[J-75A&B-2011] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

THE HOSPITAL & HEALTHSYSTEM ASSOCIATION OF PENNSYLVANIA, GEISINGER HEALTH SYSTEM, ST. VINCENT HEALTH CENTER AND ABINGTON MEMORIAL HOSPITAL	:	No. 20 MAP 2010
	:	Appeal from the Order of the Commonwealth Court dated April 15, 2010 at No. 522 M.D. 2009
v.	:	
THE COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE, THE TREASURY DEPARTMENT, AND THE OFFICE OF THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	
APPEAL OF: COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE AND THE OFFICE OF THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	997 A.2d 392 (Pa. Cmwlth. 2010)
	:	ARGUED: September 14, 2011

THE PENNSYLVANIA MEDICAL SOCIETY, ON BEHALF OF ITSELF AND ALL OF ITS MEMBERS	:	No. 21 MAP 2010
	:	Appeal from the Order of the Commonwealth Court dated April 15, 2010 at No. 523 M.D. 2009
v.	:	
THE COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE, THE TREASURY DEPARTMENT, AND THE OFFICE OF	:	

THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	
APPEAL OF: COMMONWEALTH OF PENNSYLVANIA, THE DEPARTMENT OF INSURANCE AND THE OFFICE OF THE BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA	:	997 A.2d 392 (Pa. Cmwlth. 2010)
	:	ARGUED: September 14, 2011

DISSENTING OPINION

MADAME JUSTICE TODD **DECIDED: September 26, 2013**

I would hold our decision pending a final order in Hosp. & Healthsystem Ass'n v. Ins. Comm'r of Pa., 2013 WL 4033850 (Pa. Cmwlth. filed Aug. 9, 2013) (hereinafter "Hosp. & Healthsystem") — for which appeal has been sought to this Court[1] — because I find my resolution of this appeal is contingent on a final determination in that litigation. Accordingly, I respectfully dissent.

I. The Commonwealth Court's Decision in Hosp. & Healthsystem

As the majority alludes to, see Majority Opinion at 27 n.24, in Hosp. & Healthsystem, the Commonwealth Court recently construed Section 712(d)(1) of the MCARE Act, the provision which determines the aggregate dollar amount of the assessments to be levied on health care providers in a given year. Therein, the healthcare providers asserted they were overcharged assessments in 2009, 2010, and 2011.[2] Section 712(d)(1) provides that the assessment "shall, in the aggregate,

[1] The Insurance Commissioner filed a petition for allowance of appeal in this Court on September 9, 2013. Hosp. & Healthsystem Ass'n v. Ins. Comm'r of Pa., 681 MAL 2013. That petition is pending.

[2] Notably, the $100 million transfer authorized by Act 50, at issue in the instant case, occurred during this period, in 2009.

produce an amount sufficient to do all of the following:" (i) reimburse the MCARE Fund for claims paid out the prior year; (ii) pay expenses of the Fund for the prior year; (iii) pay principal and interest to cover loans made to the Fund the prior year, if there was a shortfall; and (iv) provide a reserve equaling 10% of the sum of (i), (ii), and (iii). 40 P.S. § 1303.712(d)(1). At issue in that case was the meaning of the preamble — that the assessment *shall, in the aggregate, produce an amount sufficient to do* (i) through (iv) — and, specifically, whether that calculation includes any surplus monies remaining in the Fund from the prior year. The healthcare providers asserted the aggregate assessment calculation must account for any surplus, while the Insurance Commissioner took the position that the assessment is unrelated to the balance in the Fund.[3]

The court concluded the assessment calculation must include any unspent balances from the prior year. First, the court observed that the statute used the phrase "produce an amount sufficient to" cover the sum of (i) through (iv), not an amount *equal to* that sum. Hosp. & Healthsystem, 2013 WL 4033850 at *5. Second, the court reasoned:

> Most importantly, the MCARE Act says nothing about the accumulation of unspent balances in excess of the 10% reserve. It does not authorize them. Accordingly, it provides no direction on when and how to use them. Likewise, the

[3] The court provided the following illustration, based on a stipulation of the parties regarding the 2009 assessment. Therein, the MCARE Fund calculated the 2009 aggregate assessment to be approximately $204 million. Hosp. & Healthsystem, 2013 WL 4033850 at *3. This consisted of a total of: $174 million in claims from 2008; plus expenses of $12 million in 2008; plus $0 for 2008 loans; plus $18.6 million, representing 10% of the sum of $174 million and $12 million. Id. The Fund *ignored* the 2008 unspent balance of approximately $104 million. Id. According to the court, had the Fund taken the $104 million into account, "the assessments would have been significantly lower." Id. Presumably, the adjusted levy in 2009 would have been $100 million: $204 million minus the $104 million surplus.

> MCARE Act provides no guidance on the income generated by an accumulation of unspent balances, which can be considerable given the present unspent balance of $104 million. The MCARE Act's silence on these matters makes perfect sense only if the legislature never intended that such an accumulation would develop.

Hosp. & Healthsystem, 2013 WL 4033850 at *5. Finally, the court noted the operation of Section 712(k) of the Act, which directs the return of Fund balances upon the Fund's termination at some point in the future when it has satisfied all liabilities:

> The legislature has addressed the possibility of an unspent balance in only one place in the statute. Section 712(k) of the MCARE Act provides that upon termination of the MCARE Fund, "[a]ny balance remaining in the fund" shall be returned to the healthcare providers who paid "assessments *in the preceding calendar year*." 40 P.S. § 1303.712(k) (emphasis added). The very wording of this directive is instructive. It presumes a small, if "any," balance and suggests that there should not be an unspent balance in any other year. Were it otherwise, the legislature would have directed the return of accumulated unspent balances to all the providers who, in preceding years, contributed to the accumulated unspent balances lest the providers in the final year enjoy a windfall.

Hosp. & Healthsystem, 2013 WL 4033850 at *5-6.[4] As a result of its determination, the court ordered reassessments for 2009, 2010, and 2011, directing the Fund to take into account any unspent balances in calculating the aggregate assessment for each of those years.

In my view, if the Commonwealth Court's interpretation of Section 712(d)(1) in Hosp. & Healthsystem is correct, an interpretation the Insurance Commissioner is challenging before this Court, the effect is twofold: First, any monies withdrawn from

[4] The court also concluded that any contrary interpretation would be constitutionally infirm because Section 712(d) does not give the MCARE Fund any direction on how to use unspent balances, and, thus, would be an unconstitutional delegation of legislative power. Id. at *6.

the Fund — for example, the $100 million transfer out of the Fund accomplished by Act 50 — are unavailable to offset the imposed aggregate assessment for the following year, thus resulting in proportionately higher assessments for the healthcare providers in that assessment year. Second, as a corollary, there will be no year-to-year surplus in the fund, as any excess created in a given year (generated when the 10% reserve required by Section 712(d)(1)(iv) is not needed to cover claims) will be returned to healthcare providers by way of lower assessments in the next year.

The Commonwealth Court's determination, which is directly contrary to the Commonwealth's contention herein, see, e.g., Commonwealth's Brief at 36-37 ("the assessment level is entirely independent of the balance in the MCARE Fund"), has ripple effects throughout the present appeal, both on my resolution of the question of Appellees' standing, as well as the merits.

II. Standing[5]

[5] In addition to standing and political question, this case presents an additional threshold issue not addressed by the majority. That issue — whether the General Assembly is an indispensable party — was identified in the Commonwealth Court by Judge Pellegrini in his dissent, and was noted, but not resolved, by the majority herein. See Majority Opinion at 8. Specifically, Judge Pellegrini opined that the General Assembly, not joined in this action, is an indispensable party because the relief Appellees seek requires the passage of budget legislation to transfer $100 million from the General Fund back to the MCARE Fund. See Hosp. & Healthsystem Ass'n of Pennsylvania, 997 A.2d 392, 403 (Pa. Cmwlth. 2010) (*en banc*) (Pellegrini, J., dissenting) (incorporating and citing Pennsylvania Med. Soc'y v. Dep't of Public Welfare, 994 A.2d 33, 46-53 (Pa. Cmwlth. 2010) (Pellegrini, J., dissenting)).

As the issue regarding the General Assembly's status as an indispensable party implicates the Court's jurisdiction, in my view, that threshold issue should have been resolved before Appellees' claim was addressed on the merits. See City of Philadelphia v. Commonwealth, 575 Pa. 542, 572, 838 A.2d 566, 584-85 (2003) (after ruling that petitioners had standing and the question they presented was justiciable, and before awarding relief, resolving that the General Assembly was not an indispensable party, such that the court had jurisdiction to reach the merits).
(…continued)

In Pennsylvania, the requirement of standing stems from the principle that a court's intervention is appropriate only where the underlying controversy is real and concrete, and not abstract. City of Philadelphia, 575 Pa. at 559, 838 A.2d at 577. We have observed that the requirement "is not a senseless restriction on the utilization of judicial resources," but, rather, is "a prudential, judicially-created tool meant to winnow out those matters in which the litigants have no direct interest" and to ensure that there is a legitimate controversy for a court to hear. In re Hickson, 573 Pa. 127, 135, 821 A.2d 1238, 1243 (2003).

Thus, in practical terms, our standing doctrine is founded on the core concept that a party must be "aggrieved," *i.e.*, "adversely affected," by the matter he seeks to challenge in order to obtain a judicial resolution of his claim. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 192, 346 A.2d 269, 281-82 (2003). As we have stated, the "keystone to standing . . . is that a person must be negatively impacted in some real and direct fashion." Pittsburgh Palisades Park, LLC v. Commonwealth, 585 Pa. 196, 204, 888 A.2d 655, 660 (2005).

Under the test we have devised, a litigant may establish he is aggrieved, and thus, has standing, by stating facts that show he has a "substantial, direct, and

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Further, in declining to address the issue, I question the majority's reliance on the Commonwealth's representation during preliminary injunction proceedings below that it would comply with the Commonwealth Court's ultimate judgment. See Majority Opinion at 9 n.9. This approach, in my view, pays insufficient regard to the constitutional rule that this Court "has only that jurisdiction as is provided by law," and is tantamount to allowing parties to confer jurisdiction on the Court, which cannot be permitted. See In re Nader, 588 Pa. 450, 461, 905 A.2d 450, 457 (2006) (internal quotation marks omitted); id. ("The fact that Appellees in the instant matter agreed that the Order was appealable cannot confer jurisdiction on the Court if it is otherwise lacking."); see also Pa. Const. art. V, § 2(c); Given my determination that we should hold our present disposition of this matter, however, I do not address this issue any further.

immediate" interest in the outcome of the litigation. Id. A party's interest is "substantial" if "his interest exceeds that of all citizens in procuring obedience to the law." City of Philadelphia, 575 Pa. at 560, 838 A.2d at 577. His interest is "direct if there is a causal connection between the asserted violation and the harm complained of." Id. His interest is "immediate" if that causal connection is neither "speculative" nor "remote." Id. In applying this test, we have noted that Pennsylvania law does not support the proposition that harms which are "abstract or uncertain" are sufficient to confer standing. Id.

While I would agree with the majority that Appellees' interest is substantial, I cannot agree at this juncture that Appellees also have demonstrated a direct and immediate interest. In that regard, the majority accepts Appellees' assertion that the unavailability of $100 million in the MCARE Fund resulting from the 2009 transfer of fund monies harmed them and establishes their direct and immediate interest. The majority concludes this is so because, *inter alia*, "the transfer of funds is the direct and immediate cause of the alleged infringement of Appellees' vested entitlements, as well as the alleged non-uniform taxation." Majority Opinion at 16. I cannot agree, as, in my view, Appellees must more concretely demonstrate that they are harmed by the $100 million transfer. Cf. Pittsburgh Palisades, 585 Pa. at 204, 888 A.2d at 660 (negative impact must be real, not remote). However, *if* the $100 million transfer resulted in an increase in Appellees' assessments, I conclude that *would* be a sufficient demonstration of harm. As the correctness of the Commonwealth Court decision in Hosp. & Healthsystem bears directly on this question, I cannot resolve the standing question absent a final judgment in that case.[6]

[6] This analysis follows to a degree this Court's determination in Pennsylvania Med. Soc. v. Dep't of Pub. Welfare, 614 Pa 574, 39 A.3d 267 (2012), that Appellees had standing to sue. There, the Court concluded that, since Appellees demonstrated they would pay (…continued)

III. Merits

Although my standing analysis is contingent on the Commonwealth Court's decision in Hosp. & Healthsystem, that decision likewise bears on my analysis of the merits of this appeal.

A. Vested Rights

I am skeptical of the majority's conclusion that Appellees had a vested right to the monies in the MCARE Fund because the fund "is in the nature of a trust fund whose monies are held for the purpose designated by statute." Majority Opinion at 24. The legislature expressly established the MCARE Fund as a "special fund" within the State Treasury, indicating that money in the Fund, which comes from assessments and other sources,[7] would remain under the General Assembly's budgetary control and be subject to its legislative mandates.[8] See 40 P.S. § 1303.712(a). Indeed, since it can be

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increased health care provider MCARE assessments in the future as a result of the Commonwealth's failure to fund all MCARE abatements under the Health Care Provider Retention Law ("Abatement Law"), 40 P.S. §§ 1303.1101-1115 (repealed in 2009), they sustained ascertainable harm and thereby established a direct and immediate interest in the claim they brought. 39 A.3d at 279.

[7] The record establishes that, between 2002 and 2008, the MCARE Fund received $330 million in transfers from the Health Care Provider Account under the Abatement Law (repealed in 2009), which was derived from general tax revenue on the sale of cigarettes, and more than $215 million derived from motor vehicle violation surcharges under Section 712(m) of the MCARE Act. See 40 P.S. § 1303.712(m) (repealed in June 2011).

[8] In Pennsylvania, the term "special fund" is a technical term and has acquired a particular meaning. See 1 Pa.C.S.A. § 1903 ("[T]echnical words and phrases and such others as have acquired a peculiar and appropriate meaning . . . shall be construed according to such peculiar and appropriate meaning or definition."). The Governor's Office Manual of Accounting (the "Manual"), adopted as the official accounting procedures document by the Commonwealth for Commonwealth agencies, which the parties here acknowledge, classifies and defines the various Commonwealth funds that may be established by legislative or administrative action. The Manual states, in pertinent part:
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presumed that the legislature knew how to place monies in trust and restrict their use, had the General Assembly intended that the monies in the MCARE Fund be used exclusively for MCARE purposes and for nothing else, it would have established the Fund differently, in the form of a trust, as it did when creating the Fund's predecessor, and it would have imposed express restrictions in the MCARE Act on its authority to control the uses to which Fund monies may be put, as it has in other statutes. See 40 P.S. 1301.701(e)(8) (repealed 2002) ("The [Medical Professional Liability Catastrophe Loss] fund and all income from the fund shall be held in trust, deposited in a segregated account . . . and shall not become a part of the General Fund of the Commonwealth."); 66 Pa.C.S.A. § 511(b) ("All such [annual] assessments and fees [collected from public utilities for defraying the regulatory costs of the Public Utility Commission] shall be held

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> b. Special Revenue Funds. Special revenue funds account for transactions related to resources obtained from specific revenue sources (other than for expendable trusts or major capital projects) that are legally restricted to expenditures for specified purposes. Special revenue funds account for federal grant programs, taxes levied with statutorily defined distributions, and other resources restricted as to purpose. The Commonwealth has over 50 such funds.
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> Special revenue funds, as with the General Fund, are subject to budgetary control. Controls derive from legislative mandate, as is the case with the State Lottery Fund and the Motor License Fund, or by direction of the Governor.

The Manual (Exhibit A to Petitioner's Reply Brief in Support of Application for Summary Relief) at 32. By contrast, under the Manual, "fiduciary fund types," classified as "Expendable Trust Funds," "Nonexpendable Trust Funds," "Pension Trust Funds," or "Agency Funds," are "held by the Commonwealth as a trustee or agent for some other entity or for itself." Id. at 32-33.

in trust solely for that purpose, and shall be earmarked for the use of, and annually appropriated to, the commission for disbursement solely for that purpose.").

Regardless, I cannot join the majority's decision to remand this matter to the Commonwealth Court for a determination of whether a surplus exists in the Fund. As discussed above, in my view, that court has already determined in Hosp. & Healthsystem that the assessment mechanism provided in Section 712(d)(1) of the MCARE Act contemplates there will be *no* surplus from year to year. Instead of a remand, I would hold the present appeal pending a final determination in Hosp. & Healthsystem.

B. Uniformity Clause

Like the majority, I would assume for present purposes that "the $100 million diversion amounted, in practical effect, to a tax on health care providers," Majority Opinion at 30, implicating Appellees' claim that the transfer was a violation of the Uniformity Clause. However, unlike the majority, I would not remand the issue to the Commonwealth Court for a determination of whether Act 50's transfer of $100 million was from surplus monies. Again, in my view, that court has already decided that the assessment formula leaves no surplus. Furthermore, if the Commonwealth Court's analysis in Hosp. & Healthsystem is correct, there would appear to be a direct correlation between the $100 million transferred out of the fund by Act 50 and an increase in the aggregate assessment on Appellees the following year. This would indicate, consistent with Appellees' argument, that Appellees' resulting assessment was, in fact, a general revenue tax. Accordingly, rather than remand the question to a court that has, in my view, essentially already decided the matter, I would hold our decision pending a final determination in Hosp. & Healthsystem.

For all these reasons, I respectfully dissent.