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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JUNE 13, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2018-SC-000594-MR DATE 7/5/19 Kim Robinson, DC

WILLIAM TAYLOR ROBINSON, IV — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-000927-OA
KENTON CIRCUIT COURT NO. 17-CI-01623

DAWN GENTRY, JUDGE, KENTON FAMILY COURT — APPELLEE

AND

JENNIFER SUE ROBINSON — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant William Taylor "Tay" Robinson, IV appeals the decision of the Kentucky Court of Appeals denying his petition for a writ of prohibition. Tay filed his petition for writ after the trial court granted a third party's—Swindler Funeral Home ("Swindler")—Motion to Quash a subpoena demanding information regarding Swindler's financials. Tay argues on appeal that he is entitled to a writ because the trial court's erroneous ruling on Swindler's untimely motion will cause him irreparable harm; he may end up overpaying for spousal maintenance and cannot recoup any excess spousal maintenance if

said maintenance is reversed on appeal. Finding none of these claims meritorious, we affirm the Court of Appeals' denial of Tay's writ petition.

I. Factual and Procedural Background.

On September 14, 2017, Tay initiated a dissolution of marriage proceeding in Kenton Family Court. His wife, Jennifer Sue Robinson, filed her response on October 16, 2017. During the dissolution proceedings, the main issue has been the amount of spousal maintenance to which Jennifer is entitled. Tay argues that Jennifer is underemployed at her family's funeral home and he should not have to pay her the maintenance she is requesting.

On May 3, 2018, the trial court quashed a subpoena Tay had served upon Swindler, requesting the personnel files of Jennifer and a third-party employee, as well as evidence that Swindler paid money into Jennifer and Tay's Health Savings Account. On May 14, 2018, Tay served Swindler with another subpoena, this time requesting virtually all financial information related to the business. Swindler filed a Motion for Protective Order/Motion to Quash on May 30, 2018, and the subpoena was quashed by the trial court on June 8, 2018. On June 18, 2018, Tay promptly filed his writ petition with the Court of Appeals. The Court of Appeals denied the petition on October 4, 2018, holding that Tay had an adequate remedy through the traditional appellate process. This appeal followed.

II. Standard of Review.

When reviewing an appeal of a writ action, we follow the standard of review set forth in *Appalachian Racing, LLC. v. Commonwealth*:

> We employ a three-part analysis in reviewing the appeal of a writ action. We review the Court of Appeals' factual findings for clear error. Legal conclusions we review under the de novo standard. But ultimately, the decision whether or not to issue a writ of prohibition is a question of judicial discretion. So review of a court's decision to issue a writ is conducted under the abuse-of-discretion standard. That is, we will not reverse the lower court's ruling absent a finding that the determination was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

504 S.W.3d 1, 3 (Ky. 2016) (citations and quotations omitted).

III. Analysis.

We first note that the "issuance of a writ is an extraordinary remedy that is disfavored by our jurisprudence." *Caldwell v. Chauvin*, 464 S.W.3d 139, 144 (Ky. 2015) (citation omitted). Further, "the issuance of a writ is inherently discretionary" and even upon a showing that the "requirements are met and error found, the grant of a writ remains within the sole discretion of the Court." *Id.* at 145–46 (citation omitted).

> 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).

Although Tay's argument section does not state which class of extraordinary writ he asks relief from, we can presume—based on his legal citations—that he is attempting to obtain relief through the second class of writs, *i.e.*, that the lower court is acting or is about to act erroneously within its jurisdiction. The seminal case Tay cites to support his argument, *Hodge v. Coleman*, granted a writ in an extraordinary case regarding post-conviction expert witness funding where the "traditional post hoc appellate procedures [did] not provide him . . . with an adequate remedy." 244 S.W.3d 102, 109 (Ky. 2008) (citations and quotations omitted). In that case we noted:

> [A] finding that Hodge and Epperson should merely raise these issues on a direct appeal seems an unreasonable burden on the proper administration of justice in that denying the writ would prevent Hodge and Epperson from presenting witnesses on their behalf at the post-conviction hearing that we have already ordered. In turn, Hodge and Epperson would likely then appeal, meaning that we would in that future appeal reverse the trial court's decision to deny funding, starting the process anew. Such needless delay is improper and unnecessary because both the Commonwealth and the petitioners herein are entitled to finality.

244 S.W.3d at 110. However, absent the extraordinary circumstances of the *Hodge* post-conviction proceeding, a petitioner in a normal discovery dispute must first show that no adequate remedy exists on appeal to prevail under a writ of the second class. *See Inverultra, S.A. v. Wilson*, 449 S.W.3d 339, 344 (Ky. 2014).

"No adequate remedy by appeal means that any injury to Appellant[] 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." *Indep. Order of Foresters v. Chauvin*, 175 S.W.3d 610, 614–15 (Ky. 2005) (citation and quotations omitted). Initially, in a discovery dispute, we have "recognized a distinction between trial court orders allowing discovery and orders denying discovery, the former often frustrating appellate review, but the latter adequately 'remed[ied] by way of appeal.'" *Inverultra*, 449 S.W.3d at 345 (quoting *Wal-mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 800 (Ky. 2000) (citation omitted)). Tay argues that if he is not granted access to third-party Swindler's financials—a company Jennifer has no ownership interest in—he *may* be ordered to pay excessive spousal maintenance payments, without the opportunity for recoupment, in the event he loses at trial. In support of this argument, Tay cites a Court of Appeals' decision finding that recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support. *Clay v. Clay*, 707 S.W.2d 352, 353 (Ky. App. 1986). However, Tay has failed to address the holding in *Wheeler v. Wheeler*, 579 S.W.2d 378, 380 (Ky. App. 1979), a case that dealt directly with the overpayment of spousal maintenance. In *Wheeler*, the trial court denied a motion by the husband for recoupment of overpayments he made during the pendency of an appeal. *Id.* at 379. The Court of Appeals held that the denial of repayment was erroneous, and advised the trial court that

> appellee must account to appellant for the overpayment. This does not mean, however, that appellant can be excused from paying any maintenance until he has received full credit for the overpayment. The trial court can apportion the credit over a reasonable period of time, and appellant's monthly payments can be reduced in the

> reasonable discretion of the trial judge over a period of months to insure that appellant **will receive full credit for the overpayment.**

Id. at 380 (emphasis added). This holding directly contradicts Tay's theory that he has no remedy on appeal, as *Wheeler* explicitly gives him one.

Further, Tay provides no authority as to why the trial court erred in quashing his subpoena requesting complete access to the financial records of a third party. Tay appears to argue that the trial court made an untimely ruling on Swindler's Motion for Protective Order/Motion to Quash. However, CR[1] 45.02 states that a motion to quash may be made any time "before the time specified in the subpoena for compliance therewith[.]" Swindler's motion was filed on May 30, 2018, two weeks before the June 13, 2018, compliance date listed on the subpoena. Due to Tay's adequate remedy on appeal, and lack of foundation for his procedural argument, we affirm the Court of Appeals decision to deny the writ under the second class.

Lastly, Jennifer argues that this appeal is frivolous and requests damages and costs under CR 73.02(4). Jennifer bases her claim for damages and costs on Tay's lack of citation to *Wheeler* in either his Court of Appeals or Supreme Court briefs, and Tay's violation of the trial court's order sealing two affidavits which Tay has attached to his appellate briefs. Granted, the holding in *Wheeler* undercuts Tay's theory concerning an inadequate remedy; however, Jennifer did not raise *Wheeler* in the Court of Appeals, and it was cited for the

[1] Kentucky Rules of Civil Procedure.

first time in her response brief in this Court. Therefore, we are unable to determine whether the failure to address directly adverse authority was willful or simply inadvertent. Furthermore, Tay's comparison of spousal maintenance to the child support payments in *Clay* is not facially illogical absent the holding in *Wheeler*. Thus, no damages or costs shall be awarded under CR 73.02(4) for Tay's failure to distinguish *Wheeler* in his briefs before this Court and the Court of Appeals.

Further, the violation of a trial court order does not render an appeal frivolous, but it may be grounds for an award of attorney's fees. Nonetheless, "an award of attorney's fees is committed to the sound discretion of the trial court . . . . That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct." *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). Accordingly, we leave the question of whether a potential violation of a trial court order entitles Jennifer to attorney's fees to the sound discretion of the Kenton Family Court in further proceedings on this matter.

IV. Conclusion.

Finding no abuse of discretion by the Court of Appeals, we affirm the denial of Tay's writ petition.

Minton, C.J.; Buckingham, Hughes, Keller, VanMeter, and Wright, JJ., sitting.

Minton, C.J.; Buckingham, Hughes, VanMeter and Wright, JJ., concur. Keller, J., concurs in result only. Lambert, J., not sitting.

KELLER, J., CONCURRING IN RESULT ONLY: I concur in the majority's holding that Robinson has an adequate remedy by appeal and is, therefore, barred from obtaining his requested writ. However, I write separately to emphasize the broad scope of discovery in Kentucky. Under Kentucky Rule of Civil Procedure ("CR") 26.02(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The requested information need not be admissible at trial; it is enough that it "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* This broad scope reinforces the "importance of satisfying the 'need' for discovery information if a law suit is to be decided as a search for the truth, and the policy of the law to accommodate such need if the courts can do so consistent with a legal privilege." *Riggs v. Schroering*, 822 S.W.2d 414, 415 (Ky. 1991). Though some information may be privileged and not subject to disclosure, such "privileges contravene the fundamental principle that the public has a right to every man's evidence" and that "individuals possess no rights to refuse testimony or deny access to information that is needed by litigants." ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 5.00[2][a] (5th ed. 2013) (internal quotation marks omitted) (quoting *Trammel v. United States*, 445 U.S. 40 (1980)) (discussing Kentucky Rule of Evidence 501).

In this case, Robinson requested information related to the finances of a funeral home owned by his ex-wife's family. During the pendency of the case she was employed part time at the funeral home. Robinson, however, alleged that she had turned down a full-time position there previously. Thus, he sought

this information to determine whether she is voluntarily underemployed and what income would otherwise be available to her. The requested information may have been broad and some of the information may have been privileged or of such a private nature that a protective order was warranted. However, the information is clearly relevant to the allegation of voluntary underemployment and the underlying motions for temporary maintenance, and it "appears reasonably calculated to lead to the discovery of admissible evidence." The family court order lacks any finding that the information is privileged, nor does it contain any discussion of why a protective order would fail to protect any privileged or sensitive information. Under CR 26.02, then, it appears that Robinson was entitled to the requested documents. Nevertheless, the family court quashed his discovery request. As a result, Robinson was forced to pursue this writ, thereby incurring additional litigation costs and wasting not only his own time, but our valuable judicial resources as well. I, therefore, write separately to note that, while Robinson's request for a writ is barred by the availability of an appeal, this matter could have been handled more effectively in the family court.

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