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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: MARCH 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000459-MR

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2012-CA-001589-OA
LYON CIRCUIT COURT NO. 07-CI-00007

HON. EDWIN WHITE (SPECIAL JUDGE,
LYON CIRCUIT COURT), ET AL. — APPELLEES

AND

THE FEDERAL MATERIALS
COMPANY, INC., ET AL. — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Commonwealth of Kentucky, Finance and Administration Cabinet (the Cabinet), petitioned the Court of Appeals for a writ of prohibition to prevent the Lyon Circuit Court from enforcing two bar orders it entered relating to a class action settlement. The first bar order, issued on the same day the class action settlement was approved, prohibited settlement class members from bringing any additional lawsuits arising from the subject matter

of the settlement. The second bar order, entered several months later, applied the previously-entered bar order specifically to the Cabinet, enjoining the Cabinet from bringing any additional claims related to the class action.

The Court of Appeals denied the petition, and the Cabinet now appeals to this Court as a matter of right, Ky. Const. § 115, CR 76.36(7)(a), arguing that this Court should grant its writ because (1) the Lyon Circuit Court failed to properly certify the class, (2) there was no live controversy at the time the Lyon Circuit Court issued the bar order directed specifically at the Cabinet, (3) sovereign immunity precluded enforcement of both bar orders, and (4) the Lyon Circuit Court failed to provide proper notice to the settlement class. For the reasons that follow, we affirm the Court of Appeals' order denying the Cabinet's petition for a writ of prohibition.

I. BACKGROUND

This case concerns defective concrete poured at a Western Kentucky Correctional Complex (the Prison) a decade ago. In 2001, the Cabinet entered into a contract with Pinnacle, Inc. (Pinnacle) for the construction of a new correctional facility in Caldwell County, Kentucky. Pinnacle, a construction firm, in turn, entered into a subcontract with The Federal Materials Company, LLC (Federal) to supply concrete for the project. Federal purchased the aggregate for its concrete mixture from a limestone quarry owned by Hanson Aggregates Midwest, Inc. (Hanson), which later transferred ownership of the quarry to Rogers Group, Inc. (Rogers).

The Department of Corrections assumed occupancy of the Prison in April 2004. After occupying the premises for eighteen months, site personnel discovered structural defects that were later determined to be the result of defective concrete.

During the same period of time that the Cabinet began to investigate the causes of the Prison's structural defects, a proposed class action was filed in Caldwell Circuit Court on behalf of any and all owners of property containing defective concrete supplied by Federal. The Caldwell Circuit Court class action was then removed to the United States District Court for the Western District of Kentucky, which ultimately denied the plaintiffs' motion for class certification. *See Adams v. Fed. Materials Co.*, No. 5:05-CV-90-R, 2006 WL 3772065 (W.D. Ky. Dec. 19, 2006).

Following the denial of class certification in *Adams*, approximately 350 separate cases seeking damages for the premature deterioration of various concrete installations were filed in Lyon, Caldwell, Hopkins, Crittenden, and Franklin counties. Among these suits was a complaint filed by the Cabinet in Franklin Circuit Court, *Commonwealth v. Pinnacle, Inc.*

At the same time the *Pinnacle* litigation was proceeding through discovery, one of the complaints in Lyon Circuit Court, *Sutton v. The Federal Materials Co.*,[1] was amended to seek class-wide relief for owners of property containing defective concrete supplied by Federal. The Lyon Circuit Court

[1] Hanson and Rogers are also named as defendants in the Lyon Circuit Court action. Thus, Federal, Hanson, and Rogers are real parties in interest in this petition for writ arising from the *Sutton* litigation.

subsequently certified a settlement class and preliminarily approved the class action settlement. The order granting preliminary approval of the settlement explicitly identified the Cabinet as a settlement class member by virtue of its ownership of the Prison. Additionally, the order required the settling parties to mail notice of the settlement to the Prison and to provide the Prison with an opportunity to opt out of the class.[2]

Four months later, the Lyon Circuit Court entered an order of final judgment in the class action in which it expressly determined that class notice, including notice to the Prison, had been properly executed and that it comported with due process. The same day, the Lyon Circuit Court also issued a bar order generally prohibiting class members from bringing any additional lawsuits related to defective concrete supplied by Federal.

Following the settlement in the *Sutton* case, to which the Cabinet was not a named plaintiff but was identified as a class member, the Cabinet attempted to continue with written discovery in the *Pinnacle* litigation in Franklin Circuit Court. However, in response to a discovery request by the Cabinet in the *Pinnacle* action, Federal and Rogers both filed motions in Lyon Circuit Court arguing that the Cabinet's failure to opt out of the *Sutton* class action settlement precluded it from pursuing its claims against them in Franklin Circuit Court.

---

[2] The settling parties were also required to publish a summary of the class notice in several newspapers, including in Caldwell County, the location of the Prison.

Agreeing with Federal's and Rogers's motions, the Lyon Circuit Court entered a second bar order enforcing its class action settlement and specifically barring the Cabinet from proceeding with any claims related to the defective concrete that was the subject of the *Sutton* settlement. In its second bar order, the Lyon Circuit Court ruled that the Cabinet fell within the class of persons covered by the class settlement. Additionally, the circuit court found that the Cabinet had received adequate notice of the settlement proceedings. The order also specifically enjoined the Cabinet from pursuing its claims against Federal and Rogers in the ongoing *Pinnacle* litigation in the Franklin Circuit Court.

After the Lyon Circuit Court's second bar order was issued against the Cabinet, Pinnacle complained in the Franklin Circuit Court case that the Cabinet's failure to participate in the *Sutton* settlement effectively extinguished the potential indemnity and contribution claims of Pinnacle against Federal. Thus, Pinnacle argued that the Cabinet's failure to mitigate its own losses thereby precluded any award in favor of the Cabinet against Pinnacle. The Franklin Circuit Court agreed and entered an order of partial summary judgment against the Cabinet. The order effectively prevented the Cabinet from pursuing damages against Pinnacle.

Following the Franklin Circuit Court's entry of partial summary judgment, the Cabinet filed a petition for a writ of prohibition asking the Court of Appeals to prevent the Lyon Circuit Court from enforcing its bar order entered at the time of class certification and its second bar order directed

specifically at the Cabinet. The Court of Appeals denied the petition and this appeal followed.

II. ANALYSIS

Writs of mandamus and prohibition are "extraordinary in nature." *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961). As we explained in *Bender*:

> 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 more recent case: "Extraordinary writs are disfavored . . . ." *Buckley v. Wilson*, 177 S.W.3d 778, 780 (Ky. 2005).

The standards for granting petitions for writs of prohibition and mandamus are the same. *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 77 n.2 (Ky. 2010) (citing *Martin v. Admin. Office of Courts*, 107 S.W.3d 212, 214 (Ky. 2003)). This Court set forth that standard in *Hoskins v. Maricle*, explaining:

> A writ . . . 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). In this action, the Cabinet invokes both classes of writ cases, alleging in separate arguments that the trial court acted both outside its jurisdiction and erroneously but within its jurisdiction.

In the first class of writ cases, where the trial court is alleged to be acting outside its jurisdiction, the standard of review is de novo, as jurisdiction is a matter of law. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

When a writ is sought under the second class of writ cases, the petitioner must satisfy the threshold condition that it lacks adequate remedy by appeal or otherwise, and that great injustice and irreparable injury will result if his petition is not granted. *Hoskins*, 150 S.W.3d at 10. There is, however, a narrow exception to the irreparable harm requirement, to wit:

> [I]n certain special cases this Court will entertain a petition for prohibition 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. It may be observed that in such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury.

Bender, 343 S.W.2d at 801.

Typically, a Court of Appeals' decision to grant or deny a writ is reviewed for an abuse of discretion. *S. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 926 (Ky. 2013) (citing *Newell Enters., Inc. v. Bowling*, 158 S.W.3d 750, 754 (Ky. 2005)). "But when the issue presented involves a question of law, we review the question of law de novo." *Id.* In this case, the only determinations made by the Court of Appeals were that the Lyon Circuit Court was proceeding within

its jurisdiction and that the Cabinet had an adequate remedy available outside of a writ. Similar to the question of jurisdiction, the question of whether an adequate remedy exists is a question of law. *See Newell*, 158 S.W.3d at 755, *overruled on other grounds by Interactive Media Entm't and Gaming Ass'n, v. Wingate*, 320 S.W.3d 692 (Ky. 2010) ("[T]he existence of a remedy by appeal, adequate or not, is a question of law . . . ."). Since the only determinations made by the Court of Appeals were both questions of law, we review the entire proceeding de novo. *See Combs*, 413 S.W.3d at 926.

Furthermore, even if a petitioner meets the requirements for either class of writ case, the court may deny the writ in its discretion. *See Commonwealth ex rel Conway v. Shepherd*, 336 S.W.3d 98, 102 (Ky. 2011). With these imposing standards in mind, we begin our review of the Cabinet's request for a writ of prohibition.

A. Class Certification

The Cabinet first argues that the Lyon Circuit Court was proceeding outside its jurisdiction when it entered each of its bar orders because it had failed to properly certify the class in *Sutton*. More specifically, the Cabinet alleges that the circuit court failed to make findings as required by CR 23.01[3]

---

[3] CR 23.01 states, in pertinent part:

> [O]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

and CR 23.03(2).[4] The Cabinet asserts that the end result of the trial court's failure to comply with CR 23 is that a proper class action never existed. *See Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989) (holding that a trial court's failure to certify a class under CR 23 means there was not a class action); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky. 1975). According to the Cabinet, if there was no class action, the *Sutton* lawsuit must be viewed as between the named plaintiffs only, and the Lyon Circuit Court never had jurisdiction to enter bar orders against the Cabinet.

In addressing the Cabinet's first argument, we note that the jurisdiction referred to in the first class of writ cases is subject matter jurisdiction. *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999), *overruled on other grounds by Masters v. Masters*, 415 S.W.3d 621 (Ky. 2013); *Preston v. Meigs*, 464 S.W.2d 271, 275 (Ky. 1971). Subject matter jurisdiction is "[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." *Clements v. Harris*, 89 S.W.3d 403, 406 (Ky. 2002) (citation omitted). Put another way, subject matter jurisdiction "refers to a court's authority to determine 'this kind of case' . . . ." *Id.* (quoting *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001)).

By statutory authority, the circuit courts of this state have subject matter jurisdiction over class action suits. *See* KRS 23A.010(1) ("The Circuit Court is a court of general jurisdiction; it has original jurisdiction of all

[4] CR 23.03 states in pertinent part: "An order that certifies a class action must define the class and the class claims, issues, or defenses . . . ."

justiciable causes not exclusively vested in some other court."). The Cabinet claims that the circuit court acted contrary to law by making inadequate findings under CR 23 and that this error deprived the court of jurisdiction.

We find the Cabinet's argument unpersuasive because even if the circuit court was acting contrary to law in its certification of the class, it does not follow that the court was acting outside its subject matter jurisdiction. *See Lee v. George*, 369 S.W.3d 29, 33 (Ky. 2012) ("In the context of the extraordinary writs, 'jurisdiction' refers not to mere legal errors, but to subject-matter jurisdiction, which goes to the court's core authority to even hear cases."). Under *Lee*, a circuit court does not lose its jurisdiction every time it makes an erroneous ruling. *See id.* What matters is that the court had jurisdiction to certify the class to begin with and not whether it made the correct ruling once it had already exercised that jurisdiction. *See id.*

The circuit court had jurisdiction to certify a class action as conferred by statute. *See* KRS 23A.010(1). Therefore, we need not consider the Cabinet's argument that the circuit court's findings under CR 23 were inadequate. *See Lee*, 369 S.W.3d at 39. All that matters to our current review is that the court had jurisdiction to make those findings, right or wrong. *See id.*

B. The Circuit Court's Authority to Enforce Its Judgments

The Cabinet next argues that the Lyon Circuit Court lacked jurisdiction to issue its second bar order because there was no controversy at the time the order was entered. This argument builds upon the Cabinet's contention that the Lyon Circuit Court failed to properly certify the *Sutton* class action. The

Cabinet asserts that, if the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot. According to the Cabinet's logic, because the class was not properly certified, once the named plaintiffs settled, the action became moot. Therefore, the Lyon Circuit Court was without jurisdiction to issue the second bar order against the Cabinet.

The Cabinet's argument here is unpersuasive because, after a circuit court enters a judgment, it retains authority to enter orders necessary to protect and preserve that judgment. *See Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970) (holding that a court has "the authority to enforce its own judgments and remove any obstructions to such enforcement."). Whether a settlement had been reached does not matter when the court is exercising its jurisdiction for the purpose of protecting its judgment. When a court's prerogative is to protect its judgment, it is always acting within its jurisdiction.

As explained above, the Lyon Circuit Court possessed subject matter jurisdiction in its certification of the *Sutton* class. Therefore, it retained continuing jurisdiction to enforce its judgment in the class action settlement. *Id.* Thus, Appellant has not justified the issuance of an extraordinary writ on the basis that the circuit court acted outside its jurisdiction.

C. Sovereign Immunity and Inadequate Notice

The Cabinet's remaining two arguments invoke the second class of writ cases, alleging that the Lyon Circuit Court proceeded erroneously but within its jurisdiction. The Cabinet asserts that sovereign immunity precluded enforcement of the bar order against the Cabinet, and inadequate notice of the

class action was given. This second class of writ cases requires the Cabinet to satisfy the threshold condition of establishing lack of adequate remedy by appeal or otherwise, and that great injustice and irreparable injury will result if his petition is not granted. *Hoskins*, 150 S.W.3d at 10.

Prior to issuing its second bar order against the Cabinet, the Lyon Circuit Court considered the Cabinet's arguments that sovereign immunity precluded enforcement of a class action against the Commonwealth and that class notice was inadequate. The court determined there was no merit in these arguments and entered the bar order against the Cabinet.

In its petition for a writ of prohibition to the Court of Appeals, the Cabinet acknowledged that it could have appealed the Lyon Circuit Court's second bar order but stated that it declined to do so because it was awaiting a decision from this court in another case that had the potential to impact the legal viability of its claims against Federal and Rogers.[5] The Court of Appeals held that the Cabinet failed to prove lack of an adequate remedy by appeal, finding that the Cabinet could have appealed the Lyon Circuit Court's second bar order.[6]

---

[5] The Cabinet was referring to this Court's decision in *Giddings & Lewis Inc. v. Ind. Risk Insurers*, in which we adopted the economic loss rule. 348 S.W.3d 729 (Ky. 2011). *Giddings* limited a project owner's legal remedies for defective construction work to breach of contract claims. *Id.* at 738. In this case, the Cabinet's contract was with Pinnacle, the general contractor. Thus, the Cabinet could not pursue contract claims against Federal and Rogers and its ability to pursue tort claims against downstream material suppliers was effectively extinguished by *Giddings*.

[6] The Lyon Circuit Court had certified the second bar order as immediately appealable pursuant to CR 54.02(1). The Cabinet has not challenged the propriety of this certification and we do not take up the issue here.

We agree with the Court of Appeals that the possibility that this Court would issue dispositive precedent does not justify the Cabinet's failure to appeal the circuit court's order. Civil Rule 76.03(4)(k) provides for the situation that the Cabinet faced by requiring "[a] statement . . . as to whether there is pending before the . . . Supreme Court another case . . . involving an issue which is substantially the same, similar or related to an issue in this appeal" to be included in the prehearing statement. If the Cabinet wanted to challenge the Lyon Circuit Court's second bar order, it should have filed an appeal and provided the statement required by CR 76.03(4)(k).

Accordingly, we hold that the Cabinet has failed the first prong of the threshold inquiry—lack of an adequate remedy by appeal or otherwise. Thus, we need not consider whether great injustice or irreparable injury occurred or if the certain special cases exception applies. *E.g.*, *Jones v. Constanzo*, 393 S.W.3d 1, 7-8 (Ky. 2012) (quoting *Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 615 (Ky. 2005)) ("Lack of an adequate remedy by appeal is an absolute prerequisite to the issuance of a writ under this second category.").

III. CONCLUSION

In sum, the Lyon Circuit Court proceeded within its jurisdiction when it issued each of its bar orders against the Cabinet. Any errors that the court may have made in issuing those orders could have been adequately challenged

---

Furthermore, this Court has held that an order denying a claim of sovereign immunity is susceptible to interlocutory appeal. *Breathitt Cnty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 888 (Ky. 2009).

by appeal. For the foregoing reasons, we affirm the Court of Appeals, and deny the Cabinet's petition for a writ of prohibition.[7]

Minton, C.J.; Cunningham, Keller, Noble, Scott, and Venters, JJ., concur. Abramson, J., not sitting.

[7] We undertook no consideration of Rogers's claims that this petition should have been dismissed for failure to name an indispensable party and that Rogers should be granted attorney's fees. These issues were not properly raised by cross-appeal. *See Fischer v. Fischer*, 348 S.W.3d 582, 591-98 (Ky. 2011).

COUNSEL FOR APPELLANT:

Carl D. Edwards, Jr.
Gregory Lee Monge
Patrick W. McGee

COUNSEL FOR APPELLEE:

Edwin M. White, pro se

COUNSEL FOR REAL PARTIES IN INTEREST, THE FEDERAL MATERIALS COMPANY, LLC, AND THE FEDERAL MATERIALS COMPANY, LLC, F/K/A THE FEDERAL MATERIALS COMPANY, I, LLC:

W. David Denton
David Lyle Kelly
Robert S. Patterson

COUNSEL FOR REAL PARTY IN INTEREST, HANSON AGGREGATES MIDWEST, INC.:

P. Blaine Grant

COUNSEL FOR REAL PARTY IN INTEREST, ROGERS GROUP, INC.:

Timothy Lawrence Edelen
John Mark Grundy
Jesse Allen Mudd
Jared Andrew Cox