# 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# NOT TO BE PUBLISHED OPINION

**THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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NOT TO BE PUBLISHED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

2009-SC-000382-MR



BUBALO, HIESTAND & ROTMAN, PLC,
AND GREGORY J. BUBALO — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2009-CA-000387-OA
JEFFERSON CIRCUIT COURT NO. 08-CI-005334

HONORABLE JUDITH McDONALD-BURKMAN
(JUDGE, JEFFERSON CIRCUIT COURT, DIVISION NINE)
AND BEVERLY J. GLASCOCK
(REAL PARTY IN INTEREST) — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Appellants, Bubalo, Hiestand & Rotman, PLC, ("BHR") and Gregory J. Bubalo, appeal from a decision of the Court of Appeals denying their petition for a writ of prohibition. Because we agree with the Court of Appeals that the standard for granting a writ has not been met, we affirm.

The Real Party in Interest, Beverly J. Glascock, filed suit against the Appellants in circuit court, alleging retaliatory and wrongful discharge, among other claims. As discovery proceeded, the Appellants moved the trial court for a protective order, requesting that the trial court

prohibit Glascock "from discussing or mentioning in any way during her deposition confidential communications" in a specific case litigated by the Appellants during Glascock's employment with BHR. According to the Appellants' motion, Glascock's answers to interrogatories made clear that she intended to discuss matters involving the case, which it contended would "clearly violate the attorney-client privilege."

The trial court denied the motion for protective order but ordered that when Glascock's deposition was taken that it be placed under seal and that it not be filed in the record. The Appellants then filed under seal a petition for a writ of prohibition with the Court of Appeals.

The Court of Appeals denied the petition, finding that it did not meet the "stringent" standard for granting a writ provided in Hoskins v. Maricle.[5] Because the trial court was alleged to have acted erroneously within its jurisdiction, a writ could only be granted if "great injustice and irreparable injury" would result from denial of the writ.[6] The Court of Appeals explained that the Appellants had not shown irreparable injury because of the trial court's protective intervention by ordering Glascock's

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5 150 S.W.3d 1 (Ky. 2004).

6 *Id.* at 10. ("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.").

deposition to be taken under seal and ordering that her deposition not be filed in the record:

> Here, the petitioners assert that the trial court acted erroneously within [its] jurisdiction. Having considered the petition and the response, we conclude that the present case is not such an "extraordinary case" requiring the issuance of a writ. *See* Cox v. Braden, 266 S.W.3d 792, 796 (Ky. 2008). The facts do not present the typical attorney-client privilege situation in that deposing the real party will not result in the disclosure of confidential information because of the trial court's actions in sealing the deposition and directing that the deposition not be filed in the record. The petitioners fail to demonstrate that they will suffer irreparable injury.

We find no error in the denial of the requested writ. To the extent that Glascock may divulge any privileged information during the course of her deposition, the trial court has taken appropriate steps to ensure that such information is only disclosed to Bubalo, BHR, the parties' attorneys, and the trial court before the trial court reviews the testimony *in camera* and determines if any information provided in Glascock's deposition is protected by the attorney-client privilege or subject to any valid exception to the privilege.

We recognize that we stated in The St. Luke Hospitals, Inc. v. Kopowski: "extraordinary relief is warranted to prevent disclosure of privileged documents. There is no adequate remedy on appeal because privileged information cannot be recalled once it has been disclosed."[7] But the disclosure at issue in Kopowski was disclosure to the opposing party through the production of documents. In contrast here, so long as

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[7] 160 S.W.3d 771, 775 (Ky. 2005) (footnote omitted).

Glascock's deposition testimony remains under seal, the information she imparts in her deposition testimony will only be provided to the parties claiming the privilege, attorneys of record, and the trial court.

As noted by the trial court, any further issues regarding allegations of privilege—whether occurring during Glascock's deposition or in further proceedings—may be raised to and resolved by the trial court upon proper objections or motions. The Appellants have failed to show that "there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted" so the Court of Appeals properly denied the writ.

Minton, C.J.; Cunningham, Noble, Schroder, Scott, and Venters, JJ., sitting. All concur. Abramson, J., not sitting.

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