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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000464-MR

MALCOLM CHERRY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2011-CA-000014-OA
FRANKLIN CIRCUIT COURT NO. 04-CI-01067

HON. THOMAS D. WINGATE (JUDGE, FRANKLIN CIRCUIT COURT), ET AL. — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Malcolm Cherry, petitioned the Court of Appeals for a writ prohibiting the Franklin Circuit Court from proceeding upon the claims of AIK Comp against him. The Court of Appeals denied the petition and Appellant now appeals to this Court as a matter of right. Ky. Const. § 115; CR 76.36(7)(a). For reasons that follow, we affirm the order of the Court of Appeals.

I. BACKGROUND

AIK is an unincorporated association and a group insurance fund, which consists of various employers who have agreed to jointly and severally pool their workers' compensation liabilities. In August 2005, the Franklin Circuit Court placed AIK into rehabilitation pursuant to Kentucky's Insurers

Rehabilitation and Liquidation Law (IRLL).[1] In December 2005, the trial court approved a reorganization and assessment plan, which required all group members to pay their pro-rata share of the amount assessed.

American Machine & Welding, Inc. was a member of AIK and was thus assessed a pro-rata share based upon the assessment plan. In August 2009, Sharon P. Clark,[2] in her capacity as rehabilitator for AIK, for and on behalf of AIK, obtained a $23,835 judgment against American Machine because it had failed to comply with the plan. The rehabilitator was unsuccessful in collecting the judgment amount. Through post-judgment discovery, the rehabilitator learned that American Machine had sold its assets prior to the judgment and was rendered insolvent via the transfer of the asset sale proceeds to Appellant, its principal.[3]

In June 2010, the Franklin Circuit Court entered an order joining Appellant as a party and granted the rehabilitator leave to file an amended and supplemental petition against Appellant. The rehabilitator thereafter filed the petition, which sought to unwind the transfers from American Machine to Appellant pursuant to KRS Chapter 378. Appellant answered and moved to dismiss the petition for lack of jurisdiction. On December 10, 2010, the trial court denied Appellant's motion to dismiss via an interlocutory order.

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[1] *See* KRS Chapter 304.33.

[2] Sharon P. Clark is the Commissioner for the Kentucky Department of Insurance.

[3] Between 2004 and 2008, American Machine distributed at least $252,442 in cash to Appellant.

Appellant then filed an original action in the Court of Appeals seeking a writ of prohibition against the trial court. The appellate court denied the request, as it concluded that the trial court correctly denied the motion to dismiss the petition. This appeal followed.

II. ANALYSIS

We stated the standard for granting a petition for a writ in *Hoskins v. Maricle*, to wit:

> 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.

150 S.W.3d 1, 10 (Ky. 2004). Furthermore, in *Kentucky Employers Mut. Ins. v. Coleman*, we reiterated the long-standing, lofty standards which must be attained before a writ will be granted, as follows:

> [T]he writs of prohibition and mandamus are extraordinary in nature, and the courts of this Commonwealth "have always been cautious and conservative both in entertaining petitions for and in granting such relief." *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961).
>
> > This careful approach is necessary to prevent short-circuiting normal appeal procedure and to limit so far as possible interference with the proper and efficient operation of our circuit and other courts. If this avenue of relief were open to all who considered themselves aggrieved by an interlocutory court order, we would face an impossible burden of nonappellate matters.

> *Id.* This policy is embodied in a simple statement from a recent case: "Extraordinary writs are disfavored . . . ." *Buckley v. Wilson*, 177 S.W.3d 778, 780 (Ky. 2005).

236 S.W.3d 9, 12 (Ky. 2007).

In the case at hand, Appellant sets forth two jurisdictional arguments. Specifically, he argues that the Franklin Circuit Court did not have jurisdiction to amend the judgment and that any action against him, individually, must be prosecuted in Warren County. We address each argument in turn.

A. Jurisdiction to Amend

Relying upon CR 15.01 and CR 59.05, Appellant first contends that the trial court lost jurisdiction to amend the judgment ten days after its entry. According to Appellant, the judgment against American Machine became final because the rehabilitator did not file a motion to alter, amend, or vacate, or otherwise appeal. In support, Appellant points this Court to our predecessor court's decision in *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92 (Ky. 1956).

The rehabilitator responds that neither CR 15.01 nor CR 59.05 applies to the amended or supplement petition against Appellant. Instead, the rehabilitator points us to CR 69.03 and KRS 426.381(1) and argues that this authority supports the trial court's decision. We agree with the rehabilitator.

1. CR 15.01 and CR 59.05

CR 15.01 reads, in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. *Otherwise a party may amend his pleading only by leave of court or by written consent of*

the adverse party; and leave shall be freely given when justice so requires.

(Emphasis added). CR 59.05 provides that "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment."

In *James*, the trial court entered an order dismissing several negligence actions with prejudice because the complaints did not state a claim upon which relief could be granted. 299 S.W.2d at 93. After more than ten days expired, the court twice permitted the plaintiffs to amend their complaints and entered an order amending the order of dismissal to strike the words "with prejudice." *Id.* The court subsequently dismissed the amended complaints because the plaintiffs again failed to state a claim on which relief could be granted and thus entered a new judgment dismissing the actions with prejudice. *Id.*

On review, our predecessor court held that the trial court had no jurisdiction to reopen or amend the initial judgment, or to permit the amended complaints to be filed. *Id.* at 94. In so doing, the court noted the time limitation of CR 59.05 and rejected the plaintiffs' argument that authority to amend the complaints could be found in CR 15.01:

> We think it is obvious that this Rule applies only to amendments offered during the pendency of the action. Certainly it was not intended to apply in situations where, by the lapse of a period of 10 days after judgment, the court has lost control of the judgment.

Id. at 93-94.

Appellant's reliance upon *James* (and its attendant civil rules) is misplaced. Unlike *James*, the amendment in this case concerned an effort to execute judgment, i.e., to bring claims against Appellant in the enforcement of the judgment against American Machine. The proper inquiry is instead whether CR 69.03 and KRS 426.381(1) support the trial court's decision, as this is the relevant authority with respect to execution of a judgment. *See, e.g., Universal C. I. T. Credit Corp. v. Bell High Coal Corp.*, 454 S.W.2d 706 (Ky. 1970).

2. CR 69.03 and KRS 426.381(1)

CR 69.03 states that "[t]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the Kentucky Revised Statutes." Furthermore, KRS 426.381(1) reads:

> After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, *the plaintiff in the execution may by an amended and supplemental petition filed in the action have the same redocketed and join with the execution defendant or defendants any person believed to be indebted to him or them*, or to hold money or other property in which he or they have an interest, or to hold evidences or securities for the same. Upon the filing of such amended petition the case shall be transferred to the equity docket and summons issued thereon. In such supplemental proceeding or in a separate suit in equity against such parties (at his option) the plaintiff may have discovery and disclosure from the judgment creditor and his debtor or bailee, and may have any property discovered, or a sufficiency thereof, subjected to the satisfaction of the judgment.

(Emphasis added).

Here, the execution was issued and returned with an indication that no property was found to satisfy the judgment. Through post-judgment discovery, the rehabilitator learned that American Machine had sold its assets prior to the judgment and was rendered insolvent via the transfer of the asset sale proceeds to Appellant. As such, the rehabilitator alleged in its amended petition that Appellant was indebted to AIK.

Based upon the foregoing, we reject Appellant's contention that the Franklin Circuit Court did not have jurisdiction to amend the judgment. Simply put, the rehabilitator satisfied the requirements of KRS 426.381(1) and thus the trial court correctly denied the motion to dismiss the amended and supplemental petition.

B. County of Prosecution

Appellant also argues that any action against him, individually, must be prosecuted in Warren County because he is a "citizen and resident" of Warren County. Moreover, he notes that he has "no ties or connections" to Franklin County. We disagree.

KRS 304.33-140(2) reads:

> Upon the issuance of an order directing the commissioner to rehabilitate a domestic insurer, *the court shall have exclusive jurisdiction over all matters relating to the rehabilitation*, including, but not limited to, the proper scope and application of the provisions of this subtitle to the rehabilitation as well as all interpretation and enforceability of all contracts of insurance to which the insurer is a party.

(Emphasis added). Furthermore, KRS 304.33-040(3)(a) expressly provides that "[t]he court shall have exclusive jurisdiction to entertain, hear, or determine all

matters in any way relating to any delinquency proceeding under this subtitle, including but not limited to all disputes involving purported assets of the insurer." Most importantly, "'[c]ourt' means the Franklin Circuit Court" for purposes of the IRLL. KRS 304.33-030(13).

Because this action was commenced to recover a judgment debt for an unpaid assessment owed AIK pursuant to its rehabilitation, the Franklin Circuit Court enjoyed exclusive jurisdiction. *See also Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 689-691 (Ky. 2010). We therefore reject Appellant's argument that this action must be prosecuted in Warren County.[4]

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[4] Notwithstanding our recitation of the exclusive jurisdiction enjoyed by the Franklin Circuit Court, Appellant's argument seems to actually contest personal jurisdiction rather than subject matter jurisdiction. Personal jurisdiction, though, concerns the relationship between the Commonwealth and the party—not a county and the party:

> In analyzing whether constitutional due process permits jurisdiction over Appellant, several questions must be answered: *Did Appellant have minimum contacts with this Commonwealth* such that maintenance of a suit would not offend traditional notions of fair play and substantial justice? *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *Did Appellant purposefully avail itself by conducting activities within this Commonwealth*, thus invoking the benefits and protections of our laws? *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). *Did Appellant have a connection with this Commonwealth* such that it should reasonably anticipate being haled into court here? *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

National Grange Mut. Ins. Co. v. White, 83 S.W.3d 530, 534 (Ky. 2002) (emphasis added). As a result, Appellant's assertions—that he is a "citizen and resident" of Warren County and that he has "no ties or connections" to Franklin County—are irrelevant.

III. CONCLUSION

Since Appellant failed to show that the Franklin Circuit Court was proceeding outside of its jurisdiction, we will not examine the merits of his claim. For the foregoing reasons, we affirm the order of the Court of Appeals.

All sitting. All concur.

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