

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of Unity Health Care, Class F
Home License No. 352187 and Unity
Home Care, Inc., Class A Professional
Home Care License No. 353694

**AMENDED ORDER GRANTING IN
PART AND DENYING IN PART
DISCOVERY MOTIONS OF THE
PARTIES, DENYING DEPARTMENT'S
MOTION *IN LIMINE* AND DENYING
LICENSEE'S MOTION FOR SUMMARY
DISPOSITION**

The above-captioned matter came before Administrative Law Judge Perry Wilson (ALJ) on September 18, 2014 by telephone on the Department's motions to compel discovery, the Department's motion *in limine*, Licensee's motion to compel discovery, for *in camera* review and Licensee's motion for summary disposition.

Audrey Kaiser Manka, Assistant Attorney General, appeared on behalf of the Department of Health (Department). Lateesa T. Ward, Ward & Ward, appeared on behalf of Licensee, Unity Health Care (Unity).

The Department filed its motion to compel discovery and motion *in limine* and supporting memorandum on September 2, 2014. Unity filed its motion for summary disposition and motions to compel discovery on September 2, 2014. The parties filed their respective memoranda opposing these motions on September 16, 2014.

The ALJ orally ruled on the motions on September 22, 2014 because the hearing was to begin that day. The ALJ indicated that a written order would confirm the oral rulings and this is that order.

On December 12, 2014, the ALJ issued the original order on these motions that contained a typographical error in the accompanying memorandum. This amended order is issued to correct that error.

Based on all of the submissions of the parties and proceedings in this matter, and for the reasons set forth in the Memorandum below, the ALJ issues the following:

ORDER

IT IS HEREBY ORDERED:

1. The Department's Motion to compel discovery is **GRANTED IN PART**. Unity shall respond to the Department's Requests for Admissions without

objecting that the period for written discovery had passed when the pleading was served;

2. The Department's Motion *in Limine* is **DENIED**.
3. Unity's motion for *in camera* review of the documents listed on the Department's privilege log is **GRANTED**. The ALJ has performed an *in camera* review of the listed documents and determined that they were appropriately withheld by the Department.
4. Unity's motion to compel the Department to produce Patricia Nelson for an additional deposition of up to three hours is **GRANTED**. Unity's motion to compel the Department to produce documents related to enforcement actions it has taken against other entities under Minn. Stat. § 144A.46, subd. 3a (2014) is **DENIED**.
5. Unity's motion for summary disposition is **DENIED**.

Dated: December 16, 2014

s/Perry M. Wilson

PERRY M. WILSON
Administrative Law Judge

AMENDED MEMORANDUM

i. The Department's Motion to Compel

The Department bases its motion to compel discovery on Unity's objections to the Department's Requests for Admissions. Unity has objected that it need not respond to these requests because the period for written discovery ended over a year before the Requests were served. Unity is incorrect; there was no separate cutoff for written discovery. All discovery closed at the same time: August 22, 2014.¹ Therefore, the ALJ has ordered Unity to respond to the Department's Requests for Admission without objecting that written discovery ended before the document was served on it.

ii. The Department's Motion *in Limine*

The Department moves for an order *in limine*, precluding Unity from contradicting positions it took in its Answer and Counterclaim in a lawsuit between it and Pathways in Hennepin County District Court. The Department asserts that Unity is judicially estopped from asserting in this matter positions different from those it took in the Pathways lawsuit. According to the materials supplied by the Department, the Pathways lawsuit was settled without trial. Since there was a settlement, Unity did not benefit legally from any positions that might differ from those it has taken in this proceeding.

¹ See Amended Fifth Prehearing Order, dated May 27, 2014.

Therefore, the application of the doctrine of judicial estoppel is not proper here. The Department may ²use Unity's pleading in the Pathways case for impeachment, or other proper purpose, in this proceeding.

iii. Unity's Request for *in Camera* Review

Unity requests that the ALJ perform an *in camera* review of the documents listed on the Department's privilege log to determine whether the documents have been properly withheld as protected from disclosure by the attorney-client privilege and the work product doctrine. The ALJ granted Unity's request and performed an *in camera* review of the documents withheld. The ALJ has determined that the documents were properly withheld by the Department.

iv. Unity's Motion to Compel Nelson Deposition

Unity has moved to compel the Department to produce Patricia Nelson for an additional deposition of no more than three hours in length. Unity argues that it did not know that Ms. Nelson was the surveyor for the 2013 survey of Unity until shortly before the deposition occurred. Unity further argues that it had not yet received documents pertaining to the 2013 survey at the time of Ms. Nelson's deposition. The Department objects on the ground that Ms. Nelson has already been deposed for the full seven hours permitted by Rule 30.04(b) of the Minnesota Rules of Civil Procedure.

The ALJ addressed the circumstances under which an order for additional deposition time is appropriate in the order dated May 29, 2014. With regard to Ms. Nelson's deposition, the ALJ is persuaded that additional deposition time of up to three hours is needed for Unity to prepare to respond to the findings in the Department's 2013 survey of Unity. When Ms. Nelson was first deposed, Unity did not have the documents related to the survey and was therefore limited in its ability to complete meaningful discovery.

v. Unity's Motion to Compel Production of Enforcement Documents

Unity has moved to compel the Department to produce documents reflecting disciplinary and enforcement action it has taken against other entities pursuant to Minn. Stat. § 144A.46, subd. 3a. Unity argues that these documents are relevant to its defense that the Department has singled it out for enforcement action and because the documents will show the standard for enforcement action the Department employs under the statute. The ALJ denied this motion because the scope of the discovery sought and the burden imposed on the Department are out of proportion to the issues in this proceeding.

Under Rule 26.02(b) of the Minnesota Rules of Civil Procedure a court must balance the need for the discovery sought against the likely burden imposed by the discovery on the responding party. As the rule states:

² This amended order eliminates the word "not" from this sentence.

Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.³

Unity is entitled to question the Department's interpretation of statutes and rules it applied to Unity and to question the application of those principles to the specific facts supporting the tags issued to Unity by the Department that are the subject of this proceeding. Allowing discovery into other enforcement proceedings is not proportionate to the burden imposed on the Department if the discovery was permitted. Unity has the ability to question both the meaning of and the application to it of the statutes and rules without lengthy discovery into how the Department has applied the same statutes and rules to other health care organizations in different fact situations. Moreover, Unity has had knowledge of the Department's objections to its discovery requests since June 10, 2013. It did not move to compel responses until August 29, 2014. The motion could have been brought earlier and it is now too close to the hearing date for the ALJ to permit such broad scope discovery into information that is burdensome and time consuming for the Department to provide.

vi. Unity's Motion for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue of material fact and where a determination of the applicable law will resolve the controversy.⁴ The Office of Administrative Hearings has generally followed the summary judgment standards developed in the district courts in considering motions for summary disposition of contested case matters.⁵

The ALJ's function on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but solely to determine whether genuine fact issues exist.⁶ The judge does not weigh the evidence on a motion for summary judgment.⁷

In deciding a motion for summary disposition, the judge must view the evidence in the light most favorable to the non-moving party.⁸ All doubts and factual inferences

³ Minn. R. Civ. P. 26.02(b).

⁴ See *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); *Gaspord v. Washington County Planning Commission*, 252 N.W.2d 590, 590-591 (Minn. 1977); Minn. R. 1400.5500(K) (2009); Minn. R. Civ. P. 56.03.

⁵ See Minn. R. 1400.6600 (2013).

⁶ See e.g., *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

⁷ *Id.*

⁸ *Ostendorf v. Kenyon*, 247 N.W.2d 834, 836 (Minn. Ct. App. 1984).

must be resolved against the moving party.⁹ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹⁰

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact.¹¹ If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts that are in dispute that can affect the outcome of the case.¹²

To successfully defeat a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.¹³ It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial. A genuine issue is one that is not sham or frivolous.¹⁴ A material fact is a fact whose resolution will affect the result or outcome of the case.¹⁵

While the purpose and useful function of summary judgment is to secure a just, speedy, and inexpensive determination of an action, summary disposition cannot be used as a substitute for a hearing where any genuine issue of material fact exists. Accordingly, summary disposition is only proper where there is no fact issue to be decided.¹⁶

Unity has moved for summary disposition of the Department's enforcement proceedings on the grounds that it is undisputed that Unity has corrected all violations identified in the Department's surveys. The Department disputes the facts supporting Unity's assertion that all violations identified in the surveys have been corrected. The question whether all violations identified by the Department have been corrected is a material fact. It appears from the record presented on this motion that these facts are disputed. Therefore, Unity's motion for summary disposition is denied.

Unity also argues that by seeking the remedy of license revocation, the Department is in violation of the doctrine of election of remedies. Unity argues that the Department has imposed corrective action on the basis of the survey results when it should have sought the revocation of Unity's license, but that the Department cannot do both based on the same survey findings. The statutory scheme under which the Department seeks enforcement, chapter 144A of Minnesota Statutes (2014), provides the Department with a number of enforcement options, ranging from a correction order to license revocation. There is nothing in this statutory scheme indicating that the

⁹ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

¹⁰ *DLH*, 566 N.W.2d at 69.

¹¹ *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

¹² *Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), rev. denied (Minn. Feb. 6, 1985).

¹³ *Thiele*, 425 N.W.2d at 583; *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

¹⁴ Minn. R. Civ. P. 56.05.

¹⁵ *Highland Chateau*, 356 N.W.2d at 808.

¹⁶ *Sauter*, 70 N.W.2d at 353.

remedies must each be pursued to the exclusion of the others. Therefore, Unity's motion for summary disposition based on the doctrine of election of remedies is denied.

P. M. W.