

THE ARKANSAS SUPREME COURT HOLDS THAT THE MEDICAL RECORDS OF A STEPFATHER MAY NOT BE SUBPOENAED IN A CUSTODY DISPUTE BETWEEN THE FATHER AND MOTHER WHERE THE RECORDS WERE PROTECTED BY PHYSICIAN-PATIENT PRIVILEGE, THE STEPFATHER WAS NOT A PARTY TO THE CUSTODY DISPUTE, AND THE STEPFATHER DID NOTHING TO BRING HIS MEDICAL CONDITION INTO QUESTION.

In *McKenzie v. Pierce*,¹ the Arkansas Supreme Court granted a writ of certiorari in a discovery matter and held that the medical records of a third party to a child custody dispute could not be subpoenaed.² The court granted the writ, reasoning that the third-party had no interest in the underlying lawsuit, nor an appealable interest in the final order of the circuit court in which it subpoenaed the records; thus, granting the writ remained the only available remedy to the third party.³

The case arose from a child custody dispute between Joshua Pierce and Kayla Pierce, who had divorced in 2007.⁴ Joshua Pierce sought to change custody of their minor child, asserting that Kayla Pierce maintained an unstable relationship with her subsequent husband, Cleo McKenzie.⁵ In support of his motion seeking modification of the custody arrangement, Joshua Pierce alleged that McKenzie suffered from depression and instability.⁶ Pierce served subpoenas duces tecum on two medical facilities, seeking the medical and mental health records of McKenzie.⁷ In response, McKenzie filed a motion to quash on the grounds that he was not a party to the custody matter and that the subpoenas violated his rights pursuant to state and federal law.⁸ He also requested sanctions under Arkansas Rule of Civil Procedure 11.⁹

The circuit court denied McKenzie's motion to quash and request for sanctions and ordered the subpoenaed records to be submitted to the court under seal, noting, however, that the records would not be reviewed immediately.¹⁰ The next day, McKenzie filed a notice of appeal from the order and later filed a motion with the Arkansas Supreme Court seeking to stay

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1. 2012 Ark. 190, ___ S.W.3d ___.
 2. *McKenzie*, 2012 Ark. 190, at 9, ___ S.W.3d at ___.
 3. *Id.* at 9, ___ S.W.3d at ___.
 4. *Id.* at 1, ___ S.W.3d at ___.
 5. *Id.* at 1–2, ___ S.W.3d at ___.
 6. *Id.* at 2, ___ S.W.3d at ___.
 7. *Id.*, ___ S.W.3d at ___.
 8. *McKenzie*, 2012 Ark. 190, at 2, ___ S.W.3d at ___.
 9. *Id.*, ___ S.W.3d at ___.
 10. *Id.*, ___ S.W.3d at ___.

the circuit court’s proceedings.¹¹ The court granted his motion in part, staying the release of the records.¹²

A discovery order, specifically an order denying a motion to quash a subpoena, is not a final order and thus generally not appealable.¹³ The Arkansas Supreme Court, therefore, lacked jurisdiction to hear the case as an appeal.¹⁴ Instead, it treated the matter as a petition for extraordinary relief, or a writ of certiorari, within its original jurisdiction.¹⁵

The court found that McKenzie met the requirements for granting a writ of certiorari.¹⁶ First, no other remedy existed for McKenzie other than the writ of certiorari; he had no right of appeal because the order was not final.¹⁷ Moreover, even if the order denying the motion to quash and for sanctions was final, the court could not entertain an appeal from McKenzie, a non-party to the underlying lawsuit.¹⁸

Second, the court reasoned that the case fell within an exception to the general rule that writs of certiorari will not lie in discovery matters, in which circuit courts have jurisdiction and enjoy broad discretion.¹⁹ The court previously recognized such an exception in *Kraemer v. Patterson*,²⁰ which it held dispositive of the issue of whether to grant the writ in McKenzie’s case.²¹ In *Kraemer*, the plaintiffs sought a writ of certiorari from an order permitting the defendants in a medical-malpractice action from calling one of the plaintiff’s physicians as expert witness, arguing that the order violated the prohibition on informal, ex parte contact with a patient’s doctor codified in Arkansas Rule of Evidence 503.²² The court rejected the defendant’s assertion that the issue could be resolved on appeal; it granted the writ of certiorari, finding that an appeal would not provide an adequate remedy and that the record revealed “a plain, manifest, clear, and gross abuse of discre-

11. *Id.*, ___ S.W.3d at ___.

12. *Id.*, ___ S.W.3d at ___.

13. *Id.* at 3, ___ S.W.3d at ___ (citing *In re Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992)).

14. *McKenzie*, 2012 Ark. 190, at 3, ___ S.W.3d at ___.

15. *Id.* at 3, ___ S.W.3d at ___ (citing *White v. Palo*, 2011 Ark. 126, 380 S.W.3d 405).

16. *Id.* at 3–4, ___ S.W.3d at ___.

17. *Id.* at 4, ___ S.W.3d at ___.

18. *Id.* at 4, ___ S.W.3d at ___ (citing *Swindle v. Benton Cnty. Cir. Ct.*, 363 Ark. 118, 211 S.W.3d 522 (2005)). The court held inapplicable the two recognized exceptions to this general rule. *Id.*, ___ S.W.3d at ___.

19. *McKenzie*, 2012 Ark. 190, at 5, ___ S.W.3d at ___ (citing *Monticello Healthcare Ctr., LLC v. Goodman*, 2010 Ark. 339, 373 S.W.3d 256; *Chiodini v. Lock*, 373 Ark. 88, 281 S.W.3d 728 (2008)).

20. 342 Ark. 481, 29 S.W.3d 684 (2000).

21. *McKenzie*, 2012 Ark. 190, at 5, ___ S.W.3d at ___.

22. *Id.* at 5, ___ S.W.3d at ___.

tion,” as the plain language of Rule 503 forbade the ex parte communication authorized by the court.²³

Relying on *Kraemer*, the court reasoned that the doctor-patient privilege protected McKenzie’s records.²⁴ Arkansas Rule of Civil Procedure 35 authorizes discovery of medical records but retains the privilege, requiring disclosure when a party relies upon his or her physical or mental condition as part of the claim.²⁵ The court reiterated that McKenzie was not a party to the underlying custody matter.²⁶ Moreover, McKenzie’s records were protected under Arkansas Rule of Evidence 503, which shields records or communications among the patient, doctor or therapist, made for the purpose of seeking medical treatment or a diagnosis.²⁷ The exception to the rule is only operative when a party to the action relies on his or her medical or emotional condition as part of the claim or a defense.²⁸ Again, the court held this exception to the privilege inapplicable because McKenzie was not a party to the custody suit, thus he maintained no claim or defense pursuant to it.²⁹ The court analogized the case to *Johnson v. State*,³⁰ in which it previously denied access by a defendant to a third party’s medical records.³¹

Finally, the court rejected the argument that McKenzie became a party to the underlying action by virtue of his in loco parentis status to the child and his marriage to the child’s mother, Kayla Pierce.³² One generally becomes party to an action by filing a complaint, filing an answer to a complaint, or through intervention³³ or joinder rules³⁴ provided in the Arkansas Rules of Civil Procedure.³⁵ The court found none of these means of obtaining party status applicable to McKenzie and the underlying lawsuit.³⁶ The court granted the writ of certiorari, finding that McKenzie’s records could not be subpoenaed and no other adequate remedy was available.³⁷

23. *Id.* at 5–6, ___ S.W.3d at ___ (citing *Kraemer*, 342 Ark. at 492, 29 S.W.3d at 690–691).

24. *Id.* at 6–7, ___ S.W.3d at ___.

25. *Id.* at 6, ___ S.W.3d at ___.

26. *Id.*, ___ S.W.3d at ___.

27. *McKenzie*, 2012 Ark. 190, at 6, ___ S.W.3d at ___.

28. *Id.* at 6–7, ___ S.W.3d at ___ (citing ARK. R. EVID. 503(d)(3)(A)).

29. *Id.* at 7, ___ S.W.3d at ___.

30. 342 Ark. 186, 27 S.W.3d 405 (2000).

31. *McKenzie*, 2012 Ark. 190, at 7–8, ___ S.W.3d at ___.

32. *Id.* at 9, ___ S.W.3d at ___.

33. *See* ARK. R. CIV. P. 24.

34. *See* ARK. R. CIV. P. 19.

35. *McKenzie*, 2012 Ark. 190, at 9, ___ S.W.3d at ___ (citing *In re \$3,166,199*, 337 Ark. 74, 987 S.W.2d 663 (1999)).

36. *Id.*, ___ S.W.3d at ___.

37. *Id.*, ___ S.W.3d at ___. In a concurrence, Chief Justice Hannah, joined by Justice Goodson, offered a similar analysis as the majority, but asserted more directly the confiden-

In his dissent, Justice Danielson, joined by Justices Corbin and Gunter, argued that the case did not warrant granting a writ of certiorari, which should be reserved for extraordinary circumstances.³⁸ Justice Danielson asserted that the circuit court's subsequent and final order denying custody in the case made the issue of McKenzie's medical records moot, as the court stated therein that it had not reviewed the records and that they were to be released only to McKenzie.³⁹ An issue becomes moot when a judgment would have no impact on an existing legal controversy, and appellate courts do not review issues that are moot, as doing so is tantamount to rendering advisory opinions.⁴⁰ Because the circuit court later set aside its final order, Justice Danielson found that the case could come within an exception to the mootness doctrine, but nonetheless argued that granting a writ was unwarranted.⁴¹

Instead, Justice Danielson would not have disturbed the discretion and jurisdiction of the circuit court, noting that the court had previously denied petitions for writs of certiorari based on objections to discovery orders at the trial level.⁴² Moreover, he asserted that McKenzie had other remedies available to him, such as a protective order.⁴³ As such, Justice Danielson contended that the writ of certiorari constituted extraordinary relief and should only be granted in narrow circumstances, which he found to be lacking in the case.⁴⁴

This case illustrates a narrow circumstance in which a writ of certiorari may lie, while holding that medical records of a non-party may not be subpoenaed under the circumstances presented.

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tial nature of medical records and their general immunity from discovery. *Id.* at 10–11, ___ S.W.3d at ___ (Hannah, J., concurring).

38. *Id.* at 12, ___ S.W.3d at ___ (Danielson, J., dissenting).

39. *Id.*, ___ S.W.3d at ___ (Danielson, J., dissenting).

40. *McKenzie*, 2012 Ark. 190, at 12, ___ S.W.3d at ___ (Danielson, J., dissenting) (citing *Mountain Pure, LLC v. Little Rock Wastewater Util.*, 2011 Ark. 258, 383 S.W.3d 347).

41. *Id.*, at 13–14, ___ S.W.3d at ___.

42. *Id.* at 14–15, ___ S.W.3d at ___.

43. *Id.* at 15, ___ S.W.3d at ___ (citing ARK. R. CIV. P. 26(c)).

44. *Id.* at 16, ___ S.W.3d at ___.