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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JANUARY 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2009-SC-000324-MR

DATE 2/11/10 Kelly Klaber D.C.

COMMONWEALTH OF KENTUCKY,
EX REL. JACK CONWAY, ATTORNEY GENERAL — APPELLANT

v.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-002297-OA
FRANKLIN CIRCUIT COURT NO. 07-CI-00751

HONORABLE THOMAS D. WINGATE, JUDGE,
FRANKLIN CIRCUIT COURT — APPELLEE

AND

MARATHON PETROLEUM COMPANY, LLC — REAL PARTIES IN INTEREST

AND

MARATHON OIL CORPORATION

AND

SPEEDWAY SUPERAMERICA, LLC

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a matter of right appeal[1] from an original action in the Court of Appeals denying the Attorney General's (Appellant herein) petition for a writ of prohibition. The request for a writ was made by the Appellant after the trial

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[1] CR 76.36(7).

court ruled that the Attorney General's office must designate "at least one individual with knowledge of relevant facts to be available for deposition," and further, directed the Attorney General to complete interrogatories and discovery in a consumer products case filed under KRS 367.374 by the Appellant. We opine that the Court of Appeals did not abuse its discretion in denying said writ and thus affirm.

In the wake of Hurricane Katrina, then-Kentucky Governor Ernie Fletcher, by Executive Order 2005-927 (EO 5-927), declared a state of emergency in the Commonwealth. The next day, August 31, 2005, Governor Fletcher signed EO 5-943, which implemented the provisions of the Consumer Protection Act[2] dealing with SALES AND RENTALS DURING STATE OF EMERGENCY,[3] by applying the Act to the sale of gasoline.[4]

On May 10, 2007, the Attorney General filed a civil action against the real parties in interest which alleged that the real parties in interest violated KRS 367.374 by excessively charging their consumers for fuel during the period that the Commonwealth was under a declared state of emergency - which reportedly reaped record incomes for the real parties in interest. The real parties in interest answered and counterclaimed challenging the constitutionality of KRS 367.374 and raising a number of affirmative defenses and arguments in their counterclaims.

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[2] KRS 367.110 et seq.

[3] KRS 367.372 et seq.

[4] Did not include diesel fuel.

During discovery, a dispute arose when Marathon served former Attorney General, now House Speaker Gregory D. Stumbo with a CR 30.02(6) notice to take a videotaped deposition about certain matters relating to the passage and enforcement of the Consumer Protection Act. The current Attorney General resisted with a motion to quash. By order entered November 13, 2008, the circuit court ruled that Marathon could not take the former Attorney General's deposition, but that the Attorney General's office must designate a representative to be available for deposition, pursuant to CR 30.02(6).

The Attorney General filed an original action with the Court of Appeals seeking a writ of prohibition to prohibit enforcement of that portion of the November 13 trial court order directing it to designate an individual to be available for deposition. The Court of Appeals denied the writ after concluding that the Commonwealth failed to meet the high standard for issuance of a writ because allowing the deposition to proceed would not result in irreparable injury or a substantial miscarriage of justice. The Court of Appeals opined that the Commonwealth's desire to protect privileged information could be accomplished

> by objecting during the deposition to questions that seek such privileged information. Kentucky Rules of Civil Procedure (CR) 30.03(3) states that "[a]ny objection to evidence during a deposition shall be stated concisely and in a nonargumentative and nonsuggestive manner." The Commonwealth can then seek a protective order pursuant to CR 26.03 and CR 30.04.

"The writ of mandamus, like the writ of prohibition, is extraordinary in nature. Such a writ bypasses the regular appellate process and requires significant interference with the lower courts' administration of justice."[5] "[T]his Court has articulated a strict standard to determine whether the remedy of a writ is available."[6] In Hoskins v. Maricle,[7] we said

> 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.

Even where the request meets this strict standard, the court in which the petition is filed may decline to exercise this discretionary power.[8] The standard of review we must apply when reviewing a denial of a writ of prohibition depends upon the class or category of the writ.[9] 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.[10] When an appellant alleges the lower court is acting within its jurisdiction, but in error, the standard is abuse of discretion.[11] It was uncontroverted in this case that

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[5] Cox v. Braden, 266 S.W.3d 792, 795 (Ky. 2008).

[6] Id. at 796.

[7] 150 S.W.3d 1, 10 (Ky. 2004).

[8] St. Clair v. Roark, 10 S.W.3d 482, 485 (Ky. 1999).

[9] Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004).

[10] Id.

[11] Id.

the trial court was acting within its jurisdiction. Therefore, the question before us is not whether the circuit court has jurisdiction, but whether the court is about to act erroneously, although within its jurisdiction, to justify a writ action, thus our review is for an abuse of discretion.

We are of the opinion that the Court of Appeals did not abuse its discretion in denying the writ. The Court of Appeals determined that this was not one of those cases where there was no adequate remedy by appeal nor was it one of those "certain special cases" where the requirement of irreparable harm can be substituted with a showing that a "substantial miscarriage of justice will result if the lower court is proceeding erroneously . . . ."[12] The Court correctly noted that the Attorney General could object to a question under CR 30.03(3) and proceed under CR 26.03 and CR 30.04 for a protective order. Under these rules, the Attorney General can move for a ruling by the trial court before the deponent answers the question (or is relieved from answering the question on the grounds of privilege). The Civil Rules themselves provide the Appellant with a remedy before an appeal is necessary.

For the foregoing reasons, the decision of the Court of Appeals to deny the petition for a writ of prohibition is affirmed.

All sitting. All concur.

[12] Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961) (recognizing "certain special cases" where great and irreparable harm does not have to be shown).

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