STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0382

In re Stephen A. Lawrence, et al.,
Petitioners,

Stephen A. Lawrence, et al.,
Petitioners,

vs.

Rihm Family Companies, Inc., et al.,
Respondents.

Filed December 21, 2020
Writ of prohibition granted
Reilly, Judge

Hennepin County District Court
File No. 27-CV-18-19102

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Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

S Y L L A B U S

When an attorney represents more than one client related to a matter, the clients hold a joint attorney-client privilege. Waiver of a joint attorney-client privilege requires consent by all joint clients.

O P I N I O N

REILLY, Judge

This litigation arises out of the sale of a business. Petitioners, former shareholders of the business, sold the business to respondents, current shareholders of the business. Petitioners seek a writ of prohibition to preclude the district court from enforcing an order granting respondents' motion to review potentially privileged information between petitioners, the business and their attorneys before the business was sold. Because both the business and its shareholders jointly hold and control any privilege over communications involving an attorney who represented the business and the shareholders before and during the sale, and because the district court ordered disclosure based on waiver by the business alone, we determine that a writ of prohibition is necessary to protect the rights of the petitioners as joint privilege-holders. As a result, we grant the petition for a writ of prohibition.

FACTS

This litigation arises out of the corporate reorganization and stock sale of a closely held truck and trailer leasing company, LTX, Inc. (LTX). Petitioners are former shareholders of LTX.[1] Respondents are current shareholders of LTX.[2] LTX is not a party

[1] Petitioners include Stephen Lawrence, Stephanie Johnson, Anne Jones, David Lawrence, Eric Lawrence, Margaret Lawrence, R. Scott Jones and Anne Jones as Tenants in Common, Allan Watts and Julie Watts as Joint Tenants, Stephen Lawrence as trustee for the Stephen A. Lawrence Revocable Trust UTA 04/05/10, George Wilson as trustee for the George C. Wilson Revocable Trust UTA 10/12/06, Lawrence Management, Inc., and Lawrence Brothers Realty.

[2] Respondents include the Rihm Family Companies, Inc., CEO Kari J. Rihm, and Kari J. Rihm as trustee for the Kari J. Rihm Revocable Trust UAD 12/2/08.

to this litigation. In 2018, petitioners filed a civil action alleging, among other things, that respondents breached the stock purchase agreement by defaulting on payments. The following summarizes facts alleged in petitioners' complaint, as well as the facts stipulated by petitioners and respondents when they submitted this discovery issue to the district court.

Before its reorganization and sale to respondents, LTX was the parent company of five subsidiary companies. One subsidiary company managed LTX's leasing operations, while the others managed LTX's logistics and trucking operations. In 2016, LTX's founder, Stephen Lawrence, discussed selling the leasing operations to respondents. Because respondents were only interested in LTX's leasing operations, petitioners undertook a corporate restructuring that separated the leasing business from the other business activities.

The stock sale closed in January 2017, pursuant to a stock purchase agreement. Petitioners sold their shares in LTX and one of the LTX subsidiaries to respondents. Petitioners are not the only individuals who sold the company stock here. Other individuals also sold company stock to respondents, but are not named as petitioners or as respondents. After the sale, some of LTX's employees went to work for respondents.

The privileged information at the heart of this appeal is in LTX's electronic files. Before the stock sale, the parties discussed separating the electronic files of LTX and its subsidiaries and migrating the data about LTX's leasing operations from the original email servers to respondents' servers. As part of the electronic data migration, entire employee email accounts for the individuals who went to work for respondents were transferred to

respondents. The parties' information-technology consultants did not complete the data-migration process until several months after the January 2017 closing.

After petitioners sued respondents for nonpayment and during the discovery process, respondents' counsel learned that the data migration included potentially privileged communications between the company, petitioners and other shareholders, and their attorneys at Kaplan Strangis and Kaplan P.A. (KSK). KSK provided legal advice to LTX in connection with the corporate reorganization and stock sale. KSK also represented and provided legal advice to the individual seller shareholders of LTX in connection with the stock purchase agreement.[3] Petitioners contend that, unknown to them, privileged documents and communications (the transferred communications) were transferred to respondents during the data-migration process. The parties agreed to segregate and sequester the transferred communications pending determination of whether they were subject to claims of privilege by petitioners.

After discovering the transferred communications, respondents filed a motion for authority to view them. Respondents gave two reasons: first, petitioners did not control the attorney-client privilege, LTX did; second, petitioners waived any privilege. Petitioners provided the district court with a privilege log of documents, identifying the

[3] Petitioners have presented evidence demonstrating joint representation of LTX and the individual-selling shareholders. Respondents do not challenge the evidence showing that KSK attorneys also represented the selling shareholders in their individual capacities. Even so, the district court determined that LTX, alone, controlled the privilege based on its analysis of caselaw addressing the transfer of privilege from one company to another. As explained below, this analysis does not resolve whether the individual-selling shareholders also held or waived privilege.

transferred communications potentially subject to privilege. The log consisted of nearly 800 email exchanges and attachments sent between March 2016 and April 2017.

As for respondents' first argument, the district court noted that generally, when control of a corporation passes to new management, the authority to assert and waive the attorney-client privilege passes as well. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349, 105 S. Ct. 1986, 1991 (1985). The district court determined that the authority to assert the attorney-client privilege passed to LTX's successor company with respect to confidential communications relating to general business communications and certain other matters. But the district court also concluded that LTX's successor company did not control the attorney-client privilege with regard to the communications concerning the acquisition. *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663, 666 (N.Y. 1996).

Nevertheless, the district court partially granted respondents' motion to view the transferred communications based on waiver. The district court first considered whether the disputed information included privileged information and treated the transferred communications "as if they satisfy the threshold criteria of embodying a communication in which legal advice is sought or rendered." The district court next considered what legal work was performed for the petitioners and LTX. The district court recognized petitioners' contention that KSK "represented the individual selling shareholders of LTX in connection with the Stock Purchase Agreement, and as such, the individual sellers, and not the corporation, control the attorney-client privilege." But the district court recognized that petitioners "also admit" that KSK "provided some legal services to LTX in relation to the

Stock Purchase Agreement" and argue that "this work was only in furtherance of their representation of the individual selling shareholders."

After examining the privilege log, however, the district court found it could not "determine which communications were made in relation to the corporate restructuring and which were made in relation to the . . . Stock Purchase Agreement. Similarly, . . . the Court cannot determine which communications were made regarding matters specific to the corporation and which communications were made regarding matters specific to the individuals."

Even so, the district court determined that LTX had sole control over the attorney-client privilege for communications related to the corporate restructuring and stock purchase agreement because a waiver occurred. The district court noted that "[a]ll of the Transferred Communications were made or received using corporate addresses," that Stephen Lawrence copied his executive assistant on privileged emails, and that the employee handbook designated the emails as company property. The district court also determined that LTX waived the privilege. The district court denied petitioners' letter request seeking permission to file a motion for reconsideration of the order.[4]

[4] Respondents moved to strike portions of petitioners' brief and addendum relating to petitioners' reconsideration request. We denied the motion to strike in a special-term order, noting that an addendum to a petition for an extraordinary writ may include "any portion of the record necessary for an understanding of the application." Minn. R. Civ. App. P. 120.01. Upon review, we note that the reconsideration materials relate mainly to the district court's determination that LTX waived any privilege over the disputed information. Because we do not reach the waiver issue, we do not consider these materials helpful to our analysis.

In March 2020, petitioners sought a writ of prohibition to prevent the district court from enforcing its order. We stayed the district court's order, and ordered briefing and oral argument on the petition.

ISSUE

Did the district court exceed its authority when it ordered disclosure of the transferred communications?

ANALYSIS

Petitioners request a writ of prohibition to prevent the district court from enforcing its order. "Prohibition is an extraordinary remedy and should be used only in extraordinary cases." *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43, 46 (Minn. 1965). For a writ of prohibition to issue, a petitioner must satisfy three elements: "(1) [the district court] must be about to exercise judicial or quasi-judicial power; (2) the exercise of such power must be unauthorized by law; and (3) the exercise of such power must result in injury for which there is no adequate remedy." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 208 (Minn. 1986). A writ of prohibition may issue "to correct an error of law in the [district] court where no other adequate remedy is available to the petitioner and enforcement of the [district] court's order would result in irremediable harm." *State v. Turner*, 550 N.W.2d 622, 626 (Minn. 1996).

In discovery-related disputes, "a petition for a writ of prohibition is an appropriate means of obtaining review of a discovery order, which is not appealable as of right, where the district court has ordered the production of information clearly not discoverable." *Turner*, 550 N.W.2d at 625; *see also Loveland v. Kremer*, 464 N.W.2d 306, 308 (Minn.

App. 1990) (recognizing that "a writ of prohibition is the appropriate form of relief when a court has exceeded its power to order discovery" (quotation omitted)). Because there is not an adequate remedy at law for disclosure of attorney-client privileged communications, a writ of prohibition is an appropriate remedy. *See In re Paul W. Abbott Co*., 767 N.W.2d 14, 17-19 (Minn. 2009). An appellate court reviews "a district court's order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law." *Id*. at 18 (quotation omitted).

In the district court, respondents argued that they acquired the privilege when they bought LTX stock. The district court rejected that argument and determined that the privilege did not automatically transfer with the sale of the stock. The district court then found that the corporation, alone, could waive that privilege. The question before us is whether the petitioners, as joint clients of the same legal counsel, can invoke attorney-client privilege to protect the transferred communications from disclosure. The attorney-client privilege encourages clients to confide openly with their attorneys, to enable attorneys to act more effectively on their clients' behalf. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 738-39 (Minn. 2002). The privilege is found to exist:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Kobluk v. Univ. of Minn., 574 N.W.2d 436, 440 (Minn. 1998). The party asserting the attorney-client privilege bears the burden of proving that the privilege applies. *Sprader v. Mueller*, 121 N.W.2d 176, 180 (Minn. 1963).

As determined by the district court, the parties agree that KSK represented petitioners and LTX before and during the stock purchase agreement, KSK communicated electronically with petitioners and LTX, and that these communications were ultimately transferred to new servers after the sale closed. The district court presumed that the transferred communications were privileged. The district court relied on the stipulated facts presented by the parties and determined that (1) "the Transferred Communications were made or received using corporate email addresses," (2) Stephen Lawrence copied his executive assistant on these emails, (3) the employee handbook designated all the emails as company property, and (4) petitioners failed to properly delineate between business and personal communications. Based on these facts, the district court determined that LTX controlled the attorney-client privilege on its own behalf and on behalf of the individual selling shareholders.

The district court's decision that LTX controlled the privilege of the individual selling shareholders is erroneous. When an attorney represents more than one client, those clients are considered joint clients of the attorney and any co-client may invoke attorney-client privilege. Restatement (Third) of the Law Governing Lawyers § 75(2) (2000). There are no Minnesota cases specifically addressing the appropriateness of a writ of prohibition in cases involving joint-client privilege such as this. When Minnesota caselaw does not address an issue, we may look to other jurisdictions for guidance. *Berthiaume v. Allianz*

Life Ins. Co. of N. Am., 946 N.W.2d 423, 427 (Minn. App. 2020). And caselaw from other jurisdictions recognizes that "waiving the joint-client privilege requires the consent of all joint clients." *Teleglobe Commc'ns Corp. v. BCE Inc.*, 493 F.3d 345, 363 (3d Cir. 2007) (citing Restatement (Third) of the Law Governing Lawyers § 75(2)), *as amended* (Oct. 12, 2007). A joint client "may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client." *Id.* (citing Restatement (Third) of the Law Governing Lawyers § 75 cmt. e (2000)). But the joint client may not "unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients." *Id*. Additionally, "communications by co-clients with their common lawyer retain confidential characteristics as against third persons." Restatement (Third) of the Law Governing Lawyers § 75 cmt. b (2000).

KSK performed legal work for LTX related to the corporate reorganization and subsequent stock sale. KSK also represented the individual seller shareholders of LTX regarding the stock purchase agreement. Thus, as joint clients of KSK, LTX and the individual seller shareholders had rights and expectations that they could openly and freely communicate with KSK. As explained in *Teleglobe*, "a client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client," however, it cannot "unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients." 493 F.3d at 363 (citing Restatement

(Third) of the Law Governing Lawyers § 75 cmt. e). There does not appear to be any basis in the law for a district court to assign "control" of a joint privilege to one client.

Because the district court assumed that the transferred communications contain privileged information, and because any privileged information is protected by a joint privilege, we hold that the district court erred in concluding that LTX controlled and could waive the attorney-client privilege on behalf of itself and all the selling shareholders, including petitioners. We therefore conclude that a writ of prohibition precluding the district court from enforcing its discovery order is necessary to protect the joint-privilege holders, and we grant the petition for a writ of prohibition.

But our holding here is limited. We hold that the district court erred by assigning control of a joint privilege to one privilege-holder, after assuming for purposes of its analysis that all of the transferred communications are privileged. We have not been asked to address, and this decision should not be construed to reach, the assumption that each of the transferred communications sought or rendered legal advice. We conclude that the district court erred by determining that LTX controlled the privilege and could waive it on behalf of all petitioners, but we do not further address the waiver issue. Nothing in our decision today should be read to preclude further proceedings before the district court about the transferred communications, provided such proceedings reflect our holding here.

D E C I S I O N

When an attorney represents two or more clients in a matter, all clients jointly hold and control the attorney-client privilege, and the privilege must be waived by each privilege-holder. The district court erred when it concluded that the company controlled

the attorney-client privilege for itself and for the individual seller shareholders, including petitioners. Thus, the district court's order for disclosure was not authorized by Minnesota law. Petitioners do not have an adequate remedy if privileged communications with counsel are disclosed. We therefore grant the writ of prohibition.

Writ of prohibition granted.