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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001286-MR

BRENDA ROBINSON APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE THOMAS SMITH, SPECIAL JUDGE
ACTION NO. 13-CI-00825

REGINA COLEMAN-COMPTON, O.D. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, GOODWINE, AND TAYLOR, JUDGES.

COMBS, JUDGE: This is a medical negligence case in which a jury found in favor of Regina Coleman-Compton, O.D. (Dr. Coleman-Compton), the Appellee. Appellant, Brenda Robinson (Robinson), submits that she is entitled to a new trial because the trial court erred: (1) in denying her motion for an *in camera* review of

medical records, which she alleged had been altered; and (2) in allowing the defendant to read, utilize and introduce into evidence at trial privileged communications and work product. After our review, we affirm.

We refer to the record only as necessary to resolve the issues before us. On August 2, 2013, Brenda Robinson filed a complaint in Pike Circuit Court against Dr. Coleman-Compton, an optometrist. According to her complaint, Robinson saw Dr. Coleman-Compton on October 22, 2012, for an itchy right eye. Dr. Coleman-Compton prescribed drops. On October 30, 2012, Robinson returned for a follow-up appointment, underwent eye measurements, and received a prescription for glasses. On January 13, 2013, Robinson returned with complaints that her eyesight was not clear. Dr. Coleman-Compton checked the glasses and wrote a prescription for the right lens to be re-made.

While vacationing in Florida, Robinson experienced worsening vision. On February 4, 2013, she sought medical attention in Florida and was diagnosed with a full thickness macular hole in the right eye. Ultimately, Dr. Jack Hollins performed a successful surgical repair after she returned to Kentucky. Robinson alleged that Dr. Coleman-Compton failed to comply with the applicable standard of care by failing to discover and diagnose the developing macular hole.

Trial commenced on June 4, 2018. The jury found in Dr. Coleman-Compton's favor. On July 20, 2018, the court entered its judgment dismissing Robinson's complaint with prejudice.

On July 30, 2018, Robinson filed a motion for *in camera* review of her medical chart and for a new trial, arguing as follows:

> At the trial of this matter, [Dr. Coleman-Compton] was called to testify and produced what was claimed to be a complete set of Plaintiff's medical chart from her office. Plaintiff's counsel reviewed the same and discovered a blank form was included within the set of records that was not within the records that had been provided to Plaintiff during the course of discovery. [1]

Robinson maintained that the "attempt to insert the blank form into the medical records certainly could give the jury the impression that [she] did not report any applicable symptoms." Robinson asked the court to compel Dr. Coleman-Compton to produce the original office file in its entirety for review *in camera* and for a new trial under CR[2] 59.01(a), (b) or (c). In addition, Robinson argued that she was entitled to a new trial under CR 59.01(a) and (h)[3] because of

[1] The video record (6/6/18, 9:28:45) reflects that counsel approached the bench. Robinson's counsel objected to what had not been previously provided to him at Dr. Coleman-Compton's deposition. Defense counsel voluntarily agreed to remove the page to which counsel objected, stating "so, take that page out."

[2] Kentucky Rules of Civil Procedure.

[3] In relevant part, CR 59.01 provides that a new trial may be granted on the following grounds:

the "use, introduction and display of privileged documents to the jury[,]" namely a letter from her counsel to Dr. Hollins, a treating physician (Appellant's Brief, pp. 17-18).

In her response filed on August 9, 2018, Dr. Coleman-Compton explained that plaintiff was "attempting to argue that the Court should conduct an in camera review of the medical chart . . . on the basis that one Patient History record, a double-sided document, was missing the back page." We note that the subject document is a form entitled "Medical History Questionnaire." A copy of the front page of that form dated October 30, 2012, is attached as Appendix 3 to Appellee's Brief. At the bottom of the page, the form states: "***Please turn this form over and complete side two****" (emphasis original).

With respect to the letter Robinson's counsel sent to Dr. Hollins and his response, Dr. Coleman-Compton explained that this was not an attorney/client privilege scenario, nor was it a communication with a consulting expert and that Dr. Hollins was not listed as an expert on plaintiff's Rule 26 Expert Disclosure.

> (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
> (b) Misconduct of the jury, of the prevailing party, or of his attorney.
> (c) Accident or surprise which ordinary prudence could not have guarded against.
> . . .
> (h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

On August 15, 2018, the trial court entered an order denying Robinson's motion for an *in camera* review and her motion for a new trial. On August 21, 2018, Robinson filed a notice of appeal to this Court from the judgment entered on July 20, 2018, and from the order denying her motion for new trial entered on August 15, 2018.

Robinson's first argument on appeal is that the trial court erred in denying her motion for an *in camera* review and her motion for a new trial with respect to what she characterizes as the alteration of medical records tendered at trial. Whether to engage in an *in camera* review is a decision which rests within the trial court's sound discretion. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 818 (Ky. 2004). In reviewing the denial of a motion for new trial, the standard of our review is to determine whether the trial judge abused his discretion. *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky. App. 1992).

Robinson explains that at her discovery deposition, Dr. Coleman-Compton confirmed that the medical records which Robinson had requested and received were a complete set. However, Robinson claims that "[Dr. Coleman-Compton] and/or her counsel altered those medical records to include [at trial] a blank document directly related to the central issue of the litigation, i.e. whether, on October 30, 2012, Robinson presented with symptoms consistent with a macular hole."

Robinson claims that the addition of a blank form to the medical records left her with "serious doubt as to the true contents of Compton's office chart[.]" Robinson contends that she "was prejudiced by this surprise tactic." However, as noted above, the first page of the Medical History Questionnaire form clearly instructs the patient to turn the form over and complete side two. That instruction should have alerted Robinson that she only received the front side of the form dated October 30, 2012, in the set of medical records provided prior to trial. We find no abuse of discretion.

The second issue that Robinson raises on appeal is whether the trial court erred in denying a new trial when "Appellee is permitted to use a privileged letter from Counsel [for] Robinson to her treating physician on a consultant basis . . . throughout trial in contravention of the attorney work product doctrine . . . . Sowders v. Lewis, 241 S.W.3d 319 (Ky. 2007)." In relevant part, the letter states:

> Please be advised I am the attorney for Brenda Robinson, a well-established patient of yours. She was in your office last week for a follow-up examination and had some questions she intended to ask you. However, . . . Brenda did not have the time to ask you the questions she had. I have talked with her since then and she has requested that I get in touch with you to relay those questions.

The letter then asks three questions regarding treatment and discovery of a macular hole and whether the treatment regimen and prognosis would have

been different had the macular hole been discovered in mid-January rather than in early February. The letter further provides:

> Brenda has these unresolved questions in her mind and wanted your input on helping her resolve those questions. Of course, understanding this is taking up your valuable time, I would be willing to compensate you for your time in answering these questions.

In *Morrow v. Brown, Todd & Heyburn*, 957 S.W.2d 722, 724 (Ky. 1997), our Supreme Court explained that:

> The work-product doctrine is designed to protect an adversary system of justice, and is generally traced to the decision of the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).
>
> > In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.
>
> *Id.* at 510-11, 67 S.Ct. at 393.
>
> The Federal Rules of Civil Procedure substantially codified the *Hickman* decision in what is now Rule 26(b)(3). Its counterpart in the Kentucky Rules of Civil Procedure, CR 26.02(3)(a),[4] is patterned after the Federal Rule . . . .

[4] CR 26.02(3)(a) provides:

The letter to Dr. Hollins is not work product. It does not contain Robinson's counsel's mental impressions, conclusions, opinions, or legal theories. Nor does it fall within the scope of attorney-client privilege. We believe that Robinson's reliance upon *Sowders* is misplaced. In *Sowders,* the Kentucky Supreme Court held that the circuit court erred in denying the plaintiffs' motion to disqualify Dr. Bonnarens from testifying as a defense medical expert where he had previously consulted with the plaintiff's prospective co-counsel and opined that there was no violation of the standard of care. The Court explained that:

> The attorney-client privilege applies to a confidential communication "made to facilitate the client in his/her legal dilemma and made between two of the four parties listed in [KRE 503]: the client, the client's representatives, the lawyer, or the lawyer's representatives." *Haney v. Yates*, 40 S.W.3d 352, 354 (Ky. 2000). . . . [T]he attorney-client privilege attached to any confidential communications between Casi [plaintiffs' prospective co-counsel] and Dr. Bonnarens.

> Subject to the provisions of paragraph (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

> There is evidence that Casi . . . provided Dr. Bonnarens, a consulting medical expert, with work product. . . . Thus, there is great risk that Dr. Bonnarens' testimony could violate the attorney-client privilege.

241 S.W.3d at 322. In disqualifying Dr. Bonnarens, the Court declined "to employ a rule . . . that requires a finding of fact . . . as to exactly what the expert reviewed for the opposing party. A simple finding that the expert did review the case for the opposing party and gave an opinion is sufficient." *Id.* at 323.

In the case before us, Robinson contends that "there is even more connection between the parties to the letter" than in *Sowders.* We disagree. Robinson submits that "an active doctor/patient relationship would qualify Dr. Hollins to be [her] representative per the meaning of KRE 503."[5] Dr. Hollins was not Robinson's representative, nor was he a consulting medical expert. The letter from Robinson's counsel to Dr. Hollins contains no work product. Consequently, we find no abuse of discretion.

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[5] Kentucky Rule of Evidence (KRE) 503 is entitled Lawyer-Client Privilege. Subsection (2) defines "Representative of the client" as:

> (A) A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or
> (B) Any employee or representative of the client who makes or receives a confidential communication:
> (i) In the course and scope of his or her employment;
> (ii) Concerning the subject matter of his or her employment; and
> (iii) To effectuate legal representation for the client.

We AFFIRM the judgment of the Pike Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

John G. McNeill
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