

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

**UPMC’S RESPONSE IN OPPOSITION  
TO THE ATTORNEY GENERAL’S  
MOTION IN LIMINE**

In an attempt to reargue what this Court has already decided, General Shapiro grossly mischaracterizes the Pennsylvania Supreme Court’s opinion. The Court should reject General Shapiro’s inaccurate version of the Supreme Court’s mandate, hold him to his burden of proof, and deny his Motion in Limine because: (1) the Supreme Court rejected UPMC’s preliminary objection and remanded for a limited hearing beyond the pleading stage on the meaning and scope of the Modification Provision as applied to the Termination Provision; and (2) General Shapiro as the Petitioner bears the burden of proof, as he acknowledged at the May 31, 2019 status conference.

**1. General Shapiro Mischaracterizes the Issue at the Hearing.**

In seeking to free himself from the burden of proof, General Shapiro erroneously contends that the case is before the Court on UPMC’s preliminary objection, such that UPMC bears the burden of proof. Contrary to General Shapiro’s characterization, the Supreme Court already held that the Modification Provision is ambiguous and capable of more than one

reasonable interpretation — namely, UPMC’s interpretation and that of General Shapiro. May 28, 2019 Opinion and Order at 20 (“At a minimum, UPMC establishes a degree of tension within the four corners of the Consent Decrees that casts doubt upon OAG’s and Highmark’s argument that unrestricted modification of the duration of the Consent Decrees comports with the parties’ intent.”). In fact, the Supreme Court concluded that there was **no plain meaning** to the Modification Provision, because it found the Provision ambiguous. *See* May 28, 2019 Opinion and Order at 19 (“UPMC persuasively demonstrates that the meaning of the Modification Provision may be more elusive than its unqualified terms might suggest. UPMC is correct that dictionary definitions of the words “modification” and “modify” are replete with references to minor, slight, or partial changes, rather than sweeping changes unbridled in scope.”). At page 20 of its Opinion, after recounting the existence of two reasonable interpretations of the Modification Provision, the Court held:

As applied to this circumstance, we find that the Modification Provision is “subject to more than one reasonable interpretation.” . . . . That is, the provision is ambiguous with respect to the availability of the relief that OAG seeks. Where contractual terms are ambiguous, “resort to extrinsic evidence to ascertain their meaning is proper.”

May 28, 2019 Opinion at 20 (citations omitted).<sup>1</sup> Consequently, “the matter requires evidentiary development beyond the pleading stage in order to glean what the text fails to reveal: the parties’ intent with regard to the scope of the Modification Provision.”<sup>2</sup> *Id.* at 21. If the Supreme Court had intended to place the burden on UPMC to refute General Shapiro’s argument, it could have

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<sup>1</sup> Notably, three Justices would have gone even further and held that, even if ambiguous, the evidence overwhelmingly supports UPMC’s reading of the Consent Decree.

<sup>2</sup> By reversing this Court’s order, the Supreme Court conclusively moved the case beyond preliminary objections. *See* discussion *infra* at 4. Further, UPMC filed its Answer to the Petition on April 15, 2019. The case no longer is at the preliminary objections stage.

said so. Despite what General Shapiro would have this Court believe, the Supreme Court did not.

**2. General Shapiro Misstates the Supreme Court’s Holding.**

In his Motion, General Shapiro selectively quotes the Supreme Court out of context to suggest incorrectly that it directed this Court to weigh UPMC’s interpretation against the “plain language” of the Modification Provision. *See* Shapiro Mot. in Limine at 1. But, in fact, General Shapiro only “quotes” the portions of the Supreme Court’s opinion that *recite his own arguments* to the Court — arguments that the Court ultimately rejected. It is disingenuous at best for General Shapiro to claim that the passages quoted in his Motion in Limine represent the Court’s holding.

General Shapiro incorrectly describes the hearing ordered by the Court as a choice between his vision of the Modification Provision (as described by the Supreme Court) and an interpretation “contrary to the express language such that the termination date was implicitly excluded from the Modification Provision.” *Id.* The latter, however, could not be further from the Supreme Court’s description of UPMC’s “reasonable interpretation” of the Modification Provision, which the Supreme Court also characterized as follows: “[o]n UPMC’s account, especially in light of the shades of meaning encompassed within the word ‘modify,’ the Modification Provision may be employed for minor alterations to the terms of the Consent Decrees, but may not ‘repudiate fundamental terms of the parties’ agreement’ such as the termination date.” May 28, 2019 Opinion at 20. General Shapiro’s misapplication of the Supreme Court’s order cannot withstand scrutiny.

**3. As the Petitioner, General Shapiro Bears the Burden of Proof at the Hearing.**

General Shapiro’s Motion gets the burden of proof exactly wrong. This case is not at the preliminary objections stage any longer; the Supreme Court rejected UPMC’s preliminary

objection and remanded for a limited hearing beyond the pleadings stage on the meaning and scope of the Modification Provision as applied to the Termination Provision. As the Petitioner, he bears the burden of coming forward with evidence to prove that his interpretation of the Modification Provision justifies the relief sought in his Petition. Consequently, he must demonstrate that his proposed modification of the Consent Decree’s five-year term is within the scope of the Modification Provision.

In ordering this hearing, the Supreme Court specifically stated that further proceedings would not be controlled by the preliminary objection standard. Rather, the purpose of this hearing, according to the Court, is to provide “evidentiary development *beyond the pleading stage* in order to glean what the text fails to reveal: the parties’ intent with regard to the scope of the Modification Provision.” May 28, 2019 Opinion at 21. Thus, General Shapiro’s only authority to support his Motion is inapplicable — by reversing this Court’s grant of UPMC’s demurrer, the Supreme Court disposed of UPMC’s preliminary objections and moved the case *beyond the pleading stage*.<sup>3</sup>

It is well settled that the party seeking relief on the basis of a contract bears the burden of proving the terms of the contract. *See, e.g., Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc.*, 247 F.3d 79, 102 (3d Cir. 2001) (holding that, under Pennsylvania law, a party asserting a contract claim should bear the burden of proving the meaning of an ambiguous term that was an element of his cause of action). As both the Supreme Court and this Court have recognized, the

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<sup>3</sup> General Shapiro would retain the burden of proof even if this case were still in the pleading stage. As the Court noted at the May 31, 2019 conference, this hearing is not unlike an evidentiary hearing in connection with a jurisdictional challenge. *See* May 31, 2019 Transcript of Status Conference at 7. In such cases, the burden shifts to the plaintiff to establish jurisdiction once the defendant has made an adequate showing. *See, e.g., Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc.*, 698 A.2d 80, 84 (Pa. Super. 1997) (“[O]nce the party opposing jurisdiction has supported his objections with competent evidence, the burden shifts to the party asserting jurisdiction to prove that, both statutorily and constitutionally, personal jurisdiction is proper.”). There is no question that UPMC has made an adequate showing here, because the Supreme Court has already concluded that the Modification Provision is ambiguous.

Consent Decree is a contract controlled by ordinary rules of contract law. *See* May 28, 2019 Opinion at 16; *Commonwealth ex rel. Shapiro v. UPMC*, No. 334 MD 2014, slip. op. at 26 (Pa. Commw. Ct. Apr. 3, 2019). Accordingly, General Shapiro bears the burden of persuasion and proof because he is the party asserting and relying upon an ambiguous provision of the Consent Decree.

Even if General Shapiro presented relevant legal authority to support his Motion — which he does not — he would still fall far short of the mark to reconsider an issue this Court has already decided. The parties fully discussed the order of proof with the Court at the May 31, 2019 status conference. Counsel for General Shapiro specifically requested the current schedule “given that we [General Shapiro] would be going first” because it would be unfair to give UPMC a full weekend to prepare its responsive case. May 31, 2019 Transcript of Status Conference at 13. The Court agreed to that schedule and ordered General Shapiro to “present [his] position[] on June 10,” with UPMC to respond the following day. Scheduling Order III, para. 4. General Shapiro makes no attempt to justify this late change, or to meet the standard for reconsideration of the Court’s decision.

**CONCLUSION**

General Shapiro’s misleading characterization of the Supreme Court’s opinion should not alter what the Court has already decided: that General Shapiro, as the petitioner seeking relief on the basis of his interpretation of the Modification Provision, bears the burden of proof and must present his case first. Consequently, and for the foregoing reasons, UPMC respectfully requests that the Court deny General Shapiro’s Motion in Limine.

Dated: June 6, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of June, 2019, I submitted the foregoing Response in Opposition to the Attorney General's Motion in Limine for electronic service via the Court's electronic filing system on the following:

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