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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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ACTION.

RENDERED: FEBRUARY 20, 2014

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000445-MR

FINAL

DATE 3-13-14 East Ground P.C.

MICHAEL J. O'CONNELL, IN HIS OFFICIAL
CAPACITY AS JEFFERSON COUNTY
ATTORNEY; AND SHELLEY SANTRY, IN
HER FORMER CAPACITY AS AN
ASSISTANT JEFFERSON COUNTY
ATTORNEY

APPELLANTS

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2013-CA-000205-OA
JEFFERSON CIRCUIT COURT NO. 06-CI-007802

HON. FREDERIC J. COWAN, JUDGE,
JEFFERSON COUNTY CIRCUIT COURT

APPELLEE

AND

BRUCE ALAN BRIGHTWELL;
THE CITY OF JEFFERSONTOWN, KENTUCKY;
AND DETECTIVE ROSCOE SCOTT

REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On March 2, 2005, Bruce A. Brightwell, a licensed attorney in the Commonwealth of Kentucky, was charged in the Jefferson District Court with one count of intimidating a participant in the legal process, one count of harassing communications, and two counts of terroristic threatening. Detective Roscoe Scott of the Jeffersontown Police Department was the investigating officer. The criminal complaint alleged that Brightwell sent

threatening messages to the victim of a criminal case through use of his Yahoo Instant Messaging account.

In order to conduct forensic testing, Detective Scott obtained a search warrant and seized Brightwell's computer. A subsequent charge of tampering with physical evidence was filed on July 21, 2005. Assistant Jefferson County Attorney Shelley Santry was the prosecutor who filed the additional charge. Brightwell maintains that Santry filed the charge based on Detective Scott's claim that Brightwell had hidden or destroyed evidence of the purported messages. A probable cause hearing was held on September 15, 2005. The detective who performed the forensic testing on Brightwell's computer testified that there was no evidence that Brightwell tampered with his computer. Consequently, the district court dismissed the tampering with physical evidence charge. In regards to the other charges, Brightwell ultimately pled guilty to harassing communications and received a diverted sentence.

On September 6, 2006, Brightwell filed a civil complaint against Detective Scott and the City of Jeffersontown. Brightwell's complaint alleges abuse of process, malicious prosecution, intentional infliction of emotional distress, and a violation of 42 U.S.C. § 1983. The basis for Brightwell's lawsuit is that Detective Scott made false statements to Santry in order to induce her to file the tampering with physical evidence charge despite there being no evidence to support it.

Detective Scott denied these allegations in his answers to Brightwell's first set of interrogatories. Detective Scott further identified Santry as a

witness who could substantiate his defense. Accordingly, Brightwell filed a *subpoena duces tecum* and *ad testificandum* compelling Santry's deposition and requiring her to produce, among other things, documents pertaining to the filing of the tampering with physical evidence charge. Michael O'Connell, the Jefferson County Attorney, on behalf of Santry (collectively referred to as "County" or "Appellants"), filed a motion to quash the subpoena. Appellants argued that the requested documents comprised the County's entire litigation file, including privileged documents. Before a hearing on the matter was conducted, both parties reached an agreement whereby Santry agreed to answer interrogatories and provide communications between her and Detective Scott relating to the tampering with physical evidence charge. Santry also reserved the right to object to the production of documents due to the work-product doctrine.

Soon thereafter, Santry answered Brightwell's interrogatories and requests for production of documents. Santry admitted that, while there were oral communications between her and Detective Scott concerning the tampering charge, she could not remember any specifics. In addition, Santry withheld documents pursuant to the work-product exception to Kentucky Rules of Civil Procedure ("CR") 26.02(3)(a). Brightwell, being less than satisfied with Santry's discovery responses, urged the trial court to allow for her deposition.

On August 4, 2008, the trial court issued a detailed order on the discovery dispute. The trial court found that the work-product privilege did not

protect Santry's information or documents since neither she nor the County were named parties in Brightwell's action. The trial court also stated that even assuming the work-product privilege applied, Brightwell made the required showing, pursuant to CR 26.02(3)(a), that he was in substantial need of the information and was unable to obtain the substantial equivalent information by other means. As a result, Santry was ordered to appear at a deposition and provide Brightwell with "all documents generated while the underlying prosecution of Brightwell was pending, which in any manner relate to the decision to charge Brightwell with Tampering with Physical Evidence, including but not limited to all reports, memos, correspondence, or notes which were relied upon in making that charge."

Appellants immediately filed a petition for a writ of prohibition in the Court of Appeals. On August 18, 2009, the Court of Appeals, agreeing with trial court's conclusions, denied the petition. Appellants then appealed to this Court. In a fifteen-page opinion and order dated May 20, 2010, this Court reversed the Court of Appeals' denial of the writ of prohibition. *O'Connell v. Cowan*, 332 S.W.3d 34 (Ky. 2010). While we agreed that CR 26.02(3)(a) did not apply to Santry's information or documents, we acknowledged that CR 26.02(3)(a) failed to fully incorporate "the broader work-product doctrine recognized in *Hickman v. Taylor*, [329 U.S. 495, 510-11 (1947)]." *Id.* at 40. In formulating this conclusion, we focused on the special need to protect prosecutorial work product while also cautioning that the privilege is not absolute. *Id.* at 40-42.

This Court's opinion also explained how a lower court should evaluate the disclosure of information which is subject to the work-product privilege. Particularly, we re-emphasized the distinction "between primarily factual, non-opinion work product, and opinion work product, also called 'core' work product, which includes the 'mental impressions, conclusions, opinions, or legal theories of an attorney.'" *Id.* at 42 (quoting *Morrow v. Brown, Todd and Heyburn*, 957 S.W.2d 722, 724 (Ky. 1997)). We then ruled that prosecutorial opinion work product from a prior criminal prosecution enjoys a heightened protection requiring a compelling need for its disclosure. Indeed, the disclosure requests must go "to the pivotal issue in the subsequent litigation and the need for the material must be compelling." *Id.* at 43 (quoting *Morrow*, 957 S.W.2d at 726).

Notwithstanding the trial court's failure to differentiate whether Santry's work product was factual or opinion, we concluded that, in all likelihood, the work product sought was that of Santry's opinion. *Id.* at 43-44. Therefore, the trial court's "substantial need" standard was improper and a compelling need analysis was required. *Id.* This Court remanded the case to the Court of Appeals for an order granting the writ of prohibition and instructions to the trial court to do the following: "[R]e-evaluate the request for discovery of Santry's opinion work product under the heightened 'compelling need' standard discussed in this opinion and conduct an *in camera* review of the material before permitting discovery of such information." *Id.* at 45.

Upon remand, and by order dated January 3, 2013, the trial court ordered the Appellants to turn over to the court “for *in camera* inspection any and all documents [Appellants] have withheld from [Brightwell] based on the work product privilege.” The trial court further ordered Appellants to produce a privilege log of each document and the reasons for its non-disclosure. After that time, the trial court would conduct an *in camera* review of the documents and determine if the privilege applied. Lastly, the trial court stated that it would release documents to Brightwell which were “not legally and factually supported in the privilege log.”

Once again, Appellants filed a petition for a writ prohibiting the trial court from enforcing its new discovery order. Appellants also filed a motion for emergency relief. The Court of Appeals denied both motions, noting that “[r]eview of the circuit’s discovery order establishes that it is doing precisely what the Supreme Court directed it to do.” Appellants now appeal to this Court as a matter of right pursuant to CR 76.36(7)(a).

Writs can be divided into two classes—those in which “the inferior court allegedly is (1) acting without jurisdiction (which includes ‘beyond its jurisdiction’), or (2) acting erroneously within its jurisdiction.” *Bender v. Eaton*, 343 S.W.2d 800 (Ky. 1961). We are focused on the second class of writs. In these cases, an appellate court has discretion to grant a writ of prohibition upon a showing that the court is (1) acting or is about to act erroneously; (2) there exists no adequate remedy by appeal or otherwise; and (3) great injustice and irreparable injury will result if the petition is not granted. *Hoskins v.*

Maricle, 150 S.W.3d 1, 10 (Ky. 2004). Additionally, we note that writs are reserved for “extraordinary cases and are therefore discouraged” *Cox v. Braden*, 266 S.W.3d 792, 796 (Ky. 2008) (citing *Buckley v. Wilson*, 177 S.W.3d 778, 780 (Ky. 2005)).

Based on the mere claim that privileged documents may be disclosed, Appellants have proven the threshold showing of a lack of an adequate remedy by appeal, and that they will suffer great and irreparable injury. *See The St. Luke Hospitals, Inc. v. Kopowski*, 160 S.W.3d 771, 775 (Ky. 2005) (citing *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 800–01 (Ky. 2000) (“[E]xtraordinary relief is warranted to prevent disclosure of privileged documents [since] [t]here is no adequate remedy on appeal because privileged information cannot be recalled once it has been disclosed.”)). Having determined that Appellants may avail themselves of this extraordinary remedy, we now look to the claimed errors. Appellants place forth three arguments to support their contention that the trial court acted erroneously, or will act erroneously, by way of enforcing its discovery order. First, Appellants argue that the trial court erred in failing to make a pre-requisite finding that Brightwell was entitled to an *in camera* review. Secondly, Appellants believe the discovery order deprives them of their right to contest the court’s ruling regarding whether the privilege applies before disclosing the information to Brightwell. Thirdly, Appellant’s argue that the trial court’s order errs in its failure to prohibit Brightwell from deposing Santry. We will address each alleged error in turn.

Threshold Showing For In Camera Review

As discussed, this Court's previous opinion ordered the trial court to conduct an *in camera* review of Santry's withheld documents. Even so, the trial court was still obligated to first find that Brightwell was entitled to an *in camera* inspection. To be deserving of an *in camera* review, Brightwell was required to show, by a preponderance of the evidence, that the review would reveal evidence "that the communication or material is either outside the scope of [] the privilege or falls within a specified exception to the privilege." *Stidham v. Clark*, 74 S.W.3d 719, 727 (Ky. 2002). Once this showing is made, the decision to conduct an *in camera* review rests soundly within the discretion of the trial court. *Id.*

Despite Appellants' argument, the trial court did indeed make the pre-requisite finding in its discovery order. The trial court specifically stated the following:

[B]y a preponderance of the evidence [] it is reasonable to believe that this *in camera* inspection may yield evidence that establishes an exception to the work product privilege This Court also finds that this *in camera* review is necessary because it may reveal factual or opinion work product for which plaintiff has a compelling need in this case.

We note that the trial court did not impart its reasoning into its discovery order. However, we can assume, based on the extensive procedural history of this case and the trial court's previous rulings, that it properly analyzed whether an *in camera* inspection would reveal evidence that the privilege would be overcome by a compelling need. For instance, in the trial court's earlier

August 4, 2008 order, the court essentially anticipated a compelling need exception to the privileged material. In particular, the trial court stated that the privileged documents or communications were needed “to either support [Brightwell’s] claims against the defendants or, as discussed at the hearing, to dismiss his claims in their entirety. He has attempted to obtain the information by other less intrusive means and has been unsuccessful. Thus, he is left with no other alternative” Clearly, the trial court has made the pre-requisite finding that an *in camera* review of what otherwise may be privileged documents may establish a compelling need for the disclosure of the documents.

In addition, Appellants supply a related argument that Brightwell was required to resubmit arguments or briefs in order for the trial court to conduct a compelling need analysis. Yet, our directive was for the trial court to re-examine Brightwell’s arguments under this heightened standard. Brightwell, in his own professional judgment, had the option of submitting new arguments or case law tailored to the compelling need standard. However, he certainly was not required to do so. Therefore, regardless of Brightwell’s subsequent litigation tactics, we believe the trial court properly determined that an *in camera* review would likely demonstrate a compelling need exception to the work product privilege.

Procedures Before Disclosure

Next, we address Appellants’ claim that the trial court’s discovery order deprives them of their right to contest an abrogation of the privilege before

disclosure. This argument is based on the trial court's discovery order, which states that it "will order any document produced that is withheld under any claim of privilege that is not legally and factually supported by the privilege log." Appellants interpret this sentence to mean that the trial court will provide Brightwell with privileged documents after an ultimate determination that the compelling need exception applies without first holding a hearing or giving proper notice.

We agree with Appellants that whether an exception applies is a far more rigorous analysis requiring a heightened standard of review than the less intrusive hurdle of obtaining an *in camera* review. *U.S. v. Zolin*, 491 U.S. 554, 572 (1989) (stating that an "*in camera* inspection . . . is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure."). Nonetheless, whether this heightened standard affords Appellants an opportunity to be heard before a subsequent disclosure is not an issue properly before us. The trial court's order is directed to the Appellants. It in no way indicates that the court will disclose privileged material without notice or a hearing, thereby depriving Appellants the opportunity to remonstrate. On the contrary, the trial court is merely burdening Appellants to provide a detailed privilege log which will aid the court in determining whether or not the privilege applies to the documents in the first place. *See General Motors Corp. v. Chauvin*, No. 2004-SC-0338-MR, 2005 WL 119747, *6 (Ky. Jan. 20, 2005). We do not find that the trial court's order requiring disclosure of

what it determines to be non-privileged documents as a “truly extraordinary” situation requiring a writ of prohibition.

Santry’s Oral Deposition

Lastly, Appellants urge this Court to issue a writ prohibiting Brightwell from deposing Santry. This argument is premature. The trial court’s discovery order makes no mention that it will or will not allow Brightwell to depose Santry. It goes without saying that, before we can determine whether the trial court is proceeding erroneously, the trial court must make a ruling on the issue. The trial court, however, has yet to determine whether privileged information is even at stake and, if so, whether an exception to the privilege applies.

Conclusion

For the aforementioned reasons, we affirm the Court of Appeals’ order denying Appellants’ petition for a writ of prohibition. The Jefferson Circuit Court may compel Appellants to produce for *in camera* inspection any and all documents that have been withheld from Brightwell based on the work-product doctrine.

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

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