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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-1093-MR DATE 9-15-05 E.I.A.Grant, D.C.

CATHY CRESS — APPELLANT

V.

APPEAL FROM THE COURT OF APPEALS
2004-CA-001931
JEFFERSON CIRCUIT COURT NO. 02-CI-008580

HON. THOMAS B. WINE, JUDGE
JEFFERSON CIRCUIT COURT, DIVISION TEN — APPELLEE

and

MEDICAL LIFE INSURANCE COMPANY — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Cathy Cress, appeals from an order of the Court of Appeals denying her petition for a writ of prohibition filed pursuant to CR 81 and CR 76.36. In her petition, Appellant asked the Court of Appeals to prohibit the respondent trial court from allowing further proceedings in an action involving the real party in interest, Medical Life Insurance Company ("MLI"). For the reasons set forth herein, we affirm the Court of Appeals.

In November 2002, Appellant filed and properly served a complaint against MLI. The trial court entered default judgments against MLI on December 19, 2002, and

February 14, 2003, because MLI failed to answer or respond to Appellant's complaint. On June 18, 2004, more than one year after entry of the default judgments, MLI filed a motion to reopen and set aside the judgments entered against it pursuant to CR 55.02 and CR 60.02. Arguing surprise, excusable neglect, fraud, and circumstances justifying the requested relief, MLI stated that it failed to file an answer because it had come to a tentative settlement agreement with Appellant the day before the answer was due. In the days and weeks following the tentative settlement agreement, MLI alleged that Appellant's counsel simultaneously participated in serious settlement discussions with MLI and in proceedings to procure default judgments against MLI without MLI's knowledge and without informing the trial court that Appellant was in contact with MLI and had received a settlement offer from MLI. MLI further alleged that Appellant refused to respond to any of its correspondence after the entry of the default judgments and purposely waited for more than one year to enforce the judgments in order to prevent MLI from setting the judgments aside pursuant to CR 60.02.

On September 3, 2004, the trial court granted MLI's motion to set aside the judgments entered against it and reopened the matter for further proceedings, ruling that MLI "has shown excusable neglect for failing to file an answer." Appellant immediately filed a petition for writ of prohibition with the Court of Appeals, arguing the trial court proceeded without jurisdiction or erroneously within its jurisdiction when it granted MLI's motion to set aside the judgments pursuant to CR 60.02. Appellant claimed the trial court had no authority to set aside the judgments because CR 60.02 provides that motions under the Rule shall not be made more than one year after the judgment is entered if the motion is based on grounds of excusable neglect. The Court of Appeals denied Appellant's petition, holding that Appellant failed to satisfy the

threshold requirement for considering the merits of such an extraordinary writ. Appellant appealed the Court of Appeal's order to this Court and we consider it as a matter of right. CR 76.36(7).

It has been established that a writ of prohibition "is an 'extraordinary remedy' that Kentucky courts 'have always been cautious and conservative both in entertaining petitions for and in granting such relief.'" Newell Enterprises, Inc. v. Bowling, 158 S.W.3d 750, 754 (Ky. 2005) (quoting Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961)). The merits of any such writ will not be considered and the petition denied if the party requesting the writ cannot first demonstrate a minimum threshold showing of harm and lack of redressability on appeal. The St. Luke Hospitals, Inc. v. Kopowski, 160 S.W.3d 771, 774 (Ky. 2005).

When conducting the minimum threshold analysis, the Court typically divides writ cases into "two classes, which are distinguished by whether the inferior court allegedly is (1) acting without jurisdiction (which includes beyond its jurisdiction), or (2) acting erroneously within its jurisdiction." Newell Enterprises, Inc., supra at 754 (citations omitted). In this case, Appellant argues the trial court violated CR 60.02 when it set aside the judgments previously entered against MLI. Since Appellant is not arguing that the trial court was totally without subject matter jurisdiction to proceed at all in this case, Appellant's allegations originate under the latter class of writ cases. See Chamblee v. Rose, 249 S.W.2d 775, 777 (Ky. 1952).

"Under the second class of cases, a writ *may* be granted upon a showing 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." Newell Enterprises, Inc., supra

at 754 (citations omitted). Appellant argues the Court of Appeals erred by failing to find that she is without adequate remedy by appeal and/or that she would suffer irreparable harm. She argues that because she would be forced to "spend thousands of dollars" and "valuable time" on trial proceedings that would ultimately be vacated on appeal due to an erroneous pre-trial order, the threshold requirements are met in this case. We disagree.

While there are very limited circumstances in which a finding of irreparable harm may not be required, "[l]ack of an adequate remedy by appeal is an absolute prerequisite to the issuance of this second class of writ." Newell Enterprises, Inc., supra at 754, Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961). A remedy by appeal is not deemed "inadequate" simply because the judicial process necessary to obtain such a remedy "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 v. Wolfford, 39 S.W.2d 672, 674 (Ky. App. 1931); see also, Ison v. Bradley, 333 S.W.2d 784, 786 (Ky. 1960) ("[T]he delay incident to litigation and appeal by litigants who may be financially distressed cannot be considered as unjust, does not constitute irreparable injury, and is not a miscarriage of justice."). Although inconvenient, Appellant has an adequate remedy by appeal and thus, is not entitled to relief through this extraordinary writ.

The order of the Court of Appeals is affirmed.

All concur.

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