

**COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA**

NO. 2021-CA-0703

**JAMES L. DONELON, COMMISSIONER OF INSURANCE FOR THE
STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF
LOUISIANA HEALTH COOPERATIVE, INC.**

Plaintiff

VERSUS

**TERRY S. SHILLING, GEORGE C. CROMER, WARNER L. THOMAS,
IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS,
CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES
INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN INC., BUCK
CONSULTANTS, LLC AND TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA**

Defendants (Appellants)

**ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT OF THE
STATE OF LOUISIANA, PARISH OF EAST BATON ROUGE
SUIT NO. 651,069, SECTION 22
HONORABLE TIMOTHY KELLEY**

A CIVIL PROCEEDING

**ORIGINAL BRIEF ON BEHALF OF THIRD PARTY-APPELLEE,
LOUISIANA DEPARTMENT OF INSURANCE**

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I. STATEMENT OF THE CASE

This case arises out of the failure of Louisiana Health Cooperative, Inc. (“**LAHC**”), a Louisiana HMO created under the Affordable Care Act and regulated by the Louisiana Department of Insurance (“**LDI**”) before its collapse. LAHC sold health insurance policies to the public for less than two years before being placed in receivership after losing more than \$54 million. In September 2015, LAHC was placed into rehabilitation pursuant to the authority of James J. Donelon, the Commissioner of Insurance of the State of Louisiana, in his capacity as Rehabilitator. Seeking recovery against actuaries and others who caused or contributed to the insolvency, this suit was originally filed in August 2016 and after many years of litigation, the remaining defendants include Appellants herein, Milliman, Inc. (“**Milliman**”) and Buck Global, LLC (“**Buck**”).

As part of their defense strategy, Appellants served third party subpoenas *duces tecum* upon the LDI seeking any and all documents related in any way to any aspect of the licensure, the operations, and the regulation of LAHC and numerous other health insurers. In responding and objecting to the document subpoenas, the LDI referred to the documents which had been produced by LAHC and to the public records regarding LAHC that had previously been produced by the LDI, and repeatedly quoted from immunity and confidentiality statutes in the Insurance Code, La. R.S. 22:2043.1 and 2045, in submitting that the documents requested were not relevant and were not reasonably calculated to lead to the discovery of admissible evidence.

This appeal stems from the trial court’s denial of motions to compel the LDI, a nonparty, to produce the documents subpoenaed by Milliman and Buck (together “**Appellants**”). The trial court, exercising its sound discretion in light of the facts and law, correctly determined that the documents sought by Appellants were not

only inadmissible, but, more importantly, were not reasonably calculated to lead to the discovery of evidence admissible at the trial.

II. SUMMARY OF ARGUMENT

Contrary to Appellants' assertions, the proper standard of review of the trial court's denial of the motions to compel is abuse of discretion. A "trial court is granted broad discretion in its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion." *Barnett v. Woodburn*, 2020-0675 (La. App. 1 Cir. 4/16/21), 2021 WL 1440376 (citing *Turner v. Ostrowe*, 2001-1935 (La. App. 1 Cir. 9/27/02), 828 So. 2d 1212, 1216, writ denied, 2002-2940 (La. 2/7/03), 836 So. 2d 107). In this case, the trial court, properly applied the precepts of La. C.C.P. art. 1422¹ and correctly found that the information sought by Appellants' motions to compel was not relevant, admissible, nor would it lead to admissible evidence.

The trial court did not abuse its discretion when it correctly recognized that the discovery sought by Appellants was not reasonably calculated to lead to the discovery of admissible evidence. "A trial court has broad discretion in discovery matters, including the right to refuse or limit discovery of matters that are not relevant to the issues." *Johnson v. Louisiana Dep't of Lab., Off. of Workers' Comp.*, 98-0690 (La. App. 1 Cir. 5/14/99), 737 So. 2d 898. The court below correctly applied La. C.C.P. art. 1422 and did not abuse its discretion and commit legal error, by finding that the non-public information sought from the LDI would not lead to admissible evidence. There has been no error of law warranting a *de novo* review.

¹ "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." La. C.C.P. art. 1422.

Considering the broad discretion given to trial courts in pre-trial discovery matters, this Court should affirm the denial of the motions to compel.

III. ARGUMENT

A. Standard of Review

The proper standard of review is abuse of discretion. It is well established that a trial court's broad discretion regarding pre-trial discovery matters will not be disturbed on appeal absent a clear showing of abuse. *Black v. Louisiana Dep't of Pub. Safety & Corr.*, 2015-1908 (La. App. 1 Cir. 6/3/16), 2016 WL 3132157 (citing *Moak v. Illinois Central Railroad Co.*, 93-0783 (La. 1/14/94), 631 So.2d 401, 406). Relying upon the LDI's absolute immunity protection set forth in La. R.S. 22:2043.1, the trial court, operating well within the bounds of its discretion, determined that the discovery sought to be compelled by Appellants' motions would not lead to the discovery of evidence admissible at trial, and correctly denied the motions. This Court should not disturb that finding absent a showing that the trial court abused its discretion.

Appellants repeatedly and incorrectly assert that a *de novo* review is warranted because the trial court committed legal error by conflating the test for discoverability with the test for admissibility. It is well settled that information is discoverable if it appears reasonably calculated to lead to the discovery of admissible evidence. La. C.C.P. art. 1422. Despite Appellants' contentions, however, the trial court well understood the applicable standard of discovery, stating clearly in its oral reasons for judgment that "[t]here has to be an inquiry into what could that discovery lead to ..." (R. 2537). The trial court, exercising its broad discretion, correctly found that the discovery sought by Appellants would not lead to the discovery of admissible evidence. Although Appellants now seek to side step the trial court's inquiry, it was not legal error to find that the non-public documents sought from the LDI will not

lead to the discovery of admissible evidence. This Court should affirm the trial court's denial of the motions to compel because there was no abuse of discretion.

B. The trial court properly denied Appellants' motions to compel because the non-public documents sought from LDI are irrelevant and will not lead to the discovery of admissible evidence.

The trial court properly found that the documents sought by the document subpoenas and the motions to compel were irrelevant and were not reasonably calculated to lead to admissible evidence. According to the Louisiana Code of Civil Procedure, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." La. C.C.P. 1422. As an initial inquiry, the documents sought by Appellants are irrelevant, as a matter of law, to the subject matter involved in the pending action, including any claim or defense by Appellants. The Insurance Code provides that "[n]o action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver," and further provides that the LDI, its employees, and all others who act on its behalf, are absolutely immune from liability "for any action taken by them in performance of their powers and duties under this Code." La. R.S. 22:2043.1. In accordance with that statute, the trial court struck Appellants' defenses based on any regulatory actions or inactions.² Accordingly, in light of La. R.S. 22:2043.1 and the trial court's January 12, 2021-ruling, the documents requested by Appellants – all of which relate to regulatory action or inaction taken by the LDI or on its behalf – are statutorily irrelevant, and the trial court acted well within its discretion in determining that the documents could not be reasonably calculated to lead to the discovery of admissible evidence.

² Additionally, the trial court, after this appeal was taken, granted partial summary judgment finding that "La. R.S. 22:2043.1(A) does not allow defendants to plead defenses predicated upon prior wrongful or negligent actions of [LAHC.]" July 21, 2021-Order (copy attached).

Moreover, not only are the requested documents not relevant and related to any claim or defense and not calculated to lead to admissible evidence, but they are confidential and not subject to subpoena according to statute. The Insurance Code is clear that:

All working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner, or any other person, in the course of an examination made under this Chapter, **shall be given confidential treatment and are not subject to subpoena** and may not be made public by the commissioner or any other person, except to the extent provided in La. R.S. 22:1981(E) and Subsection I of this Section. Any access may be granted to the National Association of Insurance Commissioners. The parties shall agree, in writing prior to receiving the information, to provide to it the same confidential treatment as required by this Section, unless the prior written consent of the company to which it pertains has been obtained. (emphasis added)

La. R.S. 22:1983(J). Accordingly, the regulatory records requested by Appellants are confidential by statute, may not be subpoenaed, and are not calculated reasonably to lead to the discovery of admissible evidence.

In addition to La. R.S. 22:1983 above, La. R.S. 22:2045 similarly forecloses the possibility that the information sought by Appellants could lead to the discovery of admissible evidence. In relevant part, La. R.S. 2045(A) and (B) provide:

“A. All working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner, or any other person, in the course of an action pursuant to this Chapter, which are confidential or privileged pursuant to any other provision of law, shall be given confidential treatment and shall not be subject to subpoena or disclosed pursuant to the Public Records Law.”

“B. All working papers, recorded information, documents, and copies thereof disclosed by the commissioner, or any other person, to the receiver in the course of an action pursuant to this Chapter, which are confidential or privileged pursuant to any other provision of law, shall be given confidential treatment and shall not be subject to subpoena or disclosed pursuant to the Public Records Law.”

All of the documents requested by Appellants relate to regulatory action or inaction taken by LDI or on its behalf.


“In determining whether the trial court erred, this court must balance the information sought in light of the factual issues involved and the hardships that would be caused by the court's order.” *Lehmann v. Am. S. Home Ins. Co.*, 615 So. 2d 923, 925–26 (La. App. 1 Cir. 3/5/93), *cert. denied*, 617 So. 2d 913 (La. 1993). Here, the information sought is all related to LDI action or inaction and it is a fact of this case that the trial court has already stricken those defenses. Compelling disclosure of these regulatory documents, which the Louisiana Legislature has deemed confidential, would also be a burdensome and fruitless endeavor by the LDI. Given the trial court’s previous rulings striking regulatory defenses (which are not before this Court), the corresponding irrelevance of the requested documents to the now-stricken defenses, and the Louisiana Legislature’s determination to preclude these documents from subpoena, the trial court did not abuse its discretion in finding that these documents, irrelevant and inadmissible by operation of La. R.S. 22:2043.1, would not lead to the discovery of any evidence, relevant and admissible at trial.

IV. CONCLUSION

Considering that the documents requested are immaterial, irrelevant to any defense, confidential, not subject to subpoena, and in light of the trial court’s previous orders striking those defenses, the trial court was considered and correct in exercising its broad discretion in denying Appellants’ motions to compel. The trial court properly undertook “an inquiry into what could that discovery lead to” and determined that it was not reasonably calculated to lead to the discovery of admissible evidence. Absent a showing that the trial court somehow abused its discretion, this Court must affirm at Appellants’ cost.

Respectfully submitted,

TAYLOR, PORTER, BROOKS & PHILLIP L.L.P.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **ORIGINAL BRIEF ON BEHALF OF THIRD PARTY-APPELLEE, LOUISIANA DEPARTEMENT OF INSURANCE** was this day sent via electronic mail to counsel of record, as follows:

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Baton Rouge, Louisiana, this 16th day of August, 2021.


Michael A. Grace

JAMES J. DONELON, COMMISSIONER : SUIT NO.: 651,069 SECTION: 22
OF INSURANCE FOR THE STATE OF :
LOUISIANA, IN HIS CAPACITY AS :
REHABILITATOR OF LOUISIANA :
HEALTH COOPERATIVE, INC. : 19TH JUDICIAL DISTRICT COURT
:
:
versus :
:
GROUP RESOURCES INCORPORATED, : PARISH OF EAST BATON ROUGE
MILLIMAN, INC., BUCK GLOBAL, :
L.L.C. AND IRONSHORE SPECIALTY :
COMPANY : STATE OF LOUISIANA

ORDER

A hearing, conducted via Zoom, at 10:00 a.m. on June 17, 2021, was held to consider Plaintiff's Motion for Partial Summary Judgment Regarding Officer / Director / Employee / Etc. Defenses or, in the Alternative, Motion to Strike Defenses Precluded as a Matter of Law ("Motion"). Participating in this Zoom hearing were:

- J. Cullens and S. Layne Lee for Plaintiff, the Receiver of LAHC ("Plaintiff" or "Receiver")
- Brett Mason for Defendant, Group Resources, Inc. ("GRP")
- James Brown, Sheri Corales, and David Godofsky for Defendant, Buck Global, LLC ("Buck")
- Harry Rosenberg, Justin Kattan, and Justine Margolis for Defendant, Milliman, Inc. ("Milliman")
- Adam Whitworth for Defendant, Ironshore Specialty Insurance Company ("Ironshore").

Considering the briefs and pleadings filed by the parties, the exhibits attached thereto which were all admitted into evidence, applicable law, and the argument of counsel, for the reasons stated in open court following this hearing and for those reasons set forth in Plaintiff's original memorandum in support and reply memorandum in support of this Motion, which are incorporated by reference:

IT IS HEREBY ORDERED that Plaintiff's Motion For Partial Summary Judgment, to the extent directed to "Director & Officer" Defenses, is **GRANTED**; specifically, the Court finds that La. R.S. 22:2043.1(A) does not allow defendants to plead defenses predicated upon prior wrongful or negligent actions of any officer, manager, director, trustee, employee, or agent of Louisiana Health Cooperative, Inc. ("LAHC"), and that there are no genuine issues of material fact bearing upon the application of La. R.S. 22:2043.1(A) to bar such defenses.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike, to the extent directed to defenses predicated upon prior wrongful or negligent actions of any officer, manager, director,

trustee, employee, or agent of LAHC is **GRANTED**, as, pursuant to La. R.S. 22:2043.1(A), those defenses are insufficient as a matter of law and should be stricken pursuant to La. C. C. P. art. 964.

IT IS THEREFORE ORDERED that the following affirmative defenses, to the extent predicated upon prior wrongful or negligent actions of any officer, manager, director, trustee, employee, or agent of LAHC, be stricken:

1. Milliman's Fifth, Sixth, Eighth, Eleventh, Twelfth, Thirteenth and Fourteenth Affirmative Defenses set forth in its Answer to Plaintiff's Second Supplemental, Amending and Restated Petition (and as renumbered in its Answer to Plaintiff's Fifth Supplemental, Amending and Restated Petition);
2. Buck's Fifth, Eighth, and Ninth Affirmative Defenses set forth in its Answer to Plaintiff's Second Supplemental, Amending and Restated Petition (and as renumbered in its Answer to Plaintiff's Fifth Supplemental, Amending and Restated Petition);
3. GRI's Third, Fourth, Eighth, and Ninth Affirmative Defenses set forth in its Answer to Plaintiff's Second Supplemental, Amending and Restated Petition (and as renumbered in its Answer to Plaintiff's Fifth Supplemental, Amending and Restated Petition).

The court reserves ruling on whether La. R.S. 22:2043.1(A) applies to bar defenses predicated upon prior wrongful or negligent actions of CGI Technology and Solutions, Inc. and/or Beam Partners, LLC, due to the existence of genuine issues of material fact as to their relationship to LAHC.

The arguments raised by Defendants that La. R.S. 22:2043.1(A) is unconstitutional as applied were deferred and will be considered at the August 20, 2021 hearing on defendants' Motion for Partial Summary Judgment on Unconstitutionality of La. R.S. 22:2043.1(A) as Applied. If the Court subsequently holds that the application of this statute in this context is unconstitutional, the defendants will be permitted to replead the defenses that have been stricken by this Order.

IT IS FURTHER ORDERED that Defendants, GRI, Buck, and Milliman, shall equally bear the costs associated with Plaintiff's Motion.

SO ORDERED this ___ day of July 21 2021, 2021, at Baton Rouge, Louisiana.


HONORABLE JUDGE TIMOTHY KELLEY


I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT / JUDGMENT / ORDER / COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED. SEE ATTACHED LETTER FOR LIST OF RECIPIENTS.

Danelon v. Shilling, et al., No. 651,069
Sec. 22, 19th JDC of Louisiana

DONE AND MAILED ON July 22, 2021


DEPUTY CLERK OF COURT

Respectfully submitted,


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RULE 9.5(b) CERTIFICATE

I hereby certify that I first circulated a proposed ORDER to counsel for all parties by email on June 18, 2021, and that after edits and revisions suggested by defense counsel were made, counsel for Milliman and Buck agreed to the form of this proposed ORDER and counsel for GRI neither objected nor suggested any proposed changes to the same prior to filing.

Certified this 20th day of July, 2021



J. E. Cullens, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via e-mail to all counsel of record as follows, this 20th day of July, 2021, in Baton Rouge, Louisiana.

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