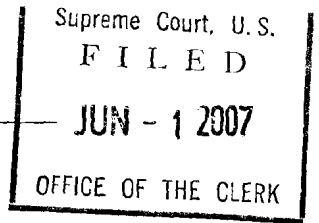


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CASE NO. 06-415



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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN SELIG, IN HIS OFFICIAL CAPACITY AS DIRECTOR  
OF THE ARKANSAS DEPARTMENT  
OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

VS.

PEDIATRIC SPECIALTY CARE, INC., ET AL., RESPONDENTS

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUGGESTION OF MOOTNESS

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MARTIN WAYNE BOWEN  
COUNSEL OF RECORD  
ROBINSON, BIGGS, INGRAM, SOLOP &  
FARRIS, PLLC  
101 SOUTH SPRING STREET  
SUITE 420  
LITTLE ROCK, AR 72201  
(501) 664-0300

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## SUGGESTION OF MOOTNESS

The respondents, Pediatric Specialty Care, Inc., Child & Youth Pediatric Day Clinics, Inc., Family Counseling & Diagnostic Clinic, Inc., Tomorrow's Child Learning Center, LLC, D and D Family Enterprises, Inc., James and Stacey Swindle, as Parents and Next Best Friends of Jacob and Noah Swindle, Minors, and Susann Crespino, as Parent and Next Best Friend of Michael Crespino, a Minor, respectfully come before this Court, by and through their attorneys, Kaplan, Brewer, Maxey & Haralson, P.A., and Robinson, Biggs, Ingram, Solop & Farris, PLLC, and for their Suggestion of Mootness pursuant to Rule 21.2(b), state:

1. This matter is before the Court on a Petition for Writ of Certiorari filed by Petitioners on September 20, 2006 ("the petition"). Petitioners presented the following questions for review to this Court:

1. PRIVATE ENFORCEMENT: Does the statute defining the services that state Medicaid programs are authorized to cover create private rights that are enforceable under 42 U.S.C. § 1983? Does the statute that obligates states to safeguard against unnecessary Medicaid utilization create private rights that are enforceable under 42 U.S.C. § 1983?

2. QUALIFIED IMMUNITY: Are state Medicaid directors subject to personal monetary liability under § 1983 for:

- (a) Medical necessity decisions made by independent board-certified physicians engaged (but not employed) by a federally designated independent contractor of the state Medicaid program; or
- (b) Unauthorized conduct of a nurse employed by the federally designated independent contractor?

PETITION FOR WRIT OF CERTIORARI, page i.

2. The petition arises out of an opinion issued by the United States Court of Appeals for the Eighth Circuit on April 17, 2006, and a subsequent opinion by the same court that denied rehearing on June 22, 2006 (collectively referred to as "the opinions"). The appellate court

upheld the district court's order denying qualified immunity to Petitioners Ray Hanley and Roy Jeffus from Respondents' claims for money damages.

3. Jurisdiction in the appellate court was based upon the collateral order doctrine. This doctrine allows an appeal from a denial of a motion for summary judgment to the extent the motion is based upon the right to absolute or qualified immunity, which protects a defendant from having to defend a lawsuit. *Johnson v. Jones*, 515 U.S. 304, 311 (1995).

4. Respondents have decided to dismiss with prejudice their money damages and individual capacity claims against Mr. Hanley and Mr. Jeffus. By permanently withdrawing these claims, Respondents submit that the petition is moot because there is no longer a justiciable controversy under Article III of the Constitution. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193 (1988) (holding that because respondents "state that they no longer seek any equitable relief in federal court" there no longer is a live controversy between the parties over whether the federal court can hear such claims and "the first question on which certiorari was granted is moot."). Specifically, because Mr. Hanley and Mr. Jeffus will no longer be subject to claims for money damages, the qualified immunity issue is no longer disputed.

5. By letter dated May 18, 2007, Respondents notified Petitioners and the Solicitor General of their decision to dismiss with prejudice their claims for money damages filed against Mr. Hanley and Mr. Jeffus in their individual capacities. A copy of the letter is attached hereto as Exhibit A.

6. By deciding to dismiss with prejudice their individual capacity and money damages claims against Mr. Hanley and Mr. Jeffus, and withdrawing these claims in their entirety, Respondents suggest that all issues presented by the petition are moot. Because jurisdiction over the order denying summary judgment for Mr. Hanley and Mr. Jeffus is

premised on the denial of qualified immunity, dismissal of the money damages claims against Mr. Hanley and Mr. Jeffus will render the petition moot.

7. Respondents hereby represent to the Court that they are withdrawing their money damages and individual capacity claims against Mr. Hanley and Mr. Jeffus in their entirety and with prejudice. If the Court accepts Respondents' suggestion of mootness, dismissal of the petition and an order to the district court directing a dismissal of these claims with prejudice is appropriate.

8. Respondents recognize that vacatur of the underlying opinion is the established procedure when a case becomes moot as a result of the unilateral action of the party who prevailed in the lower court. *U.S. Bancorp Mortgage. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994). Respondents therefore do not object to vacatur of the opinions at issue on this appeal and an order of remand with directions to the district court to dismiss with prejudice the money damages and individual capacity claims filed by Respondents against Mr. Hanley and Mr. Jeffus. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

WHEREFORE, Respondents pray that the Court consider their Suggestion of Mootness, determine that the Petition for Writ of Certiorari is moot, remand the case with an order to dismiss with prejudice the money damages and individual capacity claims against Petitioners Ray Hanley and Roy Jeffus, for each of the parties to bear their own costs, and for all other just and proper relief.

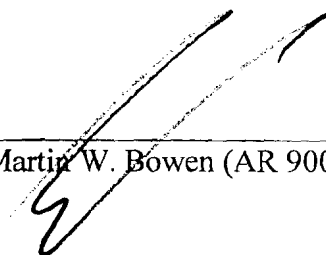
Respectfully submitted,

PEDIATRIC SPECIALTY CARE, INC.,  
CHILD & YOUTH PEDIATRIC DAY  
CLINICS, INC., TOMORROW'S CHILD  
LEARNING CENTER, LLC, D AND D  
FAMILY ENTERPRISES, INC., JAMES AND  
STACEY SWINDLE, AS PARENTS AND  
NEXT BEST FRIENDS OF JACOB AND  
NOAH SWINDLE, MINORS, AND SUSANN  
CRESPINO, AS PARENT AND NEXT BEST  
FRIEND OF MICHAEL CRESPINO, A  
MINOR, Respondents

KAPLAN, BREWER, MAXEY, &  
HARALSON, P.A.  
415 Main Street  
Little Rock, AR 72201  
(501) 372-0400  
(501) 376-3612 (facsimile)

ROBINSON, BIGGS, INGRAM, SOLOP &  
FARRIS, PLLC  
101 South Spring Street  
Suite 420  
Little Rock, AR 72201  
(501) 664-0300  
(501) 664-0301 (facsimile)

By:

  
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Martin W. Bowen (AR 90095)

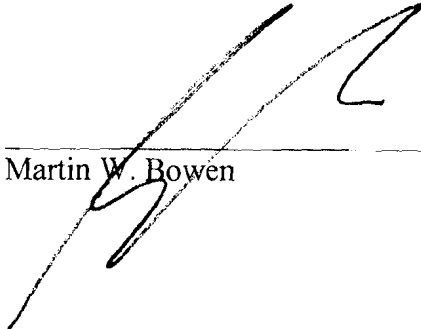
CERTIFICATE OF SERVICE

I, an attorney for Respondents, certify that I have served copies of the foregoing on opposing counsel by depositing copies thereof, first-class postage prepaid, with the United States Postal Service, addressed as follows:

Mr. Charles Hicks  
Office of Chief Counsel  
Arkansas Department of Health and Human Services  
P.O. Box 1437  
Slot 1033  
Little Rock, AR 72203-1437

Ms. Carolyn F. Corwin  
Covington & Burling, LLP  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004-2401

this 1st day of June, 2007.

  
\_\_\_\_\_  
Martin W. Bowen