IN THE SUPREME COURT OF PENNSYLVANIA

Case No. 46 MM 2019

COMMONWEALTH OF PENNSYLVANIA,
by Josh Shapiro, Attorney General; et al.,

Petitioner,

v.

UPMC, A Nonprofit Corp.; et al.,

Respondents.

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

RESPONDENT UPMC'S ANSWER TO PETITION FOR PERMISSION TO APPEAL, OR IN THE ALTERNATIVE, APPLICATION FOR ALTERNATIVE RELIEF

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The Office of Attorney General ("OAG") asks this Court to consider, again, whether UPMC's Consent Decree, with an explicit termination date of June 30, 2019, really means what it says. Just a few months ago, OAG asked this Court to force UPMC to continue contracting with Highmark Inc. ("Highmark") beyond that termination date for the supposed benefit of seniors, whom the Consent Decree designates as a "vulnerable population." In rejecting that claim, this Court specifically held that the Consent Decree cannot be interpreted in a way that allows one provision to override another.

In its current appeal, OAG has tried to pour its old wine into a new legal bottle, contending that the Consent Decree's general modification provision overrides all other provisions in the agreement, supersedes the Court's 2018 opinion, and authorizes imposing on UPMC—in perpetuity—a slate of new and unprecedented obligations set forth in a modified "consent" decree to which UPMC never agreed. In support of this extraordinary request, OAG again cites the supposed plight of seniors after June 30 as well as vague (and false) allusions to "the health and welfare of millions of Pennsylvanians." Petition for Permission to Appeal at 1 ("Petition").

The Commonwealth Court correctly rejected this latest attack on the Consent Decree's expiration, specifically citing this Court's 2018 decision addressing the "vulnerable population" of seniors, as well as basic legal principles

that OAG does not even dispute. Rather than offer legal authority to the lower court, OAG essentially argued—and is arguing now—that by agreeing to a boilerplate modification provision in a five-year consent decree, UPMC somehow put itself under OAG's unfettered control forever. That defeats the purpose and plain intent of having a termination provision in the first place. If it actually believed that the termination provision could be "modified" out of existence, OAG should have sought modification a year ago, when it last contested the Consent Decree's termination date for seniors.

It did not do so then, and it should not be allowed to do so now, because a claim to "modify" the parties' agreement by repudiating its unambiguous and material terms has no place in law or the meaning and intent of the Consent Decree. OAG has now filed two briefs in support of its request and has not once cited any legal authority to support nullification of the Consent Decree's express and unambiguous termination provision. Nor has OAG acknowledged, much less tried to overcome, the basic legal precepts this Court has (twice) held govern the interpretation of UPMC's Consent Decree.

Despite this total lack of legal authority—and despite having waited nearly *five years* to seek elimination of a termination date that it expressly endorsed in 2014—OAG petitions this Court not only to exercise its discretionary and extraordinary jurisdiction, but also to accommodate false exigencies that are

entirely of OAG's own making by rushing through an impossibly compressed judicial process that would go from OAG's opening brief to this Court through post-trial judgment by the Commonwealth Court before June 30—not including any post-trial appellate practice. For multiple independent reasons, the Court should deny OAG's Petition.

First, OAG has not demonstrated a "substantial ground for difference of opinion." 42 Pa. C.S. § 702(b). Pennsylvania law requires reading the Consent Decree as a whole, giving meaning to each of its terms, and—most importantly—effectuating the parties' intent, which always included the termination that OAG is now trying to void. OAG fails to show any substantial ground to dispute the lower court's application of those principles to the Consent Decree at issue.

Second, OAG has not demonstrated that an immediate appeal will "materially advance the ultimate termination of the matter." 42 Pa. C.S. § 702(b). On the contrary, granting an interlocutory appeal in this matter will (1) confound everyone's long-standing expectations about what is to happen on June 30; (2) require the parties to make frenetic preparation for a possible trial (now scheduled to begin May 29) on the underlying merits of Count One of OAG's Petition; (3) almost certainly guarantee an eventual appeal from any ultimate judgment rendered on Count One by the lower court; and (4) depending upon final disposition on the merits of Count One, lock the Commonwealth Court and this

Court into perpetual supervision of a radical re-ordering of all healthcare delivered in the Commonwealth. To "advance the ultimate termination of this matter" the Court should promptly exercise its discretion to deny OAG's request for interlocutory review.

Third, OAG comes nowhere close to overcoming the high bar this Court sets for exercising its extraordinary jurisdiction under 42 Pa. C.S. § 726. A necessary predicate to the exercise of this jurisdiction is a clear right to relief, but OAG does not even argue that such a right exists here. Petition at 17-18. Indeed, OAG stretches its credibility to the limits in asserting that there is even a substantial ground for a difference of opinion on the underlying issue, let alone a "clear right to relief." Nor can OAG meet the other requirements for Section 726 jurisdiction—immediacy and public importance—when it knowingly delayed seeking modification for years, and when this Court has already considered the only circumstances that OAG cites in support of its request for extraordinary jurisdiction.

The parties agreed to the Consent Decree in 2014 and are now nearing the end of that agreement. In a collateral assault on the straightforward contractual interpretation that this Court announced just a few months ago, OAG is trying to conjure into existence a new, radical decree that has nothing whatsoever to do with "consent" or "modification." Its request that this Court enlist itself in that effort by

reversing—on an interlocutory and expedited basis—the decision of the court below should be declined.

COUNTERSTATEMENT OF THE CASE

This Court has already decided two appeals in this case and is familiar with the background facts. *See generally Commonwealth ex rel. Shapiro v. UPMC*, 188 A.3d 1122, 1123-35 (Pa. 2018); *Commonwealth ex rel. Kane v. UPMC*, 129 A.3d 441, 445-57 (Pa. 2015).

In brief, UPMC, OAG, the Pennsylvania Department of Insurance ("PID") and the Pennsylvania Department of Health ("DOH") are parties to a 2014 Consent Decree that was intended to provide a five-year, orderly transition and wind-down of numerous contractual relationships between UPMC and Highmark. The Consent Decree mapped out that transition while emphasizing in its opening paragraph that it was not an extension of any of those contractual relationships "and shall not be characterized as such." *See* Appendix 1 at I.A. The in-network access it provides is limited to particular services for certain kinds of Highmark members under specified circumstances. *See id*. § IV.A. The Consent Decree—which the Commonwealth Court approved on July 1, 2014—also includes a provision labelled "termination" stating that "[t]his Consent Decree shall expire five (5) years from the date of entry," or June 30, 2019. *Id*. § IV.C.9.

On February 7, 2019—more than four years after signing the Consent Decree—OAG filed a "Petition to Modify Consent Decrees" in the Commonwealth Court. That Petition asks the Court to "modify" UPMC's Consent Decree by entering, effective the day after the existing Consent Decree expires, a "Proposed Modified Consent Decree" that bears no resemblance to the existing Consent Decree, repudiates the intent and plain language of the parties' agreement, has nothing whatsoever to do with "consent," and would impose on UPMC and others a complex and radical set of new legal obligations—all in perpetuity. Although PID and DOH signed the existing Consent Decree, neither joined OAG's request for modification.[1]

The proposed decree includes the following provisions, among others:

- **No termination date** – The proposed decree would "remain in full force and effect until further order of the Court." Appendix 2 § 11.
- **Forced provider contracting** – The proposed decree would require that all UPMC hospitals and doctors enter into a contract with any insurer that desired a UPMC contract, including for federal programs. *Id*. § 3.2.

[1] Those agencies have conspicuously avoided opining in this Court on the merits of OAG's proposal. *See* Apr. 11, 2019 No Answer Letter. In the proceedings below, they are also refusing to participate in any discovery that might reveal their analyses of OAG's proposals. *See* Mar. 28, 2019 Application to Quash. It is remarkable that the other state agencies that co-signed the Consent Decree and that have explicit regulatory oversight of healthcare and health insurance insist on having no involvement with the radical changes now being proposed, and that OAG, to which the General Assembly delegated no such regulatory authority, is alone in pushing for these extreme changes.

- **Forced insurer contracting** – The proposed decree would require that all of UPMC's insurance subsidiaries enter into a contract with any provider that desired a UPMC Health Plan contract, including for federal programs. *Id*. § 3.2.

- **Forced arbitration** – Any UPMC subsidiary who failed to negotiate a contract with an interested counter-party would be forced to accept terms imposed on it through "baseball arbitration." *Id*. § 4.1.

- **Board terminations** – UPMC would be required to replace a majority of its board members. *Id*. § 3.11.

- **Ongoing Commonwealth Court supervision** – Interpretation and enforcement of the modified consent decree would remain in the original jurisdiction of the Commonwealth Court. *Id*. § 13.

On February 21, 2019, UPMC filed a motion to dismiss the Petition to Modify. While briefing on that motion was still underway, the Commonwealth Court *prospectively* certified any dispositive order it might issue for interlocutory appeal. The court's March 12, 2019 Scheduling Order II states that, in "recognition of the public interest, any dispositive orders pertaining to … the Petition to Modify shall be deemed to include permission to appeal from this Court … pursuant to Pa. R.A.P. 1311, and contain the statement prescribed by 42 Pa. C.S. § 702(b), without further application by the parties." Appendix 3.

On April 3, 2019, the Commonwealth Court, Judge Simpson presiding, issued a decision on the Motion to Dismiss. *See* Petition Appx. A. The court first noted that standard principles of contract interpretation apply when construing the meaning of UPMC's Consent Decree. *See* Petition Appx. A at 26. The Court then

held that it could not modify the UPMC's Consent Decree to alter the June 30, 2019 termination date. In the relevant part of its analysis, the Court held that,

> [a]s noted above, our Supreme Court has already decided that the June 30, 2019 termination date is an unambiguous and material term of the Consent Decree.... That Court also instructed that in the absence of fraud, accident or mistake, courts have neither the power nor the authority to modify or vary the terms set forth.... Whatever preclusion label is applied, our Supreme Court's ruling on this issue is binding here. Stated differently, regardless of the authority of the Attorney General or the remedies set forth in the Consent Decree, inherent limitations on this Court's power prevent relief inconsistent with the Supreme Court's prior ruling in this case. Because the OAG does not plead fraud, accident or mistake, this Court lacks the power or authority to modify the termination date of the Consent Decree without the consent of the parties, even if it were in the public interest to do so.

Id. at 34-35. Consistent with its earlier Order, the Court also certified its decision on this point for interlocutory appeal pursuant to Pa. R.A.P. 1311. OAG then filed the Petition in this Court.[2]

[2] The Petition presents a misleading Controlling Question of Law that suggests—wrongly—that the Consent Decree "expressly provided" for the power "to modify the duration" of the agreement. Petition at 11. The parties' Consent Decree does not "expressly provide" for the power to modify the duration of the agreement. The modification provision makes no reference to the termination provision at all.

LEGAL STANDARD

To permit appeal of an interlocutory order, the trial court must conclude that the petitioner has shown there is "substantial ground for difference of opinion" as to the question at issue, and "that an immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa. C.S. § 702(b). Once the trial court certifies an interlocutory appeal under this statute, the appellate court may then, "in its discretion" permit the appeal if the appellate court "is satisfied with the trial court's certification." *Kensey v. Kensey*, 877 A.2d 1284, 1289 (Pa. Super. Ct. 2005). The trial court's determination does not control whether to permit appeal. *See id.* (declining appeal despite trial court's certification).

The Court invokes its extraordinary jurisdiction pursuant to 42 Pa. C.S. § 726 "sparingly." *Washington Cty. Comm'rs v. Pa. Labor Relations Bd.*, 417 A.2d 164, 167 (Pa. 1980). The presence of an issue of immediate public importance is necessary, but "not alone sufficient to justify extraordinary relief." *Phila. Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 n.11 (Pa. 1978). As with a request for mandamus, the Court "will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner's rights." *Id*.

REASONS WHY THE COURT SHOULD DENY THE PETITION

I. THERE CAN BE NO DIFFERENCE OF OPINION THAT THE REQUESTED "MODIFICATION" IS IMPROPER.

OAG's Petition fails right out of the gate. A "controlling question of law as to which there is a substantial ground for difference of opinion" under Section 702(b) typically is found with questions of first impression, conflicting lines of case law, or unsettled areas of the law. *See, e.g., Southeastern Pa. Transp. Auth. v. Dunham*, 668 A.2d 272, 273 (Pa. Commw. Ct. 1995) (conflicting case law).

This case is none of the above. As this Court has twice recognized in reference to the same agreement at issue here, the Consent Decree is a "judicially sanctioned contract that is interpreted in accordance with the principles governing all contracts." *Shapiro*, 188 A.3d at 1131. And as with any contract, the fundamental rule in interpreting the 2014 Consent Decree is to ascertain the intent of the parties through the plain, unambiguous language, and to read the contract as a whole. *See id*. at 1131-32; *see also Hazell v. Servomation Corp.*, 440 A.2d 559, 560-61 (Pa. Super. Ct. 1982); *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 175 A.2d 58, 61-62 (Pa. 1961) (court lacked authority to modify "clear and unequivocal" provisions of consent decree); *Watson v. City of Sharon*, 406 A.2d 824, 826-27 (Pa. Commw. Ct. 1979) (same).

OAG does not dispute that these clear legal rules apply. Nor is there a dispute that the parties expressly intended the Consent Decree to end on June 30,

2019. As Judge Pellegrini recognized, the parties' intent was to provide for limited access rights for certain Highmark subscribers "during a period of transition to enable them to decide whether to remain with Highmark or change insurance carriers." *Commonwealth v. UPMC*, 2018 Pa. Commw. Unpub. LEXIS 393, at *3 (Pa. Commw. Ct. Jan. 29, 2018). In its very first provision (called "interpretive principles"), the Consent Decree states that it "is not a contract extension and shall not be characterized as such," Appendix 1 § I.A, and repeats later that certain access rights are not "a contract extension," *id.* § IV.A.10. And the Consent Decree sets a specific termination date of June 30, 2019. *Id.* § IV.C.9.

This Court held less than nine months ago that the expiration date of the Consent Decree was a material provision of the parties' agreement and that the courts cannot "alter[] an unambiguous and material term of the Consent Decree — the June 30, 2019 end date." *Shapiro*, 188 A.3d at 1132. Without even mentioning modification, OAG—acting without the joinder of PID or DOH—argued that this Court should force UPMC to continue contracting with Highmark for Medicare Advantage subscribers through at least June 2020, supposedly because seniors would be confused by a mid-year termination and somehow suffer harm. *Id*. at 1126. This Court refused to do that, ruling that it could not and would not "alter[] an unambiguous and material term of the Consent Decree—the June 30, 2019 end date." *Id*. at 1132. According to this Court's unanimous opinion, the

Consent Decree's requirement that UPMC "shall treat all Medicare participating consumers as In-Network," *id*. at 1124, had to be read in conjunction with the termination provision, and without fraud, accident, or mistake, courts simply do not have authority to modify or vary the unambiguous end of a consent decree. *Id.* at 1132. It is thus not surprising that the Commonwealth Court similarly held it has "neither the power nor the authority" to modify the termination date contrary to the parties' stated intent. Petition Appx. A at 35.

OAG now contends that the material, unambiguous termination provision can simply be "modified" out of existence because "[t]here is no carve out preventing the June 30, 2019 termination date of the Consent Decrees from being modified" under section IV(C)(10) of the decree ("Modification"). Petition at 3. But there is no allegation or credible argument that UPMC agreed, in advance, to unlimited modifications in perpetuity. No one would have executed a document with a termination clause that was subject to infinite change at the discretion of the adverse party.

Nor is what OAG proposes a "modification" of the termination provision. To "modify" is "to make minor changes in" something or "to change something slightly, esp. to improve or make it more acceptable or less extreme."[3] No one

[3] Miriam Webster Online, https://www.merriam-webster.com/dictionary/modify; Cambridge Dictionary Online, https://dictionary.cambridge.org/us/dictionary/english/modify.

understands "modify" to mean "eliminate," "annul," or "delete." Yet that is exactly what OAG asked the lower court and now this Court to do to the termination provision.

Merely stating OAG's position demonstrates its absurdity. As the record reflects, OAG and other Commonwealth agencies have expressly acknowledged they have no authority to require UPMC to enter into contracts with Highmark. *See* Appendices 4 and 5 hereto. Similarly, the Commonwealth Attorneys Act does not authorize the Attorney General to enact new policies through litigation or bring stand-alone "public interest" claims designed to remake healthcare. *See* 71 P.S. § 732-101, *et seq*. But because UPMC signed a Consent Decree—one that expressly acknowledged that it was *not* a contract extension, included an express termination date, and stated that it must be interpreted consistently with PID's prior public-interest assumption that there would be no contract—OAG contends it can now impose new, perpetual obligations on UPMC beginning the day after the existing Consent Decree expires. Such a reading improperly overtakes the parties' original purpose and intent, violates the material terms of the parties' agreement, and must be rejected. *Hazell*, 440 A.2d at 560-61.

OAG has not offered a single legal authority, either to this Court or to the court below, for this astounding proposition. To the contrary, a specific term like the termination provision "controls the general," such as the modification provision

contained in section IV(C)(1), not the other way around. *See Trombetta v. Raymond James Fin. Servs. Inc.*, 907 A.2d 550, 560 (Pa. Super. Ct. 2006). That is the only way to interpret the Consent Decree as a whole without annulling the termination provision. And, it is "fundamental that one part of a contract cannot be so interpreted as to annul another part." *Shehadi v. Ne. Nat. Bank of Pa.*, 378 A.2d 304, 306 (Pa. 1977).

For OAG to suggest that a general term like modification must specify when it does not apply or otherwise override a material, unambiguous term is literally unprecedented. And if the intent of the parties to *this* contract had been to allow for open-ended modification of infinite duration and new ongoing obligations past June 30, 2019, then they would not have (1) agreed to negotiate a transition plan of limited duration, (2) expressly stated the transition was not a contract extension, and (3) agreed to an absolute expiration date with no carve-out or other limitation. It is implausible to conclude otherwise. At a minimum, the Court cannot conclude there is a substantial disagreement on the law when OAG has not cited a single case in support of its position.[4] There is no reason for this Court to discard the

[4] Although Highmark is not a signatory to UPMC's Consent Decree, did not join OAG's Petition to Modify, and was not the subject of any adverse ruling (much less one certified for interlocutory appeal), Highmark filed a "Joinder" arguing that "the Commonwealth Court's *sua sponte* recognition that its ruling meets" the criteria of Section 702(b) "is reason enough to conclude there is a substantial ground for a different of opinion." Joinder at 4. Highmark cites

application of plain meaning or hornbook contract law and revisit a decision it issued less than one year ago.

II. AN IMMEDIATE APPEAL WILL ONLY PROLONG LITIGATION AND UNCERTAINTY.

Nor can OAG show that an immediate appeal from the Order will "materially advance the ultimate termination of the matter." 42 Pa. C.S. § 702(b). Advancing the ultimate termination usually means interlocutory review will *eliminate* the need for trial, not *create* the need for *more* litigation. *See Kensey*, 877 A.2d at 1289 (denying interlocutory appeal); *Miller v. Krug*, 386 A.2d 124, 127 (Pa. Super. Ct. 1978) (same).

Here, OAG's requested appeal will only ensure the need for additional legal proceedings—both immediately and stretching into perpetuity. If OAG's appeal is granted and the Commonwealth Court is reversed, the trial on OAG's central claim—that its radical recasting of healthcare in Pennsylvania is "in the public interest"—will commence on May 29 and presumably conclude before June 30. Any outcome of that trial will then be subject to direct appeal to this Court. And if OAG ultimately prevails on the merits of that claim, this Court—not the Legislature, the Governor, PID or DOH—will have to oversee Pennsylvania's new regime for healthcare in the complete absence of guidance from laws, regulations,

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nothing for that proposition, which—as discussed above—is contrary to the plain language of Section 702(b) and wrong as a matter of law. *See supra* at 9.

or legal precedent. Far from finality, there will be no limit to the disputes created by OAG's radical attempt to assert its dominion over the healthcare delivered in Pennsylvania.

Nor is there any reason for this Court to grab OAG's appeal on an expedited basis now. OAG has known for five years that the Consent Decree will expire in June 2019. By its own admission, OAG has been attempting to secure UPMC's agreement to "modifications" for two years. Petition at 8. But it waited until February 2019 to file the Petition to Modify. OAG could have and should have asserted these claims during its last trip to this Court—but did not even bother to mention them. Neither this Court nor the other parties should have to turn themselves inside out to accommodate an extraordinarily cramped schedule, compressing the timetable from Petition for Review to oral argument before this Court into just over one month, and the timetable for an incredibly complex trial on the merits into whatever time remains between this Court's decision and June 30.

Indeed, OAG's sole basis for suggesting that immediate, interlocutory, expedited review is needed is that certain Highmark subscribers will lose in-network access to certain UPMC services in Allegheny and Erie counties on June 30, thereby rendering those services more expensive. But ending the five-year transition period on June 30, 2019, was the express intent of the Consent Decree. Nothing was different in 2014, when the parties agreed to this end-date. Nor was

anything different in 2018 when this Court rejected the same arguments that OAG makes again here—that disruption to in-network access or public confusion warrant imposing obligations on UPMC beyond June 30, 2019. The June 30, 2019 end-date had been well advertised to consumers, and especially seniors. CMS, the federal agency that oversees Medicare Advantage, maintains "well-developed contingencies for" network disruptions that "diminish the proffered potential impacts of chaos and confusion, even in the case of significant network changes midyear." *Shapiro*, 188 A.3d at 1133.[5]

Underlying OAG's modification request is the suggestion that UPMC is violating the law by not giving Highmark system-wide contracts. But if OAG

[5] Public outreach over the past year further confirmed the June 30, 2019 end date—and also puts the lie to the new and unverified factual claims that Highmark introduces in its Joinder. To this Court, Highmark claims that the end of the Consent Decree will "affect the public in profound ways." Joinder at 4. Outside of this Court, one of Highmark's most senior executives told the public that Highmark expects the termination of the Consent Decree "to be a nonevent." S. Twedt, *A year away, UPMC's split from Highmark has lost its sting*, PITTS. POST-GAZETTE (Jul. 5, 2018) (attached as Appendix 6). Highmark asks this Court to believe that the termination will cause "adverse consequences for hundreds of thousands" of Pennsylvanians. Joinder at 5. But just a few days before OAG filed its Petition to Modify, Highmark's CFO publicly stated "consumers have been hearing about it for six years. They are ready for this next stage…. And we're ready to go. For us, that's really kind of in the rearview mirror." T. Bannow, *CFO Karen Hanlon says Highmark is moving past the UPMC conflict* Modern Healthcare (Feb. 2, 2019) (attached as Appendix 7). As Highmark acknowledges, it is "the litigation"—all of it brought by OAG and Highmark in the last two years—that "has created confusion in the marketplace," not the well-advertised Consent Decree or UPMC's compliance therewith. Joinder at 7.

really believes that, it can file a complaint and the parties can litigate those claims. OAG should not be permitted, however, to short circuit that process; force the parties and courts to pay for OAG's own tardiness; and overwrite the plain language of the Consent Decree's termination provision.

III. OAG COMES NOWHERE CLOSE TO MEETING THE STANDARD REQUIRED FOR EXTRAORDINARY JURISDICTION.

As an afterthought, OAG asks in the alternative that the Court exercise its extraordinary jurisdiction pursuant to 42 Pa. C.S. § 726. Petition at 17. As noted *supra*, the rare cases when this Court grants appeal pursuant to Section 726 involve both issues of immediacy and public importance, and a record that "clearly demonstrates a petitioner's rights." *Jerome*, 387 A.2d at 430, n.11. OAG meets none of those requirements here.

First, there is no record at all, much less one that "clearly demonstrates [OAG's] rights." *Id*. As to the legal question at issue in its petition, OAG offers no legal authority or argument supporting its misreading of the Consent Decree, its call on this Court to reverse its 2018 decision, or its attack on the lower court's reasoning. More importantly for purposes of Section 726, however, OAG cannot show that it is entitled to any modification of the Consent Decree regardless of how the termination provision is applied. OAG stuffed its Petition to Modify with a series of unproven allegations about UPMC that are highly misleading or outright false. UPMC—which has not even filed an Answer to that petition yet—will fully

contest each of OAG's allegations at the appropriate time. But OAG does not benefit from the early posture of this case. This Court does not assert extraordinary jurisdiction by *assuming* the truth of allegations. It is OAG's burden to come forward with a record showing a clear right to relief, and its failure to do so—or even argue that it has done so—precludes jurisdiction under Section 726. *See Washington Cty. Comm'rs*, 417 A.2d at 167.

For a similar reason, the Court should not countenance any request for a special injunction extending the existing Consent Decree beyond June 30, 2019 and through "the ultimate resolution of this action." Petition at 19; *see also* Joinder at 4-8. That would be improper both under the Consent Decree, and as a matter of basic procedure. No one ever raised a claim for a special injunction below, and claims not presented to the trial court are waived on appeal. *See* Pa. R.A.P. 302(a). Section 726 should not be used as an escape hatch for claims that a litigant has waived. Nor should this Court exercise its extraordinary jurisdiction in order to hear in the first instance disputed questions of fact—such as those presented throughout OAG's Petition for Permission to Appeal and Highmark's Joinder—concerning whether to issue mandatory injunctive relief that would *change* the status quo by abrogating the termination date. *See Jackson v. Hendrick*, 503 A.2d 400, 408 (Pa. 1986) (excepting from the exercise of extraordinary jurisdiction "resolutions of fact which are best determined by the Court of Common Pleas").

In addition, the Petition does not identify any "immediate issues of public importance." The Petition argues that this case raises issues concerning the healthcare of Pennsylvania citizens, and that those issues are immediate because the Consent Decree terminates on June 30, 2019. Petition at 17-18. But the entire purpose of the Consent Decree was to provide a five-year runway to the end of UPMC and Highmark's contractual relationship. Any person or employer who might be impacted by the expiration of the Consent Decree has had *five years* to plan accordingly. The fact that OAG waited to file the Petition to Modify until four months before the Consent Decree expires does not turn the planned conclusion of a five-year transition into an "immediate" issue of public importance.

Similarly, the public importance of this issue has been reviewed twice already by this Court, and its prior opinion specifically rejected OAG's arguments that confusion and network disruption warrant extending UPMC's obligations beyond June 30, 2019. OAG offers no reason to revisit those same issues now.

CONCLUSION

For the foregoing reasons, UPMC respectfully requests that the Court deny OAG's Petition for Permission to Appeal, or in the Alternative, Application for Extraordinary Relief.

Dated: April 12, 2019

Respectfully submitted,

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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.

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, true and accurate copies of Respondent UPMC's Answer To Petition For Permission To Appeal, Or In The Alternative, Application For Alternative Relief were served via PACFile on counsel of record.

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