2020 WL 215819

District Court of Appeal of Florida, Second District.

Patricia WEBBER, individually and on behalf of all those similarly situated, Appellant,
v.
BACTES IMAGING SOLUTIONS, INC., n/k/a Sharecare Health Data Services, LLC, Appellee.

Case No. 2D18-2964
|
2D18-4813
|
Opinion filed January 15, 2020

Synopsis

Background: Patient, individually and on behalf of similarly situated patients, brought class action against medical records company, alleging that company's practice of charging "other entities" rate when patient's attorney requested medical records on behalf of patient violated Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The Circuit Court, 13th Judicial Circuit, Hillsborough County, Martha J. Cook, J., denied patient's motion for permanent injunction and granted company's motion for summary judgment. Patient appealed.

The District Court of Appeal, Morris, J., held that company's practice was unfair act or practice under FDUTPA.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Permanent Injunction; Motion for Summary Judgment.

Appeals pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Martha J. Cook, Judge.

Attorneys and Law Firms

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Opinion

MORRIS, Judge.

***1** In these consolidated class action appeals, Patricia Webber, individually and on behalf of others similarly situated, appeals the order denying her motion for permanent injunction and granting final partial summary judgment in favor of Bactes Imaging Solutions, Inc.[1] Webber filed an amended complaint below seeking declaratory relief, an injunction, and damages based on a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), as well as damages for unjust enrichment. The basis for Webber's complaint was that Bactes routinely overcharges for copies of a patient's medical records when the records request is made by the patient's legal representative rather than by the patient directly. The trial court denied Webber's motion for a permanent injunction and granted Bactes's motion for summary judgment as to the FDUTPA claim, concluding that no FDUTPA violation occurred. In this appeal,[2] Webber challenges that finding, and the Florida Justice Association has appeared amicus curiae, filing a brief in support of Webber's arguments. Because we conclude that Bactes's conduct constitutes a violation of FDUTPA, we reverse.

I. BACKGROUND

The undisputed facts reflect that when Bactes received Webber's request and those of the class members for copies of their own medical records (via the requesting parties' lawyers), Bactes charged $1.00 for each page after the first twenty-five pages, which is four times the

maximum charge set forth in Florida Administrative Code Rule 64B8-10.003(2) for patients who request such records. Bactes asserted that it was authorized to charge the $1.00 rate instead of the twenty-five-cent rate charged to patients because the requests were being made by lawyers on behalf of the patients and, therefore, the requests were being made by "other entities" for which the $1.00 rate is permissible under rule 64B8-10.003(3).

While this case was pending, a case with nearly identical facts but a different medical records company was being decided in the same judicial circuit. See Allen v. HealthPort Techs., LLC, 21 Fla. L. Weekly Supp. 908a (Fla. 13th Jud. Cir. May 1, 2014); Allen v. HealthPort Techs., LLC, 22 Fla. L. Weekly Supp. 577b(Fla. 13th Jud. Cir. Nov. 13, 2014). In that case, the medical records company, HealthPort Technologies, defended its overcharges arguing that under rule 64B8-10.003, it was entitled to charge the higher rate for "other entities," rather than the rate for patients, when the request was being made by a lawyer asking on behalf of his or her client (i.e., the patient). The trial court granted partial final summary judgment in favor of the patient, concluding that under rule 64B8-10.003(2), the patient rate must be applied "irrespective of whether the patient's request for copies was delivered, initiated, or made by the patient's legal representative, as defined by Florida Administrative Code Rule 64B8-10.004, and irrespective of whether the request for copies be delivered to the patient's legal representative." Allen, 21 Fla. L. Weekly Supp. 908a. Subsequently, the trial court entered a declaratory judgment based on the violation of rule 64B8-10.003(2) and a permanent injunction based on common law. Allen, 22 Fla. L. Weekly Supp. 577b. Notably, although the plaintiff in Allen asserted claims pursuant to FDUTPA, those claims were severed from the declaratory judgment and injunction claims, and thus the trial court did not analyze them.

***2** After the partial final summary judgment was granted in Allen, but prior to the declaratory judgment and injunction being entered in that case, Webber filed a motion for partial summary judgment in this case. In it, she argued that she was entitled to summary judgment on her claim for a declaratory judgment because, pursuant to rule 64B8-10.003(2), Bactes was not authorized to charge $1.00 for every page when the request for copies of medical records is being made by a patient's legal representative, rather than by the patient his or herself. In a nonfinal April 2015 order, the trial court in this case agreed with Webber's argument and granted Webber's motion for partial summary judgment on the declaratory relief claim. In doing so, the trial court in this case expressly relied on the order granting summary judgment in Allen. In spite of the April 2015 order, Bactes continued to charge $1.00 per page for copies of medical records regardless of the number of the pages when the request was submitted by a patient's lawyer. Bactes continues to refuse delivery of the copies until all charges are paid in full.

The question of whether a violation of rule 64B8-10.003(2) also violates FDUTPA was not decided in Allen.[3] Thus after obtaining the partial final summary judgment on her claim for declaratory relief, Webber filed a motion for permanent injunction, arguing that the rule violation constituted a FDUTPA violation. Thereafter, Bactes filed a motion for partial final summary judgment on the FDUTPA claim.

At the hearing on the motions, Bactes agreed to "assume that there is a violation" of rule 64B8-10.003. But Bactes argued that as a question of law, such a violation did not violate FDUTPA. Noting that the injunction entered in Allen was based on common law, whereas in this case, the amended complaint did not contain a request for a common law injunction, the trial court in this case refused to base its decision on what transpired in Allen. Rather, the trial court correctly noted that the FDUTPA issue had not yet been decided. After analyzing the language and the purpose of rule 64B8-10.003, the trial court ultimately concluded that a violation of the rule did not constitute an unfair method of competition or an unfair, deceptive, or unconscionable act or practice that violated FDUTPA. Accordingly, it denied Webber's motion for permanent injunction and entered partial final summary judgment on the FDUTPA claim in favor of Bactes.

II. ANALYSIS

Below, Bactes acknowledged that it continues to charge the "other entities" rate when a lawyer submits the request for copies of medical records on behalf of his or her client, the patient, and as previously noted, Bactes agreed on the facts to assume that it was violating rule 64B8-10.003. As reflected in the trial court's order under review, the issue that was decided then was not whether Bactes's conduct was a violation of the rule but, rather, whether such a violation constituted a FDUTPA violation such that Webber and those similarly situated would be entitled to a permanent injunction. Accordingly, we confine our analysis to the question of whether it is a violation of FDUTPA for a practitioner or its agent to continue to charge the "other entities" rate where a lawyer

submits a request for copies of medical records on behalf of his or her client, a patient, especially where the practitioner or its agent has been put on notice by a ruling from the trial court that its use of the "other entities" rate violates rule 64B8-10.003(2).

Rule 64B8-10.003 expressly recognizes "that patient access to medical records is important and necessary to assure continuity of patient care" while also expressly recognizing "that the cost of reproducing voluminous medical records may be financially burdensome to some practitioners." To balance the competing interests, the rule allows for the costs of reproduction of medical records to be reimbursed to medical practitioners but it also sets limits depending on who makes the request for the records. For instance, "patients and governmental entities" may not be charged more than $1.00 for the first twenty-five pages and then no more than twenty-five cents for every page thereafter. Fla. Admin. Code R. 64B8-10.003(2). However, for "other entities," a practitioner cannot charge more than $1.00 per page regardless of the number of pages. Fla. Admin. Code R. 64B8-10.003(3).

***3** FDUTPA is contained in chapter 501 of the Florida Statutes. One of the purposes of FDUTPA is "[t]o protect the consuming public ... from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." § 501.202(2), Fla. Stat. (2017); see also Am. Online, Inc. v. Pasieka, 870 So. 2d 170, 172 (Fla. 1st DCA 2004) (recognizing that purpose of FDUTPA is "to afford a broader protection to the citizens of Florida"). FDUTPA must be construed liberally to promote that policy. § 501.202.

FDUTPA provides a private cause of action to any aggrieved party, and it provides three different types of remedies: (1) declaratory relief; (2) injunctive relief; and (3) damages. § 501.211(1)-(2); see also Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. 2d DCA 2006). Under section 501.203(3)(c), a violation of "[a]ny law, statute, rule, regulation, or ordinance which proscribes ... unfair, deceptive, or unconscionable acts or practices" is a per se violation of FDUTPA. But even where a rule or regulation does not explicitly proscribe unfair, deceptive, or unconscionable acts or practices, a party can still violate FDUTPA by engaging in "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1).

"An unfair practice is 'one that "offends established public policy" and one that is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." ' " Rollins, 951 So. 2d at 869 (quoting Samuels v. King Motor Co. of Ft. Lauderdale, 782 So. 2d 489, 499 (Fla. 4th DCA 2001)); see also PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003). We conclude that Bactes's conduct in charging the "other entities" rate when a lawyer submits a request for copies of medical records on behalf of his or her client, the patient, is an unfair act or practice under section 501.204(1). The only way the patient—who is being represented by legal counsel—can obtain his or her records is to either pay the "other entities" rate merely because the medical records request was submitted by his or her lawyer or for the patient to submit a separate medical records request directly to the practitioner. But Bactes has already been instructed by the trial court that its policy of charging the "other entities" rate in such circumstances violates rule 64B8-10.003. And requiring a patient to jump over an additional hurdle to obtain his or her own medical records—where that patient has already signed a release indicating that the patient gives express permission for the records to be released to the lawyer—is a practice that we construe to be offensive to public policy.[4] We likewise conclude that it is "oppressive, unscrupulous or substantially injurious to consumers" where a party frustrates patient access to medical records by charging higher than permissible rates for copies despite already being instructed that it was not permitted to do so. See Fla. Admin. Code R. 64B8-10.003 (noting that patient access to medical records is important and necessary for purposes of continuity of care); Fla. Admin. Code R. 64B8-9.003(1) (describing purposes of maintaining medical records including but not limited to (1) serving as a basis for planning continuity of treatment, (2) furnishing documentary evidence of the course of evaluation and treatment, (3) documenting communication between practitioners, and (4) assisting "in protecting the legal interest of the patient"). This is especially so where, as in this case, the request is actually made by the patient herself, but merely submitted by the lawyer.[5]

***4** Because we have already determined that Bactes's conduct constitutes an unfair act or practice under FDUTPA, see § 501.204(1), it is unnecessary for us to decide whether that conduct is also deceptive.[6]

Similarly, it is unnecessary for us to resolve whether Bactes's conduct constitutes a "per se" violation of FDUTPA, that is, a violation of "[a]ny law, statute, rule, regulation, or ordinance which proscribes ... unfair, deceptive, or unconscionable acts or practices." § 501.203(3)(c). But we note that the definition of "proscribe" is "[t]o outlaw or prohibit; to forbid

officially." *Proscribe*, Black's Law Dictionary (11th ed. 2019). And our review of rule 64B8-10.003 along with cases involving FDUTPA claims in other contexts suggests that there are both arguments for and against concluding that rule 64B8-10.003 "proscribes" the charging of the "other entities" rate to lawyers who submit requests for medical records on behalf of their clients such that a violation of the rule results in a violation of FDUTPA pursuant to section 501.203(3)(c), despite the fact that the rule does not expressly reference "unfair or deceptive" acts.[7]

***5** The trial court erred in denying Webber's motion for permanent injunction and in granting partial final summary judgment in favor of Bactes on the FDUTPA claim because the act of charging the "other entities" rate when a lawyer submits a patient's request for copies of his or her medical records pursuant to rule 64B8-10.003(2) constitutes a violation of section 501.204(1). We therefore reverse the trial court's order and remand for proceedings in conformance herewith.

Reversed and remanded.

NORTHCUTT and SLEET, JJ., Concur.

All Citations

--- So.3d ----, 2020 WL 215819, 45 Fla. L. Weekly D125

Footnotes

1 Bactes is now known as Sharecare Health Data Services, LLC.

2 We have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B).

3 Allen was appealed to this court, and we issued a per curiam affirmance. See HealthPort Techs., LLC v. Allen, 207 So. 3d 229 (Fla. 2d DCA 2016). Webber alleges and Bactes has not disputed that the parties in Allen settled after this court's affirmance.

4 We note that under such circumstances, the records are still for the patient, not for an "other entity," i.e., the lawyer. The lawyer is acting on behalf of the patient; that is, the lawyer is acting as an agent for the patient. See Brugh v. Freas, 306 So. 2d 599, 600 (Fla. 2d DCA 1975) ("Generally, an attorney is an agent for his client."). We note too that the Florida Board of Medicine even contemplates that patients will have legal representatives. See Fla. Admin. Code R. 64B8-10.004 (defining "legal representative" in relevant part as "a patient's attorney who has been designated by the patient to receive copies of the patient's medical records"). Such facts are completely different from a scenario where a lawyer, on his own accord, seeks copies of a party's medical records such as where the lawyer represents a party opposing the patient and needs the records for litigation purposes.

5 Webber's release form stated that "I, Patricia Webber, hereby authorize the designated records custodian ... to disclose all protected health information for review and evaluation in connection with a legal claim. I expressly request that you disclose, make available, furnish with photocopies, and release to my attorney(s) at Jeeves Law Group." It also included a description of the requested documents. Webber signed the form. Thus, it was Webber, and not her lawyer, who actually made the request.

6 "A deceptive practice is one that is 'likely to mislead' consumers." Rollins, 951 So. 2d at 869 (quoting Davis v. Powertel, Inc., 776 So. 2d 971, 974 (Fla. 1st DCA 2000)). Here, Bactes was charging and continues to charge $1.00 per page regardless of the number of pages when a request for medical records is submitted through a patient's lawyer. Such a fee is permissible if the party seeking the records is properly classified as an "other entity," which is how Bactes was classifying lawyers submitting requests such as the one made in this case. This is different from a business charging a fee to a person that the business itself is not obligated to pay but for which it implies that it must pay and then pocketing the difference when the actual fee incurred by the business is far less. Cf. Latman v. Costa Cruise Lines, N.V., 758 So. 2d 699, 703 (Fla. 3d DCA 2000) (holding that where cruise line bills passengers for port charges but keeps part of the money for itself, that is a deceptive practice under FDUTPA because a reasonable consumer would interpret the term "port charges" to mean pass-through charges that the cruise line itself has to pay to the relevant port authorities and others); Cabrera v. Haims Motors, Inc., 288 F. Supp. 3d 1315, 1324-25 (S.D. Fla.

2017) (holding that where car dealer charged customers $250 for registration and titling fees, but where car dealer actually only paid the tag agency $82.35 for the titling and registration and then pocketed the difference, car dealer engaged in a deceptive or unfair practice under FDUTPA because "a reasonable consumer ... would likely think [the fees] were mandated by and forwarded to the state").

Admittedly, Bactes was put on notice via the nonfinal order granting Webber's motion for partial summary judgment on the declaratory judgment claim that under rule 64B8-10.003, it could not charge the "other entities" rate to lawyers who submit requests on behalf of their clients. Thus it is arguable that Bactes's continued course of conduct in charging that rate—even in the face of being told that it cannot do so—is deceptive because it is implying to consumers that that rate is, in fact, being properly applied in circumstances such as those presented in this case. Cf. Samuels v. Am. Legal Clinic, Inc., 176 B.R. 616, 625-26 (Bankr. M.D. Fla. 1994) (noting that section 501.204(2) expressly gives great weight to the interpretations of the Federal Trade Commission and the federal courts relating to a provision in the Federal Trade Commission Act (FTCA) and further explaining that the FTCA was made "for the general public, which has been defined as 'that vast multitude which includes the ignorant and unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions' " (quoting In re Fleet, 95 B.R. 319, 332 n.10 (E.D. Pa. 1989))).

[7] Compare Fla. Admin. Code R. 64B8-10.003 (recognizing importance and necessity of patient access to records for purposes of continuity of care and providing that the various fees "shall not" exceed the limits set forth for the two categories of parties requesting the records but containing no explicit reference to unfair or deceptive trade practices nor indicating that charges exceeding limits are unlawful), Hucke v. Kubra Data Transfer Ltd., No. 15-14232-CIV-ROSENBERG/LYNCH, 2015 WL 12085833 at *7-*8 (S.D. Fla. 2015) (concluding that violations of Money Transmitter Statute or Surcharge Statute did not "implicate consumer protection or ... target deceptive or unfair trade practices to the extent sufficient to allow them to be used as predicates to state per se FDUTPA violations," i.e., they were not "the equivalent of acts that are likely to deceive a consumer acting reasonably under the circumstances" even where a violation might cause a party "to pay a fee that otherwise is illegal"), Bruno v. Mona Lisa at Celebration, LLC (In re Mona Lisa at Celebration, LLC), 472 B.R. 582, 639 (Bankr. M.D. Fla. 2012) (rejecting argument that violations of the 1933 Securities Act and the Florida Condominium Act constitute per se violations of FDUTPA because they "do not proscribe unfair methods of competition and are not encompassed within the penumbra of consumer protection statutes covered by FDUTPA" and holding that while the statutes were designed to protect purchasers, "the protection they provide is totally unrelated to the scope of FDUTPA that is designed to protect purchasers from unfair competition or deceptive trade practices"), Edgewater by the Bay, LLLP v. Gaunchez, 419 B.R. 511, 515-18 (Bankr. S.D. Fla. 2009) (rejecting argument that violations of various construction industry statutes and county code provisions constitute per se violations of FDUTPA pursuant to section 501.203(3)(c) because they did not regulate unfair trade practice or competition nor were the alleged violations a "type of immoral or unscrupulous conduct" proscribed by FDUTPA), and Feheley v. LAI Games Sales, Inc., No. 08-23060-CIV, 2009 WL 2474061 at *3-*4 (S.D. Fla. 2009) (concluding that a violation of section 849.15, Florida Statutes (2008), a statute related to slot machines, "cannot serve as a predicate" for a per se FDUTPA violation because it "neither expressly nor impliedly regulates unfair or deceptive trade practices" and it had never been relied on to find such a per se violation), with State Farm Mut. Auto. Ins. Co. v. Performance Orthapaedics & Neurosurgery, LLC, 315 F. Supp. 3d 1291, 1306-08 (S.D. Fla. 2018) (concluding in relevant part that violations of the Florida Health Care Clinic Act and the Florida Anti-Rebate Statute could serve as statutory predicates for per se FDUTPA violations where the statutes proscribed the conduct that FDUTPA was designed to protect against even though they did not explicitly reference FDUTPA or use the terms "unfair or deceptive"), and Trotta v. Lighthouse Point Land Co., 551 F. Supp. 2d 1359, 1367 (S.D. Fla. 2008) (holding that violation of Interstate Land Sales Full Disclosure Act (ILSA) constitutes per se violation of FDUTPA where provisions of ILSA expressly prohibited certain acts even though the terms "unfair or deceptive trade practices" were not used), rev'd on other grounds, 319 F. App'x 803 (11th Cir. 2009).

