IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 11-13-03 Ella Grauitt, D.C.

2003-SC-0121-MR

GREGORY L. BROWN, M.D. — APPELLANT

V.

ORIGINAL ACTION FROM COURT OF APPEALS
2002-CA-2426
JEFFERSON CIRCUIT COURT NO. 2001-CI-007731

HONORABLE DENISE G. CLAYTON, JUDGE
JEFFERSON CIRCUIT COURT — APPELLEE

AND

JULIE GEORGE & RACHELE KNORPP — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The appellant, Gregory L. Brown, M.D., sought a writ from the Court of Appeals to prohibit Judge Denise Clayton of the Jefferson Circuit Court from consolidating for trial two separate medical negligence claims made against Appellant by two previous patients. The Court of Appeals denied the writ by finding Appellant had an adequate remedy by appeal. Appellant appeals as a matter of right. For the reasons set forth herein, we affirm the Court of Appeals and deny Appellant's petition for a writ of prohibition.

On November 1, 2000, Appellant performed cosmetic surgery (facial laser resurfacing) on Julie George, a real party in interest, who subsequently filed a professional negligence claim against Appellant in the Jefferson Circuit Court for the severe facial scarring, redness, and disfigurement that resulted from the laser treatment.

On February 19, 2001, Appellant performed the same cosmetic surgery on Rachele Knorpp, the other real party in interest. Ms. Knorpp also filed a professional negligence claim against Appellant in the Jefferson Circuit Court for sustaining the same injuries from the laser treatment. Both parties allege that Appellant was overly aggressive with the use of the laser and failed to adequately inform each of them of the risks involved with such a procedure. Both parties also intend to rely on the same expert witness to testify that Appellant's policy of using the exact same laser settings with all of his patients regardless of skin type is inappropriate.

After limited discovery, Ms. Knorpp made a motion to consolidate her case with that of Ms. George's alleging that common questions of law and fact existed pursuant to CR 42.01. Judge Clayton ordered the cases consolidated by an order dated August 13, 2002, and subsequently affirmed that order by an opinion and order dated October 28, 2002.

Appellant contends that consolidation of the two cases would be highly prejudicial to his case, and states that he is aware of no Kentucky case that has ever consolidated tort claims not involving the same accident or negligent event. A cursory review of case law in the Commonwealth does not reveal an instance of consolidation similar to the case at bar. However, we do note that consolidation pursuant to CR 42.01

is a matter within the sound discretion of the trial court. Massie v. Salmon, Ky., 277 S.W.2d 49, 51 (1955). Nonetheless, we find that Appellant is not entitled to the extraordinary remedy of a writ of prohibition, as he has an adequate remedy by appeal of any final judgment to be entered by the Jefferson Circuit Court.

In order to prevail upon an application for a writ of prohibition, a petitioner in the circumstances at bar must first establish that he or she has no adequate remedy by appeal or otherwise, and that he or she would suffer "great and irreparable injury" if the writ is denied. Bender v. Eaton, Ky., 343 S.W.2d 799, 801 (1961). Appellant contends that he does not have an adequate remedy by appeal because the trial court's order of consolidation was not a final and appealable order adjudicating the rights of the parties pursuant to CR 54.01.

Appellant cites Macklin v. Ryan, Ky., 672 S.W.2d 60 (1984), as standing for the proposition that a party challenging any interlocutory order of a trial court does not have an adequate remedy by appeal, as those orders are not final and appealable. Macklin, however, dealt with a criminal mistrial and the defendant's petition to prevent his retrial on double jeopardy grounds. Id. at 61. In that case, this Court held that the Commonwealth's motion for a mistrial was not final or appealable under CR 54.01, and that "[s]ince a mistrial, by definition, does not dispose of the merits of a case or necessarily preclude future litigation, the appellant did not have an adequate remedy by appeal from the mistrial order." Id.

The case at bar presents a different situation entirely. Appellant is entitled to appeal any adverse judgment entered against him after a trial on the merits. CR 54.02(2) states that:

> When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be

> deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Therefore, once the trial court enters its final judgment, Appellant is free to appeal any interlocutory orders entered prior to entry of the final judgment and accordingly is afforded an adequate remedy by appeal.

This Court has held numerous times that a party who merely seeks a premature appeal of a lower court's interlocutory order shall not be entitled to the extraordinary remedy of a writ. See Ison v. Bradley, Ky., 333 S.W.2d 784, 786 (1960); Wiglesworth v. Wright, Ky., 269 S.W.2d 263, 266 (1954); Osborn v. Wolfford, 239 Ky. 470, 39 S.W.2d 672, 673 (1931).

Appellant also urges us to grant the writ in order to save time, money and valuable judicial resources that will inevitably be wasted by requiring Appellant to fully litigate at trial, appeal the trial court's interlocutory order, and ultimately seek a new trial. While this is a laudable goal, we have held that a writ is not appropriate even though a remedy by appeal "may be fraught with delays, inconveniences, postponements, greater financial outlays, and even possible imprisonment, all of which might be avoided, or greatly curtailed, by a resort to an original application to this court." Osborn, supra, at 674. Moreover, if this Court were to entertain all such cases attempting to challenge interlocutory orders of the trial court on the mere basis of financial distress, it would take "a minimum of imagination to envision the utter confusion and chaos in the trial of cases" that would ensue. Ison, supra, at 786.

Accordingly, we hereby affirm the Court of Appeals in denying the writ of prohibition.

Lambert, C.J.; Johnstone, Keller, Stumbo, and Wintersheimer, JJ., concur.

Cooper, J., dissents by separate opinion, with Graves, J., joining that dissent.

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DISSENTING OPINION BY JUSTICE COOPER

It has long been a rule of both the law of evidence and the law of torts that evidence of a prior negligent act by the defendant is not admissible to prove that the defendant acted negligently on a subsequent occasion.

> [E]vidence of other acts, even of a similar nature, of the party whose own act or conduct . . . is in question . . . is not competent to prove the commission of a particular act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.

Massie v. Salmon, Ky., 277 S.W.2d 49, 51 (1955) (quoting 20 Am.Jur. Evidence § 302). See also Moore v. Bothe, Ky., 479 S.W.2d 634, 635-36 (1972); Morris v. Daniel, Ky., 465 S.W.2d 295, 298 (1971); Baker Pool Co. v. Bennett, Ky., 411 S.W.2d 335, 337 (1967); Price v. Bates, Ky., 320 S.W.2d 786, 788 (1959); cf. Louisville & N.R. Co. v.

Jackson's Adm'r, 250 Ky. 92, 61 S.W.2d 1104 (1933) (evidence of other accidents at railroad crossing admissible to show defendant's notice of dangerous condition); Dowell v. Bivins, Ky. App., 586 S.W.2d 297 (1979) (where child pedestrian killed on highway, evidence that child had played in the highway on other occasions was admissible to rebut parent's testimony that child was closely supervised and not prone to wander). The rule has survived the adoption of the Rules of Evidence. See generally, Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.40 at 120-26 (3d ed. Michie 1993). While KRE 404(b) applies to civil cases, that rule does not permit evidence of "other bad acts" to show action in conformity therewith, and there is no "other purpose" for such evidence in this case except to prove Dr. Brown's negligence on one occasion by proof of his similar negligence on another occasion.

It logically follows that if evidence of Dr. Brown's alleged malpractice with respect to Mrs. George would be inadmissible at the separate trial of Mrs. Knorpp's malpractice action, it was error to consolidate the actions for the purpose of trial.

> Under common-law practice it is generally a prerequisite to the joinder of causes of action that all of the causes affect all the parties to the action. Thus, joinder of causes of action in favor of several plaintiffs or against several defendants, is under common-law practice permissible only where the causes affect all parties.

1 Am.Jur.2d, Actions § 109.

Thus, where a defendant's single act of negligence injures more than one person, all of those injured may be joined in one action against the defendant. Or where one plaintiff is injured by separate negligent acts of multiple defendants, all of the defendants may be joined in one action by the plaintiff. But where multiple plaintiffs allege separate injuries caused by separate and distinct acts of negligence of the same

defendant, the actions may not be joined because all of the causes do not affect all of the parties to the action.

Appellees, Real Parties in Interest, have cited no authority from any jurisdiction for the proposition that two separate tort actions arising out of two separate acts of negligence by the same defendant on two different occasions causing nonconcurrent injuries to two different plaintiffs can be consolidated or joined for purposes of trial. If such authority exists, my own research efforts have failed to find it. And unless such authority exists, our existing precedents indicate that this order of consolidation will necessarily result in a reversal on appeal. Obviously, we have jurisdiction to reverse an erroneous denial by the Court of Appeals of a meritorious petition for a writ. I do not agree that a common law rule of our own creation, i.e., "adequate remedy by appeal," ante at ___ (slip op., at 3), divests this Court of the authority to exercise that jurisdiction when substantial justice and judicial economy demand that we exercise it. Rather, I regard that rule as a valid reason to deny a petition when it is not clear from an underdeveloped record that, as here, a subsequent appeal would be successful.

Accordingly, I would reverse the Court of Appeals and remand with directions to issue the writ.

Graves, J., joins this dissenting opinion.