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.

FILED
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PETITIONERS' RESPONSE TO RESPONDENT'S INITIAL BRIEF

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INTRODUCTION

Petitioners, Shirley Doelfel and John Doelfel, her husband (Plaintiffs), hereby file their response to Respondent's Brief in this matter.

ARGUMENT

Respondents have responded to Petitioners' initial brief by setting forth what Respondents had attempted to do in order to secure Petitioner's medical records, both located within the State of Florida and located within the State of Pennsylvania, pursuant to the Florida Rules of Civil Procedure. Having reviewed the steps allegedly taken by Respondents, it is even more certain that the trial court, by its Order, departed from the essential requirements of the law.

Prior to the trial court's ordering that Petitioner, SHIRLEY DOELFEL, sign the medical authorizations, the Respondents never made an affirmative showing to the trial court that Petitioners records could not have been obtained by use of discovery rules provided for in the Florida Rules of Civil Procedure, nor did they attempt to do so.

The Respondents, in their reply to Petitioner's initial brief, go to great lengths to discuss what they did prior to seeking the order at issue. What they, in fact, did was to initially seek the records by use of Fla.R.Civ.P. 1.351. Upon the initial examination of Respondents' attempt to utilize Fla.R.Civ.P. 1.351, counsel for Petitioners objected pursuant to Fla.R.Civ.P. 1.351(b), which states, in pertinent part:

> If any party serves an objection to production under this rule within 10 days of service of the notice or the person upon whom the subpoena is to be served objects at any time before the production of the documents or things, the documents or things shall not be produced under this rule.

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The Committee Notes (1980 adoption) provide:

> This rule is designed to eliminate the need of taking a deposition of a records custodian when the person seeking discovery wants copies of the records only. It authorizes objections by any other party as well as the custodian of the records. If any person objects, recourse must be had to Rule 1.310. (Emphasis added.)

The Respondents contend that, through the use of the objection procedure authorized under Fla.R.Civ.P. 1.351, the Petitioners have thwarted, hindered, and obstructed their ability to get the medical records sought. The Respondents clearly imply that the Petitioner's actions in objecting pursuant to the Rule were somehow improper. If that is the case, Petitioners are at a loss to understand why Respondents fail to seek judicial determination as to the validity of Petitioners' objections.

The Respondents go to great lengths in their brief to discuss what steps they took in an attempt to obtain the records sought. What they, in fact, did was attempt to utilize, in an improper fashion, Fla.R.Civ.P. 1.351, and then, once that failed, Fla.R.Civ.P. 1.350.

The subpoena attempt by the Respondents was defective from the outset. The subpoenas to be served were issued by a Clerk of the Court in Orange County, Florida. Respondents imply that as a result of the efforts of Petitioners, Respondents were unable to obtain the requested documents from the out-of-state health care providers. That implication could not be farther from the truth. The most significant reason that Respondents have been unable to obtain the various medical records of Petitioner is because of their own failure to utilize the Florida Rules of Civil Procedure.

Through the entire response to Petitioners' initial brief, Respondents have failed to explain why no attempt was ever made to properly subpoena either the medical care

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providers themselves, by subpoena duces tecum, or their records custodians. The record is devoid of any showing by Respondents that they made any effort to comply with the procedure provided for under Pennsylvania law, 42 Pa.C.S.A. §5326(a). This section provides in part:

> (a) General Rule. A court of record of this Commonwealth may order a person who is domiciled or is found within this Commonwealth to give his testimony or statement or to produce documents or other things for use in a matter pending in a tribunal outside this Commonwealth. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this Commonwealth, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this Commonwealth issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, for a person appointed by the court. The person appointed shall have power to administer any necessary oath.

In examining the Pennsylvania statute, it is apparent on its very terms that a less draconian alternative was available to both the trial court and the Respondents in an attempt to secure the Pennsylvania medical records. The Respondents never attempted to utilize the procedure provided for in the Pennsylvania statute, rather, they sought an order from the trial court for a medical authorization. Therefore, it is entirely spurious that Respondents have not received the subject records because of any supposed actions taken by Petitioners.

The cases cited by Petitioner in support of their position are totally applicable to the facts of this case and warrant the quashing of the trial court's order. The

Respondent attempts to distinguish these cases but is unable to do so. Respondent fails to discuss the steps taken by the parties prior to seeking the medical authorization order in each of the cases.

Specifically, in Johnston v. Donnelly, 581 So.2d 909 (Fla. 2 DCA 1991), the Defendants sought medical records from plaintiff's treating physicians who were located in Canada. The defendants took the initial step of having subpoenas issued, and there does not appear to be any objection in the case to the issuance of the subpoenas. The problem that developed in Johnson was that some of the physicians refused to honor the subpoenas.

In Reinhardt v. Northside Motors, 479 So.2d 240 (Fla. 4 DCA 1985), the defendant sought to obtain an authorization for release of medical records without first utilizing the procedures authorized by Rule 1.350, Fla.R.Civ.P., or implementing the procedures provided for by the Uniform Foreign Depositions Law, Fla.Stat. §92.251 (1983), nor a statutory procedure provided for in the foreign jurisdiction in which the medical records were located.

The Reinhardt court, in granting certiorari, and finding that the order for authorization of release of medical records constituted a departure from the essential requirements of law, held:

> Respondents made no attempt to obtain the records through 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 for by the Florida Rules of Civil Procedure, the trial court's order constitutes a departure from

> the essential requirements of the law. Accordingly we grant certiorari and quash the trial court's order.

In Reinhardt, there is discussion of the available methods that the party seeking the records could have utilized. In the case at bar, the Respondents attempt to distinguish this case by contending that they utilized all of the methods available. Clearly, this is not the case.

Similarly, the Third District, in Rojas v. Ryder Truck Rental, Inc., 625 So.2d 106 (Fla. 3 DCA 1993), discussed the lengths the party seeking the medical records went through prior to seeking the written authorization for release of the medical records. In Rojas, the seeking party attempted to obtain the records by directing subpoenas to the various out-of-state providers. The opinion is silent as to the methodology utilized by the seeking party. Consequently, one must assume that the procedure attempted was a provided for in both the Florida Rules of Civil Procedure as well as the statutory authority of the foreign jurisdiction. The health care providers failed to respond to these subpoenas.

What has, in fact, been attempted in this case by the Respondents, is the following: a flawed and improper attempt to utilize Rule 1.351 of the Fla.R.Civ.P., and an attempt to obtain the medical records from the Petitioners through the use of Fla.R.Civ.P. 1.350. Clearly, there were other alternatives available to the Respondents to obtain the records at issue. This includes a proper use of Rule 1.351, Fla.R.Civ.P., and 42 Pa.C.S.A. §5326(a). The Respondents have failed to show that the records could not have been obtained by discovery procedures provided for by the Florida Rules of Civil Procedure.

CONCLUSION

For all of the foregoing reasons, and the supporting authority of law, the Petitioners respectfully request this Court to grant certiorari and enter an order quashing the trial court's order of November 10, 1993, which directs Petitioner, SHIRLEY DOELFEL, to sign authorizations for the release of medical records from health care providers located both in the State of Florida and outside the State of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by postal delivery this 19 day of April, 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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