

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: NOVEMBER 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2006-SC-000430-MR

DATE 6-19-08 ELLA GOWIN P.C.

RAYMOND SCHLAGEL AND
KORLISS SCHLAGEL

APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NUMBER 2005-CA-002561
BOONE CIRCUIT COURT NO. 90-CI-000425

HON. ANTHONY W. FROHLICH, JUDGE,
BOONE CIRCUIT COURT, AND
BERLING DEVELOPMENT ENTERPRISES/
BERLING CONSTRUCTION COMPANY,
REAL PARTY IN INTEREST, ET AL

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a matter of right appeal from an original action in the Court of Appeals. In that action, the Appellants, Raymond and Korliss Schlagel (hereinafter, "the Schlagels") sought relief from an order of the Boone Circuit Court denying their motion to compel the Boone Circuit Clerk to produce a copy of a supersedeas bond allegedly filed in a prior matter. The Court of Appeals denied the Schlagels' petition for a writ of mandamus. Upon review, we affirm the decision of the Court of Appeals.

In May of 1990, the Schlagels filed suit against the real party in interest herein, Berling Development Enterprises (formerly Berling Construction Company and hereinafter, "Berling"). The suit alleged, inter alia, breach of warranty, misrepresentation, and violations of the Kentucky Consumer Protection Act arising out

of Berling's construction of a private residence for the Schlagels. Following a jury trial, the Schlagels were awarded both compensatory and punitive damages for a total final judgment of \$1,140,000.¹ The Court of Appeals affirmed the judgment in an unpublished opinion.²

According to the Schlagels, Berling posted a supersedeas bond to cover the judgment during the pendency of the direct appeal to the Court of Appeals. Since the conclusion of the appeal of the original action, the Schlagels claim that they have sought unsuccessfully to obtain a copy of the supersedeas bond and a certified copy of the case history. While they did receive a certified letter from the Boone Circuit Court Clerk's office purporting to contain a certified copy of the case history, the Schlagels claim that such letter contained neither a certified copy of the case history nor a copy of the bond.

Thereafter, the Schlagels moved the Boone Circuit Court to compel production of the supersedeas bond. In an order entered June 1, 2005, the Appellee herein, Judge Anthony W. Frohlich, found that Berling had never posted a supersedeas bond. In the order, Judge Frohlich noted that an order of non-wage garnishment and a writ of execution were obtained by the Schlagels against Berling in an attempt to collect on the judgment while Berling appealed the original judgment. Judge Frohlich correctly explained that the Schlagels were permitted to "engage in these efforts because [Berling] did not supersede the judgment by posting a bond."

¹ The judgment of the Boone Circuit Court was dated August 9, 1996.

² See Berling Construction Company v. Schlagel, 1996-CA-003222-MR. Berling later sued its attorney in that litigation, James Woltermann, for legal malpractice. In a series of partial summary judgments, all claims were resolved in favor of Woltermann. The Court of Appeals later affirmed that judgment in an unpublished opinion. See Berling Development Enterprises, Inc. v. Woltermann, 2004 WL 1175749.

As further evidence that a supersedeas bond was not posted, Judge Frohlich referred to a pleading filed by the Schlagels in the Boone Circuit Court in April of 1997, a year after the original judgment. In that pleading, counsel for the Schlagels asserted that “[Berling] has never put up a supersedeas bond in this action and it is the [Schlagels’] intention to begin levying and foreclosing on the property of Berling Construction’s successor company.” By subsequent order dated June 6, 1997, the Boone Circuit Court allowed such execution by stating that “execution may now issue forthwith against Berling Development Enterprises, Inc.”

Though finding no evidence of a bond, Judge Frohlich, out of an abundance of caution, sua sponte ordered a hearing on this issue. Berling’s counsel, Stephen Wolnitzek, appeared and acknowledged in open court that his client had never posted a supersedeas bond.

Finally, Judge Frohlich noted that “the Court has examined the Court files and Court Calendar and finds no evidence that [Berling] ever filed a supersedeas bond. In fact, the [Schlagels’] efforts throughout this case in using the processes of this Court to obtain payment of their Judgment indicate that [their] collection efforts were not ever superseded.” Accordingly, having found no evidence of a bond, the Schlagels’ motion to compel the Boone Circuit Court to produce such bond was denied.

Thereafter, the Schlagels petitioned the Court of Appeals for a writ of mandamus directing Judge Frohlich to provide them with a copy of the supersedeas bond and the case history. In that petition, the Schlagels asserted that the bond is known to exist, but that it has been withheld from them. Furthermore, they argue that, by denying them a certified copy of the case history, they are being deprived of the record they need for their appeal.

The petition was denied. Explaining that a writ of mandamus is an appropriate remedy only when a trial court is refusing or neglecting to carry out its duties, the Court of Appeals determined that Judge Frohlich had fully adjudicated the matter by his June 1, 2005 order. Furthermore, the Court of Appeals noted that the Schlagels presented no additional evidence that would demonstrate that Judge Frohlich's findings or order was in error.

The Schlagels appealed the denial of the writ to this Court. Upon review, we agree with the Court of Appeals that a writ of mandamus is not warranted in this instance.

A writ is an extraordinary remedy that is granted conservatively, and only in exceptional cases. See Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992). Accordingly, it is granted for only two reasons: (1) where the lower court is acting beyond its jurisdiction; and (2) where 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 or irreparable injury will result if the petition is not granted. Newell Enterprises, Inc. v. Bowling, 158 S.W.3d 750, 754 (Ky. 2005). The requirements that no adequate remedy exists by appeal and that irreparable injury will result are absolute prerequisites to the issuance of a writ. Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961). On appeal, the basic standard of review is for an abuse of discretion, though questions of law are reviewed de novo. Newell, 158 S.W.3d at 754.

Here, the Schlagels have failed to demonstrate that the lower court has acted beyond its jurisdiction. Furthermore, Judge Frohlich's June 1, 2005 order is a final and appealable order. Furthermore, the Schlagels have failed to demonstrate that no

adequate remedy exists by direct appeal of that order. Accordingly, the requirements of the extraordinary remedy of a writ of mandamus have not been met in this case.

For the foregoing reasons, the decision of the Court of Appeals denying the petition for a writ of mandamus is hereby affirmed.

All concur except Schroder, J., not sitting.

APPELLANTS:

Raymond Schlagel
64 W. Cobblestone Ct.
Florence, KY 41042

Korliss Schlagel
64 W. Cobblestone Ct.
Florence, KY 41042

COUNSEL FOR APPELLEES:

Stuart W. Cobb
Assistant Attorney General
Civil & Environmental Law Division
Office of the Attorney General
P. O. Box 2000
Frankfort, KY 40602-2000

Hon. Anthony W. Frohlich
Boone County Justice Center
6025 Rogers Lane
Suite 444
Burlington, KY 41005

Joseph F. Bamberger
1598 Shady Cove
Florence, KY 41042

**COUNSEL FOR REAL PARTY IN INTEREST,
BERLING DEVELOPMENT ENTERPRISES:**

Stephen D. Wolnitzek
Matthew Beatty Demarcus
WOLNITZEK & ROWEKAMP, PSC
502 Greenup Street
P. O. Box 352
Covington, KY 41012-0352