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RENDERED: FEBRUARY 15, 2018
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2017-SC-000376-MR

BAYER CORPORATION — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2017-CA-000245-OA
FRANKLIN CIRCUIT COURT NO. 07-CI-00148

HONORABLE PHILLIP J. SHEPHERD,
JUDGE, FRANKLIN CIRCUIT COURT,
DIVISION 1 — APPELLEE

AND

COMMONWEALTH OF KENTUCKY, ex rel.
ATTORNEY GENERAL ANDY BESHEAR — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Bayer Corporation (Bayer), appeals from the Court of Appeals' order denying its petition for a writ of prohibition. For the following reasons, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY.

Bayer marketed an anti-cholesterol drug, Baycol, from 1997 or 1998[1] until 2001. In 2007, Bayer and 30 states, including the Commonwealth, began litigation regarding the drug. The Commonwealth filed a complaint, alleging violations of the Kentucky Consumer Protection Act (KCPA) contained in Kentucky Revised Statutes (KRS) 367.110 *et seq.*, alleging Bayer misrepresented the risks associated with Baycol. Bayer and the Commonwealth approved a consent judgment which was entered by the trial court in 2007. The consent judgment contained provisions relating to Bayer's compliance with applicable laws regarding the marketing and advertisement of its products.

Bayer subsequently began marketing two oral contraceptive drugs, YAZ and Yasmin. YAZ, in addition to being a contraceptive, also treats premenstrual dysphoric disorder and moderate acne. The Food and Drug Administration (FDA) disapproved of Bayer's television advertisements for YAZ because the advertisements did not sufficiently distinguish between premenstrual dysphoric disorder and premenstrual syndrome, and the advertisements did not specify that YAZ was only approved to treat moderate acne and not all severities of acne. Bayer was asked by the FDA to cease using its current advertisements and to also correct any misinformation that had been disseminated.

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[1] Bayer's brief states the drug was marketed from 1998-2001. The Commonwealth's brief states the drug was marketed from 1997-2001. The Court of Appeals did not make a finding as to the beginning date the drug was marketed.

The Commonwealth and other states began additional investigations regarding Bayer's advertisements for YAZ. As a result of these investigations, the 2007 consent judgment was modified by agreed order on February 11, 2009. The agreed order only mentioned the drug YAZ, not Yasmin.

The Commonwealth filed a motion to hold Bayer in contempt in 2013 for violating the consent judgment due to the company's marketing and advertising of YAZ and Yasmin. The Commonwealth also sought to amend its 2007 complaint and requested damages for independent violations of the KCPA. Bayer filed a motion to dismiss asserting the Commonwealth could not reopen the case to add additional claims and that a contempt proceeding was improper because any violations of the consent judgment were not ongoing. The Franklin Circuit Court conducted a hearing and denied Bayer's motion to dismiss on January 17, 2017, and granted the Commonwealth's motion to amend its complaint.

Bayer filed a writ of prohibition with the Court of Appeals making the same arguments as it did in Franklin Circuit Court. The Court of Appeals denied Bayer's petition. Bayer now appeals as a matter of right.

II. STANDARD OF REVIEW.

When reviewing a petition for a writ, factual findings of the Court of Appeals are reviewed for clear error and legal conclusions are reviewed *de novo*. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). However, whether or not to issue a writ of prohibition is left to judicial discretion and reviewed under the abuse of discretion standard, except that issues of law are

reviewed *de novo*. *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The trial judge in this sense is the Court of Appeals, as a writ is an original action. *See Trude*, 151 S.W.3d at 809-10.

III. ANALYSIS.

A. Writ of Prohibition.

"A writ of prohibition is an 'extraordinary remedy and we have always been cautious and conservative both in entertaining petitions for and in granting such relief.'" *Id.* at 808 (quoting *Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961)).

> 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.

Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004) (emphasis in original).

1. Jurisdiction.

The first classification of writs is the "no-jurisdiction" writ. Bayer argues, as it did below, that the Franklin Circuit Court acted outside of its jurisdiction when it allowed the Commonwealth to amend the 2007 complaint. In Bayer's opinion, the consent judgment was final, essentially closing the case.

"One seeking a writ when the lower court is acting 'outside of its jurisdiction' need not establish the lack of an adequate alternative remedy or

the suffering of great injustice and irreparable injury. Those preconditions apply only when a lower court acts 'erroneously but within its jurisdiction'." *Goldstein v. Feeley*, 299 S.W.3d 549, 552 (Ky. 2009).

As discussed in *Nordike v. Nordike*, there are three types of jurisdiction: personal, subject-matter, and jurisdiction over the particular case at issue. 231 S.W.3d 733, 737-38 (Ky. 2007). Personal jurisdiction is "the court's authority to determine a claim affecting a specific person." *Id.* at 737 (internal citations omitted). Subject-matter jurisdiction is the court's power to hear and rule on a particular type of controversy. *Id.* Jurisdiction over the particular case at issue "refers to the authority and power of the court to decide a specific case, rather than the class of cases over which the court has subject-matter jurisdiction." *Id.* at 738 (internal citations omitted). "This kind of jurisdiction often turns solely on proof of certain compliance with statutory requirements and so-called jurisdictional facts. . . ." *Id.*

However, jurisdiction in the writ context means jurisdiction of the subject matter.[2] *Goldstein*, 299 S.W.3d at 552. "In the context of

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[2] In *Ohio River Contract Co. v. Gordon*, 186 S.W. 178, 181 (Ky. 1916) and *Central Of Georgia Ry. Co. v. Gordon*, 203 S.W. 725 (Ky. 1918), our predecessor court held that, because the question of personal jurisdiction was reviewable on appeal, writs of prohibition were unavailable to litigants claiming a lack of personal jurisdiction. It stated in *Central Of Georgia Ry. Co.*:

> [t]he court over which the respondent presides clearly has jurisdiction of the subject-matter of the Metcalfe suit. As to whether it has jurisdiction in that suit of the person of the petitioner is a question to be determined by that court upon the facts presented to it. It has jurisdiction to determine that question, and if it should commit error in doing so, this court would have jurisdiction to review it upon appeal.

Goldstein, 299 S.W.3d at 553.

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." *Lee v. George*, 369 S.W.3d 29, 33 (Ky. 2012) (internal citations omitted). Subject matter jurisdiction does not mean jurisdiction over "this case." See *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970).

It is clear that the Franklin Circuit Court had subject-matter jurisdiction, that is, the ability to hear the *type of case* at issue. Kentucky Revised Statute (KRS) 367.190(1) states as follows:

> Whenever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by KRS 367.170 to be unlawful, and that proceedings would be in the public interest, he may immediately move in the name of the Commonwealth in a Circuit Court for a restraining order or temporary or permanent injunction to prohibit the use of such method, act or practice. The action may be brought in the Circuit Court of the county in which such person resides or has his principal place of business or in the Circuit Court of the county in which the method, act or practice declared by KRS 367.170 to be unlawful has been committed or is about to be committed; or with consent of the parties may be brought in the Franklin Circuit Court.

KRS 367.990(1) further states:

> Any person who violates the terms of a temporary or permanent injunction issued under KRS 367.190 shall forfeit and pay to the Commonwealth a civil penalty of not more than twenty-five thousand dollars ($25,000) per violation. For the purposes of this section, the Circuit Court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the Commonwealth may petition for recovery of civil penalties.

"Once a court has acquired subject matter and personal jurisdiction, challenges to its subsequent rulings and judgment are questions incident to the exercise of jurisdiction rather than to the *existence* of jurisdiction." *Hisle v.*

Lexington-Fayette Urban County Government, 258 S.W.3d 422, 429-30 (Ky. App. 2008) (emphasis in original) (internal citations omitted). Pursuant to the above statutes, we agree with the Court of Appeals that the Franklin Circuit Court is vested with the authority to hear these types of cases. Further, "a judgment is always open to construction by any court that is asked to give effect to it." *Board of Ed. Of Campbellsville Independent School Dist. v. Faulkner*, 433 S.W.2d 853, 855 (Ky. 1968).

As the Court of Appeals pointed out, whether the consent judgment may be reopened and whether the 2007 complaint could be amended requires application of finality rules to jurisdictional facts and an analysis of particular case jurisdiction, which is not governed by a writ action. *See Hisle*, 258 S.W.3d at 430 ("Particular case jurisdiction generally involves more specific so-called 'jurisdictional facts'."); *Nordike*, 231 S.W.3d at 738; *see also General Elec. Co. v. Cain*, 236 S.W.3d 579, 589 (Ky. 2007) (quoting *Collins v. Duff*, 283 S.W.2d 179, 182 (Ky. 1955)) (. . . "where the jurisdiction of the court depends upon a fact which the court is required to ascertain, the court has jurisdiction to determine that jurisdictional fact, and its judgment determining that fact is conclusive on the question of jurisdiction until set aside or reversed by direct proceedings. . . .").

2. Irreparable Injury.

The second classification of writ is available if the petitioner can establish there is no adequate remedy by appeal and great injustice and irreparable harm will result. *Hoskins*, 150 S.W.3d at 6.

"No adequate remedy by appeal means that any injury to [Bayer] could not thereafter be rectified in subsequent proceedings in the case. Lack of an adequate remedy by appeal is an absolute prerequisite to the issuance of a writ under this second category." *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 614-15 (Ky. 2005) (internal citations and quotations omitted).

Great injustice and irreparable injury have been defined as "incalculable damage to the applicant, either to the liberty of his person, or to his property rights, or other far-reaching and conjectural consequences." *Litteral v. Woods*, 4 S.W.2d 395, 397 (Ky. 1928). This Court holds that Bayer has not proven it will suffer great injustice and irreparable injury in the absence of a writ. The Court of Appeals made no finding that Bayer would suffer great injustice and irreparable injury. The only injury this Court could conceive is that Bayer will have to litigate this case, which in Bayer's opinion, has either already been decided or should have been brought in a separate action. Great and irreparable injury is not such an injury as is usually suffered and sustained by a losing litigant upon a trial of his case, *Osborn v. Wolfford*, 39 S.W.2d 672, 673 (Ky. 1931), and this Court has consistently held that the costs of litigation are not enough to show inadequate remedy by appeal. *Chauvin*, 175 S.W.3d at 615.

> [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.

Chauvin, 175 S.W.3d at 616 (citing *Bender*, 343 S.W.2d at 801).

This exception has been applied in limited situations where the writ would prevent a blatant violation of law. *Id.* (internal citations omitted). "Nevertheless, where there is a right of appeal, this Court is slow to use its extraordinary power and will use it only where the remedy by appeal is manifestly inadequate." *Goetz v. Holbert*, 448 S.W.2d 45, 46 (Ky. 1969).

Bayer has a right to appeal any adverse decision of the Franklin Circuit Court. We find no sufficient reasons to grant Bayer's writ of prohibition.

3. Amended Complaint.

Although we find the Franklin Circuit Court has jurisdiction in this case, under our well-developed writ precedent, we address the issues presented regarding the Commonwealth's motion to amend the 2007 complaint, as the issue was also addressed by the Court of Appeals.

> 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. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Kentucky Rule of Civil Procedure (CR) 15.01.

"It is within the trial court's discretion to grant or deny a motion to amend a pleading, and on appellate review, its decision should not be disturbed unless the trial court abused that discretion." *Nichols v. Zurich*

American Ins. Co., 423 S.W.3d 698, 707 (Ky. 2014) (citing *Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 8 (Ky. 1972). "Liberality in allowing amendments to pleadings is to be definitely encouraged." *Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 9 (Ky. 1972).

We uphold the circuit court's granting of leave to amend the complaint because the trial court is vested with the authority to do so. Had the trial court denied leave to file the amended complaint, this Court would not disturb that decision. As such, because the trial court saw fit to grant leave to amend, this Court will not disturb that decision at this juncture. Any error can be addressed on appeal.

4. Contempt.

Bayer also argues that the circuit court should be prohibited from considering the Commonwealth's contempt claims. The Court of Appeals noted that the trial court had not yet ruled on the contempt claims, and any claim of injury would be purely speculative. The Court of Appeals continued by stating extraordinary relief is not available to remedy claims involving a finding of contempt because there is an adequate remedy by appeal. *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 756-57 (Ky. 2005) (disagreed with on other grounds by *Interactive Media Entm't and Gaming Ass'n, Inc. v. Wingate*, 320 S.W.3d 692 (Ky. 2010)).

We agree with the Court of Appeals in its holding. The Franklin Circuit Court has not yet found Bayer in contempt and this Court will not preemptively sanction the trial court from hearing that issue. The trial court has merely

denied Bayer's motion to dismiss and will allow the Commonwealth's contempt claim to proceed. Bayer has an adequate remedy by appeal if it is indeed found to be in contempt. Any alleged deviation or procedural problems under the civil rules or statutes can be addressed on the merits of the case and are not appropriate for the granting of a writ.

IV. CONCLUSION.

For the foregoing reasons, the order of the Court of Appeals is affirmed and the writ of prohibition is denied.

All sitting. All concur.

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