

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky **FINAL**

2005-SC-000392-MR

DATE 12-14-05 Ellen A. Grawth, D.C.  
APPELLANT

ANDREW SILVESTRI

V. ON APPEAL FROM THE COURT OF APPEALS  
2005-CA-000182  
PULASKI CIRCUIT COURT NO. 03-CI-01269

HON. ROBERT E. GILLUM, JUDGE,  
PULASKI CIRCUIT COURT, ET AL.

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant Andrew Silvestri, appeals from the Court of Appeals' denial of his petition for extraordinary relief. Specifically, Silvestri sought a writ of prohibition to prevent the trial court from enforcing its order allowing the Plaintiff below, Kathy Ashley, to have her CR 35 medical examination videotaped.

The underlying litigation involves a car accident between Ashley and Silvestri's sixteen-year-old daughter who was driving a vehicle owned by her father at the time of the accident. Ashley filed suit against Silvestri and his daughter for alleged injuries sustained in the accident. After the Silvestris requested a CR 35 examination of Ashley, Ashley moved to have the examination videotaped. The court granted the motion and ordered that Ashley be allowed to videotape the examination. The Silvestris sought a writ of prohibition to prevent the trial court from enforcing this order.

CR 35.01 permits the court to order a party to submit to a physical examination by an appropriate health care expert when the party's mental or physical condition is in controversy and good cause is shown for the examination. The examined party is entitled to "a detailed written report of the examining health care expert setting out all findings, including results of all tests made, diagnoses and conclusions[.]"<sup>1</sup> While the rule is silent on what conditions a court may impose on the examination, this Court has held that the trial court has discretion to determine whether to impose certain conditions, including the appropriateness of certain external presences such as a video recorder.<sup>2</sup> While the parties disagree as to whether the trial court abused its discretion, both agree that Metropolitan Property & Cas. Ins. Co., v. Overstreet<sup>3</sup> governs the issue.

In Overstreet, this Court conducted a thorough review of the jurisprudence from federal courts and other state jurisdictions concerning the permissibility of an external presence in the examination room, such as an audio or video recording device. Our review revealed that some states allow an external presence as a matter of course. Federal courts have taken a more conservative approach and allow an external presence only if the circumstances of the particular case warrant it. However, "[c]ourts have unanimously accepted the tenet that the conditions of a Rule 35 examination are left to the sound discretion of the trial court."<sup>4</sup> Thus, in Overstreet, this court held that a trial court could impose an external presence in the Rule 35 examination upon a showing of good cause. We pronounced three primary factors to aid the trial court in

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<sup>1</sup> CR 35.02.

<sup>2</sup> Metropolitan Property & Cas. Ins. Co., v. Overstreet, 103 S.W.3d 31 (Ky. 2003).

<sup>3</sup> Id.

<sup>4</sup> Id. at 35-36.

evaluating the “good cause” standard. We held that the court should consider the nature of the proposed external presence, the nature of the exam itself, and any evidence that the examination may be conducted in an unfair manner.<sup>5</sup> In the instant case, the Appellant contends that the trial court’s ruling was erroneous because Ashley failed to show good cause for having the examination videotaped.

In response, we first note that the challenged ruling is interlocutory and therefore not immediately appealable.<sup>6</sup> Thus, Appellant attempts to utilize a special procedural vehicle to obtain interlocutory review. CR 81 allows a party to bring an original action against a trial court in the Court of Appeals. An appellate court may grant relief under CR 81 to correct an erroneous interlocutory ruling.<sup>7</sup> Such relief takes the form of an extraordinary writ, and is only granted in rare circumstances, after certain firm prerequisites are met.<sup>8</sup> Precisely, only upon a showing that the ruling, if erroneous, would result in irreparable injury and could not be corrected through conventional appeal or otherwise, will the petitioner be entitled to a review of the merits.<sup>9</sup> Accordingly, the Court of Appeals need only review the merits of the alleged error if the threshold showing is made.<sup>10</sup> If a petitioner fails to meet the threshold, the petitioner is not entitled to the relief sought regardless of whether the interlocutory order is erroneous.<sup>11</sup>

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<sup>5</sup> Id.

<sup>6</sup> CR 54.02. See also Vaught v. Vaught, 296 Ky. 754, 178 S.W.2d 590 (Ky. 1944).

<sup>7</sup> Bender v. Eaton, 343 S.W.2d 799 (Ky. 1961) (A court may also grant relief where the trial court is acting outside its jurisdiction. As noted, however, Overstreet held that the imposition of conditions on a Rule 35 examination was within the sound discretion of the trial court. Clearly, then, the trial court in the instant case was acting within its jurisdiction).

<sup>8</sup> Bender, 343 S.W.2d 799.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

In Overstreet, the Court of Appeals did not explicitly decide whether an extraordinary writ was the appropriate avenue for relief in this situation. Instead, it proceeded directly to the merits of the writ petition. Consequently, this Court also reviewed the decision on the merits. In the instant case, the Court of Appeals did not reach the merits of the alleged error. Rather, it declined to review the merits of the petition because Silvestri failed to meet the prerequisite showing of irreparable injury and lack of an adequate remedy by appeal or otherwise. Accordingly, we first focus on the threshold requirements and declare this to be the better practice.

The Court of Appeals pointed out that “[t]he Silvestris make no argument as to the adequacy of an appeal of the matter.” Furthermore, the only argument of irreparable injury is that the examination will become a mere performance due to the presence of a video recorder and will place the parties in unequal positions. Our jurisprudence illustrates that we have acted with extreme reluctance in entertaining extraordinary writ petitions, let alone, granting them.<sup>12</sup> The most common types of injuries that we have held to be irreparable and incapable of appellate remedy are those which require disclosure of potentially privileged information, for example, trade secrets or information protected by the attorney-client privilege.<sup>13</sup> This is not such a case. Simply stated, Appellant has not shown irreparable injury. If prejudicial error occurs at trial as a result of the videotaped examination, Petitioner may present his claim on appeal after entry of a final judgment.

Accordingly, we affirm the Court of Appeals’ decision as Appellant has not met the threshold requirements necessary to entertain the merits of his petition.

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<sup>12</sup> Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803 (Ky. 2004).

<sup>13</sup> See, e.g., Trude, 151 S.W.3d 803; The St. Luke Hosp., Inc., v. Kopowski, 160 S.W.3d 771 (Ky. 2005).

All concur.

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