

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 1, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2009-SC-000144-MR

DATE

10/22/09 Kelly Klauer D.C.

STATE AUTO PROPERTY & CASUALTY
INSURANCE COMPANY

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-001950
CUMBERLAND CIRCUIT COURT NO. 07-CI-00027

HONORABLE EDDIE C. LOVELACE, JUDGE,
CUMBERLAND CIRCUIT COURT

APPELLEE

AND

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY

REAL PARTY IN INTEREST

AND

BOBBY SEVERE

REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

State Auto Property & Casualty Insurance Company (State Auto) appeals as a matter of right the decision of the Court of Appeals which denied State Auto's writ of prohibition against Judge Eddie C. Lovelace of the Cumberland Circuit Court. Judge Eddie C. Lovelace denied State Auto summary judgment and ruled adversely to State Auto on certain discovery matters. For the reasons set forth herein, we affirm the Court of Appeals.

BACKGROUND

This matter began in the Cumberland Circuit Court as a result of an automobile accident between Bobby Severe and Angela Spears. Spears was injured and filed suit against Severe. State Auto insured Spears and also provided the underinsured coverage (UIM carrier). Severe was insured by Kentucky Farm Bureau Mutual Insurance Company (KFB) for \$100,000.00. A Coots¹ letter was sent pursuant to KRS 304.39-320(4) and the UIM carrier paid the \$100,000.00 to Spears, preserving its subrogation rights. Subsequently, the UIM carrier paid Spears an additional \$50,000.00 to settle the UIM claim against it.

At this point, Spears has been made whole and is out of the picture, although State Auto is subrogated to her claims against Severe for \$150,000.00. State Auto then made a demand against KFB for the \$100,000.00 KFB offered Spears to settle. KFB refused. State Auto filed suit against KFB for the \$100,000.00 advanced, and against Severe for the \$50,000.00 paid in UIM benefits.

State Auto moved for summary judgment against KFB for the \$100,000.00 on the theory that pursuant to KRS 304.39-320(4), it was entitled to reimbursement as a matter of law. The trial court denied summary judgment on grounds that State Auto only stepped into the shoes of Spears, so State Auto would have to prove liability as well as damages. The trial court also made some pre-trial discovery rulings that State Auto objects to.

¹ Coots v. Allstate Ins. Co., 853 S.W.2d 895 (Ky. 1993).

State Auto petitioned the Court of Appeals for a writ (CR 76.36) to prohibit the trial court from acting outside its jurisdiction, or alternatively, from ordering that State Auto may not take the deposition of Todd Whittle (the adjuster of KFB who evaluated the claim). The Court of Appeals denied the writ and State Auto appeals as a matter of right.²

ANALYSIS

A writ of prohibition is an extraordinary remedy, available only in two instances: 1) when a “lower court is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an application to an intermediate court; or 2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise, and great injustice or irreparable injury will result.”

Ally Cat, LLC v. Chauvin, 274 S.W.3d 451, 456-57 (Ky. 2009), quoting Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). “[A]lthough a writ of prohibition will issue only in exceptional circumstances, whether to do so lies within the sound discretion of the court in which the writ is sought.” St. Clair v. Roark, 10 S.W.3d 482, 485 (Ky. 1999) (citing Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992); Jones v. Hogg, 639 S.W.2d 543, 543 (Ky. 1982)). “The court in which the petition is filed may, in its discretion, address the merits of the issue within the context of the petition for the writ, or may decline to do so on grounds that there is an adequate remedy by appeal.” St. Clair, 10 S.W.3d at 485.

² CR 76.36(7).

The standard of review we must apply when reviewing a denial of a writ of prohibition depends on the class or category of writ. Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). When the lower court is alleged to be acting outside its jurisdiction, the proper standard is *de novo* review because jurisdiction is generally only a question of law. Id. When an appellant alleges that the court with which the writ was filed is acting within its jurisdiction but in error, the standard is abuse of discretion. Id. In the case before us, State Auto argues that the trial court's rulings in this case were in direct conflict with the language of KRS 304.39-320(4) and exceeded its jurisdiction. We disagree that the trial court exceeded its jurisdiction, because the circuit court is the proper court to interpret a statute.³ Thus, the circuit court had subject matter jurisdiction, and the Court of Appeals so held. The rulings by the trial court are alleged to be in error. Therefore, State Auto's argument should have been that the court is acting erroneously within its jurisdiction, which requires a review under an abuse of discretion standard.

The Court of Appeals also held the petitioner failed to show that the Cumberland Circuit Court was acting erroneously within its jurisdiction and that a great injustice and irreparable injury would result if the petition was not granted. We agree. Summary judgment, discovery, and protective orders are all matters within the jurisdiction of the trial court and upon a final judgment can be appealed. The only allegation of injustice is that State Auto will have to try the case, and will have to do its own discovery on damages. Even if the

³ See KRS 23A.010(1).

Court of Appeals had believed the trial court was acting erroneously within its jurisdiction, the decision whether or not to issue a writ is discretionary with the Court of Appeals, which may decline to do so on the grounds that there is an adequate remedy by appeal. St. Clair, 10 S.W.3d at 485.

Accordingly, we cannot say that the Court of Appeals abused its discretion in denying Appellant's writ of prohibition, and hence, we affirm.

All sitting. All concur.

COUNSEL FOR APPELLANT:

David A. Nunery
Angela Michelle Call
Steven Casey Call
Nunery & Bennett, PLLC
105 East Main Street
Campbellsville, KY 42718

COUNSEL FOR APPELLEE:

Honorable Eddie C. Lovelace
Judge, Cumberland Circuit Court
Justice Center
104 Cumberland Street
Albany, KY 42602

COUNSEL FOR REAL PARTY IN INTEREST
KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY:

John C. Miller
Bertram, Cox, & Miller, LLP
321 East Main Street
P.O. Box 1155
Campbellsville, KY 42718

COUNSEL FOR REAL PARTY IN INTEREST
BOBBY SEVERE:

Jeffrey Hall Hoover
Hoover Law Office
40 South Main Street
P.O. Box 985
Jamestown, KY 42629

Stephen Howard Poindexter
412 Courthouse Square, Ste 202
P.O. Box 904
Burkesville, KY 42717