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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 20, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000021-MR

SANDRA J. BRACE (PERSONAL REPRESENTATIVE OF THE ESTATE OF ROB BRACE) — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2011-CA-000201-OA
FAYETTE CIRCUIT COURT NO. 05-CI-03409

HON. THOMAS L. CLARK (JUDGE, FAYETTE CIRCUIT COURT, EIGHTH DIVISION), ET AL. — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Sandra J. Brace, Personal Representative of the Estate of Rob Brace, petitioned the Court of Appeals for a Writ of Prohibition, asking it to prohibit the trial court from compelling her to produce a deposition preparation video[1] to the defense for discovery purposes. 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), arguing that the video contains communications protected by the attorney-client privilege and constitutes attorney work

[1] As discussed *infra*, the video helps prepare individuals for deposition testimony by providing general information about the deposition process, what is expected of a deponent's personal appearance and conduct, and what types of questions a deponent should expect and how to answer them.

product. For the reasons that follow, we affirm the judgment of the Court of Appeals.

I. BACKGROUND

Because we cannot improve upon the Court of Appeals' recitation of the facts, we adopt them as our own:

> Sandra Brace and Rob Brace were involved in a motor vehicle accident with Thomas Merriett in Lexington, Kentucky. Mr. Brace filed suit against Real Parties in Interest, Merriett, Republic Industries, Republic Welding Co., Republic Industries International, Inc., Geico General Insurance Co., and Westfield Services Inc. Shortly after filing the complaint, Mr. Brace committed suicide allegedly as a result of the pain he suffered in the accident.
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> On February 23, 2010, counsel for the Real Parties in Interest deposed Ms. Brace. During the questioning, Ms. Brace indicated that she had viewed a video in preparation for her deposition testimony. Subsequently, the Real Parties in Interest requested a copy of the preparation video. Ms. Brace refused to produce the video claiming it was work-product and an attorney-client communication. The Real Parties in Interest filed a motion to compel production of the video. Following a hearing, the trial court ordered Ms. Brace to produce the video for an in camera inspection. The trial court found that the video did not constitute work-product or an attorney-client communication and ordered the production of the video. Ms. Brace filed a motion to reconsider, which the trial court denied. Subsequently, Ms. Brace filed for a writ of prohibition. On August 1, 2011, [the Court of Appeals] ordered Ms. Brace to produce the video under seal for review. Ms. Brace complied . . . .

Brace v. Clark, et al., No. 2011-CA-000201-OA, slip op. at 2 (Ky. App. Dec. 12, 2011).

Upon review of the video, the Court of Appeals determined that it does "not contain any information specifically tailored to Ms. Brace or her cause of action." Rather, it "provides general information about the deposition process, personal appearance, conduct, and the types of questions that any deponent

should expect and how to answer them." Accordingly, the Court of Appeals concluded that the video was not protected by the attorney-client privilege.

It further concluded that the video was not protected work product material under Kentucky Rule of Civil Procedure (CR) 26.02(3)(a). Specifically, it determined that it "does not contain any mental impressions, legal theories, strategies, or information related to the present litigation." Because the video was not a privileged communication or protected work-product, the Court of Appeals denied Appellant's writ of prohibition.

II. ANALYSIS

This Court set forth the standard for granting a writ of prohibition in *Hoskins v. Maricle*:

> 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). And in *Kentucky Employers Mutual Insurance v. Coleman*, we reiterated the long-standing, lofty standards which must be attained before a writ will be granted:

> [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.
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> *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). Appellant invokes the second class of writ case, alleging that the trial court acted erroneously but within its jurisdiction, resulting in great injustice and irreparable injury, with no adequate remedy by appeal.

We begin our analysis with a two-step threshold inquiry. First, we ensure that Appellant meets the requirement of lack of redressability by appeal. *The St. Luke Hosps., Inc. v. Kopowski*, 160 S.W.3d 771, 774 (Ky. 2005) If Appellant establishes that requirement, we must then determine "whether the party will be greatly and irreparably injured as recognized in our precedents." *Id.* at 775. In this threshold analysis, "we take as true the movant's claim of error." *Id.* (*citing Fritsch v. Caudill*, 146 S.W.3d 926, 928 (Ky. 2004)). "This is not to say, however, that error was committed. That is a question deferred to the next stage of analysis." *Id.* at 774-75. If the threshold criteria is established, we must then determine whether the video in question contained privileged information.[2] *Id.* at 775. If so, a writ *may* be issued. *See Hoskins*, 150 S.W.3d at 10.

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[2] Although Appellant argues to this Court that the deposition preparation video contained a privileged attorney-client communication and constituted attorney work product, she did not include a copy of the video in the record. "It is incumbent upon Appellant to present the Court with a complete record for review." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 303 (*citing Steel Technologies, Inc. v. Covington*, 234 S.W.3d 920, 926 (Ky. 2007); *Davis v. Commonwealth*, 795 S.W.2d 942, 948-49 (Ky.

A. Threshold Inquiry

1. Lack of Redressability on Appeal

With respect to the first requirement of establishing lack of adequate remedy by the normal appeals process, we have previously stated "that extraordinary relief is warranted to prevent disclosure of privileged documents." *Kopowski*, 160 S.W.3d at 775 (*citing McMurry v. Eckert*, 833 S.W.2d 828 (Ky. 1992); *Bender v. Eaton*, 343 S.W.2d 799 (Ky. 1961)). "There is no adequate remedy on appeal because privileged information cannot be recalled once it has been disclosed." *Kopowski*, 160 S.W.3d at 775 (*citing Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 800-01 (Ky. 2000)). Because at this stage of our review we take as true Appellant's claim that producing the deposition preparation video would disclose privileged information, she has satisfied this part of the test.

2. Great Injustice and Irreparable Injury

With respect to the second part of the test, we have held that a petitioner can show great injustice or and irreparable injury by establishing either: (1) harm of a "ruinous nature," *see, e.g., Kopowski*, 160 S.W.3d at 775; or (2) "a substantial miscarriage of justice," *see, e.g., id.* In *Bender*, our predecessor

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1990)). "When the record is incomplete, this Court must assume that the omitted record supports the trial court." *Id.* (*citing Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky.1985)). "We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record." *Id.* (*quoting Thompson*, 697 S.W.2d at 145).

The Court of Appeals reviewed the video at issue after ordering it to be produced under seal. We will assume for the sake of this discussion that the Court of Appeals fairly and accurately described the contents of the video, and will therefore base our relevant conclusions on its description.

Court recognized that "[c]ompelling a party, in advance of trial, to produce for the benefit of his adversary information or evidence, even assuming he should not be required to produce it under the Rules, probably would not constitute 'great and irreparable injury' within the meaning of that phrase." 343 S.W2d at 802. This conclusion was reaffirmed in *Kopowski*. 160 S.W.3d at 775.

However, this Court has recognized that, where the privilege applies, its breach could have disastrous consequences that "undermine[] confidence in the judicial system and harm[] the administration of justice." *Id.*[3] Additionally, in *Bender*, we indicated that protecting privileged information "is important to the orderly administration of our Civil Rules."[4] 343 S.W.2d at 802. Accordingly, our case law requires that "a party may obtain CR 81 [writ] relief, if entitlement is shown, when it is improperly ordered to divulge documents privileged by virtue of the attorney-client relationship." *Kopowski*, 160 S.W.3d at 775. Appellant has therefore satisfied the threshold criteria of establishing

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[3] In *Kopowski*, we noted:

> A few of the potential detrimental consequences of declining to issue the writ sought here and allowing breach of the privilege are that clients may not feel comfortable in fully disclosing all pertinent facts—both favorable and unfavorable to their counsel; there would be a chilling affect [sic.] on attorneys in their attempts to zealously seek out even the most damaging of facts; it would discourage persons or business entities from conducting comprehensive investigations if that could later cause legal liability; and would encourage attorneys to push a witness to admit lack of recollection to facilitate access to otherwise out-of-reach, privileged documents. This is not a result that comports with the interest of justice.

160 S.W.3d at 775.

[4] Although *Bender* involved the work product rule, we believe that protecting communications under the attorney-client privilege is just as important to the orderly administration of justice as protecting work product information.

(1) a lack of an adequate remedy by appeal, and (2) great injustice and irreparable injury (vis à vis a substantial miscarriage of justice).

B. Privileged Information

Because Appellant has satisfied the threshold criteria for issuance of a writ, we must now determine whether (1) the attorney-client privilege, or (2) the work-product privilege[5] apply to the deposition preparation video seeking to be protected.

1. The Attorney-Client Privilege

Appellant first contends that the deposition preparation video was used to facilitate the rendition of legal services and/or to render advice to Appellant, and that the video was intended to remain confidential between Appellant and her attorney. As such, she argues that it qualifies as a privileged communication.

KRE 503(b) states:

> General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

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[5] Although the attorney work-product rule is not a privilege per se, we will refer to it as a privilege for lack of a better descriptor. *See* 8 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice & Procedure* § 2023 (2d ed. 1994).

> [I]s work product protection a "privilege"? Some have viewed this question as having substantial importance. Certainly it is now clear that work-product materials are not beyond the scope of discovery on the ground that they are 'privileged.' But we have developed a more textured view of privilege, and even the Supreme Court has acknowledged [that] *Hickman v. Taylor*[, 329 U.S. 495 (1947)] "recognized a qualified privilege." This matter of nomenclature should therefore not continue to be of importance.

Wright, Miller, & Marcus at § 2023 (citations omitted).

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(2) Between the lawyer and a representative of the lawyer;

(3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Among lawyers and their representatives representing the same client.

"Because privileges operate to exclude relevant evidence, '[t]he party asserting the privilege has the burden to prove the privilege applies.'" *Stidham v. Clark*, 74 S.W.3d 719, 725 (Ky. 2002) (*quoting United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990)). We review a determination as to the existence of a privilege for abuse of discretion. *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997) ("Where a petition for one of the extraordinary writs alleges that a lower adjudicatory body within its jurisdiction has acted incorrectly, and the threshold factors of inadequate remedy and irreparable injury are satisfied, the writ should be granted only upon a showing that the challenged action reflects an abuse of discretion.").

In this case, the Court of Appeals reviewed the contents of the deposition preparation video in its entirety, and concluded (as did the trial court) that it did not contain privileged communications. Specifically, it stated: "The video does not contain any information specifically tailored to [Appellant] or her cause of action. The video provides general information about the deposition

process, personal appearance, conduct, and the types of questions that any deponent should expect and how to answer them."

We agree with the Court of Appeals and hold that the deposition preparation video is not protected by the attorney-client privilege. First, we have stated that "[f]or the privilege to attach, the statement must be a confidential communication made to facilitate the client in his/her legal dilemma and made between two of the four parties listed in the rule: the client, the client's representatives, the lawyer, or the lawyer's representatives." *Haney v. Yates*, 40 S.W.3d 352, 354 (Ky. 2000). Because the video was made by an unknown third-party, its contents cannot fairly fall within the requirement that the communication be "between two of the four parties listed in the rule." *Id.*

Nor does Appellant argue that the video communicated information from her attorney (or one of his representatives) to Appellant (or one of her representatives). Rather, relying on *In re Brown*, No. 03-97-00609-CV, 1998 WL 207793, at *1-3 (Tex. App. 1998), she argues that a deposition preparation aid created by a third-party, utilized by an attorney with the intent to facilitate the rendition of legal services to a client and intended to be kept confidential, qualifies as a privileged communication. However, in *In re Brown*, the Texas Court of Appeals found that the deposition preparation memo in question was privileged because "[t]he Memo's author was undisputedly an employee of the

client's attorney"—that is, one of the lawyer's *representatives*. *Id.* at *2. Appellant's reliance on this case is therefore misplaced.[6]

Second, the video did not contain privileged information. "[S]tatements made by the lawyer to the client will be protected in circumstances where those communications rest on confidential information obtained from the client . . . or where those communications would reveal the substance of a confidential communication by the client." Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 5.05[3], at 337 (4th ed. 2003) (*quoting Rehling v. City of Chicago* 207 F.3d 1009, 1119 (7th Cir. 2000)). Neither of these scenarios is implicated here.

Moreover, it has been held that "lawyers do not provide legal services for purposes of the privilege when they merely relay information to clients from other persons or entities." *Id.* at § 5.05[4], at 340. *See also Peters v. Commonwealth*, 477 S.W.2d 154, 157 (Ky. 1972). The deposition preparation video can fairly be described as information from a third-party being relayed to Appellant by her attorney. As such, it does not implicate the attorney-client privilege.

Additionally, given the generalized and non-client-specific nature of the video, none of the "potential detrimental consequences of declining to issue the writ" that we recited in *Kopowski* are triggered here. 160 S.W.3d at 775; *see*

[6] Additionally, the memorandum at issue in *In re Brown* actually contained communications from the client. The first half of the memo was "a question-and-answer section containing descriptions of asbestos-laden products and blanks for plaintiffs to describe their exposure to those products." *Id.* at *1. Thus, it fell squarely under the rule protecting confidential communications from client to attorney. *Id.* at *3, *4.

also supra note 3. Requiring production of the video will not make clients less comfortable fully disclosing all pertinent facts; it will not produce a chilling effect on attorneys' attempts to seek out the most damaging of facts; it will not discourage persons or entities from conducting comprehensive investigations; and it will not encourage attorneys to push a witness to admit lack of recollection to facilitate access to otherwise privileged documents. *See Kopowski*, 160 S.W.3d at 775. In short, the contents of this deposition preparation video contain none of the indicia of a privileged communication, and its production will trigger none of the concerns associated with requiring disclosure of privileged communications.

For the foregoing reasons, we hold that the deposition preparation video does not contain privileged attorney-client communications.

2. The Work-Product Privilege[7]

Appellant next argues that the video is protected work-product material. CR 26.02(3)(a) provides, in pertinent part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, *the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*

[7] As indicated *supra* in footnote 5, although the work-product rule is not a privilege per se, we will refer to it as a privilege for lack of a better descriptor.

(Emphasis added). "The intent and spirit of the rule is to afford the greatest latitude possible in discovery. However, the discovery cannot encroach upon the attorney's work product or the attorney's or other representative's . . . mental impressions, conclusions, opinions or legal theories concerning the litigation." *Newsome by and through Newsome v. Lowe*, 699 S.W.2d 748, 752 (Ky. App. 1985).

The Court of Appeals concluded that the video does not fall within the work-product rule because it "does not contain any mental impressions, legal theories, strategies, or information related to the litigation." Rather, it "merely provides general information that would be equally applicable to any litigant in any cause of action." Assuming, as we must, that the Court of Appeals fairly and accurately described the contents of the video, *see supra* note 2, we cannot conclude that the trial court abused its discretion.

III. CONCLUSION

Although Appellant established the threshold criteria of lack of adequate remedy by appeal and great injustice/irreparable injury, we hold that the deposition preparation video at issue contains no privileged attorney-client communication, and that it is not protected attorney work product. We therefore affirm the judgment of the Court of Appeals.

All sitting. All concur.

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