

Third District Court of Appeal

State of Florida

Opinion filed March 4, 2020.

Not final until disposition of timely filed motion for rehearing.

No. 3D19-0642
Lower Tribunal No. 16-0151

State Farm Mutual Automobile Insurance Company,
Petitioner,

vs.

**CEDA Health of Hialeah, LLC,
a/a/o Henry Diaz,
Respondent.**

On Petition for Writ of Certiorari from the Circuit Court for Miami-Dade County, Appellate Division, Valerie R. Manno Schurr, Spencer Eig and Jennifer Bailey, Judges.

Birnbaum, Lippman & Gregoire, PLLC, and Nancy W. Gregoire (Ft. Lauderdale); Perez & Rodriguez, P.A., and Luis N. Perez, for petitioner.

Feiler & Leach, P.L., and Martin E. Leach, for respondent.

Before SCALES, LINDSEY, and GORDO, JJ.

LINDSEY, J.

Petitioner State Farm Mutual Automobile Insurance Company seeks second-tier certiorari review of a circuit court appellate decision affirming final summary judgment in favor of Respondent CEDA Health of Hialeah, LLC in the underlying county court action for personal injury protection (“PIP”) benefits. In addition, State Farm seeks review of an order denying its motion to disqualify a judge on the circuit court appellate panel.¹ Because the standards for certiorari review are not met, we deny the petition.

I. Background

After a State Farm insured driver was involved in an automobile accident, CEDA provided chiropractic treatment and sought reimbursement from State Farm. State Farm calculated the reasonableness of the charges based on the Medicare Part B Fee Schedule and paid CEDA less than the total amount it was seeking. CEDA then filed the underlying action in county court for the full amount of its charges.

¹ Although we ordinarily review circuit court appellate decisions under second-tier certiorari, the order denying State Farm’s motion to disqualify was originally decided in the circuit court and is therefore not before us on second-tier review. Cf. Certified Windshield, LLC v. GEICO Gen. Ins. Co., 264 So. 3d 217, 217-18 (Fla. 2d DCA 2018) (“Here, however, we are not reviewing the circuit court’s disposition of an appeal from an order of the county court. . . . [O]ur review of the circuit court’s order . . . is by means other than second-tier certiorari.”). The traditional remedy for *interlocutory* review of an order denying a motion to disqualify would be by way of a petition for writ of prohibition, Sutton v. State, 975 So. 2d 1073 (Fla. 2008), but here, we review the order under our first-tier certiorari jurisdiction because it is being reviewed with the circuit court’s merits decision. See Wal-Mart Stores, Inc. v. Carter, 768 So. 2d 21 (Fla. 1st DCA 2000); Smith v. Santa Rosa Island Auth., 729 So. 2d 944 (Fla. 1st DCA 1998).

CEDA ultimately moved for final summary judgment arguing that State Farm had improperly calculated the reimbursement amount, that CEDA's charges were reasonable, and that State Farm had no evidence to the contrary. In support of its motion, CEDA filed an affidavit of the supervising chiropractor at the time of treatment, which stated the charges were reasonable. State Farm responded with an affidavit from a different chiropractor opining that the charges were excessive.

Following a hearing on the motion, the county court entered an order partially granting CEDA's motion for final summary judgment. In its order, the court determined that CEDA satisfied its burden of setting forth a *prima facie* case regarding reasonableness and that State Farm's affidavit was inadmissible pursuant to section 90.702, Florida Statues (2013), and the Daubert standard governing the admissibility of expert testimony.

State Farm appealed to the Eleventh Judicial Circuit. Upon learning the composition of the appellate panel, State Farm moved to disqualify one of the judges whose spouse is a PIP law attorney.² The circuit court judge denied State Farm's motion as "legally insufficient," and the case proceeded to oral argument. Following full briefing and oral argument, the circuit court appellate panel issued a written per curiam opinion affirming the county court. State Farm now seeks certiorari review.

II. Analysis

² All parties agree that the spouse is not involved in this case.

Our analysis is limited “by the narrow scope of second-tier certiorari review of a circuit court acting in its appellate capacity.” State Farm Mut. Auto. Ins. Co. v. CC Chiropractic, LLC, 245 So. 3d 755, 758 (Fla. 4th DCA 2018). “[W]hen a district court considers a petition for second-tier certiorari review, the ‘inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law,’ or, as otherwise stated, departed from the essential requirements of law.” Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1092 (Fla. 2010) (quoting Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995)). Importantly, “certiorari cannot be used to grant a second appeal to correct the existence of mere legal error.” Id. at 1093.

State Farm argues that the circuit court departed from the essential requirements of law by applying an incorrect standard of review in affirming the trial court’s rejection of State Farm’s affidavit. Based on the record before us, we are unable to conclude that the circuit court departed from the essential requirements of the law. In its opinion, the circuit court identified the correct law: “The standard of review of an order granting summary judgment is de novo, while the standard of review regarding a trial court’s admission or exclusion of expert testimony is for abuse of discretion.” Even if we agreed with State Farm that the circuit court erroneously applied the standard of review, this amounts to mere legal error—

applying the correct law incorrectly as opposed to applying the incorrect law.³ See CC Chiropractic, 245 So. 3d at 759.

With respect to State Farm’s challenge to the denial of its motion to disqualify a judge on the circuit court appellate panel, we apply the standard applicable for first-tier certiorari, which requires a petitioner to demonstrate “(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a ‘depart[ure] from the essential requirements of the law.’” Nader v. Fla. Dept. of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012) (alteration in original) (quoting Belair v. Drew, 770 So. 2d 1164, 1166 (Fla. 2000)).⁴

Based on this standard, we conclude that there was no departure from the essential requirements of law because the standard governing disqualification of an appellate judge is more personal and discretionary than the strict rules applicable to trial judges. See In re Estate of Carlton, 378 So. 2d 1212, 1216 (Fla. 1979). In the appellate context, each judge personally decides both the legal sufficiency of a

³ As the Fourth District did in CC Chiropractic, we also caution that “[a] denial of discretionary second-tier certiorari review should not be construed to mean that we approve of the underlying decisions.” 245 So. 3d at 757 n.2.

⁴ Our first-tier certiorari standard is not as narrow as second-tier certiorari because “[a]s a case travels up the judicial ladder, review should consistently become narrower, not broader.” Heggs, 658 So. 2d 523, 530 (Fla. 1995).

request for disqualification and the propriety of withdrawing. *Id.* This discretionary standard also applies to circuit court judges sitting in an appellate capacity. Clarendon Nat. Ins. Co. v. Shogreen, 990 So. 2d 1231, 1233 (Fla. 3d DCA 2008) (“[F]or the purposes of a motion to disqualify a member of a three-judge appellate panel of the circuit court, reviewing a judicial decision of the county court, the applicable standard is that which is applied to a justice of the Florida Supreme Court and a judge of a district court of appeal.”). Because the standard for disqualification is largely discretionary and personal in the appellate context, we are unable to conclude that the circuit court judge departed from the essential requirements of law in denying State Farm’s motion to disqualify.

III. Conclusion

Given the narrow scope of our review in this case, we deny State Farm’s petition for certiorari review of the circuit court’s affirmance of final summary judgment and the denial of State Farm’s motion to disqualify.

Petition denied.