COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2001-SC-000531-MR

LEXINGTON PUBLIC LIBRARY — APPELLANT

v. APPEAL FROM THE COURT OF APPEALS
ACTION NO. 2001-CA-00531-OA

HON. THOMAS L. CLARK, JUDGE, FAYETTE CIRCUIT COURT, DIVISION EIGHT — APPELLEE

AND

DIANA KOONCE — REAL PARTY IN INTEREST/APPELLEE

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BRIEF FOR REAL PARTY IN INTEREST/APPELLEE

SUBMITTED BY:

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Certificate Required by CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail, postage prepaid, on this ___ day of _____ 2001: Hon. Thomas L. Clark, Fayette Circuit Court, 215 W. Main Street, Lexington, KY 40507; Richard G. Griffith, Jeffrey J. Chapuran, Stites & Harbison, 2300 Lexington Financial Center, Lexington, KY 40507; and, Hon. George M. Geogehan, III, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned does also certify that the record on appeal has not been removed from the Office of the Clerk of the Court of Appeals.

_____
Robert L. Abell

STATEMENT CONCERNING ORAL ARGUMENT

This case presents an issue – the scope and application of the attorney-client privilege as regards a corporate party – that has not been addressed by the Court. Because this issue will have application to many cases besides this one, it is necessary to respectfully disagree with appellant and suggest that oral argument may prove helpful to the Court.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Introduction

In this case, as the affidavit submitted by appellant indicates, a lawyer was engaged to direct an investigation regarding an employee's "behavior and performance as Marketing Director." (Appellant's Brief, Appendix, Affidavit of Susan Brothers ¶ 4). Appellant claims that all communications made in the personnel review process are insulated from discovery by the attorney-client privilege, because the lawyer advised as to the legal aspects at the end of the process. Because the subject communications are not privileged and because production of the sole communication setting forth the legal advice was deemed privileged, the appellee trial judge did not abuse his discretion and the Court of Appeals, which denied appellant's petition for a writ of prohibition, should be AFFIRMED.

Counterstatement of the Facts

Appellant moved for a protective order regarding documents related to the personnel review process and investigation. The appellee trial judge, Hon. Thomas L. Clark of the Fayette Circuit Court, reviewed *in camera* the relevant documents and overruled the motion in part and sustained it in part. It was sustained as to a document

stating the lawyers legal advice but overruled regarding documents that "do not purport to give legal advice or reveal any confidential communication between the client and counsel[.]"[1]

Appellant sought and the Court of Appeals denied a writ prohibiting enforcement of appellee's order that the documents were not privileged and must be produced. (R. 35-43).

Appellant has identified and numbered the relevant documents 1 through 14. Document numbers 9 and 13 are not at issue. Appellant's numerical references will be used in this brief.

The documents are of three types. The first is documents 1 through 7, which are documents generated by various of appellant's employees regarding the job performance, actions and behavior of the adverse party, the employee being investigated, Bob Patrick, along with document 11, which are notes of conversations with the employees that generated documents 1 through 7. The second type consists of documents 8, 10, and 14, which are or regard communications between appellant's representatives

[1] The trial judge's order was attached to appellant's Petition for Writ of Prohibition (R. 4 – 26). In addition to being in the record, the order is included in the appendix hereto.

and the adverse party, Patrick. The third type is document 12, which apparently reflects direction regarding conduct of the investigation into the employee's "job performance and behavior as Marketing Director."

ARGUMENT

POINT 1

WHERE NON-PRIVILEGED DOCUMENTS AND COMMUNICATIONS WERE ORDERED PRODUCED AND A COMMUNICATION SETTING FORTH THE LAWYER'S LEGAL ADVICE WAS DEEMED PRIVILEGED, THE APPELLEE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION AND THE COURT OF APPEALS SHOULD BE AFFIRMED.

The scope of the attorney-client privilege must be strictly construed. The involvement of a lawyer in the ordinary business process of reviewing an employee's "job performance and behavior" does not render privileged all communications and information generated in that process. The facts leading to a business personnel decision are not privileged merely because some legal aspects are also involved. KRE 503(a)(2)(B) defines confidential communications by a "representative of the client" as those occurring in the ordinary course of an employee's employment and regarding the subject matter of the employee's employment. The attorney-client privilege does not apply to communications from a client to the adverse party or from the adverse party to the client. Because the

appellee trial judge conducted an *in camera* review and properly distinguished between non-privileged and privileged communications, the scope and purpose of the attorney-client privilege was honored. Accordingly, the Court of Appeals' decision denying a writ of prohibition should be AFFIRMED.

5. The Scope of the Attorney-Client Privilege Must be Strictly Construed.

This case involves the scope of the attorney-client privilege set forth in KRE 503. "[C]ourts have universally held that it must be strictly construed and given no greater application than is necessary to further its objectives." Lawson, Kentucky Evidence Law § 5.10 at 232.

6. The Involvement of a Lawyer In the Ordinary Business Process of Reviewing an Employee's Job Performance and Behavior Does Not Render Privileged All Communications and Information Made and Developed in that Process.

Appellant fundamentally errs by urging that the involvement of a lawyer in the ordinary business process of reviewing an employee's "job performance and behavior" renders that process and all information developed in it subject to the attorney-client privilege. "Nothing seems to be more frequent in the modern litigation-prone world than a sophisticated client who tries to involve a lawyer in some fact-finding process and thus make privileged both the

fact of that process and the information gathered." Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 116 (A.B.A. 3rd ed. 1997). "Communications to a lawyer acting as a general agent for the performance of functions that any nonlawyer could also perform are not privileged." *Id*. at 99. "When the lawyer performs such acts, the lawyer is not necessarily 'acting as a lawyer.'" *Id*. "Communications made to a lawyer by a client seeking business judgment or advice rather than legal advice are not privileged." *Id*. at 97. "No litmus test for determining what constitutes 'legal advice' or 'legal services' has ever been formulated[,]" and a case-by-case analysis is required. *Lawson, supra*, at 234.

"When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved." *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987), *citing SCM v. Xerox*, 70 F.R.D. 508, 517 (D.Conn. 1976). As the Court of Appeals observed in quoting *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 203-204 (E.D.N.Y. 1988):

> The attorney-client privilege does not protect nonlegal communications based on business advice given by a lawyer. Where a lawyer mixes legal and business advice the communication is not privileged unless "the communication is

> designed to meet problems which can fairly be characterized as predominantly legal." 2 J. Weinstein & M. Berger, *Weinstein's Evidence*, para. 503(a)(a)(01) at 503-22.

Of course, advice about the legal consequences of the various options is generally privileged. Epstein, *supra*, at 98.

7. KRE 503(a)(2)(B) Requires that a Confidential Communication from a "Representative of the Client" Occur in the Ordinary Course of the Employee's Employment and Regard the Subject Matter of the Employee's Employment.

Appellant grounds its argument in KRE 503 but errs by omitting KRE 503(a)(2)(B)'s definition of "representative of the client," which is as follows:

> Any employee or representative of the client who makes or receives a confidential communication:
>
> (i) In the course and scope of his or her employment;
> (ii) Concerning the subject matter of his or her employment; and,
> (iii) To effectuate legal representation for the client.

The foregoing establishes limits on the scope of the privilege recognized by KRE 503: "[c]overage depends … upon whether or not 'the communications concern matter within the scope of the employee's duties and [whether or not] the employee is aware that the information is being furnished to enable the attorney to provide legal advice to the corporation.'" Lawson, Kentucky Evidence Law § 5.10 at 247

(3d ed. 1993), *quoting Admiral Ins. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1492 (9th Cir. 1989).

A communication that occurs in the workplace by a representative of the client is not privileged merely because it took place at work. This point was illustrated by the drafters of KRE 503:

> Suppose, in a suit for personal injuries sustained when the client's truck entering the client's loading yard struck a pedestrian, the lawyer for the client interviews the driver of the truck and secretary who happened to be look it out the window when the accident occurred. The interview with the driver would be privileged but not so the interview with the secretary because the accident was not a matter within the course and scope of her employment.

Lawson, *supra*, at 247, *quoting Study Committee* at 41.

4. The Attorney-Client Privilege Does Not Apply to Communications from the Client to the Adverse Party or from the Adverse Party to the Client.

The attorney-client privilege applies only to confidential communications between the client and its lawyer. "A client is one who is the intended beneficiary of legal services." Epstein, The Attorney-Client Privilege and the Work-Product Doctrine at 72 (ABA 3d. ed. 1997). The attorney-client privilege applies only to communications between lawyer and client. Lawson, *supra*, §5.10 at 233.

5. This Court Employs Here a Very Deferential

"Abuse of Discretion" Standard of Review

This Court reviews this matter from a very deferential abuse of discretion standard. A writ of prohibition should only be issued "upon a showing that the challenged action reflects an abuse of discretion." *Southeastern United Medigroup v. Hughes*, Ky., 952 S.W.2d 195, 199 (1997). "Where the challenge involves matters of fact, or application of law to facts, however, an abuse of discretion should be found only where the factual underpinning for application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule." *Id.* at 199-200.

6. Where the Documents Set Forth Communications Whose "Primary Purpose" Was Service to the Ordinary Business Function of Reviewing an Employee's "Job Performance and Behavior," There Was No Showing By Appellant that the Communications Regarded the Ordinary Subject Matter of the Employees' Employment and There Were Communications Between Appellant, Neither the Appellee Trial Judge Nor the Court of Appeals Abused Their Discretion In Ordering These Documents Produced.

The Court of Appeals should be affirmed: there has been no abuse of discretion by the appellee trial judge, who correctly distinguished between privileged and non-privileged communications.

First, the documents should be produced because the "primary purpose" of their creation was the ordinary

business function of personnel review: Patrick's "job performance and behavior as Marketing Director." Because communications regarding such ordinary business matters are not privileged, even where legal aspects are involved, the documents do not include confidential communications insulated from production by KRE 503.

Second, documents 1 through 7 and 11 cannot be considered confidential communications because there has been no showing by appellant that they regard the ordinary subject matter of the employees' employment. A "confidential communication" from a "representative of the corporation" must regard the ordinary subject matter of the employee's employment. KRE 503(a)(2)(B). Accordingly, the Court of Appeals should be affirmed on this ground as well.

Third, documents 8, 10 and 14 cannot possibly be considered confidential communications: they are communications between appellant and the adverse party, Patrick. The attorney-client privilege applies only to communications between attorney and client, not between the client and an adverse party. Accordingly, the Court of Appeals should be affirmed on this ground as well.

The appellee trial judge reviewed *in camera* the relevant documents in accordance with *Shobe v. EPI Corp.*, Ky., 815 S.W.2d 395, 398 (1991). The trial judge's review

indicated that production of the documents would not disclose any "confidential communication." That ruling is supported by the Court of Appeals' determination that the "primary purpose" of the documents was to "investigate 'Patrick's behavior and performance as Marketing Director.'" (R. 42). Thus, contrary to the conclusory assertions of appellant's arguments, but in accord with the affidavit submitted by appellant, both the appellee trial judge and the Court of Appeals have determined correctly that the primary function served by the communications was the ordinary business process of reviewing Patrick's "job performance and behavior as Marketing Director."

"Communications made to a lawyer seeking business judgment or advice rather than legal advice are not privileged." *Epstein, supra*, at 97. "When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved." *Hardy v. New York News*, 114 F.R.D. at 643-44. "Where a lawyer mixes legal and business advice the communication is not privileged unless 'the communication is designed to meet problems which can fairly be characterized as predominantly legal.'" *Cuno, Inc.*, 121 F.R.D. at 203-204.

The Court of Appeals and the appellee trial judge have correctly distinguished between non-privileged and privileged documents. "[T]he business aspects of the decision are not protected simply because legal considerations are also involved." *Hardy v. New York News, supra*. Legal advice about the various options is, of course, privileged. Epstein, *supra*, at 98. The business aspects of the decision, which appear to include a substantial number of reports concerning Patrick's "job performance and behavior" and resulted in Patrick's separation from the appellant's employ, have been ordered produced. At the same time the legal advice regarding that decision has been shielded from discovery. The case-by-case review that these issues require has been conducted carefully and correctly. Appellant has made no showing of abuse of discretion or that the applicable legal rule has been distorted. Accordingly, the Court of Appeals should be AFFIRMED.

The record indicates that documents 1 through 7 and 11 reflect communications from a number of appellant's employees regarding Patrick's job performance and behavior. However, there has been no showing by appellant that the ordinary subject matter of these employees' employment was Patrick's job performance and behavior. KRE 503(a)(2)(B)

requires that a "confidential communication" from a "representative of a corporation" regard the subject matter of the employee's employment. Such a confidential communication does not occur merely because it was made at work. *See* Lawson, *supra*, at 247, *quoting Study Committee* at 41. Accordingly, because documents 1 through 7 and 11 do not constitute a confidential communication under KRE 503, the appellee trial judge correctly ordered their production and the Court of Appeals should be affirmed on this ground too.

The record also indicates that documents 8, 10 and 14 are or regard communications between appellant's representatives and the adverse party, the employee being investigated, Patrick. The attorney-client privilege applies only to communications between lawyer and client. Lawson, *supra*, § 5.10 at 233. The attorney-client privilege does not apply to communications between client and the adverse party. Accordingly, because documents 8, 10 and 14 are or regard communications between appellant's representatives and the adverse party, the appellee trial judge correctly concluded that they did not include confidential communications and should be produced. Therefore, the Court of Appeals should be affirmed on this ground too.

Appellee relies correctly on *Upjohn v. United States*, 449 U.S. 383 (1981), but errs by misstating its holding.[2] First, *Upjohn* does not establish a categorical set of rules but cautions that attorney-client privilege issues must be addressed on a case-by-case basis. 449 U.S. at 396. Second, the communications made by the corporate representatives at issue in *Upjohn* were within the ordinary scope of the employee's duties. 449 U.S. at 394. Third, the documents at issue in *Upjohn* regarded the legality of payments made to foreign government officials, not the ordinary business issue of an employee's job performance.

The ruling by the appellee trial judge and the Court of Appeals is consistent with *Upjohn*. First, the primary purpose of the investigation in *Upjohn* was "possibly illegal" payments made to foreign governments. Here, by contrast, the primary purpose of the investigation was assessment of an employee's "job performance and behavior," a very ordinary business function. Communications made pursuant to this ordinary business procedure do not become privileged merely because some legal aspects exist as well. *Hardy v. New York News, supra; Cuno, Inc., supra*. Second, the communications at issue in *Upjohn* regarded the ordinary

[2] KRE 503 incorporates *Upjohn*'s analysis "for the basis parameters of the lawyer-client privilege for the corporate

subject matter of the employees' employment. Here, appellant has made no such showing. For communications by corporate employees to become privileged KRE 503(a)(2)(B) requires that they regard ordinary subject matter of the employees' employment. The case-by-case analysis that *Upjohn* directs must occur has been completed correctly; there has been no abuse of discretion by the appellee trial judge or the Court of Appeals. Therefore, the Court of Appeals should be affirmed.

Appellant's reliance on *Carter v. Cornell University*, 173 F.R.D. 92 (S.D.N.Y. 1997), is misplaced. First, the documents at issue in *Carter* were trial preparation materials. This case, by contrast, does not include any claim that the documents at issue are trial preparation materials. Second, while here the documents at issue were created during a process whose "primary purpose" was the assessment of Patrick's "job performance," the documents at issue in *Carter* were created specifically to aid in the defense of a lawsuit. Thus, the *Carter* court conducted the case-by-case analysis that must be done and found the foregoing differences material. The ruling of the appellee trial judge and the Court of Appeals is not contrary to *Carter*: the documents here are not trial preparation

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context." Lawson, *supra*, § 5.10 at 245.

materials and were created by a process whose "primary purpose" was the ordinary business process of reviewing and assessing an employee's "job performance."

Appellant's reliance on *First Chicago Intern. v. United Exchange Co., Ltd.,* 125 F.R.D. 55 (S.D.N.Y. 1989), is similarly misplaced. The court in that case, unlike the appellee trial judge and Court of Appeals here, made the determination that legal considerations were predominant and therefore the attorney-client privilege required the communications be shielded from discovery. Here, however, the appellee trial judge and the Court of Appeals have determined that the "primary purpose" of the communications at issue here was the ordinary business procedure of reviewing an employee's job performance. That the court in *First Chicago* reached a different conclusion based on different facts does not indicate that the appellee trial judge or the Court of Appeals abused their discretion or distorted the legal rule.

The court's decision in *State ex rel Oregon Health Sciences University v. Haas*, 942 P.2d 261 (Ore. 1997), has no application here because that case involved a peculiarity of Oregon evidence law. Indeed, the Court in *Haas* pointed out that the definition of "representative of the client" at issue therein was "not patterned after any

other state's definition" and that "no other state's interpretation of that term is instructive." 942 P.2d at 269. *Haas* is very specifically limited to issues of Oregon law not at all present in this case.

Appellant's citation to *McDonnell Douglas Corp. v. United States Equal Employment Opportunity Commission*, 922 F.Supp. 235 (E.D. Mo. 1996), is similarly without merit. At issue in that case was whether certain documents were exempt from disclosure under the federal Freedom of Information Act.

CONCLUSION

The attorney-client privilege must be strictly construed. The privilege does not insulate from discovery information regarding ordinary business processes, such as an employee's "job performance and behavior," merely because legal considerations are also present. The privilege applies only to communications by corporate employees that regard the subject matter of their employment. The privilege does not apply to communications from appellant to the adverse party. Because the appellee trial judge followed the appropriate procedure of *in camera* review and correctly distinguished between privileged and nonprivileged documents, there has been no abuse of

discretion nor distortion of the legal rule. Accordingly, the Court of Appeals should be AFFIRMED.

Respectfully submitted,

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