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Supreme Court of Kentucky

2019-SC-0216-MR
2019-SC-0244-MR

GAIL HARKINS, APRN; CANDIS MILLER-FOX; MEMORIAL HOSPITAL, INC., D/B/A CLAY COUNTY PRIMARY CARE CENTER A/K/A WEEKEND EXPRESS CLINIC; SAM VORKPOR, M.D.; AND TAMMY LEWIS — APPELLANTS/CROSS-APPELLEES

ON APPEAL FROM COURT OF APPEALS
V. NO. 2018-CA-1145
CLAY CIRCUIT COURT NO. 15-CI-00076

HONORABLE OSCAR GAYLE HOUSE, JUDGE, CLAY CIRCUIT COURT — APPELLEE

AND

BILLY WELLS; AND DAVID SCOTT WELLS AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF LORETTA WELLS — REAL PARTIES IN INTEREST/ CROSS-APPELLANTS

AND

2019-SC-0217-MR

LENORA CAMPBELL, APRN; HAITHAM ALSAHLI, M.D.; JENNIFER CEDILLO; TRACY TURNER; EVONNE SHEPHERD; AND MEMORIAL HOSPITAL, INC. — APPELLANTS

ON APPEAL FROM COURT OF APPEALS
V. NO. 2018-CA-1144
CLAY CIRCUIT COURT NO. 13-CI-00381

HONORABLE OSCAR GAYLE HOUSE, JUDGE, CLAY CIRCUIT COURT — APPELLEE

AND

WILLIE PENNINGTON BY AND THROUGH HIS GUARDIAN, CHARLENE WAGERS — REAL PARTY IN INTEREST

OPINION OF THE COURT BY JUSTICE NICKELL

REVERSING AND REMANDING

We are called upon in these separate but related appeals to determine the propriety of the decisions of the Court of Appeals denying Appellants' petitions seeking writs of prohibition. In these medical malpractice actions, Appellants—medical providers and their employers—contend the Clay Circuit Court erred in finding their joint counsel had actual conflicts of interest requiring disqualification and the Court of Appeals should have granted the requested writs. For the following reasons, we reverse the Court of Appeals' decisions and remand with directions to grant Appellants' writ petitions.

The historical facts underlying these appeals are largely unimportant to our decision, thus requiring only an abbreviated recitation to set the stage for our analysis. On December 26, 2012, Willie Pennington presented at Clay County Primary Care Center with complaints of pain in his lower left leg, left foot, and left toe. Nurse Practitioner Lenora Campbell performed a physical

examination and believed Pennington had a muscle strain. She ordered imaging studies to verify her findings and eliminate other possible causes of the pain. Those studies were performed the same day at Manchester Memorial Hospital[1] and revealed no acute abnormalities or evidence of deep venous thrombosis. Pennington presented to Clay County Primary Care Center again on December 28, 2012, complaining of unresolved left leg pain. Additional imaging studies were ordered, and some were performed on January 3, 2013.[2] Two days later, Pennington arrived at the emergency department of Manchester Memorial Hospital with complaints of extreme lower left leg pain. Dr. Haitham Alsahli examined Pennington and ordered additional testing. Based on the results of the tests, his examination, and improvement in pain levels while being treated in the emergency room, Dr. Alsahli diagnosed Pennington with muscle strain and discharged him with instructions to present to his regular physician or return to the hospital if his symptoms did not improve within five days. Pennington received no further treatment at any Memorial Hospital, Inc., facility or from any of its employees. Subsequently, Pennington underwent a failed vascular graft surgery at an unrelated hospital followed several weeks later by an above-the-knee amputation of his left leg. Pennington filed suit

[1] Clay County Primary Care Center and Manchester Memorial Hospital are assumed names of Memorial Hospital, Inc., and all individual medical providers were employed by Memorial Hospital, Inc., at all relevant times during Pennington's care and treatment.

[2] Pennington's poor kidney function prohibited completion of one of the ordered tests.

against Memorial Hospital, Inc., Clay County Primary Care Center, and Campbell alleging negligence in his treatment on December 26, 2012, and against Dr. Alsahli for treatment rendered on January 5, 2013. No claims were raised related to Pennington's care by other providers subsequent to his release by Dr. Alsahli on January 5. Pennington is represented by Annette Morgan-White and Yancey L. White. Attorneys Joseph M. Effinger and Matthew A. Piekarski were retained to represent the named medical defendants in the action.

On November 8, 2014, Loretta Wells presented to Memorial Hospital, Inc.'s Weekend Express Clinic for treatment of a persistent cough.[3] Tammy Lewis was the registration clerk who signed Wells in, and treatment was provided by Nurse Practitioner Gail Harkins and medical assistant Candis Fox (now Miller-Fox).[4] Wells was diagnosed with bronchitis and Harkins ordered Miller-Fox to administer doses of the same antibiotic and steroid which had resolved similar complaints by Wells approximately six months prior. Shortly after receiving the injections, Wells was found collapsed on the floor, not breathing and without a pulse. Harkins began CPR and ordered Lewis to call 911. Emergency responders arrived within moments, taking over Wells' care and loading her into an ambulance. She was diagnosed with anaphylaxis at

[3] Wells was accompanied by her husband, Billy Wells, who complained of a similar malady and received similar treatment.

[4] Dr. Sam Vorkpor, Harkins' collaborating physician, was available for consultation but was not physically present during Wells' visit. Dr. Vorkpor had no participation in Wells' care.

Memorial Hospital, Inc., and subsequently transferred to the University of Kentucky Medical Center for care. Unfortunately, she passed away without regaining consciousness. Her husband and estate filed suit against Harkins and Weekend Express Clinic for malpractice, asserting administering the antibiotic led directly to Wells' demise. Her care after leaving the Weekend Express Clinic was not challenged. Attorneys Morgan-White and White represent the plaintiffs; attorneys Effinger and Piekarski were retained to represent the named medical defendants in the action, subsequently appearing to represent Lewis and Miller-Fox at their respective depositions.[5]

On February 23, 2017, Pennington moved to disqualify Effinger and Piekarski from representing "Memorial Hospital, Inc. and related defendants," asserting the existence of an actual conflict of interest. Pennington argued Effinger and Piekarski's representation of the named parties was in direct conflict with their representation of Jennifer Cedillo, the technologist who performed one of the imaging studies of Pennington's leg. He claimed the representation of Cedillo, a non-party fact witnesses, was improper and undertaken only to achieve a tactical advantage for their "actual" client, Memorial Hospital, Inc. Pennington contended the multiple representation deprived him of the ability to conduct *ex parte* discovery and to prepare for trial. He also asserted the practice was a fraud upon the judicial system. It was undisputed Pennington was not and had never been a client of or

[5] At the time of their depositions, Lewis and Miller-Fox were no longer employed by Memorial Hospital, Inc.

represented by Effinger or Peikarski, nor has he imparted any confidential or privileged information to either attorney. When the disqualification motion was filed, the case had been pending for over three years, discovery was mainly completed, and the only matters Pennington had been denied access to were details regarding the attorney-client relationships between Effinger, Piekarski, and the medical providers. Pennington filed at least five briefs in the trial court attempting to support his quest for disqualification, each time asserting different reasons; Pennington likewise raised additional and differing arguments during evidentiary hearings on the motion.

Appellants vehemently sought to retain Effinger and Peikarski as counsel, claiming any conflict of interest claims belonged solely to them and therefore Pennington had no standing to raise the issue. Further, Appellants contended no conflict existed between any of the medical personnel or their employers as all asserted the treatment of Pennington had been proper and non-negligent, and all were pursuing a unified defense. Appellants accused Pennington of overreaching in an attempt to fabricate a conflict where none existed. Further, Appellants averred Pennington had not been precluded from access to any discoverable information, testimony, or documentation because of the multiple representation.

Similarly, on July 27, 2017, Wells moved to disqualify Effinger and Piekarski, also asserting existence of an actual conflict of interest. Again, the matter had been pending for a significant length of time and discovery was nearly complete. The primary basis for disqualification urged by Wells related

to the assertion of attorney-client privilege during the depositions of Lewis and Miller-Fox which were completed nearly a year prior to filing the disqualification motion. Wells asserted the multiple representation resulted in a deprivation of the ability to conduct *ex parte* discovery and the inability to obtain a single document.[6] As did Pennington, Wells filed multiple pleadings asserting new and varying reasons purporting to support disqualification. It was undisputed Wells was not and had never been a client of Effinger or Peikarski and had never imparted confidential or privileged information to either attorney.

In response, Appellants raised the issue of standing to assert a conflict of interest, asserted no factual or legal conflict existed amongst any of them, insisted they were pursuing a unified defense, and denied any and all assertions by Wells of a conflict of interest as spurious and fabricated solely in an attempt to obtain a tactical advantage.

Following evidentiary hearings on the motions for disqualification convened on August 22, 2017, all parties tendered briefs supportive of their respective positions. Several months later, on June 18, 2018, the trial court entered its lengthy orders in these matters. The trial court first concluded Pennington and Wells, while having no prior or current attorney-client relationship with Effinger or Peikarski, had standing to assert a conflict of

[6] Interestingly, the trial court subsequently overruled all assertions of privilege, ordered production of the single document, and granted Wells' motion to compel Harkins, Lewis, and Miller-Fox to answer the few questions they had previously been instructed by counsel not to answer.

interest on behalf of the Appellants under SCR[7] 3.130 (Rule 1.7).[8] Basing its decision on two unpublished federal district court cases from Michigan, and state court decisions from Georgia and Delaware, the trial court found a party may assert a conflict of interest of an opposing party "where the violation of the

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[7] Rules of the Supreme Court of Kentucky.

[8] SCR 3.130 (Rule 1.7) states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

rules are [sic] sufficiently severe to call in question the fair and efficient administration of justice and/or the rights of the movant are prejudiced."

The trial court then went on to find the existence of actual conflicts of interests because the multiple representation by Effinger and Peikarski of parties and non-party fact witnesses could result in a difference in interests which could impair the attorneys' professional judgment; multiple representation of the medical parties was "fertile soil" for a "point your finger defense" wherein one party or witness would attempt to shift liability to another; other conflicts were "obvious"; and the assertion of an affirmative defense to punitive damages revealed "the defense attorneys primary goal is to guard the best interests of their client, Memorial Hospital, if necessary, to the detriment of their other clients." The findings related to adverse interests of the jointly represented parties appear to be based almost entirely on the assertions of Appellees.

The trial court fully granted Pennington's request for disqualification. As for Wells, the trial court partially granted disqualification, imposed significant restrictions and limitations on counsel's activities and participation, struck the asserted affirmative defenses to punitive damages, and required separate counsel for all parties during any settlement negotiations or mediations.

The Kentucky Court of Appeals subsequently denied separate petitions seeking writs of prohibition. Like the trial court, the Court of Appeals relied on federal authorities to conclude Pennington and Wells had standing to raise a conflict of interest of opposing counsel, finding trial courts have inherent

authority to disqualify counsel if the orderly administration of justice would otherwise be impaired. The Court of Appeals went on to hold the trial court's findings that actual conflicts existed because the interests of the parties and non-party fact witnesses were adverse were supported by substantial evidence. The Court of Appeals noted no written conflict waivers appeared in the record. As for the limitations on presentation of evidence and defenses, the Court of Appeals determined an adequate remedy existed by appeal, thereby rendering issuance of a writ inappropriate. These separate appeals followed as a matter of right. Because of the great similarities of the legal issues presented and in the interest of judicial economy, we have chosen to address these appeals in a single opinion.

Appellants assert the Court of Appeals erred in concluding the trial court correctly found Pennington and Wells had standing to raise a conflict of interest in these matters and further erred in affirming the trial court's determination regarding existence of an actual conflict of interest. Thus, Appellants seek writs prohibiting the trial court from disqualifying their counsel of choice.

"The issuance of a writ is an extraordinary remedy that is disfavored by our jurisprudence. We are, therefore, cautious and conservative both in entertaining petitions for and in granting such relief." *Caldwell v. Chauvin*, 464 S.W.3d 139, 144-45 (Ky. 2015) (internal citations and quotation marks omitted). In *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004), we noted writs 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.

Appellants seek writs of the second class. Lack of an adequate remedy by appeal or otherwise is an initial prerequisite in seeking such a writ. If such a showing is made, it must then be shown absent issuance of a writ great injustice or irreparable harm will occur. If great injustice and irreparable injury cannot be shown, a writ may still be available in "certain special cases," that is, if "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 20 (quoting *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961)). By granting a writ "in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury." *Bender*, 343 S.W.2d at 801. Issuance of a writ is inherently discretionary, so our review of the Court of Appeals' decision is for an abuse of discretion. *Caldwell*, 464 S.W.3d at 145-46.

In *Marcum v. Scorsone*, 457 S.W.3d 710, 716 (Ky. 2015), we held disqualification of an attorney is not an appealable issue in civil cases and therefore no adequate remedy exists. Likewise, we determined the "certain special cases" exception was applicable in a challenge to a disqualification order and a writ action is the appropriate vehicle for mounting such a

challenge. *Id.* Thus, we conclude Appellants have satisfied the burdens of showing entitlement to seek issuance of a writ.

Disqualification of counsel is a "drastic measure" that "courts should be hesitant to impose except when absolutely necessary. Disqualification separates a party from the counsel of its choice with immediate and measurable effect." *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 560 (Ky. 2001) (citing *University of Louisville v. Shake*, 5 S.W.3d 107 (Ky. 1999)). A party seeking disqualification of opposing counsel must "show an actual conflict, not just a vague and possibly deceiving appearance of impropriety. And that conflict should be established with facts, not just vague assertions of discomfort with the representation." *Marcum*, 457 S.W.3d at 718.

The trial court determined Effinger and Peikarski should be disqualified based on perceived violations of the Kentucky Rules of Professional Conduct raised by Appellees. It concluded Appellees had standing to raise the issue because the violation was severe and called into question the fair administration of justice. The Court of Appeals agreed with these findings. However, in so doing, the trial court and the Court of Appeals have adopted a minority rule which we expressly reject. As litigants normally do not go out of their way to protect the interests of their opponents, motions to disqualify opposing counsel where no prior attorney-client relationship existed should generally be viewed with a skeptical eye.

The preamble to the Kentucky Rules of Professional Conduct states

> [v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a

> case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in a pending litigation. . . . [T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

SCR 3.130 Kentucky Rules of Professional Conduct, Preamble, § XXI. As explained by the Fifth Circuit, "[a]s a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification." *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 88-89 (5th Cir. 1976) (collecting cases).

> To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist. It would place in the hands of the unauthorized surrogate powerful presumptions which are inappropriate in his hands. Courts do not generally examine the motives of a moving party in a disqualification motion. Once the preliminary showing is made by the former client, the motion must be granted regardless of whether the former client gains an advantage at the expense of his adversary. We are reluctant to extend this where the party receiving such an advantage has no right of his own which is invaded.

Id. at 90 (internal citations omitted).

In *Dana Corp. v. Blue Cross & Blue Shield Mut. of Northern Ohio*, the Sixth Circuit noted in the federal system

> [a] three-part test for disqualification exists: (1) a past attorney-client relationship existed between the party seeking disqualification and the attorney it seeks to disqualify; (2) the subject matter of those relationships was/is substantially related; and (3) the attorney acquired confidential information from the party seeking disqualification. *City of Cleveland v. Cleveland*

> *Electric Illuminating*, 440 F.Supp. 193, 207 (N.D.Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996, 98 S.Ct. 1648, 56 L.Ed.2d 85 (1978).

900 F.2d 882, 889 (6th Cir. 1990). Consistent with these authorities, and our reading of the pertinent Rules of Professional Conduct, we conclude a general requirement exists that to raise a conflict of interest and seek disqualification of counsel, a party must be a current or former client of the attorney against whom disqualification is sought.

We need not—and do not today—determine whether a non-client may ever have standing to assert an alleged conflict of opposing counsel. However, in our view, a non-client's standing to raise an alleged conflict of interest by opposing counsel is questionable at best. Absent an unethical change of sides or a violation so open and obvious it compels a court to act, the ability of a non-client to "champion the rights" of an opponent typically does not exist. *See FMC Technologies, Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1156 (W.D. Wash. 2006) (citing *In re Yarn*, 530 F.2d at 89). No such circumstances are present in this case sufficient to confer standing on Appellees. The trial court and the Court of Appeals erred in not so finding.

Further, the Appellees' continually shifting reasoning and their failure to point to a single issue of fact revealing an actual conflict after years of litigation exposes the weakness of their position. It further reveals the true purpose of the motions: to gain a tactical advantage and wrest control of attorney selection from the opposition. Morgan-White's own affidavit states she files disqualification motions in every case where an attorney represents multiple

parties, regardless of whether she believes an actual conflict exists. This is the very sort of weaponizing which should be avoided.

We are convinced Appellants have shown all parties represented by Effinger and Piekarski have agreed to joint representation and a unified defense has been and continues to be asserted against all of Appellees' claims. There appear to be no factual, legal, or strategic conflicts among any of Effinger and Piekarski's clients. Although the trial court and Appellees can conjure potential scenarios where conflicting interests might possibly emerge, that is simply not enough. The appearance-of-impropriety standard was rejected in *Marcum* wherein this Court held "there should be something more substantive than just a *possible* conflict before disqualification takes place." 457 S.W.3d at 717. Thus, contrary to the holdings of the trial court and the Court of Appeals, even if Appellees had standing to raise an alleged conflict—which they do not—we discern no issue exists here warranting the draconian sanction of attorney disqualification. The trial court's disqualification orders were improper and writs of prohibition barring their enforcement is the appropriate remedy.

For the foregoing reasons, the decisions of the Court of Appeals are reversed, and the matters are remanded to that court to issue the requested writs.

All sitting. All concur.

COUNSEL FOR APPELLANTS:

Joseph M. Effinger
Patricia Colleen Le Meur
Ryan Daniel Nafziger
Matthew Allan Piekarski
Phillips Parker Orberson & Arnett PLC

APPELLEE:

Honorable Oscar Gayle House
Judge, Clay Circuit Court

COUNSEL FOR REAL PARTIES IN INTEREST:

Alice Annette Morgan-White
Yancey Lee White
Morgan & White Law Offices