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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 9-13-12 [handwritten]

2012-SC-000082-MR

MOTORISTS MUTUAL INSURANCE COMPANY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-001718-OA
PIKE CIRCUIT COURT NO. 09-CI-01040

HON. EDDY COLEMAN, JUDGE, PIKE CIRCUIT COURT — APPELLEE

AND

GYPSIE THACKER — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant in this case is appealing from a decision of the Court of Appeals, which denied a writ of mandamus to compel the Honorable Eddy Coleman, Pike Circuit Judge, to permit discovery of certain treatment records of the Real Party in Interest. We agree with the Court of Appeals that Appellant has an adequate remedy on appeal of the *final* judgment and that the Appellant has not shown "irreparable injury" if it waits until an appeal of the final judgment.

Gypsie Thacker, the Real Party in Interest, was struck by a motor vehicle while she was riding a bicycle. She settled her claims with the driver of the

motor vehicle for his policy limits and sought additional sums from her underinsurance carrier, Motorists Mutual Insurance Company - the Appellant herein. During the course of discovery, Appellant learned that Thacker had been treated both before and after the accident in question by Michael Spare, a psychotherapist. After the accident, Dr. Spare referred Thacker to Dr. Clayton Hall, a psychiatrist, for treatment. Dr. Hall started treating her for depression, posttraumatic stress disorder, and anxiety disorder. In the course of discovery, Appellant attempted to obtain Thacker's mental health records. However, her attorney filed a motion to quash the subpoena of Dr. Spare's psychotherapy records and a motion for a protective order.

The trial court conducted an *in camera* review of Dr. Spare's records and entered a protective order denying discovery on the basis that Dr. Spare's records did not contain information relevant to Thacker's claims, nor would they lead to discovery of relevant evidence. Appellant filed a petition for a writ of mandamus with the Court of Appeals requesting that Court order the trial court to grant the discovery request. The Court of Appeals denied the petition for a writ, distinguishing between alleged errors allowing discovery and alleged errors denying discovery, and concluding that if the trial court in this case did err in denying discovery, there was an adequate remedy on appeal. Appellant appealed to this Court as a matter of right.[1]

[1] One appeal is a matter of right under Section 115 of the present Kentucky Constitution.

A writ of mandamus or prohibition

> is an extraordinary remedy, available only in two instances: 1) when a "lower court is proceeding or is about to proceed outside its jurisdiction and there is no remedy through an application to an intermediate court; 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 or irreparable injury will result."

Alley Cat, LLC v. Chauvin, 274 S.W.3d 451, 456-57 (Ky. 2009) (quoting *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004)).

The standard of review to be applied when reviewing a denial of a writ depends on the class or category of writ. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). When the lower court is alleged to be acting outside its jurisdiction, the proper standard is *de novo* review because jurisdiction is generally only a question of law. *Id.* When an appellant alleges that the court against which the writ petition is sought is acting within its jurisdiction but in error, the standard is abuse of discretion. *Id.* In the case before us, no one questions that the circuit court was the proper court to determine discovery matters in personal injury actions. Therefore, the circuit court had subject matter jurisdiction. The rulings by the trial court are alleged to have been made erroneously, which requires a review of the Court of Appeals' decision under an abuse of discretion standard.

"[W]rits of prohibition and mandamus are extraordinary in nature, and the courts of this Commonwealth 'have always been cautious and conservative both in entertaining petitions for and in granting such relief.'" *Kentucky*

Employers Mut. Ins. v. Coleman, 236 S.W.3d 9, 12 (Ky. 2007) (quoting *Bender v. Eaton,* 343 S.W.2d 799, 800 (Ky. 1961)). Courts are more inclined to grant writs where discovery is granted by the trial court than when discovery is denied, because "[o]nce the information is furnished it cannot be recalled." *Bender,* 343 S.W.2d at 802. Likewise, where discovery has been erroneously denied, a writ is usually not necessary, because the erroneous denial can be remedied by appeal. *See Roberts v. Knuckles,* 429 S.W.2d 29, 30 (Ky. 1968). The Court of Appeals opined that the Appellant had an adequate remedy by appeal and denied the writ.

We agree. The matter before the trial court was a discovery issue. CR 26.03 allows trial courts to issue protective orders when good cause is shown under the rule, and CR 45.02 allows a trial court to quash a subpoena if it is unreasonable or oppressive. There was a timely motion to quash in this case with an affidavit from Dr. Spare to the effect that his treatment records should have no bearing on the case before the court. The trial court conducted an *in camera* review of said records and exercised its discretion in entering a protective order.

The Appellant is seeking a *de facto* interlocutory appeal of an adverse discovery ruling. If the trial court erred in exercising its discretion, the Appellant has a remedy by appeal of the final judgment. *See Futrell v. Shadoan,* 828 S.W.2d 649, 651 (Ky. 1992). Nevertheless, Appellant cites two

cases[2] allowing discovery because of irreparable harm, such as dimmed memories or loss of evidence over time. Such is not the case here, because the trial court has a copy of the records requested. If an appellate court should reverse the trial court, the records are preserved for future discovery before a new trial. We agree with the Court of Appeals that it was proper to deny the writ petition in this case. There is an adequate remedy on appeal from a final judgment, and the Appellant has demonstrated no irreparable injury in denying discovery at this time.

For the foregoing reasons, we affirm the order of the Court of Appeals, which denied a writ of mandamus to compel the trial court to permit discovery of certain treatment records in the above styled case.

All sitting. All concur.

[2] *Rehm v. Clayton*, 132 S.W.3d 864 (Ky. 2004); *Volvo Car Corp. v. Hopkins*, 860 S.W.2d 777 (Ky. 1993).

COUNSEL FOR APPELLANT:

David Clarence Jones
Baker, Kriz, Jenkis & Pruwitt
PNC Bank Plaza
200 West Vine Street, Suite 710
Lexington, KY 40507-1620

APPELLEE:

Eddy Coleman
172 Division Street, Suite 435
Pikeville, KY 41501

COUNSEL FOR REAL PARTY IN INTEREST:

William Hickman III
P.O. Box 667
Pikeville, KY 41502

Gary C. Johnson
Gary C. Johnson, PSC
316 West High St.
P.O. Box 1717
Lexington, KY 40507

Ray Stanley Jones II
Jones & Hickman, PSC
P.O. Box 3850
Pikeville, KY 41502

Rhonda J. Blackburn
Gary C. Johnson, PSC
110 Caroline Avenue
P.O. Box 231
Pikeville, KY 41502