

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

PROGRESSIVE EXPRESS  
INSURANCE COMPANY,

CASE NO.: 2006-CA-551-O  
WRIT NO.: 06-07

Petitioner,

v.

ADVANCED HEALTH CARE  
GROUP, INC., as assignee of  
LEAH HAVILL,

Respondent.

---

Petition for Writ of Certiorari.

Dale T. Gobel, Esq., Daniel J. O'Malley, Esq., and  
Kimberly A. Daniels, Esq.,  
for Petitioner.

Dean A. Mitchell, Esq.,  
for Respondent.

Before RODRIGUEZ, KIRKWOOD, and WHITE, J.J.

PER CURIAM.

**FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

Petitioner Progressive Express Insurance Co. timely filed its Petition for Writ of Certiorari seeking review of the trial court's "Order Granting Plaintiff's Motion to Compel Better Responses to Second Request to Produce" which was entered on December 19, 2005. This Court has jurisdiction. Fla. R. App. P. 9.030(c)(2). We dispense with oral argument. Fla. R. App. P. 9.320.

Advanced Health Care Group, Inc. ("Respondent"), alleges that on or about October 30, 2003, Leah Havill ("insured") was insured by Petitioner and was involved in a motor vehicle

accident. Respondent also alleges that the insured began treating with Respondent for her alleged injuries.

On January 22, 2004, Respondent billed Petitioner \$60.00 for application of a modality to one or more areas; electrical stimulation, which is also denoted as CPT code 97014. Petitioner determined that \$51.00 was a reasonable charge for the treatment based on generally accepted billing and coding rules and practices. Petitioner made a determination of reasonableness in part by using a computer program provided to it by Mitchell International, Inc.<sup>1</sup>

On or about June 16, 2004, Respondent filed its Complaint in this action seeking, among other things, the \$9.00 by which Petitioner had reduced the bill for the aforementioned electrotherapy. On July 7, 2005, Respondent served its Second Request to Produce. Petitioner's second request to produce included, in relevant part, requests that the Petitioner produce documents referred to as sliver reports,<sup>2</sup> procedure reports,<sup>3</sup> and the charge distribution graphs for CPT code 97140 for January 22, 2004, for zip code 34741.

On August 12, 2005, Petitioner served its response to the Second Request to Produce. In response to the request for sliver reports the Petitioner raised objections including that the sliver reports were not in Petitioner's possession, that they did not exist, and that the request was invasive of trade-secret, attorney-client and work product privileges. In response to the request for procedure reports the Petitioner objected, claiming, among other things, that it was not in possession of the requested information. In response to the request for charge distribution graphs, Petitioner objected by claiming, among other things, that Petitioner did not possess the

---

<sup>1</sup> In determining the usual and customary charges for a given medical service in a given geographic region, Progressive utilizes a computerized database provided to it by Mitchell International, Inc. ("Mitchell") with data supporting that system provided by Ingenix, Inc. ("Ingenix"). Petitioner reduced payment for the charge in question in part by using the Mitchell database.

<sup>2</sup> A sliver report was described at the hearing before the trial court as a graph that can be produced that depicts the usual and customary charge of a given service.

<sup>3</sup> Procedure reports were described as a summary of information that is compiled by the Petitioner by inputting data into its computer system every time a bill is received from a health care provider.

requested documents and they did not exist. Respondent subsequently filed its “Motion to Compel Better Responses to Second Request to Produce.” A hearing on the Motion was held on November 4, 2005, before the trial court and the issues were limited to documents related to CPT code 97140.

At the hearing, the Petitioner stated that no sliver report existed and that the underlying information was not in Petitioner’s possession. Respondent argued that a sliver report can be created by third party Ingenix and requested by the Petitioner. The court denied the Petitioner’s objection and ordered Petitioner to produce the sliver report.

The court then examined the request for the procedure reports. Respondent requested a procedure report created for CPT code 97014 for 2003 and 2004. Petitioner again objected claiming that a procedure report did not exist and the only reason for it to be produced in the future is for litigation purposes. Respondent did not claim that the procedure report existed; only that Petitioner was capable of creating it. The court again denied the Petitioner’s objection but narrowed the time period included in the procedure report to six months before and six months after January 22, 2004. In lieu of creating a procedure report, the court gave the Petitioner the option of handing over all of the underlying data that would be used to create a procedure report. Petitioner claimed that the data belonged to a third party, was work product and trade secret and requested a confidentiality order, but these objections were denied.

The court then addressed the request for charge distribution graphs. Again Petitioner raised several objections including that no such document exists and if it were to be created it would be only for the purpose of litigation and would therefore be privileged. Respondent did not contend that the document existed but instead argued that a similar document had been created in the past for trial in a separate case. The court again denied Petitioner’s objections

because it was determined that the charge distribution graph was part and parcel of the sliver report.

On December 19, 2005 the trial court entered its Order Granting Plaintiff's Motion to Compel Better Responses to Second Request to Produce. The trial court ordered in pertinent part as follows:

- a. Plaintiff's Motion to Compel is GRANTED and Defendant's objections are overruled as follows:
- b. The Defendant shall provide the plaintiff with the procedure report for six months before January 22, 2004 and six months after January 22, 2004, for charges for CPT code 97140, for zip codes beginning with the following three digits: 347. Alternatively, the Defendant may provide the underlying data that would comprise the aforesaid procedure report. The procedure report or the underlying data shall be disclosed to the Plaintiff by December 15, 2005.
- c. Defendant shall provide to Plaintiff, on or before December 15, 2005, the charge distribution graphs and fee verification report, also called a "sliver report," for CPT code 97140 for date of service of January 22, 2004 for zip code 34741.

(Order Granting Pl.'s Mot. Compel at 3.)

Review by certiorari is appropriate when a discovery order departs from the essential requirements of the law, causing material injury to a petitioner throughout the remainder of the proceedings and effectively leaving no adequate remedy on appeal. Allstate Ins. Co. v. Langston, 655 So. 2d 91 (Fla. 1995); Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1999 (Fla. 1987).

Petitioner raises four separate arguments in its Petition to show that the trial court departed from the essential requirements of the law. First, the Petitioner argues that the trial court departed from the essential requirements of the law by ordering that Petitioner produce information that is not in its possession, custody or control and that has not been shown to exist.

The second argument is that the court's order directing production of the underlying data in procedure reports was a departure because Respondent never requested that information and therefore timely objections were not prepared. Petitioner then contends that the court departed from the essential requirements of the law by failing to allow Petitioner to present its trade secret argument without making specific findings regarding inapplicability of the trade secret privilege. Finally, Petitioner claims that the trial court's failure to conduct an in camera inspection of the documents asserted as work product was a departure from the essential requirements of the law. Because certiorari is warranted as to the first two issues, the remaining will not be addressed herein.

Petitioner claims that the trial court departed from the essential requirements of the law by ordering that Petitioner produce documents that were not in its custody, control or possession and that do not exist. Rule 1.350(a)(1), Florida Rules of Civil Procedure, states that a party is only required to produce documents that are in the possession, custody or control of the party to whom the request is directed. Petitioner cites Balzebre v. Anderson, 294 So. 2d 701 (Fla. 3d DCA 1974), to support its contention. In Balzebre, a couple was ordered to produce net worth statements reflecting their assets, liabilities and net worth. Id. at 701. The court held that the order was too broad and stated that a party cannot be compelled to produce documents which it does not have and which are not shown to exist. Id. at 702. Similarly, in this case the Petitioner may have access to the information, but it cannot be compelled to produce a document that does not exist and Respondent has not shown the document to exist.

In Allstate Ins. Co. v. Pinder, 746 So. 2d 1255 (Fla. 5th DCA 1999), the court agreed that a party cannot be compelled to produce documents that do not exist. Id. at 1257. In that case the Petitioner was ordered to create documents with information regarding Petitioner's expert's prior

work. Id. at 1255. The court quashed the discovery order holding that Petitioner was not required to create documents even if the information is such that the opposing party is entitled to it. Id. at 1256-57.

Petitioner also cites the case of Progressive Express Ins. Co. v. Bixon Chiropractic Ctr., P.A., Case No. 04-115-AP (Fla. 18th Cir. Ct. Nov. 18, 2005). In Bixon, the trial court ordered Progressive to provide a list of names of medical providers whose charges were used to determine that the amounts charged by Bixon were not usual, reasonable, and customary. Id. at 1-2. The court also ordered that Progressive provide the names of the medical providers in the geographic region whose rates were incorporated into the Mitchell database used by Progressive. Id. at 2. The court found that the order was a departure from the essential requirements of the law because the information was not in the possession, custody or control of Progressive, but instead belonged to Mitchell. Id. at 2-3. However, the court in Bixon warned that a party takes a risk in failing to provide information that it may later want to rely on in trial. Id. at 3.

In this case the Petitioner has repeatedly argued that the requested sliver report and procedure report do not exist, and therefore Petitioner does not have possession, custody or control of said documents. Although Respondent has demonstrated that similar documents have been obtained in similar cases, Respondent has not shown that the documents requested in this case exist. Again, the Petitioner is not required to produce documents that are not in existence even if the Respondent is entitled to such information. A contrary ruling would produce the irreparable harm of compelling production of non-discoverable items. E. Colonial Refuse Serv., Inc. v. Velocci, 416 So. 2d 1276 (Fla. 5th DCA 1982).

Petitioner then argues that the trial court's order that Petitioner produce all of the underlying data used to compile a procedure report in lieu of creating a procedure report was a

departure from the essential requirements of the law because it consisted of data and documents that were not requested by the Respondent. Petitioner asserts that it was deprived of its due process right to object to producing non-discoverable documents. Petitioner claims that the objections would have included that such a request is harassing, overbroad and unduly burdensome because the request entails a search of Petitioner's entire database of explanation of benefits forms.

In State Farm General Insurance Co. v. Grant, 641 So. 2d 949, 950 (Fla. 1st DCA 1994), the trial court held a hearing on a motion to compel better answers to interrogatories. Although the petitioner had filed objections to a request to produce in addition to objecting to the interrogatories, the request to produce was not noticed for the hearing and the petitioner's objections regarding the documents requested were not argued. Id. at 950-51. Despite this, the trial court compelled the petitioner to produce the documents. Id. at 951. The appellate court granted certiorari and quashed this portion of the trial court's order, finding that it departed from the essential requirements of the law because the "[p]etitioner did not have notice and an opportunity to demonstrate to the trial court that the documents requested were work product." Id.

In this case, Respondent requested only the procedure reports. Thus, the trial court ordered production of documents that were not requested when it stated that Petitioner could provide Respondent with the documents that are used to create the procedure reports. Just as in the State Farm case, Petitioner did not have notice and an opportunity to be heard regarding whether those documents are discoverable. Therefore, the trial court departed from the essential requirements of the law when it ordered production of documents that were not requested by

Respondent without first allowing Petitioner to investigate the request, form objections, and have those objections heard.

**THEREFORE**, based upon the foregoing, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. The Petition for Writ of Certiorari is **GRANTED** and the trial court's "Order Granting Plaintiff's Motion to Compel Better Responses to Second Request to Produce" is **QUASHED**.
2. Respondent's motion for an award of attorney's fees and costs is **DENIED**.

**DONE AND ORDERED** on this 5\_\_ day of \_\_\_\_\_ June \_\_\_\_\_, 2007.

RODRIGUEZ, KIRKWOOD, and WHITE, J.J., concur.

\_\_\_\_\_  
/S/  
**JOSE R. RODRIGUEZ**  
Circuit Judge

\_\_\_\_\_  
/S/  
**LAWRENCE R. KIRKWOOD**  
Circuit Judge

\_\_\_\_\_  
/S/  
**ALICE BLACKWELL WHITE**  
Circuit Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing order was furnished via U.S. mail on this \_\_\_\_\_ 5 day of \_\_\_\_\_ June \_\_\_\_\_, 2007, to the following: Dale T. Gobel, Esq., Daniel J. O'Malley, Esq., and Kimberly A. Daniels, Esq., de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP, P.O. Box 87, Orlando, FL 32802-0087; and Dean A. Mitchell, Esq., 4939 N.W. 115th Ave., Ocala, FL 34482.

\_\_\_\_\_  
/S/  
Judicial Assistant