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# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2001-CA-001965-OA

DANIEL D. PRIMM, JR., M.D. PETITIONER

ORIGINAL ACTION
FROM FAYETTE CIRCUIT COURT
v. CIVIL ACTION NO. 99-CI-02289

HONORABLE SHEILA R. ISAAC, Judge,
Fayette Circuit Court RESPONDENT

AND

ROSE M. RHODUS;
FANSTEEL V/R WESSON; LARRY
S. FRAHER; and STEVE MUELER REAL PARTIES IN INTEREST

OPINION AND ORDER

DENYING CR 81 RELIEF

** ** ** ** **

BEFORE: BARBER, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: This original action brought pursuant to Kentucky Rule of Civil Procedure (CR) 81[1] seeking relief in the

[1] Ky. R. Civ. Proc. (CR) 81 provides that: "Relief heretofore available by the remedies of mandamus, prohibition, scire facias, quo warranto, or of an information in the nature of a quo warranto, may be obtained by original action in the appropriate court."

nature of a writ of prohibition calls upon this Court to consider an issue that has not been previously addressed by the appellate courts of Kentucky. The issue is whether, and to what extent, a trial court may require a non-party expert witness to produce business and personal tax information, prior to his discovery deposition, to a party seeking to elicit evidence of prejudice or bias for impeachment purposes.[2]

In 1998, the petitioner, Dr. Daniel D. Primm, Jr., an orthopedic surgeon who maintains an office in Lexington, Kentucky, performed a single pre-litigation physical examination of the real party in interest, Rose M. Rhodus, at the request of her employer, Fansteel V/R Wesson. Dr. Primm subsequently issued a written report of his findings and his recommendation that Rhodus begin an exercise program and return to regular full-time work. Because Dr. Primm's findings and recommendation were in conflict with those of Rhodus's treating physician, Fansteel required Rhodus to consult with one of two physicians of its choice for another examination. Rhodus failed to satisfy Fansteel's demand and, eventually, she was terminated. She then filed the action styled Rose M. Rhodus v. Fansteel V/R Wesson et al. in Fayette Circuit Court[3] alleging wrongful discharge and discrimination.

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[2] Whether those documents would be admissible at trial or not is not an issue at this time. Precisely because of the narrow focus of the instant decision, we have determined that the principle established in Current v. Columbia Gas of Kentucky, Ky., 383 S.W. 2d 139, 143-44 (1964) (details regarding an expert's rate of compensation "inject[] collateral matter into the trial" and "the better rule is to limit the showing to the fact that payment is being made") has no application herein.

[3] Civil Action No. 99-CI-02289.

This original action was prompted by a decision of the respondent trial judge which granted, for the most part, Rhodus's demand that Dr. Primm produce to her counsel certain business and personal tax records ahead of the date scheduled for his deposition. Dr. Primm seeks in this original action to have the trial court's decision vacated and set aside in its entirety.

Through a subpoena duces tecum[4] directed to Dr. Primm's billing records custodian/office manager, Rhodus sought to discover a statement showing Dr. Primm's gross income for the years 1997, 1998 and 1999, in performing independent medical examinations (IMEs) for the benefit of defendants, their attorneys and their insurance carriers. The subpoena listed the needed documents as "including, but not limited to tax returns, 1099s, W-2, and W-4 forms and any and all other tax information for the tax years of 1997, 1998, 1999 . . . ." Rhodus also sought a copy of all IMEs performed by Dr. Primm during those years and a copy of the invoices pertaining to those examinations. The subpoenaed employee filed an objection stating that the information was not available and/or that the request was burdensome and lacked relevancy. The trial court sustained the objection in part. In particular, the court limited the allowed discovery to the year 1998.

Subsequently, Dr. Primm himself moved for reconsideration. The trial court conducted two hearings on the issue, the first on August 9, 2001, and the second on August 28, 2001, plus a telephone conference with counsel. On September 6,

[4] See CR 45.02.

2001, the court entered the order that Dr. Primm challenges in this action.

In its decision, the trial court said that "Dr. Primm should cooperate in the discovery of information sufficient to determine the extent to which his 1998 medical practice income was derived from litigation-related services including, but not limited to deposition and independent medical examinations . . . ." Specifically, the court required Dr. Primm to produce the following:

1. Dr. Primm shall produce a true and accurate photocopy of that page from his 1998 income tax return that demonstrates the amount of his income derived from his medical practice a well as that page from the tax return which bears his signature along with a certification from his accountant that said amount as reflected on the tax return constitutes the amount of income Dr. Primm derived from his medical practice in 1998;
2. Dr. Primm shall produce a copy of his invoices for 1998 litigation-related services including but not limited to depositions and independent medical examinations. Each page of the said invoices shall be numbered chronologically and patient identification information shall be redacted.
3. Dr. Primm shall produce copies of the 1099 forms he received for his income derived from his medical practice in 1998. Dr. Primm shall provide a verified

statement noting the extent to which each 1099 form relates to litigation-related services including but not limited to depositions and independent medical examinations. Each such 1099 notation shall also identify the page number of the related invoice(s).

4. Dr. Primm shall produce the "day sheets" and "monthly sheets" from the financial records of his medical practice for the year 1998 which were mentioned in the testimony of his office assistant, Terry Hazelwood. Any patient identification information on these sheets is to be redacted. In the event these sheets are no longer in existence, Dr. Primm shall so certify to the court;
5. All records to be produced as hereinabove designated shall be labeled "CONFIDENTIAL", shall be produced UNDER SEAL, and shall be utilized only in connection with the above referenced case; it is further ordered that said information and documentation shall not be disseminated to anyone or to any entity except upon further Orders of this court;
6. Dr. Primm is hereby ordered to comply with the production requirements of this order by September 7, 2001 and at his expense, and
7. The production of the aforesaid documents is for the purpose of discovery only, and the Court has not made a ruling as to the admissibility into evidence of

said documents or information obtained only as a result of this production of documents.[5]

Dr. Primm contends that the trial court acted erroneously within its jurisdiction and that its decision will result in great and irreparable injury to him and to the administration of justice.[6] In addition, as a non-party, he has no remedy by appeal. Dr. Primm also argues that the "intrusive invasion of privacy" resulting from the production of his business and personal records outweighs the limited interest that Rhodus has in challenging his credibility on cross-examination. Jurisdictions other than Kentucky have addressed this issue. The precept gleaned from those decisions is that unless compelling circumstances are shown by the party seeking discovery, a less intrusive method, such as the exploration of the matter through questions at deposition, should be selected for the purpose of showing bias.[7] Dr. Primm also argues that the federal courts recognize a qualified privilege protecting personal financial records and disallow their routine disclosure in the absence of a showing of relevancy and compelling need, which, he contends, is absent in the instant case.[8]

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[5] Original emphasis.

[6] See Bender v. Eaton, Ky., 343 S.W.2d 799 (1961).

[7] See Gramman v. Stachkunas, 750 So.2d 688 (Fla. 1999); Acme Rug Cleaner, Inc. v. Likes, 256 Neb. 34, 588 N.W.2d 783 (1999); Morris v. Craddock, 530 So.2d 785 (Ala. 1988); Jones v. Bordman, 243 Kan. 444, 759 P.2d 953 (1988).

[8] See, Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397 (5th Cir. 1993); Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225 (9th Cir. 1975); Tele-Radio Systems, Ltd. v. De'Forest Electronics, Inc., 92 F.R.D. 371 (D. N.J. 1981). (continued...)

In addition, Dr. Primm contends that the scope of the documents that he has been ordered to produce is unduly burdensome, expensive and equates to a "wholesale fishing license." He states that he has "never attempted to hide this information but has been forthright" in previous deposition testimony regarding the number of IMEs and related services that he has performed and the earnings he has garnered therefrom. There are, he says, also deposition and data banks that Rhodus could explore. Therefore, since Rhodus can obtain the substantial equivalent of the information she wants by other means, the trial court has overreached its authority and abused its discretion, which entitles him to the extraordinary remedy of a writ of prohibition.

In her response, Rhodus contends that the information she seeks from Dr. Primm is discoverable because it is entirely relevant and crucial to her case and will facilitate effective inquiry into Dr. Primm's possible bias.[9] She argues that he is not an independent medical expert but, rather, a professional defense witness who "typically examines plaintiffs in secrecy and then testifies against them" and who was specifically selected by Fansteel in order to create "a pretext to dishonor the work limitations" imposed by her treating physician, and ultimately to terminate her employment.

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[8](...continued)
In its response, Fansteel relies on Behler v. Hanlon, 199 F.R.D. 553 (D. Md. 2001), and Wacker v. Gehl Co., 157 F.R.D. 58 (W.D. Mo. 1994).

[9] See Ky. R. of Evid. (KRE) 401 and CR 26.02.

Rhodus does not disagree with the two-prong test on which Dr. Primm relies, i.e., relevancy and compelling need. She argues, however, that the information she seeks to discover from Dr. Primm is relevant and compelling because it has the tendency to put his credibility into question[10] and to "indicate that his current opinion is not unique but common and recurring for the purposes of financial gain." Further, Rhodus asserts that Dr. Primm made the choice of entering the legal arena as an expert for the purpose of advocating a party's position and, consequently, has waived some privacy rights and may himself be regarded as a party to the litigation. And, she adds, there is no authority for Fansteel to exploit the privacy right of its expert for the purpose of impeding the search for the truth.[11]

Rhodus also posits that limiting discovery to questions at Dr. Primm's deposition is "ill advised" because Dr. Primm has been successful in the past in using that procedure to avoid producing evidence that is relevant to his credibility.[12] Efficiency is better achieved by requiring advance compliance with production. Finally, since Dr. Primm has already testified that the information is available, Rhodus advances that it is difficult

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[10] See Motorists Mut. Ins. Co. v. Glass, Ky., 996 S.W.2d 437 (1997); Keller v. Commonwealth, Ky., 572 S.W.2d 157 (1978); Parsley v. Commonwealth, Ky., 306 S.W.2d 284 (1957); and Holt v. Commonwealth, Ky., 259 S.W.2d 463 (1953).

[11] Rhodus invokes Meenach v. General Motors Corp., Ky., 891 S.W.2d 398 (1995), for the principle that Kentucky law does not allow parties to enter into private agreements that aim at ensuring that relevant evidence remains secret.

[12] In that regard, Rhodus refers to Sexton v. Bates, Ky. App., 41 S.W.3d 452 (2001).

to see how the production of the same discovery in written form could be an invasion of his privacy.

The standard that this Court must apply when called upon to exercise its discretion to grant or to deny the extraordinary remedy of a writ of prohibition is well established. The 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 issues.[13] Following satisfaction of the threshold prerequisites to entitlement, the petitioner is required to show that the challenged decision is an abuse of discretion.[14]

Dr. Primm is entitled to a consideration of the merits of his original action because, if the documents he has been ordered to produce are ultimately ruled not to be discoverable, the injury he would suffer upon production could not be later rectified.[15] However, a review of the record and, in particular, of the videotape of the hearings conducted by Judge Isaac, leads this Court to the conclusion that the trial court's decision is neither

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

[14] Id.

[15] See Wal-Mart Stores, Inc. v. Dickinson, Ky., 29 S.W.3d 796, 800 (2000); Sisters of Charity Health Systems, Inc. v. Raikes, Ky., 984 S.W.2d 464, 466 (1998); and Bender v. Eaton, supra, n. 5, at 799.

erroneous nor an abuse of its discretion and, consequently, that a writ of prohibition should not issue.

We begin our analysis with a consideration of the allowable scope of discovery. CR 26.02(1) provides, in pertinent part, that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . 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.

In the case *sub judice*, Rhodus seeks the production of Dr. Primm's business and tax records in order to gauge the extent of his litigation-related services and the income he derived therefrom. The ultimate purpose of the discovery is to facilitate the cross-examination of Dr. Primm on the issue of bias and the incentive he may have to maintain the goodwill of those who hire him for those services by giving opinions favorable to them. The Kentucky Supreme Court has opined that evidence that may suggest bias or prejudice on the part of a witness is not collateral and is relevant to impeach the credibility of that witness at trial.[16] Hence, it is clear that the information sought by Rhodus is relevant and that it satisfies the requirements of CR 26.02.

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[16] See Motorists Mut. Ins. Co. v. Glass, supra, n. 9, at 447. See also Rolli v. Commonwealth, Ky. App., 678 S.W.2d 800, 802 (1984), and Carver v. Commonwealth, Ky., 634 S.W.2d 418, 421 (1982).

Next, we turn to Kentucky Rule of Evidence (KRE) 401, which defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The discovery sought by Rhodus fits the definition of "relevant evidence" set forth in KRE 401. Federal Rule of Evidence (FRE) 401, which is identical to KRE 401, and the cases in which the Rule have been construed provide guidance in support of the relevancy of evidence of bias for impeachment purposes.[17]

In addition, it must be remembered that Fansteel relied on Dr. Primm's findings and recommendation to support its decision to terminate Rhodus. Thus, any evidence of his bias or prejudice is material to Rhodus's theory of her case, arguably even more so than it would be if Dr. Primm's sole involvement herein was the performance of an IME after the filing of her action against Fansteel.

We recognize that Dr. Primm is a non-party and, for that reason, agree with his argument that, in addition to relevancy, the party seeking production from a non-party should demonstrate both a compelling need for that information and that it cannot be otherwise obtained. Rhodus has made that showing. The history of previous cases shows that Dr. Primm has been deposed numerous times, and his deposition testimony suggests he has made a sizeable income from litigation-related services. However, until now, he

[17] See United States v. Abel, 469 U.S. 45, 51, 105 S. Ct. 465, 468, 83 L.Ed.2d 450, 457 (1984).

has been able to satisfy the parties and the courts by merely offering his testimony without being required to produce any hard documents to verify his statements. But, it appears that the very essence of the information that Rhodus seeks has been readily given by Dr. Primm in oral testimony. Thus, it is difficult to fathom why the same information could not be produced in written form. In addition, it appears inimical to the concept of fairness that Rhodus be initially obligated to expend the time and resources in taking Dr. Primm's deposition without the support of any of the evidence to which she is clearly entitled ab initio.

Rhodus has an additional basis to show her compelling need to obtain the information she seeks. Last year, this Court decided Sexton v. Bates[18] in which the issue was whether the defendant, Sexton, was required to agree to the trial court's selection of a physician to conduct an IME of the plaintiff, Skinner, who had objected to an examination by Dr. Primm, the physician chosen by Sexton. This Court determined that Skinner's objection to being examined by Dr. Primm was based on unsubstantiated allegations that Dr. Primm is a "defense doctor" and has a "large economic incentive to ensure that his opinions are conservative."[19] This Court held that a defendant is entitled to

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[18] Supra, n. 12.

[19] Even more recently, this Court had the opportunity to decide the propriety of recording IMEs on videotape. Dr. Primm was the examining physician in that case as well, which was styled Metropolitan Property and Casualty Ins. Co. v. Honorable Robert B. Overstreet, Judge, Scott Circuit Court, No. 2001-CA-001909-OA. The matter was resolved on December 21, 2001, by Opinion and Order denying relief, and is currently pending on appeal before the Kentucky Supreme Court.

select the examining doctor unless the plaintiff has made "a valid objection, supported by compelling evidence, regarding the physician's qualifications or record, not upon a mere conclusory assertion discrediting the selection."[20]

As applied to this case, the principle enunciated in Sexton requires Rhodus to obtain specific discovery evidence pertaining to Dr. Primm's medical income and the percentage thereof derived from performing IMEs, if she is to pursue any attempt at impeaching his credibility. Without that evidence, she is in a position identical to Sexton's when he objected to the selection of Dr. Primm but did not substantiate the basis of his objection. Since a party is entitled to conduct a fair and complete cross-examination of an expert witness chosen by her adversary, that party is also entitled to fully pursue the discovery of relevant evidence that has the tendency to assist that process.

Finally, we address the issue that specifically pertains to the discoverability of the personal tax records of a non-party to the case. The decision that we render today should not be taken as a blanket authorization for the indiscriminate discovery of such documents. Like all other aspects of discovery, the scope of production is within the discretion of the trial court, but that discretion is not unlimited and should be cautiously exercised on a case-by-case basis after a thorough analysis of the facts and circumstances. In particular, when it comes to personal tax records, the trial court is required to balance the potential invasion of privacy of the individual required to release the

[20] Supra, n. 12, at 457.

documents against the interest and the need of the party seeking to discover those documents. The federal courts have decided that a person has a qualified privilege to the confidentiality of personal tax records. This means that the documents may be discoverable, but only after the trial court has conducted an analysis of the need for the information, its materiality and its relevancy.[21]

The respondent trial court properly considered all those elements. First, the court limited the allowed discovery to 1998. In addition, the court did not order the production of Dr. Primm's entire tax return for 1998, but only the portion that details his medical income. Second, the court conducted several lengthy hearings in which it carefully and actively monitored all facets of the issues presented to it. The court clearly and repeatedly explained the exact nature of the information it wants produced: the total amount of Dr. Primm's medical income for the year 1998 and the percentage of that income derived from performing litigation-related services in 1998. The court also clearly and repeatedly explained that the information is needed because testimony given by Dr. Primm by deposition in previous cases has raised questions as to his bias and the documents sought by Rhodus are relevant to its answer.

During the hearing conducted on August 9, 2001, the court emphasized that it wanted the best evidence of the information needed, but that tax returns did not have to be produced if there exist other documents that would be just as good and credible

[21] See, e.g., DeMasi v. Weiss, 669 F.2d 114, 120 (3rd Cir. 1982).

pieces of evidence as those returns would be. The court suggested that Dr. Primm's billing records, or any record that his office prepares for the surgeon's accountant, might be that type of evidence. However, Dr. Primm's counsel made a number of objections to production of the actual billing records, and proposed to total his 1998 invoices and to produce a statement of the result. The trial court questioned why Dr. Primm could not produce a document that is already in existence and that includes the same information, and it ordered that such a document be produced to it.

During the second hearing, and even after testimony had been adduced from Dr. Primm himself and from his billing records custodian, it became clear that, through "ignorance or resistance," as the court put it, the best evidence that the court had ordered produced was still not before it. The court expressed its frustration and even implied that Dr. Primm and his counsel were flirting with a contempt citation. The court stated that it would not allow Dr. Primm to hand-pick and prepare his own impeachment evidence and that it intended to enforce its orders until and unless reversed by a higher court.

In view of the circumstances that appear in the record of those hearings, we can conclude that the September 6, 2001, order requiring Dr. Primm to produce a partial tax return, plus other financial documents for 1998, was not arbitrary or capricious nor contrary to any applicable law. Indeed, it appears that the documents the court compelled Dr. Primm to produce may well be the only documents that he cannot reasonably claim to be non-existent or unavailable. Further, those documents being personal to Dr.

Primm, it follows that they can only be discovered from him, and it is doubtful that a substantial equivalent could be found by other means.

Finally, we emphasize that the trial court has made no decision regarding the admissibility of the documents. In addition, it incorporated protective language to ensure that the confidentiality of the records will be maintained under seal, with the added prohibition that the information may not be used or disseminated outside the confines of the pending action.

Dr. Primm's original action seeking relief in the nature of a writ of prohibition directing the respondent trial court to vacate its order of September 6, 2001, is denied.

ALL CONCUR.

ENTERED: March 22, 2002

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

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