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

BLESSING REHAB CENTER, INC., A/A/O SYDNEY EDMOND,

Petitioner,

ALLSTATE INDEMNITY COMPANY,

Respondent.
_____/

CASE NO.: 2012-CA-14451-O
WRIT NO.: 12-74
Consolidated Lower Case Numbers: 2010-CC-17736 & 2010-CC-17737

Petition for Writ of Certiorari, from the County Court,
in and for Orange County, Florida,
Deborah B. Ansbro, County Judge.

Herbert V. McMillan, Esquire,
for Petitioner.

Donald J. Masten, Esquire and
Sonia Maritza Henriques, Esquire,
for Respondent.

Before EVANS, SHEA, JOHNSON, J.J.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Blessing Rehab Center, Inc., a/a/o Sydney Edmond ("Blessing"), seeks review of the Trial Court's "Order Following Hearing on Plaintiff's Motion to Quash Subpoena Duces Tecum and Motion for Protective Order" entered on August 1, 2012 in favor of Respondent, Allstate Indemnity Company ("Allstate"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(2). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Summary of Facts and Procedural History

Allstate issued an automobile insurance policy to Sydney Edmond that provided for no-fault benefits. Thereafter on or about February of 2009 Sydney Edmond and Elionel Saintus ("Insureds") were involved in a motor vehicle accident and obtained medical treatment for their injuries from Blessing. Blessing then billed Allstate for its medical services. Allstate did not pay Blessing and in January of 2010, Blessing sent Allstate a demand letter seeking payment for its medical services. Allstate refused to pay Blessing claiming that the accident did not happen as reported or that it was staged.

Blessing then filed a breach of contract action against Allstate seeking payment for its medical services. Allstate alleged fourteen separate affirmative defenses, two of which are most relevant for the purposes of this Court's review and will be discussed further herein. After the pleadings were filed, the parties entered into a stipulation consolidating the cases for discovery into Case No.: 2010-CC-17736-O.

Discovery then ensued including depositions of persons affiliated with Blessing. Allstate also served Blessing's accountant with a subpoena duces tecum for various financial documents including corporate tax returns, bank statements, withdraws and deposits, wage and hourly reports, cash receipts, and ledgers pertaining to Blessing and other entities and employees affiliated with Blessing. In response to the subpoena, Blessing filed a Motion to Quash Subpoena Duces Tecum and Motion for Protective Order to prevent Allstate from obtaining the documents at issue that was heard on May 24, 2012. At the hearing Blessing argued that all of the items sought were privileged communications per the accountant-client privilege under section 90.5055, Florida Statutes. Blessing also argued that the documents were not relevant based upon the pleadings and that the request for these documents violated the right to privacy of

the individuals identified in the subpoena duces tecum. The Trial Court overruled all of Blessing's objections and denied Blessing's motion on the basis that the documents sought by Allstate were not communications protected by the accountant-client privilege and were relevant.

Standard of Review

In reviewing a nonfinal order, for which no appeal is provided by statute, a Court's review by certiorari is limited only to whether the order departs from the essential requirements of law and whether it causes material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal. This principle remains the appropriate standard in considering the grant of certiorari relief in pretrial discovery. *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993, 999 (Fla. 1999); *Bogert v. Walther*, 54 So. 3d 607 (Fla. 5th DCA 2011). Further, a departure from the essential requirements of law is more than "a simple legal error" but requires that there be "a violation of a clearly established principle of law resulting in a miscarriage of justice." *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000) *citing Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983).

Arguments

Blessing argues that the Trial Court committed reversible error and departed from the essential requirements of law by overruling its objections and denying its Motion for Protective Order because: 1) The corporate tax returns, bank statements, 1099 forms, and W-2 statements that Allstate seeks disclose the money paid to the individuals who treated the Insureds, but who are not parties to this lawsuit; thus, the documents are not relevant in this PIP case; 2) Discovery into the personal income of these non-parties violates their right to privacy; and 3) The documents sought are privileged under the accountant-client privilege. Lastly, Blessing seeks

appellate attorney's fees and costs pursuant to section 627.428, Florida Statutes, and Florida Rule of Appellate Procedure 9.400.

Conversely, Allstate argues: 1) The accountant-client privilege does not apply in this case as the privilege only protects communications and does not protect documents generally and 2) The documents sought do not unnecessarily intrude into privacy rights as the documents sought are relevant as to the affirmative defenses it alleges, specifically as to clinic ownership and licensure.

Discussion

Among the affirmative defenses, Allstate argues that the cause of action is precluded because the medical services for which recovery is sought were not lawfully rendered and Blessing is not eligible to lawfully render treatment because it is not wholly owned by a chiropractic physician and is not properly licensed. Allstate's Seventh Affirmative Defense states:

> The cause of action is precluded because the medical services for which recovery is sought were not lawfully rendered, reasonable, related and/or medically necessary to treat the insured's alleged February 11, 2009 injuries pursuant to Florida Statute Section 627.736.

Allstate's Fourteenth Affirmative Defense states:

> That the Defendant alleges that the Plaintiff Provider was not eligible to lawfully render treatment at the time of treatment at issue in the subject claim; therefore, the Plaintiff cannot recover in part or in full on the subject claim. Specifically, the Defendant alleges that the Plaintiff corporation is not wholly owned by a chiropractic physician and is not properly licensed in direct contravention of Fla. Stat. § Fla. Stat. [sic] 460.4167, Fla. Stat. § 627.736(1)(a), Fla. Stat. § 627.732(11), and Fla.. Stat. § 460.403. Moreover, the Plaintiff corporation does not qualify for payment of Personal Injury Protection benefits as the Plaintiff corporation is not wholly owned by a chiropractic physician. Therefore, the Defendant alleges that the bills submitted by the Plaintiff are not compensable pursuant to Fla. Stat. § 627.736(5)(b)(1)(b) [sic] because they were not lawfully performed pursuant to the provisions of the same statute.

The statutes cited by Allstate in these affirmative defenses govern the ownership and licensure of health care clinics, supervision by chiropractic physicians, complete care, custody, and control of the equipment or practice. Further, section 627.736(1)(a), Florida Statutes (2012) requires that for medical benefits to be reimbursed, the initial services and care must be lawfully provided, supervised, ordered, or prescribed by a chiropractic physician licensed under chapter 460 or provided in a hospital or in a facility that owns, or is wholly owned by, a hospital; and for reimbursement of follow-up services, the entity providing the services must be wholly owned by one or more chiropractic physicians licensed under chapter 460. Section 627.736(5)(b)1.b., Florida Statutes (2012), b)1. states that an insurer or insured is not required to pay a claim or charges for any service or treatment that was not lawful at the time rendered. Lastly, section 627.732(11), Florida Statutes (2012), defines "lawful" or "lawfully" to mean in substantial compliance with all relevant applicable criminal, civil, and administrative requirements of state and federal law related to the provision of medical services or treatment. *See Active Spine Centers, LLC v. State Farm Fire and Casualty Co.*, 911 So. 2d 241 (Fla. 3d DCA 2005) (applying the plain meaning of a similar statute section 456.0375(1)(b)6., Florida Statutes (2003), which states that "all charges or reimbursement claims made by or on behalf of a clinic that is required to be registered under this section, but that is not so registered, are unlawful charges and therefore are noncompensable and unenforceable); *see also State Farm Fire & Casualty Co. v. Silver Star Health and Rehab, Inc.*, 2011 WL 6338496 (M.D. Fla. 2011) (applying *Active Spine*).

Allstate, in its Response, points out portions of testimony from the depositions that it claims led to the need to subpoena the documents that are relevant to its affirmative defenses. First, Allstate deposed chiropractor, Frederic Freeman, D.C. ("Freeman"), the registered agent of

Blessing. Freeman testified that the lease on the facility where treatment was allegedly rendered was either in his name individually or in the name of another company, Wishbone Health and Wellness, Inc. ("Wishbone"). He also testified that Blessing did not own any chiropractic equipment or acupuncture needles, but believed that the equipment was either owned by him individually or by Wishbone. Freeman further testified that he hired Diana Merice, an employee of Merimed, Inc. ("Merimed"), to market, manage and operate the facility where Blessing was located.

From review of the deposition transcripts and as Allstate points out, Freeman gave conflicting statements about the ownership of Merimed. First, when asked, "Do you know who owned Merimed? Who the owners were?" Freeman responded, "Diana." A few minutes later in the deposition when asked, "Well, Merimed was set up to service Blessing was it not, solely for that purpose? Within a week's of Blessing's? And you're telling me you don't know who owns it?" Freeman responded, "No, I don't know who owns it." Also, according to Allstate, the Department of State's records revealed that Merimed, Inc. was formed on November 10, 2008, one week after Blessing and that the articles of incorporation stated that the purpose for Merimed was "to provide service management of medical clinic on central Florida." [sic] and Blessing's address was listed as the address for the president of MeriMed who was Diana Merice's brother, Datanase Merice. When asked at the deposition, "Who is Datanase Merice?" Freeman's response was, "I'm not sure." It was only after reviewing corporate records that he was able to recognize the name of Datanase Merice as President of Merimed. Also, Freeman was not able to state exactly what Datanase Merice did for Merimed.

In addition, Allstate claims that the medical forms were illegible as to who actually rendered the medical services for which Blessing is seeking payment. According to Freeman's

testimony, he believed two of the signatures to be those of Jose Antonio Diaz-Mendez, chiropractor assistant, and Svetlana N. Kotsenko, acupuncturist. As Allstate also points out, with regards to who actually employed those individuals, Freeman gave conflicting statements. In one portion of his deposition Freeman claims that he, "only had two individuals working for me at that time." Later in his deposition, he testified that Jose Diaz performed most of the services on the patients in question and that he was an independent contractor paid by Merimed. Freeman also testified that Merimed would arrange for fill-in chiropractors to work at Blessing who were paid by Merimed instead of Blessing. Further, Freeman gave conflicting testimony as to whether he was an employee of Blessing or an independent contractor.

Allstate then deposed Datanase Merice who testified that Diana Merice owns and operates Merimed, Inc. and that he is the owner in name only and had no involvement with Merimed. Instead, he stated that he was a barber. When asked, "What does Merimed do?" Mr. Merice's response was, "I don't know what Merimed do. I don't know what Merimed mean. She tell me it's a business." Also, Mr. Merice was not able to provide any information regarding Merimed's employees. Specifically when asked, "As President of Merimed, Inc., did you ever enter into any contracts with anyone?" Mr. Merice responded, "No, not anyone; I don't see nobody. Only Diana has seen. I don't see nobody; I don't know nothing."

Following Datanase Merice's deposition, Allstate deposed Diane Merice. When asked about her relationship with Merimed, she testified, "I'm the management." She also testified that that she possessed keys to the clinic at Blessing's location and that Merimed personnel opened and closed the clinic, scheduled patients, compiled, sent, and followed up with bills/claims and records to the insurance companies, deposited funds into the clinic's banking account, and did all the marketing.

Also both Freeman and Diana Merice testified as to the existence of a written contract between Blessing and Merimed. However, they both stated that they did not know where the contract was and no longer had a copy of it. When asked about how Merimed's employees, including how Jose Diaz got paid, Diana Merice explained that they were given Merimed checks and that Merimed, through its accountant Brenda Sealy, prepared the 1099 forms. During her deposition, Diana Merice was asked to review the SOAP notes related to this case in order to identify the signatures of the person rendering treatment. She stated that she believed two of the signatures were from Jose Diaz and Lana [sic]. However, for several dates of service she could only state that it was a "different doctor" but could not name who. According to Allstate, Jose Diaz moved out of the country and was not available for a deposition so Allstate was unable to verify which dates of service were in fact performed by him. Therefore, Allstate claims that because neither Freeman nor Diana Merice could state with certainty who rendered the services to Allstate's Insureds, the only way that Allstate can now obtain this information is through the documents sought by Allstate's subpoena.

Allstate argues that neither Diana nor Datanase Merice are licensed health care providers and therefore are prohibited from owning a clinic. Further, Allstate claims that Merimed is not licensed with the Agency for Health Care Administration ("AHCA") as a health care clinic, so any services rendered by its personnel are not compensable. Thus, Diana Merice was sent a subpoena duces tecum for the deposition requesting most of the items which are the subject of this Petition. However, she did not bring any of the documents with her, and instead indicated that they were with her accountant, Brenda Sealy. Thereafter, according to Allstate, in an attempt to discern who was actually rendering the services and what entities they worked for,

Allstate moved for a subpoena duces tecum to depose Brenda Sealy, requesting that certain documents be produced.

At the hearing on May 24, 2012 addressing Blessing's Motion to Quash Subpoena Duces Tecum and Motion for Protective Order, Blessing first argued that the documents were privileged under section 90.5055, Florida Statutes, governing the accountant-client privilege. The Court addressed each document and determined that none of them were communications falling under the privilege stating:

> And again, for the record, not a single one of these, these are records. They're bank statements, they're wage and hourly reports. They're documentation supporting withdraws and deposits, they're financial statements, they're cash receipts, ledger detailed records. They are not communications that would be privileged either under the case law or under the statute. So, it's denied as to all of Exhibit A.

Section 90.5055(c), Florida Statutes (2012), provides that a communication between an accountant and client is confidential if it is not intended to be disclosed to third persons other than: 1) Those to whom disclosure is in furtherance of the rendition of accounting services to the client and 2) Those reasonably necessary for the transmission of the communication. Accordingly, this Court concurs with the Trial Court that the privilege only applies to communications. Further, the court record does not reveal that any of the subpoenaed documents contained privileged communications such as notes to warrant redaction.

This Court now addresses the relevancy of the documents. "Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence." *Residence Inn by Marriott v. Cecile Resort Ltd*., 822 So. 2d 548, 549 (Fla. 5th DCA 2002). The statutory requirements supporting the basis for Allstate's affirmative defenses as discussed above warrant Allstate's inquiry through discovery as to the ownership and licensure of Blessing and the other entities and persons involved in

treating the Insureds and billing for those services in this case. The testimony revealed in the depositions directly related to the ownership and licensure status of Blessing and its relationship to Merimed and the persons allegedly involved in providing the medical services billed in this case. Further, because portions of the testimony were nebulous and conflicting, the subject documents are relevant and necessary. The Trial Court appropriately acknowledged this lack of information provided in the testimony by indicating that Allstate was entitled to this information and because the persons deposed did not clearly answer the questions including who they worked for, the documents were relevant and necessary.

Conclusion

Based on the forgoing, this Court finds that the Trial Court's Order entered August 1, 2012 denying Blessing's Motion to Quash Subpoena Duces Tecum and Motion for Protective Order should stand as the Trial Court's findings and decision did not depart from the essential requirements of law.

Therefore, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Blessing Rehab Center, Inc.'s Petition for Writ of Certiorari is **DENIED** and Petitioner's Motion for Attorney's Fees filed January 22, 2013 is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 9th day of July, 2013.

/S/_____
ROBERT M. EVANS
Circuit Judge

/S/_____
TIM SHEA
Circuit Judge

/S/_____
ANTHONY H. JOHNSON
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Herbert V. McMillan, Esquire**, Law Office of Herbert McMillan, P.A., P.O. Box 608033, Orlando, Florida 32860, lawmcmillan@bellsouth.net, herbmcmillan3@att.net and **Donald J. Masten, Esquire and Sonia Maritza Henriques, Esquire**, Masten, Peterson & Denbo, LLC, P.O. Box 4449, Orlando, Florida 32802, Don.Masten@MPDFlaLaw.com, OrlandoPleadings@MPDFlaLaw.com on this 9th day of July, 2013.

/S/_____
Judicial Assistant