Opinion issued July 7, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00009-CV

IN RE HALLIBURTON ENERGY SERVICES, INC., Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

In this original proceeding, relator, Halliburton Energy Services, Inc., seeks mandamus relief from the trial court's order that granted a motion to compel privileged documents.[1] In two issues, Halliburton contends that the trial court

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[1] The underlying case is *Halliburton Energy Services, Inc. v. Harris Machining, LLC and Bruce Harris*, cause number 2016-83308, pending in the 113th District Court of Harris County, the Honorable Rabeea Sultan Collier presiding.

abused its discretion in compelling the disclosure of privileged documents and that it lacks an adequate remedy by appeal.

We conditionally grant mandamus relief.

Background

In December 2016, Halliburton sued the real parties in interest, Harris Machining, LLC and Bruce Harris (collectively, "Harris"), seeking a judicial declaration that the parties' agreements remain in full force and effect. Subsequently, Harris brought counterclaims and sought a continuance in case mediation was not successful.

In October 2019, Harris served Halliburton with requests for production.[2] Halliburton responded to the requests for production on December 12, 2019, stating in a few of its responses that it "objects to this request to the extent that it seeks documents protected by the attorney client or attorney work product privileges." The next day, Harris e-mailed Halliburton, stating, "Can you please send to me the documents [Halliburton] is producing or advise me of when I will receive them? Also, please provide me with a privilege log of all documents that [Halliburton] is withholding on the basis of legal privilege." Three days later, on December 16, 2019, Halliburton responded to Harris, stating, "We will provide a privilege log upon substantial completion of Halliburton's production and request

[2] *See* TEX. R. CIV. P. 196.1.

that your clients do the same."[3] On the same day, Harris replied, "As for the privilege log request, we will comply with the Rules and ask that HAL do the same." On July 8, 2021, Halliburton provided its privilege log to Harris.[4]

From 2020 until September 2021, the record shows that the parties engaged in discovery without acrimony. The first instance of disagreement amongst the parties regarding discovery occurred on September 1, 2021, when Harris responded to Halliburton's emergency motion to strike, or in the alternative, motion for continuance. The Harris parties alleged that Halliburton gave a late production of 7,274 pages of documents, which caused Harris to file its amended counterclaims past its deadline.[5]

On October 27, 2021, Harris filed a motion to compel, arguing that Halliburton's privilege log was not timely produced, did not state the privileges asserted, and that 25% of the e-mails that Halliburton claimed were privileged did not contain counsel in the "to/from/cc" field. Harris further contended that, based on testimony from a former Halliburton employee, Halliburton had not produced

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[3] *See* TEX. R. CIV. P. 196.2 (providing that responding party may state that "production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production").

[4] *See* TEX. R. CIV. P. 196.3(a) (stating that responding party must produce requested documents at either time and place requested or time and place stated in response).

[5] In its September 1, 2021 response, Harris noted that Halliburton produced documents on May 25, 2021, June 25, 2021, August 24, 2021, and August 30, 2021.

all documents. Harris argued that Halliburton failed to comply with Rule 193.3 and that such failure resulted in waiver of the privileges asserted.

Two days later, Halliburton contacted Harris to attempt to resolve Harris's motion to compel. Halliburton attached a supplemental privilege log with "additional detail and highlighting." Halliburton also responded to the motion to compel on November 12, 2021, pointing out that it sent a supplemental privilege log on October 29, 2021 and noting that Harris requested a privilege log before any document production had occurred, before the parties had agreed on a protective order, and before Halliburton had the opportunity to review the documents requested by Harris. Harris replied to Haliburton's response, raising the same arguments urged in its motion to compel.

During a November 16, 2021 hearing, neither the parties, nor the trial court focused on whether the withheld documents were actually privileged. Instead, the parties and the trial court focused on whether Halliburton waived its privileges, if any, by producing an untimely and insufficient privilege log. Harris argued that the privilege log was 19 months late, well-beyond the 15-day deadline,[6] and that at least 66 e-mails did not state a privilege. Harris noted that the original privilege log and the supplemental privilege log did not state which privileges were being

[6] *See* TEX. R. CIV. P. 193.3(b) (requiring withholding party to respond within 15 days, describe materials withheld, and assert specific privilege for each item).

asserted by Halliburton, but they assumed attorney-client privilege. Harris also asked, in the alternative, for the trial court to conduct an in-camera inspection of documents to decide whether the documents were privileged.

Halliburton argued that Harris requested a privilege log before the parties had reached an agreement as to the "terms of the documents that would be collected" and that Halliburton told Harris that it would submit a privilege log after it determined which documents were being withheld, after substantial completion of production had occurred. Halliburton argued that it timely served its privilege log after substantial completion of discovery ended and that its supplemental privilege log identified attorney-client communications. The following exchange then occurred:

> **Trial court**: But how did you comply with the rules? I mean, why aren't they waived? Because you failed to timely respond. That's—I mean, I'm not seeing kind of—
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> **Halliburton**: At the time—at the time the request was made in December, it was immediately after the initial request for production had been served. At that point in time, there were no documents being withheld, as none had been produced or collected. Once documents were produced, a log was served shortly thereafter.

When the trial court asked Harris if that is how it happened, Harris's counsel responded that he was not on the case then, but that one of their exhibits showed

that Halliburton had already provided responses claiming privilege, and so Harris requested the privilege log. The trial court told the parties that if a privilege was asserted, a log was requested, and the log was not provided timely, those privileges were waived. While determining the sequence of events, the trial court stated that it wanted to see if Halliburton claimed a privilege with respect to the first through fourth requests for production and "whether a privilege log was not presented until much later, after 15 days, those are waived."

Halliburton responded that it served its responses in December 2019 and "there were ongoing negotiations regarding the privilege log and the scope of the discovery requests. The parties reached an agreement as to some documents—." The trial court interrupted and said that it did not need the history but just the dates. Harris informed the trial court that the privilege "log was requested December 13, 2019, after we got the initial responses to the requests for production. Despite the fact there's a 15-day deadline, Halliburton didn't serve the log until July 8, 2021."

The trial court then told Halliburton that it had one day to present it with authority that allowed Halliburton to produce its privilege log in July 2021, based on the dates that were just provided to the Court.[7]

[7] From the hearing, the trial court heard that Harris's first through fourth requests for production occurred on October 23, 2019, October 28, 2019, May 15, 2020, and May 14, 2021, respectively.

Halliburton filed a supplemental brief, arguing that it "objected to some of the Harris Parties' requests 'to the extent that [those requests] seek[] documents protected by the attorney client or attorney work product privileges,' . . . and no withholding statements were provided, as no documents had been collected, produced, or withheld." Thus, Harris's premature request for a privilege log "did not invoke the application of Rule 193.3."

Harris also filed supplemental briefing, arguing that Halliburton did not comply with Rule 193.3, that it provided an untimely privilege log, and that the privilege log was defective for failing to state which privileges Halliburton was asserting.

On November 19, 2021, Halliburton responded to Harris's supplemental briefing, disagreeing that Harris's authorities supported any finding of waiver of privileges. Halliburton also informed the trial court that nothing more was required to preserve its privileges, but it nevertheless served Harris with a letter, described as a "supplemental withholding statement" and an enhanced privilege log. The supplemental withholding statement made clear that Halliburton was withholding documents as identified in the privilege log, which were responsive to multiple requests in Harris's First Requests for Production, specifically requests for production No. 1, No. 3, and No. 53. The supplemental withholding statement further stated that "every document on the privilege log had been withheld on the

basis of attorney/client privilege, which is shown on the attached log by the column entitled 'description of AC Privileged Material.'"

On December 1, 2021, Harris responded to Halliburton's response, arguing that Halliburton was withholding documents as far back as December 16, 2019, when Halliburton's counsel confirmed via e-mail that it would "provide a privilege log upon substantial completion of Halliburton's production."

On January 7, 2022, the trial court signed an order granting Harris's motion to compel, ordering Halliburton to produce all documents described in Exhibit B to Harris's motion to compel within 7 days "as a result of its failure to properly and timely designate the documents listed therein as privileged as required by the Texas Rules of Civil Procedure."

Halliburton then filed a petition for writ of mandamus in this Court. We granted emergency relief, temporarily staying the trial court's January 7, 2022 order.

Analysis

A. *Standard of Review and Applicable Law*

Generally, to be entitled to mandamus relief, the relator must demonstrate that the trial court abused its discretion and that it has no adequate remedy by appeal. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig.

proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker*, 827 S.W.2d at 839. With respect to the resolution of factual issues, the reviewing court may not substitute its judgment for that of the trial court, and the relator must establish that the trial court could reasonably have reached only one decision. *Id*. at 839–40. A trial court has no discretion in determining what the law is or in applying the law to the facts. *Id*. at 840. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *In re Allstate Cnty. Mut. Ins. Co*., 85 S.W.3d 193, 195 (Tex. 2002) (orig. proceeding). "A party will not have an adequate remedy by appeal when the appellate court would not be able to cure the trial court's discovery error." *In re Ford Motor Co*., 211 S.W.3d 295, 298 (Tex. 2006) (per curiam) (orig. proceeding).

The general rule is that a party may obtain discovery regarding any matter that is not privileged, is relevant, and is reasonably calculated to lead to the discovery of admissible evidence. *See Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 127 (Tex. 1995) (orig. proceeding); *see also* TEX. R. CIV. P. 192.3(a). Rule 193.2 states that "[a] party who objects to production of privileged material or information does not waive the privilege but must comply with Rule 193.3 when the error is pointed out." TEX. R. CIV. P. 193.2(f). Rule 193.3(a) provides,

> A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state—in the response (or an amended or supplemental response) or in a separate document—that:
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> (1) information or material responsive to the request or required disclosure has been withheld,
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> (2) the request or required disclosure to which the information or material relates, and
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> (3) the privilege or privileges asserted.

TEX. R. CIV. P. 193.3(a).[8]

Once a withholding party complies with Rule 193.3(a), the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. *See id.* 193.3(b). Within fifteen days of service of the request, the withholding party must serve a response that: "(1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and (2) asserts a specific privilege for each item or group of items withheld." *See id*. 193.3(b). "The description of the information

[8] The comments following Rule 193.3 provide, "[T]he rule requires parties to state that information or materials have been withheld and to identify the privilege upon which the party relies. The statement should not be made prophylactically, but only when specific information and materials have been withheld." TEX. R. CIV. P. 193 cmt. 3. The party must amend or supplement the statement if additional privileged information or material is found subsequent to the initial response. Thus, when large numbers of documents are being produced, a party may amend the initial response when documents are found as to which the party claims privilege. *Id.*

or material withheld must be specific enough that the requesting party can identify each document withheld and assess the applicability of that privilege." *In re Christus Health*, 167 S.W.3d 596, 599 (Tex. App.—Beaumont 2004, orig. proceeding). A party may then request a hearing on a claim of privilege asserted. *See* TEX. R. CIV. P. 193.4(a).

"Waiver—the intentional relinquishment of a known right—can occur either expressly, through a clear repudiation of the right, or impliedly, through conduct inconsistent with a claim to the right." *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015) (quotations omitted). The attorney-client privilege must be carefully guarded—once the privilege is waived, it is forever waived. *Mid–Century Ins. Co. of Tex. v. Lerner*, 901 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1995, no writ). The Texas Rules of Civil Procedure are designed to avoid waivers of privilege. *See In re Fisher & Paykel Appliance*, 420 S.W.3d 842, 849 (Tex. App.—Dallas 2014, orig. proceeding); *In re Lincoln Elec. Co*., 91 S.W.3d 432, 436 (Tex. App.—Beaumont 2002, orig. proceeding [mand. denied]) ("[I]t would appear that significant effort was made by the promulgators of the Rules to avoid waiver by a party when privileged materials or information may be at issue.").

B. *Waiver of Privileges*

From the time the parties communicated about the privilege log in December 2019 until late 2021, the record does not show that the parties had any further discussions about a withholding statement or a privilege log. It was not until October 2021, after Halliburton produced a privilege log, that Harris filed its motion to compel, objecting to the timeliness and deficiencies of the privilege log. Then, in response to the motion to compel, Halliburton attempted to clarify its original privilege log by producing a supplemental privilege log with additional detail.

At the hearing, the trial court stated that if Halliburton asserted privileges in its responses, and a request for a privilege log was made that was not complied with in a timely manner, Halliburton waived its privileges. Harris argued that Halliburton indicated that it was withholding documents as far back as December 2019 based upon Halliburton's responses to the requests for production. According to Harris, Halliburton waived its privileges by not providing a privilege log within 15 days of Harris's request.

After the hearing but before the trial court ruled, Halliburton filed supplemental briefing, an enhanced privilege log, and a letter, described as a supplemental withholding statement, providing clarity that it was withholding documents based on the attorney-client privilege.

At the outset, we note that the rules do not set a time limit for asserting a privilege. *See* TEX. R. CIV. P. 193.3; *In re Graco Children's Products, Inc.*, 173 S.W.3d 600, (Tex. App.—Corpus Christi 2005, orig. proceeding) (stating "no objection needs to be made to preserve a privilege, and the rules set no time-limit for asserting a privilege"); *In re Park Cities Bank*, 409 S.W.3d 859, 870 (Tex. App.—Tyler 2013, orig. proceeding) (no waiver of privilege when relator did not object to requests for production within 30 days).

In reviewing the discovery at issue, we disagree that Halliburton's responses to Harris's first request for production indicated that it was withholding privileged documents at that time or that its response could be construed as a withholding statement pursuant to Rule 193.3. Halliburton's response objected to the extent that Harris's request called for privileged material, but the response did not communicate that Halliburton was withholding privileged documents, to trigger the 15-day deadline of Rule 193.3 after Harris requested a privilege log. *See* TEX. R. CIV. P. 193.3(a) (requiring party to state that information or material has been withheld), (b) ("After receiving a response indicating that material or information has been withheld from production, a party seeking discovery may serve a written request that the withholding party identify the information and material withheld."). As Halliburton explained in briefing and at the hearing, at the time it responded to the requests for production, it had neither reviewed, nor produced any

documents. Thus, when Harris requested a privilege log a few days after receiving Halliburton's responses, such request for a privilege log was premature because Halliburton had not yet provided a withholding statement in compliance with Rule 193.3. *See id.* To the extent that the trial court determined that Halliburton waived its privileges by not sending a privilege log within 15 days after Harris requested one, the trial court abused its discretion.

We also note that Halliburton never expressly indicated that it was waiving a privilege, nor did it impliedly represent through conduct that it was waiving its privileges.[9] *See G.T. Leach Builders*, 458 S.W.3d at 511. Based on Halliburton's responses to discovery, its conduct in informing Harris that it would produce a privilege log after substantial completion of discovery, providing a privilege log consistent with its communication, and then providing two supplemental privilege logs and a letter indicating that it had withheld privileged documents, we conclude that Halliburton properly designated its documents as privileged, so as not to waive its privilege to the withheld documents.[10]

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[9] Halliburton's discovery responses also stated, "Halliburton submits these responses subject to, and without in any way waiving or intending to waive, but, on the contrary, intending to reserve and reserving: (a) all questions as to the competency, relevance, materiality, privilege . . . for any purpose of any of the information or documentation referred to or responses given, or the subject matter thereof, in any subsequent proceeding. . . ."

[10] We agree that Halliburton's original privilege log, produced July 8, 2021, was deficient. However, upon being apprised of its deficiencies, Halliburton provided

Harris contends that Halliburton waived its privileges because it did not produce a timely withholding statement and did not produce a privilege log until 19 months after it was original requested. Harris relies on two authorities in support of its argument that Halliburton waived its privileges. *See In re Anderson*, 163 S.W.3d 136 (Tex. App.—San Antonio 2005, orig. proceeding) and *In re Soto*, 270 S.W.3d 732 (Tex. App.—Amarillo 2008, orig. proceeding). Both of these cases, however, involved a party who failed to identify documents withheld as privileged. Unlike *Anderson* and *Soto*, Halliburton submitted a privilege log, two supplemental privilege logs, and a letter further indicating that the documents included in its logs were privileged on the basis of the attorney-client privilege. Thus, the cases on which Harris relies do not support a waiver of Halliburton's privileges. And as stated earlier, Harris's request for a privilege log was premature and thus, the 15-day deadline for Halliburton to produce a privilege log had not been triggered. *See* TEX. R. CIV. P. 193.3(b) (stating, after response indicating that material or information has been withheld, party seeking discovery may request that withholding party identify information and material withheld and response must be complied with within 15 days).

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amended privilege logs and a withholding statement, which comply with Rule 193.3. *See* TEX. R. CIV. P. 193.3(a), (b).

Accordingly, we conclude that the trial court abused its discretion in finding that Halliburton did not properly and timely designate privileged documents and ordering Halliburton to produce such documents.

Adequate Remedy by Appeal

An appeal is an inadequate remedy when the court erroneously orders disclosure of privileged information. *In re Ford Motor*, 211 S.W.3d at 298.

Here, the effect of the trial court's order is to disclose 202 documents, allegedly subject to the attorney-client privilege. Because we hold that the trial court's order erroneously concluded that Halliburton failed to properly and timely designate its privileged documents, we necessarily conclude that Halliburton lacks an adequate remedy by appeal. *See In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 287 (Tex. 2016) (holding that relator had no adequate remedy by appeal because trial court improperly ordered privileged documents disclosed); *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218, 223 (Tex. 2004) (stating, "Mandamus is proper when the trial court erroneously orders the disclosure of privileged information because the trial court's error cannot be corrected on appeal").

We sustain Halliburton's first and second issues.

Conclusion

We order the trial court to vacate its order of January 7, 2022. The writ will issue only if the trial court fails to do so. We lift the stay entered on January 13, 2022. All pending motions are denied.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.