fine); *Ferguson v Gies*, 82 Mich 358, 364; 46 NW 718 (1890)(fine or prosecution). Adopting the Defendants' approach would abrogate the implied right of action doctrine.²

² The Defendants rely on Justice Scalia's concurrence in *Thompson*, in which he suggests that the courts "get out of the business of implied private rights of action altogether." See *Thompson*, 484 US at 192. While the Defendants seek to impose this approach, that is not the law in Michigan. Neither the United States Supreme Court nor any state court has adopted this approach. That is not surprising, for while such an approach may be easy for the courts, it is indifferent to legislative intent. Courts have the duty to discern and effectuate the legislature's intent from the text of the statute. It would be a neglect of duty for a court to refuse to infer a right of action where "the text of the act demonstrates an *implicit* intent to provide for a private cause of action." *Office Planning Group*, 472 Mich at 504.

The relevant question is not whether an enforcement mechanism exists for violation of a statute. Rather, the issue comes down to this: despite having granted purchasers of generic prescription drugs the right to specific monetary savings, did the legislature, by creating an administrative disciplinary subcommittee to punish pharmacists who violate the Public Health Code, intend to deny purchasers the ability to sue in court to recover their specific monetary savings? The answer is no. The creation of an administrative disciplinary subcommittee to punish pharmacists who violate the Public Health Code does not evidence legislative intent to deny Plaintiffs the right to sue to recover their specific monetary savings.

The Defendants suggest that two of this Court's decisions support their argument that the Public Health Code's administrative disciplinary tools are exclusive. See *Dudewicz v Norris-Schmid Inc*, 443 Mich 68; 503 NW2d 645 (1993); *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995). These cases actually support Plaintiffs' position.

Dudewicz involved a claim under the Whistleblower Protection Act ("WPA"), which created a beneficial right and a means to secure that right. This Court noted that the remedy provided by the WPA was exclusive. *Dudewicz*, 443 Mich at 79. *Dudewicz* is entirely consistent with Plaintiffs' argument. Where the legislature confers a right *and* provides a means to secure that right, that remedy is exclusive. However, where the legislature grants a right to a class of persons but provides no means to secure it, a civil action must be inferred to effectuate the legislature's intent.

Orzel also supports Plaintiffs' position. There, this Court affirmed that a civil action may arise by implication. *Orzel*, 449 Mich at 570 ("Statutes that permit certain classes of persons to recover do so either explicitly or implicitly. . . . Where the statute is silent regarding recovery, courts are left to infer whether the Legislature clearly intended persons similarly situated as the

plaintiff to be entitled to seek recovery"). No right of action was found in *Orzel* because the plaintiffs (who engaged in the "illicit use of drugs") did not "fall within the class of persons that the allegedly violated statutes were devised to protect." *Id.* at 574. Unlike the plaintiffs in *Orzel*, there is no question that the Plaintiffs here (as purchasers and third-party payment sources of generic prescription drugs) fall directly within the class of persons intended to benefit from the Generic Drug Pricing Law. See *Gurganus*, slip op at 9, Joint App 566a (concluding that the Generic Drug Pricing Law "by its plain language . . . creates a beneficial right in favor of a purchaser or payee of generic drugs").

Orzel also confirms that the legislature created only an administrative disciplinary scheme for punishing pharmacists, not an alternative means for purchasers to secure their property. *Id.* at 575 ("The provisions are limited in scope to *penalties that may be imposed by a disciplinary subcommittee*—not a trial court" (emphasis added)).³ Given that the legislature conferred a direct, beneficial right on purchasers of generic drugs in the form of specific monetary savings, it would be unreasonable to conclude that the legislature intended to deny purchasers the right to recover their property by creating an administrative disciplinary scheme to do nothing more than punish pharmacists.⁴

³ That the disciplinary subcommittee may impose restitution as a penalty does not change the analysis, for restitution is always available in any criminal proceeding. See Mich Const Art 6, § 24 ("Crime victims . . . shall have . . . [t]he right to restitution"). As such, restitution was available for violations of the criminal statutes in *B F Farnell* and *St John*. Just as the possibility that a prosecutor may (in its sole discretion) choose to bring a criminal action and attempt to secure restitution did not preclude the inference of a right of action in *B F Farnell* or *St John*, the same is true here: the possibility that the disciplinary subcommittee may bring an enforcement action (in its sole discretion) does not preclude the inference of a right of action for violation of the Generic Drug Pricing Law.

⁴ The Defendants' reliance upon *Fisher v WA Foote Memorial Hospital*, 261 Mich App 727 (2004), is also misplaced. There, the court of appeals concluded that a right of action cannot be inferred for violation of a statute if there was a means to enforce the statute. *Id.* at 750. That is not the law.

B. PERMITTING PLAINTIFFS TO SUE TO RECOVER THEIR MONETARY SAVINGS THE EFFECTUATES THE LEGISLATURE'S INTENT.

1. The Defendants' Argument that the Generic Drug Pricing Law Does Not Create a Direct, Beneficial Right for Plaintiffs Is Baseless.

The Generic Drug Pricing Law provides that "[i]f a pharmacist dispenses a generically equivalent drug product, the pharmacist *shall pass on the savings in cost to the purchaser* or to the third-party payment source if the prescription purchases is covered by a third-party payee contract." MCL 333.17755(2)(emphasis added). In the face of this plain language, Defendants argue that the Generic Drug Pricing law "does not confer a beneficial right on a defined class of persons." See Defs/Cross-Appellees' Br at 12. But as the Court of Appeals unanimously concluded, the plain language of the statute clearly grants purchasers the right to specific monetary savings.

Nonetheless, the Defendant Pharmacies suggest that the statute merely creates a duty for pharmacists, directing them to pass the savings in cost to purchasers. Every statute creates a duty. The question is whether the statute, in creating the duty, confers a beneficial right on a class of persons. By mandating that pharmacists pass savings in the cost of generic drugs to purchasers and third-party payment sources of those drugs, the Generic Drug Pricing Law confers a direct, beneficial right on a defined class of persons. The court of appeals had no difficulty reaching this obvious conclusion.⁵

The existence of rights-creating language in a statute is "the most accurate indicator of the propriety of implication of a cause of action." *Cannon v Univ of Chicago*, 441 US 677, 693

⁵ The Defendant Pharmacies suggest that the statute would have conferred a beneficial right on a class of persons if the legislature had stated, "Purchasers and third-party payment sources shall receive from the pharmacist the savings in cost of generic prescription drugs," rather than (as written) that "the pharmacist shall pass on the savings in cost to the purchaser or to the third-party payment source." This argument elevates form over substance, ignores legislative intent, and thus must be rejected.

n13 (1979); see also *Universities Res Ass'n v Coudu*, 450 US 754, 771–72 (1981) ("The Court has found that Congress intended to create a cause of action 'where the language of the statute explicitly confer[s] a right directly on a class of persons[s] that include[s] the plaintiff in the case.' . . . Conversely, it has noted that there 'would be far less reason to infer a private remedy in favor of individual persons' where Congress, rather than drafting the legislation 'with an unmistakable focus on the benefited class,' instead has framed the statute simply as a general prohibition or a command to a federal agency").

This Court (and courts throughout the country) consistently infer a right of action where a statute contains rights-creating language and does not provide an administrative mechanism to secure that right. See, e.g., *B F Farnell*, 377 Mich at 554 n2 ("the building contract fund . . . shall be . . . a trust fund for the benefit of . . . subcontractors or materialmen"); *St John*, 308 Mich at 336 ("Any employer of labor in this state . . . who shall pay any female . . . a less wage . . . shall be guilty of a misdemeanor"); *Starko v Presbyterian Health Plan*, 276 P3d 252, 265 (NM Ct App 2011)(inferring right of action from statute conferring property right in "dispensing fee and cost of the drug to dispensing pharmacists"); *Cannon*, 441 US at 693 n13 ("this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in this case").

The Generic Drug Pricing Law, by mandating that pharmacists pass on the savings in the cost of generic prescription drugs to purchasers and third-party payment sources of those drugs, confers a beneficial right on a class of persons. It is implicit in the language of the statute that the legislature intended Plaintiffs to be able to sue in court to recover their property.

2. **The Legislature Did Not Express an Intent to Deny Purchasers a Civil Action by Empowering a Disciplinary Subcommittee to Punish Pharmacists.**

Whether an enforcement mechanism indicates a legislative intent to foreclose a right of action depends upon whether the statute creates a duty for the benefit of the public or instead confers an individual right for a defined class. Where a statute creates a duty for the public, a punitive enforcement mechanism is exclusive. But, where a statute creates a beneficial right *for a particular class of individuals*, a punitive enforcement mechanism is not exclusive. As this Court explained:

The true rule is said to be that the question should be determined by a construction of the provisions of the particular statute, and according to whether it appears that the duty imposed is merely for the benefit of the public, and the fine or penalty a means of enforcing his duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of particular individuals or classes of individuals. *If the case falls within the first class, the public remedy by fine or penalty is exclusive; but, if the case falls within the second class a private action may be maintained.*

Bolden, 239 Mich at 327 (emphasis added).

The Generic Drug Pricing Law confers an individual right on purchasers of generic prescription drugs. While the administrative disciplinary subcommittee's ability to punish pharmacists for violations of the Public Health Code secures the *public* interest, it does nothing to secure the purchasers' *individual* interest in (and right to) the specific monetary savings guaranteed by the Generic Drug Pricing Law.

Absent a private right of action, Plaintiffs cannot recover their property from the disciplinary subcommittee. All a victim can do is write a letter alleging a violation. See MCL 333.16231(1). When an allegation is received, the department alone decides whether there is a violation. See MCL 333.16231(2), (4). If a disciplinary subcommittee finds that "grounds exist for disciplinary action," it may impose an "appropriate sanction" or the department may enter

into a consent agreement (a plea bargain) with the violator. See *id.*; MCL 333.16237(4). The victim has no right to participate in the disciplinary process or challenge any disciplinary sanction imposed.

Where the legislature has conferred a direct, individual right on purchasers of generic prescription drugs and third-party payment sources, it cannot reasonably be inferred that the legislature, by creating a disciplinary system for violations of the Public Health Code in which a victim has no right to participate, intended to preclude purchasers from suing to recover their property. See *Cannon*, 441 US at 707 n41 ("this Court has . . . has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute"). Consistent with its prior precedent, this Court should imply a right of action under the unique Generic Drug Pricing Law.


III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the court of appeals' conclusion that Plaintiffs lack a private right of action under MCL 333.17755(2).

Respectfully submitted,

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