CONDITIONALLY GRANT and Opinion Filed October 15, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00634-CV

IN RE STEVEN K. TOPLETZ, Relator

Original Proceeding from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-04120-2012

MEMORANDUM OPINION

Before Chief Justice Burns, Justice Osborne, and Justice Reichek
Opinion by Justice Reichek

This is the second mandamus proceeding related to postjudgment orders regarding the amount and sources of relator Steven K. Topletz's payments to his attorneys in this litigation. In the first mandamus proceeding, this Court concluded the documents made the subject of the requests were privileged, conditionally granted the writ, and ordered the trial judge to vacate those portions of her order requiring Topletz to produce the information. *See In re Topletz*, No. 05-19-00547-CV, 2019 WL 4027076, at *7 (Tex. App.—Dallas Aug. 27, 2019, orig. proceeding) (mem. op.). In this proceeding, relator again challenges a trial court order compelling him to produce information related to his payment of attorney's fees in

this litigation. Topletz seeks mandamus relief from that order. Because the information ordered to be disclosed in this most recent proceeding falls within the ambit of our prior opinion, we again conclude it is privileged and therefore not discoverable. Accordingly, we conditionally grant the writ.

BACKGROUND

Lynda Carroll Willis, individually and on behalf of Lancaster Bluegrove, L.P., obtained a judgment against Topletz in 2015. Willis died after the trial, and her son, real party in interest Raygan Bryce Waddle, was appointed to represent Willis's Estate (the Estate).

In the first mandamus proceeding, Topletz and his counsel, Harper Bates & Champion (HBC), sought relief from a turnover order that required them to (1) deposit unearned funds paid and/or held in attorney IOLTA accounts owned by or for the benefit of Topletz into the trial court's registry and (2) produce billing statements, invoices, and other documents reflecting fee agreements, payments, and accounting related to HBC's representation of Topletz. *Id*. at *1. This Court conditionally granted mandamus relief. *Id*.

With respect to production of documents related to attorney's fees, this Court began by setting out the attorney–client and work–product privileges:

> The attorney–client privilege protects communications between attorney and client that are not intended to be disclosed to third parties and made for the purpose of facilitating the rendition of professional legal services. TEX. R. EVID. 503(a)(5), (b)(1). The work product privilege, which is broader than the attorney–client privilege, protects:

> "(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives . . . ; or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys . . . ." TEX. R. CIV. P. 192.5(a); *In re Bexar County Crim. Dist. Attorney's Office*, 224 S.W.3d 182, 186 (Tex. 2007) (orig. proceeding). Because billing records constitute "communication[s] made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives" and "represent the mechanical compilation of information that reveals counsel's legal strategy and thought processes," *see* TEX. R. CIV. P. 192.5(c)(2), the supreme court has held a request for all billing invoices, payment logs, payment ledgers, payment summaries, and documents showing flat rates "invade the zone of work–product protection." *See In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d at 804, 806.

Id. at *4.

We further explained that "absent unusual circumstances and outside a scenario where a party puts its attorney fees at issue, such as making a claim for attorney fees, using attorney fees as a comparator in challenging an opponent's fee request, or designating counsel as an expert, information about the party's attorney fees and expenses is privileged or irrelevant and, thus, not discoverable. *Id*. We determined that the turnover proceeding did not constitute such a scenario or present circumstances under which privileged documents regarding a party's attorney fees and expenses would be discoverable. *Id*. at *6. But, in a footnote, we noted that "the Estate is not precluded from seeking responses from Topletz to post-judgment discovery seeking more narrowly tailored requests for information or documents regarding payments to Topletz's attorneys that [are] relevant to the Estate's

collection efforts and [do] not invade the attorney's strategic decisions or thought processes." *Id*. at *6 n.5.

Once back in the trial court, the Estate made a second attempt at obtaining information related to Topletz's attorney's fees. Relevant to this proceeding, in its second set of postjudgment discovery, the Estate sought the following:

SECOND SET OF INTERROGATORIES

* * *

13. In connection with Your payments to Harper Bates & Champion for attorneys representing You in connection with this case, please identify the following:

a) amount of attorneys' fees paid by You or on Your behalf to date;

b) identify the source of monies used to pay Your attorneys' fees (e.g. name of bank, account number, etc.);

c) identify the source of monies used to pay Your attorneys' fees if such payments did not originate from You (e.g. who paid for You); and,

d) the amount of attorneys' fees paid on Your behalf to date and by whom.

SECOND SET OF PRODUCTION REQUESTS

Please produce the following documents:

* * *

2. All payments by You to Harper Bates & Champion LLP since January, 2018.

Topletz made the same objection to each request, stating he had "no non-privileged information" that was responsive. The Estate filed a motion to construe

the objections and to compel responses, and a hearing date was set. Two days before the hearing, Topletz filed supplemental responses to the discovery requests in which he stated he was withholding information that would disclose the amounts paid to attorneys by him or on his behalf and, thus, had no nonprivileged information responsive to (a) and (d). Subject to this withholding, Topletz identified the credit account he uses to make payments to HBC, which included the card issuer, the cardholder name, and the last four digits of the card number. He also filed a response to the Estate's motion, and the Estate filed a reply.

The trial court held a hearing on the motion.[1] Following that hearing, the trial court signed an order that, among other things, overruled Topletz's objection to Interrogatory 13 and expressly required him "to respond to parts 'a' and 'd' of such interrogatory" as well as to "specifically identify all parties from whom payments were made." It also overruled the objection to Request for Production No. 2. This original proceeding ensued.[2]

ANALYSIS

[1] The mandamus record does not include a reporter's record of this hearing but does include the affidavit of relator's counsel stating that no evidence or testimony was adduced at the hearing. Consequently, we conclude the record is sufficient to address the issue before us. *See* TEX. R. APP. P. 52.7(a)(2).

[2] In this proceeding, Topletz also complains about Request for Production No. 4, but the trial court's order does not make any reference to this request; therefore, we do not address it. Additionally, with respect to Interrogatory No. 13, Topletz does not dispute that the source of payments is relevant to the Estate's postjudgment collection efforts and those requests "are not the subject" of his petition.

Topletz argues the trial court abused its discretion by requiring him to produce documents and information that would identify the amount and timing of his payments to HBC. He argues the privilege issue is identical to that previously raised in the turnover proceeding in the first mandamus; thus, he urges this Court to reaffirm our prior ruling.

The Estate counters the information is both relevant and discoverable. It argues that Topletz has not satisfied the judgment but has the "financial where[-withal] to fund extensive litigation and appeals to avoid payment on the judgment." Thus, it argues, information as to the source of the funds and amounts paid to Topletz's attorneys is relevant to its collection efforts. And, it argues, our prior opinion left open the possibility of obtaining the information through more narrowly tailored requests that do not "invade the attorneys' strategic decisions or thought processes." The Estate argues its requests do just that.

After reviewing the mandamus record, the petition, the response to the petition, and our previous opinion on this same issue, we agree with Topletz that the information is privileged and therefore not subject to discovery.

To be entitled to the extraordinary remedy of mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial court's clear failure to analyze or apply the law correctly will constitute an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833,

840 (Tex. 1992). And, there is no adequate remedy at law if the trial court orders the disclosure of privileged information that will materially affect the rights of the aggrieved party. *Id*. at 843.

Here, Topletz supplied the Estate with the source of his attorney's fees payments in his supplemental response. The question, therefore, is whether he must also supply information that would reveal the amount and timing of those fees. We conclude the answer is no. The information sought by the Estate and ordered produced by the trial court falls squarely within the category of "information about the party's attorney fees and expenses" that this Court determined is not discoverable "absent unusual circumstances and outside a scenario where a party puts its attorney fees at issue, such as making a claim for attorney fees, using attorney fees as a comparator in challenging an opponent's fee request, or designating counsel as an expert." *In re Topletz*, 2019 WL 4027076, at *4. In this case, neither party has put its attorney fees at issue. The Estate simply suspects that Topletz should be able to make payment on the judgment because he apparently has been able to pay his attorneys throughout this litigation. But that circumstance fails to fall within the kind of acceptable scenario that would permit discovery of the attorney fee information sought here. *See id*.

Nevertheless, the Estate argues this Court's prior decision in *In re Topletz* is distinguishable because this is a postjudgment discovery dispute, not a challenge to a turnover order. Additionally, it argues that, unlike the prior proceeding, it is not

seeking attorney billing statements and is not seeking documents from Topletz's attorneys; rather, it is seeking discovery from Topletz himself. But regardless of whether the information is supplied by Topletz or his counsel in the context of a turnover proceeding or a discovery dispute, this Court made clear that such information is not discoverable if it invades the attorney's strategic decisions or thought processes. *Id*. at *6 n.5. Even if the credit card statements might contain fewer details about the fees incurred compared to the firm's billing statement, the supreme court has stated that "[a]ggregate fee summaries also reveal strategic choices." *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 806 (Tex. 2017) (orig. proceeding). As the court explained, "[a] dramatic increase in mid-litigation spending could imply an upcoming filing or significant research expenditures related to elevated concerns over recent litigation events." *Id*. Thus, relator's credit card statements reflecting payments to his counsel could expose his attorney's strategic decisions or thought processes.

The Estate faults relator for failing to provide specific evidence establishing how or why the challenged discovery requests would require him to disclose his counsel's strategic decisions or thought processes. *See* TEX. R. CIV. P. 193.4(a); *see also In re CI Host, Inc.*, 92 S.W.3d 514, 516 (Tex. 2002) (orig. proceeding) ("Any party making an objection or asserting a privilege must present any evidence necessary to support the objection or privilege."). But neither the rules of civil procedure nor case law requires evidence in support of an assertion relating to

discovery when evidence is unnecessary to decide the matter. *See In re Union Pac. Res. Co.*, 22 S.W.3d 338, 341 (Tex. 1999) (orig. proceeding). Here, evidence is not necessary to show that the requested information is not discoverable because this Court has already determined, as a matter of law, it is not. *See id.* (concluding evidence not necessary to determine discoverability of settlement agreements because question was simply whether settlement dollar amounts were pertinent to issues in current litigation); *In re Wal-Mart Stores, Inc.*, 545 S.W.3d 626, 634–35 (Tex. App.—El Paso 2016, orig. proceeding) (concluding evidence not necessary to support objection if discovery requests themselves demonstrate overbreadth as matter of law).

Finally, the Estate complains that relator failed to provide a privilege log identifying which items are being withheld based on privilege. But privileged documents of a lawyer "concerning the litigation in which the discovery is requested" are exempt from the privilege log requirement. *See* TEX. R. CIV. P. 193.3(c)(2). Thus, relator was not required to supply a privilege log here.

We conclude the trial court abused its discretion in overruling relator's objections to the requested discovery regarding attorney's fees. And, as stated previously, a relator has no adequate remedy by appeal when the trial court erroneously orders the production of privileged documents. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d at 802–03.

Accordingly, we conditionally grant mandamus relief and order the trial court to vacate that portion of its June 10, 2020 order compelling relator to produce information regarding attorney's fees in response to Interrogatory No. 13(a) and (d) and Request for Production No. 2. The writ will issue only if the trial court fails to comply. We lift the stay imposed by order dated June 23, 2020.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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