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RENDERED: JUNE 21, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000705-MR

JOHN MIKE BREEN, INCORRECTLY NAMED; CORRECT NAME-MICHAEL A. BREEN A/K/A MIKE BREEN — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000170-OA
WARREN CIRCUIT COURT NO. 06-CI-01764

HON. THOMAS CASTLEN, SPECIAL JUDGE WARREN CIRCUIT COURT, DIVISION I — APPELLEE

AND

HON. LANNA MARTIN KILGORE, ET AL. — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This writ case arises from a defamation suit filed by Real Party in Interest Larry Smith, through his attorney Real Party in Interest Lanna Kilgore, against Appellant Michael Breen. Breen appeals from an order of the Court of Appeals denying his petition for a writ of prohibition and mandamus against Appellee Judge Thomas Castlen. We affirm the Court of Appeals' denial of the writ with respect to Breen's assertions of religious privilege and his attempt to depose attorney Kilgore. However, we reverse and remand with instructions to grant the writ with respect to Breen's assertion of spousal privilege as to communications between Breen and his wife during their marriage.

I. BACKGROUND

In 2005, Larry Smith and his company, Timberpeg Construction, Ltd., filed a defamation suit against Michael Breen,[1] a Bowling Green attorney. Smith alleged that Breen made statements damaging to his and Timberpeg's reputation. Smith's attorney in the defamation suit is Lanna Kilgore. Both Kilgore and Breen were members of Living Hope Baptist Church (LHBC) in Bowling Green, and Kilgore's husband was also LHBC's executive pastor.[2]

At Smith's request, Kilgore arranged a meeting between Smith and Breen in the hopes of resolving their dispute. The meeting occurred on June 10, 2006 at Breen's office. Breen asserts that this was a "Matthew 18" meeting,[3] conducted under the auspices of LHBC, and that the meeting was therefore intended to be confidential. Smith, who is not associated with LHBC, denies that any such arrangement existed.

In addition, on multiple occasions following the filing of the lawsuit, Breen consulted with the church elders of LHBC. According to Breen, the purpose of these meetings was to seek spiritual advice and to determine the proper way to respond to the allegations against him. Of particular concern to

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[1] Breen and his late wife were third-party defendants.

[2] Smith, after consulting with separate counsel, waived any potential conflict created by his attorney, his attorney's husband, and Breen attending the same church. *See* SCR 3.130-1.7(b).

[3] *See* Matthew 18:15-17 ("Moreover if your brother sins against you, go and tell him his fault between you and him alone. If he hears you, you have gained your brother. But if he will not hear, take with you one or two more, that 'by the mouth of two or three witnesses every word may be established.' And if he refuses to hear them, tell it to the church. But if he refuses even to hear the church, let him be to you like a heathen and a tax collector."). It appears from the record that LHBC utilizes this procedure for intra-church conflicts.

Breen was the fact that a fellow church member, i.e., Kilgore, was the plaintiff's attorney in the lawsuit.

In the course of depositions, Breen repeatedly asserted a religious privilege against disclosure of the substance of his alleged "Matthew 18" meeting and his meetings with the LHBC elders. This resulted in an evidentiary hearing, which was held on September 21, 2010, before Judge Thomas Castlen.

During the hearing, Breen, being questioned by Kilgore, testified as follows:

> Q: Are those words, liar, cheat, thief, lying Larry, are those words you would have used to describe Larry Smith in 2005?
>
> A: I don't believe so.
>
> Q: Have you ever used those words to describe Mr. Smith or Timberpeg?
>
> A: Mrs. Kilgore, that question would require me to disclose confidential communications and I accordingly assert spousal privilege and I accordingly assert the clerical privilege.

Breen explained that the question would require him to disclose both private conversations with his late wife and the substance of the alleged "Matthew 18" meeting. During the course of the evidentiary hearing, Breen also again asserted a religious privilege with respect to his conversations with the LHBC elders.[4]

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[4] The court permitted Breen to assert a religious privilege with respect to discussions he had with several ministers.

Following the evidentiary hearing, counsel for Breen filed a motion to compel a limited deposition of attorney Kilgore as to all circumstances surrounding the scheduling and conduct of the alleged "Matthew 18" meeting. Kilgore filed a motion for a protective order to prevent the deposition.

In an order entered January 11, 2011, Judge Castlen overruled Breen's various assertions of religious and spousal privilege and ordered Breen to respond to Kilgore's questions within 14 days. In a separate order entered the same day, Judge Castlen granted Kilgore's motion for a protective order to prevent the taking of her deposition by attorneys for Breen.

Breen filed a petition for a writ of prohibition and mandamus with the Court of Appeals to (1) prohibit the compulsion of deposition testimony on the basis of religious and spousal privilege and (2) set aside the protective order shielding Kilgore from being deposed. The Court of Appeals concluded that the "Matthew 18" meeting and the meetings with the LHBC elders did not fall under the religious privilege and that Breen had failed to establish the applicability of the spousal privilege. The court also held that, because the "Matthew 18" meeting was not privileged, Kilgore's testimony about the circumstances of the meeting would be irrelevant, and therefore the protective order was not erroneous. Breen now appeals to this Court.

II. ANALYSIS

Whether to issue a writ is always discretionary. *Hoskins v. Maricle,* 150 S.W.3d 1, 9 (Ky. 2004). A writ of prohibition *may* be granted in two categories of cases, the first of which is "upon a showing that . . . 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 . . . ." *Id.* at 10. Breen, however, does not claim that the circuit court is acting outside its jurisdiction.

The second category of case in which a writ may be granted is where "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." *Id.* Within this second category, even where the petitioner does not stand to personally suffer irreparable injury, "in certain special cases," a writ may issue where "the administration of justice generally will suffer the great and irreparable injury." *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). *See also Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646, 649 (Ky. 2010).

"[W]here privileged information is in danger of being disclosed, there is no adequate remedy on appeal." *3M Co. v. Engle*, 328 S.W.3d 184, 188 (Ky. 2010) (citing *St. Luke Hosp., Inc. v. Kopowski*, 160 S.W.3d 771, 775 (Ky. 2005)). Further, discovery that threatens to disclose privileged information "implicates the 'certain special cases' subcategory of writ, in which the harm is to the administration of justice." *Id.* Breen has therefore met the prerequisites for issuance of a writ, and we must consider whether the trial court acted erroneously. For writs falling within the "certain special cases" subcategory, we conduct a *de novo* review of the decision of the Court of Appeals. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

The religious privilege is found in KRE 505:

> (a) *Definitions.* As used in this rule:
>
> (1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
>
> (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
>
> (b) *General rule of privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the person and a clergyman in his professional character as spiritual adviser.
>
> (c) *Who may claim the privilege.* The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

With respect to the alleged "Matthew 18" meeting between Breen and Smith, it is clear that neither participant meets the definition of a "clergyman" under KRE 505(a)(1). As the Court of Appeals noted, Breen is an attorney and Smith is a construction contractor. Neither man is a minister, and the meeting occurred at Breen's office – not a church. Neither participant is a "clergyman" as contemplated by KRE 505.

Breen argues that his assertion of privilege is not based on KRE 505, but "upon the primary tenet of the 'Matthew 18' conciliation conference arising from the biblical teachings of The New Testament," which requires

confidentiality. Kentucky law, however, recognizes no religious privilege aside from that found in KRE 505. Therefore, the trial court did not act erroneously when it ordered Breen to answer questions that implicated the substance of the "Matthew 18" conference.

Breen also met with the LHBC elders on multiple occasions, both individually and in groups. With respect to these conversations, Breen argues that he consulted with the elders for spiritual advice and that the elders meet the KRE 505(a)(1) definition of clergymen. According to Breen's testimony, he met with the elders for the purpose of deciding what to do about the litigation Smith had filed against him. Of particular concern to Breen was Kilgore's participation, given that she was a member of LHBC and her husband was the executive pastor.

The record includes the portion of LHBC's bylaws dealing with the duties of the elders. The bylaws establish that the elders' duties include "[s]piritual oversight of the congregation." However, their other duties include setting and reviewing policy, representing the congregation, responding to letters and phone calls, and managing the congregation and its employees. While the elders have some spiritual duties, as might be expected of any leader within a church, we agree with the Court of Appeals that the bylaws "seem to indicate that the Elders are tasked more with the administrative and business matters of the Church." They are not "similar functionar[ies]" to a minister, priest, or rabbi and are therefore not clergymen as contemplated by KRE 505. Nor has Breen established that he sought spiritual advice or intended that the

conversations be confidential. KRE 505(b). The trial court did not act erroneously in ordering Breen to answer questions that may disclose the substance of his communications with the LHBC elders.

We reach a different conclusion than the Court of Appeals, however, with respect to Breen's assertion of spousal privilege. KRE 504 governs the spousal privilege, and provides in relevant part:

> (b) *Marital communications.* An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

The Court of Appeals held that, because Breen's wife was not present at the alleged "Matthew 18" conference, Breen had failed to establish the applicability of the spousal privilege. However, Breen was asked, and ordered to answer, "Have you ever used those words [liar, cheat, thief, lying Larry] to describe Mr. Smith or Timberpeg?" The answer to this question is potentially far broader than the substance of the "Matthew 18" meeting and, according to Breen, implicates private conversations he had with his late wife. Therefore, to the extent that the question would require Breen to disclose confidential communications made only to his wife during their marriage, Breen's writ petition should be granted.

Finally, we consider whether the Court of Appeals erred in denying Breen's petition for a writ of mandamus to set aside the circuit court's

protective order shielding attorney Kilgore from being deposed. The same standard applies regardless of whether the petitioner seeks a writ of prohibition or a writ of mandamus. *See Hodge v. Coleman*, 244 S.W.3d 102, 109 n.25 (Ky. 2008). Because this petition does not implicate the "certain special cases" subcategory, we review the decision of the Court of Appeals for an abuse of discretion as to whether the writ is available and appropriate. *See Grange Mut. Ins. Co.*, 151 S.W.3d at 810.

We agree with the Court of Appeals that, because the substance of the alleged "Matthew 18" meeting is not privileged, any questions to Kilgore about the circumstances surrounding the meeting would be irrelevant. *See* KRE 401. Therefore, the Court of Appeals did not abuse its discretion in denying Breen's petition for a writ of mandamus.

III. CONCLUSION

With respect to the issue of spousal privilege, the order of the Court of Appeals is reversed, and the case remanded with instructions to issue a writ of prohibition preventing Breen from being required to disclose confidential communications made only to his wife during their marriage. In all other respects, the order of the Court of Appeals is affirmed.

Abramson, Cunningham, Noble, Schroder, Scott, and Venters, JJ., concur. Minton, C.J., not sitting.

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