ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT	*	NO. 2017-CA-0388
	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
VIOLET DOCK PORT, INC., LLC	*	STATE OF LOUISIANA
	*	
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CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT	**NO. 2017-C-0412**
VERSUS	
VIOLET DOCK PORT, INC., L.L.C.	

LOVE, J., DISSENTS AND ASSIGNS REASONS

I respectfully dissent. The issue before us is whether the trial court erred in ordering the disclosure of the underlying documents described in billing invoices which Ruppel/Chaffe and Violet Dock allege pertain to efforts to quash the subpoenas. I find the majority's decision to remand for the issuance of a protective order by first deciding whether the discovery request is unduly burdensome ignores the primary issue raised by the parties: the alleged privileged nature of the discovery request. Because I find we must first determine whether a privilege exists before this Court can remand the matter for the issuance of a protective order, I dissent from the majority.

As a general rule, "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . ." La. C.C.P. art. 1422 (emphasis added). Thus, I find the threshold inquiry is determination of the scope of the discovery request—whether the information

sought by St. Bernard Port is privileged.[1] The parties acknowledge that this is the starting point for analysis as the key arguments in the trial court and in brief to this Court address whether a privilege exists and if so, whether the privilege was waived. Ruppel/Chaffe's undue burden assertion is ancillary to its main argument that St. Bernard Port is not entitled to disclosure because a privilege exists which was not waived. Further, consideration of the chief arguments the parties offer is all the more important where the basis for the trial court's decision is unclear.

If a privilege exists, the next inquiry is whether an exception to the general discovery rule applies, in this case, whether the privilege has been waived. *Succession of Smith*, 513 So.2d 1138, 1143-44 (La. 1987); *Boyd v. St. Paul Fire & Marine Ins. Co.*, 99-1820, p. 9-10 (La. App. 3 Cir. 12/20/00), 775 So.2d 649, 656. Additionally, I find *all* competing interests must be weighed in determining whether a protective order should be issued pursuant to La. C.C.P. art. 1426.[2] Therefore, because the parties dispute the nature of the discovery request, whether the information sought is privileged is a necessary consideration in this case. Without determination of the privilege issue, the balancing of competing interests would fail to consider one of the most fundamental interests one can assert—privacy. Consequently, any claim that the discovery request is also unduly burdensome and requiring a protective order may only be considered after determining whether a privilege exists.

I also dissent from the majority's conclusion that the request is unduly burdensome and unnecessary. Though the trial court did not provide written reasons for its ruling, the trial court did express its concerns on the record. It stated that $400,000 in attorney fees allegedly owed for defense of the subpoenas,

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[1] In that I agree with the majority that the discovery request is relevant to the subject matter of the motion for costs, the focus of this dissent is the privilege issue.

[2] *See Plaquemines Parish Com'n Council v. Delta Development Co., Inc.*, 472 So.2d 560 (La. 1985) (applying a balancing approach to competing interests in determining whether to grant a protective order); *also Prine v. Bailey*¸42,282 (La. App. 2 Cir. 8/15/07), 964 So.2d 435 (balancing of competing interests to determine that certain medical records were discoverable).

"shocks the conscience." The trial court explained that the billing statements seem facially disproportionate with what it recalled being only "one small proceeding." Expressing its doubt based on the lack of documentary support the trial court stated, "I'm going to want to know what you did for $400,000."

The majority is correct that St. Bernard Port has a legitimate interest in ensuring the reasonableness of the attorney fees that are sought. However, I disagree with the majority's suggestion that St. Bernard Port seeks "wholesale production of all underlying communications referred to in the billing statements." To the contrary, St. Bernard Port stated at the hearing that it only seeks those documents that are sufficient to show work that is associated with defense of the subpoenas. St. Bernard Port simply argues that the $400,000 invoice submitted to support the motion for costs is unreliable based on patent errors contained therein and the disproportionality of the time devoted to the litigation of the subpoena issue as compared to the rest of the litigation.

Additionally, the argument that compliance would require manual review of approximately 25,000 pages of allegedly private communications is a red herring. Counsel for both Violet Dock and Ruppel/Chaffe conceded at the hearing that they overstated the degree to which the discovery request is unduly burdensome. Counsel for Ruppel/Chaffe admitted to running an electronic search of communications based on names of counsel and staff members and admitted that the results are likely duplicative. Likewise, counsel for Violet Dock reiterated that Ruppel/Chaffe conducted an "over-inclusive broad general search" containing documents that *may* be responsive to St. Bernard Port's request. Neither party was able to provide an accurate accounting of the number of documents that are actually responsive to the request. Moreover, neither party offered any evidence or explanation for why a more limiting electronic search (ex. date and/or subject matter search) was not feasible.

Under the majority's theory, in order to avoid disclosure, one need only demonstrate that compliance with the discovery request is overly burdensome because the number of documents *potentially* involved *may* be voluminous. St. Bernard Port avers that deposing the billing attorneys is not a sufficient means to challenge the accuracy of the invoices in this case. In essence, St. Bernard contends that without documentary support any testimony it might try to elicit is subject to "unchecked editorial control." *Smith v. Kavanaugh, Pierson & Talley*, 513 So.2d 1138, 1144 (La. 1987). Similarly, so long as Ruppel/Chaffe and Violet Dock purport a privilege exists, they are likely to assert the same privilege in their deposition testimony. Given Ruppel/Chaffe's admissions and their demonstration that an electronic search is a quick and inexpensive method to discover responsive evidence, I find feasible alternative methods are available which are reasonably likely to produce responsive documentary evidence that will not pose the same burden or expense as the manual review Ruppel/Chaffe suggests it would have to conduct. Therefore, I disagree with the majority that the discovery request is unduly burdensome.

Based on the foregoing reasons and the vast discretion afforded the trial court on discovery matters, I respectfully dissent from the majority.