SUPREME COURT OF FLORIDA

CASE NO. 83,218
District Court of Appeal
5th District - No. 93-2808

SHIRLEY DOELFEL, ET VIR.

Petitioner,

vs.

THOMAS P. TREVISANI, M.D.
ET AL.

Respondent.
_____/

PETITIONERS' AMENDED INITIAL BRIEF

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TABLE OF CONTENTS

GREVIOR & JORDAN, P.O. DRAWER 14063, FORT LAUDERDALE, FLORIDA 33302 • TELEPHONE (305) 462-8394 • (305) 523-2700

TABLE OF AUTHORITIES

INTRODUCTION

Petitioners, Shirley Doelfel and John Doelfel, her husband (Plaintiffs), respectfully request this Court review the decision of the Fifth District Court of Appeal rendered on February 4, 1994. The decision of the Fifth District Court of Appeal upheld an order entered by the Hon. William C. Gridley on November 10, 1993, in the Circuit Court of the 9th Judicial Circuit, in and for Orange County, Florida. Pursuant to the terms of the order at issue, the Petitioner, Shirley Doelfel, has been instructed to sign medical authorizations for the release of her medical records to the Defendants in this action.

FACTS

This is a medical negligence action in which Plaintiff, Shirley Doelfel, alleges that the care and treatment rendered to her by Defendant, Thomas P. Trevisani, M.D., fell below acceptable standards of care. A loss of consortium claim has been maintained on behalf of John G. Doelfel, husband of Shirley Doelfel.

In August of 1993, Defendant, Thomas P. Trevisani, M.D., attempted to obtain voluminous medical records regarding the Plaintiff, Shirley Doelfel, pursuant to Fla.R.Civ.P. 1.351(b), production from non-party. (Appendix 7) The Defendant was attempting to obtain medical records from numerous health care providers located both in the State of Florida and in the State of Pennsylvania. Pursuant to Fla.R.Civ.P. 1.351(b) and the applicable case law, the Plaintiff objected in a timely fashion. (Appendix 8) At no point did Defendant seek judicial determination as to the validity of Plaintiffs objections to the production from non-parties.

Instead of seeking to overturn Plaintiffs' objections to their methodology, the Defendants sought production of the various medical records by use of Fla.R.Civ.P. 1.350. (Appendix 5) Plaintiff responded to Defendant's request in a timely fashion by indicating that she did not possess the documents requested. (Appendix 6)

On September 8, 1993, Defendant filed a motion to compel Plaintiff, Shirley Doelfel, to sign an authorization for the release of the medical records at issue. (Appendix 2) The trial court held a hearing

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on November 4, 1993, and granted Defendant's motion to compel. The trial court ordered Plaintiff, Shirley Doelfel, to authorize the release of medical records from several out-of-state health care providers located in the State of Pennsylvania, as well as one health care provider located in the State of Florida, to the Defendant. (Appendix 1)

On December 3, 1993, Plaintiffs petitioned the Fifth District Court of Appeal for a Writ of Certiorari, quashing the order of the trial court. On February 4, 1994, the Fifth District Court of Appeal issued an opinion denying Plaintiffs' Petition for a Writ of Certiorari. The court certified conflict of its decision of Johnston v. Donnelly, 581 So.2d 909 (Fla. 2 DCA 1991), and Reinhardt v. Northside Motors, Inc., 479 So.2d 240 (Fla. 4 DCA 1985). (Appendix 9)

JURISDICTION

This Court has jurisdiction over the matter at hand pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi). The opinion of the Fifth District Court of Appeal certifies conflict of its decision with the decision of other district courts of appeal.

SUMMARY OF ARGUMENT

The trial court departed from the essential requirements of the law in compelling the Petitioner, Shirley Doelfel, to execute authorizations for release of her medical records from her various health care providers.

Reinhardt v. Northside Motors, Inc., 479 So.2d 240 (Fla 4 DCA 1985); Wilson v. Rodriguez, 547 So.2d 196 (Fla. 4 DCA 1989); and Condon v. Community Psychiatric Centers, 583 So.2d 1123 (Fla. 4 DCA 1991),, stand for the proposition that all other viable methods of discovery should be exhausted before a court should order such an extraordinary remedy. In this case, the Defendant has failed to take even the most rudimentary steps in obtaining the documents through normal discovery methods.

ARGUMENT

The trial court departed from the essential requirements of law in compelling the Petitioner, Shirley Doelfel, to execute authorizations for the release of her medical records from various medical

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providers located in both the State of Florida and the State of Pennsylvania.

The issue before this Court is neither new nor novel. It has been addressed by numerous forums. These cases include Reinhardt v. Northside Motors, Inc., 479 So.2d 240 (Fla. 4 DCA 1995); Wilson v. Rodriguez, 547 So.2d 196 (Fla. 4 DCA 1989); Condon v. Community Psychiatric Centers, 583 So.2d 1123 (Fla. 4 DCA 1991); Rojas v. Ryder Truck Rental, Inc., 625 So.2d 106 (Fla. 3 DCA 1993); and in a worker's compensation context in Campbell v. Wendy's of South Florida, 495 So.2d 890 (Fla. 1 DCA 1986). Each of these cases stands for the proposition that the parties seeking the authorization to obtain medical records needs to exhaust the other available methods of discovery prior to the seeking of such authorization. Ordinary methods of discovery, such as those authorized by the Rules of Civil Procedure, should be followed for seeking such an extraordinary remedy as the authorization which the Respondent seeks in this case.

In Reinhardt, the respondents sought a medical authorization from the petitioner to allow release of medical records from providers in the State of California. The respondent had failed to attempt to obtain the records by use of Fla.R.Civ.P. 1.350, request for production. In quashing the trial court's order, the Fourth District Court of Appeal found:

> Respondents made no attempt to obtain the records through the existing means of discovery. Although the procedure attempted by respondents and implemented by the court may be more expedient, it is not provided for under Florida Rules of Civil Procedure. In the absence of a showing that the records could not be obtained by the use of discovery procedures already provided by the Florida Rules of Civil Procedure, the trial court's order constitutes a departure from the essential requirements of the law.

The Fourth District Court of Appeal again addressed this issue in Wilson v. Rodriguez, 547 So.2d 197 (Fla. 4 DCA 1989). In Wilson, a medical malpractice defendant sought and ultimately obtained an order compelling authorizations for release of a petitioner's medical records from providers in the State of Michigan. The defendant had initially scheduled numerous depositions of the medical providers in Michigan, and then voluntarily cancelled them. By cancelling the depositions, the defendants had given up a reasonable opportunity to obtain the desired medical records through the proper discovery route:

namely, pursuant to a subpoena for production of documents at the physicians depositions. The Fourth District, in quashing the order of the trial court, held that the motion to compel the medical authorization should not have been granted on the grounds that the medical records could have been obtained through the use of Fla.R.Civ.P. 1.410(d). The Second District Court of Appeal addressed this issue in Johnston v. Donnelly, 581 So.2d 909 (Fla. 2 DCA 1991).

In Johnston, the defendants in a negligence action sought to obtain medical records from the plaintiff's treating Canadian physicians. Some of the physicians refused to honor subpoenas issued by Florida courts pursuant to Fla.R.Civ.P. 1.351. The defendant argued to the trial court that it knew of no other means for obtaining the records for which the authorization was sought. The trial court, in turn, granted the motion and ordered the Johnston's to sign and return the medical authorization forms. In granting the Petition for Writ of Certiorari, the court suggested that Fla.R.Civ.P. 1.350 should have been utilized. The defendant had failed to direct a request for production of documents to the plaintiff. The court, in quashing the order, stated that in simply ordering the execution of a blanket release of medical information, the trial court bypassed the procedural safeguards of the discovery rules.

The most recent case dealing with the issue at bar is Rojas v. Ryder Truck Rental, Inc., 625 So.2d 106 (Fla. 3 DCA 1993). In Rojas, the plaintiffs were seeking damages for injuries suffered in an accident. The defendants sought plaintiff's medical records from a Massachusetts hospital and Massachusetts health care plan, both of whom had treated the plaintiffs before and after the accident. The health care providers failed to respond to defendant's subpoenas requesting the records. The defendants, in turn, moved the trial court to compel plaintiffs to sign written authorizations directed to the two health care providers, permitting release of the medical records directly to the defendants. The trial court granted defendants' motion, and ordered the plaintiffs to execute such authorizations. The Third District Court of Appeal, in addressing Rojas, found that the order entered by the trial court accomplishes the discovery of the medical records in the most expeditious and practical way possible. The court held that this radical methodology burdens the judicial resources the least, and does the most to insure full disclosure so that defendants in

personal injury litigation can fully and fairly litigate their liability.

The Third District, in arriving at its conclusion, states:

> Although it is clear that, since the various forms of discovery available to litigants are not exclusive, the determination of which discovery method to pursue remains the choice of the requesting party, the procedure invoked here (i.e. executing written authorizations, followed by an in camera review, if requested) is a far more desirable process than a request for production under Fla.R.Civ.P. 1.350. In a simple request for production, the producing party decides, which parts of their medical records to produce, and which to retain as non-discoverable, thereby acting as the arbiter of the requesting party's discovery request. Although there is no allegation of bad faith in this case, the potential for abuse by unscrupulous litigants in other cases by withholding records is obvious. However, by conducting an in camera review of all the medical records, the trial court, and not the producing party, would make the determination of what is discoverable. This is much more conducive to the conduct of ethical and efficient litigation.

The decision rendered by the Third District Court of Appeal in Rojas runs contrary to the fundamental bases of the Florida Rules of Civil Procedure. The very essence of the Florida Rules of Civil Procedure is stated in Rule 1.010, which provides:

> These rules apply to any actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules or small claims rules apply. The form, content, procedure, and timing for all pleading and all special statutory proceedings shall be prescribed by the statutes governing the proceeding, unless these rules specifically provide to the contrary. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. These rules shall be known as the Florida Rules of Civil Procedure and abbreviated as Fla.R.Civ.P. (Emphasis added.)

The argument of the Respondent in the case at bar, to both the trial court and to the Fifth District Court of Appeal, as well as the decision of the Third District Court of Appeal, goes contrary to the very essence of the Florida Rules of Civil Procedure. The logical deduction which can be elicited from the arguments both of the Respondent and the decision of the Third District Court of Appeal is that the Florida Rules of Civil Procedure as stated do not provide a just, speedy and inexpensive determination of the actions. Rather, an additional methodology, the execution of the medical records authorization, is additionally required.

Although the authorization which Respondent seeks may be, for all intents and purposes, more expedient, that is no reason why the procedural safeguards provided for by the Florida Rules of Civil Procedure should not be followed.

The remedy sought by the Respondent in this case is extraordinary. The various opinions previously cited go to great lengths to describe the methods utilized by the parties seeking the medical authorization to obtain the records prior to attempting to obtain an order to get the authorization. In this case, the Respondent has failed to take even the most preliminary steps to obtain the records through normal channels of discovery. The Respondent has not attempted to obtain the records through the use of Fla.R.Civ.P. 1.310. Further, the Respondent has not attempted to use the rules promulgated by the State of Pennsylvania, authorizing its courts to issue subpoenas to aid discovery arising from litigation in other states. See, 42 Pa.C.S.A. §5326.

Respondent's attempt to obtain Petitioner's medical records by use of Rule 1.351 was defective from the outset. The Respondents sought to have the subpoenas issued by the Clerk of the Court in Orange County, Florida. Such subpoenas would have no force and effect in the State of Pennsylvania.

While recognizing that the State of Pennsylvania has not adopted the Uniform Depositions Act, the State has adopted the previously cited statutory methodology to aid out-of-state litigants in obtaining discovery. Respondents made no attempt to utilize this methodology.

CONCLUSION

For all the foregoing reasons, the Petitioners request this Court to grant certiorari and enter an order quashing the trial court's order dated November 10, 1993, which directs the Petitioner, Shirley Doelfel, to sign authorizations for the release of medical records from various health care providers.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by postal delivery this __ day of March, 1994, to: Hector A. More, Esquire, and Tyler S. McClay, Esquire, Attorney for Defendants, Taraska, Grower, Unger and Ketcham, P.A., 111 North Orange Avenue, Suite 1700, Orlando, FL 32801.

Respectfully submitted,

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