

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMAS E. BLANKENBAKER, et al.,

Plaintiff,

v.

CHRISTINA URIAS,

Defendant.

No. CV 2011-093099

Phoenix, Arizona

July 21, 2011

9:00 a.m.

BEFORE THE HONORABLE LINDA A. AKERS

TRANSCRIPT OF PROCEEDINGS

Oral Argument

Proceedings recorded by electronic sound recording; transcript produced by AVTranz.

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I N D E X

July 21, 2011

PLAINTIFF'S WITNESSES

DIRECT

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None

DEFENDANT'S WITNESSES

DIRECT

CROSS

REDIRECT

RECROSS

VD

None

M I S C E L L A N E O U S

PAGE

Taken under advisement

16

APPEARANCES

July 21, 2011

Judge: Linda A. Akers

For the Plaintiff:

David L. Abney

Witnesses:

None

For the Defendant:

Alyse Cheryl Meislik

Witnesses:

None

Also Appearing:

Shawn Wherry

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Phoenix, Arizona

July 21, 2011

(The Honorable Linda A. Akers Presiding)

ORAL ARGUMENT:

THE COURT: Good morning, Counsel.

MR. ABNEY: Good morning, Your Honor.

THE COURT: This is CV 2011-093099, Thomas E. Blankenbaker v. Christina Urias. Did I pronounce it correctly?

MS. MEISLIK: Urias.

THE COURT: All right. I'm from Texas originally and so I have to ask if I've put the emphasis on the wrong syllable, so let me -- correct me if I have mispronounced someone's name.

Let's get appearances for the record and we'll start with Mr. Blankenbaker's counsel. Mr. Abney?

MR. ABNEY: David Abney appearing for Thomas Blankenbaker, who's on my left, and Shawn Wherry, who is seated in the audience.

THE COURT: All right. Thank you very much.

MS. MEISLIK: Alyse Meislik appearing on behalf of the director of insurance.

THE COURT: All right. Thank you all.

Please be seated.

This is the time set for oral argument on Defendant's motion to dismiss. Ms. Meislik, anything to add to your motion

1 for failure to state a claim.

2 MS. MEISLIK: Your Honor, the director has nothing
3 further to add to the motion. It simply would like to
4 emphasize that mandamus is a very extreme remedy, and since
5 it's such an extraordinary remedy it really -- this is an
6 improper situation for it to be used.

7 No further, nothing further, unless you have anything
8 else you would like to know about?

9 THE COURT: I do not.

10 MS. MEISLIK: Okay. Thank you.

11 THE COURT: Thank you very much.

12 And Mr. Abney?

13 MR. ABNEY: Yes, Your Honor.

14 THE COURT: Anything to add to your response?

15 MR. ABNEY: I do, Your Honor.

16 THE COURT: All right. Please proceed.

17 MR. ABNEY: From the Government's viewpoint, mandamus
18 is viewed as an extraordinary extreme thing. "How dare you
19 come to us and tell us that we should be doing something that
20 we're not doing?"

21 But that's not so extreme. That's what Arizona was
22 built on actually. The rule in Arizona has always been the
23 liability is the rule and immunity the exception.

24 THE COURT: Mr. Abney, I see here that you requested
25 a court reporter. Do you wish to have a reporter present?

1 MR. ABNEY: Are you recording electronically?

2 THE COURT: We are.

3 MR. ABNEY: Electronic's fine. I can have -- I can
4 have that transcribed.

5 THE COURT: All right.

6 I had just noticed that, and if in fact in the future
7 you need a court reporter, please let me know that.

8 MR. ABNEY: No, I've -- there is actually a service
9 right across the parking lot from my office, AVTranz, and
10 they've been exceptionally good, in fact as good as any court
11 reporter, so I would prefer actually the recording.

12 THE COURT: Okay. I hope my court reporter's not
13 listening.

14 MR. ABNEY: They use court reporters, too, I think.

15 THE COURT: Okay. Thank you.

16 Please proceed.

17 MR. ABNEY: But the only way sometimes to get the
18 Government to do what it's supposed to do is to come into court
19 and require the judiciary to weigh the situation, examine the
20 facts, and come up with a suitable remedy if the circumstances
21 permit.

22 Now here we -- there is a specific statute that say,
23 The director shall enforce the provisions of Title 20." That's
24 A.R.S. § 20-142(a), "shall enforce." It's very direct, very
25 clear in this context, although I know from previous cases

1 "shall" sometimes is a slippery word. In this context it
2 simply means "must."

3 There's been no showing by the director that she has
4 -- lacks the resources or the time to devote a little bit of
5 attention to this problem, no factual showing at all that she's
6 so swamped with work that she can't take an hour to examine the
7 facts and start some sort of an action.

8 THE COURT: Counsel, let me ask you, why isn't this
9 controlled by a contract, a contract between Blue Cross Blue
10 Shield and their insured?

11 MR. ABNEY: Well, there may be a separate action that
12 would arise for some sort of contract. The trouble is that
13 Blue Cross Blue Shield writes its contracts. It has enormous
14 bargaining power, and it presents these contracts on a take-it-
15 or-leave-it basis, and people literally either have to abide by
16 all the terms of the contract or simply don't get the health
17 services that they need.

18 THE COURT: Or go to another insurer.

19 MR. ABNEY: If that's available. Sometimes it's not.

20 If you're working for a company, they're providing
21 you with insurance through Blue Cross Blue Shield, you're
22 pretty much stuck unless you want to pay 500 or \$1,000 a month
23 or more to get your own insurance, so for most people the
24 economic reality is that the enormous companies like Blue Cross
25 Blue Shield write these contracts and enforce them any way they

1 want.

2 The check on that is really the director of
3 insurance. And it's her duty to make sure that they are not
4 unfair practices, and specifically there is a statute that
5 deals with this particular problem, and this is the one we're
6 here on today, A.R.S. § 20-461(b). When you cut through the
7 legislative gobbledygook it's pretty straightforward.

8 If you're getting -- there can't be discrimination
9 among physicians. If you are receiving care, if you have a
10 medical condition or a chiropractic condition, a condition that
11 can be treated by a medical doctor, an osteopathic doctor, a
12 chiropractic doctor, then the insurance company is supposed to
13 pay for the services provided by that physician without
14 discrimination among types of medical practices, osteopathic
15 practices, chiropractic practices. It's an anti-discrimination
16 provision.

17 So, and here the complaint alleged in detail, and I
18 went through that in the response in detail, made sure I cited
19 every part of the complaint to go through all this and show how
20 Blue Cross Blue Shield is indeed discriminating. There's
21 really no question if you accept the facts of the complaint as
22 being true.

23 And we plead -- I've pleaded them very carefully in
24 the complaint in far more detail than the notice pleading
25 requires exactly how Blue Cross Blue Shield is indeed

1 discriminating. It's not authorizing proper -- the same kind
2 of level of payments. It's discriminating in a number of ways,
3 all of which are set out in great detail, none of which of
4 course the State can contest at this stage.

5 And it's not as if I came into court and said, "Oh,
6 they're discriminating," one paragraph, "we're done, I need to
7 get some relief." We laid it out paragraph after paragraph in
8 great detail, in great and clear, I hope, direct English
9 exactly what's happening. And that needs to be taken as true
10 for the purposes of this proceeding.

11 There are three main arguments that are brought up
12 against us in this case. The first argument that there's no
13 requirement to take action, well, the statute specifically
14 says, 20-142(a), "The director shall enforce the provisions."

15 That doesn't mean any particular provision that the
16 director wants to enforce or not enforce. It's all -- "shall
17 enforce the provisions."

18 There might be circumstances where the director is so
19 swamped with work, I suppose, that she could legitimately come
20 into court and say, "I work 80 hours a week. I can't possibly
21 deal with this problem." They haven't done that. They haven't
22 brought a motion for summary judgment saying --

23 THE COURT: So you're asking the director of
24 insurance to, in place of your clients, then negotiate an
25 insurance policy?

1 MR. ABNEY: No, not at all.

2 The -- I'm asking the director of insurance to do
3 what they're saying, that --

4 THE COURT: To modify a contract?

5 MR. ABNEY: No, not at all.

6 THE COURT: Okay.

7 MR. ABNEY: And in fact of course as a matter of
8 Arizona law, the contract includes all of the Arizona insurance
9 statutes.

10 We're not trying to modify the contract. We're
11 trying to force Blue Cross Blue Shield -- to get the director
12 to force Blue Cross Blue Shield to do what it's supposed to do;
13 stop discriminating.

14 THE COURT: So why don't you sue Blue Cross Blue
15 Shield?

16 MR. ABNEY: Well that's not this case, Your Honor.

17 And I'm not sure that these clients -- well first of
18 all the chiropractors wouldn't have any standing to do that
19 because they are not in a contract, a health -- a health
20 insurance contract with Blue Cross Blue Shield.

21 And the individual person can't really do that
22 because Blue Cross -- she signed on to the contract with Blue
23 Cross Blue Shield, and it's got these provisions in it.

24 And most --

25 THE COURT: Which brings me back to my first

1 question. Why isn't this governed by contract law?

2 MR. ABNEY: Well, more important than anything else,
3 if you take a look at -- and I'll read, I'll read this for you.
4 A.R.S. § 20-461 sub part D. That's A.R.S. § 20-461 sub part D.
5 And I think that most directly answers the question, other than
6 the fact that the client really can't do it. Quote:

7 "Nothing contained in this section is intended to
8 provide any private right or cause of action to or on
9 behalf of any insured or uninsured resident or non-
10 resident of this state."

11 There's no private cause of action.

12 I can't -- the client can't come in and say, "You're
13 violating A.R.S. § 20-461(b). Blue Cross Blue Shield, knock it
14 off," because there's no private cause of action.

15 The only person that could do that is the director.
16 The director, it says, the next sentence, the last sentence:

17 "It is, however, the specific intent of this section
18 to provide solely an administrative remedy to the director,"
19 solely an administrative remedy to the director, "for any
20 violation of this section or a rule related to this section."

21 The only person in the State of Arizona that can
22 enforce these provisions is the director. And the director
23 says, "Won't do it."

24 All right. The first argument why is there's no
25 requirement to take action. That is false. A.R.S. § 20-142

1 sub part A specifically says, "Shall enforce."

2 The second argument is basically, "What
3 discrimination?" What discrimination could there possibly be?
4 "Are you trying to force us," the director, "are you trying to
5 force the director to come to a conclusion that there has been
6 discrimination? What discrimination?"

7 That ignores the fact that we are here under a motion
8 to dismiss. If this had been a motion for summary judgment or
9 a trial, the director could come in, could say, "Look, these
10 facts show no discrimination at all." And the director didn't
11 do that. The director could not possibly do that.

12 The facts of the complaint are not just facts we
13 pulled out of air and put on a piece of paper. Those are
14 reality. This is what's happening. Blue Cross Blue Shield is
15 discriminating against chiropractic physicians, up and down the
16 line, from co-pays, to the payments that it makes, to the
17 number of treatments that are authorized. Every way that they
18 can do it Blue Cross and Blue Shield is discriminating against
19 chiropractic physicians. So there is discrimination.

20 That really is a, as a matter of fact at this stage
21 in the proceedings and the motion to dismiss, under the well
22 pleaded allegations of the complaint, there is discrimination.

23 The third argument is not --

24 THE COURT: Counsel, you need to wrap it up. Your
25 time is running.

1 MR. ABNEY: Yes.

2 THE COURT: You have 15 minutes.

3 MR. ABNEY: The third argument is not articulated
4 very well, but it's basically, "Well even assuming that we have
5 the duty, even assuming that there is discrimination, what are
6 we supposed to do about it?"

7 Well, if you look at the reply, page 6, lines 13 to
8 15, and the reply at page 7, line 23. They know what to do.
9 They're saying, "Well, whether or not to initiate an
10 enforcement action, that's up to the director." And they
11 repeat this enforcement. She knows what to do. Institute an
12 enforcement action against Blue Cross Blue Shield.

13 At a minimum, simply tell Blue Cross Blue Shield to
14 knock it off. You are discriminating; stop.

15 That might be enough to take care of this whole
16 problem because public opinion will then force, I hope, force
17 Blue Cross Blue Shield to do the right thing.

18 But they know what to do. They say, "Institute an
19 enforcement action or not, that's my discretion."

20 Well, you're not doing anything at this point, so our
21 plea to the Court is to say, "You have the power to do this.
22 The complaint says there's discrimination. I must deny the
23 motion to dismiss because you can enforce this provision."

24 THE COURT: All right. Thank you, sir.

25 MR. ABNEY: Thank you, Your Honor.

1 THE COURT: Anything in response or reply?

2 MS. MEISLIK: Yes, Your Honor.

3 Your Honor, the Defendant, or the Plaintiff says that
4 20 -- what was it? 20-142(a) requires that the director shall
5 enforce the provisions of this title.

6 This statute is almost identical to the statute that
7 was evaluated by the Sensing v. Harris court, and in that court
8 they said:

9 "That that is simply a general provision, and that is
10 not enough for an order of mandamus. It is not
11 something that specifically imposes a mandatory duty
12 to act under a clearly defined set of circumstances."

13 There are many, many statutes in Title 20, and there
14 is no way that the director would ever have the resources,
15 time, ability --

16 THE COURT: So is this really a resource argument?

17 MS. MEISLIK: No, it's not a resource argument
18 because the director did actually review this situation. She
19 has actually looked at the Plaintiff's complaint. She has gone
20 through the process, and it's not an issue that she is swamped
21 with too much work, but she actually made a determination that
22 Blue Cross Blue Shield is not in violation of 20-461.

23 And she is the only person who actually can make this
24 determination. And all that Plaintiffs are doing here is
25 asking this Court to second guess the department -- the

1 director's decision that she actually made. They're wanting to
2 second guess her determination.

3 The director has made a reasonable exercise of her
4 discretion. She has reviewed the facts, and it is improper to
5 use mandamus for this purpose. We should not be examining the
6 merits of her determination.

7 THE COURT: Did she put that in writing?

8 (Client and Counsel Confer)

9 MS. MEISLIK: I believe it was in writing. I believe
10 she said that she looked into the complaints, and she probably
11 informed the Plaintiffs that she did not find a violation.

12 THE COURT: But that's something different.
13 Informed, what -- did she put that in writing? Is there a
14 letter somewhere that said she examined this issue?

15 MS. MEISLIK: Yes, there probably is a written letter
16 to the Plaintiff saying that she does not find a violation, and
17 that she is -- does not believe that there has been -- that
18 Blue Cross Blue Shield is violating 461(b), so she does not see
19 that as appropriate to take action.

20 THE COURT: Probably is not good enough. Is there a
21 letter?

22 MR. ABNEY: If I may, Your Honor? I never got one.

23 THE COURT: All right.

24 MS. MEISLIK: There may be similar complaints, and
25 they may have written letters to the plaintiff saying this, but

1 the director does not have a duty to even write a letter when
2 she makes this determination. The director does not have a
3 duty to investigate this.

4 The director did investigate this. The director did
5 make this determination. But she has no duty. There's no
6 requirement in the statutes, in the law, that she has to do
7 anything here. There is nothing that requires her to take
8 action even if they did violate 461.

9 THE COURT: All right.

10 Thank you, Counsel.

11 I'll take this matter under advisement.

12 MR. ABNEY: Thank you, Your Honor. It was a
13 pleasure.

14 THE COURT: Thank you.

15 (Proceedings concluded at 9:15 a.m.)

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1 STATE OF ARIZONA)
2) SS:
3 COUNTY OF MARICOPA)

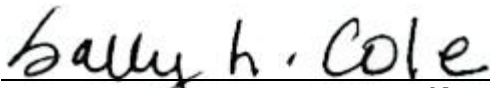
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5 certify that the foregoing pages 1 - 16 constitutes a full,
6 true and accurate transcript of proceedings had in the matter
7 of THOMAS E. BLANKENBAKER, et al. v. CHRISTINA URIAS, heard on
8 July 21, 2011; as digitally recorded; before the Court of The
9 Honorable Linda A. Akers.

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SALLY L. COLE, Transcriber

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15 SIGNED and dated August 12, 2011.

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