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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001909-OA

METROPOLITAN PROPERTY
& CASUALTY INSURANCE COMPANY — PETITIONER

v. ORIGINAL ACTION
REGARDING SCOTT CIRCUIT COURT
CIVIL ACTION NO. 98-CI-00437

HONORABLE ROBERT B. OVERSTREET,
Judge, Scott Circuit Court — RESPONDENT

AND

GARY AFTERKIRK; SYLVIA BANKS; and
CHRIS HEARD, d/b/a Lexington Motors — REAL PARTIES IN INTEREST

OPINION AND ORDER

DENYING ORIGINAL ACTION

** ** ** ** ** ** ** ** **

BEFORE: BARBER, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge. In this original action brought pursuant to Kentucky Rules of Civil Procedure (CR) 81, MetLife Auto & Home Insurance Company (MetLife)[1] seeks to have this Court to prohibit the Honorable Robert B. Overstreet, Judge of Scott Circuit Court, from allowing the videotaping of a medical examination of Gary

[1] The caption of this original action names Metropolitan Property & Casualty Insurance Company as petitioner. However, the petitioner is referred to throughout the body of the document as MetLife Auto & Home Insurance Company, and this Opinion and Order adopts this designation.

Afterkirk, the plaintiff below and a real party in interest in this Court, by Dr. Daniel D. Primm, Jr. MetLife also seeks an order prohibiting the circuit court from requiring it to provide Afterkirk with certain information regarding Dr. Primm's medical practice.

MetLife, the intervening defendant in Gary Afterkirk v. Sylvia Banks et al., Scott Circuit Court, Action No. 98-CI-00437, is the automobile insurance carrier of Afterkirk who was injured in a vehicular accident. MetLife scheduled a medical examination of Afterkirk pursuant to CR 35, to be conducted by Dr. Primm, an orthopedic surgeon whose offices are in Lexington, Kentucky. Although Afterkirk did not object to the examination, he filed a motion in which he proposed that the parties either agree on a physician or that the court appoint "an impartial independent medical examiner" other than Dr. Primm. In the alternative, he moved the court to order Dr. Primm to provide business and financial information regarding his medical practice. He also asked that the examination be videotaped, or that medical personnel be present. Following a hearing, the court entered the decision at issue herein, which orders MetLife to provide business and financial information regarding Dr. Primm's medical practice for the past twelve months, and allows Afterkirk to videotape the examination "for impeachment purposes only." Hence, this original action.

MetLife contends the respondent court is either acting without jurisdiction, or erroneously within it. It claims that the

production of the documents will "unduly burden and harass" Dr. Primm. Further, it argues, the videotaping will alter the nature of the examination and cause MetLife irreparable harm by interjecting the adversarial process into the only independent opportunity available to it to evaluate Afterkirk's condition, and by turning the examination into a performance for the camera.

On the merits, MetLife contends that the documents sought by Afterkirk are irrelevant to the subject matter of the action and that his request for their production is inappropriate because it would require a non-party to the action, unrepresented by counsel, to come forward with information concerning his practice without being served with a subpoena duces tecum.[2] As to the videotaping of the examination, MetLife argues it is contrary to the spirit of CR 35 that aims at placing both sides to a controversy on an equal footing regarding medical proof, and should not be allowed by a court without evidence of a compelling reason for it, which Afterkirk failed to adduce. Although MetLife refers to this Court's decision in Sexton v. Bates,[3] it notes that there are no reported Kentucky authorities specifically addressing the issue. However, MetLife advises us that many federal courts have spoken against the unfairness of allowing a plaintiff to use a recording device during a court-ordered medical examination, while a defendant has no similar opportunity when the plaintiff visits her

[2] Ky. R. Civ. Proc. (CR) 45.02.

[3] Ky. App., 41 S.W.3d 452 (2001).

own doctor.[4]

In response, Afterkirk disputes MetLife's entitlement to a writ since the circuit court has yet to decide whether the documents or the videotape are admissible at trial. Further, he invites this Court to decide that the court did not abuse its discretion in granting his request for business and financial documents because Dr. Primm is not an independent, neutral medical witness. Rather, he argues, Dr. Primm is a paid professional retained to advocate MetLife's position and who comes to this case with a reputation for the volume of medical examinations he has performed for the defense in a number of Kentucky counties and for the substantial financial gain he has derived therefrom, as shown by his testimony in other cases. Therefore, Afterkirk argues, the business and financial information he seeks is relevant to show bias and prejudice, thus being proper information to use in cross-examination.[5]

Likewise, Afterkirk contends, the court did not abuse its discretion in allowing the "non-intrusive" videotaping of the examination precisely because Dr. Primm is a professional defense witness with "more experience than most attorneys in interrogating people" and because the court was aware of certain sworn accusations made by some patients examined by Dr. Primm in other cases, and which Dr. Primm has denied. Therefore, he argues, the

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[4] See, e.g., Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620 (D. Kan.1999); Tomlin v. Holecek, 150 F.R.D. 628 (D. Minn. 1993).

[5] See Ky. R. of Evid. (KRE) 607.

presence of a camera will eliminate the "I said, you said, accusations" for the protection of both Dr. Primm and Afterkirk. In fact, a number of courts have construed a CR 35 medical examination as a part of the adversarial process and have allowed the presence of a third person or the recording of it.[6]

A writ of prohibition or mandamus is an extraordinary remedy that is entirely within the discretion of the reviewing court.[7] To obtain relief, a petitioner must show that the lower court is proceeding, or is about to proceed, outside its jurisdiction and there is no adequate remedy by appeal, or that it is about to act incorrectly, albeit within its jurisdiction, and there is no adequate remedy by appeal or otherwise and the petitioner would suffer great injustice and irreparable injury unless a writ issued.[8] Further, once the afore-stated threshold prerequisites to entitlement have been satisfied, a petitioner is required to make the additional showing that the challenged decision is an abuse of discretion. The specific concept that emerges from a long line of authorities is that:

> Where the challenge involves matters of fact, or application of law to facts, . . . an abuse of discretion should be found only where the factual underpinning for

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[6] See, e.g., Jacob and Sofo v. Chaplin, 639 NE 2d 1010 (Ind. 1994) relying upon Zabkowicz v. West Bend Co., 585 F. Supp. 635 (E.D. Wisc. 1984) and Rochen v. Huang, 558 A.2d 1108 (Del. Super. 1988).

[7] Haight v. Williamson, Ky., 833 S.W.2d 821, 823 (1992).

[8] See, e.g., Southeastern United Medigroup v. Hughes, Ky., 952 S.W.2d 195, 199 (1997).

application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule.[9]

Applying the aforementioned concepts to MetLife's claim regarding the discovery of business and financial information about Dr. Primm's medical practice, we are of the opinion that MetLife has failed to satisfy the prerequisites to entitle it to relief. It is hard to see any irreparable harm that might be suffered by MetLife from the discovery. It claims that the information sought by Afterkirk is not within the scope of CR 26 but does not explain why. It also claims that the discovery would unduly burden Dr. Primm by requiring "hours of work to compile by Dr. Primm's staff, taking valuable time away from the treatment of Dr. Primm's patients." The Court believes that only Dr. Primm could make such an argument. However, he has not been served with a subpoena duces tecum and, consequently, has no vehicle by which to challenge the discovery sought by Afterkirk before the court.[10] Although it appears that Dr. Primm might have produced similar information in other cases, the issue in this case is simply not ripe for review at this time, and the denial of relief to MetLife should not be interpreted to foreclose Dr. Primm from raising his own challenge below, if he so chooses, should he be properly brought into the

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[9] Id. at 199-200.

[10] Pursuant to CR 45.02, a person who is directed to produce books, papers, documents or tangible things may move the court issuing a subpoena duces tecum to quash or modify the subpoena if it is unreasonable and oppressive or require the party seeking the subpoena to pay the reasonable cost of producing the books, papers, etc.

controversy.

We turn next to MetLife's argument regarding the videotaping of the CR 35 medical examination. MetLife is entitled to a review of the merits of this issue because, if videotaping were ultimately held not permissible after it had already taken place, any injury suffered by MetLife could not be redressed in subsequent proceedings.[11] In addition, as this Court said in Sexton v. Bates,[12] "[t]he absence of any Kentucky reported authority construing and applying an important component of CR 35.01 by itself would justify a review of the merits of the case *sub judice*."[13] However, in view of the circumstances that surround the trial court's decision, MetLife's argument does not pass muster on the merits.

CR 35.01 provides that:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician, dentist or appropriate expert, or to produce for examination the person in his custody or legal

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[11] See Sisters of Charity Health Sys. Inc. v. Raikes, Ky., 984 S.W.2d 464, 466 (1998); Bender v. Eaton, Ky., 343 S.W.2d 799 (1961).

[12] Ky. App., 41 S.W.3d 452 (2001).

[13] Id. at 455.

> control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Afterkirk does not object to being examined by Dr. Primm. Thus, the issue becomes whether the "conditions" to be specified by a court "for good cause shown" may properly include the videotaping of a medical examination made pursuant to the CR 35.01. Without question, the circuit court is vested with broad discretion over the discovery process. In this original action, we are not called upon to decide whether we would have ruled as the circuit court did had we been in its shoes, but we must decide whether the latitude given to the plaintiff to videotape his CR 35 examination exceeds the parameters of reasonable discovery and, therefore, was an abuse of the court's discretion.

While the appellate courts of Kentucky have yet to issue guidelines regarding the videotaping of CR 35 medical examinations, some other states and some federal courts have had the opportunity to do so. These authorities have also analyzed other issues that have come before those courts with even more frequency, including whether the party to be examined may demand the presence of counsel, treating physician, court reporter or other third person; and we take note that the issues relating to who may observe the examination and those relating to the videotaping of it share many of the same principles. To set the stage, we first turn to the

treatises that have distilled the concepts that may be gleaned from a study of those cases.

> The presence of a court reporter or the use of a tape recorder is permissible during a medical examination to protect the subject from improper inquiries and to prevent misleading accounts by the examining physician. . . .
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> * * *
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> It has been noted that the videotaping of an examination is not expressly authorized, and a request that an examination be videotaped will not be granted unless the subject shows that videotaping is necessary to protect the subject and assure the integrity of the physician's report.[14]

And we find helpful this comment:

> The examination is likely to be an important, perhaps crucial, event in the development of the case. During this episode, the party will have to interact with, and answer questions from, a trained representative of the opposing side. It may seem odd to deprive the party of representation during this encounter . . . .
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> There have been varying views on whether the attorney for the examined party may be present during the examination, with the difference in view perhaps reflecting the

[14] 23 *Am. Jur.*2d Depositions and Discovery § 306 (1983)(footnotes omitted).

> indecision of the courts about whether the examination is part of an adversary proceeding, in which the examining doctor is acting for the other side, or whether the doctor is an impartial expert seeking only the truth. There would seem to be some instances in which the presence of the attorney would be clearly inappropriate . . . .[15]

This Court's review of the various federal and state cases available on the matter reveals many different, and often contrary, views. While the federal courts are split on the topic, it is clear that "the greater weight of authority" disfavors the presence of observers or a recording device during a court-ordered medical examination as compromising the "level playing field" intended by CR 35.01, and leading to "the infusion of the adversary process" into the examining room.[16] Another stated concern is that the presence of an observer or recording device "would constitute a distraction during the examination and work to diminish the accuracy of the process . . . ."[17]

By contrast, some state courts view the court-ordered medical examination as an integral part of the adversarial process

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[15] 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d, § 2236 (1994)

[16] Tomlin v. Holocek, supra, at 632-34. See also, Hertenstein v. Kimberly Home Health Care, Inc., supra, at 631.

[17] Shirsat v. Mutual Pharmaceutical Co., Inc., 169 F.R.D. 68, 70 (E.D. Pa. 1996); Romano v. II Morrow, Inc., 173 F.R.D. 271, 274 (D. Or. 1997) (adopting Shirsat reasoning.)

and give a party the absolute right to have an observer present. Others leave the decision to the sound discretion of the trial court. Still others require the party who wants the presence of an observer or the recording of the examination to carry the burden of showing the court that good cause exists for the favorable exercise of its discretion.[18]

While we find this background instructive, our task is actually simple because this Court has already spoken on a closely related question. In Sexton v. Bates,[19] the issue was whether the defendant was required to accept a physician of the court's choosing to conduct a CR 35 examination of the plaintiff after the latter objected to the defendant's selection of Dr. Primm, whom he characterized as a "defense doctor" with a "large economic incentive to ensure that his opinions are conservative."[20] We said that:

> It is a well established principle that a trial court has broad discretion over disputes involving the discovery process. However, this discretion is not unlimited, and we have determined that the respondent's outright rejection of Dr. Primm to perform the [examination] is an abuse of discretion for lack of proper legal basis.[21]

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[18] See, e.g., a compilation of illustrative cases in Galieti v. State Farm Mut. Auto. Ins. Co., 154 F.R.D. 262 (D. Colo. 1994).

[19] Supra, n. 2.

[20] Id. at 454.

[21] Id. at 455.

In Sexton, we adopted the position espoused by many federal courts that "a defendant may choose the examining doctor and that such choice is entitled to respect but for the plaintiff's 'valid objection'."[22] We found that the plaintiff's objection to the selection of Dr. Primm was based on unsubstantiated allegations regarding the physician's "track record". We concluded that a defendant was entitled to choose the examining doctor unless the plaintiff made "a valid objection, supported by compelling evidence, regarding the physician's qualifications or record, not upon a mere conclusory assertion discrediting the selection."[23] We based our decision on a principle enunciated by the afore-mentioned federal authorities, that "the purpose embodied in CR 35.01 is to provide 'a level playing field between the parties.'"[24]

We apply the same principle in this case. We hold that a party does not have an unqualified right to have an observer or a recording device present in the CR 35 examination room. Rather, the party who seeks this type of relief must demonstrate to the court that there is a compelling need for it. The court shall review each case on its own facts and exercise its discretion accordingly.

In this case, Afterkirk demonstrated a compelling need to the respondent court and, therefore, its decision allowing the

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[22] Id. at 457.

[23] Id. at 457.

[24] Id. at 457.

videotaping of his CR 35 examination by Dr. Primm was not an abuse of discretion. First, in the memorandum accompanying his motion seeking leave to videotape the examination, Afterkirk states:

> Dr. Daniel Primm has the reputation among the Plaintiff's bar of being biased in favor of Defendants who frequently hire him to testify on their behalf. He usually testifies that there is nothing wrong with the person, or if they are obviously hurt, that it is not a serious injury, will not affect their future or that the condition preexisted the accident.
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> From previous testimony by Dr. Primm, it has been calculated that Dr. Primm earns between $500,000 and $750,000 per year doing medical examinations and testifying.

Next, Afterkirk asserts in his response to the petition that the same respondent court presided over another case where the plaintiff was examined by Dr. Primm and testified, in open court and, subsequently, in an affidavit appended to the response, that:

> 3. When Dr. Primm took my history he was very rude and repeatedly distorted what I told him. He tried to get me to say things that I had not stated. He was very intimidating.
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> 4. After he was finished I asked him if I could speak, he said, "yes, I would like to get a straight answer from you."
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> 5. One of my problems was with my shoulder. I had trouble

raising my arm. When I told him I had problems raising it, he grabbed my arms and jerked them up hurting me.

6. I have walked with a very distinct limp since I was a child. Dr. Primm stated in his notes that I did not walk with a limp.[25]

Afterkirk also provides as an exhibit the affidavit of another plaintiff examined by Dr. Primm, which states in pertinent part:

4. During the examination Dr. Daniel D. Primm, Jr. was extremely rude to me and tried to mislead me regarding my description of my symptoms.

5. During the examination Dr. Daniel D. Primm, Jr. asked me to perform physical movements which I was unable to perform such as reaching down and touching my toes. When I advised Dr. Primm that I was unable to make such a physical movement he placed his hands upon me and tried to physically force me to make the bending movement that he had requested.

6. Dr. Primm never asked me about any of the pain I was experiencing. When I tried to get him to address that issue by bringing the subject up, he abruptly turned away from [me] and walked out of the room concluding the examination without further discussion.

7. Subsequently Dr. Primm reported that I was able to

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[25] Excerpts from affidavit of Betty Votaw.

make such movements and wrote a report contradicting my physicians' findings, particularly stating that I was able to work a full five day work week.

8. Had the examination been videotaped the above information could easily be verified and Dr. Primm's mistreatment of me would be evident.[26]

Dr. Primm has denied the allegations. In view of such conflicting reports of what took place during previous CR 35 examinations by the same physician, we conclude that the respondent court crafted a sound and wise decision under the circumstances, one that might eliminate what Afterkirk calls a "swearing match" between doctor and patient, and one best fashioned to protect him, Dr. Primm and the integrity of the process. The record of the Sexton action did not include any "valid" or "cogent" reason supporting the court's appointment of a physician other than Dr. Primm, and this Court determined that the "outright rejection of Dr. Primm . . . [was] an abuse of that discretion for lack of proper legal basis."[27] In this case, however, we are satisfied that the respondent court had a "proper legal basis" to grant Afterkirk leave to videotape his CR 35 examination.

Lastly, we are not persuaded by MetLife's argument that

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[26] Excerpts from affidavit of Rose Rhodus who is a real party in interest in another original action pending before this Court styled Primm v. Judge Sheila Isaac, Fayette Circuit Court, 2001-CA-001965-OA in which Dr. Primm seeks to prevent the enforcement of an order granting Rhodus's request for the discovery of business and income tax records relating to his medical practice.

[27] Id. at 455.

the videotaping of Afterkirk's examination will irreparably alter its nature. Afterkirk's counsel has stated on the record that the process chosen by him will be "non-intrusive." We also note that courtrooms in a significant number of Kentucky counties routinely use videotape equipment to record proceedings. This Court is not aware of any suggestion that this system causes a distraction to the bench, the bar or to witnesses. Like the Supreme Court of Indiana in Jacob and Sofo v. Chaplin,[28] we "fail to see any reason why electronic recording of the [CR 35] examination would in and of itself impede an examiner's ability to conduct a fair and complete examination." When "good cause" for using this process is shown, the videotaping of a CR 35 examination is an appropriate "condition" for a court to order.

Metlife's petition seeking to prohibit Judge Overstreet from ordering the videotaping of Gary Afterkirk's CR 35 examination is denied. Likewise denied is Metlife's petition seeking an order prohibiting Judge Overstreet from requiring it to provide certain information regarding Dr. Primm's medical practice.

ALL CONCUR.

ENTERED: December 21, 2001

/s/ Joseph R. Huddleston
Judge, Court of Appeals

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[28] Supra, n. 6, at 1013.