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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 4-14-11 ElizA Grant

2010-SC-000484-MR

TAYLOR BANKS — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2010-CA-000408-OA
JEFFERSON CIRCUIT COURT NO. 09-CI-005325

HON. BARRY L. WILLETT, JUDGE
JEFFERSON CIRCUIT COURT, DIVISION ONE — APPELLEE

AND

JAMES WILLIAMS, JR. — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Taylor Banks, and the real-party-in-interest, James Williams, Jr., were involved in a car accident in February of 2009. Williams suffered severe injuries and sought damages for permanent impairment, pain and suffering, medical expenses, and lost wages. He filed suit against Banks in Jefferson Circuit Court.

As discovery progressed, Banks requested a defense-sponsored physical examination of Williams pursuant to CR 35.01. Banks secured Dr. Martin G. Schiller to perform the examination. Over the objections of Banks, Williams

successfully moved the trial court to establish conditions under which the examination could be conducted and also requested that the exam be videotaped.

The trial court's order granting Williams' motion stated, in pertinent part:

> [T]he CR 35.01 exam of Plaintiff [shall] be conducted under the following conditions and guidelines:
>
> 1. The scope of the examination shall only be for the injuries claimed in this subject wreck and not any unrelated injuries;
>
> 2. This shall be a physical examination only and the Plaintiff shall not be questioned by the doctor or his staff regarding details of how the wreck occurred, employment, or other areas outside specific questions about her (sic) physical injury;
>
> 3. The Plaintiff shall not be required to produce any documentation or diagnostic test results;
>
> 4. Any testimony or report from the Defendant's expert physician(s) shall be limited in scope to Plaintiff's injury from the wreck and shall only be within the scope of his professional specialty;
>
> 5. The doctor's failure to produce any and all financial information properly requested under the law of Commonwealth of Kentucky shall prohibit his right to testify at trial.

Banks moved the trial court to reconsider and included with the motion a sworn response from Dr. Schiller. In his letter, Dr. Schiller declined to proceed with the examination under the guidelines imposed. He explained that the conditions would impair his ability to conduct a thorough and effective examination and would violate the standards of practice set forth by the American Medical Association. The trial court denied the motion.

Banks then moved the Court of Appeals for a writ of prohibition, arguing that the trial court was acting erroneously, though within its jurisdiction. The

Court of Appeals denied the motion, determining that Banks failed to meet the threshold requirements for the granting of a writ. That is, Banks failed to demonstrate that he lacked an adequate remedy by appeal and that irreparable injury would result. He now appeals to this Court.

In the seminal case of *Hoskins v. Maricle*, this Court not only clarified the history and function of writs in Kentucky, but also the circumstances under which they will be granted. 150 S.W.3d 1 (Ky. 2004). When, as here, the petitioner alleges that the trial court is acting erroneously, though within its jurisdiction, a writ will only be granted when two threshold requirements are satisfied: there exists no adequate remedy by appeal or otherwise; *and* the petitioner will suffer great and irreparable injury. *Id.* at 18. These two requirements are prerequisites to the issuance of a writ and will be considered prior to any analysis of the merits. "[O]nly after determining that the prerequisites exist will the court decide whether an error occurred for which a writ should issue." *Id.*

"'No adequate remedy by appeal' means that any injury to Appellants 'could not thereafter be rectified in subsequent proceedings in the case.'" *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 614-15 (Ky. 2005) (quoting *Bender v. Eaton*, 343 S.W.2d 799, 802 (Ky.App. 1961)). In cases where, as here, the writ action concerns a trial court's discovery orders, this Court has drawn a distinction between orders limiting or prohibiting discovery and those allowing discovery. "[T]here will rarely be an adequate remedy on appeal if the alleged error is an order that allows discovery." *Grange Mut. Ins.*

Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). This is so because "[o]nce the information is furnished it cannot be recalled." *Bender*, 343 S.W.2d at 802. Cases where we have granted a writ to prevent discovery typically involve the disclosure of privileged materials or documents. *See, e.g., CSX Transp., Inc. v. Ryan*, 192 S.W.3d 345 (Ky. 2006) (writ issued to prohibit disclosure of attorney work product material).

In this case, the trial court's order limits discovery and does not involve the potential disclosure of privileged information. When, and if, an adverse final judgment is rendered in this case, Banks will have the normal and usual avenues of appeal available to him. As such, we find no error in the Court of Appeals' conclusion that Banks failed to satisfy this threshold requirement.

Further, Banks has not satisfied his burden in demonstrating irreparable injury. Irreparable injury is of a "grievous or ruinous" nature. *Radford v. Lovelace*, 212 S.W.3d 72, 78 (Ky. 2006) (overruled on other grounds by *Cardine v. Commonwealth*, 283 S.W.3d 641, 646-47 (Ky. 2009)). The crux of Banks' argument is that he will not be able to employ the medical expert of his choice or to otherwise fully exercise his rights under CR 35. Even if we were to assume that Banks' rights have been infringed upon, a question we do not reach herein, "the mere loss of valuable rights . . . [does not] constitute[] great and irreparable injury entitling the loser automatically to relief from the error." *Schaetzley v. Wright*, 271 S.W.2d 885, 886 (Ky.App. 1954). Moreover, this Court has repeatedly explained that the "[i]nconvenience, expense, annoyance, and other undesirable aspects of litigation" do not constitute irreparable injury.

Fritsch v. Caudill, 146 S.W.3d 926, 930 (Ky. 2004). The potential injury to Banks is not an egregious or irreparable harm so as to warrant relief in the form of a writ.

Though not pled before the Court of Appeals, Banks seems to now argue that this matter falls within the "special cases" exception. In these special cases, the prerequisite showings of inadequate appellate remedy and irreparable injury may be set aside. *Trude*, 151 S.W.3d at 808. Instead, there must be a showing that "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." *Bender*, 343 S.W.2d at 801. This argument was not presented to the Court of Appeals and, therefore, we need not address it. Suffice it to say, however, that Banks has failed to demonstrate that correction of the trial court's error, assuming one does exist, is necessary to maintain orderly judicial administration. *Cf. Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008) (where criminal defendant sought evidentiary hearing to determine whether he was entitled to state-sponsored expert assistance, it was in the interest of orderly judicial administration to grant writ of mandamus and avoid needless retrial).

A writ is an unusual remedy reserved for extraordinary circumstances and is granted rarely. Where, as here, it is alleged that the trial court is proceeding erroneously, but within its jurisdiction, we review the Court of Appeals' decision for an abuse of discretion. *Trude*, 151 S.W.3d at 810. In light of the precedent cited herein, we find no abuse of discretion in the Court

of Appeals' determination that Banks failed to meet the threshold requirements for issuance of a writ.

The order of the Court of Appeals is hereby affirmed.

Minton, C.J., Cunningham, Noble, Schroder, Scott and Venters, JJ., concur. Abramson, J., also concurs with the majority opinion for the reason that Appellant Banks has not met the Court's standard requiring "no adequate remedy by appeal" and demonstration of "irreparable injury" and is compelled to reiterate that these constitute the grounds for denial of the writ, not any determination regarding the legal soundness of the trial court's order.

COUNSEL FOR APPELLANT:

William P. Carrell, II
Allen Campbell Ewen
Ewen, Kinney & Rosing
1090 Starks Building
455 South Fourth Street
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Chauncey R. Hiestand
500 W. Jefferson Street, Suite 1500
Louisville, KY 40202

Hon. Barry Lee Willett
Judge, Jefferson Circuit Court
Jefferson County Justice Center
700 West Jefferson Street, Suite 601
Louisville, KY 40202

COUNSEL FOR AMICUS CURIAE:

Donald Cameron Walton, III
Walter A. Ward
Ward, Hocker and Thornton, PLLC
The World Trade Center
333 W. Vine Street, Suite 1100
Lexington, KY 40507