

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 20, 2006 Session

**JOHN P. KONVALINKA v. CHATTANOOGA-HAMILTON COUNTY
HOSPITAL AUTHORITY d/b/a ERLANGER HOSPITAL**

**Appeal from the Chancery Court for Hamilton County
No. 05-1155 W. Frank Brown, III, Chancellor**

No. E2006-00064-COA-R3-CV - FILED SEPTEMBER 11, 2006

This appeal involves a public records request made to the Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Hospital (“Erlanger”) by John Konvalinka (“Konvalinka”), an attorney who practices law in Chattanooga. In a related case, we granted a Tenn. R. App. P. 9 interlocutory appeal filed by Alexander Stratienko, M.D. (“Stratienko”) on the limited issue of whether the medical credentials of another physician were protected from disclosure by the Peer Review Statute. Konvalinka represents *Stratienko* in that related proceeding. We entered an order in the *Stratienko* appeal staying all proceedings below pending our decision on the merits of that appeal. While our stay was in effect, Konvalinka filed the present lawsuit, which is a petition for access to public records in the possession of Erlanger. The Chancery Court determined that all but two groups of the requested documents were covered by our stay in the *Stratienko* case and denied the petition as to all of the remaining documents because of our stay. Konvalinka appeals. We affirm in part, reverse in part, and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery
Court Affirmed in Part and Reversed in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Jennifer H. Lawrence, Chattanooga, Tennessee, for the Appellant John P. Konvalinka.

Fred H. Moore and Joseph R. White, Chattanooga, Tennessee, for the Appellee Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Hospital.

OPINION

Background

This lawsuit involves a petition for access to public records filed pursuant to the Public Records Act, Tenn. Code Ann. § 10-7-503, *et seq.* Konvalinka is an attorney who represents various physicians in the Chattanooga area. In March of 2003, Konvalinka sent a request for public records to Erlanger. After Konvalinka did not receive all of the requested documents, a follow-up letter was sent in August of 2003. Even after the follow-up letter was sent, Konvalinka still did not receive all of the requested records. However, Konvalinka took no further action at that time to obtain the documents.

Almost one year later, on September 16, 2004, one of Konvalinka's clients, Alexander A Stratienco, M.D., was involved in a physical altercation with Van Stephen Monroe, M.D. ("Monroe"). The physical altercation happened on Erlanger's premises. Following the altercation, there were several discussions between Mel Twiest, M.D., who was Erlanger's Chief of Staff, and various other physicians. As a result of these discussions Erlanger decided to suspend Stratienco's clinical privileges pending Stratienco being evaluated by the Tennessee Medical Foundation. Stratienco immediately obtained an *ex parte* restraining order from the Hamilton County Circuit Court which temporarily restrained Erlanger from suspending Stratienco's clinical privileges. Erlanger moved to dissolve the temporary restraining order, but the Circuit Court refused to do so until Stratienco had the opportunity to conduct discovery. During the discovery process Stratienco requested copies of Monroe's credentials. Erlanger refused to provide this information, claiming it was protected from disclosure by the Peer Review Statute, Tenn. Code Ann. § 63-6-219. Stratienco then filed a motion to compel production of Monroe's credentials. Although the motion to compel eventually was denied, the Circuit Court nevertheless granted Stratienco permission to file a Tenn. R. App. P. 9 interlocutory appeal. According to the Circuit Court:

[T]he Court suggested that Tennessee law concerning whether the application of Dr. Monroe, together with any supporting documentation furnished in connection with such application, all of which were submitted to defendant Chattanooga-Hamilton County Hospital Authority to obtain privileges to conduct certain procedures, including, but not limited to, the right to conduct peripheral vascular procedures, is protected by the "peer review" privilege pursuant to Tennessee's Peer Review Statute, Tennessee Code Annotated Section 63-6-219 is not settled. Accordingly, the Court suggested that an interlocutory appeal may be appropriate....

We granted Stratienco's request for a Tenn. R. App. P. 9 interlocutory appeal on the limited issue of whether Monroe's credentials and supporting documentation were protected from disclosure pursuant to the Peer Review Statute, Tenn. Code Ann. § 63-6-219. Our Order granting Stratienco's request for an interlocutory appeal was filed on May 17, 2005, and provides in its entirety as follows:

Alexander A. Stratienco, M.D. (“Petitioner”) is before this Court seeking an Interlocutory Appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. We find this to be an appropriate situation in which to allow an interlocutory appeal, and Petitioner’s Application for Interlocutory Appeal is GRANTED on the sole issue raised in Petitioner’s Application. *All proceedings below, including the administrative hearing currently scheduled for June 2, 2005 are stayed pending resolution of this Interlocutory Appeal.* (emphasis added)

While our stay was in effect, on October 14, 2005, Konvalinka sent another public records request to Erlanger. After Konvalinka received no response to his 2005 request, he filed a Petition for Access to Public Records against Erlanger in the Hamilton County Chancery Court on November 16, 2005. Konvalinka filed the petition on his own behalf as the petitioner, and is represented by attorney Jennifer H. Lawrence (“Lawrence”).¹ In the petition, Konvalinka sought all of the records referenced in his October 14, 2005, letter to Erlanger. The petition sought five groups of documents which had been requested originally in March and again in August of 2003 (the “2003 documents”). In addition to the 2003 documents, the petition also sought production of fourteen other groups of documents which were requested for the first time in Konvalinka’s letter dated October 14, 2005 (the “2005 documents”).

Erlanger filed a motion to dismiss Konvalinka’s petition for access to public records. In this motion Erlanger claimed, among other things, that many of the documents sought by Konvalinka were closely tied to the pending *Stratienco* litigation. According to Erlanger:

Most of the documents requested by Petitioner in his Petition are clearly related to the allegations in Dr. Stratienco’s Amended Complaint, including but not limited to the Authority’s relationship with Cardiovascular Group, P.C., the scheduling of call coverage for cardiologists, and the credentialing process for Stephen Monroe, M.D. Petitioner’s and Lawrence’s attempt to obtain these documents on behalf of their client, Dr. Stratienco, by filing a separate cause of action in this Court, in Petitioner’s name, is a blatant disregard of the Order of the Court of Appeals and an attempt to circumvent the Stay.

While Dr. Stratienco is not the petitioner in this cause, it is apparent that Petitioner and Petitioner’s counsel, Jennifer H. Lawrence (“Lawrence”) (Dr. Stratienco’s attorneys in the Stratienco Litigation) filed the Petition in an effort to circumvent the Stay for the purpose of gathering information, as Dr. Stratienco’s attorneys, on behalf of Dr. Stratienco for use in the Stratienco Litigation. Therefore, Petitioner’s Petition should be

¹ Konvalinka and Lawrence were co-counsel in the *Stratienco* litigation.

dismissed, with prejudice, or, in the alternative, stayed until the Court of Appeals lifts the Stay.

On December 7, 2005, the Chancery Court entered a detailed order disposing of Konvalinka's petition. The Chancery Court initially determined that Konvalinka had waived his right to file a petition seeking the 2003 documents because that petition had not been made in a timely fashion. The Chancery Court then discussed the petition in light of this Court's stay which had been entered in the *Stratienko* litigation. According to the Chancery Court:

Mr. Konvalinka contended that he had at least 3 or 4 clients, in addition to Dr. Stratienko, who were interested in the records sought herein. When asked to identify the clients, an objection was made on the basis of the attorney-client privilege. The objection was sustained. Mr. Konvalinka and Ms. Lawrence both contended that Erlanger's interpretation of the stay order limited them in the practice of law. They could not be "full service" lawyers if they could not pursue a Public Records action.

This court can only respond in two ways. First, this court did not enter the stay order; the Court of Appeals made that order. This court lacks the power to change the orders of the Court of Appeals. Counsel, by an appeal in this case or by appropriate proceedings in the *Stratienko* case presently pending before the Court of Appeals, can obtain an interpretation of the meaning of the stay order from the Court of Appeals. Second, courts generally do not let persons do indirectly what they cannot do directly. There are just too many similar circumstances between the *Stratienko* case, from the attorneys to the information sought, and this case to be allowed. Often in football, if a team is going to attempt an end run, they have the fullback fake a run up the middle while the tailback goes around the end. There is little or no disguise/fake in the case at bar....

The court has reviewed the October 14, 2005 letter requesting documents, the Amended Complaint of Dr. Stratienko and the notes from the testimony presented in court. The only request for documents, identified by the court, which Erlanger may (or may not) have and that is not associated with, covered by, or directly relevant to the *Stratienko* case are Numbers 2 and 5, which requests state:

2. Any and all letter of endorsement written on behalf of former Erlanger employee Dennis Pettigrew.
5. Any correspondence to the Erlanger Board of Trustees in support of James Brexler.

[The Chief Legal Officer for Erlanger] testified he was not certain there would be any record of these letters or correspondence in Erlanger's records. However, he must examine the records of Erlanger and produce for inspection, and copying at a reasonable rate if requested, any letters and correspondence covered by requests 2 and 5 set forth above which are found.

Because all other requests relate, or could relate to the *Stratienko* case, the court is going to deny those requests. First, this court looks not only to the language but also the spirit of the Court of Appeals' stay order. Second, the Petitioner should be able to receive these documents through the discovery mechanisms available pursuant to the Tennessee Rules of Civil Procedure in the *Stratienko* case....

Mr. Konvalinka requested payment of his attorney fees. Tennessee Code Annotated § 10-7-505(g) permits recovery of attorney's fees if the public official's refusal to disclose the records was willful. The court holds that Erlanger's refusal was not willful in view of the Court of Appeals' stay in the *Stratienko* case and the relationship of the Petitioner, his counsel and the material requested to the *Stratienko* case.

On December 19, 2005, Erlanger filed a motion with this Court in the *Stratienko* appeal seeking to have Konvalinka and Lawrence held in contempt of court for allegedly violating our stay. After Konvalinka and Lawrence responded to the motion for contempt, we entered an order stating as follows:

While the Tenn. R. App. P. 9 interlocutory appeal was pending in the present case, ... [Erlanger] filed on December 19, 2005, a Motion for Contempt seeking to have attorneys John P. Konvalinka and Jennifer H. Lawrence held in contempt of court for violating the stay issued by this Court on May 17, 2005. Specifically, [Erlanger] claims Mr. Konvalinka and Ms. Lawrence violated the stay when they filed a Petition for Access to Public Records in the Chancery Court for Hamilton County on November [16], 2005. The Petition for Access to Public Records was filed by Mr. Konvalinka as the petitioner, with Ms. Lawrence as the attorney representing Mr. Konvalinka.

On December 7, 2005, the Chancery Court issued a Memorandum Opinion and Order essentially concluding that of the nineteen specific document requests, including subparts, only two of the requests were not "associated with ... or directly relevant to" the present case. On January 5, 2006, Mr. Konvalinka filed an

appeal from that decision of the Chancery Court, and the appeal has been assigned number E2006-00064-COA-R3-CV.

It is apparent to this Court that our resolution of the Motion for Contempt could be affected by the result of the appeal in the Chancery Court action. We also find it unnecessary to prolong the appeal in the present case by waiting on the outcome of the appeal in case number E2006-00064-COA-R3-CV. Therefore, the Appellate Court Clerk is directed to transfer the Motion for Contempt, Appellant's response to that motion, and any other documentation relating to that specific motion to case number E2006-00064-COA-R3-CV. The Motion for Contempt will be disposed of contemporaneously with the filing of the formal Opinion in case number E2006-00064-COA-R3-CV. The Appellate Court Clerk further is directed to transfer any court costs associated with the Motion for Contempt to case number E2006-00064-COA-R3-CV, to be taxed upon resolution of that motion.

After the motion for contempt was transferred to the appeal in the present case, we issued our Opinion in *Stratienko*. See *Stratienko v. Chattanooga-Hamilton County Hospital Authority*, No. E2005-01043-COA-R3-CV, 2006 WL 550460 (Tenn. Ct. App. Mar. 8, 2006). In that Opinion we concluded:

(1) the credentialing process is part of the peer review process; (2) documents generated as part of the peer review process are not to be considered as being made "in the regular course of business" of a hospital for purposes of the exception contained in Tenn. Code Ann. § 63-6-219(e); and (3) documents or records "otherwise available from original sources" are not immune from disclosure from either the original source or a peer review committee.

Stratienko, 2006 WL 550460, at * 6 (Tenn. Ct. App. Mar. 8, 2006).

Erlanger filed a Tenn. R. App. P. 11 request for permission to appeal our decision in *Stratienko* to the Tennessee Supreme Court. That request currently is pending with the Supreme Court.

In addition to the issues raised in Erlanger's motion for contempt, Konvalinka's appeal in the present case raises three issues. Konvalinka claims the Chancery Court erred when it denied the vast majority of his petition for access to public records because, Konvalinka argues, Erlanger was required to produce those documents in accordance with the Public Records Act. Next, Konvalinka claims the Chancery Court erred when it determined that he had waived his right to request the 2003 documents. Finally, Konvalinka claims the Chancery Court erred when it denied his request for attorney fees. Erlanger asks this Court to find Konvalinka and Lawrence in contempt for violating the stay. Erlanger further asserts that the decision of the

Chancery Court denying most of the petition for access to public records was correct, as was the decision of the Chancery Court not to award Konvalinka any attorney fees.

Discussion

The factual findings of the trial court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

As relevant to this appeal, the Public Records Act, Tenn. Code Ann. § 10-7-503(a)(Supp. 2005), provides as follows:

Except as provided in § 10-7-504(f), all state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Although not stated exactly as such, the primary issue on this appeal involves whether the broad construction to be given the Public Records Act trumps the stay entered by this Court in the *Stratienko* litigation, or *vice versa*. Neither party to this appeal asserts any challenge to this Court’s authority to enter a stay in the *Stratienko* litigation. Along this line we note that Tenn. R. Civ. P. 62.08 provides as follows:

Rule 62.08 Power of Appellate Court not Limited. – Nothing in this rule shall be construed to limit the power of an appellate court or a judge thereof to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment that may subsequently be entered.

Even if there was a challenge that could be made to our stay, it necessarily needed to have been made in the *Stratienko* litigation.

In *Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 1999), this Court was called upon to decide whether the broad construction to be given the Public Records Act took precedence over Tenn. R. Civ. P. 26.02, which addresses if and when work product can be discovered. We concluded:

Both [*Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996) and *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987)] make clear that the courts will find exceptions to the Public Records Act apart from those specifically set forth therein. Specifically, the Court will look to the Rules of Civil Procedure and the Common Law for such exceptions....

Moreover, Tennessee law provides that provisions published in Tennessee Code Annotated will not supersede the Rules of Civil Procedure. T.C.A. § 16-3-406 states that once the Rules of Civil Procedure have become effective, ‘all laws in conflict therewith shall be of no further force or effect.’ Any conflict between provisions of the Rules of Civil Procedure and provisions of the Tennessee Code which cannot be harmoniously construed shall be resolved in favor of the Rules of Civil Procedure. *Mid South Pavers, Inc. v. Arnco Constr. Inc.*, 771 S.W.2d 420 (Tenn. Ct. App. 1989)....

We hold, on the authority of *Ballard*, ... which specifically deals with exceptions to the Public Records Act, created by the Rules of Civil Procedure, that an attorney's work product is protected from discovery under the Public Records Act.

Arnold, 19 S.W.3d at 785-86. See also *Eldridge v. Putnam County*, 86 S.W.3d 572, 575 (Tenn. Ct. App. 2001).

We conclude that a stay issued by this Court takes precedence over the provisions of the Public Records Act to the extent records sought pursuant to that Act are covered by the stay. In other words, the stay issued by this Court in *Stratienko* would prohibit Stratienko and his attorneys from doing indirectly what the stay prohibited their doing directly by filing a separate petition pursuant to the Public Records Act to obtain documents for their use in *Stratienko*.

As noted previously, Konvalinka is seeking two groups of documents in this litigation, i.e., the 2003 documents and the 2005 documents. We first will address the 2003 documents. Whatever first motivated Konvalinka to seek the 2003 documents clearly had nothing to do with the *Stratienko* litigation given that his initial request for the 2003 documents occurred approximately 1_ years before even the altercation between Stratienko and Monroe. Accordingly, we conclude that our stay issued in the *Stratienko* litigation does not bar Konvalinka from seeking the 2003 documents requested for other clients of Konvalinka for matters other than the *Stratienko* litigation as testified to by Konvalinka.

The next issue is whether Konvalinka waived his right to file the petition with respect to the 2003 documents due to the lapse of time between the making of the initial request

and the filing of the petition. Although Erlanger acknowledges the absence of any statute of limitations contained within the Public Records Act, Erlanger nevertheless argues:

Requiring a requestor of public records to timely enforce his public records request would not infringe upon the rights of a citizen to obtain copies of public documents. The requestor would have a reasonable amount of time to seek enforcement of his request. If he sits on his rights for an unreasonable amount of time, then he could simply make another request and then file his petition within a reasonable amount of time after submitting the new request, if the public body fails or refuses to disclose the requested public documents.

Unfortunately for Erlanger, this is exactly what happened with respect to the 2003 documents. The 2003 documents were requested initially in March of 2003. Any documents that were not produced were again sought in the follow-up letter dated August of 2003. When the remaining documents were not produced, they again were requested via letter dated October 14, 2005. It was not until the October 2005 letter went unanswered that Konvalinka filed his petition. We conclude that Konvalinka did not waive his right to file the petition seeking access to the 2003 documents. Because we conclude Konvalinka made no such waiver, we express no opinion on whether a citizen can in fact waive his or her right to file a petition under the Public Records Act.

In summary and with respect to the 2003 documents, we conclude that the 2003 documents are not subject to our stay entered in the *Stratienko* litigation. We further conclude that Konvalinka did not waive his right to file a petition pursuant to the Public Records Act requesting the 2003 documents. As the 2003 documents are not subject to our stay, the Chancery Court, on remand, is instructed to determine if the Public Records Act requires production of the 2003 documents and, if so, to order Erlanger to produce those documents if it does not do so voluntarily.

The Chancery Court determined that of the various 2005 documents sought, only two groups were not “associated with, covered by, or directly relevant to the *Stratienko* case.” On appeal, Konvalinka raises a general challenge to this conclusion by arguing that the stay does not bar the Public Records Act request, an argument we have already rejected. Konvalinka does not raise any specific objections regarding whether the Chancery Court improperly concluded that all but two groups of the 2005 documents were covered by the stay.

There is absolutely no doubt that at least some of the 2005 documents were directly covered by the stay in *Stratienko*. For example, in the Public Records Act request Konvalinka sought:

Copies of all documents containing, referring or related to all peripheral vascular credentialing requirements in effect from the date of Dr. Monroe’s initiation of the credentialing process to the present.

At oral argument, Konvalinka's attorney candidly and quite appropriately acknowledged that at least some of the 2005 documents were unquestionably related to the *Stratienko* litigation and directly covered by the stay. We conclude that the Chancery Court did not commit error when it determined that of the 2005 documents, only requests numbered 2 and 5 were not covered by our stay. The judgment of the Chancery Court as to the 2005 documents is, therefore, affirmed.

Given that the 2005 documents contained requests that were *directly* covered by our stay in the *Stratienko* case, we must conclude that the Petition for Access to Public Records was nothing less than an attempt to obtain through the chancery court action documents that unquestionably could not be obtained at that time in the *Stratienko* litigation due to this Court's stay order. While our stay was in effect, clearly Konvalinka and Lawrence engaged in a deliberate attempt to do indirectly what they were prohibited from doing directly as Stratienko's attorneys. As the Chancery Court found, they made no pretense of its being otherwise. Therefore, we find that Konvalinka and Lawrence are in direct civil contempt of this Court's stay order. As sanctions for this contempt, Konvalinka and Lawrence, jointly and severally, shall be required to pay Erlanger's reasonable attorney fees associated with drafting, filing, and arguing the Motion for Contempt. On remand, the chancery court is instructed to conduct a hearing to determine the reasonable amount of those fees.

The final issue is Konvalinka's argument that the Chancery Court erred when it denied his request for attorney fees. In *Henderson v. City of Chattanooga*, 133 S.W.3d 192 (Tenn. Ct. App. 2003), we stated:

Tenn. Code Ann. § 10-7-505(g) authorizes an award of attorney fees if the governmental entity knew the records were public and willfully refused to disclose them. The statute also provides an award of attorney fees is discretionary with the trial court. In *Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 1999), this Court stated every refusal to disclose a public record was not wrongful because the statute expressed a "knowing and willful" standard, which was synonymous with bad faith. *Id.* at 789 (citations omitted). The Court in *Arnold* went on to add that bad faith was more than bad judgment or negligence and implied the conscious doing of a wrong because of a dishonest purpose. *Id.*

Henderson, 133 S.W.3d at 215, 216. Even though we hold in this Opinion that the 2003 documents were not covered by our stay, we find that Erlanger's actions in not producing the 2003 documents were not willful as they were based upon a good faith interpretation of this Court's stay. Further, because we have affirmed the Chancery Court's determination that a majority of the requested 2005 documents were subject to our stay and the actions of Konvalinka and Lawrence in filing the petition seeking those documents were contemptuous, we readily conclude that the Chancery Court did not abuse its discretion when it held that Konvalinka was not entitled to any attorney fees because Erlanger's actions were not willful.

We note that if the Tennessee Supreme Court denies Erlanger's Tenn. R. App. P. 11 request for permission to appeal our decision in *Stratienko*, our stay issued in that case will be dissolved in its entirety by its terms upon our mandate being issued.

Conclusion

The judgment of the Chancery Court is affirmed in part and reversed in part. This cause is remanded to the Chancery Court for further proceedings consistent with this Opinion and for collection of the costs below. Exercising our discretion, all court costs associated with the Motion for Contempt are taxed to John Konvalinka and Jennifer H. Lawrence. All remaining costs on this appeal are taxed one-half to the Appellant, John Konvalinka, and his surety, and one-half to the Appellee, Erlanger Hospital.

D. MICHAEL SWINEY, JUDGE