IN THE SUPREME COURT OF PENNSYLVANIA

130 EAL 2014

JAMES EISEMAN, JR. AND
THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
Petitioners,

v.

AETNA BETTER HEALTH, INC.,
HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN,
Respondents.

ANSWER OF AETNA BETTER HEALTH, INC., HEALTH PARTNERS OF PHILADELPHIA, INC., AND KEYSTONE MERCY HEALTH PLAN, IN OPPOSITION TO PETITION FOR ALLOWANCE OF APPEAL

Appeal from the Order of the Commonwealth Court, No. 1949 C.D. 2012, Dated February 19, 2014, Affirming in Part and Reversing in Part the Final Determination of the Pennsylvania Office of Open Records, Dated September 17, 2012

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I. INTRODUCTION

In these consolidated appeals, James Eiseman, Jr. and the Public Interest Law Center of Philadelphia ("Petitioners") requested, pursuant to Pennsylvania's Right to Know Law, 65 P.S. § 67.101, *et seq.* ("RTKL"), documents from the Pennsylvania Department of Public Welfare ("DPW") containing rate information of DPW and of Respondents, three of the five Medicaid HMOs that administer DPW's HealthChoices program in southeastern Pennsylvania.[1] The HMOs objected to the disclosure of the rate information. DPW denied the request, and Petitioners appealed to the Pennsylvania Office of Open Records (the "OOR"). The OOR reversed DPW's denial of the request and ordered DPW to turn over the documents containing the rate information. The HMOs and DPW appealed to the Pennsylvania Commonwealth Court, which affirmed in part and reversed in part.

[1] The other two HMOs are United Health Care Community Plan, and Coventry Health Care. We will refer to the five HMOs collectively as "the HMOs" or "the MCOs."

The Commonwealth Court affirmed the OOR's decision as to documents containing DPW's rates, but reversed as to documents containing the HMOs' rates, holding that those rates are protected from disclosure under the RTKL. Petitioners now seek to have this Court hear its appeal of the Commonwealth Court decision to the extent that it reversed the OOR decision.

This Petition for Allowance of Appeal (the "Petition") must be denied because it presents no "special and important reasons" for this Court to exercise its discretion and review the decision of the Commonwealth Court. The Petition amounts to a laundry list of alleged legal errors by the Commonwealth Court, but fails to make the case that this appeal presents issues of substantial public importance such that this Court should step in. In fact, the issues in this case are quite narrow, involving the Commonwealth Court's application of specific sections of a state statute (the RTKL) to specific facts as developed before the OOR. The facts involve the provision of specific services (dental care) under a specific state program (HealthChoices) administered by a specific state agency (DPW). The Commonwealth Court applied the RTKL to these particular facts and reached a split decision, holding that DPW's rates should be disclosed but that the HMOs' rates should be protected from disclosure. Petitioners offer no reason for this Court to exercise its discretion and review that decision.

II. COUNTER- STATEMENT OF THE CASE[2]

Petitioners' Statement of the Case contains, rather than "a concise statement of the case containing the facts material to a consideration of the questions presented" (Pa.R.A.P. 1115(a)(4)), a rehash of many of the same tired *arguments* that they unsuccessfully presented to the Commonwealth Court. *See, e.g.,* Petition at 3-4 ("The decision below has the effect of denying the public any right to know how much of its money is spent to provide care to low-income children, adults with disabilities, and other eligible individuals."), and at 10 ("[The Commonwealth Court] went on to conclude that the MCO Rates contain confidential proprietary information, *id.* at 23, ***even though*** a single subcontractor was already in possession of the MCO Rates of four of the five MCOs, *id.* at 17 n.15, ***even though*** 'the MCOs' fact witnesses did not explain how the harm ... qualifies as substantial," *etc.*) (emphasis added). Such a self-serving, argument-laden Statement of the Case is alone enough to deny the Petition. *Cf.* Pa.R.A.P. 2117(b) (forbidding argument in the statement of the case in appellate briefs); *Giovagnoli v. State Civil Service Commission*, 868 A.2d 393, 399 & n.8 (Pa. 2005) (noting that "those who ignore form in the discretionary appeals context risk informing the exercise of the appellate court's discretion in a fashion contrary to their cause").

[2] Because this Petition concerns one of two companion sets of consolidated appeals, we will refer collectively to this set of appeals (Nos. 129 EAL 2014, 130 EAL 2014, and 131 EAL 2014) as "Eiseman I" and the companion set (Nos. 132 EAL 2014, 133 EAL 2014, and 134 EAL 2014) as "Eiseman II."

Accord Pa. R.A.P. 1115(d) (cautioning that "failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.").

This case involves the provision of dental services in one region, the Southeast Zone, of Pennsylvania's Medicaid managed care program called "HealthChoices." Under HealthChoices, DPW has standard contracts with the five HMOs in the Southeast Zone to provide health care services to their enrollees. The HMOs compete with each other for enrollees in the Southeast Zone of the HealthChoices program.

Pursuant to their contracts with DPW, the HMOs are required to establish and maintain a provider network and to ensure access to medical care, including dental care, for the Medicaid beneficiaries enrolled with their respective health plans. Pursuant to the contracts, DPW pays the HMOs a per member per month amount, called a "PMPM rate," or "capitation rate." The PMPM rate covers all medical and dental services that are required to be provided under Medicaid, and does not break out dental coverage as a separate payment item.

The HMOs ensure access to dental care by, primarily, subcontracting with third parties that in turn develop dental provider networks. The HMOs pay the subcontractors a negotiated per member per month rate for the services they

provide pursuant to the subcontracts. The subcontractors, not the HMOs, pay the dental providers for services rendered to the HMOs' enrollees.

On June 17, 2011, Petitioners submitted a request (the "Request") to DPW pursuant to the RTKL. The Request sought, for the period January 1, 2008, to June 15, 2011, the following documents: (1) "Each and every document, including correspondence and appendices, that sets forth any rate of payment, including but not limited to capitation rates, that DPW pays to any Medicaid HMO to provide Medicaid coverage to recipients in Southeastern Pennsylvania, including but not limited to any document that isolates the amount per member per month DPW calculates it pays to provide dental services to Medicaid recipients under 21 years of age," and (2) "Each and every document, including correspondence and appendices, in DPW's possession, custody, or control that sets forth the amount for any one or more individual dental procedure codes that any Medicaid HMO pays to provide dental services to Medicaid recipients in Southeastern Pennsylvania." Commonwealth Court Opinion ("Opinion") at 2.

On July 25, 2011, DPW responded to the Request, granting it in part and denying it in part. Pertinent to the issues involved in the Petition, DPW denied the Request as to documents showing either the DPW PMPM rates or the HMOs' rates. On or about August 15, 2011, Petitioners appealed the partial denial of the

Request to the OOR. On or about August 31, 2011, the HMOs sought permission to participate in the appeal, which was granted.

The OOR conducted an evidentiary hearing before Hearing Examiner Edward S. Finkelstein, Esquire, on May 21 and 22, 2012. At the hearing, each of the HMOs presented testimony concerning the steps they take to protect the confidentiality of their rates. The HMO witnesses testified that they keep their rates confidential, both in their maintenance and in their contractual provisions. *Id.* at 4. In addition, the HMOs presented the testimony of an expert witness, Henry Miller, Ph.D., who testified concerning the treatment of such information in the health care industry. Dr. Miller testified that in his more than 40 years in the healthcare industry he has not seen rate information disclosed outside the HMOs, and that disclosure of the rates would reduce the value of the HMOs' considerable investment in negotiating favorable rates. *Id.* at 5.

Petitioners did not present any testimony or affidavits at the hearing. *Id.*

Following the hearing, the OOR granted Petitioners' appeal. In its Final Determination of September 17, 2012, the OOR ruled that (1) records containing DPW's PMPM rates are "financial records," and therefore cannot be withheld under the RTKL exemptions for "trade secrets" and "confidential proprietary information"; (2) records containing the HMOs' rate information cannot meet the definition of "trade secrets," under *Lukes v. Dep't. of Public Welfare*, 976 A.2d 609

(Pa. Commw. 2009); and (3) the HMOs had not carried their burden of proving that the records containing the HMOs' rate information constituted "confidential proprietary information."

DPW and the HMOs appealed the OOR Final Determination to the Commonwealth Court, in three separate appeals.[3] The Commonwealth Court consolidated the three appeals. The issues were fully briefed, and the Commonwealth Court ordered these consolidated appeals to be argued seriately before the *en banc* Court with the appeals in Eiseman II. The *en banc* court heard oral argument on October 9, 2013.

In its Opinion, dated February 19, 2014, the Commonwealth Court, after conducting its own "independent review of the evidentiary record created below" (Opinion at 1) affirmed in part and reversed in part the OOR's ruling. Calling the case "fact-intensive," the Commonwealth Court held as follows:

- The DPW-HMO capitation rates are not protected from disclosure by the RTKL or the Pennsylvania Uniform Trade Secrets Act (the "Trade Secrets Act"), and must be disclosed.[4] Opinion at 8-14.

[3] These appeals were docketed at Nos. 1935 C.D. 2012, 1949 C.D. 2012, and 1950 C.D. 2012.

[4] The Petitioners are not seeking any relief in this Court as to this part of the Commonwealth Court's ruling. *See* Petition at 2 n.1.

- Documents containing the rates between the HMOs and the subcontractors are not "public records," overruling *Lukes*. Opinion at 14-15.
- The rates between the HMOs and the subcontractors also meet the definition of "confidential proprietary information," based upon the testimony at the hearing before the OOR, and therefore documents containing those rates must be protected from disclosure. Opinion at 16-23.
- Although not necessary to the analysis, the same evidence at the hearing establishes that the rates between the HMOs and the subcontractors qualify as "trade secrets." Opinion at 23.

The Petition was filed and served on March 20, 2014.

III. PETITIONERS DO NOT OFFER SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO ALLOW THE APPEAL

Petitioners fail to even state the standard for allowance of appeal by this Court. Review of a final order of the Commonwealth Court is "not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor." Pa.R.A.P. 1114; *see Commonwealth v. Byrd*, 657 A.2d 961, 962 (Pa. 1995). Nor do Petitioners come close to offering special and important reasons justifying review by this Court.

In their "Reasons Relied Upon for Allowance of Appeal," Petitioners spend the vast majority (all but two) of the 13 pages criticizing the Commonwealth Court's statutory interpretation of the RTKL and its application of that law to the specific facts of this case. (Petition, at 12-24). Rather than a "concise statement of the reasons relied upon for allowance of an appeal," as required by Rule 1115(a)(5), Petitioners' statement is a confusing hodge-podge of alleged errors by the court below, which are insufficient grounds to allow an appeal to this Court. Moreover, by employing a "shotgun" approach in its arguments, the statement is neither brief nor clear, thus warranting dismissal of the Petition on this ground alone. *See* Pa. R.A.P. 1115(d).

A. Petitioners Cannot Use the Part of the Commonwealth Court's Opinion That They Are *Not* Challenging to Justify Review By This Court.

Petitioners' first argument for why this Court should exercise its discretionary jurisdiction to hear this appeal is a garden-variety statutory construction argument as to how the Commonwealth Court erred in applying the Trade Secrets Act, an application that, they claim, "would nullify in all instances the carveout in Section 708(c) for trade secrets in financial records." Petition at 15-16. Petitioners go on to argue that "[t]his holding—that there is never any application for Section 708(c)'s limitation on the 'trade secret' exception—is a grave error with broad implications, requiring review by this Court." *Id.* at 16. But

the part of the Commonwealth Court's opinion that Petitioners are objecting to here is ***the part that they are not asking this Court to review***, specifically pages 8-14 of the Opinion dealing with DPW capitation rates, in which the Court affirmed the OOR's ruling.[5] In fact, application of the Trade Secrets Act was expressly ***not*** a basis for the Court's reversal of the OOR's decision concerning the HMOs' rates: "Having already held the MCO Rates are protected under the confidential proprietary information exception of the RTKL, ***it is not necessary to fully discuss their status as trade secrets.***" Opinion at 23 (emphasis added). Petitioners cannot have it both ways, failing on the one hand to contest the Court's decision in one part, yet seeking on the other hand to use the Court's rationale in that same part as a basis for this Court to review the parts of the ruling that they ***are*** contesting. For this reason alone, this Court should deny the Petition.

But even if considered on its merits, their argument is the type commonly seen in appeals to intermediate appellate courts, but is not appropriate in appeals to this Court. Petitioners are free to disagree with the Commonwealth Court's statutory interpretation, but they fail to explain how that interpretation warrants this Court's discretionary review. If an intermediate appellate court's interpretation of a statute constituted a "special and important reason" for an

[5] *See* Petition at 2, n.1: "Petitioners do not seek review of the portion of the Order affirming the final determination of the Office of Open Records."

appeal to this Court, there would be no end to this Court's docket of appeals from lower courts. Rule 1114 requires more.[6]

B. The Commonwealth Court's Statutory Interpretation of the RTKL's Distinction Between Public and Private Funds and of the "Financial Records" Provision is Not a Proper Basis for this Court's Discretionary Review.

Petitioners' second argument—that the Commonwealth Court erred in overruling *Lukes* and in determining that documents containing the HMOs' rates are not "financial records" (Petition at 17-20)—also does not meet the Rule 1114 threshold. Again, the Commonwealth Court performed a statutory interpretation of the RTKL and concluded that "***[b]ased on the language of the current RTKL***, the funds lose their character as public funds once they leave an agency's hands and enter the private sector." Opinion, at 15 (emphasis added). The Court went on to hold that *Lukes* is "no longer valid in cases under the current RTKL" to the extent that the contrary rationale was central to the *Lukes* holding. *Id.* Petitioners are free to disagree with this statutory interpretation, but their argument that this holding "threatens the public's ability to follow funds in a multitude of public programs involving private providers" (Petition at 20) is pure speculation. This Court

[6] Moreover, the Commonwealth Court's statutory construction analysis is sound. As explained by the Court at page 10 of the Opinion, both sections 306 and 3101.1 of the RTKL provide an independent statutory basis for applying the Trade Secrets Act even when financial records are involved.

"generally does not grant discretionary appeals merely to review claims of error." *Commonwealth v. Gleason*, 785 A.2d 983, 991 (Pa. 2001) (Castille, J., dissenting).

Moreover, Petitioners' argument that the *Lukes* rationale survives the current RTKL misses the mark. Petitioners attempt to prop up this argument with a footnote from this Court's opinion in *SWB Yankees v. Wintermantel*, 45 A.3d 1029, 1044 n.19 (Pa. 2012), seizing on the phrase "...particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime." Petition at 18. But this Court was merely noting in *dicta* that its decision in *SWB Yankees* was consistent with another decision of this Court under the old RTKL. *See id.* To interpret that statement as affirming the "ongoing vitality" of *Lukes* is quite a stretch.

Petitioners' argument that the Commonwealth Court erred in determining that documents containing the HMOs' rates are not "financial records" under Section 708(c) is yet another argument grounded in statutory interpretation. The Commonwealth Court applied sound principles of statutory construction in determining that the RTKL's definition of "financial records" does not encompass documents containing rates from the HMOs to the subcontractors. As the Court stated, the RTKL defines "financial records" as documents dealing with "the receipt or disbursement of funds by an agency," with the emphasis on the word "by." *See* Opinion at 15. The Court correctly concluded that "[b]ecause MCO

Rates are not disbursed 'by an agency,' OOR erred in concluding MCO Rates are 'financial records.'" *Id.* "The clearest indication of legislative intent is generally the plain language of a statute." *Walker v. Eleby,* 842 A.2d 389, 400 (Pa. 2004).[7]

C. The Commonwealth Court's Application of the RTKL to the Specific Facts of This Case Does Not Merit Review By This Court.

Finally, in their third argument for review—which amounts to a simple disagreement with the Commonwealth Court's application of the RTKL to the specific facts of this case— Petitioners do not even attempt to show "special and important reasons." *See* Petition at 20-24. In fact, Petitioners concede the fact-based nature of their argument, stating "the Commonwealth Court erred by holding that ***years-old payment rates*** have present-day competitive value, and that four of the five MCOs had maintained the confidentiality of those rates ***even when they have shared those rates with a business that negotiated MCO Rates with their competitors.***" *Id.* at 20-21 (emphasis added). This argument suffers from the same infirmity as the first two—*i.e.*, failing to meet the Rule 1114 threshold—only this

7 Petitioners' additional argument, that the second part of the financial records definition applies, makes no sense. That part—*i.e.*, documents dealing with "an agency's acquisition, use or disposal of services, supplies, materials, equipment or property"—encompasses ***an agency's procurement of*** goods and services, rather than ***an agency subcontractor's payment for*** health care services. The word "use" means "to put into action or service, avail oneself of." Merriam-Webster Dictionary (online edition). It is ***the subscribers of the HMOs, not DPW***, who "avail [themselves] of," or "use," the services of the dental providers. Petitioners' strained interpretation of the plain language of the "financial records" definition should be rejected.

time Petitioners' disagreement is not with the lower court's statutory interpretation, but rather with the court's application of the RTKL to the particular facts of this case. Fact-specific appeals are not appropriate for this Court's discretionary review. *See Bowling v. Office of Open Records*, 75 A.3d 453, 479 (Pa. 2013) (Castille, J., dissenting) (cautioning against interpretation of RTKL that would result in the "need to erect a screening mechanism to avoid the inevitable inundation of fact-bound appeals"). Rather than offer any "special and important reasons" for review by this Court, this third argument is merely a rehash of arguments made to the Commonwealth Court which that court rejected. This Court is not the appropriate forum for recycled arguments that failed below.

But even if considered on their merits, the arguments fall apart.

By arguing that the "economic reality that costs in the healthcare industry vary so significantly from year to year" means that "the requested MCO Rates do not have predictive value for the MCO Rates to be negotiated for future years" (Petition at 22), Petitioners ignore the Commonwealth Court's thorough analysis of the "existing comprehensive record" (Opinion at 24), after which the Court concluded that "the evidence is sufficient to meet the preponderance of the evidence standard." *Id.* at 22. Petitioners also fail to mention that they presented ***no evidence*** on the issue of competitive harm to rebut the extensive evidence offered by the HMOs.

The Commonwealth Court was also correct in rejecting Petitioners' argument that DentaQuest's knowledge of four of the five HMOs' rates makes them any less confidential. As the Court pointed out, DentaQuest is not a competitor of the HMOs, it is a subcontractor. In addition, DentaQuest is bound by its contracts with the HMOs to maintain secrecy of the HMOs' rates. *Id.* at 17 n.15. Contrary to Petitioners' argument, these are record facts, not "arguments of counsel." Petition at 24. In addition, Petitioners fail to acknowledge the extensive testimony at the hearing before the OOR that shows that the HMOs scrupulously protect from their competitiors, and treat as secret and confidential, their rates to their subcontractors, including Dentaquest.

IV. CONCLUSION

For all of the foregoing reasons, Respondents Aetna Better Health Inc., Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan respectfully request that this Honorable Court deny the Petition for Allowance of Appeal.

Respectfully submitted,

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Dated: April 7, 2014

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CERTIFICATE OF SERVICE

I, Christopher H. Casey, hereby certify that this 7th day of April 2014, I have caused two (2) copies of Respondents' Answer in Opposition to Petition for Allowance of Appeal to be served upon the following counsel of record via First Class, U.S. Mail, which service satisfies the requirement of Pa. R.A.P. 121:

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