

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

SYMPHONY MEDICAL, LLC,

Petitioner,

v.

FFD GA HOLDINGS, LLC;  
THERATRUE GEORGIA, LLC;  
NATURES GA, LLC; TREEVANA  
REMEDY, INC.,

Respondents.

CIVIL ACTION NO.  
2023CV382943

**ORDER ON OUTSTANDING MOTIONS AND  
SETTING BRIEFING SCHEDULE AND FINAL HEARING**

This case is before the Court on Respondents' Motion to Dismiss (Dkt. 11), Respondents' Request for Expedited Briefing and Final Hearing (Dkt. 10), and Petitioner's Motion for Stay (Dkt. 19).<sup>1</sup>

**I. Procedural Background**

Petitioner Symphony Medical, LLC ("Symphony") is an unsuccessful applicant for a Class 2 license to produce and sell low-THC oil pursuant to Georgia's HOPE Act, O.C.G.A. § 16-12-200 *et seq.* After the Georgia Medical Cannabis Commission provisionally awarded the available licenses to FFD GA Holdings, LLC, TheraTrue Georgia LLC, Natures GA LLC, and Treevana Remedy Inc., Symphony appealed. Symphony first filed in the Superior Court of McIntosh County, but the prospective

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<sup>1</sup> Petitioner's Response to the Motion to Dismiss includes a Motion for Stay, which is essentially identical to Petitioner's response to Respondents' Motion for Expedited Briefing and Final Hearing and the Court addresses it in this Order. (Dkt. 19). Petitioner's Response also includes a Motion for Attorneys' Fees, which is not addressed here because it is not yet ripe.

licensees – the Respondents in this case – moved to dismiss the appeal, arguing the Court had no jurisdiction. Symphony then filed a Petition for Writ of Certiorari, under O.C.G.A. § 5-4-1, *et. seq.*, in this Court. (Case No. 2022CV371628). The Superior Court of McIntosh County ultimately dismissed Symphony’s case because the Court lacked jurisdiction. Symphony’s appeal of that dismissal is currently pending before the Georgia Court of Appeals, Case No. A23A0862. Symphony then voluntarily dismissed its Petition in this Court on January 19, 2023. The instant case is a renewal action of the voluntarily dismissed certiorari petition. (Dkt. 3)

## **II. Respondents’ Motion to Dismiss**

Respondents now seek to dismiss this case, based on the “prior pending action doctrine” and because Symphony’s prior certiorari action was procedurally defective and cannot be renewed. (Dkt. 11)

### **A. McIntosh County Action and Appeal**

The prior pending action doctrine provides that “when there are two lawsuits involving the same cause of action and the same parties that were filed at different times but that both remain pending in Georgia courts, the later-filed suit must be dismissed.” *McLeod v. Clements*, 310 Ga. App. 235, 238 (2011) (*quoting Sadi Holdings, LLC. V. Lib Prop., Ltd.*, 293 Ga. App. 23, 24 (2008)); *see also* O.C.G.A. §§ 9-2-5 and 9-2-44. But “there is an exception to the rule. If it appears from the face of the pleadings in the first-filed case that the court therein does not have jurisdiction to resolve the pending claims on the merits, then the plea of abatement will not lie and the later-filed suit may proceed forward.” *Bhindi Bros. v. Patel*, 275 Ga. App.

143, 146 (2005). This exception is based on the plain language of the statute on which Respondents partly rely – “if the first action is so defective that no recovery can possibly be had, the pendency of a former action shall not abate the latter.” O.C.G.A. § 9-2-44(a). Here, the McIntosh County case was dismissed for lack of jurisdiction – at Respondents’ urging – because no recovery could be had in that Court. The fact that Symphony filed an appeal does not change that fact.<sup>2</sup>

The purpose of the prior pending action rule “is to ensure judicial economy, to avoid inconsistent judgments, and to prevent harassment of the parties through multiple proceedings.” *Drs. Hosp. of Augusta, LLC v. Georgia Dep't of Cmty. Health*, 344 Ga. App. 583, 583 (2018) (quoting *Brock v. C & M Motors, Inc.*, 337 Ga. App. 288, 290 (2016) (collecting cases)). That purpose is not served by a dismissal of Symphony’s renewed certiorari action.<sup>3</sup> If the Court of Appeals reverses the McIntosh County trial court, the instant certiorari action will no doubt be dismissed. If the Court of Appeals affirms, this certiorari action will proceed. In those circumstances, there is virtually no risk of inconsistent judgments or waste of judicial resources.

#### B. Prior Certiorari Action

Respondents also assert the original certiorari petition must be dismissed because procedural deficiencies render it void and incapable of being renewed. Specifically, Respondents point out that Symphony Medical did not name or serve

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<sup>2</sup> The *Sadi* case is unpersuasive given that the prior pending action in that case had not been dismissed on jurisdictional grounds. 293 Ga. App. at 24. Compare *Drs. Hosp. of Augusta*, 344 Ga. App. at 583 (reversing dismissal on prior pending action grounds where prior case had been dismissed on jurisdictional grounds, though stated basis for dismissal was dissimilarity of claims).

<sup>3</sup> Respondents did not raise the prior pending action rule in the initial certiorari action.

Judge Howells in the original action and did not file a bond. Respondents are correct that a void certiorari petition cannot be renewed under O.C.G.A. § 9-2-61. *Bass v. Milledgeville*, 121 Ga. 151, 152 (1904) (a certiorari that is “void for any reason... cannot be renewed”); *see also Buckler v. DeKalb County*, 290 Ga. App. 190, 191 (2008). However, Symphony’s original certiorari petition was not void, but merely voidable.

Georgia law provides that “a valid bond may by amendment be substituted for a void bond or no bond at all” (O.C.G.A. § 5-4-10) and, because a “valid bond may be supplied by amendment,” lack of a bond is not necessarily fatal to a certiorari action *Scott v. Oxford*, 105 Ga. App. 301, 305 (1962); *see also Buckler v. DeKalb County*, 290 Ga. App. 190, 192 (1) (2008); *Williams v. City of Douglasville*, 354 Ga. App. 313, 319 (2020). Additionally, the applicable code sections do not require that the lower tribunal be named as a party. *See Fisher v. City of Atlanta*, 212 Ga. App. 635, 635 (1994). While service on the lower tribunal is required, failure to serve the officer whose decision is under review “is a mere irregularity” that can be cured in numerous ways and “will not render the proceeding void,” but merely voidable. *City of Dunwoody v. Discovery Prac. Mgmt., Inc.*, 338 Ga. App. 135, 136–37 (2016) (*quoting Bass*, 121 Ga. at 153).

A merely voidable case can be renewed under O.C.G.A. § 9–2–61 (a). And this would be true even if this Court had dismissed the case for any of these procedural failures. *See Fisher v. City of Atlanta*, 212 Ga.App. 635 (1994). Because Symphony’s initial petition was “merely voidable” when it was dismissed, it can be renewed under

O.C.G.A. § 9-2-61. *Dunwoody v. Disc. Prac. Mgmt.*, 338 Ga. App. at 137 (2016). As a result, Respondents' Motion to Dismiss is hereby DENIED.

### **III. Respondents' Motion for Expedited Briefing Schedule and Final Hearing and Petitioner's Motion for Stay**

Symphony asks this Court to stay the case until the resolution of its appeal of the McIntosh County dismissal (Dkt. 18, 19). Conversely, Respondents seek expedited briefing and a hearing, despite the pending – and potentially dispositive – appeal. (Dkt. 10) All parties anticipate a decision from the Court of Appeals on or before November 18, 2023. Absent further appellate litigation, affirmance of the McIntosh County dismissal means this certiorari action would proceed, while a reversal likely means the case would return to McIntosh County.

Given this procedural posture, the Court believes it is advisable to await the Court of Appeals' decision before addressing the merits. However, all parties assert a desire to litigate this matter expeditiously, and the record from the lower court has already been filed. (Dkt. 16) In those circumstances, a blanket stay will not serve the interests of the parties or judicial economy and efficiency. The standard of review on the merits in either Court will be virtually the same,<sup>4</sup> such that preparing briefing on the merits of the lower tribunal's decision will not be wasted effort. Therefore, Petitioner's Motion for Stay (Dkt. 19) is DENIED. Because the date of briefing and hearing will be after the Court of Appeals' decision (and therefore not expedited),

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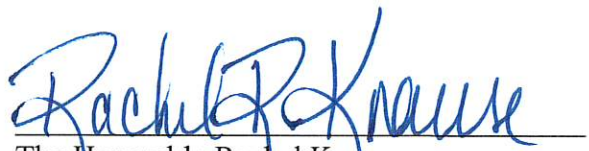
<sup>4</sup> Certiorari - *DeKalb Cty. v. Bull*, 295 Ga. App. 551, 552 (2009); *Neal v. Augusta-Richmond Cnty. Pers. Bd.*, 351 Ga. App. 340 (2019). Appellate Practice Act – O.C.G.A. § 5-3-5. Administrative Procedures Act – O.C.G.A. § 50-30-19(h), *Georgia Pro. Standards Comm'n v. Lee*, 333 Ga. App. 60 (2015); *Georgia Dep't of Agric. v. Brown*, 270 Ga. App. 646, 649 (2004).

Respondents' Motion for Expedited Briefing Schedule and Final Hearing (Dkt. 10) is likewise DENIED.

Briefing and Hearing Schedule

When a petition for review is filed, the reviewing court is obligated to establish filing deadlines and schedule necessary hearings. O.C.G.A. § 5-3-9.<sup>5</sup> On or before December 8, 2023, each party may submit briefing to the Court – not to exceed 30 pages – as to the legal and factual issues presented by the petition and the lower tribunal's decision. On or before December 18, 2023, each party may submit rebuttal briefing to the Court – not to exceed 10 pages – responding only to the issues asserted in the other party's initial briefing. This matter shall be set for in-person hearing at 9:30 a.m. on December 21, 2023. The parties shall notify this Court of appellate court decisions and/or further appellate litigation that might necessitate changes to – or obviate the need for – this briefing and hearing schedule.

IT IS SO ORDERED, this 18<sup>th</sup> day of September, 2023.



The Honorable Rachel Krause  
Fulton County Superior Court  
Atlanta Judicial Circuit

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<sup>5</sup> See also, O.C.G.A. § 5-4-11 (“Certiorari cases shall be heard ... upon reasonable notice to the parties, at any time that the matters may be ready for a hearing.”)