

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH NEWMAN and JULIA NEWMAN,

Plaintiffs-Appellants,

v

BLUE CROSS & BLUE SHIELD OF
MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

March 20, 2007

Nos. 266627; 269983

Oakland Circuit Court

LC No. 2003-052761-CZ

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In Docket No. 266627, plaintiffs appeal by leave granted from the trial court's order affirming the administrative decision of the Commissioner of the Office of Financial and Insurance Services ("OFIS"), which upheld defendant's decision to deny health care benefits to plaintiffs. In Docket No. 269983, plaintiffs appeal as of right from the trial court's order granting defendant summary disposition of their remaining claims under MCR 2.116(C)(7) and (10). We affirm.

A trial court's review of the commissioner's decision in a case pursued under the Patient's Right to Independent Review Act ("PRIRA"), MCL 550.1901 *et seq.*, is limited to determining whether the decision was authorized by law. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 455; 688 NW2d 523 (2004); *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 490-491; 586 NW2d 563 (1998). An agency's decision is not authorized by law if it "is in violation of a statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious." *Id.* at 488 (citation omitted; alteration in original). On appeal, "this Court reviews the administrative decision in the same manner as the circuit court," i.e., "to determine whether it was 'authorized by law.'" *Ross v Blue Care Network of Michigan*, 271 Mich App 358, 370-371; 722 NW2d 223 (2006), oral argument gtd on whether to grant lv ___ Mich ___ (No. 131711, dated 12/8/2006).

Plaintiffs first argue that PRIRA is unconstitutional because it does not allow covered persons who request review of a denied claim the right to receive copies of the insurance company's submission to the commissioner, thereby depriving them of procedural due process. Plaintiffs challenged the constitutionality of PRIRA in their response to defendant's motion for

summary disposition. As the trial court recognized, however, the constitutionality of PRIRA was relevant only to review of the commissioner's decision, and the court had already affirmed the commissioner's decision and plaintiffs had already filed an application for leave to appeal with respect to that decision, before plaintiffs raised their constitutional challenge. Therefore, the trial court did not consider the issue. Because plaintiffs did not timely challenge the constitutionality of PRIRA as part of their earlier challenge to the commissioner's decision, we consider this issue unpreserved. In *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234-235; 507 NW2d 422 (1993), our Supreme Court stated:

The board first raised its constitutional claim in its appeal to this Court; the issue was neither presented to nor evaluated either by the trial court or the Court of Appeals. Issues raised for the first time on appeal are not ordinarily subject to review. In addition, there exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case. On the basis of the arguments articulated above, we refuse to consider the board's constitutional argument. [Citation omitted.]¹

We likewise decline to address plaintiffs' untimely and thus unpreserved constitutional claim.² Moreover, assuming a procedural due process problem relative to PRIRA and that plaintiffs were deprived of pertinent documentation or information, there was no prejudice to plaintiffs where, for the reasons discussed below, there is no coverage afforded under the policy given the circumstances and no indication whatsoever that there exists information and documents that would in any way change that determination. Again, we will not reach constitutional issues that are not necessary to resolve a case. *Booth, supra* at 234.

Plaintiffs also argue that the trial court erred in affirming the commissioner's decision denying coverage. We disagree.

An agency's decision "made upon unlawful procedures resulting in material prejudice" is unauthorized by law and may be set aside. *English, supra* at 455. However, plaintiffs' argument that the commissioner's decision was based upon unlawful procedures is essentially the same as

¹ Absent exceptional circumstances, our Supreme Court "has repeatedly declined to consider arguments not presented at a lower level, including those related to constitutional claims." *Booth, supra* at 234 n 23; see also *Lantz v Southfield City Clerk*, 245 Mich App 621, 627 n 4; 628 NW2d 583 (2001).

² Plaintiffs filed, as "supplemental authority" on a separate constitutional argument, a copy of our Supreme Court's order in *Ross, supra*, in which the Court granted oral argument with respect to whether leave should be granted. Plaintiffs contend that PRIRA effects an unconstitutional delegation of authority to a private party. We first note that the Supreme Court's order does not stand for such a proposition given that it simply permits argument on the issue in the context of a future decision regarding whether to grant leave. Moreover, contrary to MCR 7.212(F)(1), plaintiffs' supplemental authority raises a new issue, which is also unpreserved. Therefore, we shall not substantively consider the argument.

their constitutional argument, i.e., that the procedures prescribed by PRIRA violate procedural due process. For the reasons previously indicated, plaintiffs' argument fails.

Plaintiffs also argue that the commissioner's decision was arbitrary and capricious because there was no factual support for the finding that there was no medical emergency, or for the finding that the patient was admitted for substance abuse treatment rather than mental health treatment.

An agency's decision that is "arbitrary and capricious" is unauthorized by law and may be set aside. *English, supra* at 455. But where, as here, a contested hearing is not required, courts are precluded from reviewing the question whether the agency's decision is supported by competent, material, and substantial evidence on the record. See *Northwestern, supra* at 487-491.³ Therefore, this Court may not consider plaintiffs' arguments that there is no factual support for the commissioner's finding that there was no medical emergency, or for the alleged finding that the patient was treated for substance abuse rather than a personality disorder.

For their last issue, plaintiffs argue that the trial court erred in granting defendant summary disposition of their remaining claims. We disagree.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

We first note that plaintiffs have failed to address the basis of the trial court's decision to grant summary disposition to defendant on three of plaintiffs' claims. In particular, plaintiffs fail to address the trial court's holding that Michigan law does not recognize independent causes of action for violation of the implied covenant of good faith and fair dealing, or for equitable estoppel. Plaintiffs also fail to address the trial court's holding that they may not maintain a claim for intentional infliction of emotional distress for violation of a commercial contract, such as a contract of insurance. Because plaintiffs do not address these bases of the trial court's decision, issues that necessarily must be reached, they are not entitled to appellate relief with respect to these three claims. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). The only remaining claims are plaintiffs' claims for breach of contract and waiver.

We additionally note that after this case was removed to federal court, it was remanded to state court for further proceedings on plaintiffs' original complaint, not the amended complaint filed in federal court. Plaintiffs did not add a claim under the Mental Health Parity Act ("MHPA"), 29 USC 1185a, on remand in state court. Therefore, the trial court did not err by

³ The *Ross* panel stated that, because PRIRA does not provide for a hearing, it is not proper for the circuit court or this Court to review the evidentiary support for the decision rendered by the OFIS commissioner. *Ross, supra* at 369.

failing to address plaintiffs' argument that defendant's monetary limitations on lifetime mental health coverage violate the MHPA.

Next, plaintiffs argue that the trial court erred in finding that their breach of contract and waiver claims were barred by collateral estoppel and the doctrine of election of remedies. Assuming that collateral estoppel and the doctrine of election of remedies did not bar plaintiffs' claims, the trial court nonetheless correctly found that plaintiffs failed to show a question of material fact that precluded summary disposition of their claims.

We will assume for the sake of argument that the documentary evidence shows that a question of fact existed concerning whether the patient was admitted to the clinic for substance abuse treatment, for mental health treatment, or for both. However, substance abuse coverage is clearly precluded in this case due to the clinic's nonparticipating status and the lack of prior authorization. Thus, to avoid summary disposition, plaintiffs had to show that a question of fact existed concerning whether the admission was for mental health treatment rather than substance abuse, *and also* that a medical emergency existed, such that defendant was required to provide coverage under the policy despite the clinic's nonparticipating status. Because plaintiffs failed to submit any admissible evidence, such as affidavits, depositions, or other documentary evidence tending to show that a medical emergency existed, summary disposition was properly granted to defendant. Merely stating that the patient attempted suicide a week earlier is not enough to show that a medical emergency existed at the time the medical services were rendered.⁴

Plaintiffs also argue that defendant, by failing to answer their requests for admissions, is deemed to have admitted that a medical emergency existed. We first note that two of the requests for admissions were submitted by plaintiffs while the case was in federal court; however, the case was removed from federal court after it was determined that ERISA was not implicated. We are not prepared to find that failure to respond to requests for admissions in a federal court, which court ultimately lacked jurisdiction, provides a sound basis to deem the requests as being admitted under the Michigan Court Rules. We also note that, in the context of an appeal from an administrative decision under ERISA, the court's review is limited to the agency's record. See *Wilkins v Baptist Healthcare Sys, Inc*, 150 F3d 609, 615-616 (CA 6, 1998). The same is true in appeals from administrative decisions under PRIRA. *Northwestern, supra* at 496 (holding that a covered person is generally not entitled to conduct discovery). That being said, we are now addressing standard causes of action alleged to be outside the administrative appeal, and plaintiffs did again submit requests for admissions once the case was returned to the state court. However, defendant timely challenged the requests for admissions, thereby preventing its failure to answer the requests from being deemed an admission. MCR 2.312(B)(1). Thus, the trial court did not err in not considering the unanswered requests for admissions. The breach of contract claim was properly dismissed.

⁴ We note that the patient traveled to Kansas and received treatment at the out-of-state clinic for a three-month period.

The analysis is the same for plaintiffs' waiver claim. Plaintiffs failed to submit any admissible evidence in support of their claim that defendant waived its right to rely on the contract terms expressed in the booklet and the SAT-2 rider. Plaintiffs' unanswered requests for admissions may not be considered. Because plaintiffs failed to show that a question of material fact existed concerning their waiver claim, the trial court properly granted summary disposition to defendant.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly