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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002565-OA

SCOTT KOLTER — PETITIONER

v. ORIGINAL ACTION REGARDING JEFFERSON CIRCUIT COURT
ACTION NO. 03-CI-008717

STEPHEN P. RYAN, JUDGE
JEFFERSON CIRCUIT COURT — RESPONDENT

AND

CSX TRANSPORTATION, INC. — REAL PARTY IN INTEREST

OPINION AND ORDER
GRANTING ORIGINAL ACTION IN PART

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BEFORE: TAYLOR AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

VANMETER, JUDGE: This matter is before the Court on a petition for writ of mandamus and/or prohibition filed by petitioner, Scott Kolter, and the response of the real party in interest,

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

CSX Transportation, Inc. Kolter, plaintiff to a personal injury action against CSX, his employer at the times referred to in the complaint, seeks an order from this Court that would direct the respondent trial court to amend two discovery orders or prohibit it from enforcing the orders.

The relevant facts are as follows. Kolter moved the trial court to compel CSX to produce the raw test data of Dr. Barry Gordon, a neurologist with a specialty in neuropathology who conducted a court-ordered independent medical examination (IME) of Kolter, upon CSX's request. The trial court signed an order tendered by CSX requiring the parties to exchange the raw test data from all neuropsychological tests administered to Kolter.

CSX produced Dr. Gordon's report and raw test data. Kolter produced the report and raw test data prepared by its retained expert, Dr. Martine RoBards, but moved for a protective order against the production of similar information prepared by Dr. Lisa Morrow, another neuropsychologist whom Kolter also consulted and whom he initially named as a testifying expert but had since withdrawn from his expert witness list. Kolter argued that Dr. Morrow's data and report were shielded from discovery by the work product doctrine pursuant to CR 26.02(4)(b). CSX moved to compel production, arguing that it was entitled to discovery of a like report of a previous examination of Kolter

for the same condition after having turned over Dr. Gordon's report and data to Kolter pursuant to CR 35.02. Following a hearing, the trial court agreed with CSX. Kolter moved to amend, alter or vacate, arguing that Dr. Morrow had not prepared a report and that CR 35.02 does not require the production of raw data. The motion was denied.

Kolter, relying on Bender v. Eaton,[2] claims entitlement to a review of the merits of his original action by arguing that the forced discovery of material that is privileged would cause him and the administration of justice irreparable harm and that this Court must protect his work product from wrongful disclosure.

On the merits, Kolter claims that his request for Dr. Gordon's report and raw data was made pursuant to CR 26, not CR 35.02. He argues that CSX previously indicated in its Disclosure of Expert Witnesses that it would produce the report, which is information that CSX is required to provide under CR 26 since it has designated Dr. Gordon as a testifying expert. Kolter goes on to argue that the mere fact that CSX satisfied its CR 26 obligation by submitting Dr. Gordon's report does not then transform his request into one made pursuant to CR 35.

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[2] 343 S.W.2d 799, 801 (Ky. 1961).

Kolter asserts that, pursuant to CR 26, Dr. Morrow's report and data is work product that is not discoverable unless CSX could show a substantial need for the materials and the inability to obtain a substantial equivalent by other means without undue hardship which, he contends, it has not. In the alternative, Kolter argues that, if CR 35.02 applies, it allows, by its very language, for the production of a report, but not that of raw data. In support of his argument, Kolter relies on Newsome v. Lowe[3] and Morrow v. Stivers.[4]

In response, CSX contends that Kolter has failed to demonstrate irreparable harm because the information that it seeks is not a trade secret or of a proprietary nature, and the only harm may be that "Dr. Morrow's findings did not support petitioner's injuries." CSX further argues that the substantial miscarriage of justice exception set forth in Bender is not applicable because neither CR 26 nor CR 35.02 was adopted to protect litigants in Kolter's position. In addition, Bender did not involve a CR 35.02 request and the latter is the subject of a clear exception under CR 26.02(4)(b).

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[3] 699 S.W.2d 748 (Ky. App. 1985)(pre-litigation report prepared by consulting physician retains its qualified privilege status even after consultant has been retained as trial expert).

[4] 836 S.W.2d 424 (Ky. App. 1992)(reports prepared by plaintiff's experts who had not been retained to testify ruled inadmissible).

As to the merits, CSX argues that Dr. Morrow's report is discoverable under CR 35.02, which makes no exception for non-testifying experts. CSX argues that it is Kolter's motion to compel the production of Dr. Gordon's report, and its receipt by him, that triggered his reciprocal obligation to deliver like reports to it and that the fact that he withdrew Dr. Morrow as a testifying expert is not material to that obligation. CSX further asserts that the raw data generated by Dr. Morrow's examination is also discoverable under CR 35.02 and that Kolter's narrow interpretation of that Rule is without support.

Our Supreme Court has repeatedly stated that writs of prohibition and mandamus are extraordinary remedies that "are reluctantly granted."[5] In a case such as this one where the petitioner argues that the trial court is proceeding within its jurisdiction but erroneously, the petitioner must first satisfy two threshold prerequisites to demonstrate its entitlement to a review of the merits of its claim of error, i.e., that there exists no adequate remedy by appeal or otherwise and that great

[5] Kentucky Farm Bureau Mut. Ins. Co. v. Wright, 136 S.W.3d 455, 458 (Ky. 2004).

injustice and irreparable injury would result unless a writ is granted.[6]

We decide initially that, contrary to CSX's argument, Kolter could suffer irreparable harm if the information that he seeks to shield from discovery is ultimately held to be privileged after it has already been produced.[7] In addition, we believe that, since this is a matter of first impression, our consideration of the merits of this original action will assist the orderly administration of justice by providing a construction of the provisions of CR 35.02(1).[8] Therefore, we shall now proceed to decide whether the respondent trial court erred in ordering Kolter to produce to CSX Dr. Morrow's raw test data and report, or her raw test data alone if she did not actually prepare a report.

CR 35.02(1) provides as follows:

> If requested by the party against whom an order is made under Rule 35.01 or the person examined, the party causing the examination to be made shall deliver to that person or party a copy of a detailed written report of the examining health care expert setting out all findings, including results of all test made, diagnoses and conclusions, together with like reports of all earlier

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[6] See, e.g., Hoskins v. Maricle, 150 S.W.3d 1, 10 (2004).

[7] See Sisters of Charity v. Raikes, 984 S.W.2d 464, 466 (Ky. 1999).

[8] Bender v. Eaton, fn.2 at 802; Grange Mutual Ins. Co. v. Trude, 151 S.W.3d 803, 808 (Ky. 2004).

> examinations of the same condition. After delivery, the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows an inability to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician or examining health care expert fails or refuses to make a report the court may exclude such testimony if offered at the trial.[9]

First, we do not believe that the fact that CSX had previously announced that it would produce Dr. Gordon's report and raw data somehow excludes this matter from the operation of CR 35.02(1). The Rule provides that it is the request for a report of a medical examination by the party against whom an order was made under Rule 35.01, or the person who was examined, which activates the duty to exchange similar information. Dr. Gordon's examination of Kolter was made pursuant to CR 35.01 and CR 35.02 does not require that a request for a report of that examination be made by specifically invoking CR 35.02. Clearly, by choosing to compel the production of Dr. Gordon's IME report

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[9] One of Kentucky's sister jurisdictions with a Rule similar to CR 35.02(1) has explained that its purpose is "to eliminate uncertainty concerning the medical aspects of the cause and permit the preparation of an intelligent and (FOOTNOTE CONTINUED)

and by receiving it, Kolter triggered his CR 35.02(1) reciprocal obligation to produce reports of the same condition generated by physicians who examined him at his own request, "and he should not thus be heard to complain of its operative effect."[10]

We also believe that Kolter's work product argument may have had merit if Dr. Morrow had not physically examined Kolter and had merely submitted an advisory opinion.[11] However, Dr. Morrow did physically examine Kolter and, as a consequence, the report of her examination becomes discoverable under CR 35.02(1). And, that is true regardless of the fact that Kolter will not call her as a trial witness as the Rule makes no exception for non-testifying experts. We note that CR 26.02 (4)(b) expressly includes a CR 35.02 exemption, which would become meaningless were we to take Kolter's argument to its logical conclusion. In fact, as noted by CSX, language articulated in Morrow [12] fully supports the determination that we have made. We believe that such interpretation of CR 35.02(1) is reasonable because it is consistent with the purpose assigned

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informed defense." State v. Clark, 881 S.W.2d 627, 630 (Mo. 1994)(citation omitted).

[10] Weir v. H.A. Simmons, 233 F.Supp. 657, 660 (D. Neb. 1964).

[11] See Queen of Angels Hospital v. Superior Court, 57 Cal. App. 3d 370, 374 (Cal. 1976), on which CSX relies.

[12] 836 S.W.2d at 428.

to CR 35.01 to maintain a level playing field between the parties.[13] As opined by the California court in Queen of Angels Hospital[14]:

> To conclude otherwise would permit [plaintiff] to arrange unlimited medical examinations and reports and suppress those he might think unfavorable merely by characterizing the doctors who prepared them as advisers to counsel and promising not to call them as witnesses.

Therefore, we conclude that CSX is entitled to discover Dr. Morrow's report of Kolter's examination, if she prepared one.

However, we are of the further opinion that a plain reading of CR 35.02(1) leads to the interpretation that CSX is not also entitled to the raw test data collected by Dr. Morrow even if she did not prepare a report. Pursuant to the Rule, upon Kolter's request, CSX was required to provide "a detailed written report of the examining health care expert setting out all findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition." After delivery, pursuant to that Rule, Kolter was then required to produce a "like report of any examination, previously or thereafter made, of the same

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[13] See Sexton v. Bates, 41 S.W. 3d 452, 457 (Ky. App. 2001).

[14] 57 Cal. App. 3d at 375.

condition....” We construe this language to mean that detailed written reports must be exchanged by the litigants but not that other separate documents also prepared by the examining physician, whatever the documents may be, must also be produced to the opposing party. This narrow construction of the extent of discovery allowed by CR 35.02(1) is warranted because this Rule carves out an exception to the otherwise strictly enforced provisions of CR 26.02(4)(b) as they apply to “facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial....”[15] We are cited to no authority to the contrary.

Therefore, it is ORDERED that this petition be GRANTED IN PART. The respondent trial court is hereby DIRECTED to amend its orders entered November 18, 2004, and December 3, 2004, by granting a protective order to Kolter against the production of

[15] Although not addressing the specific matter at issue herein, we find the following cases to be instructive. See State v. Clark, supra, fn.9 at 630-31; Smith v. State, 852 P. 2d 957, 959 (Or. 1993); State v. Gallagher, 797 S.W.2d 726, 729-30 (Mo. 1990); Miller v. Marks, 532 N.Y.S.2d 35, 36 (N.Y. 1988).

Dr. Morrow's raw test data from the neuropsychological tests that she administered to him. However, if Dr. Morrow prepared a report, Kolter must produce it to CSX.[16]

ENTERED: March 11, 2005

/s/ L. B. VanMeter____
JUDGE, COURT OF APPEALS

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[16] We are mindful of the discovery difficulties that may arise as a result of this interpretation. However, we believe that CR 35.02(1) in its current form cannot be construed in a broader manner.