

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0677-MR

DATE 3-11-04 ELLAGROW H.D.C.

TANYA R. GREGORY

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
2003-CA-1273-OA
JEFFERSON CIRCUIT COURT NO. 2000-CI-4160

ANN O'MALLEY SHAKE, JUDGE

APPELLEE

AND

SHELTER MUTUAL INSURANCE COMPANY

REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Tanya R. Gregory, appeals as a matter of right from an order issued by the Court of Appeals denying her relief under CR 76.36. Because Gregory has failed to show that she was entitled to relief, we affirm.

Facts

Gregory was injured in a motor vehicle accident in March of 1999. Apparently, the accident was caused by the other driver, who carried only \$25,000 in liability insurance. Gregory submitted requests for coverage to both the tortfeasor's insurance company and to her own underinsurance motorist insurer, Shelter Mutual Insurance Company ("Shelter"). Trouble subsequently arose between Gregory and Shelter. As a

result, Gregory began preparing for litigation against Shelter. Part of this preparation included the retention of the services of Dr. Robert P. Granacher, Jr., M.D.

On June 28, 2000, Gregory filed suit against Shelter for breach of contract and bad faith. The trial court bifurcated the underlying contract claim from the bad faith claim. On February 13, 2002, Gregory and Shelter settled the breach of contract claim. In preparing for the bad faith claim, Shelter sought to discover the records and findings that Dr. Granacher had prepared in connection with his examination of Gregory.

Gregory moved to quash Shelter's subpoena duces tecum for these records arguing that they were protected from discovery under CR 26.02(4)(b), and CR 26.02(3)(a). The trial court denied the motion based on its conclusions that (1) the protections of CR 26.02(4)(b) and CR 26.02(3)(a) did not apply because Gregory did not retain Dr. Granacher in connection with her bad faith claim, and (2) Dr. Granacher's records and opinions were relevant to the bad faith claim.

Gregory then filed an original action in the Court of Appeals under CR 76.36 for a writ to prohibit the trial court from enforcing its order allowing discovery of Dr. Granacher's records. The Court of Appeals denied the petition based on its conclusion that Gregory failed to show irreparable harm resulting from the alleged violation.

Discussion

An original action is an extraordinary remedy. See, e.g., Wal-Mart Stores, Inc. v. Dickinson, Ky., 29 S.W.3d 796, 800 (2000). Where there is no claim that the trial court is acting outside its jurisdiction, to be entitled to relief the petitioner must show that "the lower court is about to act incorrectly . . . and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result." Southeastern United Medigroup, Inc. v. Hughes, Ky. 952 S.W.2d 195, 199 (1997)

(emphasis added). Thus, if the petitioner cannot show both inadequate remedy and irreparable injury, there is usually no reason to address the merits of the alleged error.

There is little question that Gregory has met the first prong. "As a practical matter, whenever a discovery violation occurs that allegedly allows discovery in error, a party will not have an adequate remedy by appeal because once the information is furnished it cannot be recalled." Dickinson, 29 S.W.3d at 800 (internal quotation marks omitted). Gregory, however, all but ignores the question of irreparable harm. The issue is not addressed until the concluding paragraph of her brief which states:

The Court of Appeals erred in finding that [Gregory] failed to show irreparable harm. Allowing the trial court's order to stand would result in a substantial miscarriage of justice, particularly since the civil rules at issue were expressly adopted for the protection of those in [Gregory's] position. . . . Kentucky litigants have a "present, valid expectation" that they may obtain information from consulting experts to prepare their case without fear that they will be required to disclose that information to their adversary.

In Bender, we rejected a very similar claim of irreparable injury, stating,

[I]t is alleged that great and irreparable injury will be suffered by the petitioners and others similarly situated. We do not believe injury of a ruinous nature can be shown. Compelling a party, in advance of trial, to produce for the benefit of his adversary information or evidence, even assuming he should not be required to produce it under the Rules, probably would not constitute "great and irreparable injury" within the meaning of that phrase.

Bender, 343 S.W.2d at 802.

Bender does acknowledge an exception to the irreparable injury requirement in special cases where "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration." Id. at 801. But no such concerns are present in this case.

The alleged error here embraces two issues: (1) whether the trial court correctly determined the relevance of the requested records, and (2) whether the trial court correctly determined that Dr. Granacher had not been retained in connection with the bad faith claim. Resolution of these issues would add very little to the proper interpretation of the civil rules in question. Compare this result with that reached in Dickinson, 29 S.W.3d at 801, which concluded that "the issue raised in this case concerning the proper application of CR 34.01 is sufficiently important that we may address the merits under the exception established in Bender."

Conclusion

For the reasons set forth above, the decision of the Court of Appeals is hereby affirmed.

Lambert, C.J.; Graves, Johnstone, Keller, Stumbo, and Wintersheimer, JJ., concur. Cooper, J., concurs in result only.

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