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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 20, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000204-MR

MOTORCYCLE SAFETY FOUNDATION, INC.;
KENTUCKY DRIVING SCHOOL, INC.;
JAMES EPLEY; JACK HOWARD; AND
UNKNOWN DEFENDANT — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002120-OA
JEFFERSON CIRCUIT COURT NO. 05-CI-005890

HON. IRV MAZE, JUDGE,
JEFFERSON CIRCUIT COURT — APPELLEES

AND

CATHERINE LACKS AND
TIMOTHY LACKS — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Motorcycle Safety Foundation, Inc., the Kentucky Driving School, Inc., James Epley, and Jack Howard appeal from an Order of the Court of Appeals denying their petition for a writ directing Judge Irv Maze of the Jefferson Circuit Court to dismiss a personal injury suit brought against them by the real parties in interest, Timothy and Catherine Lacks. The Court of Appeals ruled that Appellants are not entitled to relief under CR 81 because the errors they allege may be reviewed by appeal in the ordinary course of litigation. We agree and so affirm.

Catherine was injured while participating in a motorcycle operator training program provided by the Kentucky Driving School through its instructors Epley and Howard. The Lackses allege that the school and its instructors negligently provided her with a motorcycle that malfunctioned, resulting in Catherine's injuries. When she registered for the course, Catherine executed a waiver form which contains a release of the school, its instructors, and the Motorcycle Safety Foundation "from any and all liability . . . [for] bodily injuries and property damage arising out of participation in this motorcycle training course." Relying on this waiver, Appellants moved for summary judgment. In their motion they noted that in an unpublished opinion, *Broughton v. Motorcycle Safety Foundation, Inc.*, 2006-CA-001839-MR, 2007 WL 3317792 (Ky. App. Nov. 9, 2007), a unanimous panel of the Court of Appeals upheld the validity of an identical waiver and affirmed the dismissal of a similar personal injury suit brought against the Motorcycle Safety Foundation and another provider of a motorcycle operator's training program.

Notwithstanding *Broughton,* the trial court denied Appellants' summary judgment motion. The court explained that it did not consider itself bound by the Court of Appeals' unpublished decision and indicated that it deemed the waiver form invalid under the test this Court set out in *Hargis v. Baize,* 168 S.W.3d 36 (Ky. 2005). Appellants thereupon petitioned the Court of Appeals for a writ compelling the trial court to dismiss the Lackses' complaint. They argued before the Court of Appeals, as they now argue before us, that the trial court erred with respect to both the binding effect of *Broughton* and the validity

of the waiver under *Hargis*. As the Court of Appeals correctly noted, however, allegations of error alone do not justify extraordinary relief under CR 81. On the contrary, as we have many times recited, a writ for extraordinary relief may be granted only

> upon a showing (1) that the 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) 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.

Estate of Cline v. Weddle, 250 S.W.3d 330, 334 (Ky. 2008) (quoting from *Hoskins v, Maricle,* 150 S.W.3d 1, 10 (Ky. 2004)). Where, as here, the trial court is proceeding within its jurisdiction, "a showing of no adequate remedy by appeal is 'an absolute prerequisite' to obtaining a writ for extraordinary relief." *Id.* at 335 (quoting from *Independent Orders of Foresters v. Chauvin,* 175 S.W.3d 610, 615 (Ky. 2005)).

Whether *Broughton,* although unpublished, was nevertheless binding upon the trial court, and if not whether the waiver Catherine executed is enforceable under *Hargis* are ordinary questions of law of the sort that trial courts must routinely decide. With a few narrow exceptions, under our rules such interlocutory trial court decisions are not subject to immediate appellate review. *Cf., Breathitt County Board of Education v. Prater,* 292 S.W.3d 883 (Ky. 2009). They are reviewed rather with other assertions of error in the appeal from the final judgment. CR 54.

Appellants complain that if the trial court has erred, a correction of the error at this juncture would spare them and the trial court the expense of trial. We have many times held that CR 81 is not a substitute for an interlocutory appeal and that under that rule "the ordinary expense of litigation does not render an appeal inadequate." *Sunbeam Corporation v. Dortch,* 313 S.W.3d 114, 117 (Ky. 2010) (citing *Estate of Cline,* 250 S.W.3d at 335).

Appellants also seek to bring their case within one of the exceptions to the final judgment rule by analogizing the waiver at issue to the immunity from suit enjoyed by the State and its agencies. In *Prater,* we explained that because the Commonwealth's immunity from suit is meant to shield it from the distraction and burden of litigation as much as from liability for damages, a trial court's denial of a good-faith immunity defense requires interlocutory review lest the litigation shield be rendered meaningless. Appellants invoke this litigation shield aspect of immunity, but we do not understand them to be claiming that they are in fact immune from the Lackses' suit. Such a claim is not sustainable. Appellants note that pursuant to KRS 15A.350, the Justice and Public Safety Cabinet has been charged with establishing a motorcycle safety education program for the Commonwealth and that in furtherance of that mandate the Cabinet, through the Kentucky Motorcycle Safety Education Program (KMSEP), has adopted training standards promulgated by the Foundation and has contracted with training providers such as the Kentucky Driving School. These facts, however, as Appellants more or less concede, do not change the fact that Appellants are all private parties pursuing private

ends, public-spirited though they may be, and thus they have no claim to the Commonwealth's immunity from suit. *Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2001) (discussing immunity in its various guises, all of which apply only to state or governmental actors).

We understand Appellants' argument to be rather that, like immunity, the waiver Catherine executed was meant to give Appellants not only a defense against liability but a shield against being sued at all, a shield all the more appropriate because of the public interest in promoting motorcycle safety. Appellants will lose this benefit of their bargain, they insist, if they are not granted what in effect would be an interlocutory appeal from the denial of their summary judgment motion. We disagree.

The Commonwealth's immunity from suit has traditionally been justified on the ground that the public is entitled to a government zealously serving the public good undeterred by the threat of damages suits and undistracted by litigation. *Yanero,* 65 S.W.3d at 518-19. As the United States Supreme Court discussed in *Richardson v. McKnight,* 521 U.S. 399 (1997), a case in which the Court held that guards at a private prison were not immune from suit under 42 U.S.C. § 1983, those concerns do not translate to private entities, which, subject to market discipline, serve their own interests, interests sufficient to overcome the deterrent effects of litigation and potential liability. Contracts not to sue, therefore, implicate not immunity concerns but ordinary market negotiating and may, like other contracts, be adequately enforced by an award of damages for breach. Sonja A. Soehnel, *Recovery of Attorneys' Fees and*

Costs of Litigation Incurred as Result of Breach of Agreement Not to Sue, 9 A.L.R. 5th 933 (1993). Even if it is ultimately determined, therefore, that Catherine entered a valid contract not to sue Appellants and breached that agreement by bringing the present action, Appellants have adequate means of vindicating their bargain either by counter-claim in this litigation or by bringing a separate action for breach of contract.

In sum, whether the trial court is bound by an unpublished opinion of the Court of Appeals and whether it erred by refusing to give effect to Catherine's purported waiver are interlocutory questions subject to the final judgment rule. If the trial court has erred, Appellants have an adequate remedy through an appeal and breach of contract claim, and thus are not entitled to extraordinary relief. Accordingly, we affirm the Order of the Court of Appeals denying the petition for writ.

All sitting. All concur.

COUNSEL FOR APPELLANTS:

Virginia Hamilton Snell
David Andrew Calhoun
Sara Christine Veeneman
Wyatt, Tarrant & Combs, LLP
500 W. Jefferson St., Suite 2800
Louisville, KY 40202-2898

APPELLEES:

Hon. Irv Maze, Judge
Jefferson Circuit Court
Jefferson County Judicial Center
700 West Jefferson St., Suite 901
Louisville, KY 40202

COUNSEL FOR REAL PARTIES
IN INTEREST, Timothy Lacks and
Catherine Lacks:

Grover Simpson Cox
Mussler & Associates
401 W. Main Street, Suite 1700
One Riverfront Plaza
Louisville, KY 40202