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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, By JOSH SHAPIRO, Attorney General, *et al.*;	:	
Petitioners,	:	
v.	:	No. 334 M.D. 2014
UPMC, A Nonprofit Corp., *et al.*;	:	
Respondents.	:	

THE COMMONWEALTH'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM JUNE 10-11 HEARING

The Commonwealth of Pennsylvania, by Attorney General Josh Shapiro as *parens patriae*, proposes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. UPMC and Highmark are 501(c)(3) institutions. As charitable entities, their missions are to provide access to high quality affordable healthcare. Hearing Transcript (H.T.) 161:4-9; 160:3-7 (VanKirk); 271:2-18 (McGough).

2. Highmark and UPMC had a longstanding contractual agreement that was to end at the end of 2012. H.T. 32:5-6 Testimony of James Donahue (Donahue); 164:4 Testimony of Thomas VanKirk (VanKirk); 175:18-20 (VanKirk); 233:16 Testimony of Thomas McGough (McGough).

3. Following a mediation, that contract was extended through the end of 2014, after which UPMC planned to end its contractual relationship with

Highmark. H.T. 36:21-24 (Donahue); 165:5-7, 175:20-21 (VanKirk); 232:17-19 (McGough).

4. The Attorney General, Governor, and others were concerned that, when the contract ended in 2014, the citizens of western Pennsylvania would be harmed "because people with Highmark insurance wouldn't have access to the various [high-quality] UPMC products and facilities" that dominated that area. H.T. 33:11-17 (Donahue).

5. The Attorney General was concerned UPMC was acting contrary to the public interest and violating its charitable mission. H.T. 42:5-8, 11-14 (Donahue).

6. The Attorney General particularly wanted "to provide vulnerable populations, a five year transition period where they remain protected . . . ." H.T. 139:5-8 (Donahue). *See also*, H.T. 162:5-163:4-12 (VanKirk).

7. These vulnerable populations included seniors, CHIP subscribers, and oncology patients. H.T. 162:8-12 (VanKirk).

8. In late May or early June 2014, the Governor created the Patients First Leadership Task Force, to which he appointed the Secretary of Health, the Insurance Commissioner, and invited the Attorney General to participate. H.T. 42:25-43:7 (Donahue); 163:13-16 (VanKirk); 252:11-20 (McGough).

9. The Task Force sought to negotiate "some sort of resolution [between UPMC and Highmark] that would ensure that people in western Pennsylvania had access to appropriate healthcare . . . at an affordable cost." H.T. 43:9-13 (Donahue).

10. The parties first sought to negotiate term sheets, laying out the "core principles" that would "form the basis of an agreement." H.T. 49:16-18, 21-23 (Donahue). *See also*, 173:4-12 (VanKirk); 268:4-8 (McGough).

11. The term sheets were not meant to include every term that would appear in the final agreement. H.T. 49:16-18, 21-23 (Donahue); 173:17-21 (VanKirk); 273:5-14 (McGough).

12. On June 11, 2014, the Office of Attorney General (OAG) circulated the first draft term sheets to UPMC and Highmark. H.T. 54:18-20 (Donahue); 174:1-6 (VanKirk); Ex. 1, Cmwlth.000001-000012.

13. The term sheets were intended to be "mirror images," reflecting the parties' respective obligations to one another. H.T. 50:17-22 (Donahue); 168:2-10 (VanKirk).

14. The original term sheets contained an extension provision – which UPMC admitted applied only to extension of arbitration applicable to its underlying contracts with Highmark, not the entire agreement – and no termination date. H.T. 330:23-331:4 (McGough); Ex. 1, Cmwlth.000001-000012.

15. Between June 11 and June 24, 2014, the parties exchanged numerous drafts of term sheets, making "changes to virtually every paragraph." H.T. 60:12-15, 61:24-25 (Donahue). *See also*, Ex. 1, Cmwlth.000013-000102.

16. Among these exchanges, on June 22, 2014, UPMC, sent a draft term sheet to the OAG with Mr. McGough's extensive handwritten proposed revisions, notes, deletions, and interlineations, including a proposed deletion of the provision for extending binding arbitration; by this time, the draft document reflected a term of five years. 265:23-267:5; Ex. 1, Cmwlth.000018-000024.

17. UPMC signed the term sheet on June 24, 2014, Ex. 1, Cmwlth.000059-000065, and Highmark signed on June 25. Ex. 1, Cmwlth.000080a-000080g.

18. On June 25, 2014, the OAG executed term sheets memorializing agreements in principle and reserving items for future negotiation. Ex. 1, Cmwlth.000088-000094.

19. Once the parties agreed on the core terms, they set to convert the term sheets to Consent Decrees that would be enforceable by the Court. H.T. 62:5-8 (Donahue); 170:24-171:5 (McGough); 274:18-25, 324:4-5 (McGough).

20. On June 25, 2014, the OAG sent the initial draft Consent Decree to UPMC; among other changes from the term sheets including the addition of "Definitions," Binding Arbitration," "Binding on Successors and Assigns," "Legal

Exposure," "Notices," "Averment of Truth," "Retention of Jurisdiction," "No Admission of Liability," and "Counterparts," the Consent Decrees included a "Modification" provision. Ex. 2, Cmwlth.000107-000132.

21. The Modification Provision stated that if any party believes "modification of this Consent Decree" is in the public interest, notice should be given and the parties should attempt to agree; if an agreement cannot be reached, the party seeking modification can petition the Commonwealth Court and bears the "burden of persuasion" that modification is in the public interest. Ex. 2, Cmwlth.000128.

22. The OAG took the language for the Modification Provision from prior court-ordered consent degrees in other cases to which UPMC had previously agreed. H.T. 65:15-17, 66:5-15, 67:2-16, 79:6-80:2 (Donahue); Ex. 3, Cmwlth.000260, Ex. 4, Cmwlth.000291, Ex. 5, Cmwlth.000319-000320.

23. Further vigorous negotiation followed during which UPMC discussed and edited multiple drafts and terms of the Consent Decree, both through McGough and UPMC's sophisticated outside counsel. Ex. 2, Cmwlth.000133-000238.

24. Throughout this negotiation over the Consent Decrees, in addition to adding the provisions listed that did not appear in the parties' original term sheets (as enumerated in paragraph 19 above), several provisions from the term sheets

were meaningfully edited, including: "Limited Release" and "Compliance with Other Laws." Ex. 2, Cmwlth.000108-000129.

25. Throughout the negotiation, neither UPMC nor any other party proposed any edits to the Modification Provision, which appeared with identical language in every draft circulated. H.T. 87:11-14 (Donahue); 187:5-15 (VanKirk); 280:13-15 (McGough).

26. James Donahue, representing the OAG, understood at the time that the Modification Provision would apply equally to all terms of the Consent Decrees, with no carve-out exempting the termination date from modification. H.T. 87:4-7 (Donahue).

27. Thomas VanKirk, representing Highmark, likewise "did not see any limitation" on the modification clause at the time that would exempt the termination date from modification, as long as the modification was determined by the Court to be "in the public interest." H.T. 184:16-24 (VanKirk).

28. Mr. VanKirk believed, at the time, that UPMC shared the view of Highmark and the OAG that the Termination Clause was not exempt from modification, so long as the proposed modification was in the public interest because the language was so clear and no party had sought to edit it. H.T. 181:11-19, 184:16-24, 187:1-15 (VanKirk).

29. Mr. McGough read and welcomed the modification clause, but said the modification clause could not modify any core principle, even if it was in public interest. H.T. 280:20-21; 362:5-12.

30. The parties signed the Consent Decrees and filed them with this Court along with *Motions to Approve Consent Decrees* on June 27, 2014. Ex. 6-7, Cmwlth.000335-000379.

31. On July 1, 2014, the Commonwealth Court granted the motion and entered the Consent Decrees as an order of the Court in one common Order. Ex. 8, Cmwlth.000380.

32. The only limitation on the Modification Provision is that the party petitioning the Court must meet its "burden of persuasion" that the proposed modification "is in the public interest." Ex. 6-7, Cmwlth.000351 & 000374.

CONCLUSIONS OF LAW

1. As charities, UPMC and Highmark are subject to oversight by the Attorney General. 71 P.S. § 732-204(c); *Commonwealth v. Barnes Foundation*, 159 A.2d 500 (Pa. Cmwlth 1960) (Attorney General, by virtue of his office, is authorized to inquire into the status, activities, and functioning of public charities).

2. The agreements among the Commonwealth, UPMC and Highmark that were negotiated together, memorialized in the Consent Decrees and entered together as an Order of this Court on July 1, 2014, were negotiated to be mutual

and reciprocal and thus constitute a single, unified contract. *Lesko v. Frankford Hosp.-Bucks Cty.*, 15 A.3d 337, 342 (Pa. 2011).

3. Where a third party is instrumental in bringing the parties together, is actively involved and adequately familiar in determining and deciding the contractual terms to be agreed upon in an agreement, and is knowledgeable as to both the circumstances existing at the time of the agreement and the intent of the parties, then introduction of evidence by that third party is within the discretion of the trial judge. *Stack v. Tizer*, 203 A.2d 403, 405-06 (Pa. Super. Ct. 1964).

4. The Supreme Court found in its prior review of this Court's record that the Modification Provision was ambiguous as to its scope. *Commonwealth by Shapiro v. UPMC*, 2019 WL 2275206, * 11 (Pa., May 28, 2019).

5. "[W]here a written contract is ambiguous," in order "to determine the intention of the parties," a "court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement." *Int'l Organization Master, Mates and Pilots of Am., Local No. 2 v. Int'l Organization Master Mates and Pilots of Am., Inc.*, 439 A.2d 621, 624 (Pa. 1981).

6. "In determining intent," the entire contract must be examined, "taking into consideration the surrounding circumstances, the situation of the parties when the contract was made and the objects they apparently had in view and the nature

of the subject matter." *Commonwealth by Shapiro v. UPMC*, 188 A.3d 1122, 1131 (Pa. 2018).

7. "[W]hether the language of an agreement is clear and unambiguous may not be apparent without cognizance of the context in which the agreement arose." *Steuart v. McChesney*, 444 A.2d 659, 662 (Pa. 1982).

8. "[T]he court will adopt the interpretation, which under all of the circumstances of the case, ascribes the most reasonable, probable and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished." *Unit Vending Corp. v. Lacas*, 190 A.2d 298, 300 (Pa. 1963); *Loeffler v. Mountaintop Area Joint Sanitary Auth.*, 516 A.2d 848, 851 (Pa. Cmwlth. 1986).

9. The evidence from the hearing establishes that the most reasonable, probable and natural interpretation of the Modification Provision is the interpretation of the Commonwealth and Highmark.

10. UPMC's contrary constricted interpretation of "modification" is inconsistent with established principles of contract law. A contract should be read as a whole, and a court should not interpret one provision of a contract in a manner which results in another portion being annulled. *See Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 463-64 (Pa. 2015); *LJL Transportation Inc. v. Pilot Air Freight Corp.*, 962 A2d 639, 647-648 (Pa. 2009) (stating that separate clauses in a

contract are not to be read as independent agreements thrown together without consideration of their combined effects).

11. UPMC's interpretation that the end date is immutable, causes an immediate and irreconcilable conflict between the Termination Clause and Modification Provision, that would nullify the Modification Provision. *Id.*

12. If, however, the Consent Decree, as its terms indicate, is interpreted to allow the end date to be modified, then the end date may stand or may be modified depending on the determination of this Court as to whether the modification is in the public interest – neither provision is annulled. *Id.*

13. "Words of common usage in [a contract] are to be construed in their natural, plain, and ordinary sense, and [this Court] may inform [its] understanding of these terms by considering their dictionary definitions." *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 108 (Pa. 1999) (internal citations omitted).

14. Black's Law's definition of "a contract modification" is not limited to only minor alterations. Quite the reverse, using "a contract modification" as an example, the dictionary defines "modification" as synonymous with "amendment." BLACK'S LAW DICTIONARY 1156 (10th ed. 2014). One would never say that the Fourteenth Amendment was merely a minor change to the Constitution. A plaintiff's ability to amend his or her complaint under Pa.R.C.P. 1033 has never

been limited to only incidental or subordinate changes. Moreover, in the specific context of a court's authority, the term "modify" encompasses the power to make both minor and major changes. *See e.g. Oak Tree Condo. Ass'n v. Greene*, 133 A.3d 113, 117 (Pa. Cmwlth. 2016); Pa.R.C.P. 248; Pa.R.A.P. 105 and 1926.

15. This Court may only modify a term of the Consent Decree upon a showing that the modification "is in the public interest." (Consent Decree § IV(C)(10)). But if the Modification Provision, as UPMC argues, only applies to "minor" or incidental changes, when could such a minor change ever implicate the public interest? The Modification Provision would have no meaning.

16. The principle of specific over general does not apply in the absence of conflict. Even if there is conflict, that principle cannot be applied to defeat an agreement's overall scheme or purpose. *Pa. Turnpike Comm'n v. U.S. Fidelity & Guaranty Co.*, 23 A.2d 416, 418 (Pa. 1942) ("[W]here a contract as a whole shows a given intention but certain words or phrases if taken literally will defeat such intention . . . the particular words or phrases will, if possible, be construed in such a way as to be consistent with the general intention"). "[T]he meaning which arises from a particular, even more specific clause cannot control the contract when that meaning defeats the agreement's overall scheme or purpose." 11 WILLISTON ON CONTRACTS § 32:10 (4th ed.) (Specific and general words; the *Ejusdem Generis* Doctrine).

17. The overall scheme or purpose of the Consent Decrees is to promote the public interest in preserving access to high quality, affordable health care.

18. It is axiomatic that a contract should be interpreted to favor the public interest. *See City of Philadelphia v. Philadelphia Transp. Co.*, 26 A.2d 909, 912 (Pa. 1942). The principle of the specific prevailing over the general, even where applicable, is at its weakest when its application is contrary to the public interest.

Respectfully submitted,

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

s/ Keli M. Neary
KELI M. NEARY
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I, Keli M. Neary, Chief Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on June 12, 2019, I caused to be served foregoing document via PACFile on all counsel of record.

s/ Keli M. Neary
KELI M. NEARY
Chief Deputy Attorney General