IN THE COURT OF APPEALS OF TENNESSEE
AT MEMPHIS

CAMELIA GIBSON AND SANDRA GORDON
v.
JOHN D. RICHARDSON AND THE STATE OF TENNESSEE, BY AND THROUGH BILL GIBBONS, SHELBY COUNTY DISTRICT ATTORNEY GENERAL

An Appeal from the Chancery Court for Shelby County
No. 02-2312-1(2) Arnold Goldin, Chancellor

No. W2002-03027-COA-R7-CV - Filed January 17, 2003

This case involves the scope of the attorney-client privilege. In April 2002, a daycare van was involved in an accident, killing some and injuring others. Multiple lawsuits were filed arising out of the accident. Subsequently, counsel for the daycare's insurance company took sworn statements of the owners and other employees of the daycare. Eventually, the tort litigation was settled. Meanwhile, the State began a criminal investigation of culpability for the accident. The State obtained a subpoena in general sessions criminal court ordering the insurance company's attorney to turn over the sworn statements. The daycare owners who gave the statements then filed a petition for a writ of certiorari in the chancery court below, seeking to stay enforcement of the subpoena and asserting that the sworn statements were protected by the attorney/client privilege. The chancery court declined to issue the stay. The daycare owners now appeal. We affirm, finding that the chancery court's decision was not unlawful, fraudulent, arbitrary, or capricious.

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Chancery Court is Affirmed

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. GLENN, S.J., joined.

Jeffrey S. Rosenblum and Marc E. Reisman, Memphis, Tennessee, for the appellant, Camelia Gibson.

Eugene A. Laurenzi and Bobby F. Martin, Jr., Memphis, Tennessee, for the appellant, Sandra Gordon.

John D. Richardson, Memphis, Tennessee, appellee, pro se.

Thomas D. Henderson, Memphis, Tennessee, for the appellee, State of Tennessee.

ORDER AND OPINION

On April 4, 2002, a daycare van operated by Wesley Hudson and transporting six children was involved in a one-vehicle crash. The daycare van was transporting children from Tippy Toes Learning Academy ("Tippy Toes") located in Memphis, Tennessee. The driver was killed, as were four of the children. Two other children survived but received serious head injuries.

Wrongful death actions were subsequently filed. Petitioner/Appellants Camelia Gibson ("Gibson") and Sandra Gordon ("Gordon"), alleged owners of Tippy Toes, were named as defendants.

National Indemnity Company of the South ("National Indemnity") had issued a policy of insurance to Gibson d/b/a All My Children, a different daycare center. Northfield Insurance Company ("Northfield"), another insurer, issued a policy of insurance to Gordon for Tippy Toes. Both National Indemnity and Northfield disputed insurance coverage.

National Indemnity retained Respondent/Appellee John D. Richardson ("Richardson") as its attorney to investigate whether coverage existed for the death and personal injury claims. To that end, Richardson obtained an extension of time to file a responsive pleading to the tort claims. Thereafter, on behalf of National Indemnity, Richardson wrote letters to Gibson and Gordon, through their counsel, to require that they give statements under oath, pursuant to the terms of the insurance policy.

Prior to their giving the statements, Eugene A. Laurenzi ("Laurenzi"), on behalf of Sandra Gordon, wrote a letter to Richardson requesting that National Indemnity provide Gordon with a defense to the tort litigation and asserting that National Indemnity had a fiduciary duty to Gordon. Laurenzi told Richardson that, as part of his fiduciary duty, "any statements, documents, etc. should not be disseminated to any other group, entity or individual." Richardson wrote Laurenzi back on the same day, stating that National Indemnity was "not in a position to respond to [Laurenzi's] request for defense at this time because it does not have sufficient information to determine whether any duty is owed to [Gordon] under its insurance policy." Richardson's letter said that "[n]o steps for the defense of the lawsuit will be taken by National Indemnity Company at this time." Moreover, with respect to dissemination of the sworn statements, Richardson said that he would make "no promises" regarding how he would use the statements and the related documents "other than stating that all such information and documents will be used in accordance with the terms and provisions of the policy of insurance and all applicable law."

Both Gibson and Gordon gave sworn statements and were represented by their own counsel at the examinations. These sworn statements by Gibson and Gordon are the subject matter of this litigation.

After his investigation, Richardson determined that a global settlement was desirable for National Indemnity. Consequently, all of the lawyers representing the claimants in the cases, along with the lawyers for Gibson, Gordon, Northfield, and National Indemnity (Richardson), entered into a series of extended settlement negotiations. In connection with the negotiations, a confidentiality and non-disclosure agreement was executed by the lawyers for the claimants, National Indemnity (Richardson), Gordon, and Gibson. The agreement stated in part: "Sandra Gordon and Camelia Gibson do hereby consent that National Indemnity Company of the South may disclose documents and information developed in its investigation to the lawyers for all parties." Thus, Richardson was permitted to share with the other attorneys information developed by National Indemnity, including the sworn statements by Gibson and Gordon. All the lawyers, including counsel for Gibson and Gordon, participated in the drafting of the settlement agreement. On July 12, 2002, the parties executed a settlement of all the claims, including the tort claims and coverage disputes.[1]

On September 5, 2002, a criminal investigator for the Respondent/Appellee State of Tennessee submitted an affidavit to the General Sessions Criminal Court of Shelby County, requesting that the court issue a subpoena *duces tecum* to Richardson to obtain "[a]ny and all records . . . relating to the Tippy Toes Learning Academy, including, but not limited to any and all statements, depositions and testimony of Camilla [sic] Gibson and or Sandra Gordon."[2] Richardson initially sought to quash the subpoena, arguing that it required the production of information subject to the attorney/client privilege between Richardson and National Indemnity. Subsequently, the State narrowed the scope of its request to the following:

> Any and all depositions or statements of employees and former employees of Tippy Toes Learning Academy, including but not limited to Sandra Gordon and/or Camilla [sic] Gibson and any documents associated therewith. (This is to specifically exclude correspondence with Mr. Richardson's client, National Indemnity Company of the South and exclude the terms of the settlement of the various lawsuits.)

Richardson did not object to the revised subpoena. In fact, he filed an affidavit stating that he was not the lawyer for Gibson or Gordon. His affidavit maintained that he "never suggested, stated, inferred, or otherwise hinted that [he] was serving or acting as a lawyer for Sandra Gordon or Camelia Gibson" in the tort actions. Counsel for Gibson and Gordon appeared and objected to the subpoena, arguing that the materials requested were subject to an attorney/client privilege that existed between each of them and Richardson.

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[1] The Release and Settlement Agreement are under seal by order of the Circuit Court to which the tort cases were assigned.

[2] The State's authority to obtain the subpoena in pursuit of a criminal investigation is found in the newly promulgated Terrorism Prevention and Response Act of 2002. ***See*** Tenn. Code Ann. § 40-17-123. Gibson and Gordon argue that the subpoena issued in this case falls outside the scope of the subpoena power under the statute because the crime being investigated is not related to terrorist activity. They cite no authority for that proposition, however, and we note that the statute does not limit itself to terrorist crimes. Therefore, this argument is without merit.

In December 2002, the general sessions court conducted a hearing on the matter. At the hearing, Richardson maintained that he did not represent Gibson or Gordon at any time. Counsel for Gibson and Gordon, however, argued that an attorney/client relationship existed between each of them and Richardson, and that producing the sworn statements would violate that privilege. The general sessions criminal court determined that no attorney/client relationship existed between Richardson and either Gibson or Gordon, and denied the motion to quash. The general sessions court temporarily stayed enforcement of the subpoena to permit Gibson and Gordon to seek relief from another court.

Counsel for Gibson and Gordon then filed a Petition for Writ of Certiorari and Request for Stay Pending Review by Chancery Court, asking the Shelby County Chancery Court to grant the writ and quash the subpoena. On December 17, 2002, the chancery court below heard the matter "on the limited issue of whether or not the attorney/client privilege was asserted in this matter." At the conclusion of the hearing, the chancery court held that no attorney/client relationship existed to protect the documents that were the subject of the subpoena. As a result, the chancery court dismissed the petition. Pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, Gordon and Gibson sought permission from this Court for an extraordinary appeal from the chancery court's decision.[3] We grant permission for the appeal, and have stayed enforcement of the subpoena pending the disposition of this appeal.

Gibson and Gordon properly used the common law writ of certiorari to enforce its rights to protection of the allegedly privileged information because they were not actual parties to the general sessions criminal court proceedings. ***See Hargraves v. Hamilton Nat'l Bank***, 184 S.W.2d 397, 399 (Tenn. Ct. App. 1944). A common-law writ of certiorari is not a matter of right, but is left to the sound discretion of the trial court. ***Willis v. Tennessee Dep't of Corr.***, 2002 WL 1189730, at *2 (Tenn. Ct. App. June 5, 2002). The denial of a writ of certiorari is reviewed on appeal to determine whether the lower court exceeded its jurisdiction, or acted unlawfully, fraudulently, arbitrarily, or capriciously. ***Id.***; ***see also McCallen v. City of Memphis***, 786 S.W.2d 633, 638 (Tenn. 1990).

Therefore, in this case, we must determine whether the chancery court acted unlawfully, fraudulently, arbitrarily, or capriciously in determining that the sworn statements given by Gibson and Gordon and the "documents associated therewith" are not protected by the attorney/client privilege. The attorney/client privilege is "the oldest privilege[ ] recognized in Tennessee both at common law and by statute." ***Boyd v. Comdata Network***, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002). The privilege encourages "full and frank communication between clients and their attorneys by sheltering these communications from compulsory disclosure." ***Id.*** The privilege is one that belongs to the client, and it can be waived if the client communicates otherwise privileged information in the presence of others or to third parties. ***Id.*** at 213. The burden is on the party asserting the privilege to show that it applies to the information sought to be protected. ***Hawkins v. Hart***, 1998 WL 272926, at *9 (Tenn. Ct. App. May 29, 1998).

[3]This Court agreed to hear the appeal on an expedited basis, so as not to impede the ongoing criminal investigation. Toward that end, the appeal was heard on a record stipulated by the parties.

In this case, Gibson and Gordon argue that an attorney/client relationship existed between each of them and Richardson, asserting that Richardson was retained by National Indemnity not only to determine whether coverage existed, but also to defend the tort claims filed against them. Based on that premise, they argue that the sworn statements were made to Richardson in preparation of their joint defense and that the statements fall under the attorney/client privilege.

The record demonstrates, however, that Richardson was not representing either Gibson or Gordon at the time the sworn statements were taken. Rather, Richardson was investigating whether National Indemnity was obligated under the insurance policy to defend the tort suits. This fact is made clear in the correspondence between the attorneys for Gibson and Gordon and Richardson. In a letter written to Jeffrey S. Rosenblum ("Rosenblum"), counsel for Gordon, Richardson stated that "[w]e understand that you represent Camelia Gibson and others in this matter." In a letter written to Laurenzi, Richardson stated that "I understand that you represent Sandra Gordon." When Laurenzi wrote the letter to Richardson requesting that National Indemnity provide a defense to Gordon, Richardson's response indicated that he did not intend to admit coverage or to defend Gordon with a reservation of rights until he had reviewed the available information. Richardson stated:

> [National Indemnity] is not in a position to respond to [Laurenzi's] request for defense at this time because it does not have sufficient information to determine whether any duty is owed to [Gordon] under its insurance policy. As soon as [National Indemnity] has sufficient information to make an informed decision, you and your client will be notified. No steps for the defense of the lawsuit will be taken by National Indemnity Company at this time.

In the hearing before the Chancery Court, Richardson explained that, had National Indemnity decided that coverage existed or had it chosen to defend with a reservation of rights, the cases would have been turned over to another lawyer to defend. He asserted that he could not "ethically defend the insured once [he has] been retained by the insurance company to handle the coverage question for the insurance company."

In addition, Richardson told Laurenzi that he refused to agree to keep the information obtained from Gibson and Gordon confidential. This also indicates that Richardson was not representing Gibson or Gordon when they gave him their statements. In his letter, Richardson said that he would use the information he obtained in accordance with "the terms and provisions of the policy of insurance and under applicable law." He stated that "[n]o promises can be made not to use the information or documents obtained during the examination under oath in any court or other proceedings." Thus, as of the time the sworn statements were given, Richardson represented only National Indemnity, not Gordon or Gibson.[4]

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[4] As persuasive authority in support of her position, Gibson urges this court to follow ***State ex rel. L.Y. v. Davis***, 723 S.W.2d 74 (Mo. Ct. App. 1986), where the court held that disclosures to an insurer by the insured are protected by (continued...)

Gordon and Gibson argue that the statements and documents given to Richardson are protected by the attorney/client privilege based on the "common interest doctrine." Under the common interest doctrine, participants in a joint defense may "communicate among themselves and with their attorneys on matters of common legal interest for the purpose of coordinating their joint legal strategy." ***Boyd***, 88 S.W.3d at 214. In effect, the common interest doctrine is an exception to the general rule that communications made in the presence of third parties are not protected by the attorney/client privilege. ***Id.*** at 213. A party asserting that certain communications are protected by the common interest doctrine must show:

> (1) that the otherwise privileged information was disclosed due to actual or anticipated litigation,
>
> (2) that the disclosure was made for the purpose of furthering a common interest in the actual or anticipated litigation,
>
> (3) that the disclosure was made in a manner not inconsistent with maintaining its confidentiality against adverse parties, and
>
> (4) that the person disclosing the information has not otherwise waived its [sic] attorney-client privilege for the disclosed information.

Id. at 214-15 (footnote omitted).

The record, however, shows that the sworn statements were not given in furtherance of a "common interest" between National Indemnity on one hand and Gordon and Gibson on the other hand. Rather, the record shows unequivocally that the statements were given because Gibson and Gordon were required under her insurance policy to do so to enable National Indemnity to determine whether coverage existed. Statements given for that purpose would not be in furtherance of a common interest; National Indemnity's legal position would be adverse to that of Gibson and Gordon. Moreover, even assuming that the information provided to Richardson was in furtherance of a common interest, the doctrine applies only "to communications given in confidence . . . and intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy." ***Id.*** at 214. Such was not the case here, where Richardson stated expressly that he did not intend to keep the statements confidential, and that National Indemnity had not yet determined whether it would provide Gibson or Gordon with a defense in the underlying tort suits. Therefore, the argument that the statements and related documents are protected by the attorney/client privilege under the common interest doctrine is without merit.

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[4](...continued)
the attorney-client privilege, even when the disclosures were made prior to the insurer's admission of coverage. ***Davis***, 723 S.W.2d at 75. The instant case, however, is distinguishable in that Gibson and Gordon were represented by their own counsel when their statements were given, and counsel for the insurance company (Richardson) made it clear that the statements would not be kept confidential.

Finally, Gibson and Gordon argue that the statements and related documents sought under the subpoena are also protected by the work-product doctrine. The work-product doctrine protects a lawyer from being compelled to produce his work product. It "prevents litigants from taking a free ride on the research and thinking of their adversary's lawyers." ***Id.*** at 219. The doctrine also helps attorneys by allowing them to be free to do "the sort of work that attorneys do to prepare a case for trial" and not be concerned that they may be called upon to give their work to their adversaries. ***Id.*** The work-product doctrine is clearly inapplicable to the sworn statements and related documents in Richardson's possession, and this argument is without merit.

Under these circumstances, we find that the decision of the chancery court, declining to stay enforcement of the subpoena, was not unlawful, fraudulent, arbitrary, or capricious. Therefore, we affirm the decision of the Chancery Court. The stay of enforcement of the subpoena is hereby dissolved and the State may proceed to obtain the information and documents sought in the subpoena.

The decision of the trial court is affirmed. Costs are to be assessed against the appellants, Camelia Gibson and Sandra Gordon, and their sureties, for which execution may issue, if necessary.

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HOLLY KIRBY LILLARD, JUDGE