

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2002-SC-0774-MR

DATE 11-13-03 EIA Growth, D.C.

KENTUCKY FARM BUREAU MUTUAL INSURANCE
COMPANY AND THE FB INSURANCE COMPANY

APPELLANTS/PETITIONERS

V.

APPEAL FROM COURT OF APPEALS
NO. 2002-CA-1366-OA
KNOX CIRCUIT COURT NO. 01-CI-01087

THE HONORABLE LEWIS B. HOPPER,
JUDGE, KNOX CIRCUIT COURT and

APPELLEE/RESPONDENT

GENE E. HURST

APPELLEE/REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants, Kentucky Farm Bureau Mutual Insurance Company and the FB Insurance Company ("Farm Bureau"), appeal from the Court of Appeals' denial of their petition for a writ of prohibition. In the petition, Farm Bureau sought to prevent discovery of a confidential company document prepared by a private consulting firm for the purpose of evaluating business practices from a field perspective. The trial court permitted disclosure of the document at issue, subject to the provisions of a protective order. For the following reasons we believe the trial court's resolution, undisturbed by the Court of Appeals, to be the most appropriate treatment of the issue.

For more than twenty-seven years, Gene E. Hurst,¹ Appellee herein, was the agency manager for Farm Bureau in Barbourville. In a letter dated May 18, 1999, Farm Bureau notified Hurst that his employment would be terminated as of May 28, 1999. Hurst was sixty-four years old. On November 7, 2001, Hurst filed the underlying civil action in the Knox Circuit Court, alleging age discrimination in violation of KRS 344.040, breach of an employment contract, and unconscionability of a 1995 Agency Manager's Agreement. Hurst also made a claim for unpaid commissions allegedly due under a "profitability program" for Farm Bureau agency managers. Farm Bureau denied the material allegations of the complaint, maintaining that Hurst was terminated because his agency was unprofitable, it appearing to have lost money for nine consecutive years for a total loss of \$1,839,600.00.

During discovery, Farm Bureau initially produced more than 1,000 pages of documents. Hurst thereafter filed a motion to compel production of

any and all responses, meetings, minutes, communications, and memoranda or documents regarding low morale among Farm Bureau agents and/or agency managers for any surveys conducted during calendar years 2000 or 2001... [and] [a]ny and all meeting minutes, communications, memoranda, survey responses or other documents regarding Gary Stivers' impact on morale among the agents and/or agency managers of Kentucky Farm Bureau.

This request for production described portions of the so-called "Nolan Report," which Hurst claims contains information about Gary Stivers, a former Farm Bureau Vice President who terminated him, and about the 'Loss Ratio Program,' which allegedly provided the basis for Hurst's termination. Farm Bureau identified this document in its response yet claimed that the report was exempt from discovery.

¹ Mr. Hurst passed away on September 12, 2002.

On May 23, 2002, the Knox Circuit Court granted Hurst's motion to compel production of the Nolan Report as well as the minutes of the Board of Directors' meeting relating to the termination of Gary Stivers, the Loss Ratio Program, and the abandonment of the Loss Ratio Program. The ordered disclosure of the minutes of the board meetings and the Nolan Report was subject to a protective order limiting disclosure as follows:

(i) the parties to this action; (ii) counsel of record in this action on behalf of any party to this litigation; (iii) employees or agents of such counsel who have direct responsibility for assisting such counsel in the preparation and trial of this matter; (iv) outside consultants and experts retained by such counsel and any party to this action for the purpose of assisting in the preparation and trial of this action; (v) witnesses interviewed or deposed in the course of this litigation, and/or consulted in preparation for, or during, any potential deposition, hearing, trial appearance or appeal in this action, whether or not scheduled.

On June 14, 2002, Farm Bureau filed a motion for reconsideration, specifically with regard to the Nolan Report. On June 25, 2002, the trial court overruled the motion for reconsideration.

The Nolan Report is an internal company document commissioned by Farm Bureau and prepared by a private consulting firm, the Robert E. Nolan Company. In late March 2001, almost two years after Hurst's termination, Farm Bureau retained the Nolan Company to conduct a comprehensive survey and analysis of its insurance operations from a field perspective. According to the affidavits of George Krempley, Senior Consultant for the Nolan Company, and Roger Simpson, Executive Vice President of the Kentucky Farm Bureau Mutual Insurance Companies, the objective of the Nolan analysis was to identify specific actions Farm Bureau could take to improve

its relationship with its local county boards, its agency managers and agents across the Commonwealth, and the board of the Kentucky Farm Bureau Federation.

Farm Bureau maintains that a key component of the project was confidentiality. As stated by Consultant Krempley in his affidavit, "We would not have been able to succeed in this environment without complete confidentiality." To encourage candid observations and insights, participants were assured that their contributions would be treated with the utmost confidentiality. During a four and one-half week period in 2001, ninety-seven insurance company and state Federation representatives met for individual and group interviews upon which the report was to be based.

The result of the survey was a report comprising forty pages of single-spaced text. In addition, the Nolan Company presented a ninety page PowerPoint® presentation to Farm Bureau's board of directors on June 13, 2001. Copies of the report itself were also shown to the board members on that day, but each copy of the report was numbered, and all copies were retrieved after the presentation. The Board members were not allowed to retain copies of the report.

According to Farm Bureau Executive Vice President Simpson's affidavit, the report "distills participants' insights, perceptions, opinions and anecdotes surrounding a wide variety of issues: organizational, job role accountabilities, data support, product offerings, trust, credibility, and even ethical and moral conduct within the organization." Simpson also maintained that

[t]he project did not recognize any sacred cows. It is highly critical of several areas of the company, from the underwriting department to the claims department to the sales department. It sets forth detailed strategy and detailed recommendations for several areas of the company. Not even the executive office is spared. The report devotes four

single-spaced pages to my performance and leadership...
The Report contains highly confidential, proprietary information about the Insurance Company's present state of affairs and a proposed blueprint for the future.

Consultant Krempley stated that the report addressed

[J]ob role definition, integration of job accountabilities, skill level requirements, transaction processing, strategy development, incentive plans, compensation and incentives, communications, trust, relationships, and a host of other discussion points ... We addressed root causes contributing to the less than optimal relationships among the Insurance Company, agency force and counties. We discussed symptoms which were the fallout from the root causes... It was our intention to present the field's view of the Insurance Company in the most blunt manner. We were highly critical of the underwriting department, claims department and sales department. We were critical of executive management. We even noted personal relationships among individuals that were perceived by the field to lack good judgment.

Both Simpson and Krempley maintained that Appellee Hurst was not mentioned in the report or presentation, and Krempley further stated that he had not heard of Hurst.

After the trial court denied reconsideration of its order compelling production of the Nolan Report, Farm Bureau sought a writ from the Court of Appeals prohibiting discovery of the document. As to the standard for granting a writ, the Court of Appeals held that the alleged irreparable harm was speculative, yet that if such harm did materialize, there was an adequate vehicle for relief based upon the confidentiality provisions in the trial court's order, which also gave leave to the parties to seek additional protection should the need arise. The Court of Appeals pointed out that it had not reviewed the report because it had not been submitted with the original action, and thus the trial court's decision was presumed to be correct because the trial court had reviewed the report. The Court of Appeals declined to decide whether the report

was a privileged trade secret upon the belief that the issue had not been presented to the trial court.

The record indicates that Farm Bureau did indeed present the trade secret argument to the trial court. The argument appears on pages 9-10 of Farm Bureau's memorandum opposing Hurst's motion to compel production. While the trial court's order failed to mention the issue, we are not prevented from considering it herein.

A writ of prohibition or mandamus is an extraordinary remedy, and courts traditionally have been cautious in granting such relief.² A writ may be granted when the inferior court is acting without jurisdiction, or is acting erroneously within its jurisdiction.³ For a writ to be granted in cases when jurisdiction is not conceded, a petitioner must show that 1) he would have no adequate remedy on appeal, and that 2) he would suffer great and irreparable injury if the trial court is acting in error and the writ is denied.⁴ Thus, Farm Bureau must show that it would not have an adequate remedy by appeal, and that irreparable harm would result from an erroneous decision of the trial court.

This Court has acknowledged that upon some discovery violations involving the erroneous disclosure of information, "a party will not have an adequate remedy by appeal because 'once the information is furnished it cannot be recalled.'"⁵ Thus, the first part of the standard for granting a writ is probably met here, and we must

² Bender v. Eaton, Ky., 343 S.W.2d 799, 800 (1961); Wal-Mart Stores, Inc. v. Dickinson, Ky., 29 S.W.3d 796, 800 (2000).

³ Bender at 800.

⁴ Wal-Mart at 800.

⁵ Wal-Mart, Inc. v. Dickinson, Ky., 29 S.W.3d 796, 800 (2000).

determine whether the disclosure of the report would be in error and would result in irreparable harm.

CR 26.02(1), the rule governing discovery, states in pertinent part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Farm Bureau contends that discovery of the entire Nolan Report is not proper because only parts of the document are relevant to the subject matter of the lawsuit. In support of this contention, Farm Bureau maintains that the report contains nothing about Hurst, nothing about age discrimination or breach of contract, and that it was prepared and presented to senior management more than two years after Hurst’s termination. Farm Bureau maintains that the relevant portions of the report containing information about Gary Stivers and the profitability program could be released without wholesale production of the report, and that this strategy is supported by Stidham v. Clark.⁶

In Stidham, a defendant charged with obtaining a prescription for a controlled substance by misrepresentation sought to prevent the release of his psychiatric records to the grand jury. This Court held that KRS 218A.280, which provides that information provided to a practitioner to unlawfully procure a controlled substance is not privileged, creates an exception to the psychotherapist-patient privilege. Thus, the Court held that only those portions of the psychiatric records reflecting a violation of the charged crime could be released, and the remainder of the records retained their KRE 507 privileged status.

⁶ Ky., 74 S.W.3d 719 (2002).

Farm Bureau further maintains that the Nolan Report is privileged as a trade secret, and thereby not a proper subject of discovery. KRS 365.880, the statute wherein Kentucky codified the Uniform Trade Secrets Act, states in pertinent part:

(4) Trade secret means information, including a formula, pattern, compilation, program, data, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not generally being known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Subsection (b) is clearly satisfied because Farm Bureau made extensive efforts to keep the report confidential. Care was taken to protect the identity of the interviewees, and the report was not distributed generally within the company but only at a board meeting, after which the copies were recovered.

As to the first trade secret requirement, Farm Bureau posits that it is met because the report is a compilation of information that would allow an unfair economic advantage to others if disclosed. Specifically, Farm Bureau contends that the criticism of management and the discussion of morale problems could assist a competitor in its employee recruiting efforts, in raiding Farm Bureau's workforce, and in its sales and marketing efforts. Farm Bureau also maintains that the recommendation and strategies for the future could unfairly help a competitor develop its own strategies and future action plans. Farm Bureau further contends that the report could help a personal injury lawyer in handling a bad faith claims case.

The foregoing contentions are highly speculative. As described, the Nolan report appears to be nothing more than a self-critical analysis and not the type of

document that would provide meaningful confidential information to the detriment of Farm Bureau. The trial court's protective order appears to be sufficient, and by its terms, Farm Bureau would be entitled to subsequent hearings in the event real dangers become manifest. Farm Bureau has had benefit of the provisions of CR 26.03(1)(g), and those provisions remain viable in this case.

CR 26.02 broadly grants parties a right of discovery where the information sought is relevant to the subject matter of the pending action. It is not grounds for objection "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."⁷ Hurst's agency agreement was terminated by Gary Stivers allegedly for poor profitability and a high loss ratio. Hurst believes the real reason was age discrimination to deny him commissions. The Nolan report analyzes business practices and employee perspectives. It is designed to improve employee relations and address other issues relating to the efficient operation of business. Such a report does not fall short of the standard set forth in CR 26.02.

In sum, we believe the trial court properly addressed the issue and took appropriate account of Hurst's entitlement to discovery and Farm Bureau's entitlement to protection from oppressive disclosure of confidential information. We affirm the Court of Appeals' denial of the writ of prohibition.

Lambert, C.J., and Johnstone, Keller, and Wintersheimer, JJ., concur. Cooper, J., files a separate opinion concurring in part and dissenting in part in which Graves and Stumbo, JJ., join.

⁷ CR 26.02(1).

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OPINION BY JUSTICE COOPER

CONCURRING IN PART AND DISSENTING IN PART

Appellee Hurst, the real party in interest, was formerly employed as an insurance agency manager by Appellant Kentucky Farm Bureau Mutual Insurance Company ("KFBM"). His employment was terminated by letter dated May 18, 1999, and signed by KFBM's then vice-president for sales, Gary Stivers. The letter did not state a reason for Hurst's termination. Hurst claims in the underlying action that his termination was motivated by age discrimination. KFBM asserts that Hurst was terminated because his agency was unprofitable, *i.e.*, the claims losses on policies sold by Hurst's agency exceeded the premiums paid under the company's "loss ratio" or "profitability" program.

Approximately two years after Hurst's termination, KFBM commissioned The Robert E. Nolan Company to conduct an internal field survey of all aspects of KFBM's management policies and to make recommendations as to how those policies could be modified to improve the company's efficiency and profitability. A substantial portion of the survey consisted of interviews with KFBM employees, including agency managers. Nolan's final report, consisting of forty pages of survey results and recommendations, was completed and furnished to KFBM's Board of Directors in June 2001. Shortly thereafter, Stivers retired from the company. Hurst believes the Nolan Report prompted Stivers's retirement, and that the report contains information substantiating his claim that his agency was not unprofitable and that his termination was motivated by age discrimination.

In response to a discovery request made pursuant to CR 26.02(1) and CR 34.01, the trial judge ordered KFBM to furnish a copy of the Nolan Report in its entirety to Hurst, subject to a protective order precluding use of the report for any purpose other than as needed in this litigation and ordering that all copies of the report in the possession of Hurst or his attorneys or witnesses be destroyed at the conclusion of the litigation. (The order does not explain how compliance with this latter directive is to be verified.) The order specifically permits Hurst to provide copies of the report to his expert witnesses who, of course, might include employees of KFBM's competitors. KFBM asserts that the Nolan Report is a "trade secret" and that its possession by a competitor would be damaging to KFBM's business interests. In the alternative, KFBM asserts that the trial judge should have conducted an in camera review of the Nolan Report to screen out information irrelevant to Hurst's claim. Cf. Stidham v. Clark, Ky., 74 S.W.3d 719 (2002).

A "trade secret" is defined by KRS 365.880(4), the "Uniform Trade Secrets Act," as follows:

- "Trade secret" means information including a formula, pattern, compilation, program, data, device, method, technique or process, that:
- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
 - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Without detailing KFBM's efforts to maintain the secrecy of the Nolan Report, suffice it to say, those efforts have been reasonable under the circumstances.

Nevertheless, after reviewing the Nolan Report in its entirety, I conclude that it does not fall within the definition of a "trade secret." While KFBM's desire to retain the confidentiality of a report that identifies and recommends solutions for internal management problems is understandable, I find it unlikely that a competitor could obtain any economic value from the information contained in the report. Furthermore, the fact that a document might be a "trade secret" does not exempt it from discovery. KRS 365.888 provides:

[A] court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

However, CR 26.02(1) permits discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." (Emphasis added.) See Triple Elkhorn Mining Co. v. Anderson, Ky., 646 S.W.2d 725 (1983) (writ issued to prohibit discovery in a trespass action of the defendant's income tax returns, business profits, and rates paid to others under contracts utilizing wheelage or tonnage

as the basis for compensation). The Nolan Report contains substantial information concerning KFBM's business operations and internal management procedures that is totally irrelevant to the issues joined by this litigation, i.e., whether Hurst was terminated because of age discrimination or because his agency was unprofitable. This irrelevant information should have been identified and excluded from discovery by a proper in camera review, viz:

The discovery order should have permitted discovery (subject to a proper protective order) only of those aspects of the report pertaining to "Claims Findings" (pages 15-17), "Sales Findings" (pages 17-20), "Agency Profitability Program" (page 20), "Agency Manager's Role" (page 21), "Life Insurance Excesses" (page 23), "Claims Recommendations" (pages 28-30), and "Sales Recommendations" (pages 34-38). However, discovery of the remainder of the report, including "Product, Pricing and Underwriting Findings" (pages 11-15), "Splitting Agencies" (pages 20-21), "Exceptions to Hiring Criteria" (page 21), "County Board Role in the Insurance Agency" (page 22), "Value of the District Sales Manager Role" (page 22-23), "Agents' Association" (page 23), "Underwriting Recommendations" (pages 26-28), and "Executive Vice President Issues and Recommendations" (pages 30-34), which are irrelevant to the issues pertaining to Hurst's termination, should have been denied.

Accordingly, I concur that portions of the Nolan Report are relevant and discoverable but dissent insofar as the majority opinion denies a writ prohibiting discovery of information irrelevant to the issues raised in the underlying action.

Graves, and Stumbo, JJ., join this opinion concurring in part and dissenting in part.