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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: JUNE 21, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000660-MR

JAMES A. ELLIS, JAMES A. ELLIS AND ASSOCIATES, ARCHITECT, PSC — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
2006-CA-000969-OA
PIKE CIRCUIT COURT NO. 98-CI-000645

HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE, PIKE CIRCUIT COURT; BOWLES RICE MCDAVID GRAFF & LOVE, PLLC, A/K/A BOWLES RICE MCDAVID GRAFF LOVE & GETTY, PLLC; GETTY, KEYSEE & MAYO, LLP; RICHARD A. GETTY; AND MICHAEL CARYL, (REAL PARTIES IN INTEREST) — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

This is a matter of right appeal from an original action in the Court of Appeals. In that action, James A. Ellis and a company owned by him, James A. Ellis & Associates Architects, PSC (Ellis) sought a writ of prohibition against Special Judge John David Caudill of the Pike Circuit Court from enforcing an order in a legal malpractice action that (1) denied Ellis's motion to dismiss as settled and (2) granted attorney Richard Getty's and his law firm's (along with Michael E. Caryl, the real parties in interest) motions to set aside the jury verdict and the parties' settlement agreement and for a new trial. The Court of Appeals denied the petition for a writ. Upon review, we

conclude that the Court of Appeals did not abuse its discretion in denying Ellis's petition for a writ of prohibition because Ellis did not demonstrate that he has no adequate remedy by appeal. Thus, we affirm.

II. Underlying facts and procedural history

As stated above, the underlying action is a legal malpractice action filed by Ellis against Richard Getty, Michael Caryl, and the law firms of Getty, Keyser & Mayo, LLP, and Bowles Rice McDavid Graff Love & Getty, n/k/a Bowles Rice McDavid Graff & Love, PLLC (collectively, Getty). In the lawsuit, Ellis sought money damages for Getty's alleged failure to file and pursue various causes of action.

The first trial judge to preside over the action was Judge Eddie Coleman. Judge Coleman withdrew, however, and Joseph F. Bamberger, then a senior status special judge, was appointed to preside. Judge Bamberger divided the case into three separate cases and further divided the three separate cases into two phases: (1) whether Ellis would have obtained a favorable verdict if Getty had pursued his claims and (2) whether Getty was negligent in failing to pursue the claims.

In the first hearing before Judge Bamberger (which occurred in June of 2004), Judge Bamberger recognized someone sitting with Ellis as being a possible business associate of Mark Modlin, a trial consultant. Judge Bamberger informed defense counsel that Mark Modlin was a good friend of his. Despite his friendship with Modlin, he told defense counsel that he would not recuse himself from the case on that basis as he had good friends in 95 percent of the cases over which he presided. On that information, the two defense attorneys present at the hearing stated that they had no objection to Judge Bamberger presiding.

Shortly after that first hearing, the trial on the first of the three cases began.

Before its conclusion, the parties settled that claim for $108,000.00.

Four months after the first case settled, the first phase of the second case proceeded to a jury verdict in favor of Ellis. Specifically, the jury found that if the case had been filed and litigated, Ellis could have achieved a verdict of in excess of three million dollars.

After the verdict for the plaintiffs in the first phase but before the legal malpractice phase, defense counsel made a motion for a new trial and petitioned for Judge Bamberger's recusal. In support of their motion, they cited recent developments in another unrelated case over which Judge Bamberger presided that tended to show that Judge Bamberger and Mark Modlin were more than just "good friends," although the full extent of their relationship was not yet known.

Eventually, Judge Bamberger voluntarily recused himself from the case, and John Potter, another senior status special judge, was appointed to preside over the matter. As to Getty's pending motion for a new trial, Judge Potter denied the motion and assigned the legal malpractice phase for trial.

Several days into the legal malpractice phase of the trial, the parties informed the court that they had settled all matters and the trial court discharged the jury. Mark Modlin participated in the settlement negotiations. In the months following, the parties signed releases and Getty's insurer, DPIC Insurance Companies, Inc. (DPIC), distributed the settlement monies.

Before the trial court issued an order dismissing the matter as settled, however, it voluntarily sent out a notice to all parties that directed the parties to inspect filings in a Boone Circuit Court case. Discovery filings in that case revealed that, while presiding over this case, Judge Bamberger was on the board of the Kentucky Fund for Healthy

Living, Inc. (KFHL), a non-profit corporation created to administer a charitable fund. The charitable fund was established as part of the settlement reached in an action involving a diet drug (commonly known as Phen-fen). Modlin was one of the directors of KFHL. In responding to evidence of this relationship, Modlin's counsel advised the trial court that Modlin and Bamberger were also co-owners of a piece of real estate.

On Ellis's motion, Judge Potter recused himself from the case, and Judge John David Caudill was appointed to preside over the matter.

Based on this undisclosed relationship between Bamberger and Modlin, Getty filed a motion for relief under CR 60.02, a renewed motion for a mistrial and a motion to set aside the settlement. The trial court held the case and all pending matters before the court in abeyance pending a decision by the Judicial Conduct Commission on five counts of Bamberger's alleged misconduct, one of which stemmed directly from his failure in this case to adequately disclose the full extent of his business relationships with Modlin. Ultimately, Bamberger resigned as a senior status special judge and received a public reprimand for -- among other instances of misconduct -- his failure to disqualify himself in proceedings in which his impartiality might reasonably be questioned because of his friendship with Modlin.

Following the issuance of the public reprimand, the trial court granted Getty's motion. In its order, the trial court determined that the integrity of the judicial process required that the settlement agreement be set aside and that the jury verdict reached in the first phase of the second trial be set aside. Accordingly, the trial court granted Getty's motion for a new trial.

Ellis filed a petition for a writ of prohibition in the Court of Appeals, which the Court of Appeals denied. In its order, the Court of Appeals held that Ellis had not made

the requisite threshold showing of irreparable injury and lack of an adequate remedy by appeal. And the Court of Appeals determined that this matter did not qualify as one of those special cases, as identified in Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 808 (Ky. 2004), where the Court of Appeals may look beyond the petitioner's failure to meet the irreparable injury test and analyze the merits of petitioner's claim of error by the lower court.

III. Standard of review

"A writ of prohibition is an extraordinary remedy and should only be granted in exceptional circumstances." James v. Shadoan, 58 S.W.3d 884, 885 (Ky. 2001) (citing 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." Bender, 343 S.W.2d at 800.

This Court recently reviewed Kentucky case law pertaining to writs and formulated a precise statement of the rule entitling a party to such relief:

> A writ of prohibition *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.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004) (emphasis in original). In this case, the parties seem to agree that the circuit court was acting within its jurisdiction in

granting relief under CR 60.02. Accordingly, the analysis that follows will focus on the second class of writs.

In any case, "whether to grant or deny a petition for a writ is not a question of jurisdiction, but of discretion." Id. at 5. Thus, we will review the decision of the Court of Appeals to deny the writ of prohibition for abuse of discretion.

We reject Ellis's argument that de novo review, not abuse of discretion, is the appropriate standard of review in this case. De novo review is generally the standard in the first class of writs and in the second class of writs (1) when the alleged error involves a question of law or (2) in certain special cases in which a showing of great and irreparable injury is not an absolute prerequisite for the issuance of the writ because "a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration." Bender, 343 S.W.2d at 801 (emphasis in original). See Grange Mut., 151 S.W.3d at 810 (holding that de novo review is applicable for cases falling under the certain special case exception). We agree with the Court of Appeals that Ellis has not demonstrated that a substantial miscarriage of justice will result in this case.

IV. Analysis of the issue: Did the Court of Appeals abuse its discretion in denying Ellis's petition for a writ of prohibition?

The Court of Appeals did not abuse its discretion in denying Ellis's petition for a writ of prohibition in this case because Ellis did not demonstrate that he has no adequate remedy by appeal, which is, under Bender, an absolute prerequisite for the issuance of such an extraordinary remedy. See id. at 801.

Once this case proceeds through its various trial phases and the trial court

enters a final judgment, Ellis may appeal any order of the trial court, including its decisions to (1) deny Ellis's motion to dismiss as settled and (2) grant Getty's motions to set aside the jury verdict and the parties' settlement agreement and for a new trial.

Ellis contends that his remedy by appeal is inadequate because he cannot appeal the trial court's order granting relief under CR 60.02 until the case is fully and finally adjudicated. And the case will not be fully and finally adjudicated until the trial court has conducted six jury trials. If, on the merits, the Court of Appeals upholds the settlement as valid, then those six jury trials will be rendered meaningless.

Returning to the standard enunciated above, however, we cannot agree this is one of those exceptional circumstances requiring interference from this Court. Ellis is in no different position than any other plaintiff who is put to the expense of proving his claim. It makes no difference that the litigation is complex. See Indep. Order of Foresters v. Chauvin, 175 S.W.3d 610, 615 (Ky. 2005) (citing Nat'l Gypsum Co. v. Corns, 763 S.W.2d 325, 327 (Ky. 1987)) In essence, Ellis is arguing that the normal appeal procedure is inadequate. And that argument warrants no further discussion.

As Ellis failed to show that he does not have an adequate remedy by appeal, we need not reach the merits of his assignment of error.

V. Real party in interest argument by Ellis

Ellis argues that the trial court's order should be overturned because Getty is not the real party in interest with standing to seek to have the settlement set aside. This argument is premised on the fact that Getty's insurer, DPIC, paid the settlement proceeds to Ellis.

This argument fails, however, because it is not supported by the law. "The real party in interest is the one who is actually and substantially interested in the subject-

Commonwealth v. Farmers' Bank of Kentucky, 191 Ky. 547, 231 S.W. 25, 26 (1921) (citing Taylor v. Hurst, 186 Ky. 71, 216 S.W. 95, 96 (1919)) See CR 17.01. Getty had and still has a substantial interest in the subject matter of this case, Getty's alleged legal malpractice. Getty is a named party to this lawsuit. Getty is as much a real party in interest as is Ellis.

As applied to cases involving an insured and insurer, the liability insurance company of a defendant tortfeasor is not a real party in interest to a lawsuit over the tortfeasor's liability. See Mayer v. Dickerson, 321 S.W.2d 56, 58 (Ky. 1959). This case involves a legal malpractice lawsuit filed by Ellis against Getty. Getty's liability is still very much at issue. Thus, Getty's liability insurer is not a real party in interest.

For the reasons set forth above, we affirm the Court of Appeals.

All sitting except Scott, J. All concur.

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