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' BRIEF IN SUPPORT OF CROSS-APPEAL IN DOCKET NOS. 146792 AND 146793

ORAL ARGUMENT REQUESTED

REDACTED FOR PUBLIC FILING

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

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

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.

Lower Court Case No. 10-000619-CZ

Court of Appeals # 299999

VARNUM LLP
Perrin Rynders (P38221)
Bryan R. Walters (P58050)
Attorneys for Plaintiffs/Appellees/Cross-Appellants
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

FOLEY & LARDNER LLP
Jeffrey Scott Kopp (P59485)
Larry S. Perlman (P71698)
Attorneys for Defendants/Appellants CVS
500 Woodward Avenue, Suite 2700
Detroit, MI 48226-3489
(313) 234-7100

FOLEY & LARDNER LLP
Robert H. Griffith
David B. Goroff
Attorneys for Defendants/Appellants CVS
321 North Clark Street, Suite 2800
Chicago, IL 60654
(312) 832-4500

HONIGMAN MILLER SCHWARTZ AND COHN
Eric J. Eggan (P32368)
Attorneys for Defendants/Appellants Kroger and Walgreens
222 North Washington Square, Suite 400
Lansing, MI 48933-1800
(517) 377-0726

HONIGMAN MILLER SCHWARTZ AND COHN
Norman Ankers (P30533)
Arthur T. O'Reilly (P70406)
Attorneys for Defendants/Appellants Kroger and Walgreens
660 Woodward Avenue, Suite 2290
Detroit, MI 48226
(313) 465-7306

DYKEMA GOSSETT PLLC
Jill M. Wheaton (P49921)
Attorneys for Defendants/Appellants Kmart and Sears
2723 South State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7629

DYKEMA GOSSETT PLLC
Todd Grant Gattoni (P47843)
Attorneys for Defendants/Appellants Kmart and Sears
400 Renaissance Center
Detroit, MI 48243
(313) 568-6943

MILLER CANFIELD PADDOCK & STONE PLC
Robert L. DeJong (P12693)
Joseph M. Infante (P68719)
Attorneys for Defendants/Appellants Rite Aid and Perry Drug
1200 Campau Square Plaza
99 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 454-8656

MILLER CANFIELD PADDOCK & STONE PLC
Todd Alan Holleman (P57699)
Attorneys for Defendants/Appellants Rite Aid and Perry Drug
150 West Jefferson Avenue, Suite 2500
Detroit, MI 48226-4415
(313) 496-7668

FAEGRE & BENSON LLP
Wendy J. Wildung
Craig S Coleman
Attorneys for Defendant/Appellants Target
220 Wells Fargo Center
Minneapolis, MN 55402
(612) 766-6981

DICKINSON WRIGHT PLLC
Edward P. Perdue (P55888)
Scott R. Knapp (P61041)
Attorneys for Defendant/Appellants Target
200 Ottawa Avenue, NW, Suite 900
Grand Rapids, MI 49503
(616) 458-1300

MILLER JOHNSON PLC
Matthew L. Vicari (P44049)
Joseph J. Gavin (P69529)
Attorneys for Defendant/Appellants Wal-Mart
250 Monroe Avenue, NW, Suite 800
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700

JONES DAY
Tina M. Tabacchi
Brian J. Murray
Dennis Murashko
Attorneys for Defendant/Appellants Wal-Mart
77 West Wacker Drive, Suite 3500
Chicago, IL 60601
(312) 269-4078

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction over this cross-appeal pursuant to MCR 7.302(D)(2). Defendants/Appellants filed their application for leave to appeal on March 5, 2013. Plaintiffs/Cross-Appellants filed their cross-application for leave to appeal on April 2, 2013. This Court granted both applications by order dated September 18, 2013.

STATEMENT OF QUESTION PRESENTED FOR REVIEW ON CROSS-APPEAL

Did the court of appeals err in failing to infer a right of action under MCL 333.17755(2) where (1) the legislature conferred a direct, beneficial right on purchasers of generic prescription drugs to receive specific monetary savings; (2) the legislature's creation of an administrative disciplinary subcommittee with power to punish pharmacists does not indicate an intent to preclude a civil action by purchasers to recover their property; and (3) this Court has consistently inferred a right of action to effectuate the legislature's intent when a statute confers a direct, beneficial right on a class of persons?

Plaintiffs/Cross-Appellants say: "Yes."
Defendants/Cross-Appellees say: "No."
The Court of Appeals said: "No."

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The legislature granted purchasers of generic prescription drugs the right to receive any money a pharmacy saves by dispensing a generic prescription drug in lieu of its brand-name equivalent:

> If 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 purchase is covered by a third-party payee contract. The savings in cost is the difference between the wholesale cost to the pharmacist of the two drug products.

MCL 333.17755(2)(the "Generic Drug Pricing Law")(emphasis added).

The Generic Drug Pricing Law is straightforward. For example, if a pharmacy dispenses a generic prescription drug with a wholesale cost[1] of $10 and the pharmacy's wholesale cost for the corresponding brand-name version of the drug is $50, the pharmacy must pass on to the purchaser this $40 difference between the wholesale cost of the two drug products by selling the generic drug to the purchaser for at least $40 less than the pharmacy would sell the brand-name drug to the purchaser.

So, in the example above, if the pharmacy's retail sales price for the brand-name drug was $70, the pharmacy would be required to sell the generic equivalent drug at retail for no more than $30 ($70 brand drug retail price – $40 savings in cost from dispensing generic drug). The mathematical result of the statute is that the profit to the pharmacy on the sale of the generic drug cannot exceed the profit to the pharmacy on sales of the brand-name equivalent drug.

Plaintiffs City of Lansing and Dickinson Press are two self-funded health care insurers that have not received these savings in cost from the Defendant Pharmacies when paying health

[1] The term "wholesale cost" is used interchangeably with the term "acquisition cost" throughout the Complaints. Both phrases refer to how much the pharmacy pays to obtain a prescription drug for resale.

care claims submitted by the Defendant Pharmacies for generic prescription drugs dispensed to plan participants. Plaintiff Murphy is an uninsured individual who did not receive these savings in cost when he purchased generic prescription drugs from Defendant Target.

Plaintiffs are suing individually and on behalf of a putative class of purchasers and third-party payment sources throughout Michigan to recover their money from Defendants. Potential class members include self-insured businesses and municipalities that pay health care claims for generic prescription drugs on behalf of their employees, insurance companies that pay health care claims for generic prescription drugs on behalf of their insureds, and uninsured individuals who pay for generic prescription drugs directly out of their own pockets.[2]

A third complaint against the Defendant Pharmacies was brought by Marcia Gurganus, a pharmacist employed by Defendant Kroger, on behalf of the state of Michigan. Gurganus seeks to recover on false health care claims submitted by the Defendant Pharmacies to the state's Medicaid program pursuant to the Medicaid False Claims Act, MCL 400.601, *et seq.* Gurganus had access to Defendant Kroger's wholesale cost information for a variety of generic prescription drugs and their brand-name counterparts. See *Gurganus v CVS Caremark Corp*, 1st Am. Compl. Joint App. 57a (example price sheet showing Defendant Kroger's wholesale cost and retail list price for the brand drug Cefzil and its generic equivalent Cefprozil).

The Gurganus *qui tam* complaint does not have a count for an implied right of action under MCL 333.17755(2) or a count for unjust enrichment. As such, the Gurganus *qui tam* lawsuit (Dkt. #146791) is not part of this cross-appeal.

---

[2] There are two class-action lawsuits: one against Defendants Rite Aid of Michigan Inc. and Perry Drug Stores Inc. (Dkt. #146792) and a second against all of the other Defendant pharmacies (Dkt. #146793). For all relevant purposes, the issues in the two class-action lawsuits are identical. For ease of the Court, Plaintiffs will refer to the allegations in the Second Amended Complaint of *City of Lansing v CVS Caremark Corp*, Docket No. 146793, throughout the remainder of this brief, unless otherwise noted.

Plaintiffs City of Lansing, Dickinson Press, and Murphy filed a 47-page, 170-paragraph Second Amended Complaint ("Complaint") setting forth the basis for their claims. In 2008 alone, over 113 million retail prescriptions were filled in Michigan pharmacies, with total sales of almost $6.8 billion. 2d Am. Compl. ¶ 32, Joint App. 321a. Most of these sales were of generic prescription drugs. *Id.* ¶ 33, Joint App. 322a. Since 2003 Plaintiffs have purchased (or been the third-party payment source for) over 150,000 prescription drugs from the Defendant Pharmacies. *Id.* ¶¶ 40, 62, Joint App. 322a, 323a, 328a.

The Defendant Pharmacies keep secret their wholesale costs for prescription drugs. However, based in part on the wholesale cost information obtained by the *qui tam* relator, Marcia Gurganus (a pharmacist for Defendant Kroger), the Complaint alleges the Defendant Pharmacies' wholesale costs for six generic prescription drugs and their brand-name equivalents. The Complaint also alleges the retail prices at which the Defendant Pharmacies sold these drugs to Plaintiffs. With this otherwise secret data,[3] Plaintiffs allege hundreds of generic prescription drug purchases for which the Defendant Pharmacies failed to pass on to Plaintiffs the difference between the wholesale cost to the pharmacy of the brand-name drug and its generic equivalent. *Id.* ¶¶ 63–144, Joint App. 328a–356a.

For example, consider just one of the hundreds of specific examples of an overcharge by the Defendant Pharmacies alleged in the Complaint. On January 5, 2008, Plaintiff City of Lansing purchased from Defendant CVS Caremark Corp. ("CVS") the generic drug Fluticasone Propionate ("Fluticasone"), a prescription drug used for the treatment of allergic rhinitis. *Id.*

[3] Indeed, the Defendant Pharmacies maintain that their wholesale costs for prescription drugs from 2008 are *still confidential today* and have sought to keep the wholesale cost information alleged in these lawsuits under seal and out of the public record. This demonstrates just how confidential the Defendant Pharmacies attempt to keep this wholesale cost information.

¶¶ 109, 119, Joint App. 340a–344a. Fluticasone is marketed by GlaxoSmithKline under the brand name Flonase. *Id.* ¶ 109.[4]

REDACTED FOR PUBLIC FILING

Plaintiffs have no reason to believe that the Defendant Pharmacies' failure to pass on these savings has been limited to them. Nor do Plaintiffs have any reason to believe that the

[4] The highlighted section of the Statement of Facts (highlighted in yellow) contains information that the Defendant Pharmacies deem confidential. As such, this information has been redacted from the public record in these lawsuits and is included only in the sealed version of this brief and the sealed Plaintiffs' Supplemental Appendix.

overcharges by the Defendant Pharmacies relate only to those six generic drugs used as examples in the Complaints. Rather, Plaintiffs believe that every Michigan business that pays for prescription drug benefits for its employees, every Michigan governmental unit that pays for prescription drug benefits for its employees (and for beneficiaries of governmental programs such as Medicaid), and every individual in Michigan who pays for prescription drugs out of his/her own pocket may have been subject to similar overcharges without their knowledge.

Accordingly, Plaintiffs brought their lawsuits both on their own behalf and as putative class actions on behalf of purchasers of generic prescription drugs throughout the state. *Id.* ¶¶ 152–154, Joint App. 358a–359a. Plaintiffs have pleaded four counts for relief: (1) violation of MCL 333.17755(2); (2) violation of the Michigan Consumer Protection Act; (3) unjust enrichment; and (4) violation of the Health Care False Claims Act, MCL 752.1009. *Id.* ¶¶ 155–170, Joint App. 359a–362a.

In a unanimous *per curiam* opinion dated January 22, 2013, the court of appeals held that Plaintiffs had sufficiently pled their complaints under MCR 2.112(B)(1):

> Here, the circumstances constituting fraud in all three complaints are the instances when defendants allegedly sold generic prescription drugs without passing on the savings in cost in violation of § 17755(2). The complaints state these circumstances with sufficient particularity because they identify the date, brand sales price, brand acquisition cost, brand profit, generic acquisition cost, maximum generic price, actual generic sales price, and overcharge amount for each of the drugs used as examples regarding each defendant. The complaints contain these specific allegations for hundreds of different dates in 2008. Cumulatively, these allegations sufficiently apprise defendants of what plaintiffs will attempt to prove, and leave no doubt concerning what defendants will be required to defend against. *Kassab*, 185 Mich App at 213. Further, plaintiffs allegations, if true, demonstrate that defendants violated § 17755(2). Therefore, we conclude that summary disposition pursuant to MCR 2.116(C)(8) is not appropriate because further factual development could show that plaintiffs are entitled to recovery. *Feyz*, 475 Mich at 672. Further, we conclude that the pleadings meet the heightened pleading standards for allegations of fraud because the complaints particularly state the circumstances constituting the alleged fraud,

> and there can be no doubt that the complaints sufficiently apprise defendants of the nature of the case that they must prepare to defend.

Gurganus v CVS Corp, unpublished opinion per curium of the Court of Appeals dated January 22, 2013 (Dkt. Nos. 299997–299999), at 18, Joint App. 565a.

The court of appeals further concluded that the Defendant Pharmacies' presentment of health care claims that failed to pass on the required savings in cost under MCL 333.17755(2) was actionable under both the Health Care False Claims Act and, for *qui tam* relator Gurganus on behalf of the state of Michigan, under the Medicaid False Claims Act:

> Material to a pharmacist's entitlement to payment for generic drugs that are dispensed is that the amount charged complies with § 17755(2). Here, defendants' presentation of claims for payment impliedly represents to purchasers and payees that defendants are passing on the savings in cost, if any, when generic drugs are dispensed. However, if plaintiffs' allegations are true, defendants are not actually passing on the savings in cost by concealing material facts regarding the profits that they are realizing from the sale. We conclude that this alleged mechanism for violating § 17755(2) meets the definition of "deceptive" under the plain language of both statutes. More specifically, because the alleged violation of § 17755(2) entails omission of a material fact leading purchasers and payees to believe the state of affair is something other than it actually is, defendants are engaging in deceptive, and therefore false, conduct. Moreover, we reject defendants' argument that an affirmative act or misrepresentation is required to constitute a false claim because neither the HCFCA's nor the MFCA's definition of false claim requires an affirmative act. We do not read requirements into plain statutory language. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

Id. at 20, Joint App. 567a.

However, the court of appeals affirmed the circuit court's determination that Plaintiffs may not maintain an implied right of action under MCL 333.17755(2). *Id.* at 10–11, Joint App. 557a–558a. It is only this holding that is the subject of Plaintiffs' cross-appeal.[5]

[5] The court of appeals also held that Plaintiffs' Michigan Consumer Protection Act claims were barred under this Court's prior decision in *Liss v Lewiston-Richards Inc*, 478 Mich 203, 212; 732 NW2d 514 (2007). *Id.* at 3 fn1, Joint App. 550a. This Court declined to hear Plaintiffs' cross-appeal on this issue.

ARGUMENT

I. INTRODUCTION

Plaintiffs prevailed at the Michigan Court of Appeals on almost all of the issues on which this Court has granted leave to appeal. Among the issues on which the court of appeals unanimously ruled in favor of Plaintiffs include the following:

1. That Plaintiff Gurganus is an appropriate relator under the Medicaid False Claims Act.

2. That the Health Care False Claims Act provides an express cause of action for health care insurers, including self-insured payors such as Plaintiffs City of Lansing and Dickinson Press.

3. That Plaintiffs' complaints meet the pleading standards under the Michigan Court Rules.

4. That the Defendant Pharmacies' presentation of prescription drug claims that failed to pass on the savings in cost required by MCL 333.17755(2) is actionable under the Health Care False Claims Act and Medicaid False Claims Act.

5. That the Generic Drug Pricing Law applies to all generic prescription drug purchases, regardless of whether a "substitution" occurred.

Gurganus, slip op at 3–21, Joint App. 550a–568a.

This cross-appeal relates only to the question of whether Plaintiffs City of Lansing, Dickinson Press, and Murphy *also* have an implied cause of action under the Generic Drug Pricing Law itself.

The existence of an implied right of action under the Generic Drug Pricing Law is of critical importance for Plaintiff Murphy and the class of uninsured cash payors for generic prescription drugs. Health care insurers, including self-funded insurance plans, have a clear statutory right under the Health Care False Claims Act to sue to recover the overcharges by the Defendant Pharmacies for generic prescription drug claims submitted by the Defendant Pharmacies. See MCL 752.1009 ("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"). Plaintiff Gurganus, on behalf of the state of Michigan, has a similar statutory right under the Medicaid False Claims Act to recover the overcharges by the Defendant Pharmacies to the state's Medicaid program. See MCL 400.610a(1)("Any person may bring a civil action in the name of this state under this section to recover losses that this state suffers from a violation of this act").

However, the legislature did not create an express statutory right for uninsured individuals to sue when they are overcharged for medical services. But, that is not dispositive of whether an uninsured individual may sue to recover the overcharges, as this Court has recognized that a plaintiff may have an implied right of action if that is what the legislature intended. See e.g., *Gardner v Wood*, 429 Mich 290, 301–04; 414 NW2d 706 (1987)("courts will infer a civil remedy for the violation 'to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind'").

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)("the pharmacist *shall pass on the savings in cost to the purchaser or third party payment source*") (emphasis added). That is the state's policy enacted by the legislature. Declining to infer a civil action for purchasers to recover what legally belongs to them would undermine that policy and the legislature's intent. See *Smitter v Thornapple Twp*, 494 Mich 121, 140; 833 NW2d 875 (2013)("this Court may not substitute its policy preferences for those policy decisions that have been clearly provided by statute"). 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. A CIVIL ACTION SHOULD BE INFERRED WHERE A STATUTE CONFERS A BENEFICIAL RIGHT ON A CLASS OF PERSONS, BUT PROVIDES NO MEANS TO SECURE THAT RIGHT.

When interpreting a statute, the primary goal is to "ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012)(citation omitted); see also *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013)("The touchstone of legislative intent is the statute's language"); *Frankenmuth Mut Ins Co v Marlette Homes Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998)("The primary purpose of statutory construction is to determine and effectuate the intent of the Legislature through reasonable construction *in consideration of the purpose of the statute and the object sought to be accomplished*")(emphasis added).

When determining whether to infer a right of action under a statute, this Court focuses on whether the legislature intended a civil remedy for violations of the statute, as reflected in the text and purpose of the statute. See e.g., *Gardner*, 429 Mich at 301–04; *B F Farnell v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966). Effectuating the legislature's intent is—and has always been—the Court's goal in determining whether a right of action is implied under a statute. See, e.g., *Longstreth v Gensel*, 423 Mich 675, 693; 377 NW2d 804 (1985)(inferring right of action where consistent with legislative intent); *Ferguson v Gies*, 82 Mich 358, 364–65; 46 NW 718 (1890)(inferring civil action where consistent with and effectuates legislative intent).

This Court has consistently inferred a civil action where the legislature conferred a direct, beneficial right on a class of persons, but did not provide an alternative means for that class of persons to secure their right outside of court. See, e.g., *B F Farnell*, 377 Mich at 555 (inferring civil action to secure beneficial property right conferred by statute); *Bolden v Grand Rapids*

Operating Corp, 239 Mich 318, 328; 214 NW 241 (1927). Conversely, where the statute did not confer a direct, beneficial right on a class of persons, this Court has historically refused to infer a right of action. See, e.g., *Taylor v LS & MSR Co*, 45 Mich 74, 76; 7 NW 728 (1881)(denying a civil action where statute did not create a direct, beneficial right in a class of persons).

Following this Court's precedents, and consistent with the guiding principle of effectuating the legislature's intent, the doctrinal framework for determining when to imply a right of action can be distilled to the following two points.

First, where a statute *does not* confer a beneficial right on a defined class of persons of whom the plaintiff is a member, then no cause of action should be inferred. When implied right of action cases are viewed through this filter, very few statutes will pass this first test, as very few statutes create direct, beneficial rights for a defined class of persons. Nearly every court of appeals decision denying a right of action has involved a statute that did not create a direct, beneficial right for the class of persons of which the plaintiff was a member.

Second, where a statute *does* create a direct, beneficial right for a defined class of persons of which the plaintiff is a member, a right of action should be inferred in order to effectuate the legislature's intent—absent an indication of legislative intent to the contrary. Where the legislature enacts a statute that creates a direct, beneficial right in a defined class, it would be unreasonable to conclude that the legislature does not want a member of that class to have a means to secure the new right conferred, *unless* there is some indication of legislative intent to the contrary. Any other rule would fail to effectuate the legislature's intent.

When this framework is applied, a right of action will be inferred under very few statutes. However, because the Generic Drug Pricing Law creates a direct, beneficial right for purchasers of generic prescription drugs to receive certain specific monetary savings, and because the

legislature has not indicated its intent to preclude a private right of action by providing another mechanism for purchasers of generic prescription drugs to recover their monies, a cause of action should be implied under MCL 333.17555(2).

III. THE COURT OF APPEALS ERRED IN REFUSING TO INFER A CIVIL ACTION WHERE THE GENERIC DRUG PRICING LAW CREATES A DIRECT, BENEFICIAL RIGHT FOR PLAINTIFFS, BUT NO MEANS FOR PLAINTIFFS TO SECURE THAT RIGHT.

By mandating that the savings in cost of generic prescription drugs be passed to purchasers, there is no legitimate dispute that the legislature conferred a direct, beneficial right to purchasers of generic prescription drugs. The court of appeals had no difficulty reaching this obvious conclusion. See *Gurganus*, slip op at 9, Joint App. 556a (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").

Whether a civil action should be inferred under the Generic Drug Pricing Law comes down to this: Despite having enacted a statute granting purchasers and third-party payment sources of generic prescription drugs a new right to receive specific monetary savings, did the legislature nonetheless evidence an intent to deny them the ability to sue in court to secure those monetary savings by creating an administrative disciplinary subcommittee—almost twenty years after the Generic Drug Pricing Law was adopted—with the power to punish pharmacists who fail to pass on these savings? The answer is no. *Resolving legal disputes over property rights is a core judicial function that takes place in courts.* The legislature knows that. Absent the legislature creating an alternative mechanism for purchasers to recover the monetary savings to which they are legally entitled, it is unreasonable to infer that the legislature intended to deny purchasers the right to sue in court to recover those savings.

A. THE GENERIC DRUG PRICING LAW CREATES A DIRECT, BENEFICIAL RIGHT FOR PURCHASERS AND THIRD-PARTY PAYMENT SOURCES OF GENERIC PRESCRIPTION DRUGS OF WHICH PLAINTIFFS ARE MEMBERS.

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 purchase is covered by a third party pay contract." MCL 333.17755(2)(emphasis added). As the court of appeals recognized, this statute "by its plain language . . . creates a beneficial right in favor of a purchaser or payee of generic drugs." See *Gurganus*, slip op at 9, Joint App. 556a.

1. Where a Statute Confers a Beneficial Right on a Class of Persons, This Court Has Consistently Inferred a Civil Action to Effectuate the Legislature's Intent.

In *B F Farnell* the plaintiff, who provided materials for a building project, sued the project's general contractor under the Builder's Trust Fund Act for failing to pay for the materials. *Id.* at 553–54. Providing that the funds paid by an owner to a contractor must be held in trust, the act states:

> the building contract fund paid by the owner to a contractor . . . shall be . . . a trust fund for the benefit of the owners, contractors, laborers, subcontractors, or materialmen.

Id. at 554, n2 (quoting MCL 570.151).

This statute conferred a beneficial right on a class of persons of which the plaintiffs were members. However, it did not provide an express remedy to secure that right, instead providing only a penal sanction for its violation. Applying well-established common law principles, this Court held that, since the statute created a beneficial right in a defined class of persons, but no express civil remedy to enforce the right, a civil remedy must be inferred. *Id.* at 555 ("when a statute provides a beneficial right but no civil remedy for its securance, the common law on its own hook provides a remedy, thus fulfilling law's pledge of no wrong without a remedy").

This Court also inferred a civil remedy to secure a beneficial right conferred by a statute in *St John v General Motors Corp*, 308 Mich 333; 13 NW2d 840 (1944). There, the statute provided:

> Any employer of labor in this state, employing both males and females in the manufacture . . . of any article, who shall discriminate in any way in the payment of wages as between sexes or who shall pay any female engaged in the manufacture . . . of any article . . . a less wage . . . shall be guilty of a misdemeanor.

St John, 308 Mich at 336 (quoting Act 239, Public Acts 1919). Like *B F Farnell*, while the statute conferred a beneficial right on a defined class of persons, it expressly provided only a penal sanction. To effectuate the legislature's intent (that the beneficiaries of the statute receive what the legislature mandated they be given), this Court inferred a right of action. See *id.* ("If Plaintiff has suffered financial damage by reason of defendant's noncompliance with the mandatory provisions of the statute applicable to claimants' employment then civil action may be maintained").

In *B F Farnell* and *St John*, each statute conferred a direct, beneficial right on a defined class of persons, but only a penal sanction for its enforcement. And in each case, this Court inferred a right of action in order to effectuate the legislature's intent that those persons receive that property right. Where the legislature confers a new property right, it would defy common sense for the legislature to intend to deny the right to sue in court to secure that right—unless the legislature provided some other means to secure that right.

Focusing on legislative intent, courts in other jurisdictions likewise consistently infer a right of action where a statute confers a direct, beneficial right on a specific group of persons. See, e.g., *Starko Inc v Presbyterian Health Plan*, 276 P3d 252, 265 (NM Ct App 2011)(inferring right of action for violation of statute that conferred a property right on a defined class of persons); *Maimonides Med'l Ctr v 1st United Am Life Ins Co*, 941 NYS2d 447, 450 (NY Sup

2012)(inferring a right of action from statute providing that an insurer that fails to promptly pay a health care claim "shall be obligated to pay the health care provider or person submitting the claim the full amount of the claim plus interest at the statutorily authorized rate"); *Cannon v Univ of Chicago*, 441 US 677, 693, n13 (1979)(inferring a right of action where "the language of the statute explicitly confer[s] a right directly on a class of persons that included the plaintiff in the case").

The New Mexico Court of Appeals' recent decision in *Starko* is particularly instructive. In *Starko* a class of pharmacists sued the defendants for failing to reimburse them as required by a statute, which provides, "reimbursement by the [M]edicaid program [for dispensing prescription drugs] shall be limited to the wholesale cost of the lesser expensive therapeutic equivalent drug . . . plus a reasonable dispensing fee of at least . . . $3.65." *Starko*, 276 P3d at 265.

Focusing on whether a right of action should be inferred "based upon legislative intent," the court held that the pharmacists could sue to recover the monies wrongfully withheld from them, recognizing that "reimbursement . . . in accordance with the statute is a mandatory legislative 'command'" and the statute "contains rights-creating language that gives Plaintiffs a protected property right":

> [The statute] specifies the particular right attributable to Plaintiffs, an amount of money that is clearly defined within the statute and a direction from the Legislature that it be paid. This legislative command is not just an institutional policy and practice. . . . [T]he purpose of . . . [the statute] is directed to the reimbursement of individual providers, and the wrong to be remedied by the statute is insufficient reimbursement of individual Medicaid providers. *The provisions speak not only to the expenditure of funds but, more specifically, guarantee a property right in the dispensing fee and cost of the drug to dispensing pharmacists. Therefore, there is implicit legislative intent to create an enforceable right for . . . Plaintiffs.*

Id. at 267 (emphasis added).

Just as in *Starko*, there is implicit legislative intent to permit Plaintiffs to sue to recover their wrongfully retained property. By providing that "the pharmacist *shall pass on the savings in cost to the purchaser*," the Generic Drug Pricing Law creates a measurable *property* right—calculable in dollars and cents—that pharmacists must pay to purchasers of generic prescription drugs. To effectuate the legislature's intent, a right of action must be inferred.

2. Where a Statute Does Not Confer a Beneficial Right on a Class of Persons, This Court Has Not Inferred a Right of Action.

Where a statute does not create a direct, beneficial right for a class of persons, inferring a right of action would not effectuate the legislature's intent. Consistently, this Court refused to infer a right of action in the following cases, none of which involved statutes that conferred a direct, beneficial right in a class of persons.

For instance, in *Office Planning Group Inc v Baraga-Houghton-Keweenaw Child Development Board*, 472 Mich 479; 697 NW2d 871 (2005), this Court held that there was no private cause of action to enforce a provision of the federal Head Start Act, which provided:

> Each agency shall also provide for reasonable public access to information, including . . . reasonable public access to books and records of the agency.

Office Planning Group, 472 Mich at 490. There, the plaintiff corporation, which submitted an unsuccessful bid to provide office supplies to a Head Start agency, sued the agency seeking the disclosure of bids. But because the statute did not confer a direct, beneficial right on a class of persons, there was no legislative intent to infer a right of action. Moreover, this Court observed that "the stated purpose of the [Head Start Act] is to promote school readiness by providing services to low-income children and their families," and that "the act does not contemplate any benefit to private corporations such as plaintiff." *Id.* at 504 ("Where the intended beneficiaries are specifically identified, we are loath to create a private means of seeking redress under the act for nonbeneficiaries").

Here, in contrast, the Plaintiffs are the specifically identified intended beneficiaries of the Generic Drug Pricing Law. Permitting Plaintiffs to sue to recover their property that the legislature mandated they receive (and which the Defendant Pharmacies have misappropriated) effectuates the legislature's intent.

This Court has also refused to recognize a private right of action where the statute, rather than conferring a beneficial right on a class of persons, instead merely provided a directive to a government agency. See, e.g., *Grand Traverse Cnty v State of Michigan*, 450 Mich 457, 465 n9; 538 NW2d 1 (1995)(refusing to infer a right of action for violation of statute, providing that "[t]he legislature shall appropriate sufficient funds in order to fund . . . [certain percentages of] court operational expenses"); *South Haven v Van Buren Cnty Bd Comm'rs*, 478 Mich 518, 522 n1; 734 NW2d 533 (2007)(refusing to recognize a private action where statute provided: "the board of commissioners of any county . . . may submit to the electorate . . . the question of a tax levy for highway, road and street purposes . . . . Unless otherwise agreed . . . the revenues derived from the tax levy authorized by this section shall be allocated and distributed [according to a defined formula]").

Like this Court, the United States Supreme Court's decisions reflect the importance of rights-creating language for inferring a right of action. As the United States Supreme Court observed:

> Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, *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 the case.*

Cannon, 441 US at 693, n14 (emphasis added).

But where a statute does not contain rights-creating language, the United States Supreme Court (again, like this Court) refuses to infer a right of action. See, e.g., *Alexander v Sondoval*, 532 US 275, 288 (2001)("It is immediately clear that the 'rights-creating' language so critical to the Court's analysis in *Cannon* of § 601 . . . is completely absent from § 602. Whereas § 601 decrees that '[n]o person . . . shall . . . be subjected to discrimination,' . . . the text of § 602 provides that '[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]'")(alterations in original); *Thompson v Thompson*, 484 US 174, 183 (1988)("As for the language of the Act, it is addressed entirely to States and state courts. Unlike statutes that explicitly confer a right on a specified class of persons, the . . . [Act] is a mandate directed to state courts to respect the custody decrees of sister States").

3. The Generic Pricing Law Confers a Beneficial Right on a Defined Class of Persons.

The Generic Drug Pricing Law, by mandating that pharmacists pass on the savings in the cost of generic drugs to purchasers and third-party payment sources of those drugs, confers a direct, beneficial right on a defined class of persons. See *Cannon*, 441 US at 693, n13 ("the language of the statute explicitly confer[s] a right directly on a class of persons that included the plaintiff in the case"); *Starko*, 276 P3d at 267 (statute contained language that "gives Plaintiffs a protected property right in the reasonable dispensing fee"); *Wilder v Va Hosp Ass'n*, 496 US 498, 510 (1990)("There can be little doubt that health care providers are the intended beneficiaries of the Boren Amendment . . . [where the] provision establishes a system for reimbursement of providers and is phrased in terms benefiting health care providers"). Following over a hundred years' worth of this Court's precedents, a private right of action should be found here. See, e.g., *B F Farnell*, 377 Mich at 555; *Ferguson*, 82 Mich at 364.

This is consistent with the most recent decision by this Court finding an implied private right of action. See *Longstreth*, 423 Mich 675. There, this Court concluded that the plaintiff could maintain an action for a violation of a statute (which created a duty not recognized at the common law) because the person fell within the class of persons that the statute was intended to protect. See *id.* at 693.[6]

Just as the plaintiff in *Longstreth* fell within the class of persons protected by the statute at issue there, Plaintiffs fall directly within the class protected by MCL 333.17755(2). Just as this Court held the plaintiff in *Longstreth* could maintain a right of action for violation of the statute there, Plaintiffs are entitled to maintain an action for violation of MCL 333.17755(2) here. By breaching the legal duty created by MCL 333.17755(2), the Defendant Pharmacies have been unjustly enriched.[7]

B. THE LEGISLATURE DID NOT EXPRESS AN INTENT TO DENY PURCHASERS A CIVIL ACTION BY PERMITTING AN ADMINISTRATIVE DISCIPLINARY SUBCOMMITTEE TO SANCTION PHARMACISTS WHO VIOLATE THE PUBLIC HEALTH CODE.

The court of appeals believed that the existence of an administrative enforcement mechanism to punish pharmacists who violate the pharmacy code evidenced legislative intent to prohibit generic prescription drug purchasers from suing pharmacies to recover the money wrongfully withheld from them. The court of appeals was wrong.

---

[6] *Longstreth* and this case are analogous in that in each case the legislature created a new legal duty that did not exist at common law. See *Longstreth*, 423 Mich at 679. Once the legislature created the legal duty for pharmacists to pass on the savings in costs from generic drugs, the common law—through an unjust enrichment claim—provides the form of action to recover for breach of that duty.

[7] Procedurally, when inferring a private cause of action, the "civil remedy may be afforded through an existing . . . action or a new cause of action analogous to an existing . . . action." *Gardner*, 429 Mich at 301.

First, the mere existence of a punitive enforcement mechanism for violation of a statute cannot establish the legislature's intent to foreclose a private right of action. If that were the rule, a private right of action would never be inferred, for there is always some enforcement mechanism for violation of a statute. Indeed, a right of action would not have been inferred in either *B F Farnell*, *St. John's*, or *Ferguson*, for in those cases the statutes provided for enforcement through prosecution as a misdemeanor.[8]

Whether an administrative enforcement mechanism may indicate 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 creates a beneficial right for a particular class of persons. Where a statute creates a duty for the public, a punitive enforcement mechanism is exclusive, precluding an implied right of action. 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, particularly where the injured party is not entitled or not exclusively entitled, to the penalty imposed.*

Bolden, 239 Mich at 327 (emphasis added)(concluding that a penal sanction was not the exclusive remedy and did not preclude an implied right of action where the statute created an individual right); cf *Cannon*, 441 US at 693, n13 ("the Court has been especially reluctant to

[8] The same is true with the Generic Drug Pricing Law. When it was enacted in 1974, the statute provided for enforcement through prosecution as a misdemeanor. See 1974 PA 155, Sections 14a and 23.

imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large").

Plaintiffs acknowledge that there are situations where, although the legislature created a new beneficial right, it can reasonably be inferred that the legislature intended to foreclose a private right of action to secure that new right. For instance, a private right of action would not be inferred where the legislature created an administrative scheme tailored to allow the class of people granted a new statutory right to secure their statutory right. An example of this is in the area of unemployment benefits. The Michigan Employment Security Act created a right for certain persons whose employment was terminated to receive financial compensation for a specified period of time. See, e.g., MCL 421.27. However, the legislature also created an administrative procedure for how an unemployed person may secure this right. Under those circumstances, it would be improper for the court to infer a right of action to sue in circuit court to recover unemployment benefits, as the legislature created an administrative process specifically tailored to secure the right it created.

Here, almost twenty years *after* the Generic Drug Pricing Law was created, the legislature created a disciplinary system for the purpose of punishing pharmacists who violate the Public Health Code—not for the purpose of providing purchasers of generic prescription drugs a mechanism to secure their property right to recover the monetary savings in cost of those drugs.

Where the legislature created a direct, beneficial right for purchasers of generic prescription drugs to receive certain monetary savings, it is unreasonable to conclude that the legislature intended to prohibit purchasers from suing to secure that right simply because, twenty years later, it created a disciplinary system in which the purchasers cannot secure their monetary

savings. Such an interpretation defies common sense. See *Marquis v Hartford Accident Indem*, 444 Mich 638, 644; 513 NW2d 799 (1994)("In construing the statutory language at issue, we must seek to give effect to the intent of the Legislature . . . . *In this endeavor, a court should not abandon the canons of common sense*")(emphasis added); see also *Maimonides*, 941 NYS2d at 453 (rejecting argument that an administrator's "investigatory powers and . . . ability to levy fines . . . [was] evidence that the Legislature contemplated purely administrative enforcement").

The United States Supreme Court has recognized that the creation of a general administrative enforcement scheme does not evidence legislative intent to preclude a civil action to secure a beneficial right:

> True, this Court has sometimes refused to imply private rights of action where administrative or like remedies are expressly available. . . . But it 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. . . . Title IX not only does not provide such a mechanism, but the complaint procedure adopted by [the federal agency] does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant. . . . Furthermore, the agency may simply decide not to investigate—a decision that often will be based on a lack of enforcement resources, rather than on any conclusion of the merits of the complaint.

Cannon, 441 US at 707 n41.

The Defendant Pharmacies will argue that the public health code provides the potential "remedy" of restitution through the disciplinary subcommittee. But, they overlook the fact that purchasers have no *right* to recover their property from the disciplinary subcommittee through an order of restitution. 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 it believes 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 (effectively a plea bargain) with the violator. See *id.*; MCL 16237(4). The victim has no right to participate in the disciplinary process or challenge or appeal any disciplinary sanction imposed.

Victims have no right to participate in this process or challenge the outcome because the purpose of the disciplinary administrative process is to punish pharmacists for misconduct—not to secure for purchasers of generic prescription drugs the savings to which they are entitled under the law. That a disciplinary subcommittee may—in its discretion—enter an order of restitution in an administrative disciplinary proceeding in which a victim has no right to participate is not a *remedy* for purchasers of generic prescription drugs. As such, it cannot be inferred that the legislature intended to preclude purchasers from suing to recover the monetary savings the legislature mandated they receive.

Furthermore, inferring a civil action here will not interfere with the Board of Pharmacy or the disciplinary subcommittee. This case does not implicate technical issues of the practice of pharmacy, such as compounding of drugs, dispensing of narcotics, or evaluating drug interactions. While the professional experience of the pharmacy board may be useful for evaluating these types of issues, it is entirely irrelevant to compliance with the Generic Drug Pricing Law.

Finally, the timing of the legislature's creation of the administrative disciplinary process for pharmacists also demonstrates that the administrative disciplinary process was not created to provide a remedy for purchasers of generic prescription drugs who are overcharged. The Generic Drug Pricing Law was enacted in 1974, and the right to receive the savings in cost was expanded to third-party payment sources in 1976. See 1974 PA 155; 1976 PA 425. But it was not until 1994 that the legislature, "deciding to address the licensing and disciplining of all health

care professionals," created disciplinary subcommittees and "[a]dd[ed] certain penalties (fines, reprimands, community service or restitution, probation) for violations of . . . the health code." See House Legal Analysis for House Bill 4076 (1-25-94), Pls' Supp. App. 0151. By creating disciplinary subcommittees with the power to impose punitive sanctions almost twenty years after the Generic Pricing Statute was enacted, it cannot be inferred that the legislature intended to preclude purchasers of generic drugs the right to recover the monetary savings that belong to them.

The Generic Drug Pricing Law creates a direct, beneficial right for purchasers of generic prescription drugs. The administrative disciplinary process does not provide a right for purchasers to recover the monetary savings the legislature mandated purchasers receive. A right of action must be inferred here to honor the legislature's intent. The court of appeals' decision on this issue should be reversed.

RELIEF REQUESTED

Plaintiffs respectfully request that this Court reverse the court of appeals' determination that Plaintiffs lack an implied right of action under MCL 333.17755(2) and affirm the remainder of the court of appeals' opinion, such that Defendants' motions for summary disposition are denied for all counts other than Count II (Michigan Consumer Protection Act). The cases should be remanded to the Kent County Circuit Court for further proceedings consistent with the relief requested.

Respectfully submitted,

VARNUM LLP
Attorneys for Plaintiffs/Appellees/Cross-Appellants

Dated: November 13, 2013

By: _____

Perrin Rynders (P38221)
Bryan R. Walters (P58050)
Business Address and Telephone:
Bridgewater Place, P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000

6627922_2.DOC