

SUPREME COURT OF LOUISIANA

06-CC-2378

Walter Borg, M.D.

Plaintiff-Applicant

versus

Douglas W. Cook, M.D., Palmetto Addiction Recovery Center, Inc.,
Denean James, B.C.S.A.C., John Colaluca, D.O., Jay Weiss, M.D.,
and Tony Young, Ph.D.

Defendants-Respondents

Supervisory Writ
to the Court of Appeal, Second Circuit
Parish of Ouachita

This brief is filed on behalf of the
Louisiana State Board of Medical Examiners,
non-party respondent

**Brief in Opposition to
Application for Supervisory Writ**

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Absence of Rule X § 1(a) Considerations

The writ application misstates the issue decided by the trial court. At issue is whether, in a medical-malpractice action, Dr. Borg (the plaintiff) may take the deposition of a non-party (Dr. Mouton) who, on behalf of another non-party (the Louisiana State Board of Medical Examiners), investigated Dr. Borg's possible violations of the Louisiana Medical Practice Act. The trial court ordered that the deposition not be had. Contrary to what the writ application says, the trial court did not reach this decision by creating a privilege. Rather, the trial court reached this decision for two reasons:

1. The Board has a strong, legislatively recognized interest in maintaining the confidentiality of its investigation.
2. Dr. Borg failed to show any relevance of the investigator's deposition to his medical-malpractice claims.

In reaching this decision, the trial court did not blaze any new legal trails. It simply did what all trial courts do in deciding whether particular discovery may be had. The trial court balanced the information sought in light of the factual issues involved in the case and the hardships that would be caused by providing the information. The trial court's authority to exercise its discretion in this way is well settled. *See, e.g., Wollerson v. Wollerson*, 29,183 p. 3 (La. App. 2 Cir. 1/22/97), 687 So. 2d 663, 665.

In denying a supervisory writ, the Court of Appeal likewise applied settled law. In stating that "the exercise of [its] supervisory jurisdiction is not warranted," the court recognized that the trial court has broad discretion in ruling on pre-trial discovery, and that an appellate court must not disturb the trial court's ruling absent a clear abuse of that discretion. *See, e.g., Moak v. Ill. Central R.R. Co.*, 93-0783 (La. 1/14/94), 631 So. 2d 401, 406. Finding no abuse of discretion, the Court of Appeal declined to interfere. The Board urges this Court to do likewise.

reasonable skill and safety to patients. Therefore, Dr. Borg and the Board agreed on a consent order, under which Dr. Borg waived his right to administrative adjudication of the charges asserted against him and waived the right to contest the consent order or his agreement to it in any other forum.

Dr. Borg is now suing Palmetto and others, alleging medical malpractice. In the context of that suit, he wants to take the deposition of Dr. Mouton in her capacity as the Board's investigating officer. The Board objected to the deposition, prompting a motion to compel by Dr. Borg.

The trial court denied Dr. Borg's motion. Examining La. R.S. 44:4(7) and 37:1285 E, the trial court concluded that the information sought by Dr. Borg is confidential, and that the Board's objection to Dr. Mouton's deposition "advances the interest sought to be protected by the legislative scheme."⁴ The trial court further found that Dr. Borg had failed to show the relevance of the information he might gain by deposing Dr. Mouton:

[Dr. Mouton's] function is to investigate and report and not to implement the consent decree, which is done by the probation officer for the Board. Nor does the information available to this Court suggest that she would have any information about the conduct of the defendants named in this proceeding.⁵

Dr. Borg applied to the Second Circuit for a supervisory writ. The Second Circuit denied the application, finding that "the exercise of this court's supervisory jurisdiction is not warranted."⁶

Issue Presented for Review

The trial court found that the Board has a strong, legislatively recognized interest in maintaining the confidentiality of its investigation, and that Dr. Borg failed to prove the relevance of the information that might be obtained from Dr. Mouton. Accordingly, the trial court denied Dr. Borg's

⁴ Writ App. Tab 1 p. 2.

⁵ *Id.*

⁶ Writ App. Tab 5 p. 2.

motion to compel Dr. Mouton's deposition. In so ruling, did the trial court abuse its broad discretion in ruling on pre-trial discovery?

Summary of the Argument

The trial court has broad discretion in regulating pre-trial discovery. This broad discretion includes the right to refuse or limit discovery of matters not relevant to the parties' claims and defenses. Here, the trial court acted within its discretion in refusing to compel Dr. Mouton's deposition. The trial court could reasonably conclude that Dr. Borg failed to establish the relevance of the information sought, and that the Board's interest in maintaining the confidentiality of its investigation far outweighs whatever marginal relevance the information might conceivably have.

Argument

1. The trial court's acted well within its broad discretion in regulating pre-trial discovery.

It is well established that trial courts in Louisiana have broad discretion when regulating pre-trial discovery, and that their discretion will not be disturbed on appeal absent a clear showing of abuse. *Moak v. Ill. Central R.R. Co.*, 93-0783 (La. 1/14/94), 631 So. 2d 401, 406. This broad discretion includes the right to refuse or limit discovery of matters not relevant to the issues. *Walker, Tooke & Lyons, L.L.P. v. Sapp*, 37,966 p. 8 (La. App. 2 Cir. 12/10/03), 862 So. 2d 414, 419. In reviewing a trial court's discovery order, an appellate court must balance the information sought in light of the factual issues involved and the hardship that would be caused by the court's order. *Wollerson v. Wollerson*, 29,183 p. 3 (La. App. 2 Cir. 1/22/97), 687 So. 2d 663, 665.

The trial court performed a similar balancing of interests here, and found that the Board's interest in confidentiality far outweighs any legitimate interest that Dr. Borg might have in taking Dr. Mouton's deposition.

A. The Board has a strong, legislatively supported interest in maintaining the confidentiality of its investigation.

The primary purpose for the Board's existence is to ensure "that the public shall be properly protected against unprofessional, improper, unauthorized, and unqualified practice of medicine and from unprofessional conduct of persons licensed to practice medicine" La. R.S. 37:1261. To that end, the Board has the sole authority to "[e]xamine all applicants for the practice of medicine; issue licenses or permits to those possessing the necessary qualifications therfor; and take appropriate administrative actions to regulate the practice of medicine in the state of Louisiana[.]" La. R.S. 37:1270 A(1). In addition, the Board may suspend, revoke, or refuse to issue any license or permit, or may impose probationary or other restrictions on any license or permit issued by it for causes enumerated in the Medical Practice Act or the Board's regulations governing the practice of medicine. La. R.S. 37:1285 A.

To fulfill its statutory mandate, the Board has the authority to "employ inspectors, special agents, and investigators; issue subpoenas to require attendance and testimony and the production of documents and things for the purpose of enforcing the laws relative to the practice of medicine and securing evidence of violations thereof..." La. R.S. 37:1270 B(4). Under this authority, the Board employs an investigating officer and medical consultant, whose duties involve investigating complaints concerning physicians' medical practice and making recommendations to the Board about the course of action to take in response to those complaints.

As part of the investigative process, the investigating officer uses the Board's investigative powers, including the use of subpoenas, to secure evidence related to alleged violations of the Medical Practice Act. The investigating officer reviews information and records from various sources, including federal and state law enforcement, various federal and state

officials and agencies, hospitals, pharmacies, individuals, and various other sources. Following an investigation, and with the respondent physician's knowledge, the investigating officer may recommend dismissal of an investigation, resolution through a consent order negotiated with the respondent physician, or lodging of an administrative complaint alleging specified violations of the Medical Practice Act. In the course of all these functions, the investigating officer may develop and maintain information or records regarding her investigations, conclusions, and recommendations.

A clear line of demarcation exists between the Board's physician members, who serve as factfinders in any adjudication, and the investigating officer and her counsel, who serve as prosecutors. The ultimate decision about how to conclude an investigation does not rest with the investigating officer, but is instead made by the Board. In Dr. Borg's case, the Board chose to accept the consent order that had been negotiated between Dr. Borg's counsel and the investigating officer's counsel. As investigating officer, Dr. Mouton has no role in implementing the consent order.

The Legislature has recognized the Board's need to maintain the confidentiality of information developed in an investigation, by specifically excluding that information from disclosure under the Public Records Law:

This Chapter shall not apply:

...

(7) To any records, writings, accounts, letters, letter books, photographs or copies or memoranda thereof, and any report or reports concerning the fitness of any person to receive, or continue to hold, a license to practice medicine or midwifery, in the custody or control of the Louisiana State Board of Medical Examiners.

La. R.S. 44:4(7). The Administrative Procedure Act recognizes that any records exempted from disclosure are, by definition, deemed confidential and privileged, and exempt from discovery:

(a) Records and documents, in the possession of any agency or of any officer or employee thereof including any written

conclusions drawn therefrom, which are deemed confidential and privileged shall not be made available for adjudication proceedings of that agency and shall not be subject to subpoena by any person or other state or federal agency.

(b) Such records or documents shall ... include ... records and documents which are specifically exempt from disclosure by statute.

La. R.S. 49:956(8). Since information developed in an investigation is exempt from disclosure under R.S. 44:4(7), it is "deemed confidential and privileged" under R.S. 49:956(8). Finally, the Medical Practice Act itself provides that the Board's disposition of an adjudication proceeding by consent order (as in Dr. Borg's case) is confidential, although the Board has the authority and discretion to disclose the disposition. La. R.S. 37:1285 E.

The reasons for confidentiality are clear. Physicians must be free to disclose matters pertaining to their licensure to the Board without fear that these matters will be the subject of discovery in, for example, a malpractice action in which the physician is a defendant. The Board must be free to conduct thorough investigations of physicians to discharge its duty to protect the public from poor medical practices. To order Dr. Mouton's deposition would chill the collection and analysis of information concerning Louisiana physicians by the investigating officer and would inhibit the Board's exercise of its statutory authority and duty to evaluate the fitness of physicians practicing medicine in this state.

B. Dr. Borg and his amicus have failed to show the relevance of the information sought.

Weighed against the interest of the Board in maintaining confidentiality of its investigation is the relevance of this information to Dr. Borg's lawsuit. The relevance is non-existent. This is not an action against Dr. Mouton or the Board. And unlike *Larriviere v. Howard*,⁷ the case relied upon by amicus, this is not an action alleging defamatory statements given to an

⁷ 2000-186 (La. App. 3 Cir. 10/11/00), 771 So. 2d 747, writ granted in part, 2000-3087 (La. 1/26/01), 781 So. 2d 567.

investigator in the context of an investigation. This is a medical-malpractice action, and as the trial court correctly found, there is nothing to suggest that Dr. Mouton would have any information about the conduct of the defendants named in Dr. Borg's action.

The absence of relevance is demonstrated by both the writ application and the supporting amicus. Dr. Borg says almost nothing about the subject matter of his lawsuit. On page 2, he refers to his "treatment at Palmetto," and not until the last page of his application is the word "malpractice" mentioned — those two references are the only clues he provides to what this case is actually about. There is not a word in his summary of the argument or in the argument itself demonstrating the relevance of the information he seeks.

The amicus brief likewise fails to make any argument establishing relevance. In fact, the amicus's papers suggest that amicus has no idea what this case is actually about. Amicus seems to think that this case concerns "the integrity and accountability of medical board disciplinary proceedings," and that the purpose of Dr. Mouton's deposition would be "to uncover wrongdoing and even discrimination" by the Board.⁸ Amicus seems unaware that this is a medical-malpractice case, that neither the Board nor Dr. Mouton participated in the medical care at issue, and that Dr. Borg agreed in the consent order not to challenge the Board's action in his case.⁹

2. The amicus's interest in this case.

Because the Association of American Physicians and Surgeons, Inc. (AAPS) has injected itself into this case as Dr. Borg's amicus, the Board wishes to point out that the AAPS's statement of interest is incomplete. The

⁸ See amicus's motion for leave to file, at 2; see also amicus's proffered brief at 2.

⁹ See writ app. Tab 3, Exh. 1, p. 2 (Dr. Borg "waives any right ... to contest his agreement to or the force and effect of this document in any court or other forum relating to the matters referred to herein.").

AAPS's web site¹⁰ reveals that its interest — its overall goal — is elimination of any form of “third-party interference,”¹¹ i.e. governmental regulation of the practice of medicine. Here, its purpose is to attack regulation by attacking the regulator, i.e. the Board.

The AAPS's hostility to governmental regulation is revealed by visiting almost any page on its web site. Here are just three examples: One page advises AAPS members on how to avoid HIPAA regulations and “opt out of Medicare,” and boasts of the AAPS's efforts to stop “the March Toward Dictatorial Health Depts.”¹² Another describes the HIPAA Privacy Rule as “another totalitarian regime tactic,” “big brother’ bureaucratic megalomania,” “draconian manipulation and the end of privacy in America,” and a “fascist takeover of [the] medical profession.”¹³ Still another compares governmental regulation of medical practice to the Nazi Holocaust.¹⁴

Why would such an organization go to the trouble of filing an amicus brief in a mere discovery dispute? The AAPS would like to undermine the State's regulation of the practice of medicine, by undermining the investigating officer's ability to investigate possible violations of the Medical Practice Act. Such a result would advance the AAPS's goal of eliminating all governmental regulation of the practice of medicine.

Whatever one may think of the AAPS's goal, once thing is certain: It is contrary to Louisiana's public policy as expressed by the Legislature. The Legislature recognizes “that the practice of medicine ... is a privilege granted by legislative authority and is not a natural right of individuals,” and “deems

¹⁰ <http://www.aapsonline.org>.

¹¹ See <http://www.aapsonline.org/membership.php> (accessed Oct. 10, 2006).

¹² See <http://www.aapsonline.org/judicial/lcs.htm> (accessed Oct. 10, 2006).

¹³ See <http://www.aapsonline.org/confiden/survcomm.htm> (accessed Oct. 9, 2006).

¹⁴ Joseph M. Scherzer, *The Holocaust Memorial, Ayn Rand, and Politics in Pre-Revolutionary New York: Lessons for Today*, <http://www.aapsonline.org/brochures/holojs.htm> (Oct. 8, 1993) (accessed Oct. 9, 2006).

it necessary as a matter of policy in the interests of public health, safety, and welfare to provide laws and provisions covering the granting of that privilege and its subsequent use, control, and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized, and unqualified practice of medicine and from unprofessional conduct of persons licensed to practice medicine” La. R.S. 37:1261. If this public policy is to be changed, the place to do so is the Legislature, not in this Court — and certainly not in the context of a discovery dispute.

Conclusion

In denying Dr. Borg’s motion to compel, the trial court balanced the Board’s strong interest in maintaining the confidentiality of its investigations against the non-existent relevance of the information sought. This action was well within the trial court’s broad discretion in regulating pre-trial discovery. The Second Circuit acted wisely in declining to second-guess the trial court’s exercise of discretion. The Board prays that this Court do likewise.

Respectfully submitted:
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Certificate of Service

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