[J-123-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WAYNE M. CHIURAZZI LAW INC. D/B/A CHIURAZZI & MENGINE, LLC AND DAVID A. NEELY,	:	No. 1 WAP 2012
	:	Appeal from the Order of the Superior Court entered August 11, 2011 at No. 1283 WDA 2010 reversing the Order of the Court of Common Pleas of Allegheny County entered June 17, 2010 at No. GD 09-012911 and remanding.
Appellants	:	
v.	:	
	:	27 A.3d 1272 (Pa. Super. 2011)
MRO CORPORATION,	:	
Appellee	:	ARGUED: October 16, 2012

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: JUNE 16, 2014**

I join Part III(B) of the majority opinion, holding that the Superior Court exceeded the scope of the interlocutory appeal and remanding for the trial court to address the defenses raised by MRO. I also agree with other portions of the majority's decision, including its determinations that: Liss & Marion, P.C. v. Recordex Acquisition Corp., 603 Pa. 198, 983 A.2d 652 (2009), is not dispositive of this case; the version of the Medical Records Act under review (the "MRA") capped expenses, rather than providing a uniform statutory rate; and, the manner of request, whether by subpoena or otherwise, did not alter the pricing scheme. However, I respectfully dissent relative to the majority's interpretation and application of the "estimated actual and reasonable

expenses" language of former Section 6152(a)(1) of the MRA. 42 Pa.C.S. §6152(a)(1) (superseded).[1]

Initially, I am not convinced that the statutory language was unambiguous, since the parties offer reasonable and plausible alternative interpretations. See Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd., 601 Pa. 449, 463, 974 A.2d 1144, 1153 (2009) ("[W]e find that each party's interpretation of the statutory language is plausible and, therefore, the statute is ambiguous."). The majority clarifies some of the ambiguity by adopting the trial court's view that "actual expenses means expenses existing in fact, and reasonable expenses means that the costs are not padded." Majority Opinion, slip op. at 33 (quoting Wayne M. Chiurazzi Law Inc. v. MRO Corp., No. GD 09-012911, slip op. at 6 (C.P. Allegheny, June 17, 2010)) (emphasis in original). Nevertheless, as I see it, the statute as a whole did not easily lend itself to a plain language interpretation.

Additionally, I disagree with the majority's conclusion that third-party reproducers were limited to charging only their actual costs of reproduction. The majority states that "the language of Section 6152(a)(1) speaks to a records reproducer providing 'the estimated actual and reasonable expenses of reproducing the charts or records' requested." Majority Opinion, slip op. at 31 (quoting 42 Pa.C.S. §6152(a)(1) (superseded)) (emphasis added). However, the limiting language of Section 6152(a)(1) did not broadly reference records reproducers; instead, it specified that the "health care provider[] or facility[]" shall notify the requester of the "estimated actual and reasonable expenses" of reproduction. 42 Pa.C.S. §6152(a)(1) (superseded). In fact, the term

[1] As noted by the majority, see Majority Opinion, slip op. at 3 & n.2, the operative language of Section 6152(a)(1) was deleted by the General Assembly, effective September 4, 2012. See Act of July 5, 2012, P.L. 1138, No. 139, §1 (as amended, 42 Pa.C.S. §6152(a)(1)).

"designated agent" (i.e., a third-party reproducer such as MRO) did not appear in Section 6152(a)(1), but rather, only in the first sentence of Section 6152(a)(2)(i), which merely entitled the health care entity or agent to receive payment of "such expenses" prior to reproduction. 42 Pa.C.S. §6152(a)(2)(i) (superseded) ("[T]he health care provider or facility or a designated agent shall be entitled to receive payment of such expenses before producing the charts or records." (emphasis added)). Although the majority determines, correctly in my view, that the phrase "such expenses" referenced the "expenses" of the prior section, that did not alter the statute's discrete limitation on the expenses of the health care entity.[2] Thus, reading these provisions together demonstrates that the health care facility was to notify the requester of the reasonable expenses that it incurred to have the records reproduced, whether the copies were made by the provider itself or a third party, subject to the statutory cap.

To further elaborate, given the MRA's focus on the health care entity's expenses, I favor reading this ambiguous statute as previously having imposed on a health care provider or facility a duty to charge a requester only its actual and reasonable expenses of reproducing the charts or records, subject to the statutory cap. Thus, if the facility or provider made the copies itself, it was limited to charging only the actual costs of reproduction, without profit or padding. On the other hand, if the reproduction was outsourced to a designated agent, it was the reproducer's charged rate, including its profit margin, which equated to the health care entity's expense for reproduction. However, the designated agent scenario was not without limitations, since the health care entity was still burdened with the responsibility to seek a reasonable charge when

[2] Section 6152(c) of the MRA also supported this emphasis on the health care entities' expenses, since it mandated that the health care provider or facility deliver the requested reproductions within thirty days of the "payment of its expenses." 42 Pa.C.S. §6152(c) (emphasis added).

outsourcing the copying. The determination of whether a health care provider or facility has met this burden will necessarily entail a factual inquiry, which may include, inter alia, an examination of the relationship between the reproducer and the health care entities it serves, the designated agent's profitability, and the impact that the use of computers, electronic records, and the Internet has on the costs of obtaining and copying records. In this regard, considering the statutory text, its context, and history, I perceive no legislative intent to preclude a third-party reproducer from making a profit. See, e.g., Pa. House Legislative Journal, Jan. 20, 1998, at 25 (remarks of Hon. Lita Cohen) ("This agreed-to language . . . will lower the cost of litigation while adequately protecting the revenue base for the copying companies.").[3]

In sum, I do not believe that the MRA limited third-party records reproducers to recovery of only their actual costs of reproduction. Thus, I would reverse the Superior Court and remand for the trial court's examination as to the reasonableness of the expenses incurred by the health care providers and facilities.[4]

Mr. Justice McCaffery joins this concurring and dissenting opinion.

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[3] In this regard, I differ with the majority's position that whether a third party's profit margin may be encompassed within "actual and reasonable expenses" is a "factual matter" that is "available for consideration upon remand." Majority Opinion, slip op. at 34 & n.10. To the contrary, I view this as a question of statutory construction that should be answered based on the above analysis.

[4] This assumes, of course, that the other issues discussed in Part III(B) of the majority opinion do not require dismissal of the complaint in the first instance. See Majority Opinion, slip op. at 34-36.