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RENDERED: NOVEMBER 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-9-10

2010-SC-000335-MR

PARKVIEW HEALTHCARE, LLC; ANGELA OWENS; SHORELINE HEALTHCARE MANAGEMENT, LLC; COASTAL ADMINISTRATIVE SERVICES, LLC; AND CENTENNIAL HEALTHCARE HOLDING COMPANY, LLC — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000109-OA
PIKE CIRCUIT COURT NO. 09-CI-00710

HONORABLE STEVEN D. COMBS, JUDGE,
PIKE CIRCUIT COURT

AND

ROGER COPLEY; CHADWARD L. THACKER, M.D.; AND RAYMOND O. BISHOP, M.D.
(REAL PARTIES IN INTEREST) — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellants appeal the denial of their petition for a writ of mandamus to require the trial court to enforce a settlement agreement, which they claim was reached to resolve a medical malpractice claim. Because the Appellants have not shown the prerequisites for the availability of a writ, specifically that they have no adequate remedy by appeal or otherwise, the decision of the Court of Appeals is affirmed.

I. Background

This case is related to a medical malpractice lawsuit in Pike Circuit Court. Delbert Copley, whose estate prosecuted the action, was a patient at the Parkview Nursing and Rehabilitation Center.[1] While a patient there, he allegedly suffered abuse and neglect, which ultimately resulted in his death. His son, Roger Copley, filed suit in June 2009, naming Parkview and several other business entities and individuals as defendants.

Parkview almost immediately offered to settle the claim against it. Parkview had a $250,000 declining balance insurance policy, which works by subtracting defense costs from the maximum policy limits, and offered to settle for the limits of the policy with a deduction for the minimal defense expenses that had been incurred at that time.

By a letter dated June 24, 2009, Copley's counsel, Anita Johnson, "conditionally agreed to accept" the settlement offer. The acceptance was conditioned on Copley still being allowed to pursue claims against the other defendants, specifically Omnicare, Inc. and Dr. Mohammed Bhutta. Johnson's letter concluded with the following language: "I imagine a carefully worded release could allow these claims to go forward. If you will provide me with the exact amount of the proposed settlement, and the Release terms you envision, we can proceed from there."

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[1] Parkview Nursing and Rehabilitation Center is the assumed name of Parkview Healthcare, LLC, the first named Appellant. The other Appellants, with one exception, appear to be corporate entities related to Parkview Healthcare, LLC. Rather than use the generic term "Appellants" to describe these entities, this opinion hereinafter refers to them collectively as "Parkview."

On July 21, Parkview's counsel, Kevin Murphy, spoke with Johnson by phone. Murphy claims that he told Johnson that the defense costs had not yet been ascertained and that he then asked whether Copley would be interested in settling for a flat sum of $200,000. According to Murphy, Johnson said that her client would not be interested in such an offer and that he expected the insurance policy limits less the defense costs.

Just a few minutes after the phone call, Murphy sent the proposed settlement agreement to Johnson by email. The email stated, in part, "Please call me with any questions or suggested revisions after you have had a chance to look at the document. If we can agree on language and terms, then we can talk about potential resolution figures." The draft settlement agreement appears to have included unclear language regarding a possible release against Dr. Bhutta, stating both that it covered claims against Dr. Bhutta related to his official capacity as a medical director of Parkview and that it excluded claims related to his personal capacity as a treating physician.

On July 27, Murphy sent Johnson a letter stating that the balance on the insurance policy, after defense costs, was $247,653.45. He also asked to whom the check should be written, and noted that he had "previously forwarded a carefully worked release stating that Plaintiff's claims against Dr. Bhutta and Omnicare, Inc. are unaffected by this release."

Johnson responded with a telephone call and a follow-up letter stating:

> As you have been advised by telephone, I have referred this case to Rick and Lisa Circeo for further development. I took this action after you sent the release which included parties other than your client, which I considered a counter-offer at that time.

> Further, you informed me that there would only be $200,000 available, which I further considered a counter-offer.
>
> Please be advised that we do not have a settlement in this case and direct all further correspondence, etc., to the Circeos.

Parkview then moved the circuit court to enforce the claimed settlement agreement against Copley. When the circuit court found that no agreement had been reached, Parkview petitioned the Court of Appeals for a writ of mandamus requiring the circuit court to enforce the alleged settlement agreement. The Court of Appeals denied the petition. It first addressed the merits of Parkview's claim that a settlement agreement had been reached, holding that the circuit court's order was not erroneous because there was never "a true meeting of the minds in that there was never a set amount of settlement and the proposed release did not meet the condition Copley placed upon the settlement." The court then stated that Parkview had failed to show the requirements for a writ—"that it has no adequate remedy by appeal or that a substantial miscarriage of justice will result."

Because writ petitions are original actions before the appellate court, Parkview appeals to this Court as matter of right.

II. Analysis

As this Court has noted on numerous occasions, remedy by way of a writ of prohibition or mandamus is disfavored because it upsets the normal progression of trial and appeal. As this Court recently noted,

> 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. The expedited nature of writ proceedings necessitates an abbreviated record. This magnifies the chance of incorrect rulings that would prematurely and improperly cut off

> the rights of litigants, if the process were not strictly scrutinized for appropriateness. As such, the specter of injustice always hovers over writ proceedings, which explains why courts of this Commonwealth are—and should be—loath to grant the extraordinary writs unless absolutely necessary. Because they fall outside the regular appellate process, especially when they are used as de facto interlocutory appeals (an increasing, undesired trend), writ petitions also consume valuable judicial resources, slow down the administration of justice (even when correctly entertained), and impose potentially unnecessary costs on litigants.

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

This policy, though rarely described in such explicit language of disfavor, has nevertheless been the driving force behind our writ law. To carry out this policy of disfavoring writs and to preserve the ordinary process to which litigants are due, this Court has applied a strict standard for deciding whether the remedy of a writ is even available to the litigants. *See Hoskins v. Maricle,* 150 S.W.3d 1, 10 (Ky. 2004). Such an approach allows an appellate court to resolve writ claims quickly and usually without having to address the merits of the underlying claim, and thus return the case to the appropriate forum for the initial resolution of claims—the trial court. *See Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 615 (Ky. 2005) ("This is why the bar is set so high—in the form of the 'conditions precedent' for the mere *availability* of a writ as a possible remedy—for an appellate court even to reach the question of whether the lower court has committed error.").

The standard requires a writ petitioner to show "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,* 150 S.W.3d

at 10.[2] Essentially, under this category of writ, a petitioner must show two things: (1) lack of an adequate remedy other than a writ, and (2) great and irreparable injury. This test applies to writs of mandamus and writs of prohibition. *See Cox,* 266 S.W.3d at 795; *Hodge v. Coleman,* 244 S.W.3d 102, 109 (Ky. 2008).

Though the second requirement of this test is subject to exceptions in "certain special cases," *Bender v. Eaton,* 343 S.W.2d 799, 801 (Ky. 1961); *Hoskins,* 150 S.W.3d at 20, the first requirement—no adequate remedy by appeal or otherwise—is an "absolute prerequisite." *Bender,* 343 S.W.2d at 801; *see id.* ("Our cases involving controversies in this second class, where it is alleged the lower court is acting or proceeding erroneously within its jurisdiction, have consistently (apparently without exception) required the petitioner to pass the first test; i.e., he *must* show he has no adequate remedy by appeal or otherwise." (emphasis added)); *see also Gilbert v. McDonald-Burkman,* No. 2010-SC-000035-MR, 2010 WL 3374410, at * 5, ___S.W.3d___, at ___ (Ky. 2010) ("[T]the lack of an adequate remedy by appeal is the one requirement that is set in stone and unavoidable.").

Thus, for Parkview to succeed it *must* demonstrate that it has no adequate remedy other than a writ. This it cannot do.

At its most basic, Parkview's complaint in this regard is that an appeal cannot remedy forcing it to litigate this case and then seek an appeal. But, as Parkview admits, "[t]he fact that [it] might be required to prosecute an appeal to

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[2] A slightly different test applies when the petitioner claims the lower court is acting outside its jurisdiction, *see Hoskins,* 150 S.W.3d at 10, but no such claim has been made in this case.

protect its rights does not establish that it has no adequate remedy by appeal." *Estate of Cline v. Weddle*, 250 S.W.3d 330, 335 (Ky. 2008); *see also id.* ("[W]e have similarly rejected another party's argument that an appeal could not remedy its having to go to the expense of litigating its case at trial in the first place.").

Parkview attempts to avoid this black-letter law by noting that its situation is different than that faced by the ordinary writ petitioner. Specifically, it notes that the underlying question is the existence of a settlement agreement, the main point of which is to allow the parties to avoid litigation, and that it has a declining balance insurance policy, which means litigation followed by an appeal would eat up the insurance coverage available and require payment out of pocket in the future. Neither of these facts demonstrates that Parkview has an inadequate remedy by appeal or otherwise.

Parkview's strongest argument is that forcing it to go to trial destroys the settlement agreement. Parkview's primary benefits from the agreement are avoiding the risk of a jury verdict in excess of insurance policy limits and avoiding the cost of defending at trial and possibly on appeal. If the appeal is the only remedy, it would be inadequate to protect this latter benefit, since the cost of defending will be incurred by the time an appeal could be successful. Unlike the usual interest in avoiding litigation shared by most defendants, and assuming that a settlement agreement was reached, Parkview specifically bargained for this benefit, which cannot be vindicated by an appeal. But a writ requires that no other adequate remedy—appellate or otherwise—be available.

While an appeal might not vindicate Parkview's interest, a claim for breach of the settlement agreement against Copley would. "Settlement agreements are a type of contract and therefore are governed by contract law." *Frear v. P.T.A. Indust., Inc.*, 103 S.W.3d 99, 105 (Ky. 2003); *see also Humana, Inc. v. Blose*, 247 S.W.3d 892, 895 (Ky. 2008). While there is little precedent on the issue, this Court has on at least one occasion recognized a claim for breach of contract related to a settlement agreement, *see Frear*, 103 S.W.3d at 106-08, and has decided other cases, albeit on other grounds, where the basic claim was for breach of a settlement agreement, *see Hines v. Thomas Jefferson Fire Ins. Co.*, 267 S.W.2d 709 (Ky. 1953) (finding no agreement had been reached and affirming trial court's dismissal); *Maupin v. Sumpter*, 308 Ky. 713, 713, 215 S.W.2d 832, 832 (1948) (reformation of settlement agreement instead of damages). Though relief under such a claim may not be perfect, it is a sufficiently "adequate remedy by appeal or *otherwise*" to bar the availability of writ under *Hoskins*.

Similarly, Parkview's choice of insurance coverage does not make non-writ remedies inadequate. Parkview complains in its brief that allowing the litigation to proceed, without enforcing the alleged agreement immediately, will deplete the available insurance proceeds, which will, in turn, affect Parkview's ability to tender the agreed upon amount of insurance proceeds. Parkview's argument implies that the source of the settlement funds matters, but the source of the funds is irrelevant. If at the end of the litigation and appeal, a court finds that the parties had reached a settlement agreement, then the agreement can be enforced. That Parkview might have to pay out of pocket at

that time, since its insurance may be depleted, is of no consequence to the adequacy of the appellate remedy. A party's choice of insurance cannot render its appellate and other remedies inadequate any more than a set of parties could enter into an agreement by which they grant each other a right to obtain a writ. The power to grant the extraordinary writs is a constitutional power of the judiciary and is subject only to its discretion, not that of a party seeking the writ.

Because Appellants have an adequate remedy by appeal or otherwise, we need not address whether the other requirement of a writ (or its limited exception) have been met. The failure to demonstrate the inadequacy of other remedies alone demonstrates that a writ is unavailable in this case. Nor do we need to address the merits of the underlying claim,[3] and we thus express no opinion about whether the parties reached a settlement agreement.

III. Conclusion

For the foregoing reasons, the order of the Court of Appeals denying the writ is affirmed.

All sitting. All concur.

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[3] We note in passing that the Court of Appeals addressed the merits of the settlement-agreement issues. Though it is understandable that the court wished to resolve all the issues presented to it, reaching the merits was unnecessary in this case. *Cf. Gilbert*, 2010 WL 3374410, at *5, ___S.W.3d___, at ___ (Ky. 2010) ("In fact, the Court of Appeals skipped over the initial steps required by *Hoskins* and directly considered the merits. ... [In so doing,] it prematurely addressed the merits by failing to first analyze whether the writ was even available. Assuming that Appellant could not show that the writ was available under *Hoskins,* he actually received a more in-depth review than he was entitled to."). The better practice, to avoid confusion and multiplication of issues on appeal, is to address the writ prerequisites first. If the matter can be resolved by stating simply that the prerequisites have not been shown, then nothing more need be said.

COUNSEL FOR APPELLANTS:

Byron N. Miller
Kevin Michael Murphy
Heather Renee Cash
Thompson, Miller & Simpson, PLC
734 West Main Street
Suite 400
Louisville, Kentucky 40202

APPELLEE:

Hon. Steven D. Combs
Judge, Pike Circuit Court
Hall of Justice
Suite 423
172 Division Street
Pikeville, Kentucky 41501

COUNSEL FOR REAL PARTY IN INTEREST, ROGER COPLEY:

Anita Parsons Johnson
Office of Gary C. Johnson, PSC
PO Box 231
110 Caroline Avenue
Pikeville, Kentucky 41502

Richard Eric Circeo
Lisa Erickson Circeo
Wilkes & McHugh PA
429 North Broadway
Lexington, Kentucky 40508

Deborah Kay Riordan
1 Information Way
Suite 300
Little Rock, AR 72202

COUNSEL FOR REAL PARTIES IN INTEREST, CHADWARD L. THACKER, M.D. AND RAYMOND O. BISHOP, M.D.:

Mark Edward Nichols
Wellman, Nicholas & Smith, PLLC
444 Lewis Hargett Circle
Suite 170
Lexington, Kentucky 40503