

AFFIRM; and Opinion Filed August 10, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00496-CV

JAMES MARK DUNNE, Appellant

V.

**BRINKER TEXAS, INC., CHILI'S BEVERAGE COMPANY, INC., AND BRINKER
INTERNATIONAL PAYROLL COMPANY, L.P., D/B/A CHILI'S GRILL & BAR, AND
LOIS AHLGRIM, Appellees**

**On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-13853**

MEMORANDUM OPINION

Before Justices Francis, Brown, and Schenck
Opinion by Justice Brown

After James Mark Dunne (“Dunne”) was indicted for intoxication assault, he sued Brinker Texas, Inc., Chili’s Beverage Company, Inc. and Brinker International Payroll Company L.P., d/b/a Chili’s Grill & Bar, and Loius Ahlgrim (“Chili’s”) asserting a claim under the dram shop statute. *See* TEX. ALCO. BEV. CODE ANN. § 2.02 (West 2007). Dunne then asserted his Fifth Amendment privilege in response to Chili’s request that Dunne disclose the names of persons having knowledge of relevant facts. The trial court nevertheless ordered Dunne to provide a complete response to Chili’s request. Dunne refused to do so and the trial court struck his pleadings and rendered a take-nothing judgment against him. In four issues, Dunne generally contends the trial court erred in striking his pleadings instead of granting an abatement until his criminal prosecution concluded.

Background

Sometime after 2:00 a.m. on November 29, 2012, Dunne struck a vehicle occupied by Carroll and Kenneth Dux. The Duxes both suffered serious bodily injuries. Dunne was indicted for two intoxication assault offenses. Earlier that evening, Dunne had consumed alcohol at a Chili's restaurant, but he left the restaurant about three hours before the accident.

Two years later, Dunne sued Chili's seeking to recover damages for the injuries he suffered in the accident. Dunne asserted Chili's over-served him when it was apparent he was a danger to himself and others and, as a result, he was unable to avoid a collision with another vehicle, causing injuries to himself and two of the occupants of that vehicle.

After Chili's answered, Dunne refused to respond to any discovery that would require him to incriminate himself in the criminal proceeding. Amongst the discovery Dunne asserted his Fifth Amendment privilege not to answer was Chili's request for disclosure under Texas Rule of Civil Procedure 194.2(e). This request for disclosure sought the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case. *See* TEX. R. CIV. P. 194.2(e).

Chili's subsequently filed a "Motion to Determine Offensive Use of Privilege and Additionally and Alternatively to Compel Answers to Written Discovery" requesting the trial court force Dunne to either waive his Fifth Amendment privilege or be subject to appropriate sanctions. On March 18, 2015, at the hearing on the motion, Chili's specifically complained that Dunne had not disclosed the names of the people he was with on the night of the accident, either at Chili's or during the three-hour period after he left Chili's and before the accident.

Dunne first claimed he did respond to the request for disclosure, but he then asserted responding could require him to incriminate himself. The trial court rejected Dunne's assertion of privilege with respect to Chili's rule 194.2(e) request and ordered Dunne to provide a

complete response to the request. Dunne was ordered, within ten days, to disclose the names of persons having knowledge of relevant facts and to provide a brief statement of their connection with the case. On April 22, 2015, the trial court signed a written order memorializing its oral order. Dunne did not amend his disclosures in accordance with the trial court's order.

On January 28, 2016, ten months after the trial court's initial order, Chili's filed a motion to compel and for sanctions. Following a hearing, the trial court ordered Dunne, within five days of the date of the order, to fully respond to Chili's rule 194.2(e) request for disclosure. Dunne was specifically ordered to include the names, addresses, and telephone numbers of the persons who accompanied him, met him, or spent time with him from 7:00 a.m. on November 26, 2012, until 2:30 a.m. on November 27, 2012. Dunne was also ordered to give a brief statement of each person's connection with the lawsuit. The trial court further instructed Dunne that, if he did not comply with its order, his pleadings would be struck.

Dunne amended his disclosures to include the names of two people, whom he identified as his "coworkers at the time of the incident in question." Chili's filed a "Motion for Enforcement" complaining that Dunne's disclosure did not comply with the trial court's order. On March 16, 2016, the trial court held a hearing on Chili's motion. At that hearing, Dunne acknowledged that the co-workers he had named were neither with him at Chili's, nor with him during the three-hour period after he left Chili's before the accident occurred.

Chili's again complained that Dunne had not disclosed the names of any persons he was with on the night of the accident. Dunne would not confirm he was in compliance with the trial court's order, but also asked how he could respond if he was not with anyone. The trial court notified Dunne that if he was not with anyone, he should say so.

On March 17, 2016, the trial court ordered Dunne to disclose the names of the individuals who accompanied him, met him, or spent time with him from 7:00 a.m. on November 26, 2012,

until 2:30 a.m. on November 27, 2012. The trial court also ordered Dunne to state the time periods each person accompanied, met or spent time with him. Finally, Dunne was ordered that if no person accompanied, met or spent time with him during the time he was at Chili's or the three-hour period that followed, to make a statement to that effect. The trial court informed Dunne that if he did not comply with its order his pleadings would be struck.¹

The following day Dunne filed a "Documentation of Compliance with Court Orders," to which he attached amended disclosures. Dunne's amended disclosures did not, however, disclose the names of persons that were with him the night of the accident. Dunne also did not state that no one was with him the night of the accident.

Chili's filed a "Second Motion for Enforcement." In response, Dunne reasserted his Fifth Amendment privilege. On March 23, 2016, the trial court struck Dunne's pleadings and rendered a take-nothing judgment which Dunne now appeals.

Applicable Law

A party may request disclosure of the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each person's connection with the case. TEX. R. CIV. P. 194.2(e). When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made. TEX. R. CIV. P. 193.1; *Van Heerden v. Van Heerden*, 321 S.W.3d 869, 875 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

¹ Contrary to Dunne's contention, the trial court's March 2016 order did not expand the scope of discovery. Rather, the trial court set forth the information Dunne was required to disclose to provide a complete answer to Chili's rule 194.2(e) request for disclosure. The order reflected the trial court's determinations: (1) that persons Dunne was with during the applicable time periods were persons with knowledge of relevant facts, and (2) the time periods Dunne was with those persons were necessary to show their connection with the suit. The trial court was within its discretion to do so. *See In re Nat'l Lloyds Ins. Co.*, 15-0591, 2017 WL 2501107, at *17 (Tex. June 9, 2017) (trial court has broad discretion in controlling course and scope of discovery). We also reject Dunne's assertion that the trial court erred in requiring him to provide a representation if there were no names for him to disclose that were responsive to the trial court's order. That representation was necessary to enable the trial court to determine whether Dunne's discovery responses were complete and whether he was in compliance with the trial court's order. *Cf. TEX. GOV'T CODE ANN. § 21.001* (court possesses all powers necessary for the enforcement of its lawful orders); *Beluga Chartering B.V. v. Timber S.A.*, 294 S.W.3d 300, 306 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (courts possess inherent judicial authority to enforce their own orders).

A party may invoke his Fifth Amendment privilege against self-incrimination in a civil proceeding if he reasonably fears that the answer sought might incriminate him. *United States v. Balsys*, 524 U.S. 666, 671–72, 118 S. Ct. 2218, 2222 (1998). However, a plaintiff who is seeking affirmative relief should not be permitted to use his Fifth Amendment privilege offensively by maintaining a suit and, at the same time, claim privilege to prevent the defendant from obtaining information needed to prepare a defense. *See Tex. Dept. of Pub. Safety Officers Ass’n v. Denton*, 897 S.W.2d 757, 760 (1995); *see also Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1086 (5th Cir. 1979).

Thus, when a civil plaintiff uses his Fifth Amendment privilege offensively and refuses to comply with discovery, a trial court has the authority to impose sanctions authorized by the rules of procedure, including death penalty sanctions. Tex. R. Civ. P. 215. Before imposing sanctions, the trial court must consider whether remedial steps can alleviate the problem. *Denton*, 897 S.W.2d at 760. If remedial measures will not alleviate the problem, the trial court must determine whether a lesser sanction would satisfy the legitimate purpose of the sanction before imposing a death penalty sanction. *Id.*

Application

Dunne’s issues all complain either directly or indirectly that the trial court abused its discretion in striking his pleadings. We address his arguments in light of the ultimate question of whether the trial court abused its discretion.

Dunne sued Chili’s two years after the accident, just days before limitations was set to expire. Dunne’s claims were on their face incriminatory and in order to prove them, Dunne would also have to prove he committed the offenses for which he was charged. Nevertheless, Dunne refused to provide Chili’s with a complete response to its requests for disclosure, the most basic form of written discovery permitted under the Texas Rules of Civil Procedure. *See TEX. R.*

Civ. P. 197.2 cmt.1 (“[d]isclosure is designed to afford parties basic discovery of specific categories of information . . . without objection or assertion of work product.”). Specifically, Dunne refused to disclose the names of persons having knowledge of relevant facts and, in particular, the names of persons who were with him at Chili’s or with Dunne during the three-hour period after he left Chili’s before the accident occurred. Notwithstanding Dunne’s assertion of privilege, the trial court ordered him to disclose the names. Nevertheless, Dunne continued to assert his Fifth Amended privilege. A year later, and over three years after the accident happened, the trial court gave Dunne two more opportunities to provide complete responses to Chili’s requests. Dunne continually refused to do so.

As a result, Chili’s was unable to identify or speak to people who would have had knowledge of Dunne’s claims – people whose memories were likely to be fading and would continue to fade. *Cf. Kerlin v. Saucedo*, 263 S.W.3d 920, 926 (Tex. 2008) (statute of limitations recognizes the prejudice a defendant can suffer from delay, one of which is the potential loss of witnesses and witnesses whose memories fade over time). The trial court could have determined that Chili’s suffered prejudice because it was unable to identify or talk to witnesses in a timely manner and that any further delay could not have been remedied.²

Finally, the trial court could have concluded that Dunne’s refusal to name the persons he was with during the several hours before the accident had more to do with Dunne’s desire to resist discovery than concerns of self-incrimination. Dunne’s own pleadings were incriminatory. In order to prosecute his own suit, Dunne was required to show: (1) Chili’s served him alcoholic beverages when it was apparent Dunne was intoxicated to the degree he presented a clear danger

² According to Dunne, the only remedy available to a litigant when a party refuses to identify persons having knowledge of relevant facts, is exclusion of their testimony. See Tex. R. Civ. P. 193.6. However, exclusion would not cure the prejudice resulting from Chili’s being unable to identify witnesses that might defeat Dunne’s claim. See, e.g., *Ashmore v. JMS Const., Inc.*, 05-15-00537-CV, 2016 WL 7217256, at *8 (Tex. App.—Dallas Dec. 13, 2016) (party must disclose both favorable and unfavorable witnesses). In any event, the failure to fully respond to a request for disclosure is an abuse of the discovery process. See Tex. R. Civ. P. 194 cmt. 1. In addition, Dunne also failed to obey the trial court’s orders compelling responses. Thus, he was subject to sanctions in accordance with Rule 215.2.

to himself and others; and (2) Dunne's intoxication was a proximate cause of the damages claimed. *See* TEX. ALCO. BEV. CODE ANN. § 2.02 (West 2007).

Under the particular facts of this case, the only possible remedial measure that could have protected Dunne's Fifth Amendment privilege was an abatement. But an abatement could not cure the prejudice Chili's had already suffered from being unable to identify fact witnesses for the more than a year that had passed since it first requested that information. In addition, there was no indication how long the case might sit in limbo, when trial might be, and whether Dunne would continue to assert his Fifth Amendment rights in the event of an appeal.

We conclude the trial court did not abuse its discretion in striking Dunne's pleadings and therefore affirm.

/Ada Brown/

ADA BROWN
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JAMES MARK DUNNE, Appellant

No. 05-16-00496-CV V.

BRINKER TEXAS, INC., CHILI'S
BEVERAGE COMPANY, INC., AND
BRINKER INTERNATIONAL PAYROLL
COMPANY, L.P., D/B/A CHILI'S GRILL
& BAR, AND LOIS AHLGRIM, Appellees

On Appeal from the 162nd Judicial District
Court, Dallas County, Texas

Trial Court Cause No. DC-14-13853.

Opinion delivered by Justice Brown. Justices
Francis and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees BRINKER TEXAS, INC., CHILI'S BEVERAGE COMPANY, INC., AND BRINKER INTERNATIONAL PAYROLL COMPANY, L.P., D/B/A CHILI'S GRILL & BAR, AND LOIS AHLGRIM recover their costs of this appeal from appellant JAMES MARK DUNNE.

Judgment entered this 10th day of August, 2017.