RENDERED: June 1, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000531-OA

LEXINGTON PUBLIC LIBRARY — PETITIONER

v. ORIGINAL ACTION
REGARDING FAYETTE CIRCUIT COURT ACTION NO. 00-CI-00288

HON. THOMAS L. CLARK, JUDGE,
FAYETTE CIRCUIT COURT — RESPONDENT

AND

DIANA KOONCE — REAL PARTY IN INTEREST

* * * * * * * *

OPINION AND ORDER

DENYING CR 76.36 RELIEF

BEFORE: BARBER, EMBERTON AND McANULTY, JUDGES.

BARBER, JUDGE. Petitioner, Lexington Public Library (the Library), has filed a petition for writ of prohibition to which the real party in interest, Diana Koonce (Koonce), has responded. The Court has considered the petition and the response thereto and ORDERS the petition be DENIED.

The Library is asking this Court to prohibit the respondent trial court from enforcing an order denying in part its motion for protective order against the discovery of

information it claims is protected by the attorney-client privilege.

Koonce has sued the Library for unlawful retaliation and constructive discharge by her supervisor, Bob Patrick (Patrick), in December, 1999. In the course of discovery, Koonce learned that Patrick resigned from his employment with the Library as its Marketing Director "due to differences of opinion" and concerns relating to his "style and ideas", several months after her resignation. Koonce then noticed the deposition of an agent of the Library for purposes of learning the details of Patrick's termination, and requested the production of all documents relevant to the termination upon which the deponent would rely.

The Library contends the documents responsive to Koonce's request are privileged because they are "intracorporate communications generated for the purpose of securing legal advice". Many of those documents are memoranda solicited from, and drafted by, Patrick's coworkers about his performance and addressed to several members of Library management. Others are various notes documenting interviews and telephone calls. Ultimately, the documents were transmitted to the Library's counsel who assisted in the drafting of a memorandum to Patrick listing performance deficiencies, to which Patrick responded.

An exhibit to this writ is an affidavit by Susan Brothers (Brothers), the Library's Director for Training and Human Resources, who oversaw the investigation regarding Patrick and who was involved in the decision to accept his resignation. Brothers states she contacted counsel when she "became aware of

increasing concerns surrounding Patrick's behavior and performance." She further states that the Library "was particularly concerned about its possible legal exposure should it take any action adverse to Patrick because he was over the age of forty and was experiencing health problems." (Affidavit, p.1). The affidavit includes a list of the fourteen documents alleged to be protected from disclosure.

In its order, following a review of the documents in camera, the respondent trial court ordered that all but one of them be produced to Koonce. The court found that the documents were relevant, had been prepared in the normal course of business, or as part of an internal investigation, and were not privileged even though an attorney might have been consulted because they "do no purport to give legal advice or reveal any confidential communication between the client and counsel." However, we note that the court ordered the documents to be sealed in the record.

The Library contends that enforcement of the trial court's decision would fundamentally undermine its ability to communicate in confidence with its counsel and, further, that it would have no adequate remedy by appeal should the documents be disclosed. Bender v. Eaton, Ky., 343 S.W.2d 799 (1961).

On the merits, the Library claims the documents are privileged pursuant to KRE 503 because they are information compiled for the specific and unique purpose of facilitating the rendition of legal services. Upjohn Co. V. United States, 449 U.S. 383, 390 (1981).

Koonce's response characterizes the Library's

investigation as an ordinary business procedure aimed at evaluating an employee's performance. She argues that counsel's involvement in it, i.e. the suggestion that Patrick's coworkers be interviewed, was business, not legal, advice that could have been given by a nonlawyer and, therefore, is the type of advice that "does not cloak the entire procedure with privilege." (Response at p.4). Thus, she concludes that the trial court properly excluded the one document containing legal advice, but also properly ordered the production of nonprivileged business communications about an employee's job performance that did not become privileged merely because some legal aspects existed. We agree.

A writ of prohibition is an extraordinary and discretionary remedy to be issued only when the petitioner is able to show that a lower court is proceeding, or is about to proceed, outside its jurisdiction and there is no adequate remedy by appeal or when it is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise, and the petitioner would suffer great injustice and irreparable injury should the court do so. This Court's standard of review includes the determination as to whether the challenged decision reflects an abuse of the trial court's discretion. See, Southeastern United Medigroup v. Hughes, Ky., 952 S.W.2d 195, 199 (1997).

We are of the opinion that the Library has made a sufficient showing of irreparable harm and lack of adequate remedy by appeal were the documents determined to be privileged. Therefore, it has shown entitlement to a consideration of the

merits of its original action. See, Sisters of Charity Health Systems, Inc. v. Raikes, Ky., 984 S.W.2d 464, 466 (1998).

On the merits, based on our review of the parties' arguments, the authorities on which they rely, and the appended record, we conclude that the Library failed to make a sufficient showing of error and we have determined that the trial court's decision is not an abuse of its discretion.

KRE 503(b) provides in pertinent part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:
> (4) Between representatives of the client or between the client and a representative of the client; . . .

In support of their position, the parties rely on a number of federal authorities. A review of those authorities reveals that the key to application of the attorney-client privilege is whether the "dominant" or "primary" purpose of the communication at issue was to facilitate legal advice. First Chicago International v. United Exchange Co. LTD, 125 F.R.D. 55 (S.D.N.Y. 1989); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35 (E.D.N.Y. 1973).

These authorities also clarify that nonlegal communications generated as a result of business advice to resolve a business problem do not become automatically privileged simply because they were suggested by a lawyer who then reviewed them prior to giving legal advice. In Cuno Inc. v. Pall Corp., 121 F.R.D. 198 (E.D.N.Y. 1988)(on which the Library relies), the

court stated:

> 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. Id., at 203-04.

Also, in Hardy v. New York News, 114 F.R.D. 633 (S.D.N.Y. 1987) (on which Koonce relies):

> 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.

In the instant case, although the Library contacted counsel because it was concerned about legal exposure should it terminate Patrick because of the latter's age and poor health status, the primary purpose for the memoranda/interviews, as evidenced by Brothers' affidavit, was to investigate "Patrick's behavior and performance as Marketing Director." (Affidavit, p.1). While the end result of that investigation was a memorandum embodying legal advice (and the trial court excluded that document), the record provided to this Court indicates that the remainder of the documents responsive to Koonce's request pertain to fact-finding relating to job performance. The respondent trial court, who had the benefit of first hand review of the documents, concluded that "the documents in question do not purport to give legal advice or reveal any confidential communication between the client and counsel, except for the document excluded herein." We

are not aware of any consideration militating against our deferral to the trial court's determination.

As held by the Kentucky Supreme Court: ". . . [b]road claims of 'privilege' are disfavored when balanced against the need for litigants to have access to relevant or material evidence." Meenach v. General Motors, Ky., 891 S.W.2d 398, 402 (1995)(citing United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1029 (1974)). The Library does not dispute the relevancy or materiality of the documents. The documents are not privileged. Therefore, they should be produced. CR 26.02(1).

BARBER and McANULTY, Judges, CONCUR.

EMBERTON, Judge, DISSENTS. He would grant this original action.

ENTERED: June 1, 2001

/s/ David A. Barber
JUDGE, COURT OF APPEALS

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