FILED
Nov 03 2021, 7:53 am
CLERK
Indiana Supreme Court
Court of Appeals
and Tax Court

ATTORNEYS FOR APPELLANT

B. J. Brinkerhoff
Alexandra J. Blackwell
Jeselskis Brinkerhoff & Joseph, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Todd J. Kaiser
Justin A. Allen
Ogletree Deakins Nash Smoak & Stewart, P.C.
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Christopher Allen Duncan; Patel's Palace LLC, d/b/a Indy Surplus Liquidators, Midwest Surplus Liquidators, LLC, Rupal Patel, and Christopher Zorman,

*Appellants-Defendants,*

v.

Barton's Discounts, LLC,

*Appellee-Plaintiff.*

November 3, 2021

Court of Appeals Case No. 21A-PL-211

Appeal from the Marion Superior Court

The Honorable Heather Welch, Judge

Trial Court Cause No. 49D01-1910-PL-44707

**Riley, Judge.**

## STATEMENT OF THE CASE

[1] Appellants-Defendants, Christopher Allen Duncan (Duncan), Patel's Palace LLC d/b/a Indy Surplus Liquidators (ISL), Midwest Surplus Liquidators, LLC (MSL), Rupal Patel (Patel), and Christopher Zorman (Zorman) (collectively, Appellants), appeal the trial court's Order on interlocutory appeal, which granted Appellee's-Defendant's, Barton's Discounts, LLC (Barton's), motion to compel in part, and ordered Appellants to produce all responsive, unredacted documents requested by Barton's discovery request.

[2] We affirm.

## ISSUE

[3] Appellants present this court with one issue on appeal, which we restate as follows: Whether the Fifth Amendment to the United States Constitution shields the production of potentially incriminating documents and communications in a civil discovery proceeding.

## FACTS AND PROCEDURAL HISTORY

[4] Barton's is a family-owned business headquartered in Indianapolis, Indiana. The company acquires and liquidates unsold, returned, and overstocked goods from retailers around the country. Barton's receives these goods from retailers and then re-sells them to other sellers, as well as directly to consumers at its Indianapolis warehouse. In the summer of 2019, ISL hired Duncan, Barton's then-director of Reverse Logistics. On July 17, 2019, Duncan tendered his

resignation from Barton's and joined ISL and/or MSL in a similar role to the one he held at Barton's.

[5] In September 2019, Barton's discovered that in mid-July 2019, shortly before Duncan's resignation, its internal load log system showed a discrepancy when no invoice was generated for a certain delivery of goods. Upon further investigation, Barton's came to believe that throughout 2019, Duncan sent at least nine truckloads of merchandise to locations affiliated with ISL/MSL without generating an invoice or seeking payment. Barton's contends that Duncan and ISL engaged in a conspiracy to steal these truckloads from Barton's for ISL/MSL to sell.

[6] On October 24, 2019, Barton's filed its Complaint for injunctive relief and damages, asserting claims against Appellants for conversion, conspiracy to commit conversion, aiding and abetting conversion, unjust enrichment, tortious interference with contract, and injunctive relief. Around that same time, Barton's advised Duncan and ISL that it had met with the Marion County Prosecutor's Office to report them for theft.

[7] In conjunction with filing its Complaint, Barton's filed a motion for preliminary injunction, and a motion for expedited discovery on Duncan and ISL, which was granted by the trial court on the same day, ordering responses to written discovery to be completed within fifteen calendar days, *i.e.*, no later than November 8, 2019. The discovery requests asked Duncan and ISL to detail and produce all communications with Duncan since January 1, 2019. MSL was

added to the ongoing litigation via an Amended Complaint on November 8, 2019, with additional expedited discovery to be completed by November 20, 2019.

[8] On November 8, 2019, ISL, Zorman, and Patel provided their written discovery responses. Both Zorman and Patel invoked the Fifth Amendment privilege against self-incrimination in response to certain requests for production and refused to produce responsive documents. Over the next several months, from mid-December 2019 through mid-March 2020, Barton's numerous efforts to obtain the outstanding responses and documents from Appellants produced approximately 18,000 documents. On March 13, 2020, Barton's moved to compel further outstanding discovery from Appellants, seeking the production of all communications with Duncan and requesting the trial court to issue an order: (1) directing MSL to promptly produce all responsive documents; (2) directing Patel and Zorman to withdraw their Fifth Amendment objections as for Barton's requests to production and to produce the complete documents; and (3) awarding Barton's fees incurred in bringing the motion to compel. On April 27, 2020, Appellants filed a response in opposition to the motion to compel.

[9] On June 3, 2020, the trial court issued its order, granting in part and denying in part, Barton's motion to compel production of documents. The trial court concluded that "[Appellants'] invocation of their Fifth Amendment rights [was] invalid because they were asserted as a blanket privilege and not on a document-by-document or question-by-question basis." (Appellants' App. Vol.

III, p. 67). The trial court directed that "Zorman and Patel shall produce all requested documents within the next twenty (20) calendar days" and ordered the parties to conduct "a Rule 26(F) conference so that the parties may have a discussion regarding which specific documents are Fifth Amendment privilege[d], or even whether the [Appellants] will properly invoke their Fifth Amendment privilege on a document-by-document basis." (Appellants' App. Vol. III, pp. 67-68).

[10] On June 25, 2020, Appellants produced a heavily-redacted text message exchange between Duncan and ISL, and also submitted these messages to the trial court for an *in-camera* review. The following day, Appellants submitted a privilege log identifying more than 100 text messages in the chain that were withheld on Fifth Amendment grounds. The privilege log and the text message chain revealed the date, time, and sender/recipient of the text message. On July 2, 2020, Barton's filed a renewed motion to compel, requesting the trial court to substantively address the Appellants' Fifth Amendment objections and to compel the production of the unredacted text messages.

[11] On August 11, 2020, the trial court issued an order, scheduling a hearing to address whether the court should appoint a Special Master under Indiana Commercial Rule 5, and explaining that "[t]his [c]ourt finds that an *in-camera* review of this discovery may be best conducted by a Special Master as permitted under Ind. Comm. Ct. Rule 5." (Appellants' App. Vol. III, pp. 215-16). On August 12, 2020, Barton's filed a response to the Special Master order, opining that, although it did "not categorically oppose an *in-camera* review or

the appointment of a Special Master to resolve this dispute," Barton's believed that "an *in-camera* review appears unnecessary in light of the nature of the parties' dispute." (Appellants' App. Vol. III, p. 220). Because Barton's agreed to "stipulate that the contents of the messages may be incriminating to the [Appellants]," Barton's believed the appointment of a Special Master to review the messages likely would not "materially assist the [c]ourt" in resolving the renewed motion to compel. (Appellants' App. Vol. III, p. 220). Barton's instead proposed to "conduct the hearing on August 28, 2020, to allow the [c]ourt and the parties to discuss the need for an *in-camera* review, the potential appointment of a Special Master [], and any other issue the [c]ourt believes may assist it in the adjudication of the pending motion." (Appellants' App. Vol. III, p. 219). The hearing was conducted as scheduled and no Special Master was appointed.

[12] On November 13, 2020, the trial court issued its Order on Barton's renewed motion to compel. In its Order, the trial court ordered Appellants to produce the unredacted text messages within twenty days, and concluded, in pertinent part, that

> 1. Zorman and Patel cannot withhold text messages sent on behalf of ISL/MSL based on their own individual Fifth Amendment rights.
>
> 2. In the event that any of the messages are personal communications of Zorman and Patel—not business records—they must still be produced because, here, the act of production itself is not testimonial . . . the text messages were

voluntarily created prior to the issuance of the discovery requests, and the production of the text messages is not testimonial. Therefore, the Fifth Amendment privilege does not apply, and the messages must be produced.

3. Finally, several of the text messages that the [Appellants] redacted or omitted were those sent by [Duncan]. [Appellants] cannot assert the Fifth Amendment privilege for [Duncan]—he would have to assert the privilege himself. Therefore, those messages must be produced.

(Appellants' App. Vol. II, pp. 32-33). On December 3, 2020, Appellants filed their motion to certify the interlocutory order for immediate appeal and for a limited stay of discovery and/or a protective order. On December 18, 2020, Barton's filed its motion in opposition to Appellants' motion. Thirty-one days later, on January 5, 2021, the trial court certified its Order for interlocutory appeal, but denied the Appellants' request for a stay pending the outcome of the appeal. On March 5, 2021, this court accepted Appellants' interlocutory appeal.

[13] Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

[14] This case focuses on the conflict that can arise during discovery in a civil case where a threat of criminal prosecution looms overhead. The discovery sought by Barton's, *i.e.*, contemporaneous communications exchanged between alleged co-conspirators, compelled Appellants to invoke their Fifth Amendment privilege against self-incrimination and to submit their dispute to this court.

Appellants contend that the trial court abused its discretion when it ordered them to produce the unredacted text messages, on the ground that these were non-testimonial in nature and therefore not protected by Appellants' Fifth Amendment rights.[1]

## I. *Standard of Review*

[15] The rules of discovery are designed to "allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement." *Brown v. Katz*, 868 N.E.2d 1159, 1165 (Ind. Ct. App. 2007). The trial court has broad discretion in ruling on issues of discovery and we will reverse only when the trial court has abused its discretion. *Id*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or when the trial court has misinterpreted the law. *Trs. of Purdue Univ. v. Hagerman Constr. Corp*., 736 N.E.2d 819, 820 (Ind. Ct. App. 2000). "In practice, the broad discretion allotted to the trial court in

---

[1] As a threshold argument, Barton's contends that this court should not have accepted jurisdiction of the discretionary interlocutory appeal because the trial court certified its Order outside the time period for certification and therefore Appellants' certification request should have been deemed denied pursuant to Indiana Appellate Rule 14(B). While Barton's is correct that the trial court certified its Order one day late, and therefore the certification request "shall be deemed denied," we also acknowledge that this time-span fell during November 2020 through January 2021, in the midst of the Covid pandemic with most courts closed and functioning in accordance with emergency orders issued by our supreme court. "The forfeiture of the right to appeal on timeliness grounds does not deprive the appellate courts of jurisdiction to hear the appeal." *Cooper's Hawk Indianapolis, LLC v. Ray,* 162 N.E.3d 1097, 1098 (Ind. 2021). "To reinstate a forfeited appeal, an appellant must show that there are extraordinary compelling reasons why this forfeited right should be restored." *In re Adoption of O.R.,* 16 N.E.3d 965, 971 (Ind. 2014). In light of the slight untimeliness of the certification order, the worldwide health pandemic, and the importance of the rights at stake, we elect to decide the issue on its merits rather than decline jurisdiction, as suggested by Barton's.

ruling on discovery matters, coupled with the harmless error doctrine, will bar reversal except in the unusual case." *Coster v. Coster*, 452 N.E.2d 397, 400 (Ind. Ct. App. 1983).

## II. *Fifth Amendment*

[16] "The Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408, 96 S.Ct. 1569, 48 L.Ed. 2d 39 (1976). More specifically, in *Fisher*, the Supreme Court held that the Fifth Amendment privilege against self-incrimination could be invoked to protect an individual from being compelled to personally produce documents, even if the contents of those documents were not privileged, if the act of production would have testimonial aspects that could be self-incriminating. *Id*. The Court noted that, by producing documents, the producing party implicitly concedes possession and control of the documents and indicates that the documents produced are, in fact, the documents described in the subpoena, thus implicating the testimonial prerequisite for Fifth Amendment protection. *Id*. This decision solidified what is commonly called the "act of production privilege." *Id*. On the other hand, if the "existence and location of the [subpoenaed] papers are a foregone conclusion and the [subpoenaed party] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers[,]" then "no constitutional rights are touched" by

enforcement of the subpoena. *Id.* at 411. "The question is not of testimony but of surrender." *Id*.

[17] In *Fisher*, the Court refused to grant Fifth Amendment protection to the act of producing certain tax documents, concluding that requiring the subpoenaed party to produce the requested documents would not be testimonial; the Court noted that the government already knew of the existence of the requested documents and could independently authenticate them. *Id*. at 411-413. In *United States v. Hubbell*, 530 U.S. 27, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000), on the other hand, the Court upheld the subpoenaed party's assertion of the privilege. The Court there stated,

> [w]hile in *Fisher* the Government already knew that the documents [described in the subpoena] were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here [in *Hubbell*] the Government has not shown that it had any prior knowledge of either the existence or the whereabouts [of the requested documents].

*Id*. at 44-45.

[18] Jurisdictions around the country regularly overrule Fifth Amendment objections to the production of communications and documents voluntarily created prior to litigation. *See, e.g., Sallah v. Worldwide Clearing LLC*, 855 F. Supp. 2d 1364, 1373 (S.D. Fla. 2012) ("Where documents are voluntarily prepared before they are requested . . . the supreme court held that such documents do not contain compelled testimonial evidence within the meaning

of the Fifth Amendment, even if the contents are incriminating."); *Bear Stearns & Co. v. Wyler*, 182 F. Supp. 2d 679, 681 (N.D. Ill. 2002) ("[A] person may not claim Fifth Amendment protections based upon the incrimination that may result from the contents or nature of the thing demanded.").

[19] In *Sallah*, the plaintiff pursued civil claims against various defendants for an alleged Ponzi scheme. *Sallah*, 855 F. Supp. 2d at 1366-68. The plaintiff sought the production of communications between the alleged co-conspirators, including banking records, which might reveal criminal conduct. *Id*. at 1368. While the parties and the court acknowledged that these requests could incriminate the defendants in criminal misconduct, the court determined that the requested communications and other documents were not protected by the Fifth Amendment because their production could not be considered a testimonial act:

> It has long been established that a person may be required to produce specific documents, even though they contain incriminating information. Where documents are voluntarily prepared before they are requested, for example, the Supreme Court has held that such documents do not contain compelled testimonial evidence within the meaning of the Fifth Amendment, even if the contents are incriminating . . .
>
> [T]he Supreme Court has recognized that the act of producing documents may involve a testimonial component that may enjoy the Fifth Amendment privilege, separate and apart from whether the contents of the documents at issue are protected. Sometimes, the act of production can implicitly communicate statements of fact. For example, producing documents can act as an admission

> that the requested papers exist, fall within the person's possession or control, and are authentic.
>
> Fifth Amendment protection is not triggered, however, where merely some physical act is compelled, *i.e.*, where the individual is not called upon to make use of the contents of his or her mind, or where it can be shown with reasonable particularity that, at the time that the act of production was sought to be compelled, the materials were already known of, and making any testimonial act of the production a foregone conclusion.

*Id*. at 1371-72 (internal citations and quotations omitted). Applying these principles, the *Sallah* court rejected the defendants' invocation of the Fifth Amendment privilege as applied to pre-litigation communications:

> [The discovery requests] call for objectively determinable universes of documents and do not require [defendants] to employ the contents of [their] mind to choose what documents might be responsive to the requests. Put simply, [defendants] need not exercise any judgment to respond to the requests. For example, under Request 1, either a document is a communication between [defendants] and the [alleged co-conspirators], or their agents, or it is not; there is no grey area or room for discretion.

*Id*. at 1373.

[20] Our Indiana supreme court recently analyzed the interplay between the Fifth Amendment and document requests in *Seo v. State*, 148 N.E.3d 952 (Ind. 2020). In *Seo*, our supreme court commenced its analysis by reiterating the principles pronounced in *Fisher*, emphasizing that "not all compelled, incriminating evidence falls under the [Fifth Amendment's] constitutional protection: the

evidence must also be testimonial." *Id* at 955. Our supreme court summarized the act of production doctrine and the foregone conclusion exception as follows:

> [P]roducing documents in response to a subpoena can be testimonial if the act concedes the existence, possession, or authenticity of the documents ultimately produced. But when the [requesting party] can show that it already knows this information, then the testimonial aspects of the act are a "foregone conclusion," and complying with the subpoena becomes a question "not of testimony but of surrender[.]"

*Id*. at 956 (citing *Fisher*, 425 U.S. at 411). While we agree with Appellants that *Seo* was decided in the context of compelling a criminal suspect to produce an unlocked cell phone, our supreme court also stressed that "[t]he production of an unlocked smartphone is unlike the compelled production of specific business documents." *Id*. at 959. Nevertheless, our supreme court's reliance on *Fisher* in reaching its conclusion in *Seo* that forcing a criminal suspect to produce an unlocked cellphone was not covered by *Fisher's* foregone conclusion exception, firmly indicates that Indiana's view on the Fifth Amendment as applied to document requests is squarely aligned with federal law.

[21] We agree with the trial court that the text messages are non-testimonial in nature and therefore are not protected under the Fifth Amendment. Barton's first motion to compel requested discovery of all communications between Appellants and Duncan since January 1, 2019. In response to Barton's first motion, Appellants produced a heavily-redacted text message exchange

between Duncan and ISL, as well as a privilege log identifying more than 100 text messages in the chain that were withheld on Fifth Amendment grounds. The privilege log and the text message chain revealed the date, time, and sender/recipient of the text message. On July 2, 2020, Barton's filed a renewed motion to compel, requesting the trial court to substantively address the Appellants' Fifth Amendment objections and to compel the production of the unredacted text messages. The act of production protection is inapplicable as Barton's specifically defined the parameters of its discovery—all communications between Appellants and Duncan since January 1, 2019—and Barton's was aware of the existence of these text messages between Appellants and Duncan prior to the submission of the privilege log. It knows Appellants possessed them and knows the participants in the conversations. Accordingly, as the compelled production of these documents does not communicate any incriminating testimony through the act of production itself, the doctrine does not apply. Rather, the production of the compelled documents has become a foregone conclusion, which does not require Appellants to employ the contents of their mind because either the documents fall within the specified timeline and parameters of the discovery request or they do not—no independent judgment is required to make that determination. In other words, Barton's production request calls "for objectively determinable universes of documents and do[es] not require [Appellants] to employ the contents of [their] minds." *Sallah*, 855 F.Supp. 2d at 1373. The text messages were voluntarily created prior to the issuance of the discovery requests, and the production of the text messages is not testimonial.

In their objections to the motion to compel and in their appellate brief, Appellants focus on the content of the messages when raising their Fifth Amendment rights. This is an incorrect analysis of Barton's motion to compel. Barton's is not requesting Appellants to respond to certain questions posed in interrogatories or depositions; instead, Barton's is asking for the production of text messages that it already knows exist and are in the possession of Appellants. *See, e.g., Hubbell*, 530 U.S. at 37 ("Whether the constitutional privilege protects . . . the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating."). The actual act of producing these text messages does not give Barton's any new information. Therefore, the Fifth Amendment does not apply and the unredacted text messages must be produced. As such, we affirm the trial court's Order to compel.

## III. *Business Records*

[22] In its Order, the trial court discussed an alternative ground on which it affirmed Barton's renewed motion to compel. The trial court concluded that the Fifth Amendment did not apply to Appellants' communications with Duncan as it does not protect business records created by an owner, agent, or employee of a business entity. We agree.

[23] The Fifth Amendment is a personal privilege and "an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if

these records might incriminate him personally." *Bellis v. United States*, 417 U.S. 85, 88 (1974). This is true even where the corporate records or communications are sought from a personal device or account. *See, e.g., In re Russo*, 550 S.W.3d 782, 790 (Tex. Ct. App. 2018) (compelling production of corporate records located in Defendant's Yahoo account).

[24] The record supports that the redacted messages between Duncan and Appellants were sent on behalf of corporate entities as the phone number in the text message exchanges was the phone number listed on ISL and MSL's websites. During these proceedings, Appellants did "not dispute that the phone number involved in the text chain is the main phone line for ISL and MSL." (Appellants' App. Vol. II, p. 31). Even though a personal phone might have been used to send the text messages, we agree with the trial court's conclusion that if these messages "were clearly sent in Zorman's and Patel's representative capacities on behalf of ISL and or MSL, then those messages are not the personal communications of Zorman and Patel and therefore, the messages are not protected by the Fifth Amendment." (Appellants' App. Vol. III, pp. 31-32). In other words, as the party asserting the privilege, it is Appellants' burden to establish which of these redacted messages were "conversations between the parties [and] were personal in nature." (Appellants' Br. p. 23). Appellants failed to meet that burden. *See, e.g., In re Russo*, 550 S.W.3d at 790 ("[Defendant] had the burden to prove that each of the documents he withheld are personal and not a record of one of his corporate entities. [Defendant] has not done so.") (internal citation omitted). Accordingly, the redacted text

messages, as business records of ISL and MSL, are not protected by the Fifth Amendment and are discoverable.

## CONCLUSION

[25] Based on the foregoing, we conclude that the trial court did not abuse its discretion by granting Barton's motion to compel in part, and ordering Appellants to produce all responsive, unredacted documents requested by Barton's discovery request.

[26] Affirmed.

[27] Najam, J. and Brown, J. concur