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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE  
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ACTION.

# Supreme Court of Kentucky

2013-SC-000151-MR

JON M. STRAUSS, M.D.

APPELLANT

ON APPEAL FROM COURT OF APPEALS

V.

NO. 2012-CA-001355-OA

JEFFERSON CIRCUIT COURT NO. 10-CI-007765

HON. BARRY WILLETT (JUDGE,  
JEFFERSON CIRCUIT COURT), ET AL.

APPELLEES

## **MEMORANDUM OPINION OF THE COURT**

### **AFFIRMING**

Appellant, Jon M. Strauss, M.D., petitioned the Court of Appeals for a writ of mandamus directing the Jefferson Circuit Court to rule on his then-pending motion for partial summary judgment and motion to stay enforcement of the Kentucky Board of Medical Licensure's (KBML) order of probation on his medical license. Before the Court of Appeals entered an order on Appellant's petition, the Jefferson Circuit Court denied both of Appellant's motions. After the circuit court denied Appellant's motions, the Court of Appeals allowed Appellant to file a supplemental memorandum in support of his pending petition for writ of mandamus. In his supplemental memorandum, Appellant asked the Court of Appeals to direct the circuit court to grant both of the motions it had denied. The Court of Appeals denied the petition and Appellant now appeals to this Court as a matter of right, Ky. Const. § 115, CR

76.36(7)(a), arguing that this Court should grant his writ because 1) the circuit court failed to address the merits of his motion for partial summary judgment, 2) the delays inherent in litigation continue to cause him financial hardship, and 3) the KBML has statutory immunity that would deprive Appellant of an adequate remedy by appeal. For the reasons that follow, we affirm the Court of Appeals' order.

### I. BACKGROUND

On August 19, 2010, a hearing officer under the jurisdiction of the KBML issued a recommended order of probation upon Appellant's medical license based on multiple statutory violations arising from Appellant's alleged sexual contact with two patients,<sup>1</sup> exchange of controlled substances for sexual relations with a patient,<sup>2</sup> creation of inaccurate medical records,<sup>3</sup> and provision of incomplete medical records to the KBML with the intent to deceive.<sup>4</sup> On October 4, 2010, the KBML adopted the hearing officer's recommendation and entered a final order imposing a five-year period of probation upon Appellant's medical license during which time he was allowed to continue to practice medicine subject to certain restrictions.<sup>5</sup>

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<sup>1</sup> KRS 311.595(5) (sexual contact with patients); KRS 311.595(9) (engaging in dishonorable, unethical or unprofessional conduct which departs from acceptable and prevailing medical practices).

<sup>2</sup> KRS 311.595(9).

<sup>3</sup> *Id.*

<sup>4</sup> KRS 311.590(2) (dishonesty, fraud, deceit, collusion or conspiracy in connection with any examination, hearings, or disciplinary proceedings conducted by the board); KRS 311.595(12) (violating the code of conduct or any other regulation of the board).

<sup>5</sup> The KBML ordered Appellant to attend a course on maintaining proper boundaries with patients, pay a \$5,000 fine, and reimburse the board for administrative costs on a

Appellant subsequently filed a petition for judicial review of the KBML's order of probation in Jefferson Circuit Court. Appellant's petition named the KBML, and its individual board members. The petition sought reversal of the final order, declaratory and injunctive relief, and monetary damages, including attorney's fees pursuant to 42 U.S.C. § 1983. Thereafter, the KBML filed a motion to separate and dismiss its board members; and Appellant filed a motion to stay enforcement of the KBML's order of probation and a motion for partial summary judgment.

Following the filing of the aforementioned motions, the trial court deferred ruling on both, as many of the same issues of law raised were also pending before other courts. This delay led Appellant to file a petition for writ of mandamus in the Court of Appeals, in which he sought to compel the circuit court to rule on all pending motions. Prior to the issuance of an order by the Court of Appeals, the circuit court granted the KBML's motion and denied both of Appellant's motions.

After Appellant's motions were denied by the circuit court, he filed a supplemental memorandum in support of his pending writ of mandamus with the Court of Appeals. Therein, Appellant argued that although the circuit court had just ruled against his motions, the writ should nonetheless be granted, and it should direct the circuit court to adjudicate both motions in his favor.

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schedule of \$1,000 a month for a total of \$31,802.07. Additionally, the KBML's order prohibited Appellant from being in the presence of a female patient unless accompanied by a chaperone.

The Court of Appeals denied the petition, holding that Appellant had an adequate remedy by appeal, and this appeal followed.

## II. ANALYSIS

The same standard is applied for granting petitions for writs of prohibition and mandamus. *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 77 n.2 (Ky. 2010) (citing *Martin v. Admin. Office of Courts*, 107 S.W.3d 212, 214 (Ky. 2003)). This Court set forth that standard in *Hoskins v. Maricle*:

A writ . . . *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and *there exists no adequate remedy by appeal* or otherwise and great injustice and irreparable injury will result if the petition is not granted.

150 S.W.3d 1, 10 (Ky. 2004) (second emphasis added). Appellant invokes the second class of writ, alleging that the trial court acted erroneously but within its jurisdiction. Accordingly, he is required to satisfy the threshold inquiry of establishing (1) lack of adequate remedy by appeal or otherwise, and (2) that great injustice and irreparable injury will result if his petition is not granted.

*Id.*

In *Kentucky Employers Mutual Insurance v. Coleman*, we reiterated the standard which must be attained before a writ will be granted:

[T]he writs of prohibition and mandamus are extraordinary in nature, and the courts of this Commonwealth “have always been cautious and conservative both in entertaining petitions for and in granting such relief.” *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961).

This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of our circuit and other courts. If this avenue of relief were open to all who considered themselves aggrieved by an interlocutory court order, we would face an impossible burden of nonappellate matters.

*Id.* This policy is embodied in a simple statement from a recent case: “Extraordinary writs are disfavored . . . .” *Buckley v. Wilson*, 177 S.W.3d 778, 780 (Ky. 2005).

236 S.W.3d 9, 12 (Ky. 2007).

Once the Court of Appeals has made its order granting or denying a writ under the above described standard, we review that court’s decision under an abuse of discretion standard. *See, e.g., Sowders v. Lewis*, 241 S.W.3d 319, 322 (Ky. 2007) (citation omitted). We find abuse of discretion when the court’s “decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

#### **A. Lack of Adequate Remedy by Appeal**

The first inquiry this Court must address in granting a writ of mandamus is whether the Appellant had available an adequate remedy by appeal. Under Kentucky law, “mandamus may not be used as a substitute for appeal.” *Nat’l Gypsum Co. v. Corns*, 736 S.W.2d 325, 326 (Ky. 1987) (citing *Merrick v. Smith*, 347 S.W.2d 537 (Ky. 1961)). The Court of Appeals found that

Appellant had an adequate remedy by appeal statutorily guaranteed by KRS 13B.160.<sup>6</sup>

Appellant presents to this Court three grounds for which he believes his writ should be granted: 1) the circuit court failed to address the merits of his motion for partial summary judgment, 2) the delays of litigation continue to cause him financial hardship, and 3) the KBML has statutory immunity that will deprive Appellant of an adequate remedy by appeal.

Turning to Appellant's first argument, he asserts that the circuit court summarily denied his motion without considering its merits. However, in its order denying Appellant's motion, the circuit court summarized the arguments of Appellant and the KBML and held that "[i]t would be inappropriate for the court to grant partial summary judgment in Dr. Strauss's favor at this preliminary point in the judicial review of KBML's actions."

To the extent that Appellant finds the circuit court's legal reasoning for denying his motion dissatisfying, he may address it on direct appeal guaranteed him by KRS 13B.160 once the circuit court reaches a judgment. Appellant has not yet exercised his right to appeal; thus, we find that Appellant's first argument fails to establish lack of adequate remedy through appeal.

Next, Appellant argues that his petition should be granted because the delays involved in litigation continue to cause him financial hardship due to

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<sup>6</sup> KRS 13B.160 states:

Any aggrieved party may appeal any final judgment of the Circuit Court under this chapter to the Court of Appeals in accordance with the Kentucky Rules of Civil Procedure.

the wrongful probation of his medical license. Specifically, Appellant asserts that the KBML's order of probation caused him to be removed from Medicaid, Medicare, and private insurance panels, which resulted in a loss of patients. Moreover, Appellant points to the trial court's twenty-month delay in ruling on his motion for partial summary judgment as indicative of the slow pace of litigation.

As to Appellant's argument that further delay will be financially ruinous to him, "[t]his court has repeatedly held that the delay and expense of appeals does not . . . render remedy by appeal inadequate." *Lee v. George*, 369 S.W.3d 29, 33-34 (Ky. 2012) (citations omitted). *See also Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 615 (Ky. 2005) ("[T]he cost[] of litigation . . . is not enough to show inadequate remedy by appeal . . ."). Thus, we find that Appellant's second argument fails to establish lack of an adequate remedy by appeal.

Finally, Appellant argues that the direct appeal guaranteed him by KRS 13B.160 is an inadequate remedy because KRS 311.603<sup>7</sup> provides statutory immunity to the KBML against recovery for past damages inflicted by the wrongful probation of his medical license. Therefore, his remedy by direct

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<sup>7</sup> KRS 311.603 states:

There shall be no monetary liability on the part of, and no cause of action for damages shall arise against the board . . . as the result of any act, omission, proceeding, conduct, or decision related to his official duties undertaken or performed within the scope of the function of the board, except where actual malice is shown or willful misconduct is involved.



appeal will be limited to avoidance of further damages once final adjudication renders the probation void.

We find that Appellant's final argument fails to demonstrate lack of adequate remedy by appeal given that, even if his writ were granted, his remedy would be the same as he would be afforded by appeal. Assuming that the KBML is statutorily immune, a writ of mandamus directing the circuit court to void his probation would not allow him to recover past damages for the wrongful probation of his license up to the point the writ was granted but would only prevent further financial harm. Because a direct appeal and a writ of mandamus could ultimately produce the same result, Appellant cannot claim that one is inadequate and should be superseded by the other. Therefore, we find that Appellant's final argument fails to establish lack of adequate remedy by appeal.

Each of Appellant's arguments fails to prove lack of adequate remedy through the ordinary appeals process. Thus, we find that direct appeal under KRS 13B.160 is the appropriate remedy for the alleged errors. Therefore, Appellant has failed the first prong of the threshold inquiry.

#### **B. Great Injustice or Irreparable Injury**

This Court's recent precedent makes it abundantly clear that if Appellant fails to show lack of adequate remedy by appeal, we need not consider the second prong of our threshold inquiry—that great injustice and irreparable injury will result if his petition is not granted. *E.g.*, *Jones v. Constanzo*, 393 S.W.3d 1, 7-8 (Ky. 2012) (quoting *Independent Order of Foresters v. Chauvin*,

175 S.W.3d 610, 615 (Ky. 2005)) (“Lack of an adequate remedy by appeal is an absolute prerequisite to the issuance of a writ under this second category.”).

We agree with the Court of Appeals that Appellant had an adequate remedy by appeal under KRS 13B.160 and, therefore, is not entitled to the issuance of a writ of mandamus. The Court of Appeals’ decision to deny Appellant’s petition for writ of mandamus was supported by sound legal principles. *Goodyear Tire & Rubber Co.*, 11 S.W.3d at 581 (citing *English*, 993 S.W.2d. at 945). Thus, we conclude that the Court of Appeals did not abuse its discretion in denying Appellant’s petition for a writ of mandamus. *Id.*

### **III. CONCLUSION**

Because Appellant has failed to demonstrate that the Court of Appeals abused its discretion, the Court of Appeals’ order is affirmed.

All sitting. All concur.

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