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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: DECEMBER 16, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000152-MR

R. DEAN LINDEN, PH.D — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-001711-OA
JEFFERSON CIRCUIT COURT NO. 09-CI-03347

HON. CHARLES L. CUNNINGHAM, JR. — APPELLEE
(JUDGE, JEFFERSON CIRCUIT COURT)
AND
WILLIAM TID GRIFFIN; JEFF VARNER; CHAD ESTES; HARTLEY BLAHA; RONALD BOWMAN, JR.; STEVEN STENGELL; JAMES E. SHANE; ENERGY INC. ALLIED — REAL PARTIES IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Dr. R. Dean Linden appeals from the Court of Appeals' denial of his petition for a writ of mandamus. Linden seeks to compel the Jefferson Circuit Court to hear his claim for injunctive relief. We agree with the circuit court and the Court of Appeals that the circuit court lost jurisdiction to consider Linden's claims upon the filing of a notice of appeal, and conclude that Linden has an adequate remedy on appeal. Therefore, we affirm.

Linden and William Tid Griffin are co-inventors of a technology for removing water from rocks and sewage. Linden asserts that this technology

has significant potential value. To market their technology, Linden and Griffin entered into a business venture called Gryphon Environmental, LLC (Gryphon). According to Linden, Gryphon is at a critical stage, and his technology must be managed correctly or it could become worthless.

Linden and Griffin's business relationship soured, and Linden filed suit against the Real Parties in Interest (Defendants),[1] alleging that they conspired to remove him from his positions as Operating Manager, President, CEO, and Board Member of Gryphon. Linden brought forth business-related claims, claims for injunctive relief related to the business claims, and claims for abuse of process and defamation.

Arguing that Gryphon's operating agreement required all claims to be submitted to arbitration, the Defendants filed a Motion to Stay Proceeding and Compel Arbitration. The circuit court concluded that all business-related claims were subject to arbitration pursuant to the terms of the operating agreement, while the abuse of process and defamation claims were not. Although Linden's claims for injunctive relief related exclusively to the arbitrable business claims, the circuit court concluded that it "retained jurisdiction to address motions for equitable relief . . . ." However, the circuit court cautioned Linden that an injunction would present a number of difficulties, and may be impractical or inappropriate in this particular case. Linden nevertheless filed a Motion for Temporary Injunction.

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[1] For clarity, the Real Parties in Interest will be referred to as the Defendants.

Pursuant to KRS 417.220(1), the Defendants filed a notice of appeal from the circuit court's order retaining jurisdiction over some of Linden's claims, including claims for injunctive relief, arguing that these claims should also be subject to arbitration. The Defendants then filed a motion in the circuit court to vacate an order setting a hearing on Linden's Motion for Temporary Injunction. The Defendants argued that, because they had filed a notice of appeal of the circuit court's order finding injunctive relief claims to be jural, they had divested the circuit court of jurisdiction to conduct a hearing on injunctive relief. The circuit court granted the Defendants' motion, stating that "the Court has sent some of the claims in this case to arbitration and the claims it did not send to arbitration have now been appealed. There is nothing left here in Jefferson Circuit Court."

While the Defendants' appeal was pending in the Court of Appeals, Linden filed a petition for a writ of mandamus with that court, requesting that the circuit court be directed to exercise jurisdiction over his Motion for Temporary Injunction, and to hold an evidentiary hearing thereon. The Court of Appeals denied Linden's petition, and he now appeals that denial to this Court.

Whether to issue a writ is always discretionary. *Hoskins v. Maricle*, 150 S.W.3d 1, 9 (Ky. 2004). A writ *may* be granted in two classes of cases.[2] *Id.* at

[2] "Although *Hoskins* involved a request for a writ of prohibition, we have indicated that the same showing must be made to obtain a writ of mandamus." *Estate of Cline v. Weddle*, 250 S.W.3d 330, 334 n.5 (Ky. 2008) (citing *Sowders v. Lewis*, 241 S.W.3d 319, 322 (Ky. 2007) and *Hodge v. Coleman*, 244 S.W.3d 102, 109 (Ky. 2008)).

10. The first is where "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. . . ." *Id.* This is not a case in which the lower court is proceeding outside its jurisdiction—in fact, the circuit court has refused to proceed because it concluded it does not have jurisdiction.

The second class of writ may be issued where "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." *Id.* We now consider whether this second class of writ is appropriate.

KRS 417.220(1)(a) provides that "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under KRS 417.060[.]" KRS 417.220(2) states that "[t]he appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action." An appeal in a civil action is taken by means of a notice of appeal. CR 73.01(2). A notice of appeal, when filed, divests the circuit court of jurisdiction and transfers it to the appellate court. *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). *See also Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000) ("As a general rule, except with respect to issues of custody and child support in a domestic relations case, the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending.").

Therefore, the filing of a notice of appeal by the Defendants regarding Linden's claims for injunctive relief divested the circuit court of jurisdiction to

rule on those claims while the appeal was pending. The circuit court and the Court of Appeals both correctly reached this conclusion. The circuit court therefore did not act erroneously.

In addition, if Linden is indeed facing imminent irreparable harm, he has an adequate remedy on appeal. CR 76.33 provides for intermediate relief by an appellate court, and states:

> At any time after a notice of appeal or a motion for discretionary review pursuant to Rule 76.20 has been filed, a party to the appeal or motion may move the appellate court for intermediate relief upon a satisfactory showing that otherwise he will suffer immediate and irreparable injury before a hearing may be had on the motion.

CR 76.33(1). While usually used to stay a lower court's judgment, CR 76.33 gives appellate courts very broad authority to grant intermediate relief to "accomplish any appropriate objective." 7 Kurt A. Philipps, Jr., David V. Kramer, & David W. Burleigh, *Kentucky Practice*, Rules of Civil Procedure Annotated, Rule 76.33 (6th ed. 2005).

Linden argues that CR 76.33 does not provide an adequate remedy, because "the circuit court must take some action before one of the appellate courts can obtain jurisdiction" over injunctive relief. This is true when the circuit court has ruled on a motion for a temporary injunction, or has granted or denied an injunction in a final judgment. In these situations, the aggrieved party may appeal the circuit court's decision pursuant to CR 65.07 or CR 65.08, respectively. However, CR 76.33 "extend[s] the authority for intermediate appellate relief to include appealed cases other than those

specifically provided for in the Rules[.]" *Bella Gardens Apartments, Ltd. v. Johnson*, 642 S.W.2d 898, 900 n. (Ky. 1982). Linden also argues that CR 76.33 is inadequate because it does not provide for an evidentiary hearing. However, the rule specifically permits appellate courts to grant *ex parte* relief, thereby making a hearing unnecessary. *Id.*

The circuit court acted correctly in concluding that it was divested of jurisdiction over Linden's claims for equitable relief when the Defendants filed a notice of appeal. Further, Linden has an adequate remedy on appeal in the form of moving for intermediate relief in the Court of Appeals pursuant to CR 76.33.

Finally, Linden argues that KRS 417.220 (the statute authorizing an interlocutory appeal from an order denying an application to compel arbitration) violates the Separation of Powers Clauses of the Kentucky Constitution. We express no opinion on the constitutionality of the statute at this time, but note that the Defendants' appeal based on this statute is currently pending before the Court of Appeals. Linden is free to challenge the constitutionality of KRS 417.220 in that appeal.[3] If the Court of Appeals rejects his argument, he is also free to file a motion for discretionary review with this Court. Therefore, Linden has an adequate remedy on appeal, and he will not be permitted to circumvent the regular appellate process.

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[3] The record in that appeal is not before this Court. However, an examination of the Court of Appeals Information Management System indicates that, in that appeal, the Attorney General has filed a notice of his intention not to intervene. *See* CR 76.03 (requiring that Attorney General be served with prehearing statement in civil appeals challenging the constitutionality of a statute).

For the forgoing reasons, the order of the Court of Appeals denying Linden's petition for a writ of mandamus is affirmed.

All sitting. Minton, C.J.; Abramson, and Schroder, JJ., concur. Noble, J., concurs in result only. Scott, J., dissents by separate opinion in which Cunningham and Venters, JJ., join.

SCOTT, J., DISSENTING: I must emphatically disagree with the majority's sweeping statement that an appeal from an interlocutory order denying, in part, a motion to compel arbitration divests the trial court of jurisdiction over the remaining issues involved in the case. This conclusion is an incorrect generalization and contradicts our precedent, and will unnecessarily "hamstring" our trial judges. Thus, I must respectfully dissent.

The majority attempts to export the appellate rule regarding appeals from final judgments—that filing a notice of appeal divests the trial court of further jurisdiction—into the interlocutory framework. As a result, the majority incorrectly holds that "the circuit court correctly concluded that it was divested of jurisdiction over [Appellant]'s claims . . . when the [Defendants] filed a notice of Appeal."

This overbreadth, however, runs afoul of *Garnett v. Oliver*, wherein we stated:

> It is settled that if the appeal from the particular order or judgment does not bring the entire cause into the appellate court . . . further proceedings in the conduct of the cause may properly be had in the lower court. And [even as to a final judgment] an appeal does not necessarily deprive the lower court of all jurisdiction, so as to prevent absolutely any action, even though such action does not affect the matters involved on the appeal and exclusively committed to the reviewing court. On the contrary, the case is

> often regarded as pending in the court of original jurisdiction for the purposes of proceedings other than such as pertain[ing] to the subject-matter of the judgment itself, or to the appeal and the proper hearing thereof, and concerning collateral or incidental matters necessary for the preservation of the fruits of the ultimate judgment, or affecting the status in quo of the parties. Matters of the character indicated are not placed by an appeal from its judgment beyond the jurisdiction, protection, and control of the lower court.

242 Ky. 25, 45 S.W.2d 815, 817 (1931).

The majority cities to two cases to support its position that the filing of a notice of appeal—even on an interlocutory order—divests the trial court of any further jurisdiction. However, these cases state only the "general" rule regarding the effect of a filing of a notice of appeal from a final judgment. The first case, *City of Devondale v. Stallings*, is a notice case, applying the substantial compliance policy of CR 73.02 to a defective notice of appeal. 795 S.W.2d 954 (Ky. 1990). Procedurally, *Stallings* involved an appeal from a summary judgment order—a final judgment. The second case, *Johnson v. Commonwealth*, addressed the premature nature of an appeal from a non-final criminal sentence since post trial motions were still pending in the trial court. 17 S.W.3d 109 (Ky. 2000).

The problem created by applying the "general rule" to interlocutory appeals is it deprives the trial courts of their necessary case management authority. Thus, under the majority's approach, once an interlocutory appeal is filed, the trial court no longer has the ability to manage its cases and proceed in a fashion it determines suitable for the parties—while the appellate courts resolve tangentially related issues.

Finally, I recognize that most trial judges will stay all appropriate proceedings rather than attempting to try the remaining parts of the case while other connected issues are on appeal. However, in the rare scenario where a judge decides to plow ahead anyway—disregarding the conventional wisdom of waiting until the appellate issues are resolved—our rules have other means in place by which the parties can seek appropriate relief from the appellate courts to halt these exceedingly rare situations (i.e., a writ of mandamus or prohibition under CR 76.36 or for intermediate relief under CR 76.33). Thus, our rules provide an adequate means with which to preserve order without creating "chaos" in the court that still has other necessary matters to attend to. And why else would we have these rules of relief if an appeal of an interlocutory order totally disposed of a trial court's jurisdiction?

Thus, while the trial court here acted prudently during the pendency of the appeal when it refused to adjudicate the cases not ordered to arbitration, the majority's statement reflecting its loss of jurisdiction goes too far and establishes a dangerous and chaotic precedent. Therefore, I respectfully dissent.

Cunningham and Venters, JJ., join.

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