IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00591-COA

BUTLER SNOW LLP AND DONALD CLARK JR. **APPELLANTS**

v.

ESTATE OF MARK STEVENS MAYFIELD, ROBIN MAYFIELD, WILLIAM MAYFIELD, AND OWEN MAYFIELD **APPELLEES**

DATE OF JUDGMENT:	03/12/2018
TRIAL JUDGE:	HON. PATRICIA D. WISE
COURT FROM WHICH APPEALED:	HINDS COUNTY CHANCERY COURT, FIRST JUDICIAL DISTRICT
ATTORNEYS FOR APPELLANTS:	ALAN W. PERRY STEPHEN L. THOMAS SIMON TURNER BAILEY
ATTORNEYS FOR APPELLEES:	DORSEY R. CARSON JR. JULIE SKIPPER NOONE
NATURE OF THE CASE:	CIVIL - OTHER
DISPOSITION:	REVERSED, RENDERED AND REMANDED - 06/11/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BARNES, C.J., TINDELL AND McCARTY, JJ.

McCARTY, J., FOR THE COURT:

¶1. This is a case about discovery—how it is initiated, how it is conducted, and who is privy to it. In the chancery court, a plaintiff sought information pursuant to a bill of discovery. The case was then sealed. The information obtained in the case was used to support a lawsuit against defendants in a separate federal action. The defendants then sought to intervene in the state court case, but the chancery court denied their request.

¶2. Finding that the defendants should have been allowed to intervene, we reverse and

render. We likewise reverse and render the decision to seal the case, because it was not done in accord with recent Mississippi Supreme Court precedent to conduct a balancing test, and there is nothing in this record warranting a seal.

BACKGROUND

¶3. A federal district court has provided a detailed examination of the facts giving rise to this appeal. *See Mayfield v. Butler Snow LLP*, 341 F. Supp. 3d 664, 666 (S.D. Miss. 2018). It began during the 2014 Senate race between then-incumbent and the late United States Senator Thad Cochran, and a challenger, State Senator Chris McDaniel. Certain supporters of Senator McDaniel, not directly affiliated with his campaign, were convinced that Senator Cochran was straying from his marriage of many years to Mrs. Rose Cochran. The supporters developed a plan to "out" Senator Cochran for having an affair. This plan would be supported by "exposing" that Mrs. Cochran was incapacitated and bedridden in a private care home located in Madison, Mississippi.

¶4. Individuals gained access to Mrs. Cochran's room in the private care home. They took a video of her and later posted it on YouTube. The video ignited a fire, although not in the way that the devisers of the plan had hoped. The video, and those who were believed to have recorded it or aided in its recording, were reported to various law enforcement agencies in Madison County. Counsel for Senator Cochran, the Butler Snow law firm, "told the Mayor of the City of Madison, Mary Hawkins-Butler, that the incident should be treated criminally, as it was a possible case of exploitation of a vulnerable adult." *Id.* at 667.

¶5. Law enforcement began to investigate, and ultimately arrested four different suspects

for a variety of crimes, including burglary and conspiracy. One of the persons arrested was attorney Mark Mayfield. The police executed search warrants on his home and office, and afterward the lawyer lost at least one major client. A little over a month later, he committed suicide.

¶6. His family retained lawyers to investigate whether they had claims against Butler Snow, among others. The family's counsel used a tool of investigation called a bill of discovery to seek information about what had happened leading up to the arrest of the men. The family filed two bills of discovery—one in the Hinds County Chancery Court and one in the Madison County Chancery Court.

¶7. During oral argument, counsel for Mayfield's family described the receipt of massive amounts of information from the bill of discovery. Several thousand pages of documents were received in response to subpoenas duces tecum issued under the bill of discovery, and multiple depositions were taken, including those of minors.

¶8. Counsel then used this data as a basis for a lawsuit against Butler Snow, a partner at the law firm, the mayor of Madison, various law enforcement personnel, and others. *Id.* at 668. The theory of liability against Butler Snow was that it should not have reported the video to law enforcement because there was not probable cause to suspect a crime had been committed. *Id.* at 669.

¶9. Once the federal suit was filed, Butler Snow learned about the two bills of discovery that had been used to dig up information. The proceeding in Hinds County Chancery Court had previously been sealed after motion by counsel for the family. The family asserted that

"[g]iven the underlying matters' sensitivity in that they involve political campaigns, a suicide, criminal prosecutions, and may involve pleadings referring to current or former elected officials," the case should be sealed, in order to "protect the integrity of the case from attention and media coverage that might hamper the investigation." The chancery court granted the motion and sealed the case to "protect[] from public dissemination" all that had happened.

¶10. The firm sought to intervene in the Hinds County Chancery Court proceeding and to have the case unsealed. The chancery court denied both requests. As to the request for intervention, the chancery court ruled that "because Butler Snow and [its partner] were not parties to the case, they shall not be heard on the Motion to Intervene and to Unseal Court Record."

¶11. Subsequently, the federal district court dismissed every claim asserted against Butler Snow and its partner. *Id.* at 670-71. "The bottom line is that [the partner] and Butler Snow had probable cause to believe that a crime had been committed," the district court held, and as a result "[t]hey are not liable for their report to the Madison Police Department." *Id.* at 671.

¶12. Seeking to determine what exactly had been obtained under the sealed bill of discovery, Butler Snow appealed the chancery court's rulings.

DISCUSSION

I. The appeal is not moot.

¶13. As an initial matter, the Court must first determine if it has a dispute before it.

Without a live controversy, an appeal will be dismissed as moot. *Gartrell v. Gartrell*, 936 So. 2d 915, 916 (¶7) (Miss. 2006).

¶14. During the briefing of this case, the Mayfield family argued that the appeal was moot because the Butler Snow defendants had been dismissed from the federal lawsuit. Although Butler Snow and its partner were dismissed from the lawsuit, not all parties were dismissed. Under this scenario the case is still in controversy because the district court's ruling can be "modified or rescinded at any time before final judgment [is] entered," and under the Federal Rules "a district court retains jurisdiction over a case after a decision which is merely interlocutory and thus can reexamine its initial decision until final judgment[.]" *Braswell v. Invacare Corp*., 760 F. Supp. 2d 679, 682 (S.D. Miss. 2010). Furthermore, during oral argument, counsel for the Mayfield family was emphatic that they would appeal the district court's ruling to the Fifth Circuit Court of Appeals.

¶15. As a result, there remains a live controversy between the parties, and so the case is not moot. *See also Morgan v. XLK Int'l LLC*, 255 So. 3d 1271, 1277 (¶22) (Miss. 2018) (holding that a dispute over the sealing or unsealing of a matter provided sufficient controversy to defeat the doctrine of mootness).

II. The law firm is a proper intervener.

¶16. Our Rules of Civil Procedure allow intervention both as a matter of right and in those instances when a trial court might grant permission. M.R.C.P. 24(a)-(b). The language of the Rule is broad: "Upon timely application, *anyone* shall be permitted to intervene in an action" as a matter of right, given certain conditions. M.R.C.P. 24(a) (emphasis added).

First, "when a statute confers an unconditional right to intervene," and second, "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Id.*

¶17. As to permissive intervention, the Rule again states that "*anyone* may be permitted to intervene in an action . . . when a statute confers a conditional right to intervene," or in a situation "when an applicant's claim or defense and the main action have a question of law or fact in common." M.R.C.P. 24(b) (emphasis added).

¶18. The two subsections of the Rule have different standards of review; by its nature intervention as a matter of right is a legal question, and permissive intervention requires the insight of a trial court. Accordingly, "permissive intervention receives an abuse-of-discretion review . . . ." *Kinney v. S. Miss. Planning & Dev. Dist. Inc*., 202 So. 3d 187, 196 (¶25) (Miss. 2016). "However, intervention of right receives a de novo review because the Court is reviewing a question of law." *Id*.

¶19. Butler Snow urges that it can travel either path toward intervention, although it does not claim that a statute allows an unconditional or conditional right to intervene. Instead, it argues that it has an interest in the discovery, and that no existing party can adequately represent it.

¶20. The action at hand is a bill of discovery, which "is an original action that may be pursued when there is no other remedy . . . ." *Kuljis v. Winn-Dixie Montgomery LLC*, 214

So. 3d 283, 285 (¶5) (Miss. 2017). "The bill of discovery is a viable equitable action and remedy in chancery court" but cannot be used in certain situations, such as a precursor to a personal injury suit where the discovery could be obtained in the suit itself. *Id.* at (¶4). Although the bill of discovery initiates a lawsuit, it does not seek damages like a complaint in circuit court; nor does it seek equitable relief, like a request for an injunction in chancery court. The cause of action for a bill of discovery seeks only information.

¶21. Although common law and the pre-Rules era had looser standards for gathering data, for decades now our Rules of Civil Procedure have governed discovery. As Mississippi Civil Rule of Procedure 1 reminds us, "These rules govern procedure in the circuit courts, *chancery courts*, and county courts in *all* suits of a civil nature, *whether cognizable as cases at law or in equity* . . . ." (Emphases added). Therefore the Rules explicitly apply to causes of action for a bill of discovery, as they do to all civil causes of action.

¶22. The Supreme Court has broken Rule 24 down into a set of four factors which must be met. The party seeking intervention must show that (1) it made a "timely application," (2) it had "an interest in the subject matter of the action," (3) it was "so situated that disposition of the action may as a practical matter impair or impede his ability to protect his interest," and (4) its "interest [was] not already . . . adequately represented by existing parties." *Guar. Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 381 (Miss. 1987).

¶23. As to the first point, Butler Snow sought to intervene after learning in federal court of the existence of the bill-of-discovery action in chancery court. As to the second point, the law firm has an interest in the discovery of information related to any causes of action

Mayfield's family might have, and the law firm certainly has an interest in the information that was purposefully developed in order to craft a lawsuit against Butler Snow and its partner. As to the third point, the bill of discovery was unknown to the law firm and was further sealed. So Butler Snow's ability to protect its interest was completely impaired.

¶24. As to the fourth point, there were no parties to the bill of discovery except for Mayfield's family members, who were seeking to gain information to determine if they could actually sue Butler Snow. Therefore it was not only that Butler Snow's interest was not adequately protected by existing parties, it had no one protecting its interest at all. We are reminded that "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action." M.R.C.P. 1. It would not be just to allow one party to initiate a cause of action for discovery and conduct ex parte discovery through subpoenas duces tecum and depositions, and in turn deny an interested party access to the information obtained or a full ability to defend themselves from the use of that information. Our trial courts are not dusty streets at high noon where one gunslinger hopes to get the drop on another. The Rules were adopted and implemented and will continue to be enforced so as to minimize gamesmanship and ambush. Under Rule 24(a), the law firm should have been allowed to intervene as a matter of right.

III. A balancing test must be conducted before a record is sealed.

¶25. "Mississippi law favors public access to public records . . . ." *Estate of Cole v. Ferrell*, 163 So. 3d 921, 925 (¶18) (Miss. 2012). "Court filings are considered to be public records, unless otherwise exempted by statute." *Id.* at (¶15). "The law allows courts to

determine when information should be declared confidential or privileged, exempting it from the Public Records Act." *Id.* at 929 (¶33).

¶26. As *Estate of Cole* explains, the Legislature actually requires sealing certain types of records, such as certain youth court records, or confidential financial information. *Id.* at 924 (¶10). In general, "parties may request that the trial court seal certain documents," at which point "the trial court may, in its discretion, limit the public's access to those records." *Id.* That discretion in sealing likewise provides us with a deferential standard of review, for in "determining whether the action taken by the court is proper, we review for an abuse of discretion." *Id.* at (¶11).

¶27. In analyzing whether to seal a record, the Supreme Court explained that a trial court must "balanc[e] the parties' competing interests—the public's right of access versus confidentiality." *Id.*; *accord Miss. Dep't of Corr. v. The Roderick & Solange MacArthur Justice Ctr.*, 220 So. 3d 929, 951 (¶78) (Miss. 2017) (noting the balancing test to weigh the public right of access against the private desire to seal the record from review).

¶28. Recently, the Supreme Court was faced with a sealed divorce file that contained serious allegations of the sexual abuse of underage children. *Smith v. Doe*, 2016-CA-00875-SCT, 2018 WL 549404 (Miss. Jan. 25, 2018). "Given the allegations raised and evidence presented in this appeal, th[e] Court ha[d] significant public health and safety concerns." *Id.* at *5 (¶27). It "therefore remand[ed] the chancellor's order sealing the court file for the trial court to conduct the balancing test set out in *Estate of Cole* . . . and determine whether the court file should remain under seal." *Id.*

¶29. In this case, there is no indication the chancery court conducted the balancing test in any fashion. The only request to the chancery court was from Mayfield's family to seal the matter to shield against all public scrutiny. During oral argument, counsel for Mayfield's family admitted that any need for sealing the record was lessened by the pendency of the federal suit, which injected the allegations back into the public sphere. Despite this admission, the Mayfield family has actively used the seal as a shield against discovery in the federal litigation, to conceal what information it obtained pursuant to the bill of discovery.

¶30. Our review of the record shows that it does not contain confidential information, or indeed any information, that warrants a seal; as set out above, no balancing test was performed prior to sealing. The three-volume record before us primarily contains notices of subpoenas issued, depositions taken, and various other pretrial matters. The record does not contain the responses to the subpoenas duces tecum, deposition transcripts, or other documents obtained in discovery. We therefore reverse and render, unsealing the trial court record. We take no position on whether the information gained in the suit below is discoverable in the federal action, since that will be determined by the magistrate and district court in that pending action.

CONCLUSION

¶31. For the above reasons, the case is not moot, the Butler Snow defendants are allowed to intervene, and the seal over the trial court record is dissolved. This matter is remanded to the chancery court for further proceedings consistent with this opinion.

¶32. **REVERSED, RENDERED AND REMANDED.**

BARNES, C.J., WESTBROOKS, TINDELL, McDONALD AND LAWRENCE, JJ., CONCUR. J. WILSON, P.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. CARLTON, P.J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. GREENLEE AND C. WILSON, JJ., NOT PARTICIPATING.