

IN THE SUPREME COURT OF PENNSYLVANIA

Case No. 39 MAP 2019

Commonwealth of Pennsylvania, By Josh Shapiro, Attorney General; Pennsylvania Department of Insurance, By Jessica K. Altman, Insurance Commissioner and Pennsylvania Department of Health, By Rachel Levine, Secretary of Health

v.

UPMC, A Nonprofit Corp.; UPE, a/k/a Highmark Health, A Nonprofit Corp. and Highmark, Inc., A Nonprofit Corp.

Appeal of: Commonwealth of Pennsylvania, By Josh Shapiro, Attorney General

On appeal from the Order of the Commonwealth Court of
Pennsylvania, Honorable Robert Simpson presiding,
Filed April 3, 2019, in No. 334 MD 2014

**UPMC'S RESPONSE IN OPPOSITION TO HIGHMARK HEALTH
AND HIGHMARK, INC.'S APPLICATION FOR LEAVE TO FILE A
REPLY BRIEF**

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The Application for leave for Highmark Health and Highmark Inc. (“Highmark”) to file a reply should be denied.

1. Highmark asserts that it is an appellee in this matter “only by virtue of the caption.” Application at ¶ 8. Highmark instead asks to be treated as an appellant because it supports Appellant Office of Attorney General’s (“OAG”) request to modify mirror-image Consent Decrees that Highmark and UPMC each signed with the Commonwealth.

2. But Highmark is an appellee by operation of the Rules of Appellate Procedure. This appeal concerns a request by OAG to compel UPMC to be bound over its objection to a modified consent decree. Highmark filed no claim for relief in the trial court below, suffered no adverse ruling in the trial court, and has no standing to represent the Commonwealth on appeal.

3. Highmark therefore specifically filed its April 24, 2019 opening brief in this Court “pursuant to Pennsylvania Rule of Appellate Procedure 908.” According to Rule 908, “[a]ll parties in the appellate court other than the appellant shall be appellees.” And, by rule, only “the appellant may file a brief in reply.” Pa.R.A.P. 2113.¹

¹ Highmark notes it has filed briefs in two prior appeals to this Court involving OAG and UPMC. *See* Application ¶ 13. But in neither appeal did an appellee seek—nor did this Court grant—leave to file a reply brief.

4. Nor does Highmark have any interest in the outcome of the appeal that warrants treating it as an appellant. As Highmark’s Application makes clear, it would support OAG’s proposed modification of the Consent Decree only if UPMC would also agree to that modification. Application at ¶ 2 (Highmark agrees with modification only “provided that UPMC” does the same). UPMC has definitively and repeatedly stated that it will not agree to OAG’s proposal, so Highmark should, at best, be agnostic to the outcome of this appeal.

5. Moreover, requests for leave to file additional briefing should be denied when they are “unnecessary in resolving the issues.” *See, e.g., Commonwealth v. Spatz*, 99 A.3d 866, 922 (2014).

6. There is already ample briefing before the Court in this expedited appeal. OAG has filed two briefs seeking reversal, Highmark has asserted its interest in its Rule 908 brief, members of the Democratic caucus have submitted a brief as *amici curiae*, and UPMC has filed a brief supporting the decision below. Highmark’s Application points to no new arguments not already covered in the two opening briefs before this Court or OAG’s 30-page Reply Brief. As Highmark itself recognizes, its opening Rule 908 brief already addressed “arguments UPMC made in the” lower court on the issues now on appeal. Application at ¶ 15.

7. Highmark may have some interest in the outcome, but its April 24, 2019 Rule 908 brief is sufficient to represent that interest. Its proposed reply is unnecessary, and the Application for leave to file should be denied.

Dated: May 9, 2019

Respectfully submitted,

/s/ Leon F. DeJulius, Jr.

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CERTIFICATE OF COMPLIANCE

I hereby 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/ Leon F. DeJulius, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2019, a true and accurate copy of the foregoing document was served via PACFile on counsel of record.

/s/ Leon F. DeJulius, Jr.

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