

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01024 COA

JOHN J. ASKEW

APPELLANT

v.

MISSISSIPPI BOARD OF NURSING

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HONORABLE DENISE OWENS

COURT FROM WHICH APPEALED: CHANCERY COURT OF HINDS COUNTY

ATTORNEY FOR APPELLANT:

STEPHEN L. BEACH III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: ROY A. PERKINS NATURE OF THE CASE: CIVIL: DENIAL OF ACCESS TO PUBLIC RECORDS

TRIAL COURT DISPOSITION: COURT DETERMINED THAT RECORDS WERE EXEMPT FROM STATUTE REQUIRING ACCESS TO PUBLIC RECORDS AND GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT

MANDATE ISSUED: 6/10/97

BEFORE THOMAS, P.J., COLEMAN, AND KING, JJ.

KING, J., FOR THE COURT:

The Appellant appeals an order of the Hinds County Chancery Court, which granted the Appellee's motion for summary judgment and determined that certain records within the Appellee's possession were exempt from public disclosure pursuant to section 45-29-1 of the Mississippi Code. We find no error and affirm the court's judgment.

FACTS

On August 3, 1993, the Appellant and Danny Lamier filed affidavits with the Mississippi Board of Nursing alleging that Rebecca Wilkinson Askew used marijuana and other illegal substances. After the affidavits were filed, the Appellee conducted an investigation and concluded that there was no substance to the allegations. If the Board discovered that there was substance to the allegations, it could have imposed penalties affecting Rebecca Askew's license to practice nursing pursuant to section 73-15-29 of the Mississippi Code.

On November 30, 1993, the Appellant wrote Appellee and requested copies of the records and documents relating to the Appellee's investigation of Rebecca Askew. At the time the request was made, the Appellant and Rebecca Askew were involved in a domestic dispute in Madison County Chancery Court.

Three days following the Appellant's request for the records, the Appellee's attorney informed Appellant that the information requested was exempt from disclosure pursuant to section 45-29-1 of the Mississippi Code. Seven months later, the Appellant's counsel wrote Appellee's counsel and renewed the request for disclosure of the records. Again, Appellee's counsel advised the Appellant and his counsel that the records were exempt from disclosure. Appellee's counsel further advised the Appellant that there was insufficient evidence substantiating the allegations. Thereafter, the Appellant filed a complaint for access to public records.

The Appellee propounded various items of discovery to the Appellee, which sought disclosure of the documents, and the Appellee consistently asserted that the documents and information sought were privileged, confidential, and nondiscoverable. Appellant persevered in the effort to obtain the records, and issued subpoenas duces tecum upon the Appellee's attorney, executive director, and other employees of the Appellee. A subpoena duces tecum was also issued to Rebecca Askew. The subpoenas asked the parties to appear at the office of Appellant's counsel for deposition upon oral examination, and the parties were also asked to bring copies of all documents relating to the investigation of Rebecca Askew.

Counsel for Rebecca Askew and the Appellee each filed motions requesting that the court quash the subpoenas and issue a protective order. The chancellor entered orders granting the motions of Appellee and Rebecca Askew to quash the subpoenas and for protective orders. In the order quashing the subpoena duces tecum and granting the protective order to the Appellee, the chancellor determined that the requested records were exempt from disclosure pursuant to section 45-29-1 of the Mississippi Code.

After the chancellor had quashed the subpoena duces tecum and issued the protective orders, the Appellant filed a Motion to Compel Discovery. The Appellee responded by filing a second motion for a protective order and a motion for summary judgment. The parties met in chambers, and the

chancellor gave the Appellee ten days to respond to the motion for summary judgment. Appellee filed a response to the motion for summary judgment and asked the chancellor to review the requested materials in camera for the purpose of determining if the records were exempt from disclosure as Appellee contended.

The chancellor issued a memorandum opinion and order, which granted Appellee's request for summary judgment. In the memorandum opinion and order, the chancellor determined that section 45-29-1 exempted the records from disclosure because they were compiled in the process of investigating alleged unlawful activity. In addition, the court determined that disclosure of the records would reveal the Appellee's investigating techniques and compromise the Appellee's ability to conduct future investigations.

ANALYSIS OF THE ISSUE AND DISCUSSION OF THE LAW

I.

DID THE COURT ERR IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT?

The Appellant contends that the chancellor abused her discretion by granting the Appellee's motion for summary judgment because the Appellee failed to produce substantial evidence supporting its contention that the records were exempt from disclosure. Specifically, the Appellant states that the Appellee failed to support its motion for summary judgment with affidavits and supporting documents.

Appellant recognizes that the rules pertaining to summary judgment do not require supporting affidavits, but suggests that without supporting affidavits, motions for summary judgments become a war of words. Appellant's contention fails to recognize that in addition to supporting affidavits, trial judges consider pleadings, depositions, admissions, and answers to interrogatories when ruling upon a party's request for summary judgment. *See Simmons v. Thompson Mach.*, 631 So. 2d 798, 801 (Miss. 1994). A trial judge should enter summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Thompson*, 631 So. 2d at 801.

Although no supporting affidavits were attached to the Appellee's motion for summary judgment, the pleadings and discovery responses clearly and unequivocally show that Appellant sought access to records and documents compiled during the course of the Appellee's investigation of Rebecca Askew. Moreover, the Appellant readily admits that he sought records and documents compiled during the course of Appellee's investigation. The question before the chancellor was whether the records were exempt from disclosure, thereby entitling the Appellee to judgment as a matter of law. In determining the issue, the chancellor was required to interpret provisions of the Code governing the exemption of public documents from public access. Questions requiring the interpretation of statutes are questions of law, not fact. *Hernandez v. Vickery Chevrolet-Olds Co.*, 652 So. 2d 179, 182 (Miss. 1995) (stating that interpretation of statutes is a matter of law rather than an issue for the

jury, else there would be differing results on the same facts). Our review of questions of law is de novo and if erroneous interpretation or application of the law exists, reversal is proper. *Chandler v. City of Jackson Civil Serv. Comm'n*, 687 So. 2d 142, 143 (Miss. 1997) (citing *Harrison County v. City of Gulfport*, 557 So. 2d 780, 784 (Miss. 1990)).

Pursuant to section 45-29-1 of the Mississippi Code, the following records are exempt from disclosure:

(1) records compiled in the process of detecting and investigating any unlawful activity or alleged unlawful activity, the disclosure of which

(a) would harm such investigation;

(b) would reveal the identity of informants;

(c) would prematurely release information that would impede the public body's

enforcement, investigative or detection efforts in such proceedings;

(d) would disclose investigatory techniques;

(e) would deprive a person of a right to a fair trial or an impartial adjudication;

(f) would endanger the life or safety of a public official or law enforcement personnel;

(2) records pertaining to quality control or PEER review activities.

The court determined that the records sought to be disclosed were compiled by the Appellee, a public body, during its investigation of an unlawful activity and were therefore, exempt from disclosure pursuant to section 45-29-1. The court also determined that disclosure of the records would reveal the Appellee's investigatory techniques and compromise its ability to conduct future investigations.

Our Uniform Controlled Substances Law proscribes as unlawful the sell, barter, transfer, manufacture, distribution, dispensing, possession with intent to sell, or possession of controlled substances. *See* Miss. Code Ann. 41-29-139 (Supp. 1996). The use of a controlled substance is not designated as a criminal offense; therefore, no criminal liability attached to Rebecca Askew's alleged use of marijuana.

Despite the absence of criminal liability, the alleged conduct is illegal. Section 73-15-29 of the Code proscribes the habitual use of narcotics, barbiturates, amphetamines, hallucinogens or other drugs by a nurse. The statute authorizes the Mississippi Board of Nursing to revoke or suspend the license of a nurse engaged in the conduct described. The Board may also fine, reprimand, or require the nurse to submit to counseling. *See* Miss. Code Ann. 73-15-29 (1972). Pursuant to section 73-15-29, Rebecca Askew's alleged use of marijuana was illegal. Because the records were compiled during the Appellee's investigation of Rebecca Askew's alleged illegal conduct, we are unable able to find error with the chancellor's determination that the records were exempt from disclosure, thereby entitling the Appellee to judgment as a matter of law.

The Appellant also suggests that the chancellor erred by refusing to inspect the records in camera

before determining the applicability of the exemption. In any suit to compel access to public records, the court, on its own motion, may privately view the public records in controversy before reaching a decision; however, the court is not required to view the records in camera. *See* Miss. Code Ann. 25-61-13(2) (1972). We are unable to find that the chancellor abused her discretion by refusing to inspect the records in camera, especially when the Appellant admits that the records were compiled during the course of the Appellee's investigation of Rebecca Askew's alleged illegal conduct.

II.

DID THE CHANCELLOR ERR BY QUASHING THE DEPOSITION SUBPOENA DUCES TECUM AND BY ISSUING THE PROTECTIVE ORDER?

The Appellant contends that the chancellor erred by quashing the deposition subpoena duces tecum and by issuing the protective order because he merely wanted to know why the Appellee refused to disclose the records. In so arguing, the Appellant suggests that the subpoena duces tecum were not issued for the purpose of securing the disclosed records. We are not persuaded by Appellant's contentions. The subpoena duces tecum served upon the Appellee specifically requested the Appellee to appear at the office of Appellant's counsel with all documents relating to the investigation of Rebecca Askew and all documents relating to the Appellee's disposition of the investigation.

Records concerning the Board's investigation of acts subject to discipline should be kept confidential and should not be subject to discovery or subpoena. *See* Miss. Code Ann. 73-15-31. Therefore, the court acted properly by quashing the subpoena duces tecum and issuing the protective order.

In conclusion, we find Appellant's appeal to be lacking in merit and therefore, affirm the chancellor's judgment.

**THE JUDGMENT OF THE CHANCERY COURT OF HINDS COUNTY IS AFFIRMED.
COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, PAYNE, AND
SOUTHWICK, JJ., CONCUR. BRIDGES, C.J., AND HERRING, J., NOT
PARTICIPATING.**