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IN THE SUPREME COURT OF PENNSYLVANIA

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SUPREME COURT
EASTERN DISTRICT

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

v.

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

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

Appeal from the Order of the Commonwealth Court, No. 957 C.D. 2013, Dated February 19, 2014, Reversing the Final Determination of the Pennsylvania Office of Open Records, Dated May 7, 2013

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TABLE OF CONTENTS

TABLE OF CITATIONS i

I. INTRODUCTION .... Error! Bookmark not defined.

II. COUNTER- STATEMENT OF THE CASE Error! Bookmark not defined.

III. PETITIONERS DO NOT OFFER SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO ALLOW THE APPEAL .... Error! Bookmark not defined.

A. Petitioners' Disagreement With the Commonwealth Court's Interpretation of the Standard Contract and of Section 901 of the RTKL Does Not Justify Review By This Court 9

B. The Commonwealth Court's Application of Section 506(d)(1) of the RTKL To the Specific Facts of This Case Is Not a Proper Basis for this Court's Discretionary Review 11

IV. CONCLUSION .... Error! Bookmark not defined.4

TABLE OF CITATIONS

CASES

Allegheny Cnty. Dep't of Admin. Servs./A Second Chance, Inc. v. Parsons,
61 A.3d 336 (Pa. Cmwlth. 2013) 11

Buehl v. Office of Open Records,
6 A.3d 27 (Pa. Cmwlth. 2010) 11, 12

Commonwealth v. Byrd,
657 A.2d 961 (Pa. 1995) 8

Commonwealth v. Gleason,
785 A.2d 983 (Pa. 2001) 12

Honaman v. Lower Merion Twp.,
13 A.3d 1014 (Pa. Cmwlth. 2011) 11, 12

Lukes v. Department of Public Welfare,
976 A.2d 609 (Pa. Commw. Ct. 2009) 6, 7, 13

Office of the Budget v. Office of Open Records,
11 A.3d 618 (Pa. Cmwlth. 2011) 9, 10

SWB Yankees v. Wintermantel,
45 A.3d 1029 (Pa. 2012) 12, 13

West Chester University of Pennsylvania v. Browne,
71 A.3d 1064 (Pa. Cmwlth. 2013) 9, 10

RULES AND REGULATIONS

Pa.R.A.P. 121 15

Pa.R.A.P. 1114 ..... 8, 9, 10

Pa.R.A.P. 1115(a)(4) 3

Pa.R.A.P. 1115(d) 3, 8

Pa.R.A.P. 2117(b) 3

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 Respondents, three of the five Medicaid HMOs that administer DPW's HealthChoices program in southeastern Pennsylvania,[1] and one of the two HealthChoices subcontractors in that region.[2] The HMOs and subcontractors 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

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

[2] The other subcontractor is Dental Benefit Providers, Inc. ("DBP").

documents containing the rate information. The HMOs and subcontractors appealed to the Pennsylvania Commonwealth Court, which reversed, holding that the rate information is protected from disclosure under the RTKL. Petitioners now seek to have this Court hear its appeal of the Commonwealth Court 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 held that the HMOs' and subcontractors' 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[3]

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 ("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 4 ("In the Commonwealth Court's analysis, however, adding an extra middleman performed alchemy, transmuting form public to private the Medicaid funds received by providers to treat Medicaid enrollees. ... This view is wholly unsupported by the law or by common sense"). 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"). *Accord* Pa. R.A.P. 1115(d) (cautioning that "failure of a petitioner to present with accuracy,

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

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 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 (*i.e.*, DentaQuest and DBP) 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 October 3, 2012, Petitioners submitted a request (the "Request") to DPW, which sought, for the period July 1, 2008 until June 30, 2012, any document that "(a) sets forth the amount for any one or more dental procedure codes that any Medicaid HMO and/or Medicaid Dental Subcontractor pays or has paid to dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania, or (b) otherwise establishes the rate of payment by which any Medicaid HMO and/or Medicaid Dental Subcontractor compensates or has compensated dentists (and/or other providers of dental services) for the provision of dental services to Medicaid recipients in Southeastern Pennsylvania."[4]

On November 13, 2012, DPW denied the Request. On December 3, 2012, Petitioners filed an appeal to the OOR. On December 18, 2012, the HMOs and subcontractors sought permission to participate in the appeal, which was granted.

On May 7, 2013, the OOR issued its Final Determination reversing the DPW's denial. The OOR ruled that (1) pursuant to its earlier Final Determination

[4] Petitioners specifically excluded from the Request any documents that it had previously requested from DPW in Eiseman I, *i.e.*, DPW's capitation rates and the HMOs' rates to the subcontractors. The Eiseman II request sought only the rates that the subcontractors paid to dental providers during the relevant period.

in Eiseman I, the Pennsylvania Uniform Trade Secrets Act does not apply, because "trade secret" is defined identically in the Trade Secrets Act and the RTKL; (2) federal and state regulations do not protect the records from disclosure; (3) the provider rates must be disclosed under Section 506(d)(1) of the RTKL, because the records sought directly relate to a governmental function being performed by the subcontractors, and any other interpretation would "frustrate the intent" of Section 506(d); and (4) as in Eiseman I, the rationale of *Lukes v. Department of Public Welfare*, 976 A.2d 609, 618 (Pa. Commw. Ct. 2009) (requiring disclosure) applies, and the HMOs and subcontractors had not shown that either the "trade secret" or "confidential proprietary information" exemptions to disclosure in the RTKL applied.

DPW, the HMOs, and the subcontractors appealed the OOR Final Determination to the Commonwealth Court, in three separate appeals.[5] 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 I. The *en banc* court heard oral argument on October 9, 2013.

In its Opinion, dated February 19, 2014, the Commonwealth Court reversed. The Court held as follows:

[5] These appeals were docketed at Nos. 945 C.D. 2013, 957 C.D. 2013, and 958 C.D. 2013.

- The subcontractors' rates to the providers are not, as Petitioners argued, in the "constructive possession" of DPW, for two reasons: (1) the fact that DPW has a contractual right to request records from a private contractor does not convert private contractor records into records "of" DPW, and (2) the Standard Contract between DPW and the HMOs exempts "Provider Agreements" from the definition of "subcontracts" requiring DPW approval. Commonwealth Court Opinion ("Opinion") at 10-13.
- The provider rates are not subject to disclosure under the "governmental function" section of the RTKL (Section 506(d)), because (1) the subcontractors do not have a contract with DPW, and (2) these rates do not "directly relate" to the government function of providing dental services under the HealthChoices program. Opinion at 13-17.
- The OOR erred in relying upon *Lukes* to hold that the rates must be disclosed as "public funds." Opinion at 17-19.
- Petitioners are wrong that the rates are "financial records," because they do not represent payments by an agency, but rather by a private party. Opinion at 19-20.

Judge McCullough issued a dissenting opinion.

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 of the 10 pages criticizing the Commonwealth Court's interpretation of the language of the Standard Contract between DPW and the HMOs, and its interpretation of the RTKL. (Petition, at 12-21). 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' Disagreement With the Commonwealth Court's Interpretation of the Standard Contract and of Section 901 of the RTKL Does Not Justify Review By This Court.

Petitioners' first argument for why this Court should exercise its discretionary jurisdiction to hear this appeal is that the Commonwealth Court erred in its interpretation of both the DPW-HMO Standard Contract—specifically, a section of that contract that Petitioners call the "Ready Access requirement"—and Section 901 of the RTKL, the section dealing with an agency's responsibility as to documents in its "possession, custody or control." Petition at 12-16. This argument is the type commonly seen in appeals to intermediate appellate courts, but is not appropriate in appeals to this Court.

Relying on its prior decisions in *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Cmwlth. 2011) and *West Chester University of Pennsylvania v. Browne*, 71 A.3d 1064 (Pa. Cmwlth. 2013), the Commonwealth Court held that "the Provider Rates are not 'records' of DPW ***as that term is defined in the RTKL***, quoted above" because "[t]here is no evidence DPW sought to circumvent the RTKL by placing records of its activities into the hands of a third party. Rather, the Provider Rates are negotiated between Subcontractors and providers, and do not involve DPW." Opinion at 12 (emphasis added). Thus, the Court merely restated a principle it had established in two prior decisions relating to an interpretation of specific provisions of the RTKL. Petitioners are free to

disagree with the Commonwealth Court's statutory interpretation, but they fail to explain how this disagreement warrants this Court's discretionary review. If an intermediate appellate court's interpretation of a statute constituted a "special and important reason" for an appeal to this Court, there would be no end to this Court's docket of appeals from lower courts. Rule 1114 requires more.

But even if considered on the merits, Petitioners' arguments fail. Petitioners fail to distinguish, or even address for that matter, *Office of the Budget* or *Browne*. Instead, they focus most of their argument on the "Ready Access requirement" of the Standard Contract, ignoring the Commonwealth Court's holding that even if that section were construed to apply to these documents, "access" to documents by an agency does not mean the records are "of" the agency. *See* Opinion at 11. Moreover, Petitioners do not explain how the "Ready Access requirement" even applies here. That requirement is included within Section XIII of the Standard Contract, labeled "Subcontractual Relationships," yet, as Petitioners concede, "Subcontracts" are defined to include only contracts between an MCO and another entity, and thus the provider agreements at issue here are excluded from the definition. *See* Petition at 14. In short, Petitioners' arguments have no merit even if they are considered.

B. The Commonwealth Court's Application of Section 506(d)(1) of the RTKL To the Specific Facts of This Case Is Not a Proper Basis for this Court's Discretionary Review.

Petitioners' second argument—that the Commonwealth Court erred in ruling that Section 506(d)(1), the "governmental function" section of the RTKL, does not require disclosure of the requested documents (Petition at 17-21)—amounts to a simple disagreement with the Commonwealth Court's application of the RTKL to the specific facts of this case, and thus does not meet the Rule 1114 threshold. Petitioners do not even attempt to show "special and important reasons" for review of this part of the Court's decision.

Again, the Commonwealth Court performed a statutory interpretation of the RTKL and concluded that "***[u]nder the current RTKL***, to reach records outside an agency's possession the following two elements must be met: (1) the third party performs a governmental function on behalf of the agency; and (2) the information sought directly relates to that function." Opinion at 13 (citing *Allegheny Cnty. Dep't of Admin. Servs./A Second Chance, Inc. v. Parsons*, 61 A.3d 336 (Pa. Cmwlth. 2013)) (emphasis added). The Court went on to hold that neither part of this test was met in this case. First, the Court held that "[t]his Court requires a contractual relationship between a third party and an agency to access third-party records," citing its prior decision in *Honaman v. Lower Merion Twp.*, 13 A.3d 1014 (Pa. Cmwlth. 2011). Opinion at 14-15. Second, the Court held, relying on its

prior decision in *Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Cmwlth. 2010), that "the cost of obtaining [dental] services, like the cost of acquiring goods for resale in *Buehl*, does not directly relate to the performance of the government function." Opinion at 15-17. Thus, the Court simply applied the statute to the particular facts of this case, relying upon its own prior precedent in arriving at its conclusion. Petitioners argue that the Court erred in its application of the law to the facts of this case, but make no showing that this is the type of decision requiring review by this Court. This Court "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).

But again, even considered on their merits, Petitioners' arguments fail. Petitioners again make no attempt to distinguish this case from *Honaman* or *Buehl*. Instead, they claim that the Court's decision is at odds with this Court's decision in *SWB Yankees v. Wintermantel*, 45 A.3d 1029 (Pa. 2012), and recycle arguments repeatedly rejected by the Commonwealth Court.

Petitioners argue that the Commonwealth Court's conclusion that the cost of obtaining dental services does not "directly relate" to the governmental function of administering the HealthChoices program is "contrary to this Court's decision under Section 506(d) in [*SWB Yankees*.]" Petition at 17. But in *SWB Yankees*, the issue was whether operating a concession contract at a baseball stadium constituted

a "governmental function," not whether the cost of administering the concessions contract at the stadium "directly relates" to the governmental function. *See SWB Yankees*, 45 A.3d at 1037 (stating appellant's framing of the issue on appeal as whether "exhibiting baseball games and selling concessions is a governmental function."). The issue in this case, by contrast, is not whether the HMOs perform a governmental function in administering the HealthChoices program, but whether the provider rates "directly relate" to how the HMOs perform that function. *See* Opinion at 15. Thus, *SWB Yankees* is inapposite.

Finally, Petitioners conclude with a rehash of previously rejected arguments. Petitioners' argument that the rationale of *Lukes* survives the current RTKL misses the mark. The Commonwealth Court correctly held that *Lukes*, a case decided under the old RTKL, has no application under the current RTKL. Petitioners attempt to prop up this argument with a footnote from *SWB Yankees*, seizing on the phrase: "...particularly when considering that the Legislature intended greater, not lesser, openness under the new open-records regime." Petition at 20. 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. This Court is not the appropriate forum for recycled arguments that failed below.

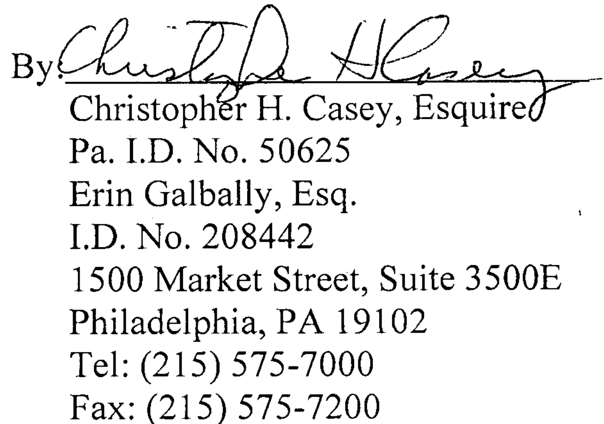
IV. CONCLUSION

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

Respectfully submitted,

DILWORTH PAXSON LLP

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 the Answer of Aetna Better Health, Inc., Keystone Mercy Health Plan, Health Partners of Philadelphia, Inc., and DentaQuest, LLC 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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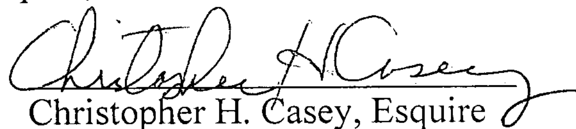

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