IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
June 4, 2020

Lyle W. Cayce
Clerk

No. 20-30236

In re: SCHLUMBERGER TECHNOLOGY CORPORATION,

Petitioner

Petition for a Writ of Mandamus to
the United States District Court
for the Western District of Louisiana

Before DENNIS, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Schlumberger Technology Corporation ("STC") petitions for a writ of mandamus to vacate the district court's order compelling STC to disclose testimony and documents STC argues are attorney-client privileged. Because STC identifies a "clear and indisputable error" by the district court that cannot be remedied otherwise, we grant the writ. *In re Itron, Inc.*, 883 F.3d 553, 567 (5th Cir. 2018) (quoting *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004)) (cleaned up).

I.

The operative complaint alleges that STC violated the Fair Labor Standards Act ("FLSA") and Louisiana law by failing to classify some of its

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

employees as eligible for overtime pay. STC's answer raises an affirmative defense that it made good-faith efforts to comply with the FLSA. *See* 29 U.S.C. § 259(a). Specifically, STC asserts that any violations "were not willful," and that it relied in good faith "on applicable law, administrative regulations, orders, interpretations and/or administrative practice or policy enforcement."

During discovery, James Hanley, a former STC human-resources consultant, was deposed. After retiring from STC, Hanley was retained by STC's legal counsel to help review the FLSA status of the positions at issue in this lawsuit. In his deposition, Hanley revealed contents of the attorney-led review team's report to STC's management. After Hanley's deposition, the plaintiffs subpoenaed FLSA classification reviews Hanley helped complete in 2004, 2008, and 2015.

STC moved to quash the subpoena and to strike portions of Hanley's deposition, arguing Hanley had revealed privileged communications between STC's attorneys and its management. The magistrate judge recommended denying STC's motions on the basis that STC had waived the privilege by raising good faith as an affirmative defense to the FLSA claims. STC objected, but the district court overruled its objection in relevant part. The court thus denied STC's motion to quash Hanley's subpoena, granted Plaintiffs' motion to continue his deposition, and granted Plaintiffs' motion to compel discovery of FLSA classification reviews Hanley completed in 2004, 2008, and 2015.

STC now petitions for a writ of mandamus, arguing the district court erred in light of our decision in *Itron*, which held a party does not waive attorney-client privilege unless it affirmatively invokes and relies on the privileged communications, 883 F.3d 553.

II.

To decide whether mandamus is warranted, "we ask (1) whether the petitioner has demonstrated that it has no other adequate means to attain the

relief it desires; (2) whether the petitioner's right to issuance of the writ is clear and indisputable; and (3) whether we, in the exercise of our discretion, are satisfied that the writ is appropriate under the circumstances." *Id.* at 567 (quoting *Cheney*, 542 U.S. at 380–81) (cleaned up).

A.

The first prong requires STC to show inadequacy of relief by other means. "[T]his requirement is 'often . . . met in cases where a petitioner claims that a district court erroneously ordered disclosure of attorney-client privileged documents." *Id.* (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760–61 (D.C. Cir. 2014)); *see, e.g.*, *In re Burlington N., Inc.*, 822 F.2d 518 (5th Cir. 1987); *In re City of Houston*, 772 F. App'x 143 (5th Cir. 2019); *In re EEOC*, 207 F. App'x 426 (5th Cir. 2006). Because the district court denied STC's motion to certify an interlocutory appeal, mandamus is its only means of protecting the privilege.

B.

To satisfy the second prong, STC must show that its "right to the issuance of the writ is . . . clear and indisputable." *Itron*, 883 F.3d at 568 (quoting *In re Volkswagen*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc)). A petitioner has a clear and indisputable right only when there has been a "usurpation of judicial power" or "a clear abuse of discretion that produces patently erroneous results." *In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 (5th Cir. 2019) (cleaned up). "[B]y definition, a district court abuses its discretion when it makes an error of law or applies an incorrect legal standard." *Itron*, 883 F.3d at 568 (quoting *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011)). Here, the district court applied an incorrect legal standard by failing to follow *Itron*.

In that case, Itron, Inc., sued three individuals for negligent misrepresentation under Mississippi law, alleging the defendants'

misrepresentations "caused it to unwittingly assume liability" under a settlement agreement. 883 F.3d at 556 (cleaned up). The defendants moved to compel production of various privileged documents, arguing that by claiming it had been misled, Itron had "waived its attorney-client privilege as to all communications with counsel concerning potential exposure." *Id.* Itron invoked the privilege and stipulated it would not use any such privileged communications in its defense. *Id.* at 557. After the magistrate judge compelled production of the privileged materials, we granted mandamus. *Id.* at 569.

We held that "a client waives the privilege by affirmatively relying on attorney-client communications to support an element of a legal claim or defense—thereby putting those communications 'at issue' in the case." *Id.* at 558 (citations omitted). Put differently, when a client "uses confidential information against his adversary," it cannot simultaneously use the privilege as a shield. *Id.* (citing *Willy v. Admin. Review Bd.*, 423 F.3d 483, 497 (5th Cir. 2005)). At the same time, however, we cautioned that asserting a claim to which privileged material is merely relevant does not waive the privilege. Instead, the client "must *rely* on privileged advice from his counsel to make his claim or defense." *Id.* at 561 (quoting *In re Cty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008); citing *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994)) (emphasis in original). While we applied Mississippi privilege doctrine, we noted that Mississippi has adopted the general approach to this question. *Id.* (citing *Jackson Med. Clinic for Women, P.A. v. Moore*, 836

So.2d 767, 773 (Miss. 2003)). Accordingly, our decision relied on treatises,[1] our cases,[2] and out-of-circuit federal cases[3] to support its holding.

Our holding in *Itron* controls here. STC's answer claimed only that it relied in good faith "on applicable law, administrative regulations, orders, interpretations and/or administrative practice or policy enforcement." STC did not claim that counsel advised it that its decisions complied with the FLSA. Indeed, its answer did not allude to advice of counsel at all. While privileged communications may have some bearing on STC's beliefs about its compliance, STC has not "rel[ied] on attorney-client communications" to establish its good-faith defense. 883 F.3d at 558; *accord McKee v. PetSmart, Inc.*, 71 F. Supp. 3d 439, 443 (D. Del. 2014) (no waiver of privilege by invoking FLSA good-faith defense).

The district court distinguished *Itron* by interpreting Hanley's testimony as an implied waiver of attorney-client privilege. The court relied on a pre-*Itron* district court decision, *Edwards v. KB Home*, No. 3:11-CV-00240, 2015 WL 4430998 (S.D. Tex. July 18, 2015). In *Edwards*, an FLSA defendant invoked the good-faith defense and conceded that it had communicated with attorneys regarding its FLSA classification decisions. *Id.* at *1. The district court held

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[1] *See Itron*, 883 F.3d at 558, 560–61 & n.6 (citing 8 Fed. Prac. & Proc. § 2016.6; 2 New Wigmore, § 6.12.4(b); 81 Am. Jur. 2d § 329; 1 McCormick On Evidence § 93; 2 Paul R. Rice et al., Attorney-Client Privilege in the United States § 9:46 (2017–18 ed.); 81 Am. Jur. 2d § 329).

[2] *See, e.g.*, *id.* at 559 nn. 3–4 (citing *United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002); *Indus. Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Co.*, 953 F.2d 1004, 1007 (5th Cir. 1992); *Conkling v. Turner*, 883 F.2d 431, 434–35 (5th Cir. 1989); *In re Burlington N.*, 822 F.2d at 533; *United States v. Miller*, 600 F.2d 498, 501–02 (5th Cir. 1979).

[3] *See, e.g.*, *id.* at 559 & n.3 (citing *Hunt v. Blackburn*, 128 U.S. 464, 470–71 (1888); *Seneca Ins. Co. v. W. Claims, Inc.*, 774 F.3d 1272, 1276–77 (10th Cir. 2014); *In re Icenhower*, 755 F.3d 1130, 1141 (9th Cir. 2014); *United States v. Bauer*, 551 F.3d 786, 790–92 (8th Cir. 2008); *United States v. Workman*, 138 F.3d 1261, 1263–64 (8th Cir. 1998); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162–63 (9th Cir. 1992)); *Sedco Int'l, S. A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982).

that where a defendant relied on counsel's advice in making classification determinations, the defendant could not shield those communications by disclaiming that reliance. *Id.* at *2.

Edwards predates *Itron* and is, in any event, distinguishable. In *Edwards*, the defendant affirmatively conceded it had relied on the advice of counsel to make its classification decisions. Here, STC made no such concession and instead tailored its pleading so as not to rely on privileged communications.

We also reject Plaintiffs' argument that STC waived the privilege simply by allowing Henley to testify about the compliance reviews. To comply with plaintiffs' discovery requests, STC was required to identify, and thus make available for deposition, persons involved in its consultations. *See, e.g.*, *In re Application of Chevron Corp.*, 736 F.Supp.2d 773, 783–84 (S.D.N.Y. 2010). Responding to that request does not amount to "us[ing] confidential information against [STC's] adversary," such that STC "implicitly waive[d] its use protectively." *Willy*, 423 F.3d at 497.

C.

As to the third prong, STC has shown that mandamus is "appropriate under the circumstances." *Itron*, 883 F.3d at 567 (quoting *Cheney*, 542 U.S. at 380–81) (cleaned up). The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). These benefits dissipate if clients are not "free from the consequences or the apprehension" that a court might order their confidential communications involuntarily disclosed. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). As STC points out, denying the privilege in FLSA cases may discourage employers from seeking legal input in classifying employees. If the district

court's "view of the law were to proliferate, more district courts could mistakenly find waiver" under these circumstances. *Itron*, 883 F.3d at 568. To prevent this from occurring, correcting this error through mandamus is a proper exercise of our discretion.

* * *

The mandamus petition is GRANTED. Petitioners' accompanying motion to place material under seal is also GRANTED.

JAMES L. DENNIS, Circuit Judge, dissenting:

I respectfully dissent from the grant of mandamus relief. The majority relies on *In re Itron, Inc.*, 883 F.3d 553 (5th Cir. 2018) to conclude that the district court clearly and indisputably erred. But that case was decided under Mississippi state law, rather than, as here, the federal common law. *See* FED. R. EVID. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege," except "in a civil case" in "which state law supplies the rule of decision"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1433–34 (5th Cir. 1993) (applying federal, rather than state, law, in analyzing waiver of attorney-client privilege in FLSA action). *Itron* is thus merely persuasive authority, and in no event binding on the district court. I do not believe a petitioner can show a clear and indisputable right to mandamus relief in such circumstances. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004).