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RENDERED: JUNE 13, 2019
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

2018-SC-000399-MR

DATE 7/5/19 Kim Redmon, DC

DANIEL POPA; NECC TELECOM, INC. (CANADA); NECC TELECOM, INC.; PULSE TELECOM, INC. (CANADA); PULSE TELECOM PTY, LTD (AUSTRALIA); SRVR, LLC; QUICKCALL.COM, LLC d/b/a BLUETONE, LLC; and BLUETONE CONNECT, PTY LTD (AUSTRALIA) — APPELLANTS

ON APPEAL FROM COURT OF APPEALS
NO. 2018-CA-000256-OA
JEFFERSON CIRCUIT COURT NO. 13-CI-002337

V.

HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE, JEFFERSON CIRCUIT COURT — APPELLEE

AND

LUCIA TIBERIA POPA,
VICENT PETRESCU,
SHERBAN APOSTOLINA,
RAMONA CEAN, and RAUL TURCU — REAL PARTIES IN INTEREST

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Daniel Popa appeals from the Court of Appeals' order dismissing his petition for writ of mandamus as moot. Because the trial court has entered its final judgment on the merits of this case and Popa raises the same issue

presented in his writ petition in his direct appeal from that final judgment, we affirm the dismissal of the writ petition.

## FACTS AND PROCEDURAL HISTORY

Daniel Popa (Daniel) and Lucia Popa (Lucia), a married couple, operated several telecommunications businesses together. In 2010, their marriage was dissolved, and the ownership and control of the companies was divided between the two individuals, presumably because a lack of liquidity precluded having one individual "buy-out" the other. On May 3, 2013, Daniel filed a Complaint against Lucia, alleging that one of the companies she controlled was not providing his companies with software and support they needed, contrary to a commitment she made in the parties' marital settlement.[1] Daniel named Lucia, her associates who were managing the companies, and several of the companies (Lucia and the companies), as defendants in the Jefferson Circuit Court action. The Complaint also named companies NECC US, SRVR, NECC Canada and Pulse Australia as defendants. Lucia was a 51% majority shareholder in three of the named companies.[2] Lucia and the companies

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[1] The marital settlement agreement established that Daniel was a 49% minority shareholder in NECC US, NECC Canada, Pulse Australia and Pulse US. Daniel was a 51% majority shareholder in Pulse Canada. Lucia was a 51% majority shareholder in NECC US, NECC Canada, Pulse Australia and Pulse US, and a 49% minority shareholder of Pulse Canada. The agreement also established that Lucia would serve as CEO and director of NECC US, NECC Canada, and Pulse Australia, and serve as the CEO of Pulse Canada and sole manager of Pulse US for four years.

[2] The record is unclear as to whether Lucia was the majority shareholder in SRVR when the complaint was filed, but as discussed below, this company was purchased from Lucia as part of a later Settlement Agreement so it appears she either held a majority interest in SRVR or managed the company.

retained attorneys Alan Linker and Paul Hershberg to represent the interests of Lucia and the named companies in the litigation.

After two years of active litigation, it became clear that the only viable solution was for one party to take complete control and pay the other for his/her interests in the companies. In September 2015, nearly two and a half years after the Complaint was filed, the parties entered a 79-page Settlement Agreement which gave Daniel full control and ownership of the companies in exchange for making $3.58 million in payments to Lucia over roughly three years. Daniel also purchased all of Lucia's ownership interest in three additional companies – SRVR, Quickcall/Bluetone, and Bluetone Australia (the Transfer Companies). In the Settlement Agreement, Lucia warranted that the financial statements delivered to Daniel fairly and accurately represented the financial condition and operations of the Transfer Companies.

In 2016, Daniel learned that, during Lucia's ownership and exclusive control of the companies, the companies incurred approximately $8 million in unpaid tax liabilities.[3] On February 16, 2017, Daniel filed a Second Amended Complaint, alleging, among other things, breach of contract, fraud, and negligent misrepresentation. Around the same time, Daniel sought to formally

[3] Given the limited record on appeal, it is not entirely clear as to which company/companies had outstanding tax liabilities. While some of the companies were initially owned by Daniel, and others (the Transfer Companies) later came under his control by virtue of the Settlement Agreement, all companies will hereinafter be referred to as "the companies" because, due to the nature of this appeal, determining which specific company or group of companies is referred to is not necessary.

realign the parties, naming all companies involved in this litigation as plaintiffs, and leaving Lucia and her associates as the only defendants.

Shortly before formally realigning the parties in the litigation, Daniel filed a motion to disqualify attorneys Linker and Hershberg. Since the companies were now completely owned by Daniel, and Linker and Hershberg previously represented some of the companies when the initial Complaint was filed, Daniel alleged an actual conflict under Kentucky Supreme Court Rule (SCR) 3.130(1.9). Daniel argued that because Linker and Hershberg were still representing Lucia in the litigation, the attorneys could use confidential information they obtained through their representation of the companies in a way which was adverse to the interest of those companies – companies now aligned with Daniel as plaintiffs.

The trial court conducted a hearing on February 3, 2017 and determined that the September 2015 Settlement Agreement contemplated that Linker and Hershberg would continue to represent Lucia in this case, and therefore Daniel waived any perceived conflict. In denying the motion to disqualify, the trial court stated it was conceivable that Linker and Hershberg's continued representation of Lucia would implicate SCR 3.130(1.9) if they actually used or threatened to use confidential information they obtained through their representation of the companies in a way adverse to the interest of those companies. But since Daniel was not alleging that such misconduct had occurred, and the court did not expect it to arise, disqualification was not

warranted. Notably, Daniel did not seek a writ following this February 2017 denial of the attorney disqualification motion.

Over the next few months, the parties engaged in ongoing discovery efforts. On August 23, 2017, Daniel filed a renewed motion to disqualify Linker and Hershberg. The trial court conducted another hearing, where Daniel's expert, an attorney specializing in legal ethics, testified that the Settlement Agreement could not constitute a waiver. Linker and Hershberg did not present any evidence at the hearing. On December 12, 2017, the trial court orally indicated that it intended to deny the renewed motion to disqualify. The written order reiterating that disqualification of the attorneys was not warranted was entered on February 2, 2018.

In two orders on February 2, 2018, the trial court made the following findings and rulings pertinent to this appeal: (1) all further proceedings must be conducted on the record;[4] (2) since Daniel did not show an actual conflict, disqualification was not warranted; and (3) it would be inequitable to remove Linker and Hershberg on the record created to date. To quote the trial court order, "it is imperative that the case be driven to a conclusion. Removing Linker and Hershberg would impose a gargantuan detour on the road to resolution . . . ."

[4] In the early stages of this litigation, the parties requested that much of the filings and discussions regarding the failure to pay taxes, a large underlying issue in the case, be kept off the record in order to avoid providing insider information to competitors and to not impair the companies' ability to resolve the problem. Unfortunately, the trial court obliged but it later recognized that this was improper and declined to continue the practice.

On February 15, 2018, Daniel filed a Petition for Writ of Mandamus with the Court of Appeals, seeking to prohibit the trial court from enforcing the February 2nd orders and to compel the trial court to disqualify Linker and Hershberg.[5] While the petition was pending before the Court of Appeals, Lucia filed a motion for final judgment on March 22, 2018. The trial court entered its Findings of Facts, Conclusions of Law, Order and Judgment on May 3, 2018 while the writ petition was still pending. Thus, the trial court has disposed of the case on the merits.

On June 29, 2018, the Court of Appeals dismissed the writ petition as moot because the trial court had entered the final judgment. The Court of Appeals noted that a writ is an extraordinary remedy used to prevent potential injury, not to remedy injuries that have already occurred. Further, the Court of Appeals noted that Daniel would have the opportunity to present the issues raised in the writ petition on direct appeal. Daniel now appeals the dismissal of his writ petition to this Court as a matter of right.

Significantly, Daniel has made two filings relevant to the underlying litigation at the Court of Appeals level – 2018-CA-000256-OA, an original writ action from which the present appeal arises, and 2018-CA-001053, Daniel's appeal from the final judgment of the trial court on the merits. Daniel's

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[5] In addition to raising an attorney disqualification issue, Daniel's writ petition also seeks to prohibit the trial court from enforcing one of the February 2nd orders that he claims amounts to a summary judgment against Daniel and the companies on liability for all pending claims and counterclaims. He highlights that no party had moved for summary judgment, and that the trial court spontaneously and unilaterally entered the order. However, his brief on the writ appeal to this Court focuses entirely on the attorney disqualification issue.

prehearing statement filed with the Court of Appeals on July 31, 2018 states that one of the issues to be raised on appeal is "[w]hether the Jefferson Circuit Court erred in refusing to disqualify opposing counsel." Given that Daniel has raised the disqualification issue on direct appeal and it can be addressed there, this writ petition must be dismissed.

**ANALYSIS**

A writ of mandamus is an "extraordinary remedy which compels the performance of a ministerial act or mandatory duty where there is a clear legal right or no adequate remedy at law." *County of Harlan v. Appalachian Reg'l Healthcare, Inc.*, 85 S.W.3d 607, 613 (Ky. 2002). "[C]ourts of this Commonwealth are — and should be — loath to grant the extraordinary writs unless absolutely necessary." *Cox v. Braden*, 266 S.W.3d 792, 795 (Ky. 2008). This Court has held that a writ may be granted:

> *only upon* a showing that: 1) the lower court is proceeding or is about to proceed *outside its jurisdiction* and there is *no adequate remedy by appeal,* or 2) the lower court is about to act incorrectly, although *within its jurisdiction,* and there exists *no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result.*

*Hoskins v. Maricle*, 150 S.W.3d 1, 6 (Ky. 2004) (quoting *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997)). In this case, the trial court indisputably had jurisdiction, making the second class of writs the only viable option for Daniel. We review the decision of the Court of Appeals to deny the writ under an abuse of discretion standard. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004).

Daniel cites *Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015), as authority for the proposition that a disqualification issue can be appropriately reviewed through a writ. *Marcum* involved a trial court order disqualifying counsel in a shareholder derivative suit based on an appearance of impropriety. *Id.* at 712. In granting the writ, this Court stated that there was no adequate remedy by appeal in those circumstances because if a client is forced to trial without the attorney of his or her choice, losing the services of that particular attorney is simply not a matter that can be remedied by appeal. *Id.* at 716.

The *Marcum* case is readily distinguishable, aside from the fact that it involved the trial court's grant of a disqualification motion as opposed to a denial, as presented here. There the petition for a writ regarding attorney disqualification was filed early in the proceedings – only six months after the complaint was filed. In Daniel's case, the Complaint was filed in May 2013, the Settlement Agreement was entered in September 2015, and the writ petition was not filed until early 2018, after the disqualification motion was denied *for the second time.* As outlined, the trial court originally denied the disqualification motion in February 2017 and then denied a renewed motion in February 2018. Moreover, as Lucia states, for sixteen months after the Settlement Agreement was entered, Daniel never suggested that the transfer of the companies created any conflict of interest on the part of attorneys Linker or Hershberg, despite the fact that Daniel and his counsel were appearing in court constantly because of lingering disputes and Linker and Hershberg continued to represent Lucia. Aside from the rather unusual procedural posture of this

case – the pendency of the appeal from the final judgment in the Court of Appeals while a disqualification writ was still pending there – this chronology severely undercuts Daniel's arguments regarding the immediacy of any perceived harm. He waited months to file the original disqualification motion and then waited again more than a year to seek relief by way of an original action after a renewed disqualification motion was denied.

Perhaps more importantly, as repeatedly noted, the trial court has already entered a final and appealable judgment and Daniel has initiated a direct appeal, which is currently pending before the Court of Appeals. Included in the issues on appeal is the very attorney disqualification issue presented by the writ. The extraordinary remedy of a writ is not available when the issue raised can be addressed in the normal appellate process and in this case the disqualification issue can most definitely be addressed by appeal.

To counter the point that appeal provides an adequate remedy, Daniel notes that Linker and Hershberg are continuing to represent Lucia on the appeals and insists this appellate representation and their involvement in any post-judgment collection and discovery efforts render the writ petition necessary. Again, we disagree. Daniel has failed to establish that the companies will suffer irreparable injury if the petition is not granted; indeed, throughout this litigation the trial court has not found that an actual conflict even exists despite Daniel's multiple opportunities to establish one. Although Daniel has alleged Linker and Hershberg have used information gained in the prior representation of the companies to disadvantage and prejudice Daniel, he

provided no factual basis for this allegation to the trial court at the hearing on the disqualification motion.

Our *Marcum* decision references *Commonwealth v. Maricle*, 10 S.W.3d 117, 121 (Ky. 1999), an earlier writ case in which this Court determined that a writ was an appropriate remedy in a case where the trial court denied a motion to disqualify counsel. The case involved an Assistant Commonwealth Attorney who represented the Commonwealth for approximately one year in the early stages of a criminal case, but less than one month before trial began working at the law firm representing the defendant. *Id.* at 118. Much like *Marcum*, the parties in the case sought disqualification promptly, approximately two months after the alleged conflict arose. *Id.* The trial court denied the motion to disqualify, and the Commonwealth filed a writ petition which was denied by the Court of Appeals. *Id.* at 119. The Supreme Court reversed and ordered that the trial court disqualify the law firm, determining that the Commonwealth would suffer irreparable injury if the firm were permitted to continue its representation of the defendant. *Id.* at 121.

*Maricle*, like *Marcum*, and our other attorney disqualification writ cases involved ongoing litigation in the trial court. *Robertson v. Burdette*, 397 S.W.3d 886 (Ky. 2013); *Jaggers v. Shake*, 37 S.W.3d 737 (Ky. 2001). Disqualification was promptly sought and a writ petition immediately filed before the trial or substantial proceedings occurred in the circuit court. All of these cases are clearly unlike Daniel's where the trial court has already entered its final judgment on the merits and an appeal has been prosecuted.

To reiterate, a writ of mandamus may not be used as a substitute for appeal or to circumvent normal appellate procedure. *Nat'l Gypsum Co. v. Corns*, 736 S.W.2d 325 (Ky. 1987); *Merrick v. Smith*, 347 S.W.2d 537 (Ky. 1961). Since Daniel has an opportunity for recourse through his direct appeal, we agree with the Court of Appeals that the extraordinary relief of a writ is not warranted in this case. "A writ of mandamus or prohibition serves only to prevent injury, not to remedy it." *Mahoney v. McDonald-Burkman*, 320 S.W. 3d 75, 78 (Ky. 2010). Even if Linker and Hershberg did in fact use confidential information gained through their early representation of the companies to disadvantage Daniel in the latter stages of this litigation, the injury has already occurred, and a writ is not the appropriate means to remedy the alleged damage. Daniel raised the attorney disqualification issue in his direct appeal and that is where it is now properly addressed on the full record of proceedings in the trial court.

## CONCLUSION

For the reasons stated, the order of the Court of Appeals dismissing the petition for a writ seeking attorney disqualification is affirmed.

Minton, C.J.; Buckingham, Hughes, Keller, VanMeter, and Wright, JJ., concur. Lambert, J., recused.

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