

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 23, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0252-MR

DATE 10-14-04 E.L.A. CHAUVIN, D.C.

HON. TOM McDONALD, JUDGE
JEFFERSON CIRCUIT COURT,
RETIRED; HON. McKAY CHAUVIN,
JUDGE, JEFFERSON CIRCUIT COURT,
DIVISION TWELVE; AND

APPELLANTS

JEWISH HOSPITAL HEALTHCARE
SERVICES, INC.

REAL PARTY IN INTEREST

V.

ORIGINAL ACTION FROM COURT OF APPEALS
2004-CA-000063-OA
JEFFERSON CIRCUIT COURT NO. 1996-CI-4861

GLENDON PHELPS AND
JOYCE PHELPS

APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

This appeal is from an order of the Court of Appeals granting the Phelps CR 76.36 relief which directs the circuit judge to vacate his decision to bifurcate the trial in the underlying tort action. The question presented to this Court is whether the decision of the Court of Appeals was erroneous.

The Phelps filed a personal injury action against Jewish Hospital and others contending that Glendon Phelps was exposed to a fungus called aspergillus while a patient at the hospital. It is alleged that the exposure was due to an unsanitary

environment caused by a renovation project at the hospital. The Phelps claim that Glendon contracted aspergillosis and now suffers from decreased lung capacity. The complaint seeks compensatory and punitive damages.

Jewish Hospital filed a motion to bifurcate the issues for trial, asserting the beneficial effect of bifurcation of the medical evidence from the other issues, i.e., judicial economy, convenience to all parties and to avoid unnecessary prejudice. The Phelps objected on grounds that the liability and damages issues were so interrelated that it would be difficult to separate the matter. Agreeing with the hospital on the benefits of bifurcation, the circuit judge granted the motion pursuant to his discretionary authority, citing CR 42.01, CR 42.02 and two cases, Adams Real Estate Corp. v. Ward, Ky., 458 S.W.2d 622 (1970) and Lexington Country Club v. Stevenson, Ky., 390 S.W.2d 137 (1965). His ruling limits the first issue tried to a determination by the jury of whether Glendon had a medical condition known as aspergillosis, and if so, then to proceed to litigate all other issues.

On a motion to reconsider, the Phelps relied on KRS 411.186(1), which provides:

In any civil action where claims for punitive damages are included, the jury or judge if jury trial has been waived, shall determine concurrently with all other issues presented, whether punitive damages may be assessed.

The circuit judge denied the motion to reconsider, stating that the statute “does not prevent the medical evidence and causation issues to be bifurcated as the punitive damage claims may still be tried concurrently with the issues presented separately at trial.”

The Phelpses sought a writ of prohibition/mandamus in the Court of Appeals. That court determined that the circuit judge erred because KRS 411.186(1) controlled. Citing Bender v. Eaton, Ky., 343 S.W.2d 799 (1961), it also concluded that the Phelpses had demonstrated their entitlement to the extraordinary remedy of a writ. Specifically, the Court of Appeals decided that “irreparable injury may be presumed from the deprivation of a right clearly bestowed by statute.” Further, the panel stated that bifurcation would cause additional delays, “thereby increasing the risk of loss of discoverable information due to the passage of time, from which the Phelpses would have no adequate remedy by appeal.” Accordingly, the Court of Appeals directed the circuit judge to enter an order vacating his previous decisions which bifurcated the trial and grant “any other relief that may facilitate the normal progress of the action to a full resolution of the issues.” This appeal followed.

Jewish Hospital argues that the decision by the Court of Appeals granting extraordinary relief was erroneous; that the decision conflicts with KRS 447.154, which dictates that rules of court take precedence over statutory law; that KRS 411.184(5) may state that KRS 411.184 supersedes judicial law, but is not applicable to KRS 411.186; that the Kentucky rules of procedure govern all procedural issues in the courts of this state, and bifurcation is a procedural issue; and that original actions seek extraordinary remedies and the Court of Appeals erred when it granted such relief in this action.

The Phelpses respond that the Court of Appeals should be affirmed because Jewish Hospital has waived several issues by raising them for the first time on appeal; that the decision should be affirmed because KRS 411.186 supersedes KRS 447.154 and is not in conflict with the Kentucky rules of civil procedure; and that the Court of

Appeals issuance of a writ of mandamus should be affirmed because the circuit judge ignored the statutory requirements of KRS 411.186.

After consideration of all the arguments in this case, we conclude that the Court of Appeals erred in granting the writ. A writ of prohibition/mandamus 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. See Bender, supra.

Here, because there is no claim that the circuit judge acted outside his jurisdiction, only the second part of the test is applicable. Thus, a writ should issue only if it is shown that there is (a) no adequate remedy by appeal and (b) great injustice and irreparable harm would otherwise occur. The petitioner must pass test (a) before reaching test (b). Bender.

In this case, the Phelps have not passed test (a) because they have not demonstrated that they do not have an adequate remedy by appeal. If the first part of the trial results in a finding in favor of the Phelps, then they may proceed to the second part of the trial without any harm. If, on the other hand, the first stage of the trial results in a finding against them, then they certainly could appeal that decision, including the decision of the circuit judge to bifurcate the trial. We find no merit in the contention that the Phelps have no adequate remedy by appeal because bifurcation would cause additional delays, thereby increasing the risk of loss of discoverable

information due to the passage of time. Having determined that the Phelps have an adequate remedy by appeal, it is unnecessary for us to reach any of the other issues.

The decision of the Court of Appeals is reversed.

All concur except Stumbo, J., who dissents without opinion.

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