IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

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No. 21821

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STATE OF WEST VIRGINIA EX REL.
CHARLESTON AREA MEDICAL CENTER,
A CORPORATION,
Relator

v.

HONORABLE PAUL ZAKAIB, JR., JUDGE OF THE
CIRCUIT COURT OF KANAWHA COUNTY;
JOSHUA HERB, AN INFANT SUING BY HIS
NEXT FRIEND AND MOTHER, VICKI HERB;
VICKI HERB; AND GLEN F. HERB,
Respondents

Petition for Writ of Prohibition

WRIT DENIED

Submitted: September 14, 1993
Filed: October 29, 1993

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Charleston, West Virginia
Attorney for Relator

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Mary McQuain

Calwell & McCormick
Charleston, West Virginia
Attorney for Respondents
Joshua Herb, an infant suing by his
next friend and mother, Vicki Herb;
Vicki Herb; and Glen F. Herb

JUSTICE MILLER delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "The prohibition standard set out in Syllabus Point 1 of Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979), permits an original prohibition proceeding in this Court to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources." Syllabus Point 1, State ex rel. Allstate Insurance Co. v. Karl, ___ W. Va. ___, ___ S.E.2d ___ (No. 21818 10/29/93).

2. "A corporate 'party' for the purposes of W. Va. Rules of Professional Conduct, Rule 4.2, includes those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation." Syllabus Point 2, Dent v. Kaufman, 185 W. Va. 171, 406 S.E.2d 68 (1991).

3. Rule 4.2 of the West Virginia Rules of Professional Conduct pertains to an attorney's professional conduct. It is not a rule of evidence. The primary purpose of Rule 4.2 is to protect the attorney-client relationship by preventing one party's attorney from making ex parte contact with another party.

4. Rule 4.2 of the West Virginia Rules of Professional Conduct is not designed to foreclose ex parte interviews of former employees of an organization by an attorney representing a party adverse to the organization unless the former employees are represented by their own attorney.

Miller, Justice:

In this original proceeding in prohibition, the Charleston Area Medical Center (CAMC) seeks to prevent the enforcement of an order entered by the respondent judge on March 5, 1993. That order allowed the plaintiffs' attorneys, under certain restrictions, to interview on an ex parte basis present or former employees of CAMC with regard to their knowledge of the facts involved in a malpractice action brought against CAMC on behalf of the infant plaintiff, Joshua Herb. Recently, in Syllabus Point 1 of State ex rel. Allstate Insurance Co. v. Karl, ___ W. Va. ___, ___ S.E.2d ___ (No. 21818 10/29/93), we summarized our practice with regard to an original prohibition in this Court:

> "The prohibition standard set out in Syllabus Point 1 of Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979), permits an original prohibition in this Court to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources."

I.

CAMC claims that the respondent judge's order violates the legal precepts contained in Dent v. Kaufman, 185 W. Va. 171, 406 S.E.2d 68 (1991), which dealt with an analogous situation. In Dent, the plaintiff's attorney sought to interview certain present employees of the defendant pharmacy corporation with regard to matters contained in the plaintiff's suit against the corporation. A protective order was sought contending that the plaintiff's attorney would violate Rule 4.2 of the West Virginia Rules of Professional Conduct by conducting such interviews. This rule is the same one involved in the present case. Rule 4.2 contains this general admonition: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

A literal reading of Rule 4.2 would seem to indicate that it does not cover an attorney's interview of employees of a corporation that the attorney has sued unless such employee is a party to the litigation. However, in Dent, we recognized, as had

other courts, that the Official Comment to the rule contains language that indicates this rule is designed to cover employees of an organization or corporation that is a named party.

After a review of authorities from other jurisdictions, we came to this conclusion in Syllabus Point 2 of Dent:

> "A corporate 'party' for the purposes of W. Va. Rules of Professional Conduct, Rule 4.2, includes those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation."

The order entered by the respondent judge in this case did not violate Dent's rule as it recognized that ex parte contact could not be made with those employees of CAMC classified in Syllabus Point 2 of Dent as those "who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation." Consequently, we conclude that with regard to the present employees of CAMC, the respondent judge's order correctly reflects our holding in Dent and the writ is denied as to this portion of the order.

II.

A subsidiary issue in this case is whether Rule 4.2 has any applicability to former employees. This issue was not present in Dent. In this case, the trial court after limiting the ex parte interviews in regard to present employees, as set out in note 2, supra, went on to state: "Plaintiffs' counsel is permitted to contact and interview, on an ex parte basis, any present or former employees of CAMC who do not fall within the hereinabove recited exceptions." (Emphasis in original).

Both parties appear to be confused about the scope of the order with regard to the plaintiffs' right to interview former employees of CAMC on an ex parte basis. The above-quoted language from the order suggests that interviews of both present or former employees are subject to the exceptions contained in the order. CAMC seizes on the imputed liability language in the order to argue that this should preclude former employees from

being interviewed. However, in Dent, we did not deal with the question of an ex parte interview of a former employee.

It must be remembered that Rule 4.2 of the Rules of Professional Conduct pertains to an attorney's professional conduct. It is not a rule of evidence. The primary purpose of Rule 4.2 is to protect the attorney-client relationship by preventing one party's attorney from making ex parte contact with another party. We emphasized this point in Dent: "It is important to remember that what we are dealing with here are rules of professional conduct, not rules of evidence." 185 W. Va. at 175, 406 S.E.2d at 72. See also Hanntz v. Shiley, Inc., 766 F. Supp. 258 (D.N.J. 1991); Valassis v. Samelson, 143 F.R.D. 118 (E.D. Mich. 1992). The Court in Valassis v. Samelson, 143 F.R.D. at 122, made this comment about interpreting Rule 4.2 and its Official Comment:

> "The Court initially observes that the purpose of a comment is to explain a rule; a comment to a rule does not add to or in any way expand upon the rule; it is explicative of the rule. Therefore, although the Comment in this case explains the application of Rule 4.2 to a corporate party, it does not expand the scope of that rule.
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> "The application of Rule 4.2 is specifically limited to a party. The Rule says that 'a lawyer shall not communicate about the subject of the representation with a party . . . .' Therefore, any analysis of the scope of Rule 4.2 must begin with a determination that the person to be approached by the attorney is indeed a party."

The rule itself refers only to a party. Thus, the right to interview ex parte a nonparty is permitted unless that individual has secured counsel for legal advice as to the controversy. This latter point is recognized specifically in the Official Comment to Rule 4.2.

The complication involving Rule 4.2 is that it does not contain specific language dealing with employees of organizations who may by their position with the organization be able to legally bind the corporation. However, as we recognized in Dent,

the Official Comment to the Rule addresses this concern. In applying the Comment, a distinction must be made between present and former employees. Former employees are distinguishable because their ability to bind an organization is restricted by the Rules of Evidence. Under Rule 801(d)(2)(D) of the Federal Rules of Evidence and its counterpart in Rule 801(d)(2)(D) of the West Virginia Rules of Evidence, statements of former employees cannot be considered an admission against the employer since they were not "made during the existence of the relationship[.]" Thus, much of the damaging nature of such statements is eliminated with regard to ex parte interviews of former employees.

There is little question that a majority of jurisdictions that have had occasion to consider whether Rule 4.2 restrictions are applicable to former employees have concluded that they are not applicable. See, e.g., Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. 899 (E.D. Pa. 1991), appeal dismissed without opinion, 961 F.2d 207 (3d Cir. 1992); Hanntz v. Shiley, Inc., supra; University Patents, Inc. v. Kligman, 737 F. Supp. 325 (E.D. Pa. 1990); Valassis v. Samelson, supra; In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 556 (N.D. Ga. 1992); Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991); Dubois v. Gradco Sys., Inc., 136 F.R.D. 341 (D. Conn. 1991); Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621 (S.D.N.Y. 1990), aff'd, 1990 WL 180571 (No. 87 Civ. 3297 S.D.N.Y. Nov. 15, 1990).

Some of these cases have relied on the ABA Committee on Ethics and Professional Responsibility Formal Opinion 359 issued in March, 1991 (ABA Formal Opinion 91-359), which determined that Rule 4.2 did not extend to former employees, including managerial employees. See, e.g., Action Air Freight, Inc. v. Pilot Air Freight Corp., 769 F. Supp. at 902-04; Hanntz v. Shiley, Inc., 766 F. Supp. at 266-67; Valassis v. Samelson, 143 F.R.D. at 122. In view of the lack of any precise language in Rule 4.2 and the specific interpretation in ABA Formal Opinion 91-359 that Rule 4.2 does not apply to former employees of an organization, we decline to create a different standard under our Rule 4.2. As we stated earlier, the primary goal behind Rule 4.2 is to protect the attorney-client relationship. To enlarge its scope defeats the broad discovery purposes contained in Rule 26 of the West Virginia Rules of Civil Procedure.

Consequently, we conclude that Rule 4.2 of the Rules of Professional Conduct is not designed to foreclose ex parte

interviews of former employees of an organization by an attorney representing a party adverse to the organization unless the former employees are represented by their own attorney. To the extent that the respondent judge's order may be interpreted to restrict ex parte interviews of former employees of CAMC, such an interpretation is erroneous.

Accordingly, the writ of prohibition is denied.

Writ denied.→