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**NOT TO BE PUBLISHED OPINION**

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RENDERED: MARCH 19, 2009  
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2008-SC-000506-MR

FINAL

DATE 4/9/09 Kelly Klaben D.C.  
APPELLANTS

MEADOWVIEW REGIONAL MEDICAL  
CENTER, LLC, DAVID LOVING AND  
LIFEPOINT HOSPITALS, INC.

V.

ON APPEAL FROM COURT OF APPEALS  
CASE NO. 2008-CA-000436-OA  
MASON CIRCUIT COURT CASE NOS.  
06-CI-00074 AND 06-CI-00345

HON. STOCKTON B. WOOD,  
JUDGE, MASON CIRCUIT COURT, ET AL

APPELLEES

## MEMORANDUM OPINION OF THE COURT

### AFFIRMING

Meadowview Regional Medical Center, LLC (hereinafter Meadowview), David Loving, and Lifepoint Hospitals, Inc. appeal the Court of Appeals' decision to deny their request for a writ prohibiting Judge Stockton B. Wood of the Mason Circuit Court from requiring Meadowview to disclose certain documents claimed to be protected by the attorney-client privilege. The documents in question relate to the death of Herberta Lang, who died as a result of complications following a surgery performed by Dr. John Christian Gunn, a vascular surgeon formerly employed by Meadowview. In denying the writ, the Court of Appeals reasoned that the attorney-client privilege did not apply because the requested documents were produced as part of

Meadowview's own internal investigation into Dr. Gunn's surgical performance and not in preparation for a legal defense. Meadowview now appeals to this Court as a matter of right, Kentucky Const. § 110(2)(a); CR 76.36(7)(a), arguing that the privilege should apply because the requested documents were part of the hospital's "investigation log," which was created at the request of its in-house counsel to aid in its legal defense. Agreeing that the attorney-client privilege does not apply to the requested documents, we affirm the Court of Appeals' decision to deny Meadowview's request for a writ of prohibition.

### **RELEVANT FACTS**

The underlying case in this appeal is a medical negligence action brought by the Estate of Herberta Lang. On December 6, 2005, Lang was admitted to Meadowview Regional Medical Center in Maysville, Kentucky, in order to undergo a right carotid endarterectomy, which was to be performed by Dr. John Christian Gunn, a newly employed vascular surgeon at Meadowview. In order to rectify complications that arose during Lang's surgery, Dr. Gunn was forced to ligate or "tie off" Lang's carotid artery and transfer her to Saint Joseph Healthcare facility in Lexington, Kentucky. Lang's complications persisted while at St. Joseph's, and she died two days later, on December 8, 2005. On March 1, 2006, Lang's Estate brought suit against Meadowview; its Corporate Executive Officer, David Loving; and Lifepoint Hospitals, the owner and operator of Meadowview, alleging that Dr. Gunn was an incompetent surgeon

who had been negligently granted operating privileges even after concerns about his competence had become known to the hospital.<sup>1</sup>

During the early stages of discovery, in January 2007, Lang's Estate requested that Meadowview produce David Loving's entire "investigation log," which recorded Loving's investigation of Dr. Gunn from November 28, 2005 until the time of Lang's surgery. In response, Meadowview argued that this log was protected by the attorney-client privilege because Loving had prepared it at the direct request of the hospital's counsel. On August 1, 2007, the trial court ordered Meadowview to submit a copy of Loving's investigation log so that it could conduct an *in camera* review and determine whether the attorney-client privilege applied. Following its review, the trial court denied the discovery request and did not require Meadowview to turn over Loving's investigation log.

Following additional discovery, Lang's Estate renewed its motion to compel the production of Loving's investigation log on November 20, 2007. In this motion, however, Lang's Estate only requested that Meadowview produce the portion of Loving's investigation log that pertained to Meadowview's December 21 and 22, 2005 Medical Executive Committee (MEC) meetings, during which the MEC interviewed two staff members who had been present during Lang's surgery, Jeff Lawson and Sherrie Goodwin. Loving, as

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<sup>1</sup> David Loving, Meadowview's CEO, stated that he began an investigation into Dr. Gunn's competency as a surgeon on November 28, 2005 (a week before Lang's surgery), after consulting with the hospital's counsel about the fact that two of Dr. Gunn's other patients had suffered complications following their surgeries. Dr. Gunn was a newly employed surgeon at Meadowview, having been granted temporary operating privileges on September 26, 2005, only two and a half months prior to Lang's surgery. Following Lang's surgery, on December 7, 2005, Dr. Gunn's temporary privileges were suspended.

Meadowview's CEO, took notes during these December 21 and 22 MEC meetings, and because the interviews of the staff members pertained to his investigation of Dr. Gunn, Loving inserted a typed version of these notes into his investigation log.<sup>2</sup> In seeking access to these MEC minutes, Lang's Estate argued that these particular records were not protected by the attorney-client privilege because the MEC meetings occurred as part of Meadowview's own internal investigation into Dr. Gunn and for the purpose of being able to make a recommendation to its Board. Further, Lang's Estate argued that minutes from several other MEC meetings had already been provided by Meadowview and there was no reason to exclude the minutes from the December 21 and 22 meetings, other than the fact they had been placed by Loving into his "investigation log." The trial court agreed, and on February 19, 2008, ordered Meadowview to produce the section of Loving's investigation log that pertained to the MEC's December 21 and 22 meetings, redacting "any 'opinions' or 'observations' made by Loving in his Investigation Log/notes." In response to this order, Meadowview sought a writ of prohibition from the Court of Appeals, arguing that the trial court was acting incorrectly by requiring them to produce documents protected by the attorney-client privilege. The Court of Appeals disagreed and denied the writ. This appeal followed.

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<sup>2</sup> Loving testified during his deposition that he did not know what happened to the original version of his notes from the December 21 and 22 MEC meetings.

## ANALYSIS

Whether to grant or deny a writ of prohibition is within the sound discretion of the court with which the petition is filed. Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992). Thus, an appellate court ultimately reviews that decision for an abuse of discretion, unless the question presented involves a question of law, which is reviewed *de novo*. Newell Enterprises, Inc v. Bowling, 158 S.W.3d 750, 754 (Ky. 2005). Although an assertion of the attorney-client privilege represents a mixed question of law and fact, Lexington Public Library v. Clark, 90 S.W.3d 53, 62 (Ky. 2002), in this case, the Court of Appeals based its denial of the writ on certain factual findings about the December 21 and 22 MEC meetings. See Newell Enterprises, Inc, 158 S.W.3d at 755 n. 13 (“[n]ormally it would be inappropriate for the Court of Appeals to find facts, but because it acts as the trial court in original actions, such findings are necessary”). Here, the Court of Appeals found that the attorney-client privilege did not apply because the December 21 and 22 MEC meetings were no different from any other MEC meeting; Meadowview produced the minutes from other MEC meetings without asserting a claim of attorney-client privilege; and even though the December 21 and 22 MEC meetings focused on Lang’s surgery and Dr. Gunn’s competence, the purpose of those meetings was to further Meadowview’s own investigation of Dr. Gunn and to formulate a final recommendation to Meadowview’s Board of Trustees. Convinced that the Court of Appeals did not err in making these findings and did not abuse its discretion in denying the writ, we affirm.

In Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004), this Court explained that

[a] writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Here, Meadowview argues that the trial court, although proceeding within its jurisdiction, is acting erroneously by ordering the production of documents protected by KRE 503. KRE 503 protects “confidential communication[s] made for the purpose of facilitating the rendition of professional legal services to the client.” Meadowview contends that because Loving created his investigation log at the direct request of counsel and for the purpose of furthering the hospital’s legal defense, the entire log, including the notes from the December 21 and 22 MEC meetings, is protected by KRE 503. We disagree.

This Court has held that whether the attorney-client privilege applies depends “not on what use was ultimately made of the communication, but on the facts and circumstances under which the communication was made.” Lexington Public Library, 90 S.W.3d at 59. Furthermore, when a business decision also has legal implications, “the business aspects of the decision are not protected simply because legal considerations are also involved.” *Id.* at 60 (internal quotations omitted). In this case, the record indicates that the MEC held the December 21 and 22 meetings not necessarily to prepare for the

hospital's legal defense, but rather, to further Meadowview's own investigation regarding Dr. Gunn and his future with the hospital and to aid in compiling its recommendation to the Board. The minutes to the December 20 MEC meeting, which Meadowview provided to Lang's Estate during discovery, stated that the MEC's strategy in dealing with Dr. Gunn was to "collect information about these cases and make a final recommendation to the Board at their next meeting." In furtherance of this goal, on December 21 and 22, the MEC interviewed Jeff Lawson and Sherrie Goodwin, two operating room staff members who were present during Lang's surgery. The MEC recognized these investigatory actions in the minutes of their January 9 meeting, noting that thus far, they had reviewed Dr. Gunn's charts, interviewed Dr. Gunn, and interviewed Lawson and Goodwin. Furthermore, these January minutes showed that pursuant to its previously stated goal, the MEC was planning on making its final recommendation to the Board at the tentatively scheduled February 10 meeting.

Despite the regulatory, business-oriented nature of the December 21 and 22 meetings, Meadowview argues that because Loving was directed to forward any documentation generated from the hospital's investigation back to counsel, his notes from these meetings are nonetheless privileged. However, even though Loving included these minutes in his investigation log and forwarded the log to the hospital's counsel, the fact remains that the December 21 and 22 meetings were conducted by the MEC first and foremost for the business purpose of furthering the hospital's own investigation, which means the notes



from those meetings are not confidential attorney-client communications protected under KRE 503. As noted above, communications made for business decisions are not protected by the attorney-client privilege, even if those decisions also involve legal considerations. Lexington Public Library, 90 S.W.3d at 60. Therefore, the Court of Appeals did not abuse its discretion in finding that Loving's notes from the December 21 and 22 meetings were discoverable and in denying Meadowview's request for a writ of prohibition.

### **CONCLUSION**

In this request for a writ of prohibition, Meadowview argued that it was entitled to a writ to prevent the trial court from requiring it to produce documents allegedly protected by the attorney-client privilege. However, the Court of Appeals agreed with the trial court that the requested documents arose by virtue of the hospital's own internal investigation and were not subject to the attorney-client communication protection of KRE 503. After having reviewed the record, we agree with the Court of Appeals and the trial court that because the MEC's December 21 and 22 meetings were conducted for the business purpose of furthering the hospital's own investigation of Dr. Gunn, Loving's notes from those meetings are not protected by the attorney-client privilege. Thus, we affirm the Court of Appeals denial of Meadowview's request for a writ of prohibition.

All sitting. All concur.

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