

**IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY**

RICHARD SUHAY,

Plaintiff-Appellant,

- vs -

PATRICIA HALL, FIDUCIARY FOR
THE ESTATE OF VILMA FADE, et al.,

Defendants-Appellees.

CASE NO. 2022-A-0062

Civil Appeal from the
Court of Common Pleas

Trial Court No. 2017 CV 00043

OPINION

Decided: December 29, 2023
Judgment: Affirmed

Robert S. Wynn, 7 Lawyers Row, P.O. Box 121, Jefferson, OH 44047 (For Plaintiff-Appellant).

Patricia Hall, pro se, 610 Northeast, 151 St. Terrace, Williston, FL 32696 (Defendant-Appellee).

William Fade, pro se, 1360 Craneing Road, Wickliffe, OH 44092 (Defendant-Appellee).

EUGENE A. LUCCI, J.

{¶1} Appellant, Richard Suhay, appeals the judgment determining that the crime-fraud exception applies to testimony sought from his attorney, Robert S. Wynn, and ordering that Attorney Wynn be deposed and precluding Attorney Wynn from asserting the attorney-client privilege at his deposition. We affirm.

{¶2} This case involves a dispute over certain real property. In a prior appeal, we set forth the background information of the dispute as follows:

In November 1992, the Ashtabula County Court of Common Pleas entered a judgment in favor of John Poss and against Marilyn Morris in the amount of \$149,750 plus interest in *Poss v. Morris*, Ashtabula C.P. No. 80956. When Poss experienced difficulties in enforcing the judgment against Morris, he filed a forcible-entry-and-detainer action against her.

Poss and Morris settled the dispute concerning the enforcement of the judgment with a July 19, 1993 agreement under which Morris agreed to convey her property to Poss and Morris would be permitted to remain in a building on a 2.505-acre tract of the property until January 1, 1994. The parties specified that the “agreement constitutes a full and complete release between the parties and John Poss will release his judgment lien and mortgage lien upon receipt of the deed to the property.” Just a few days before the agreement was executed, Morris filed a motion in the common pleas court to enforce the settlement. On September 16, 1993, the common pleas court incorporated the parties’ settlement agreement into the judgment of the court.

Morris subsequently filed for bankruptcy in 1995, which resulted in further litigation regarding the property. The United States Court of Appeals for the Sixth Circuit held that because of the 1993 judgment in favor of Poss, a constructive trust had been imposed on the property in his favor, and thus the property was not affected by Morris’s bankruptcy filing. *In re Morris* (C.A. 6, 2001), 260 F.3d 654.

In December 2002, Poss filed a motion in the common pleas court for an order that Morris transfer the property to him as she had agreed. Arguments on the motion were heard in April 2003. On November 4, 2003, before the court ruled on Poss’s motion, Morris transferred the property to Skyway. Skyway’s attorney knew of the previous litigation, but concluded that Skyway was a bona fide purchaser for value.

Suhay v. Fade, 11th Dist. Ashtabula No. 2019-A-0063, 2020-Ohio-2893, ¶ 2, (“*Suhay I*”), quoting *State ex rel. Skyway Invest. Corp. v. Ashtabula Cty. Court of Common Pleas*, 130 Ohio St.3d 220, 2011-Ohio-5452, ¶¶ 2-5. Attorney Wynn represented Morris at certain times during the aforementioned proceedings and also represented her uncle, Suhay, who owns Skyway.

{¶3} In 2012, the transfer of the property from Morris to Skyway was determined to be fraudulent and was nullified. However, Attorney Wynn, on behalf of Suhay, thereafter successfully obtained judgment in Geauga County against Morris pursuant to a cognovit note that Morris had executed. A certificate of that judgment was then filed in Ashtabula County, establishing a lien on the property.

{¶4} The present litigation commenced in 2017, when Suhay filed a complaint to foreclose on the property pursuant to the lien, and named individuals who may have an interest in the property as defendants. The defendants included Morris as well as Vilma and William Fade, who succeeded Poss in interest after his death. The Fades answered and filed crossclaims and counterclaims, including claims that Suhay, Morris, and their attorneys conspired to vexatiously and frivolously engage in litigation regarding the property through the execution of the cognovit note. The Fades thereafter successfully moved for summary judgment on the complaint. With the counterclaims and crossclaims pending, the Fades moved to disqualify Attorney Wynn from representing Suhay. The trial court granted the motion, and Suhay appealed. In *Suhay I*, 2020-Ohio-2893, this court reversed the decision on the basis that Prof.Cond.R. 1.7 and 1.9 did not support disqualification. *Suhay I* at ¶ 16. Further, because the issue of whether Attorney Wynn was a necessary witness in the matter had not yet been determined, this court concluded that Prof.Cond.R. 3.7 was not yet at issue. *Suhay I* at ¶ 18-19.

{¶5} On March 17, 2021, counsel for the Fades took the deposition of Attorney Wynn. During the deposition, Attorney Wynn affirmed that he had prepared the cognovit note signed by Morris in favor of Suhay as payee. Attorney Wynn maintained that Suhay, not Morris, was his client with respect to the cognovit note. Attorney Wynn refused to

answer questions regarding the purpose of preparation of the note based upon attorney-client privilege. When asked if Emanuel McGregor, who Attorney Wynn has maintained represented Morris with respect to the cognovit note, had any part in creating the note, Attorney Wynn declined to answer based on privilege.

{¶6} Thereafter, the Fades moved the trial court to compel Attorney Wynn to answer the questions posed during his deposition, and the Fades subsequently requested the court to conduct an in camera interview of Attorney Wynn to determine whether the crime-fraud exception to attorney-client privilege applied. On February 11, 2022, the court set the case for hearing on the issue of whether Attorney Wynn should be required to answer deposition questions regarding the cognovit note. Suhay attempted an appeal of that order, which we dismissed for lack of a final appealable order. *Suhay v. Fade*, 11th Dist. Ashtabula No. 2022-A-0008, 2022-Ohio-1368, ¶ 21, *appeal not allowed*, 168 Ohio St.3d 1449, 2022-Ohio-3909, 197 N.E.3d 593, ¶ 1, *reconsideration denied*, 168 Ohio St.3d 1483, 2022-Ohio-4617, 200 N.E.3d 270, ¶ 1.

{¶7} Thereafter, the trial court held a hearing on whether Attorney Wynn was a necessary witness and whether an in camera interview was proper. At the hearing, the court concluded that an in camera interview was appropriate and stated that, immediately following a short recess, it would conduct the in camera interview with Attorney Wynn, and only Attorney Wynn, his attorney, and the court reporter would be permitted to be present with the judge.

{¶8} In a judgment entry issued on July 8, 2022, the court found that Attorney Wynn was a necessary witness in this case because Suhay and Morris recalled little about the preparation of the cognovit note, and the preparation of the cognovit note was central

to the Fades' claims. However, the trial court did not disqualify Attorney Wynn. The trial court further determined that the crime-fraud exception to the attorney-client privilege applied to permit deposition of Attorney Wynn. The court ordered that the Fades were permitted to depose Attorney Wynn and held that "Attorney Wynn may not refuse to answer based upon a claim of attorney-client privilege." The court ordered that the in camera proceeding be made part of the record but kept under seal until further order.

{¶9} Following the issuance of the July 8, 2022 judgment entry, Suhay moved for findings of fact and conclusions of law and noticed the present appeal. Thereafter, on the Fades' motion, we issued a limited remand to permit the trial court to rule on Suhay's request for findings of fact and conclusions of law.

{¶10} On remand, the trial court issued supplemental findings of fact and conclusions of law on March 16, 2023, from which Suhay noticed an amended appeal.

{¶11} Thereafter, pursuant to a suggestion of death and motion to substitute filed in this court, Patricia Hall, Fiduciary for the Estate of Vilma Fade, was substituted for appellee Vilma Fade.

{¶12} In his two assigned errors, which we consolidate for purposes of discussion, Suhay argues:

[1.] The trial court erred to the substantial prejudice of appellant in its supplemental findings of fact and conclusions of law by failing to comply with the requirements of Ohio Civil Rule 52[.]

[2.] The trial court committed prejudic[i]al error when it ruled that the crime fraud exception applies in this case and proceeded thereupon to strip appellant and his counsel of the privilege afforded by the attorney-client privilege when the record does not contain proper evidence supporting such a ruling[.]

{¶13} “The attorney-client privilege is governed by statute, R.C. 2317.02(A), and for situations that are not addressed in the statute, the privilege is governed by the common law.” *State v. Brunson*, 171 Ohio St.3d 384, 2022-Ohio-4299, 218 N.E.3d 765, ¶ 28, citing *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 18. “R.C. 2317.02(A) covers testimonial privilege, and the common-law attorney-client privilege ‘protects against any dissemination of information obtained in the confidential relationship.’” *Brunson* at ¶ 28, quoting *Leslie* at ¶ 26, quoting *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348, 575 N.E.2d 116 (1991).

{¶14} However, “[a] communication is excepted from the attorney-client privilege if it is undertaken for the purpose of committing or continuing a crime or fraud.” *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 383, 700 N.E.2d 12 (1998), citing *United States v. Collis*, 128 F.3d 313, 321 (6th Cir.1997); *State v. Bissantz*, 3 Ohio App.3d 108, 110, 444 N.E.2d 92 (12th Dist.1982), quoting *State v. Mullins*, 26 Ohio App.2d 13, 18, 268 N.E.2d 603 (4th Dist.1971) (“A privileged communication may be a shield of defense as to crimes already committed, but it cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society.”). “A party invoking the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a crime or fraud has been committed and that the communications were in furtherance of the crime or fraud.” *Nix* at 384, citing *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir.1997). “The mere fact that communications may be related to a crime is insufficient to overcome the attorney-client privilege.” *Nix* at 384, quoting *Jacobs* at 88, quoting *United States v. White*, 887 F.2d 267, 271 (D.C.Cir.1989).

{¶15} Furthermore, we note that cases do not narrowly apply the exception to those acts which strictly further a “crime” or “fraud.” Here, the trial court inherently recognized that the exception is not so limited, as it referred to the exception as the “crime/fraud/wrongdoing” exception. In a federal case reviewing Ohio case law on this issue, the Southern District Court of Ohio concluded:

Ohio courts have, and will continue to, analyze wrongful conduct not strictly falling into the category of either crimes or frauds on a case-by-case basis to determine if the conduct involves similar elements of malicious or injurious intent and deliberate falsehood. If it does, there is no reason why the law should prevent disclosure of the role an attorney may have played in assisting his or her client to commit that type of act, which itself has no social value.

Safety Today, Inc. v. Roy, S.D.Ohio No. 2:12-CV-510, 2013 WL 5597065, *5, *objections overruled*, S.D.Ohio No. 2:12-CV-510, 2014 WL 12750617.

{¶16} In making the determination of whether the exception applies, a court may conduct an in camera review of the purportedly privileged communications without destroying the privileged nature of the communications. *United States v. Zolin*, 491 U.S. 554, 569, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). “[A] lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege.” *Id.* at 572. This showing requires “a factual basis adequate to support a good faith belief by a reasonable person’ that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” *Id.*, quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo.1982). The decision of whether to hold an in camera review of the materials is within the discretion of the trial court. *Nix* at 384.

{¶17} For purposes of discussion, we first address Suhay’s contention contained in his second assigned error that there was an insufficient demonstration of a factual basis to support an in-camera interview of Attorney Wynn.

{¶18} At the hearing, the court asked counsel for the Fades if they had any evidence to present, and counsel responded that the evidence had already been filed with the court at various stages of the case. Counsel argued that the history of the litigation between the parties supported the in camera interview, as Morris never transferred the property to Poss as ordered and had instead attempted to transfer the property to Suhay, and that transfer had been nullified. Morris and Suhay, as well as Attorney Wynn, were involved in the prior proceedings and therefore aware of the order to transfer the property to Poss. Further, counsel for the Fades indicated that, during Morris’ deposition, she stated that the point of the lien on the property was to encumber it for transfer to Suhay to repay him for money he had lent her.

{¶19} Accordingly, Morris’ own deposition testimony implies that the cognovit note, which resulted in the lien, was an attempt to contravene court order. We conclude that the trial court did not abuse its discretion to the extent that it determined a factual basis existed to support a good faith belief by a reasonable person that an in camera interview of Attorney Wynn would establish that the crime-fraud exception applies to the circumstances surrounding the preparation of the cognovit note. Accordingly, the trial court did not err in proceeding to an in camera interview.

{¶20} After the court conducted the in camera interview of Attorney Wynn, it determined that the crime-fraud exception applies and issued “supplemental findings of fact and conclusions of law” with respect to this issue. In his second assigned error,

Suhay maintains that the evidence did not establish the applicability of the crime-fraud exception, and, in his first assigned error, he argues that the trial court's supplemental findings on this issue do not comply with Civ.R. 52.

{¶21} As explained above, a trial court may rely on the information obtained during an in camera review in determining whether there exists a factual basis for a showing of probable cause to believe that a crime, fraud, or similar wrongdoing has been committed and that the communications were in furtherance of the crime, fraud, or similar wrongdoing. *Zolin*, 491 U.S. at 569; *Safety Today, Inc.*, 2013 WL 5597065, at *5. Also, as addressed above, the trial court issued supplemental findings of fact and conclusions of law in support of its determination that the crime-fraud exception applies. The supplemental findings of fact and conclusions of law were issued pursuant to Suhay's motion under Civ.R. 52, which provides, in part:

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the findings of fact found separately from the conclusions of law.

{¶22} "The purpose of Civ.R. 52 is to aid an appellate court in reviewing the evidence and in determining the validity of the basis for the trial court's judgment." *Leikin Oldsmobile, Inc. v. Spofford Auto Sales*, 11th Dist. Lake No. 2000-L-202, 2002-Ohio-2441, ¶ 15, citing *Yardmaster, Inc. v. Kish*, 11th Dist. Trumbull No. 97-T-0160, 1998 WL 684831, *3 (Sept. 25, 1998), citing *In re Gibson*, 23 Ohio St.3d 170, 172-173, 492 N.E.2d 146 (1986); see also *Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). "[T]he findings and conclusions must articulate an adequate basis upon which a

party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved disputed issues of fact and the trial court's application of the law." *Rzeszotarski v. Sanborn*, 11th Dist. Geauga No. 96-G-1906, 1996 WL 649111, *4 (June 7, 1996), quoting *Kroeger v. Ryder*, 86 Ohio App.3d 438, 442, 621 N.E.2d 534 (6th Dist.1993). "It has been held that a judgment entry, although not styled as "findings of fact and conclusions of law," complies with Civ.R. 52 mandates where it recites sufficient facts and legal conclusions which, when combined with the entire record, provide an adequate basis upon which to review the issues presented." *Rzeszotarski* at *4, quoting *Center Ridge Ganley, Inc. v. Stinn*, 71 Ohio App.3d 514, 518, 594 N.E.2d 1064 (8th Dist.1991).

{¶23} Here, assuming that the trial court was required to issue findings of fact and conclusions of law,¹ we first note that the trial court's findings appear to be framed so as to prevent disclosure of the in camera proceeding, which the court had ordered to be made part of the record but sealed based upon the claim of privilege. In order for this court to review the sufficiency and propriety of the findings and the ultimate determination of whether the crime-fraud exception applies, we must review the content of the in camera interview. However, no transcript of the in camera interview was included in the record on appeal. It was incumbent upon Suhay to request transcription of the interview for sealed inclusion with the record for this court to review whether the findings, when coupled with the entire record, provide a sufficient basis for determining that the crime-fraud exception applied. Having failed to do so, we must presume regularity in the trial court's

1. See *Sutton v. Stevens Painton Corp.*, 193 Ohio App.3d 68, 2011-Ohio-841, 951 N.E.2d 91, ¶ 10 (8th Dist.)

determination that the crime-fraud exception applies. See App. R. 9(B)(1) (“Except as provided in App.R. 11.2(B)(3)(b), it is the obligation of the appellant to ensure that the proceedings the appellant considers necessary for inclusion in the record, however those proceedings were recorded, are transcribed in a form that meets the specifications of App. R. 9(B)(6).”); *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384, 385 (1980) (“When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court’s proceedings, and affirm.”). See also *Flatt v. Atwood Manor Nursing Ctr.*, 3d Dist. Crawford No. 3-06-26, 2007-Ohio-5387, ¶ 35.

{¶24} For the reasons stated above, Suhay’s assigned errors lack merit.

{¶25} The judgment is affirmed.

MATT LYNCH, J.,

ROBERT J. PATTON, J.,

concur.