

**STATE OF ARIZONA
COURT OF APPEALS
DIVISION ONE**

THOMAS E. BLANKENBAKER, D.C., an Arizona licensed chiropractic physician; **SHAWN WHERRY, D.C.**, an Arizona licensed chiropractic physician; **EMILIA INDOMENICO**, an Arizona resident,

Plaintiffs-Appellants,

v.

CHRISTINA URIAS, in her official capacity as Director of the Arizona Department of Insurance,

Defendant-Appellee.

Case No. 1 CA-CV 11-0626

Maricopa County Superior Court Case No. CV 2011-093099
Hon. Linda A. Akers

REPLY BRIEF

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Legal Argument

1. A.R.S. § 20-142(A) imposes a mandatory duty on the Director to enforce the anti-discrimination statute.

The Director of the Arizona Department of Insurance first argues there is no express legal provision or directive specifically mandating the Director to enforce the anti-discrimination statute, A.R.S. § 20-461(B), under any particular circumstance and against any particular person or entity.¹ That argument breaks down into three sub-arguments.

The *first sub-argument* is that nothing requires the Director to enforce the anti-discrimination statute. But that sub-argument ignores A.R.S. § 20-142(A)'s actual words. Those words state that the Director “shall enforce” Title 20’s provisions.² One of those provisions is the anti-discrimination statute. Thus, the Director has a duty to enforce that statute.

The only way to evade the mandatory duty is to construe “shall” in A.R.S. § 20-142(A) in some way that changes “shall” from a mandatory word into a permissive word. But the Arizona Legislature does not use “shall” as if it were a chameleon. On the contrary, the *Arizona Legislative Bill Drafting Manual* carefully explains that one of the “prime” legislative drafting concerns “is to preserve the distinction between mandatory and permissive

¹ *Answering Brief* at 6, § B (Jan. 26, 2012).

² A.R.S. § 20-142(A) (emphasis added).

directives.”³

According to the *Arizona Legislative Bill Drafting Manual*, “‘Shall’ is properly used to indicate that something is mandatory.”⁴ “‘May’ is the word the Legislature uses for something that is ‘permissive and confers a privilege or power.’”⁵ Therefore, normally “the use of ‘may’ implies discretion or permission.”⁶ The discretion, permission, and privilege that the Director seeks is found in the statutory word “may,” not in the actual statutory word used—which is “shall.” In A.R.S. § 20-142(A)’s phrase “shall enforce,” the “shall” imposes a duty that is mandatory.

The Director’s *second sub-argument* is that a particular circumstance must exist that would compel the Director to act. The 80-paragraph Verified Statutory Special-Action Complaint (“Complaint”) provided detailed factual allegations describing how Blue Cross had repeatedly discriminated against chiropractors and their patients. The alleged facts showed many direct violations of the insurance anti-discrimination statute.

The Director has not refuted *any* of the Complaint’s alleged facts. Indeed, by filing a motion to dismiss instead of a motion for summary

³ Arizona Legislative Council, *Arizona Legislative Bill Drafting Manual: 2011-2012* at § 5.31, page 96 (2011).

⁴ *Id.* at § 5.31, page 95.

⁵ *Id.*

⁶ *Id.* at § 5.31, page 95.

judgment, the Director has effectively admitted the Complaint’s “well-pleaded material allegations.”⁷ Those well-pleaded material allegations show that Blue Cross has been methodically violating the Arizona insurance anti-discrimination statute. Therefore, for purposes of this lawsuit and this appeal, particular circumstances do exist to compel the Director to perform her mandatory duty to enforce the anti-discrimination statute.

The *third sub-argument* is that there is no particular person or entity against which the Director must enforce the anti-discrimination statute. Since the Director’s motion to dismiss means that the facts alleged in the Complaint are taken as true, the particular entity that the Director must stop from further discrimination is Blue Cross.⁸

2. The Director argues that she must first determine if there is any discrimination before there can be any duty to act to end that discrimination. But by using a motion to dismiss, the Complaint’s alleged facts have established discrimination—conclusively.

The Director contends that she must first “analyze relevant facts and use her discretion and judgment to determine whether or not particular facts

⁷ See, e.g., *Aldabbagh v. Arizona Department of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989) (“When testing a motion to dismiss for failure to state a claim, well-pleaded material allegations of the complaint are taken as admitted, but conclusions of law or unwarranted deductions of fact are not.”).

⁸ See, e.g., *Coleman v. City of Mesa*, 228 Ariz. 240, 246 ¶ 6, 265 P.3d 422, 428 ¶ 6 (App. 2011) (When reviewing a motion to dismiss, Arizona appellate courts “accept as true all well-pleaded facts stated in the complaint and resolve inferences in favor of the plaintiff.”).

constitute ‘discrimination’ in violation” of the anti-discrimination statute.⁹ Although it seems improbable, given the repeated demands for corrective action, perhaps the Director did not truly understand Blue Cross’s misconduct before Plaintiffs filed this lawsuit. But when the Director filed the motion to dismiss, she could no longer deny the facts. The facts alleged in the Complaint were taken as true. That is, the “particular facts” proving Blue Cross’s discrimination were effectively established as true in all of their well-pleaded particulars. The Complaint alleged sufficient facts to inform the Director that Blue Cross was an insurance lawbreaker.

At trial, the Director could have challenged the existence of the alleged facts proving discrimination by Blue Cross. Or with even greater ease, the Director could have challenged those alleged facts through a summary-judgment motion’s detailed statement of facts. By attacking the Complaint with a motion to dismiss, however, the Director has effectively accepted as true the fact that Blue Cross had engaged in many actions that discriminated heavily against chiropractors and their patients. There is no need for the Director to dither. For purposes of this appeal, Blue Cross’s discrimination is a judicially established fact. The Director can no longer claim that she does not know or understand what Blue Cross has been doing.

⁹ *Answering Brief* at 10 (Jan. 26, 2012).

3. **The Director claims that she has discretion on how to enforce the anti-discrimination statute—and may thus do nothing at all. The Director does have discretion. But that discretion does not stretch to doing nothing in the face of admitted discriminatory acts. Plaintiffs seek a writ of mandamus to change inaction into action.**

The most challenging point that the Director makes is that mandamus will normally not be available to force a public official to perform an act if the public official has discretion on how to perform that act. That is true enough. But that is too simplistic a view of the duty and discretion of public officials. After all, that view overlooks the occasional need to force a recalcitrant public official to stop doing nothing.

When a public official has a duty to act in some manner, mandamus can compel the public official to act, even if the public official has discretion on precisely how to act.¹⁰ Here, the uncontested facts prove Blue Cross’s discriminatory acts. Even if mandamus is not available to force the Director to perform a particular act to counter or restrain Blue Cross’s discriminatory practices, mandamus is an available remedy to compel the exercise of discretion—to force the Director to take *some* action in response to Blue Cross’s violations of the anti-discrimination statute. In a situation like this, when a public official has decided to refrain from enforcing a statute, despite

¹⁰ *State Board of Barber Examiners v. Walker*, 67 Ariz. 156, 165, 192 P.2d 723, 729 (1948) (“But where as a matter of law he is bound to act in some manner, even though he have discretion as to how he shall act, he can be compelled to act.”).

having the time, resources, and duty to enforce it, mandamus may compel the exercise of the official's discretion and official judgment without designating exactly *how* the official is to exercise that discretion and judgment.¹¹ The vital point is that mandamus *is* available.¹²

In short, a public official cannot evade the reach of mandamus merely by reciting, as the Director has done, that she has discretion.¹³ Arizona courts have long recognized that mandamus is a remedy that courts can use to require a public body or public official "to exercise its discretion which the law makes it its duty to perform, even though it cannot require it to be exercised in any particular manner."¹⁴

The Director undoubtedly has several ways that she could enforce the

¹¹ *City of Phoenix ex rel. Backstein v. Superior Court*, 6 Ariz. App. 327, 329, 432 P.2d 471, 473 (1967) ("A writ of mandamus can . . . be used . . . to compel the respondent to act in a matter involving judgment and discretion. It is limited to compelling exercise of discretion or rendition of judgment, but may not designate how the discretion shall be exercised or the nature of the judgment to be rendered.").

¹² *Eastman v. Southworth*, 87 Ariz. 394, 398, 351 P.2d 992, 995 (1960) (In Arizona, "mandamus will not lie to compel an administrative board, inferior tribunal or public official to exercise its discretion in any particular manner, but the power of the court is limited to requiring such board, tribunal or official to exercise its discretion in whatever manner its judgment may dictate.").

¹³ *Kahn v. Thompson*, 185 Ariz. 408, 411, 916 P.2d 1124, 1127 (App. 1995) ("Mandamus may compel . . . the officer to act in a matter involving discretion, but it may not designate how that discretion shall be exercised.").

¹⁴ *Arizona State Highway Comm'n v. Superior Court*, 81 Ariz. 74, 77, 299 P.2d 783, 785 (1956).

anti-discrimination statute against Blue Cross. At a minimum, she could tell Blue Cross to cease its violations. Or she could take action against Blue cross's present right to conduct the insurance business in Arizona. Or she could arrange to institute litigation against Blue Cross. The exact way that the Director may take action once mandamus rouses her from her lethargy is not important. What is important is that the Director do something to fight the unfettered discriminatory acts that Blue Cross feels free to commit against chiropractors and their clients.

4. Mandamus is particularly important in this situation because only the Director can enforce the anti-discrimination statute.

If ever there was a case where mandamus was important, it is this one. After all, the Arizona Legislature has entrusted the Director of the Arizona Department of Insurance—and only the Director—with the sole right to enforce the anti-discrimination statute. A.R.S. § 20-461 specifies that nothing in its terms “is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state.”¹⁵ The statute’s “specific intent” is “to provide solely an administrative remedy to the director for any violation” of its terms, or of any administrative rule

¹⁵ A.R.S. § 20-461(D) (“ Nothing contained in this section is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state. It is, however, the specific intent of this section to provide solely an administrative remedy to the director for any violation of this section or rule related to this section.”).

related to the statute.

Therefore, mandamus is the only way that anyone can compel the Director to act—to exercise her discretion and enforce the anti-discrimination statute.¹⁶ In this particular case, the Director has failed to live up to the trust that the Legislature reposed in her. Instead of doing something—anything—to fight and end Blue Cross’s discrimination, the Director has done nothing. This is a situation of studious inaction and failure to exercise discretion where the time-honored remedy is mandamus.

Conclusion

The Legislature ordered the Director of the Arizona Department of Insurance to enforce the statutes contained in Title 20. The Director has the time and resources to enforce the anti-discrimination statute that Blue Cross has been violating. But despite Blue Cross’s admitted discrimination and despite repeated requests for corrective action, the Director has done nothing. Mandamus is a proper remedy to compel a public official to perform a duty that the public official has failed to perform, even if the duty is discretionary, and even if the particular manner of action is up to the public official.

¹⁶ See *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930) (Mandamus “is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.”).

The trial court should have let the case move forward, should have given Plaintiffs a chance to prove the facts, and should have considered if those facts established a basis for ordering the Director to do what the Legislature ordered her to do—enforce Arizona’s Title 20 insurance statutes. Plaintiffs therefore respectfully ask the Court to vacate the dismissal of their Complaint and to remand this case for further proceedings on its merits.

DATED this 21st day of February, 2012.

KNAPP & ROBERTS, P.C.

/s/ David L. Abney, Esq.
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Attorney for Plaintiffs-Appellants

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) has 2,604 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Certificate of Service

On this date, the above-signing lawyer e-filed this document with the Office of the Clerk of the Court, Division One, Arizona Court of Appeals, and mailed two copies of it to the following:

- Thomas C. Horne, Esq. and Alyse C. Meislik, **OFFICE OF THE ARIZONA ATTORNEY GENERAL**, 1275 W. Washington St., Phoenix, AZ 85007, (602) 542-7727, Fax: (602) 542-4377, Attorneys for Defendant-Appellee.

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