IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

B&T MEDICAL CENTER, LLC
as assignee of DIANIBEL RODRIGUEZ

CASE NO.: 2006-CA-5948
WRIT NO.: 06-59

Petitioner,

v.

PROGRESSIVE AMERICAN INSURANCE COMPANY,
a foreign corporation

Respondent.
_____/

Petition for Writ of Certiorari

TERRY A. SLUSHER, Esq., on behalf of Petitioner.

VALENCIA PERCY FLAKES, Esq., on behalf of Respondent.

Before KIRKWOOD, BLACKWELL and RODRIGUEZ, J.J.

PER CURIAM

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner timely seeks review of the trial court's orders denying its Motion for Protective Order and Motion to Stay rendered on June 21, 2006, and June 26, 2006, respectively. This Court has jurisdiction to review these interlocutory orders pursuant to Florida Rule of Appellate Procedure 9.030(c)(2), and dispenses with oral argument. *See* Fla. R. App. P. 9.320.

I. FACTS

On June 14, 2004, Dianibel Rodriguez (hereinafter "Rodriguez") allegedly sustained injuries as a passenger in an automobile accident. Rodriguez sought treatment for her injuries from Petitioner, B&T Medical Center, and incurred costs related to the treatment. Rodriguez subsequently assigned her rights to any insurance benefits she might receive to Petitioner.

Petitioner submitted its bills for the services rendered to Rodriguez to Respondent, Progressive American Insurance Company, under the driver's policy. Respondent allegedly failed to pay as required by section 627.736(4), Florida Statutes, and, to date, has not paid any monies allegedly due and owing under the policy.

On December 12, 2004, Petitioner filed its Complaint for damages. During discovery Respondent sought to depose Brunilda Davila, Petitioner's owner, Eduardo Rosas, Petitioner's firm administrator, and Arnando Rosas, a physical therapist or chiropractic assistant who allegedly provided treatment to Rodriguez. In response, Petitioner filed an Amended Motion for Protective Order (hereinafter "Motion") and attached affidavits from each of the deponents essentially indicating that they had no knowledge of any issue concerning the medical reasonableness, necessity, or relatedness of the treatment rendered for Rodriguez's injuries.

On June 13, 2006, the trial court held a hearing on Petitioner's Motion. At the hearing, Petitioner basically argued that allowing the depositions was improper because the deponents did not have any knowledge regarding the only stipulated issue in dispute: coverage. Respondent, on the other hand, argued that the depositions were necessary because the deponents had knowledge concerning the affirmative defenses it raised. In relevant part, the trial court denied Petitioner's Motion but limited each deposition to one hour. Petitioner subsequently filed a Motion to Stay which was denied on June 26, 2006, and the instant petition ensued.

II. STANDARD OF REVIEW

Petitioner has sought review of the orders denying its Amended Motion for Protective Order and Motion to Stay. A discovery order is reviewable by way of certiorari when the order "departs from the essential requirements of law, causing material injury to a petitioner

throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal." *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995).

Discovery of "'cat out of the bag' material that could be used to injure another person or party outside the context of the litigation" causes irreparable harm redressable through a petition for writ of certiorari. *Id.* Similarly, disclosure of privileged material, trade secrets, work product, or information involving a confidential informant cause irreparable harm. *Id.* Likewise, overbroad discovery orders that require the production of documents without regard to the issues framed in the complaint cause material injury that is not adequately redressable on appeal. *See Redland Co., Inc. v. Atl. Civil, Inc.*, 961 So. 2d 1004 (Fla. 3d DCA 2007).

III. DISCUSSION

Petitioner appears to present two arguments to support the quashing of the trial court's order. First, the trial court's order departed from the essential requirements of law because it permitted Respondent to take depositions that only sought to inquire about unpled issues: licensing and fraud. Second, Respondent stipulated and thereby orally waived any and all of its affirmative defenses, except for the issue of coverage. Consequently, the depositions were irrelevant to any issue set forth in the pleadings and the trial court exceeded the permissible scope of discovery when it denied its motion for protective order. Since a resolution of the second issue in favor of Petitioner may foreclose the other issues raised, this argument will be addressed first.

a. The Parties Did Not Stipulate that Respondent's Only Affirmative Defense was Coverage

In its Answer to Petitioner's Complaint, Respondent asserted six affirmative defenses. These affirmative defenses, in relevant part, alleged that Plaintiff failed to provide written notice of a covered loss; failed to provide written notice and documentation to support the claim; failed

to establish that the charges were reasonable, medically necessary, and lawfully rendered; failed to obtain a valid assignment of benefits; and was not entitled to recover under the policy because she did not obtain automobile insurance even though she was the title owner of the automobile that was involved in the accident. Petitioner contends that these defenses were waived by oral stipulation, with the exception of the issue of coverage, at the Luisa Hernandez deposition. A review of the Luisa Hernandez deposition indicates otherwise.

At the Luisa Hernandez deposition, Defendant stipulated that the bills Plaintiff submitted were timely received, gave proper notice of the charges being submitted, and that cooperation was not an issue. However, Defendant refused to stipulate regarding the issues of licensing, standing, and medical necessity and relatedness. Thus, contrary to Plaintiff's assertion it is clear that Defendant did not waive all of its affirmative defenses except for coverage.

b. Respondent Did Not Seek to Take the Depositions to Only Inquire About Unpled Issues

Petitioner argues that it will suffer irreparable harm if the Respondent is allowed to take the depositions because Respondent only seeks to inquire into unpled issues. In support of this argument, Petitioner quotes two passages from the Motion hearing transcript:

> MS. FLAKES: I will address that. **What we are raising is potentially licensing and fraud issues**.
>
> THE COURT: You haven't pled them yet.
>
> MS. FLAKES: That's correct. That's why we need discovery. Taking the deposition of an adjustor –
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> Exhibit J p. 17, l. 17-23 (emphasis added).

Ms. Flakes also advised the Trial Court:

> THE COURT: You raise as a defense no coverage?
>
> MS. FLAKES: Correct. That's one of the defenses. And we have other defenses that we need these depositions in order to further develop these defenses and **we**

> **intend to move to amend our affirmative defenses and also potentially a counter-claim**. And I will get there as to the need for these depositions.
>
> Exhibit J p. 12-13, 22-5 (emphasis added).

(Pet. Writ Cert. 8.)

Petitioner contends that this exchange clearly indicates that the sole purpose for taking the depositions "was to assist in developing [the] un-pleaded defenses" of fraud and "potentially file a counter-claim." (Pet. Writ Cert. 8.)

If the passages quoted by Petitioner were the sole reason Respondent wanted to take the depositions, the Court might be compelled to conclude that the trial court erred in allowing the depositions to proceed. However, Petitioner's argument is undermined by the fact that its quotations from the hearing transcript are both selective and taken out of context. Specifically, the first quoted passage was made in the context of a potential objection, by Respondent, to the trial court allowing Petitioner to re-open the deposition of its adjuster. This exchange occurred well after the trial court ruled that Respondent could take the depositions.

In the second passage, Respondent plainly indicates that it needed to take the depositions to develop its affirmative defenses. Using the conjunctive "and," Respondent then indicated that it also intended to amend its affirmative defenses and possibly file a counterclaim. Thus, Respondent's statement could be construed, as Petitioner argues, as indicating an intent to use the depositions in order to amend its affirmative defenses and file a counterclaim. It could also be construed as indicating that Respondent needed the depositions to develop its pleaded defenses and that it had decided to amend its affirmative defenses and file a counterclaim, but had not yet filed the requisite motion. It is unnecessary to resolve this ambiguity because a complete reading of the hearing transcript reveals that Respondent wanted to take the depositions for three reasons: 1) to determine whether Eduardo Rosas was Petitioner's "de facto" owner; 2)

to inquire about Petitioner's licensing and registration; and 3) to pose questions about the treatment provided to Rodriguez.[1] These issues appear to be relevant to the affirmative defenses raised by Respondent. Consequently, contrary to Petitioner's contention, allowing Respondent to proceed with the depositions will not result in the prejudice of "having to defend against a potential, unstated cause of action while at the same time having to defend against the action properly before the court . . . ." *State Farm Mut. Auto. Ins. Co. v. Parrish*, 800 So. 2d 706, 707 (Fla. 5th DCA 2001).

c. The Trial Court Did Not Err in Denying Petitioner's Motion to Stay

Petitioner's final argument is that the trial court erred in denying its Motion to Stay the taking of the depositions. A trial court has broad discretion in granting or denying a stay. *Shoemaker v. State Farm Mut. Auto. Ins. Co.*, 890 So. 2d 1195 (Fla. 5th DCA 2005). In its Motion to Stay, Petitioner sought the trial court stay the taking of the depositions until the order on its Motion was issued and during the pendency of the instant appeal. To the extent that Petitioner sought the trial court indefinitely stay the depositions until after the disposition of this appeal, the trial court did not abuse its discretion in denying the stay. *See id.* (overturning an

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[1] **Ms. Flakes**: Edwardo [sic] Rosas is the owner -- well, de facto owner, what we believe to be the de fact owner. He 's married to the president, Brunilda Davila, that's her name. And also he's the firm administrator. He stated under sworn testimony that he sets the prices for [Petitioner] . . . has always set the prices. He is the supervisor of all the employees. He handles all the licensing and registration for [Petitioner].

. . .

Ms. Flakes: Even if you discard that argument . . . we are entitled to talk to him about the licensing and registration of [Petitioner]. We believe they are providing unlawful treatment. We believe they are not properly licensed.

The Court: I am with you so far.
Ms. Flakes: The third individual is . . . Armondo [sic] Rosas, he's the physical therapist. He provided treatment allegedly to Rodiriguez.

(Pet'r App. J. 13-14.)

order indefinitely staying an action until the resolution of two unrelated cases were disposed of by the district courts of appeal because it would create inordinate delay.); s*ee also Williams v. Edwards*, 604 So. 2d 930 (Fla. 5th DCA 1992) (abuse of discretion to stay an action pending a resolution of the issue by the supreme court.).

V. MOTIONS FOR ATTORNEY'S FEES

Petitioner seeks prevailing party attorney's fees, pursuant to sections 672.726(8) and 627.428, Florida Statutes, if the Court rules in its favor. In light of the foregoing, Petitioner's motion is denied because it is not the prevailing party. Petitioner also filed a "Notice of Serving Motion for Attorney Fees and Sanction Regarding Respondent's Motion to Tax Attorneys' Fees Pursuant to section 57.105(1), Florida Statutes." However, Plaintiff failed to attach the motion to the notice and further, it appears, failed to comply with section 57.105(4)'s, Florida Statutes, twenty-one day notice requirement.[2] Thus, Petitioner is not entitled to attorney's fees on this basis either.

As noted above, Respondent filed a motion for attorney's fees pursuant to section 57.105, Florida Statutes. Respondent contends that Petitioner's petition for writ of certiorari is "baseless" because it is based "on a contrived theory that the trial court's order permitted the depositions to inquire into potential issues involving fraud. There is nothing in the Order to substantiate [this] belief. IN [sic] fact, the hearing transcript is clear, that no such order was ever entered." (Resp'ts Mot. to Tax Att'ys' Fees ¶¶ 7, 10.) However, Petitioner's primary theory was that the trial court's order allowed Respondent to inquire into unpled issues. Given the ambiguity surrounding why Respondent wanted to take the depositions, the Court does not

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[2] Section 57.105(4), Florida Statutes (2006), states, "A motion by a party seeking sanction under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial, is not withdrawn or appropriately corrected."

conclude that Petitioner's petition for writ of certiorari was unsupported by the necessary material facts or the law such that an award of attorney's fees is appropriate.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the Petition for Writ of Certiorari is hereby **DENIED** and the trial court's June 26, 2006, order denying Petitioner's Motion to Stay is **AFFIRMED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 13 day of December, 2007.

____/S/_____
LAWRENCE R. KIRKWOOD
Circuit Judge

_____/S/_____
ALICE L. BLACKWELL
Circuit Judge

_____/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to: **Terry A. Slusher**, Esq., The Slusher Law Group, LLC, 1107 Delaware Ave., Ft. Pierce, FL 34950; **Stacy Martindale**, Esq., The Martindale Law Group, 5575 S. Semoran Blvd, Suite 30, Orlando, Florida 32822 and **Valencia Percy Flakes**, Esq., de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, P.O. Box 87, Orlando, Florida 32802-0087 on this 13 day of December, 2007.

_____/S/_____
Judicial Assistant