

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

GEICO GENERAL INSURANCE COMPANY,

CASE NO.: 2011-CV-90

Appellant,

Lower Case No.: 2009-SC-6707
consolidated with 2009-SC-6711
& 2009-SC-6714

v.

**UNITED HEALTH & REHAB ASSOCIATES OF
FLORIDA, INC.,** a/a/o Marlene Metellus, Leremy
Metellus & Berlove Metellus

Appellee.

Appeal from the County Court, in and for Orange
County, Florida, Judge John E. Jordan.

Dorothy v. DiFiore, Esquire,
for Appellant.

Marlene S. Reiss, Esquire,
for Appellee.

Before G. ADAMS, J. KEST, J. RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant, Geico General Insurance Company (“Geico”), timely appeals the Trial Court’s Final Summary Judgment entitled “Plaintiff’s Proposed Final Judgment and Certification of Question of Great Importance” entered on October 4, 2011 in favor of Appellee, United Health & Rehab Associates of Florida, Inc. (“United Health & Rehab”) a/a/o Marlene Metellus, Leremy Metellus, & Berlove Metellus. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

This appeal arose from an action to recover no-fault benefits under a policy of automobile insurance issued by Geico to Leremy Metellus, for treatment which was related to an accident that occurred on September 22, 2007. United Health & Rehab is the health care clinic that provided treatment to Leremy Metellus, his spouse, Marlene Metellus, and their son, Berlove Metellus (“Insureds”). United Health & Rehab filed suit for each individual insured, seeking to recover payment for the treatment. Subsequently, the three cases were consolidated for all purposes.

The issue in this appeal involves alleged discrepancies with documents provided by United Health & Rehab. First, when United Health & Rehab initially sought payment from Geico for the treatment provided to the Insureds, the CMS-1500 forms submitted by United Health & Rehab were under the license number for Virginia Pham, an acupuncture physician. During discovery, Geico attempted to depose Dr. Pham regarding the treatment to the Insureds and was informed that she was no longer employed with United Health & Rehab and could not be located. Geico did depose the president of United Health & Rehab, Joseph Barthelemy, who also provided an affidavit and testified that Dr. Pham was employed with United Health & Rehab as its medical director during the September through December 2007 time period when the Insureds sought treatment. Mr. Barthelemy was also requested to bring documentation in his possession regarding Dr. Pham’s employment history to his deposition, but he was unable to do as United Health & Rehab did not possess any such documents. Among the documents provided by Mr. Barthelemy were SOAP notes records with the physician’s signature line left blank.

In addition, an affidavit of Jeronimo Corona, a licensed massage therapist (“LMT”) employed with United Health & Rehab was provided during discovery. Mr. Corona stated that he and Joseph Garcia, another LMT with United Health & Rehab, provided massage treatment to the Insureds. Mr. Corona also produced daily SOAP notes for the dates in question for each of the patients and some of these documents contained therapist initials, but unlike the records produced by Mr. Barthelemy, every form for each date of service for each patient contained a signature on the physician signature line. Mr. Corona stated that he and Mr. Garcia signed for the physician’s signature on the SOAP notes for the respective dates that they treated the Insureds. Mr. Corona also stated that all acupuncture procedures were performed by Virginia Pham.

Based on the issues with the records, on August 30, 2010, Geico amended its affirmative defenses and included as Affirmative Defense No. 11 stating:

Plaintiff failed to comply with all requirements of Florida Statute Section 400.9935 regarding proper maintenance of records and requirements of the medical director, Virginia Pham at issue in this case. Failure to comply with the statutory requirements of the medical director, including maintenance of employment records constitutes a violation of Florida law and administrative code and as a result the treatment rendered was not lawful and compensable.

Thereafter, Geico moved for final summary judgment arguing that the treatment was not lawful at the time it was rendered because United Health & Rehab violated statutes and administrative regulations by failing to maintain records showing that the medical director had a written agreement with it. In response to Geico’s Motion, United Health & Rehab argued that Geico failed to meet its burden of proof and that the failure to maintain employment records did not render the treatment unlawful. In addition, United Health & Rehab argued that Geico’s position was, in essence, an attempt to enforce the administrative

regulations, but that such enforcement lay properly with the Agency for Health Care Administration (“AHCA”); thus, there was no private cause of action for Geico to enforce such rules. Upon hearing on February 18, 2011, the Trial Court concurred with United Health & Rehab’s arguments and denied Geico’s Motion for Final Summary Judgment.

Subsequently, Geico on March 4, 2011, served a third request for admissions on United Health & Rehab pertaining to the lack of documents and the log of systematic reviews of billings that it claimed should be maintained in order to comply with various statutes and administrative regulations. United Health & Rehab responded that it had none of those documents or the log. Geico ultimately filed an Amended Second Motion for Final Summary Judgment pointing out that: 1) An acupuncture physician was not on the list of professionals who is permitted to be a medical director for clinics regulated by the Health Care Clinic Act (“HCCA”) and 2) The administrative regulations require clinics to maintain specific documents in order to assist with AHCA surveys including the clinic director agreement, logs or notes demonstrating the day to day oversight of health care clinic activities by the medical or clinic director, and a description of the means by which the clinic conducts a systematic review of billings to ensure that the billings are not fraudulent.

On August 18, 2011, a hearing was held to address Geico’s Amended Second Motion for Final Summary Judgment where Geico argued that the treatment provided by United Health & Rehab was not lawful at the time it was rendered because United Health & Rehab violated the statutes and administrative regulations by failing to maintain records showing that the medical director had a written agreement with it. United Health & Rehab presented its argument in opposition to the Motion and the parties stipulated to certain facts including: 1) The benefits were properly assigned to United Health & Rehab and it had standing to bring

the lawsuit; 2) United Health & Rehab provided medically reasonable, related and necessary medical treatment to the Insureds for personal injuries sustained in the accident of September 22, 2007; 3) United Health & Rehab complied with all conditions precedent to filing suit; and 4) At the time of treatment to the Insureds, United Health & Rehab was a health care clinic duly licensed under and required to comply with the provisions of chapter 400, Florida Statutes.

Upon conclusion of the hearing, the Trial Court denied Geico's Motion and granted summary judgment in favor of United Health & Rehab and also certified a question to the Fifth District Court of Appeal that declined to exercise its discretionary jurisdiction and transferred the case to this Circuit's appellate division. Accordingly, the certified question will be discussed further below.

Arguments on Appeal

Geico argues on appeal: 1) The Trial Court erred by failing to apply the plain, unambiguous language of the Health Care Clinic Act and the PIP statute and 2) The Trial Court erred in concluding that the Legislature did not intend to protect insurers and others from paying for treatment that was provided by clinics acting in violation of the Health Care Clinic Act.

Conversely, United Health & Rehab argues: 1) The Trial Court correctly entered summary judgment in its favor by finding that alleged violations of regulatory statutes and a regulatory administrative code cannot provide a defense to relieve an insurer of its obligation to pay PIP benefits. United Health & Rehab also filed a motion for appellate attorney's fees pursuant to section 627.428(1), Florida Statutes.

Standard of Review

The standard of review for summary judgment is de novo. *Krol v. City of Orlando*, 778 So. 2d 490, 491 (Fla. 5th DCA 2001); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Accordingly, the Court on appeal must determine if there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Krol* at 491-92, citing Fla. R. Civ. P. 1.510(c).

From review of the record in this case, there are no genuine issues of material fact and many of the facts were stipulated to by the parties. Accordingly, this Court's review is whether United Health & Rehab was entitled to summary judgment as a matter of law. Also, in cases involving the application of a statute, which is a pure question of law, the standard of review is de novo. *In re Guardianship of J.D.S. v. Dep't of Children & Families*, 864 So. 2d 534, 537 (Fla. 5th DCA 2004).

Discussion

Among the facts stipulated to by the parties was that at the time of treatment to the Insureds, United Health & Rehab was a health care clinic duly licensed under and required to comply with the provisions of Florida Statutes, Chapter 400. Specifically, section 400.9935(1)(a)-(g), Florida Statutes (2007), under the Health Care Clinic Act, addresses the requirements for clinics. Among the requirements, is that the clinic appoint a medical director who agrees in writing to accept legal responsibility for certain activities of the clinic.

Also, the other applicable statutes and administrative rules that are involved in this appeal include: Section 400.9935(3), Florida Statutes (2007), stating that all charges or reimbursement claims made by or on behalf of a clinic that is required to be licensed under this part, but that is not so licensed, or that is otherwise operating in violation of this part, are

unlawful charges, and therefore are noncompensable and unenforceable; Section 627.736(5)(b)1.b., Florida Statutes (2007), stating 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; Section 627.732(11), Florida Statutes (2007), defining “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; and Florida Administrative Code Rules 59A-33.008 and 59A-33.012 addressing the required procedures for medical directors and the survey process for inspections and reviews of health care clinics to comply with the statutory requirements.

The evidence in this case as revealed through discovery shows that United Health & Rehab was not in compliance with the statutory requirements. Specifically, Joseph Barthelemu testified in his affidavit and deposition that United Health & Rehab did not possess any documents regarding Dr. Pham’s employment history. Also, in response to Geico’s Third Request for Admissions, United Health & Rehab admitted the following:

- 1) It did not possess any documents that established that it employed Virginia Pham as its medical director.
- 2) All medical services at issue in the Compliant were authorized by and ordered by Virginia Pham.
- 3) It did not possess copy of the medical or clinic director’s written agreement with the health care clinic assuming the responsibilities for the statutory activities in section 400.9935(1)(a)-(g), Florida Statutes.
- 4) It did not possess any documents that described the means by which it or Virginia Pham conducted the systematic review of billings to ensure that the billings were not fraudulent or unlawful in 2007.
- 5) It did not keep a log of systematic reviews of its billings for 2007 to the present.

6) It did not possess any documents that established that Virginia Pham complied with her obligations as the medical director under section 400.9935(1)(a)-(g), Florida Statutes for 2007.

7) It did not have any record of payment, including pay stubs or other payment records to establish that it paid Virginia Pham to serve as its medical director for 2007.

In its ruling, the Trial Court discussed in detail the findings of fact, including United Health & Rehab's failure to produce documents in compliance with the requirements under section 400.9935(1)(a)-(g), Florida Statutes and Florida Administrative Code 59A-33.012. However, notwithstanding the facts and evidence of United Health & Rehab's non-compliance with the applicable statutes and administrative rules, the Trial Court ruled against Geico in favor of United Health & Rehab finding as follows:

The legislative findings found in Florida Statutes 400.990 state that the purpose of the Health Care Clinic Act is to "provide for the licensure, establishment, and enforcement of basic standards for health care clinics and to provide administrative oversight by the Agency for Health Care Administration."

At all times relevant hereto United Health & Rehab was a licensed facility subject to rules and regulations under Florida Law.

The statutory provisions and administrative codes relied on by Geico for its assertion that United Health & Rehab violated F.S. Chapter 400 are clearly intended by the legislature to be regulatory in nature and are for the purpose of securing the welfare and safety of the public.

There is no evidence in the language of F.S. Chapter 400 that a private right of enforcement was contemplated by the legislature in enacting the Statute. In fact, the express language of the statute places enforcement of the provisions of F.S. Chapter 400 squarely in the hands of the Agency for Health Care Administration.

In support of the ruling, the Trial Court cited *Raymond Ali v. Gloria M. McCarthy*, 17 Fla. L. Weekly Supp. 661a (Fla. 18th Cir. Ct. 2010) (holding that if a facility and its treating physicians are properly licensed by Florida or governing regulatory boards, then the inquiry

ends there). Also cited was the Trial Court's prior ruling in *Tampa Chiropractic Center a/a/o Paurice, Marie v. Allstate Indemnity Company*, 18 Fla. L. Weekly Supp. 84a (Fla. Orange Cty. Ct. 2010) (holding that here is no private right of enforcement by insurance carriers under section §400.900[sic]). Lastly, cited by the Trial Court was *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla.1994) (addressing the legislative intent of chapter 489, Florida Statutes governing construction contracting and ruling that there was no private cause of action under it against the corporation's qualifying agent acting as a general contractor).

This Court finds that the cases cited by the Trial Court that were also cited by United Health & Rehab are distinguishable and not controlling in the instant case. *Raymond Ali v. Gloria M. McCarthy* involved issues pertaining to discovery as to CPT coding decisions. *Tampa Chiropractic Center a/a/o Paurice, Marie v. Allstate Indemnity Company* centered on discovery issues pertaining to depositions of nonparties who previously owned the provider business. *Murthy v. N. Sinha Corp* involved counterclaims and a third-party complaint against the corporation's president, sole stockholder, and qualifying agent for negligent construction of home improvements and additions basing the individual liability on regulatory violations governing qualifying agents. Unlike in *Murthy*, Geico in the instant case did not bring a claim against United Health & Rehab. Thus, there was no private cause of action being sought by Geico based on United Health & Rehab's alleged regulatory violations. Instead the alleged violations were presented as an affirmative defense to Geico's failure to pay the no-fault benefits.

From review of the cases presented by the Trial Court and from both parties as well as from this Court's own research, this Court did not find any controlling cases that were directly

on point addressing this issue. It appears that the Trial Court also recognized this dilemma by certifying to the Fifth District Court of Appeal the question as follows:

Whether a healthcare provider which is duly licensed by Florida Agency for Health Care Administration and renders otherwise medically reasonable, related and necessary medical treatment is subject to inquiry by, and denial of, payments by an insurer based on the provider's failure to comply with the requirements of s 400.9935(1)(A)-(G) as well as Florida Administrative Code 59A-33.012?

As the Fifth District declined review of this question, this Court has reviewed this question as it applies in the instant case and finds that Geico's arguments have merit from the plain meaning of the applicable statutes, specifically sections 400.9935(3), 627.736(5)(b)1.b., 627.732(11), Florida Statutes (2007). Further, while there are no cases directly on point with this issue, this Court finds that the cases presented by Geico and from this Court's own research are more persuasive than those cases cited by the Trial Court and by United Health & Rehab.

The case, *Active Spine Centers, LLC v. State Farm Fire and Casualty Co.*, 911 So. 2d 241 (Fla. 3d DCA 2005), involved a statute similar to section 400.9935(3), Florida Statutes, thus, presenting a similar analysis to apply in the present case. In *Active Spine*, the clinic was initially exempt from statutory clinic registration because it was owned by a licensed chiropractor. However, the clinic lost its exemption when the chiropractor died. The insurer, State Farm, brought a declaratory judgment action against Active Spine asserting that treatment rendered during the time the clinic was not properly licensed was noncompensable. The Court in rendering its ruling applied 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”. The Court applied the plain meaning of the statute and affirmed the trial court’s order granting summary judgment in favor of State Farm and denying Active Spine’s motion for summary judgment and concluding that the treatment rendered after the death of the owner and before the clinic complied with the registration requirement was not lawfully rendered, and thus not compensable. *See State Farm Fire & Casualty Co. v. Silver Star Health and Rehab, Inc.*, 2011 WL 6338496 (M.D. Fla. 2011) (applying *Active Spine*); *Allstate Insurance Co. v. Schleub & Global Physical Therapy Center, P.A.*, 19 Fla. L. Weekly Supp. 561b (Fla. 9th Cir. Ct. 2011) (applying sections 400.9935(3), 627.732(11), and 627.736(5)(b)(1), Florida Statutes, and finding that provider’s services were not lawfully rendered and not compensable); *State Farm Mutual Automobile Insurance Co. & State Farm Fire & Casualty Co. v. Advantage Medical Diagnostic, Inc. & Hirt, M.D.*, 15 Fla. L. Weekly Supp. 1094a (Fla. 13th Cir. Ct. 2007) (involving a similar fact scenario to instant case pertaining to the medical director and also applying *Active Spine*).

Accordingly, based on the foregoing, this Court finds that the Trial Court erred by failing to apply the plain, unambiguous language of the Health Care Clinic Act and the PIP statute when rendering its ruling. Further, from review of the evidence in this case, United Health & Rehab failed to comply or substantially comply with the requirements under section 400.9935, Florida Statutes, thus, supporting Geico’s defense and argument that as a result of United Health & Rehab’s failure to comply, the treatment rendered in this case was not lawful and compensable. Therefore, the Trial Court’s order denying Geico’s Amended Second Motion for Final Summary Judgment and granting final judgment in favor of United Health & Rehab must be reversed.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Trial Court's Final Summary Judgment entitled "Plaintiff's Proposed Final Judgment and Certification of Question of Great Importance" entered on October 4, 2011 is **REVERSED** and this cause is **REMANDED** for further proceedings consistent with this opinion.

2. Appellee's Motion for Appellate Attorney's Fees filed January 11, 2012 is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 18th day of June, 2013.

/S/

GAIL A. ADAMS
Circuit Judge

/S/

JOHN MARSHALL KEST
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 to: **Dorothy v. DiFiore, Esquire**, Haas, Lewis, Difiore, P.A., Post Office Box 23567, Tampa, Florida 33623, Ellison@haaslewis.com and **Marlene S. Reiss, Esquire, P.A.**, Two Datan Center, Suite 1612, 9130 South Dadeland Boulevard, Miami, Florida 33156, marlenereisspa@gmail.com on the 18th day of June, 2013.

/S/

Judicial Assistant