Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000179-MR
AND
NO. 2012-CA-000482-MR
AND
NO. 2012-CA-000902-I

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES, ET AL — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00141

THE COURIER-JOURNAL, INC.,
LEXINGTON H-L SERVICES, INC.
(d/b/a THE LEXINGTON HERALD-
LEADER;) ET AL — APPELLEES

ORDER
1) DISMISSING APPEAL NO. 2012-CA-000482 AS DUPLICATIVE;
2) DENYING MOTION FOR CR 65.07 RELIEF AS MOOT; AND
3) DENYING MOTION FOR CR 65.08 RELIEF

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KELLER AND MOORE, JUDGES.

These three related appeals stem from orders of the Franklin Circuit Court entered January 19, 2012, and February 23, 2012, in an open records action prosecuted by the Courier-Journal, Inc., and Lexington H-L Services, Inc. (collectively "the newspapers"), to obtain access to a large volume of public records of the Cabinet for Health and Family Services related to child fatalities and near fatalities occurring over the past several years. To put these two orders in proper perspective, it is necessary to briefly examine the procedural history of this case before turning to an examination of the merits.

On November 3, 2011, the circuit court entered summary judgment holding that the Cabinet had a duty to disclose the records and case files requested by the newspapers concerning the Cabinet's internal reviews, conducted pursuant to KRS 620.050(12)(b), of child fatalities or near fatalities. Recognizing that production of this volume of records would "impose a substantial administrative burden" on the Cabinet, the circuit court further ordered the parties to confer in an effort to reach agreement on the orderly and timely production of the requested records.

After no agreement was reached, the circuit court conducted a hearing on the newspapers' subsequent motion for temporary injunctive relief and entered a December 1, 2011 order which, among other things, specifically required the Cabinet: 1) to produce to the newspapers copies of the approximately ninety

written summaries of its internal reviews; 2) to implement its proposed plan for hiring temporary staff to assist with reviewing and "redacting, where appropriate," the approximately 180 case files to which the newspapers had requested access; 3) to keep a redaction log on each file which was to be produced with each individual file; and 4) to file with the Court a monthly status report documenting the steps it has taken to produce the records.

Thereafter, on December 21, 2011, the circuit court conducted a hearing on the Cabinet's motion to alter or amend the December 1, 2011 order and entered an order on that same date which required the Cabinet to produce to the Court "complete and unredacted copies" of the approximately 90 written summaries that the Cabinet had previously provided to the newspapers in redacted form. The order stated that after its review of those documents, the circuit court would enter a subsequent order either making the unredacted records public or sustaining the Cabinet's redactions in whole or in part. The court reserved ruling on the Cabinet's motion to alter or amend the December 1, 2011 order, as well as on the newspapers' motions for sanctions and to alter the protocol for redaction.

On January 19, 2012, the circuit court entered an order denominated "Final Order and Judgment Granting Declaratory and Injunctive Relief," which 1) denied the Cabinet's motion to alter and amend the December 1, 2011 order; 2) granted in part and denied in part the newspapers' motion to require production of

unredacted copies of the fatality and near fatality reviews; 3) granted the newspapers' motions for attorneys' fees and statutory penalties; 4) supplemented the injunctive relief granted in the December 1, 2011 order to permanently enjoin the Cabinet to make available forthwith the internal reviews of fatalities and near fatalities with the provisional redactions made by the court, as well as setting forth a schedule for production of documents and hearings on objections to redactions; 5) granted the motion to amend the protocol for redaction; and 6) incorporated by reference the November 3, 2011, and December 1, 2011, opinions and orders, as well as a separate memorandum opinion setting out the legal bases for the court's rulings in the January 19, 2012 order.

The Cabinet then filed a CR 65.08 motion to suspend declaratory and injunctive relief during the pendency of its appeal of the January 19, 2012 order (appeal number 2012-CA-000179), alleging that, absent interlocutory relief from the mandatory injunction during the pendency of its appeal, its appellate rights would be significantly undermined and the Cabinet's ability to protect children and others from harm impacted. By order entered January 27, 2012, this Court granted the Cabinet's CR 65.08(7) motion for emergency stay pending motion panel review of its CR 65.08 motion. Three days later, on January 30, 2012, the newspapers filed in the Franklin Circuit Court a timely CR 59.05 motion to alter, amend, or vacate the January 19, 2012 order. By order entered February 23, 2012,

the circuit court attempted to "sever" the injunctive portion of the January 19, 2012 order from its decision on the claims for declaratory relief, attorney's fees, costs and penalties. In so doing, the circuit court stated that with regard to the claims for injunctive relief, "it is necessary to delay the entry of final judgment in order to adjudicate the Cabinet's continuing assertion of claims of privilege under the Open Records Act with regard to specific redactions in the 180 case files" it had previously ordered to be produced. The Cabinet then filed a second notice of appeal (2012-CA-000482) to contest that order as being outside the jurisdiction of the circuit court or invalid because the injunctive relief cannot be severed from the final and appealable declaratory relief. Within that notice of appeal, the Commonwealth asserted a CR 65.07 motion which the Court recently docketed as appeal number 2012-CA-000902. On May 22, 2012, this Court entered an order staying both the January 19, 2012, and the February 23, 2012, orders of the circuit court.

Several procedural issues must be addressed before we consider the merits of the initial CR 65.08 motion. First, the newspapers have moved to dismiss appeal number 2012-CA-000482 as being duplicative of appeal number 2012-CA-000179. Having considered that motion, the response of the Cabinet, and being otherwise sufficiently advised, the Court ORDERS that the motion be GRANTED and appeal number 2012-CA-000482 is hereby DISMISSED. Under the plain

language of CR 59, it is clear that the circuit court retained authority to alter or amend its judgment, either upon motion of a party or on its own initiative, for ten days after the docket notation of service of judgment required by CR 77.04(2). Here, because the Cabinet filed its notice of appeal from the January 19, 2012 judgment prior to the expiration of the ten days, the notice was premature as to the newspapers' timely motion to alter or amend the judgment. CR 73.02(1)(e) makes specific provision for this occurrence when it states that a notice of appeal filed prior to the disposition of such motions "*becomes effective* when an order disposing of the last such remaining motion is entered." (Emphasis added).

We must examine the precise nature of each of the circuit court orders to fully understand the import of the February 23, 2012 order disposing of the newspapers' motion to alter or amend. Although the circuit court stated in that order that it was severing the injunctive relief set out in the January 19, 2012 order from the declaratory relief, it seems clear that in each of the previous orders injunctive relief was intended to be merely the enforcement mechanism for the circuit court's judgment regarding the Cabinet's duty to disclose. In the November 3, 2011 order, the circuit court specifically explained that the injunctive relief related solely to the *manner of production* of the records covered in the final judgment:

> Accordingly, the parties are directed to meet and confer in an effort to reach agreement on a procedure for the orderly and timely

> production of the records requested. The parties shall conduct this negotiation with ten (10) days of the entry of this Order and file a joint status report as to any agreement reached. If the parties are unable to reach an agreement, the parties shall jointly notify the Court and the Court will set the matter for a further hearing and *will issue injunctive relief specifying the time, place, and manner of production.*

(Emphasis added). Thereafter, the circuit court entered the December 1, 2011 order which incorporated by reference the November 3, 2012 order, granted injunctive relief as to the precise manner and timing of the production of the records encompassed by November 3, 2012 order, and required the Cabinet to develop a redaction protocol concerning its duty to produce the records.

Review of the circuit court's December 21, 2011 order reveals that it was, again, directed to the manner of production of the documents requested by the newspapers and required the Cabinet to produce "complete and unredacted copies of approximately ninety (90) written summaries of Internal Reviews of fatalities or near fatalities that CHFS [the Cabinet] prepared and previously provided to the plaintiffs in redacted form." The December 21, 2011 order stated that after its review, the circuit court would either make the unredacted records public or sustain the Cabinet's redactions in whole or in part. The circuit court also took under submission the Cabinet's motion to alter or amend, the newspapers' motion for sanctions, and the motion to alter the protocol for redaction. Notably, the December 21, 2011 order stated:

> The Court will enter a more detailed Order *setting forth the required procedure for compliance with this Court's prior order and judgment* requiring production of the Cabinet's records in the child abuse and neglect cases resulting in a fatality of near fatality.

(Emphasis added).

On January 19, 2012, the circuit court entered the order which precipitated appeal number 2012-CA-000179 and the accompanying motion for CR 65.08 relief. As previously noted, that order: 1) denied the Cabinet's motion to alter and amend the December 1, 2011 order; 2) granted in part and denied in part the newspapers' motion to require production of unredacted copies of the fatality and near fatality reviews; 3) granted the newspapers' motions for attorneys' fees and statutory penalties; 4) supplemented the injunctive relief granted in the December 1, 2011 order to *permanently enjoin* the Cabinet to make available forthwith the internal reviews of fatalities and near fatalities with the provisional redactions made by the court, as well as setting forth a schedule for production of documents and hearings on objections to redactions; 5) granted the motion to amend the protocol for redaction; and 6) incorporated by reference the November 3, 2011, and December 1, 2011, opinions and orders, as well as a separate memorandum opinion setting out the legal bases for the court's rulings in the January 19, 2012 order.

Nothing in the February 23, 2012 order disturbed in any manner the finality of the January 19, 2012 order, but simply attempted to retain jurisdiction over the method of enforcement by converting the previous permanent injunction to a temporary injunction. We are convinced that, after the entry of the final and appealable judgment, the circuit court lacked authority to enforce its final judgment by virtue of a *temporary* injunction which is available under CR 65.04(1) "during the pendency" of an action if the moving party demonstrates irreparable injury "pending a final judgment in the action." The injunctive relief set out in each of the orders after the November 3, 2011 final judgment merely attempted to provide a workable and timely method of enforcement of the Cabinet's duties set out in the November 3, 2011 order.

Thus, the ruling on the newspapers' motion to alter or amend the January 19, 2012 judgment resulted in nothing more than yet another attempt to "tweak" the enforcement mechanism for the November 3, 2011 judgment. Appeal number 2012-CA-000482 is therefore duplicative of appeal number 2012-CA-000179 and must be dismissed on that basis. Similarly, the injunctive relief portion of the February 23, 2012 order, occurring after final judgment, must be construed to be a permanent injunction subject to CR 65.08 review by this Court. Accordingly, the motion for CR 65.07 relief must be dismissed as moot because

the relief sought in that motion will be resolved by our decision on the previously-filed motion for CR 65.08 relief.

In addition, the motion to consolidate appeals number 2012-CA-000179 and 2012-CA-000482 is DENIED AS MOOT, as are all procedural motions relating to dismissed appeal 2012-CA-000482. Because appeals number 2012-CA-000179, 2012-CA-000336, and 2012-CA-000356 have previously been designated by the Court to be heard together, the motion to consolidate these appeals is hereby DENIED AS UNNECESSARY. The newspapers' motion to dismiss the Cabinet's motion for injunctive relief in appeal number 2012-CA-000179, or in the alternative to abate that motion, is hereby DENIED AS MOOT. The newspapers' motion to supplement the record is appeal number 2012-CA-000179 is GRANTED. The motion to dismiss appeal number 2012-CA-000179 is DENIED.

We now turn to an examination of the substance of the Cabinet's motion for CR 65.08 relief pending its appeal in which it asserts that because the merits of this case raise important legal and policy questions, release of confidential documents prior to appellate review is detrimental to the public interest and the rule of law.

Having considered the motion for CR 65.08 relief, the newspapers' responses to that motion, and being otherwise sufficiently advised, the Court ORDERS that the motion be, and it is hereby, DENIED.

We commence our discussion of the merits with the entry of a May 3, 2010 judgment by the Franklin Circuit Court in an action in which the respondent newspapers had sought access to public records concerning the Cabinet's discharge of its statutory duties to Kayden Daniels, a two-year-old infant who died while in the custody and control of the Cabinet, and to the child's teenage mother who was also in the custody of the Cabinet. The Cabinet had denied the newspapers' Open Records requests for this information, citing the confidentiality provisions of KRS 194A.060, which authorizes the Cabinet to promulgate administrative regulations protecting the confidentiality of records and reports which directly or indirectly identify a client or a patient; KRS 620.050, governing confidentiality of reports of child abuse and neglect; and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as well as the federal regulations promulgated to implement that act. Citing KRS 620.050(12)(a) and KRS 61.872, the Franklin Circuit Court ultimately concluded that "[u]nder the Kentucky Open Records Act, the public records related to the death of a child under the protection of the state foster care system are open to public inspection." The Cabinet subsequently appealed the circuit court's award of attorneys' fees and costs to the newspapers based upon its

finding that the Cabinet willfully withheld records in violation of the Kentucky Open Records Act. The Cabinet did not, however, appeal from the merits of the conclusion that records related to the death of a child are open to public inspection.

Thereafter, in December 2010, the newspapers made open records requests to the Cabinet seeking its reports concerning child fatality and near fatality cases in 2009 and 2010, along with two specific cases from 2008. After the Cabinet denied the requests, the newspapers initiated the instant litigation to compel the Cabinet to provide the records. In the November 3, 2011 order previously discussed, the circuit court concluded that the doctrine of *res judicata* barred the Cabinet from re-litigating issues fully litigated and decided in the previous action concerning release of records in cases of child fatality and near-fatality, rejecting the Cabinet's argument that disclosure of confidential information in such cases requires a case-by-case analysis. The circuit court also emphasized, however, that the Cabinet's arguments against disclosure failed for the same reasons they failed in the previous litigation – that explicit exceptions to the general confidentiality rule require disclosure.

As it had in the previous action, the circuit court analyzed the federal Child Abuse Prevention and Treatment Act ("CAPTA"), which makes state funding contingent upon confidentiality in child abuse investigations. The circuit court concluded that the exception contained in 42 U.S.C. § 5106a(b)(2)(A)(x)

permits "the public disclosure of findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." The circuit court also cited KRS 620.050(12)(a) as containing an explicit exception to the confidentiality requirements of KRS 620.050. Finally, the trial court cited public policy in concluding that "release of these records will help to keep the Cabinet accountable to prevent future tragedies and to answer to taxpayers who fund the Cabinet."

Thereafter, the Cabinet provided the newspapers with heavily redacted copies of its internal reviews and moved the circuit court to amend the judgment to approve its redaction protocol. The circuit court ordered the Cabinet to submit unredacted copies of the internal reviews for an *in camera* inspection and ordered the parties to meet and confer regarding the application of the Cabinet's proposed protocol. Although the parties agreed to the redaction of certain information such as social security numbers and provision of government benefits, the Cabinet sought to withhold even more information, including the identities of victims, perpetrators, and witnesses.

This brings us to the January 19, 2012 order in which the circuit court denied the Cabinet's motion to alter or amend the judgment, concluding: 1) that the Cabinet's proposed protocol "provides for a virtually unlimited redaction of both the fatality and near fatality reviews," and 2) that the protocol was overly broad,

inadequate and unreasonable. In an effort to balance the competing factors set out in KRS 61.878 with the need for public disclosure under the Open Records Act, the circuit court set out the following specifically authorized redactions:

> 1. In the case of a *near* fatality, the name of the child victim may be redacted.
> 2. In the case of a fatality or near fatality:
>   a. The name of the private citizen who reports the child abuse or neglect may be redacted, unless the informant is a family member. No redactions shall be made when the informant is law enforcement personnel, medical personnel, school personnel, or social service personnel;
>   b. The names of minor siblings, who are mentioned only because of their sibling relationship with a victim, may be redacted. In the individual case files, however, the siblings should be identified by "Sibling #1," "Sibling #2," etc; and
>   c. The name of a minor perpetrator may be redacted.

Finally, the circuit court concluded that the Cabinet would bear the burden of proof in any hearing concerning any challenged redactions.

Thereafter, the Cabinet filed this CR 65.08 motion for interlocutory relief to stay the January 19, 2012 order during the pendency of its appeal. Specifically, the Cabinet argues that a stay will preserve the *status quo* and that the disclosure of privileged information will result in irreparable injury and will moot its appellate remedy. We review the Cabinet's arguments under the familiar standards set out in *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978). The

Supreme Court of Kentucky explained the proper application of those standards in *Rogers v. Lexington-Fayette Urban County Gov't*, 175 S.W.3d 569 (Ky. 2005):

> In considering this case, the requirements for the issuance of an injunction must be carefully considered. They are explained in the seminal cases of *Oscar Ewing, Inc. v. Melton, d/b/a Melton's Grocery,* 309 S.W.2d 760 (Ky. 1958) and *Maupin v. Stansbury,* 575 S.W.2d 695 (Ky. App. 1978). They are as follows: (1) Has the plaintiff shown an irreparable injury; (2) Are the equities in the plaintiff's favor, considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo; and (3) Does the complaint present a substantial question?
>
> In *Commonwealth, Revenue Cabinet v. Picklesimer,* 879 S.W.2d 482 (Ky. 1994), this Court held that a movant for interlocutory relief must demonstrate that the circuit court ruling was "clearly erroneous." This standard is set out in CR 52.01 which provides that findings of fact shall not be set aside unless they are clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses. **On appellate review, the appellate court may determine that findings are clearly erroneous if they are without adequate evidentiary support or occasioned by an erroneous application of the law.** *Cf. Oakwood Mobile Homes, Inc. v. Sprowls,* 82 S.W.3d 193 (Ky. 2002).

175 S.W.3d at 570-71 (emphasis added).

With these criteria in mind, we turn to an examination of the Cabinet's claim that it is entitled to interlocutory relief. The first component of the *Maupin* formula for demonstrating entitlement to injunctive relief requires that the movant demonstrate immediate and irreparable injury. *Maupin* itself defines the parameters of this showing:

> In order to show harm to his rights, a party must first allege possible abrogation of a concrete personal right. *Morrow v. City of Louisville, Ky.*, 249 S.W.2d 721 (1952). While the nature of this right

> may be, and usually is, disputed, it is clear that some substantial claim to a personal right must be alleged. Because a temporary injunction often has the effect of enforcing a mere claim of the right, doubtful cases should await trial of the merits. *Oscar Ewing, Inc. v. Melton, supra.*
>
> In addition to showing that personal rights are at stake, CR 65.04 further requires a clear showing that these rights will be immediately impaired. Thus, the remote possibility of some feared wrong in the future is insufficient to support a trial court's award of a temporary injunction. *Chapman v. Beaver Dam Coal Co.*, Ky., 327 S.W.2d 397 (1959). Rather, the element of "immediacy" contemplates that the parties show an urgent necessity for relief. *McCloud v. City of Cadiz*, Ky. App., 548 S.W.2d 158 (1977). This means that "(a)n injunction will not be granted on the ground merely of an anticipated danger or an apprehension of it, but there must be a reasonable probability that injury will be done if no injunction is granted." *Hamlin v. Durham*, 235 Ky. 842, 32 S.W.2d 413, 414 (1930). Although the above cases dealt with permanent injunctive relief, we believe that the reasoning of those cases is equally applicable to temporary injunctive relief.

575 S.W.2d at 698. We are convinced that the Cabinet cannot meet its burden of demonstrating either prong of this component.

In support of its irreparable injury claim, the Cabinet alleges that, absent interlocutory relief, "the Commonwealth's ability to protect children and others from harm" will be restrained. It cites the following examples of potential consequences of the release of records required by the January 19, 2012 order: 1) interference with criminal prosecutions; 2) *possible* retaliation against reporting sources; 3) *possible* threat to adopted children; and 4) denial of due process rights of parents, guardians or custodial parties whom the Cabinet found guilty of abuse

or neglect, but are subsequently exonerated on appeal. In our view, not only do these concerns fail to satisfy the requirement of concrete injuries to the Cabinet, their speculative nature precludes them from being classified as "immediate" injuries:

> At the most, the complaint creates only a speculation of possible harm to the taxpayers as a group. There being no clear showing of possible irreparable injury to the [Cabinet's] rights, part 2 of the temporary injunction is improper.

Maupin, 575 S.W.2d at 700.

Next, *Maupin* requires a balancing of the equities, "considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Rogers*, 175 S.W.3d at 571. Given our conclusion that the Cabinet has failed to demonstrate injury to its concrete rights, the equities clearly favor the public's interest in disclosure of the Cabinet's performance of its statutory duties in cases of death or near death of children under its care.

Finally, *Rogers* interprets the *Maupin* component of a substantial question as requiring the Cabinet to demonstrate that the circuit court ruling was "clearly erroneous," utilizing the CR 52.01 standards. As noted in *Rogers*, appellate courts may conclude that findings are clearly erroneous if they are without adequate evidentiary support or are occasioned by an erroneous application of the law. 175 S.W.3d at 571. We are convinced that the Cabinet cannot demonstrate that the circuit court ruling was clearly erroneous.

Initially in this regard, we concur in the circuit court's assessment that the issue preclusion component of the doctrine of *res judicata* prevents the Cabinet from re-litigating the issue of its responsibility under the Open Records Act to disclose its review reports in cases of child fatalities or near fatalities. The Cabinet failed to appeal the circuit court's conclusion in the prior litigation that "[u]nder the Kentucky Open Records Act, the public records related to the death of a child under the protection of the state foster care system are open to public inspection." The decision of the Supreme Court of Kentucky in *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998), guides us in reaching this conclusion:

> For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case. *Restatement (Second) of Judgments* § 27 (1982). Second, the issue must have been actually litigated. *Id.* Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. *Id.* Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment.

Id. at 465. Because each of these factors was present in the litigation below, we can conclude only that the question of the Cabinet's responsibility under the Open Records Act regarding cases of fatality or near-fatality is settled. The unappealed conclusion of the May 3, 2010, judgment represents the *status quo* in this case.

The Cabinet nevertheless argues that the circuit court erred in limiting its ability to make whatever redactions it deems appropriate to maintain the confidentiality of the records. In our opinion, the circuit court correctly determined that the Cabinet's claimed authority to redact cannot be reconciled with its duty to disclose under the Open Records Act. The Cabinet fails to point this Court to anything in the circuit court findings which could be labeled as being without evidentiary support. Nor has the Cabinet demonstrated that the circuit court's ultimate decision is erroneous as a matter of law.

Accordingly, we are convinced that the Cabinet has failed to satisfy any of the *Maupin* standards and, therefore, its motion for CR 65.08 relief must be DENIED.

ACREE, CHIEF JUDGE, AND MOORE, JUDGE, CONCUR.

KELLER, JUDGE, DISSENTS IN PART AND WRITES SEPARATELY.

KELLER, JUDGE, DISSENTING:

I concur with the majority's holdings dismissing appeal No. 2012-CA-000438 as duplicative and denying as moot the Cabinet's motion for CR 65.70 relief. However, I would grant the Cabinet's motion for CR 65.08 relief. Therefore, I respectfully dissent from that portion of the majority's order denying that relief.

At the outset, I note that the Majority does not address the argument by the newspapers that the Cabinet is foreclosed from pursuing interlocutory relief in this Court because it did not first seek relief in the circuit court.[1] CR 65.08(1) provides that:

> After an appeal is taken from a final judgment granting or denying an injunction any party may move the circuit court to grant, suspend or modify injunctive relief during the pendency of the appeal. The circuit court, in its discretion, may provide in the order ruling on the motion that the status existing immediately before the entry of the final judgment shall be maintained for a specified limited time to protect a party wishing to proceed promptly under paragraph (2) of this rule.

CR 65.08(3) provides that, "[i]f no request was made to the trial court under paragraph (1) of this rule, the motion shall state why such request was impractical."

The Cabinet did not move the circuit court to suspend or modify its January 19, 2012, order. The newspapers argue that the language in CR 65.08 is mandatory and the Cabinet's failure to first pursue relief in circuit court is fatal to its request for interlocutory relief. I disagree for three reasons. First, the language of CR 65.08(1) is not mandatory. The Rule states that a litigant "may" seek relief in circuit court, not that a litigant "must" seek relief.

Second, CR 65.08(3) provides that a litigant filing directly before this Court shall state why it was impractical to file in circuit court. The Rule does not

[1] Based on the ultimate holding, the Majority did not need to address this issue. However, because I would grant the relief sought, I must do so.

define what constitutes impracticality nor does it state that, if this Court finds that there was no impracticality, a motion for interlocutory relief is foreclosed. The Rule simply states that the litigant must set forth the impracticality, which the Cabinet did. However, that does not mean that I believe simply giving any reason is sufficient to permit proceeding directly to this Court. Certainly, if this Court determines that the reason(s) offered by a litigant are not sufficient, this Court can dismiss a motion for interlocutory relief.

The Cabinet set forth two reasons why it was impractical to seek relief from the circuit court before proceeding to this Court: (1) the circuit court judge was out of the state and therefore unavailable to rule on any motion before the injunction's effective date; and (2) the circuit court's order implicitly suggested that seeking a delay in enforcement would be fruitless. In its January 19, 2012, order, the circuit court denied the Cabinet's request to "keep redacted portions of the Internal Reviews of fatality and near fatality cases confidential until it has determined whether to seek appellate review of the Court's ruling on that issue." I agree with the Cabinet that the circuit court's denial of that request indicates that seeking additional relief from the circuit court would have been an exercise in futility. Furthermore, I note that the circuit court had already ordered the Cabinet to pay the newspapers in excess of $47,000.00 in attorneys' fees and costs related to this litigation. Taking the futile step of seeking relief at the circuit court level

before pursuing interlocutory relief in this Court would likely have added unnecessarily to the Cabinet's liability for attorneys' fees.

As to whether this Court should grant injunctive relief, the Majority correctly noted that the requirements for considering a motion for such relief are as follows:

> (1) Has the plaintiff shown an irreparable injury; (2) Are the equities in the plaintiff's favor, considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo; and (3) Does the complaint present a substantial question?

Rogers v. Lexington-Fayette Urban County Gov't, 175 S.W.3d 569, 570-71 (Ky. 2005).

As to the first requirement, I disagree with the Majority's conclusion that the Cabinet has only put forth evidence of potential injury. In *The St. Luke Hospitals, Inc. v. Kopowski,* 160 S.W.3d 771, 775 (Ky. 2005) and *Norsworthy v. Castlen*, 323 S.W.3d 764, 768 (Ky. App. 2010), the Supreme Court of Kentucky and this Court held that information subject to the attorney/client privilege can be subject to interlocutory relief because that information cannot be recalled once it has been disclosed. As the Courts noted, the harm is in the releasing of the information, not in the possible uses that may be made of the information. While the information the Cabinet has been ordered to disclose is not subject to the attorney/client privilege, it is confidential. Like the privileged information in

Norsworthy and *Kopowski*, the confidential information contained in the child fatality and near fatality records cannot be recalled once released. Therefore, as with privileged information, the releasing of the confidential information is the harm and that harm is immediate and irreparable.

As to the second element, I believe that, for the purposes of this motion, the right to confidentiality, at this preliminary point in the appellate process, outweighs the public's interest. The Cabinet is releasing redacted documents to the newspapers; therefore, while they may not be getting all of the information they deem appropriate, the newspapers are receiving information. As noted above, the motion before this panel of the Court only requests a suspension of the circuit court's order pending a determination on the merits, it does not request such a determination. In the event the newspapers are successful on the merits of the appeal, the unredacted information will be released. I see nothing in the record that indicates how the public will be harmed by a delay in the release of that information. On the other hand, if the newspapers are not successful on the merits, the information will have been released and the Cabinet, and those whose interests if protects, will be irreparably harmed.

As to the third requirement, I do believe that the Cabinet has presented a substantial question. As set forth in *Price v. Paintsville Tourism*

Comm'n, 261 S.W.3d 482, 484 (Ky. 2008), the Cabinet has to show "that there is a substantial possibility that [it] will ultimately prevail."

In concluding that the Cabinet has not presented a substantial question, the Majority relies on the issue preclusion component of the doctrine of *res judicata*. As correctly noted by the Majority, the second element of issue preclusion is that "the issue must have been actually litigated" and the third element is that the court must have actually decided the issue. *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). From the record we have before us, it appears that the parties did litigate whether the Cabinet was required to release information related to fatality and near fatality cases. However, it does not appear from the record or from the circuit court's 2010 order that the parties litigated or even argued the issue of what information the Cabinet may or may not redact when releasing information. Because the issue of redaction is central to the circuit court's January 19, 2012, order and to the Cabinet's appeal, I disagree with the Majority's conclusion that that issue was fully litigated in the 2010 case. Furthermore, it does not appear to me that the circuit court's 2010 order addresses whether the Cabinet may or may not redact any information. Therefore, because there is no indication that the parties previously litigated the issue of redaction or that the circuit court decided that issue, I disagree with the Majority's conclusion that the Cabinet's appeal is doomed to fail because of issue preclusion.

Additionally, I note that the Majority's conclusion that "the circuit court correctly determined that the Cabinet's claimed authority to redact cannot be reconciled with its duty to disclose under the Open Records Act," appears to be an issue that should be determined by the merits panel and not by this motion panel.

In closing, it should be noted that I am in complete agreement with the concept that the Cabinet should be held accountable in all cases, particularly those involving fatalities or near fatalities. However, as set forth above, the current state of the law of the Commonwealth regarding the release of confidential information compels me to dissent from that portion of the majority's opinion and order denying the Cabinet's motion to suspend the circuit court's injunction pending resolution of the merits of its appeal. The ultimate issue, whether the Cabinet is required to release the requested information and how much of that information should be released, is a matter for the merits panel, not for this motion panel. Therefore, I would grant the Cabinet's motion.

ENTERED: JUL 09 2012

CHIEF JUDGE, COURT OF APPEALS