# *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## *NOT TO BE PUBLISHED OPINION*

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: AUGUST 25, 2005
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

2005-SC-000005-MR

DATE 9-15-05 E.W.A. Grau, D.C.

HON. LEONARD L. KOPOWSKI, JUDGE, CAMPBELL CIRCUIT COURT, — APPELLANT

and

FRED MACKE AND DELORES MACKE — REAL PARTIES IN INTEREST

V.

APPEAL FROM COURT OF APPEALS
CASE NO. 04-CA-1855 and CAMPBELL CIRCUIT COURT CASE NO. 02-CI-199

STANDARD LIFE INSURANCE COMPANY OF INDIANA — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

This is a matter of right appeal from an original action in the Court of Appeals. In that action, Standard Life (hereinafter referred to as "Standard") sought and was granted a writ of prohibition against a discovery order compelling Appellee's in-house attorneys and president to testify concerning certain conversations arguably protected by the attorney-client privilege. We affirm because we find Appellants have failed to prove by a preponderance of the evidence that the crime-fraud exception of KRE 503(d)(1) applies to defeat the privilege, and that the Court of Appeals did not abuse its discretion in granting the writ of prohibition.

## FACTUAL BACKGROUND

Standard is the defendant to an action filed by the Mackes, which pleads a number of causes of action including fraud. On June 21, 2004, original Plaintiffs, Fred and Delores Macke, moved the Campbell Circuit Court to compel testimony from Standard's in-house associate general counsel, Jeff Macy; general counsel, Steve Coons; and president, Ray Ohlson, regarding the substance of three meetings between Macy, Coons and Olson regarding the sale by one of Standard's agents of unregistered promissory notes. Standard responded arguing these conversations were subject to the attorney-client privilege. Plaintiffs contend these conversations fall within the crime-fraud exception of KRE 503 (d)(1) as they allege Standard's representatives sought legal advice "in furtherance of crime or fraud." Judge Leonard Kopowski granted plaintiff's motion to compel finding they had produced sufficient facts to sustain the motion.

In the 1990's, Appellee's agent, George Fiorini, began advertising an investment plan called the "Income Plus Plan." The plan was represented to be the "Most Powerful Guaranteed Income Tool of the 90's" and was said to be suitable for personal savings, IRAs, pension rollovers and retirement funds.

In reality, the Income Plus Plan involved investments in either Appellee's insurance products and/or in bogus trusts operated by Mr. Fiorini. The bogus trusts used names such as "I.G.W." ("In God We") Trust, Standard Trust, Guardian Trust, or Guardian Investments, and were all fraudulent promissory notes constituting unregistered securities.

In April of 1996, the Mackes first invested in the Income Plus Plan after Fioroini misrepresented that they would receive a 10% return on their investment and failed to

disclose he was actually selling them an insurance policy. The Mackes were aware of both misrepresentations by May of 1996 (when they received their policies). In March of 2000 they cashed in their policies and bought interests in the Guardian Trust through Mr. Fiorini. However, nothing in the record suggests Fiorini was acting on behalf of Standard when selling the Guardian Trust to the Mackes.

In the summer of 1998, Standard announced its merger with Midwestern National Life, with the surviving company to be Standard. The effective date of the merger was December 31, 1998.

Prior to the effective date of the merger, Standard discovered George Fiorini was selling the "IGW Trust" to various policyholders of Standard who had also been sold Standard products. The discovery occurred when Standard's president heard one of Fiorini's radio advertisements. Thereafter, Appellee's counsel and a member of its Board of Directors, Steve Coons, and its Vice President of Marketing, Mike Quaranta, met with Fiorini and his attorney to issue a verbal demand to either sell policies for Standard or sell trusts, but not both.

In December 1998, Fiorini confirmed in a letter to Appellee's President, Ray Ohlson, that he was involved with the "IGW Trust" and would no longer accept any money into the trust.

In January, 1999, Appellee began receiving complaints from policyholders alleging misrepresentation in the sale of Standard's products and/or the "IGW Trust." These complaints related to the period before the meeting with Fiorini, and Standard resolved most of them informally with the customers. Also in January of 1999, Appellee accepted over $400,000 in checks from the "IGW Trust" to pay premiums on its policies.

On June 1, 2000, following action by the Ohio Division of Securities, Standard terminated the agency of Fiorini and his related agents.

## ANALYSIS

### I. Standard of Review

There are two classes of writ cases, those where it is claimed the court acted without jurisdiction and those where it is claimed the court acted erroneously within its jurisdiction.[1] In this case, we are dealing with Appellant's allegation that the trial court acted erroneously within its jurisdiction.

In this type of writ case, "relief ordinarily has not been granted unless the petitioner established, as conditions precedent, that he (a) had no adequate remedy by appeal or otherwise, and (b) would suffer great and irreparable injury (if error has been committed and relief denied)."[2]

It has often been said by Kentucky courts that the "[i]ssuance of, or refusal to issue a writ of prohibition is in the sound discretion of the court."[3] Therefore, we will review the decision of the Court of Appeals to grant the writ of prohibition for abuse of discretion. Pure questions of law involved in that decision will be reviewed de novo[4] and findings of fact, e.g., the finding regarding irreparable harm, will be reviewed for clear error.[5]

### II. Analysis

#### A. Inadequate Remedy by Appeal/Great and Irreparable Harm

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[1] Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961).
[2] Id. at 801.
[3] Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992).
[4] Grange Mutual Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004); Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004).
[5] Grange, 151 S.W.3d at 810.

The question of whether Appellee has an adequate remedy on appeal is a question of law to be reviewed de novo.[6] The question of whether Appellee would suffer great and irreparable injury if the conversations in question become discoverable is a question of fact reviewed for clear error only.

As to the question of fact, we find the Court of Appeals' conclusion that great and irreparable injury would result if the conversations became discoverable is not clearly erroneous, and thus, stands as decided. We note that the Court of Appeals could have entertained the petition for writ of prohibition in this case even absent a showing of specific great or irreparable injury to the petitioner, as "a substantial miscarriage of justice [would] result if the lower court [were allowed to] proceed[ ] erroneously, and correction of the error is necessary and appropriate in the interest of orderly judicial administration.[7]

As to the question of whether Appellee would have an adequate remedy by appeal, "[w]e point out that there will rarely be an adequate remedy on appeal if the alleged error is an order that allows discovery."[8] And here, taking as true Appellee's claim of privilege,[9] "there is no adequate remedy on appeal because the privileged information cannot be recalled once it has been disclosed."[10]

B. Writ of Prohibition

i. Attorney-Client Privilege

We note the Appellants did not dispute Appellee's claim of attorney-

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[6] See CR 52.01.
[7] Bender v. Eaton, 343 S.W.2d at 801.
[8] Grange, 151 S.W.3d at 810.
[9] Fritsch v. Caudill, 146 S.W.3d 926, 928 (Ky. 2004).
[10] E.g., Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 800-01 (Ky. 2000).

client privilege before the trial court or on appeal; therefore, we must assume the conversations are privileged and only consider whether the crime-fraud exception of 503(d)(1) applies to pierce the privilege.

ii. Crime-Fraud Exception

KRE 503(d)(1), Furtherance of Crime or Fraud, provides in pertinent part as follows:

> There is no privilege under this rule: (1) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

"The attorney-client privilege is generally considered to be absolute as to communications made by or to a person advising with an attorney as to past transactions and offenses."[11] "However, the rule does not apply to future transactions when the person seeking the advice is contemplating the committing of a crime or the perpetration of a fraud."[12] In Standard Fire Ins. Co. v. Smith Hart, 184 Ky. 74, 211 S.W. 411(1919), this Court explained it is the professional character of a lawyer to give advice upon crimes or frauds that have already been committed.

We note also that bare allegations of a criminal purpose are insufficient to overcome the attorney-client privilege. See United States v. Zolin, 491 U.S. 554, 571, 109 S.Ct. 2619, 2630, 105 L.Ed.2d 469 (1989) (holding a bare allegation of a criminal purpose is insufficient to warrant an in-camera review that might permit opponents of the privilege to engage in groundless fishing expeditions and that a lesser evidentiary standard is needed to trigger in-camera review than is required to overcome the privilege). In Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky.

[11] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 487 (Ky. 1991)(internal citations omitted).
[12] Id.(internal citations omitted).

1991), this Court clarified there must be showing of fraud before the attorney-client privilege will become inapplicable.

This Court also held in Stidham v. Clark, 74 S.W.3d 719, 727 (Ky. 2002) there must be proof by a preponderance of the evidence that an exception to the attorney-client privilege applies before the privilege can be defeated. Therefore, Appellants must prove by a preoponderance of the evidence that the communications in question furthered a crime or fraud before the privilege can be defeated.

iii. Abuse of Discretion Standard

Appellants argue the Court of Appeals substituted its judgment for that of the trial court rather than apply the proper standard for issuance of a writ of prohibition, which is the abuse of discretion standard.

In Southeastern United Medigroup, Inc. v. Hughes, 952 S.W.2d 195 (Ky. 1997), we discussed the abuse of discretion standard as it applies to extraordinary writ cases:

> Where a petition for one of the extraordinary writs alleges that a lower adjudicatory body within its jurisdiction has acted incorrectly, and the threshold facts of inadequate remedy and irreparable injury are satisfied, the writ should be granted only upon a showing that the challenged action reflects an *abuse of discretion*. If the legitimacy of the challenged action presents only a question of law, the reviewing court may of course determine the law without necessary deference to the lower court or hearing officer. 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 (emphasis added).

The trial court had ruled the Mackes' chronology of facts contained within their motion to compel was *sufficient* to sustain the motion because it *explained* Standard

Life's knowledge of Fiorini's alleged conduct and directly *related* the meetings at issue to the Mackes' fraud claim.

The Court of Appeals essentially determined these findings did not satisfy the preponderance of the evidence standard necessary to defeat the attorney-client privilege, and thus found the trial court had abused its discretion in compelling the privileged testimony.

We agree and affirm the Court of Appeals' decision. The crucial determinative factor is that Appellants have failed to prove by a preponderance of the evidence that the conversations between Standard's executives and their in-house counsel were intended to, or did, further a crime or fraud. Whether or not Appellants have successfully proven Fiorini's fraudulent activities can in some way be connected to Standard is of little relevance without a finding that the conversations in question were made to further any such crime or fraud.

Because we find Appellants failed to prove the crime-fraud exception to the attorney-client privilege, we agree with the Court of Appeals that the trial court abused its discretion in granting Appellant's motion to compel.

We note for the record that Appellants still have and always have had the right to depose any representative of Standard Life regarding his or her actions concerning, or knowledge of, any plan by Standard or Fiorini to perpetrate a fraud on the Mackes, and any other similar and relevant matter; yet, invading conversations covered by attorney-client privilege is another matter.

We also note the lower court is not prohibited from conducting an *in camera* review of the conversations, or their gist, in order to determine whether the crime-fraud

exception applies, if this testimony has not yet been adjudicated to be privileged. A claim of privilege is not a determination of privilege.

The United States Supreme Court in U.S. v. Zolin, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), clarified that a lesser evidentiary showing is needed to trigger *in camera* review than is required to overcome the privilege and that *in camera* review is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure. Id. at 572, 109 S.Ct. at 2631(internal citations omitted). The Supreme Court explained it is within the discretion of the trial court to determine:

> in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the . . . court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before court, will establish that the crime-fraud exception does apply.

Id. Thus, it is within the discretion of the trial court to determine whether this lesser evidentiary standard has been satisfied to merit in camera review.

For the above stated reasons, we affirm.

All concur.

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