BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

ALLCARE PHARMACY & HEALTH SERVICES, **Petitioner,** **v.** **EXPRESS SCRIPTS ADMINISTRATORS AND MEDCO HEALTH SOLUTIONS, INC.,** **Respondent.**	**Docket No.: 1835380** **1835380-OSAH-INS-138-Schroer**

FILED
OSAH

JUL 3 1 2018

Kevin Westray, Legal Assistant

INITIAL DECISION

ORDER GRANTING SUMMARY DETERMINATION

I. PROCEDURAL HISTORY

On March 9, 2018, Petitioner Allcare Pharmacy & Health Services (hereinafter "Allcare") filed a complaint against Respondent Express Scripts Administrators and Medco Health Solutions, Inc. (collectively, "ESI") with the Office of the Commissioner of Insurance, alleging that ESI violated Code Section 33-64-11 and the Pharmacy Audit Bill of Rights.

On March 22, 2018, the Commissioner of Insurance issued an order granting Allcare's request for an administrative hearing under the Pharmacy Audit Bill of Rights. Further, citing Code Sections 33-2-24(d), 33-64-7, 33-64-11, and 26-4-118(i), the Commissioner "stayed" ESI from terminating its contract with Allcare or recouping any additional funds from Petitioner pending the Commissioner's final order or dismissal of this case. On April 2, 2018, the Department of Insurance ("Department") referred the matter to the Office of State Administrative Hearings ("OSAH").

On April 26, 2018, this Court issued a scheduling order establishing deadlines for the filing of dispositive motions. ESI filed a motion for summary determination on May 14, 2018,

and Allcare responded on June 4, 2018. ESI filed a reply to Allcare's response on June 11, 2018.[1]

In its motion for summary determination, ESI asserted the following four arguments:

> (1) The Commissioner of Insurance did not have the authority to stay its termination of the contract with Allcare;
>
> (2) The Pharmacy Audit Bill of Rights did not apply;
>
> (3) Allcare committed fraud, willful misrepresentation, and abuse; and
>
> (4) ESI fairly and properly terminated its contract with ESI.

For the reasons stated below, ESI's motion for summary determination is **GRANTED** as to the first two grounds. ESI's motion for summary determination on the last two grounds is **DENIED** as moot.

II. Standard on Summary Determination

Summary determination in this proceeding is governed by OSAH Rule 15, which provides, in relevant part:

> A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421, 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-05 (2006) (noting summary determination is "similar to summary judgment" and elaborating that an administrative law judge

[1] Although not contemplated by the scheduling order, Allcare also filed a sur-reply to Respondent's reply on June 12, 2018.

"is not required to hold a hearing" on issues properly resolved by summary determination).

Further, pursuant to OSAH Rule 15:

> When a motion for summary determination is supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination.

Ga. Comp. R. & Regs. 616-1-2-.15(3). See Lockhart v. Dir. Envtl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)). In considering a motion for summary determination, "the court must view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party." Floyd v. Suntrust Banks, Inc., 878 F. Supp. 2d 1316, 1321 (N.D. Ga. 2012) (citing Patton v. Triad Guar. Ins. Corp., 277 F.3d 1294, 1296 (11th Cir. 2002) ; see also Lau's Corp. v. Haskins, 261 Ga. 491 (1991).

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

Having reviewed Allcare's complaint, the motion for summary determination, and the responsive pleadings, and viewing the evidence in the light most favorable to Allcare, the Court finds that there is no genuine dispute as to the following facts:

1. ESI is a pharmacy benefits manager licensed by the Commissioner of Insurance. (Compl., p. 1).

2. Allcare is a pharmacy located in Lyons, Georgia. (Compl., p. 2; Resp't's Mot. for Summ. Determination, Exh. C).

3. ESI and Allcare entered into a contract in November 2013.[2] This contract was initially for a two-year term, but was automatically renewed every year until ESI terminated it in March

[2] Curiously, neither party included the contract or the provider manual as exhibits, despite repeatedly citing to, and relying on, specific provisions thereof. However, as Allcare acknowledged the existence of the contract in its Amended Response and did not present any probative evidence to dispute the Affidavit of Robert Jackson Horan,

2018. Pursuant to the terms of the contract, ESI can terminate the contract with Allcare without cause upon 30-days' notice. ESI can terminate the contract immediately in the event of fraud or other violations of ESI's provider manual. (Resp't's Mot. for Summ. Determination, Exh. A; Compl., Attach. 5; Pet.'s Amended Response, at p. 3).

4. On July 10, 2017, the United States Department of Justice (hereinafter "DOJ") charged Sherry McCormick, an employee of Allcare, with health care fraud. Specifically, DOJ accused Ms. McCormick of defrauding the Medicare, Tricare, and Federal Employee Health Benefit Programs of approximately $500,000 from August 2013 through January 2015 by submitting, and causing the submission of, fraudulent claims for compounded medications that were not medically necessary or prescribed by a doctor. (Resp't's Mot. for Summ. Determination, Exhs. C, D).

5. According to a July 14, 2017 press release issued by the United States Attorney's Office, Southern District of Georgia, the United States had contended that Allcare, through Ms. McCormick, had "submitted claims and received payment for prescriptions for compounded medications that were not medically necessary and not prescribed by a doctor." The press release further stated that the United States and Allcare had entered into a $175,000 civil settlement. (Resp't's Mot. for Summ. Determination, Exh. C).

Jr., attached to ESI's motion, regarding the provisions in the contract relating to termination, the Court considers these facts to be undisputed and any objection based on the best evidence rule to have been waived by Allcare. See Ga. Comp. R. & Regs. 616-1-2-.18(1) (rules of evidence as applied in civil, non-jury cases apply to administrative hearings); O.C.G.A. § 24-8-1002 (best evidence rule); O.C.G.A. § 24-8-802 ("if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible"). Moreover, although Allcare stated in footnote 1 of its Amended Response that it disputed and denied "each of the supposed uncontested material facts asserted by ESI" unless it specifically admitted a fact "throughout this brief," such general denial does not meet Allcare's burden to show that there is a genuine issue of material fact, as required by OSAH Rule 15(3)("a party opposing the motion may not rest upon mere allegations or denials. . .").

6. Based on the DOJ investigation and the allegations against Ms. McCormick, ESI initiated an investigation of Allcare's billing practices on or about August 11, 2017. During its investigation, ESI identified "discrepancies" involving Allcare's billing practices with respect to 18 products. In sum, ESI concluded that Allcare: (1) sought and obtained reimbursement for products that, according to purchase records, it did not have in stock; (2) billed ESI for drugs that were more expensive than those that it had dispensed; and (3) billed ESI for drugs utilizing the incorrect "National Drug Code" (NDC). (Resp't's Mot. for Summ. Determination, Exh. E; Compl., Attachs. 2, 4).

7. In a letter dated January 22, 2018, Mary Buescher, an investigator with ESI "Fraud, Waste, & Abuse Services," notified Allcare that ESI had reviewed documentation supplied by Allcare and identified discrepancies in the amount of $1,656,728.82. Ms. Buescher indicated in the letter that Allcare had until January 30, 2018 to contest the discrepancy finding. She attached a table detailing the findings of the investigation (entitled "Purchase Verification Discrepancy Findings") to the letter. (Compl., Attach. 2).

8. Allcare responded to ESI in a letter dated January 29, 2018 and provided information correcting some, but not all, of the discrepancies identified by ESI. Allcare attributed some of the discrepancies to errors on the part of "PCCA," an apparent third party who is not otherwise identified and whose relationship with Allcare or ESI is unclear from the record. With regard to ESI's claim that it had billed using the NDC for a brand name drug, rather than the generic, Allcare indicated that its system showed that it had, in fact, billed under the generic NDC. Allcare acknowledged errors in billing for Smartview meters, rather than test strips, and speculated that the discrepancies identified with regard to "Estradiol powder and DMSO . . . were just billing errors from a long time ago." Allcare assured ESI that it had since

implemented training programs and a more advanced software system to avoid such billing errors in the future. Importantly, Allcare did not mention or any way assert any of the rights listed in the Pharmacy Audit Bill of Rights in this letter. (Compl. Attach. 3).

9. Based on the additional information supplied by Allcare, ESI reduced its calculation of the discrepancy amount to $1,615,729.44. In a letter dated February 9, 2018, Ms. Buescher notified Allcare that the total discrepancy amount would be offset from withheld reimbursements until the total amount had been recouped. (Compl. Attach. 4).

10. By letter dated March 8, 2018, ESI informed Allcare that, based on the results of its investigation, it was terminating its contract with Allcare effective March 23, 2018. (Compl. Attach. 5).

11. Allcare filed the instant complaint against ESI on March 9, 2018. Among other grievances against ESI, Allcare states in the complaint that "ESI has also abruptly terminated its relationship with Allcare . . . ." (Compl. Attach. 1, p. 6).

IV. CONCLUSIONS OF LAW

Based on the above undisputed facts, the Court makes the following conclusions of law:

A. There is no evidence that ESI terminated the contract in retaliation of Allcare's exercise of statutorily-protected rights under the Pharmacy Audit Bill of Rights.

1. Under Georgia law, "[w]henever it may appear to the Commissioner, either upon investigation or otherwise, that any person has engaged in . . . or is about to engage in any act, practice, or transaction" prohibited by the Georgia Insurance Code[3] or any Department regulation, "the Commissioner may at his discretion issue an order . . . prohibiting such person from continuing such act, practice, or transaction." O.C.G.A. § 33-2-24(a). In addition, the Commissioner is authorized to enforce the provisions of the Georgia Insurance Code, including

[3] Title 33 of the Georgia Code may be cited as the Georgia Insurance Code. See O.C.G.A. § 33-1-1.

the provision restricting pharmacy benefit managers from recouping funds from pharmacies without first complying with the requirements of the Pharmacy Audit Bill of Rights. O.C.G.A. §§ 33-2-24(d), 33-64-7. The Commissioner also has the authority to enforce the Pharmacy Audit Bill of Rights, although he "may not enlarge upon or extend the specific provisions" relating to the regulation of pharmacy benefits managers. O.C.G.A. §§ 26-4-118(i), 33-64-7.

2. Thus, if it appeared to the Commissioner that ESI's termination of its contract with Allcare was a violation of the Georgia Insurance Code, including any provision of the Pharmacy Audit Bill of Rights, the Commissioner was authorized to issue an order to ESI staying such action, at least until the matter was adjudicated through the administrative appeal process. Ultimately, of course, whether the termination of the contract was, in fact, a violation of the Georgia Insurance Code is the exact question raised by ESI's motion for summary determination. Having considered this question, the Court has concluded that Allcare did not present any evidence to establish a genuine issue of material fact regarding whether ESI's termination of the contract constituted improper retaliation, and therefore ESI is entitled to summary determination on this issue.

3. At the outset, the Court notes that nothing in the Georgia Insurance Code, the Pharmacy Audit Bill of Rights, or the Department's regulations prohibits pharmacy benefit managers from terminating their contracts with pharmacies. See O.C.G.A. §§ 33-64-1 to -11; O.C.G.A. § 26-4-118; Ga. Comp. R. & Regs. 120-2-97-.01 to -.09. Consequently, ESI's termination of the contract, standing alone, does not trigger the Commissioner's enforcement authority. However, Georgia law does prohibit pharmacy benefit managers from "[p]enalizing or retaliating against a pharmacist or pharmacy for exercising rights" under the Pharmacy Audit Bill of Rights. O.C.G.A. § 33-64-11(a)(6). Thus, if there is any evidence, however slight, that ESI terminated

its contract with Allcare in retaliation for Allcare exercising rights under the Pharmacy Audit Bill of Rights, Allcare's retaliation claim will survive summary determination and the Commissioner's stay of the termination can remain in place. Phillips v. Key Services, Inc., 235 Ga. App. 564, 567 (1998) (quoting Garrett v. NationsBank, 228 Ga. App. 114, 115-16 (1997)).[4]

4. Notwithstanding this low bar, courts frequently grant summary adjudication in retaliation cases when the plaintiff cannot establish a *prima facie* case of retaliation. For example, the Georgia Court of Appeals affirmed summary judgment against three state employees who had alleged that they were terminated in retaliation for reporting unlawful conduct in violation of Georgia's whistle-blower statute. Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716 (2011) (citing O.C.G.A. § 45-1-4). The Forrester court first held that it was appropriate to use the McDonnell Douglas[5] burden-shifting analysis from Title VII retaliation cases to evaluate whether a state whistle-blower claim is subject to summary adjudication. Id. at 721–22. The Forrester Court then found that summary judgment against the plaintiffs was proper because there was no evidence that their supervisor knew about their whistle-blowing activity at the time they were terminated, and thus plaintiffs could not prove one of the *prima facie* elements of a retaliation claim; *to wit*, that there was a "causal connection" between a protected activity and the adverse action taken against them. Id. at 726–29; see also A.B. v. Clarke County Sch. Dist., 2009 U.S. Dist. LEXIS 47701, *28–30 (M.D. Ga. 2009) (ALJ correctly granted summary

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[4] When a defendant is the moving party, "the plaintiff, as the nonmovant, 'will survive summary judgment by presenting any evidence which establishes a jury issue regarding [an essential element of plaintiff's claim]. Even slight evidence will be sufficient to satisfy the plaintiff's burden of production of some evidence on a motion for summary judgment . . . .'" Id.

[5] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see generally Cochran v. Kendrick, 297 Ga. 655 (2015) (Georgia Supreme Court applies McDonnell Douglas analysis to claim of race discrimination in employment case and affirms grant of summary determination against employee); Murray v. Cmty. Health Sys. Prof'l Corp., 345 Ga. App. 279 (2018) (court reviewed retaliation provisions in the Georgia False Medicaid Claims Act, O.C.G.A. § 49-4-168.4 under McDonnell Douglas standards and affirmed summary judgment against plaintiff for failing to produce any evidence, other than mere speculation, of a causal connection between the termination and the plaintiff's protected action).

determination on a retaliation claim under the Individuals with Disabilities Education Improvement Act, when there was insufficient evidence to create a genuine issue of material fact to prove a *prima face* case of retaliation); Shotz v. City of Plantation, 344 F.3d 1161, 1180 (11th Cir. 2003) (In an Americans with Disabilities Act retaliation case, court held that "[a]lthough a plaintiff's burden in proving a *prima facie* case is light, summary judgment against the plaintiff is appropriate if he fails to satisfy any one the elements of a *prima facie* case.") (citation omitted); McCullough v. Bd. of Regents, 623 Fed. App'x. 980, 983 (11th Cir. 2015) (dismissal of plaintiff's retaliation claim under Title VI was proper when plaintiff failed to plead sufficient facts to establish a causal connection between the protected activity and the alleged adverse action).

5. Although the Georgia Insurance Code does not define "penalizing" or "retaliating" in Code Section 33-64-11(a)(6), the ordinary meaning of these words contemplates a reaction to predicate conduct. See Retaliate, American Heritage College Dictionary (4th ed. 2002) ("To *return* like for like, esp. evil for evil . . . To pay *back* (an injury) in kind . . . .") (emphasis added); Penalize, American Heritage College Dictionary (4th ed. 2002) ("To subject to a penalty, esp. for infringement of a law or regulation."). Moreover, this Court is persuaded that Georgia courts would require Allcare, like other parties asserting state or federal law retaliation claims, to establish a *prima facie* case of retaliation, including producing some evidence of a "causal connection" between ESI's termination of the contract and Allcare's exercise of a right protected by the Pharmacy Audit Bill of Rights.

6. Allcare has failed to do so in this case. In fact, the undisputed material facts show that Allcare did not exercise a protected right under the Pharmacy Audit Bill of Rights until it filed its complaint on March 9, 2018, one day after ESI notified Allcare that it was terminating the

contract. "[A]ctions which pre-date protected activity necessarily cannot be caused by that activity." Powell v. Doane, Civil Action. No. 2:12cv440-WHA(wo), 2013 U.S. Dist. LEXIS 120002, at *11 (M.D. Ala. Aug. 23, 2013), citing Schecter v. Ga. State Univ., 341 Fed. App'x 560, 563 (11th Cir. 2009) (finding insufficient showing of retaliation in employment discrimination context where the adverse action occurred *before* the employee engaged in the protected activity). See also Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000) (no prima facie case of retaliatory termination in violation of Family Medical Leave Act because no evidence that supervisor who fired plaintiff knew she had applied for FMLA leave; "a decision maker cannot have been motivated to retaliate by something unknown to him"), cited in Thomas v. HL-A Co., 313 Ga. App. 94, 98 (2011). Put simply, "[l]ogic dictates that the protected conduct must precede the act of retaliation." Tucker v. Fla. DOT, 678 Fed. App'x. 893, 896 (11th Cir. 2017) (in memorandum detailing complaints of sexual harassment by her supervisor under Title VII, plaintiff acknowledged that the supervisor announced his decision to fire her prior to her submission of the memorandum).

7. Based on the undisputed evidence in this case, the Court finds that Allcare did not exercise a statutorily-protected right under the Pharmacy Audit Bill of Rights until March 9, 2018, when it filed its complaint with the Commissioner. ESI notified Allcare of its decision to terminate the contract the day before Allcare filed the complaint, on March 8, 2018. Thus, because there is no evidence to establish that ESI's termination of the contract was done to penalize or retaliate against Allcare for filing the complaint, the Court finds as a matter of law that the termination was not a violation of Code Section 33-64-11(a)(6). Accordingly, as there is no evidence that the termination violated the Georgia Insurance Code, there is no longer a

statutory basis for continuing the stay of such termination, and ESI motion for summary determination on this issue is hereby **GRANTED**.

B. The Pharmacy Audit Bill of Rights does not apply to ESI's investigation because the investigation involved fraud, willful misrepresentation, or abuse.

8. The Pharmacy Audit Bill of Rights provides an exemption to "any investigative audit which *involves* fraud, willful misrepresentation, or abuse." O.C.G.A. § 26-4-118(f) (emphasis added).

> [The Pharmacy Audit Bill of Rights] shall not apply to any investigative audit which involves fraud, willful misrepresentation, or abuse, including without limitation investigative audits under Article 7 of Chapter 4 of Title 49, Code Section 33-1-16, or any other statutory provision which authorizes investigations relating to insurance fraud.

Id. After examining the plain meaning of this provision, as well as the purpose and legislative history behind the Pharmacy Audit Bill of Rights, the Court concludes that this exception applies to circumstances in which a pharmacy benefits manager conducts an investigation into a pharmacy based on suspicion of fraud, willful misrepresentation, or abuse. See generally Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch., Inc., 293 Ga. 629, 631 (2013) ("fundamental rules of statutory construction require us to construe a statute according to its terms, to give words their plain and ordinary meaning, and to look diligently for the intention of the General Assembly") .

9. First, the legislature's use of the word "involves" suggests that it did not intend for the exception to apply only where the entity conducting the audit could prove fraud, willful misrepresentation, or abuse after the audit is conducted. Farmer v. Phillips Agency, Inc., 285 F.R.D. 688, 695 (N.D. Ga. 2012) ("matter[s] of statutory interpretation . . . begin[] with the statute's text"). The word "involve" is inherently broad; it means "[t]o contain as a part; include," or "[t]o have as a necessary feature or consequence; entail." Involve, American

Heritage College Dictionary (4th ed. 2002); see CBS, Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1223 (11th Cir. 2001) ("In order to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance."). With this broad definition in mind, the Court construes "investigative audit which involves fraud . . ." to mean an investigation of fraud; that is, an investigative audit commenced based on suspicion of fraud.[6]

10. In addition to the plain language of the statute, the meaning of the phrase "any investigative audit which involves fraud" is further clarified by examining accompanying terms in the same subsection. Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps . . ."); Warren v. State, 294 Ga. 589, 590-91 (2014). Under the interpretive canon of *noscitur a sociis*, a general term should be interpreted to be similar to more specific terms in a series. Id.; Beecham v. United States, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). In the exception provision, the legislature expressly cited insurance and Medicaid fraud audits as "investigative audits which involve[] fraud." O.C.G.A. § 26-4-118 ("This Code section shall not apply to any investigative audit which involves fraud . . . *including without limitation* audits under [the Medical Assistance Act] [or] Code Section 33-1-16 . . .") (emphasis added); see Samantar v. Yousuf, 560 U.S. 305, 317 (2010) ("use of the word 'include' can signal that the list that follows is meant to be illustrative . . ."). Investigative audits of Medicaid or insurance fraud are investigations into suspected fraud; neither include a condition precedent that proof of fraud actually be found in order for the

[6] The Court does not conclude, as ESI seems to suggest, that it is sufficient for the auditor to merely label the investigative audit a "fraud investigation." Merely labeling an investigative audit a "fraud investigation" does not render the investigative audit one that "involve[d] fraud." Further, such an interpretation could potentially frustrate the purpose behind the Pharmacy Audit Bill of Rights, as auditors could, hypothetically, escape its strictures by pretextually applying the word "fraud" to routine audits. Nevertheless, there is no evidence in this case that ESI's investigation of Allcare was a pretense for a routine audit or that its purpose was other than that of investigating a suspicion of fraud.

investigative audit to be conducted. See O.C.G.A. § 33-1-16 (The Commissioner of Insurance may commence an investigation if he or she "has reason to believe that a person has engaged in, or is engaging in, a fraudulent insurance act . . ."); O.C.G.A. § 49-4-146.1. Thus, the term "any investigative audit which involves fraud" should be interpreted to mean any investigation of suspected fraud.

11. Further, interpreting the exception to encompass investigations of suspected fraud comports with the legislature's purpose in providing the exception. Edler v. Hedden, 344 Ga. App. 628, 629 (2018) ("The cardinal rule of statutory interpretation is to ascertain the legislature's purpose in enacting a statute and then construe the statute to effect that purpose, avoiding interpretations that do not square with common sense and sound reasoning." (quoting Ins. Dep't of Ga. v. St. Paul Fire & Cas. Ins. Co., 253 Ga. App. 551, 552 (2002))). If the exception applied only to investigative audits that actually uncovered fraud, willful misrepresentation, or abuse the exception would be rendered meaningless. See Handel v. Powell, 284 Ga. 550, 554–55 (2008) (Courts must construe statutes "'to give sensible and intelligent effect to all [its] provisions and to refrain from any interpretation which renders any part of the statute meaningless.'") (quoting R.D. Brown Contractors, Inc. v. Bd. of Educ. of Columbia Cty., 280 Ga. 210, 212 (2006)). To interpret the statute to excuse only auditors who could prove a pharmacist's fraud would mean that auditors reasonably suspecting, but lacking proof of fraud, would either be forced to conduct the investigative audit in accordance with the Pharmacy Audit Bill of Rights out of an abundance of caution, or ignore the Pharmacy Audit Bill of Rights and risk administrative action in the event the investigative audit uncovered no proof of wrongdoing.

12. Finally, the legislative history of the Pharmacy Audit Bill of Rights supports a broad interpretation of the exception. When the Pharmacy Audit Bill of Rights was introduced in the legislature in 2006, the exception applied to "any investigative audit where there is reliable evidence that the claim that is the subject of the audit involves fraud, willful misrepresentation, or abuse under [the Medical Assistance Act]." H.B. 1371 (as presented to Georgia House of Representatives, Feb. 15, 2006). However, the House Committee on Insurance removed the "reliable evidence" portion of the exception, such that it read: "This Code section shall not apply to any investigative audit which involves fraud, willful misrepresentation, or abuse under [the Medical Assistance Act]." H.B. 1371 (House Committee on Insurance Substitute, Mar. 8, 2006). The Senate Insurance and Labor Committee further broadened the exception to include "any investigative audit which involves fraud, willful misrepresentation, or abuse, including without limitation," those conducted by DCH and the Commissioner of Insurance. H.B. 1371 (Senate Insurance and Labor Committee Substitute, Mar. 27, 2006). This language remains in the current version of the Pharmacy Audit Bill of Rights. O.C.G.A. § 26-4-118(f). If the legislature intended for the exception to be narrow, it could have retained the requirement that the investigative audit include "reliable evidence that the claim that is the subject of the audit involves fraud."

13. In this case, the undisputed evidence is that ESI commenced its investigative audit based on information that one of Allcare's employees was subject to criminal charges for health care fraud. Allcare presented no evidence to the contrary. As there is no genuine issue of material fact as to whether ESI's investigative audit "involved fraud, willful misrepresentation, or abuse," the Court concludes that the audit is exempt from the provisions of the Pharmacy Audit Bill of Rights. O.C.G.A. § 26-4-118(f).

Accordingly, ESI's motion for summary determination on this issue is hereby **GRANTED**.

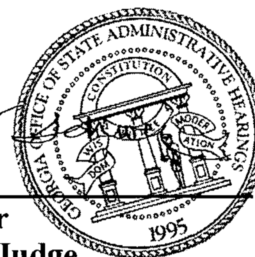
C. ESI two remaining arguments are moot.

14. As set forth above, the Commissioner's authority to adjudicate a dispute between two private parties—a pharmacy benefit manager and a pharmacy—arose under the Pharmacy Audit Bill of Rights. As this Court has ruled that the Pharmacy Audit Bill of Rights does not apply to ESI's audit of Allcare, the remaining matters raised by ESI in its motion are no longer within the Commissioner's jurisdiction. That is, outside the context of the Pharmacy Audit Bill of Rights, the two remaining arguments ESI raised in its motion for summary determination—whether Allcare committed fraud or whether ESI's termination was proper under the terms of its contract with Allcare—are simply contract disputes between two private parties. Thus, although it appears that there may be genuine issues of material fact regarding the two remaining issues raised by ESI in its motion for summary determination, the Court does not reach the merits of these arguments. Rather, the Court denies ESI's motion as to the two remaining issues because they are now moot. See Collins v. Lombard Corp., 270 Ga. 120, 121 (1998) ("a case is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights"); Shelley v. Town of Tyrone, 302 Ga. 297, 308 (2017) ("mootness is an issue of jurisdiction and thus must be determined before a court addresses the merits of a claim").

V. DECISION

IT IS HEREBY ORDERED that ESI's motion for summary determination is **GRANTED** for the reasons set forth above. As no issues within the jurisdiction of the Commissioner remain for determination, this matter is hereby **DISMISSED**.

SO ORDERED, this 31st day of July, 2018.



Kimberly W. Schroer
Administrative Law Judge

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Attachments: 1835380.PDF

Good afternoon,

Please find attached Judge Schroer's decision in the above listed case. Have a good evening.

Best regards,
Kevin

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