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NOT TO BE PUBLISHED OPINION

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THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
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UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000040-MR

SHELLEY NETHERWOOD

PETITIONER

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
NO. 05-CI-010493

JUDGE JAMES M. SHAKE,
JEFFERSON CIRCUIT COURT, DIVISION 2

RESPONDENT

AND

ELAINE KENNEDY NESSLER
AND EKM REAL ESTATE

REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Shelley Netherwood filed a pro se petition for a writ of mandamus with the Court of Appeals, asking the court to direct the trial court to (1) rule on her motion to dismiss; (2) dismiss the underlying action; and, in the alternative, (3) postpone the trial. Netherwood filed a concurrent motion for intermediate relief pending a ruling on her writ petition. The Court of Appeals denied her motion for intermediate relief, and Netherwood — still pro se — now appeals that decision.

On review, this Court affirms.

I. FACTUAL AND PROCEDURAL HISTORY.

This case arises out of a real estate transaction under which the realtor, Elaine Kennedy,¹ who is the real party in interest, claims entitlement to a commission. The contract by which Netherwood listed her property with Kennedy contained an arbitration agreement. Kennedy claimed she procured two potential buyers for Netherwood, but the negotiations broke down, and Netherwood sold the property to another buyer without Kennedy's assistance. Kennedy maintained she was entitled to remuneration under the listing contract and sued Netherwood.

Netherwood filed motions to arbitrate, which the trial court denied because it found the parties waived their rights to enforce the arbitration provision. Netherwood appealed this decision to the Court of Appeals, which affirmed on other grounds, finding the arbitration agreement invalid under KRS 417.050 and *Ally Cat, LLC. v. Chauvin*² because the provision failed to state arbitration would take place in Kentucky.³ This Court denied Netherwood's motion for discretionary review.

¹ Elaine Kennedy is referred to throughout the record as Elaine Kennedy, Elaine Kennedy-Nessler, and Elaine Kennedy-Morrow. For the purposes of this opinion, we will refer to her as Elaine Kennedy.

² 274 S.W.3d 451 (Ky. 2009).

³ *Netherwood v. Kennedy*, No. 2008-CA-001508-MR, 2010 WL 5018154 (Ky.App. Dec. 10, 2010), *review denied* (Oct. 19, 2011).

On remand, the trial court set a trial date. Netherwood filed a motion to dismiss the action and to reschedule the trial.⁴ Before the trial court ruled on Netherwood's motion to dismiss, Netherwood petitioned the Court of Appeals for a writ of mandamus to compel the trial court to (1) rule on her motion to dismiss; (2) dismiss the underlying action; and, in the alternative, (3) postpone the trial date. Netherwood also moved the Court of Appeals for intermediate relief under Kentucky Rules of Civil Procedure (CR) 76.34(4), pending a ruling on her writ petition. The Court of Appeals denied Netherwood's motion for intermediate relief. It is from the denial of immediate relief that Netherwood appeals to this Court as a matter of right.⁵ It appears the writ petition is still pending before the Court of Appeals.

Shortly after the Court of Appeals denied Netherwood's motion for intermediate relief, the trial court denied her motion to dismiss and declined to move the trial date. The trial court entered a default judgment when Netherwood did not appear for the bench trial.

II. INTERMEDIATE RELIEF IS NOT APPROPRIATE.

Netherwood's motion for intermediate relief asked the Court of Appeals to order the trial court to (1) stay the proceedings until the trial court ruled on the outstanding motion to dismiss, and (2) reschedule a trial date after

⁴ Netherwood filed the motion to dismiss around the beginning to mid-November 2011. Kennedy filed a response on or around November 23, 2011. And Netherwood filed a response on or around December 7, 2011.

⁵ CR 76.36(7)(a).

consultation with Netherwood. We find the Court of Appeals properly denied Netherwood's motion.

When a petitioner files an original action in an appellate court, intermediate relief requested under CR 76.36(4) is appropriate when the petitioner would suffer immediate and irreparable injury before the petition for writ of mandamus can be heard and decided. A petitioner cannot show immediate and irreparable injury if the petition for writ is meritless. While Netherwood's petition for writ is not technically before us, we look to the likelihood of her success on the writ petition to determine whether intermediate relief was appropriate.

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) [] 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.⁶

In the second class of writ, the "no adequate remedy" requirement is mandated; but the "great and irreparable harm" prerequisite is not. There are special cases in which this Court will entertain a writ "in the absence of a showing of specific great and irreparable injury to the petitioner, provided a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration."⁷

⁶ *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004) (citation omitted).

⁷ *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961).

A writ of mandamus is not available to Netherwood under the first class of writ because the trial court was acting within its jurisdiction. “Subject matter jurisdiction is concerned with the power of the court to hear and issue a binding decision in particular types of cases.”⁸ “The Circuit Court is a court of general jurisdiction; it has original jurisdiction of all justiciable causes not exclusively vested in some other court.”⁹ A justiciable cause is one “in which a present and fixed claim of right is asserted against one who has an interest in contesting it.”¹⁰

The trial court had jurisdiction over the underlying type of case. The amount in controversy in the civil action exceeded \$5,000¹¹ and the cause was justiciable. The trial court had the right to pass upon the issue presented in the underlying action; any error it committed in doing so would not destroy its jurisdiction.¹²

⁸ *Baze v. Commonwealth*, 276 S.W.3d 761, 766 (Ky. 2008) (citation and internal quotation omitted); see also *Gordon v. NKC Hospitals, Inc.*, 887 S.W.2d 360, 362 (Ky. 1994) (citation omitted) (“‘[S]ubject matter’ does not mean ‘this case,’ but ‘this kind of case’ [A] court is deprived of subject matter jurisdiction only in cases ‘where the court has not been given any power to do anything at all.’”).

⁹ Kentucky Revised Statutes (KRS) 23A.010(1); see also Ky. Const. § 112(5).

¹⁰ *West v. Commonwealth*, 887 S.W.2d 338, 341 (Ky. 1994) (citation and internal quotation omitted). See also *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky.App. 2005) (citations omitted) (“[R]ipeness is an element of a justiciable claim. . . . Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it.”).

¹¹ See KRS 23A.010(1) and 24A.120(1).

¹² *Covington Trust Co. of Covington v. Owens*, 278 Ky. 695, 129 S.W.2d 186, 190 (1939).

Netherwood also claims that the trial court acted erroneously (1) because the contract is void and unenforceable because of the lack of a severability clause and due to mutual mistake, misrepresentation, and unconscionability; and (2) in setting the trial date. To the extent that the trial court may have erred, Netherwood had an adequate remedy on appeal. Netherwood could have appealed from the trial court's final judgment entered against her and raised these issues on direct appeal. So it is also unlikely that Netherwood would succeed in her petition for the second class of writ or for the special writ class.

The likelihood of Netherwood's success on her petition for a writ of mandamus is low. And she has not otherwise shown any immediate and irreparable harm. Netherwood protests that this seven-year-long litigation has caused great and irreparable injury to her personal health and family life. But neither the burden of undergoing trial nor financial loss is enough to show great and irreparable damage.¹³ The fact that Netherwood allegedly could not appear for trial because she was caring for her ailing mother is also not adequate to show harm of a "ruinous nature."¹⁴

Furthermore, Netherwood's motion for intermediate relief is moot to the extent that she asked the Court of Appeals to stay the trial court proceedings until the trial court ruled on her motion to dismiss. The trial court has now denied her motion to dismiss the action.

¹³ See *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 79 (Ky. 2010); *Reeves v. Bell*, 285 Ky. 300, 147 S.W.2d 711, 715 (1941) (citations omitted).

¹⁴ *Bender*, 343 S.W.2d at 801 (citations omitted).

III. CONCLUSION.

For the foregoing reasons, we affirm the decision of the Court of Appeals, which properly denied Netherwood's motion for intermediate relief.

All sitting. All concur.

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