

SUPREME COURT OF KENTUCKY

Michael Bradley Sowders, Michael Glen Sowders, and Pamela Sowders v. Hon. Thomas R. Lewis, Special Judge, Whitley Circuit Court

241 S.W.3d 319 (Ky. 2007) · No. 2007-SC-000043-MR · Decided December 20, 2007

SUMMARY

The Supreme Court of Kentucky reviewed a petition for a writ of mandamus seeking to disqualify a medical expert who had previously consulted with the plaintiffs' prospective co-counsel. The court held that the expert should be disqualified because confidential attorney work product and privileged communications were at risk, and the plaintiffs lacked an adequate remedy by appeal. The court affirmed the denial of relief concerning defense counsel and the request to strike the defendants' answer.

CASE DETAILS

COURT	Supreme Court of Kentucky
WRITING FOR THE COURT	Justice Scott; Chief Justice Lambert; Justice Abramson; Justice Cunningham; Justice Minton; Justice Noble; Justice Schroder
JURISDICTION	Kentucky
DECIDED	December 20, 2007
DOCKET	2007-SC-000043-MR
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal as a matter of right from the Kentucky Court of Appeals' denial of a petition for a writ of mandamus seeking to compel the Whitley Circuit Court to disqualify a consulting expert, disqualify opposing counsel, and strike the defendants' answer.
STANDARD OF REVIEW	A decision to deny a writ of mandamus is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published Kentucky Supreme Court opinion; binding precedent in Kentucky.
PARTIES	Michael Bradley Sowders, Michael Glen Sowders, Pamela Sowders v. Hon. Thomas R. Lewis, Special Judge, Whitley Circuit Court

TOPICS

writ of certiorari

appellate procedure

work product doctrine

privilege

expert testimony

PRACTICE AREAS

civil procedure

appellate procedure

evidence

attorney-client privilege

medical malpractice

QUESTIONS PRESENTED

1. Whether the Court of Appeals abused its discretion by denying mandamus relief to prevent Dr. Bonnarens from testifying as a defense expert after he had previously reviewed the case for prospective plaintiffs' co-counsel.
2. Whether mandamus relief was warranted to disqualify defense counsel.
3. Whether the defendants' answer should be stricken.

HOLDINGS

1. When an expert reviews a case for one side before litigation and gives an opinion, that circumstance is sufficient to require the expert's disqualification from testifying for the opposing side; the court need not make a detailed finding about exactly what materials the expert reviewed.
2. Mandamus is available when a lower court acts erroneously, there is no adequate remedy by appeal or otherwise, and great injustice or irreparable injury will result; those requirements were satisfied because permitting the expert to testify could disclose protected information that could not be recalled.
3. Mandamus relief disqualifying defense counsel was properly denied because no evidence established that counsel became privy to information protected by the attorney-client or work-product rules.
4. The request to strike the defendants' answer was properly denied because striking the answer was not relevant to the privilege and expert-disqualification issue presented.

KEY QUOTATIONS

"A writ of mandamus is an "extraordinary remedy which compels the performance of a ministerial act or mandatory duty where there is a clear legal right or no adequate remedy at law." (241 S.W.3d at 322)

"A simple finding that the expert did review the case for the opposing party and gave an opinion is sufficient." (241 S.W.3d at 323)

FACTUAL BACKGROUND

The plaintiffs brought a medical-malpractice action concerning the alleged failure to diagnose and treat their son's septic hip. Before suit, plaintiffs' counsel provided work product to prospective co-counsel Paul Casi, who consulted Dr. Frank Bonnarens, an orthopedic surgeon, about the case; Bonnarens gave an opinion that there was no violation of the standard of care. Bonnarens later agreed to serve as an expert for the defense, despite informing defense counsel that he had previously reviewed the case for Casi. The evidence conflicted regarding whether Bonnarens received work product, but the Supreme Court concluded that the circumstances and undisputed consultation warranted disqualification.

PROCEDURAL HISTORY

In an underlying medical-malpractice action, the circuit court denied the plaintiffs' motion to disqualify Dr. Frank Bonnarens after he had consulted with prospective plaintiffs' co-counsel and was later retained as a defense expert. The Court of Appeals denied the plaintiffs' mandamus petition for failure to satisfy their burden of proof. The Kentucky Supreme Court reversed in part, directed issuance of a writ concerning Dr. Bonnarens, and affirmed the denial of relief concerning opposing counsel and the defendants' answer.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the Court of Appeals' denial of the writ as to Dr. Bonnarens and remand for entry of a writ of mandamus compelling the circuit court to disqualify him. The denial of relief concerning defense counsel and striking the defendants' answer was affirmed.

CASES CITED

- County of Harlan v. Appalachian Reg'l Healthcare, Inc., 85 S.W.3d 607, 613 (Ky. 2002)
- Newell Enterprises, Inc. v. Bowling, 158 S.W.3d 750, 754 (Ky. 2005)
- Haney v. Yates, 40 S.W.3d 352, 354 (Ky. 2000)
- St. Luke Hospitals, Inc. v. Kopowski, 160 S.W.3d 771, 775 (Ky. 2005)
- FTC v. GlaxoSmithKline, 294 F.3d 141, 144 (D.C. Cir. 2002)
- Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004)
- Bender v. Eaton, 343 S.W.2d 799, 802 (Ky. 1961)
- Newsome v. Lowe, 699 S.W.2d 748, 752 (Ky. App. 1985)