STATE OF MICHIGAN

COURT OF APPEALS

PCS4LESS, LLC, and WHOLESALE CELLUTIONS,

Plaintiffs/Counter Defendants-Appellees,

v

KYLE STOCKTON and LARRY CHEIFETZ,

Defendants-Counter Plaintiffs,

and

JESSE LOBB and HILLARY MASON,

Defendants/Counter Plaintiffs-Appellants,

and

GO MOBILE, INC.,

Defendant/Counter Plaintiff/Third-Party Plaintiff-Appellant,

and

GONZO RECYCLING,

Defendant,

and

ANDREW GOLDSTEIN, CHADI EL-HAGE, and ELIZABETH THEISEN,

Third-Party Defendants.

FOR PUBLICATION
March 8, 2011
9:05 a.m.

No. 296870
Washtenaw Circuit Court
LC No. 09-000380-CZ

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

O'CONNELL, J.

This case arises from appellees' claims that appellants misappropriated certain exclusive software from appellees. Appellees appeal by leave granted. We reverse in part and affirm in part, albeit for different reasons than those relied on by the trial court.[1]

As part of their business operations, appellees purchase Motorola cellular phones on the secondary market and then apply certain software that "unlocks" the phones for sale to vendors in the US and in other countries.[2] Appellees allege that they purchased the exclusive license for the two applicable software programs, Covenant and CNS. Appellees further allege that defendant Stockton transferred certain of their financial records and the cell phone unlocking software to appellant Lobb's computer or another Go Mobile computer. Appellees claim that the transferred information constitutes confidential and trade secret information. Appellees brought this lawsuit seeking recovery under several theories and also requested a temporary restraining order (TRO) to prevent appellants Go Mobile, Lobb, and Mason from using or destroying the purported trade secrets. The trial court granted the TRO and ordered appellants to return any of appellees' property in their possession and not to delete any computerized information taken from plaintiffs.

Because appellants did not produce the CNS program and claimed that they never had it, the trial court ordered appellants Lobb, Mason, and Go Mobile to submit sworn affidavits that Go Mobile and its employees never received, possessed, or used the CNS program and never sold a cell phone containing the CNS program. Lobb and Mason submitted affidavits in which they stated that the information at issue was protected by their rights against self-incrimination under the Fifth Amendment. US Const, Am V. Appellees responded by filing a motion to compel Lobb, Mason, and Go Mobile to properly comply with the trial court's order.

The trial court granted appellees' motion, ordering appellants to either produce the CNS program or submit proper affidavits. The court held that appellants failed to provide the court with sufficient information to establish the testimonial and incriminating character of the requested affidavits. Although appellants informed the court that appellees had instigated a federal criminal investigation, the court noted that appellants had not described any direct contact with federal authorities, nor had appellants informed the court of any specific law under which they might be prosecuted. The court denied appellants' motion for reconsideration. On appeal, appellants argue that the trial court's orders denied their Fifth Amendment right against compelled self-incrimination.

This Court reviews a trial court's discovery orders, such as an order to compel, for an abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50, 55; 555 NW2d 871 (1996). An abuse of discretion occurs where the trial court chooses an outcome falling outside a principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372,

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[1] *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

[2] According to appellees' complaint, the software "unlock[s] the standard subsidy lock" or "unlock[s] the carrier not supported lock."

388; 719 NW2d 809 (2006). Constitutional questions are questions of law, which we review de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

The first question is whether the Fifth Amendment privilege against self-incrimination is applicable in this situation at all.[3] The Fifth Amendment operates not only in criminal trials, it also protects an individual from official questioning in "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000) (internal quotation and citation omitted); see also *Kastigar v United States*, 406 US 441, 444-445; 92 S Ct 1653; 32 L Ed 2d 212 (1972) (stating that a witness may invoke the Fifth Amendment "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"). This protection operates against the states through the Fourteenth Amendment. *Malloy v Hogan*, 378 US 1, 6; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

The Fifth Amendment privilege protects an individual from being forced to answer any question that would "'furnish a link in the chain of evidence needed to prosecute." *Malloy*, 378 US at 11, quoting *Hoffman v United States*, 341 US 479, 486; 71 S Ct 814; 95 L Ed 1118 (1951). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 11-12. A judge should only bar a claim of privilege under the Fifth Amendment when the answer "cannot possibly" be incriminating. *Id.* at 12.

In this case, appellants are essentially being asked whether they possess what appellees allege to be appellees' trade secrets. It is true that appellants did not originally provide the trial court with any specific statutes that such possession might violate, but it should have been clear that possession of appellees' CNS program might well lead to criminal sanctions against appellants. Thus, answering the question might force appellants to "furnish a link in the chain of evidence needed to prosecute."

The trial court also ordered appellants to return the CNS program to appellees, if the program is in appellants' possession. In *United States v Doe*, 465 US 605, 612; 104 S Ct 1237; 79 L Ed 2d 552 (1984), the Court stated that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." Thus, where "[a] government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect," the Fifth Amendment privilege may apply. *Id*. Here, the act of producing the content of the program would be an admission that appellants possessed it. Under the circumstances of this case, such an admission would have significant testimonial value and

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[3] The relevant aspect of the right against self-incrimination has not been interpreted differently under the Michigan Constitution than the United States Constitution. *People v Cheatham*, 453 Mich 1, 10; 551 NW2d 355 (1996); *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 725-726; 344 NW2d 788 (1984) . Nor do appellants argue that the Michigan Constitution offers them greater protection.

would tend to incriminate appellants. See *id.* at 613. Therefore, the order for Mason and Lobb to either produce the program or submit the affidavit that appellants do not possess it constitutes compelled self-incrimination in violation of the Fifth Amendment privilege.

However, organizations generally are not protected by the privilege. *United States v White*, 322 US 694, 699; 64 S Ct 1248; 88 L Ed 1542 (1944); *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 715; 344 NW2d 788 (1984), citing *White*, 322 US at 699 (providing that the Fifth Amendment privilege may not be asserted on behalf of another, and it "cannot be utilized by or on behalf of any organization, such as a corporation"). Appellants argue that this case presents an exception because forcing Go Mobile to reveal whether it possesses CNS would essentially reveal whether Lobb or Mason have possessed CNS. However, as our Supreme Court has clearly observed, the custodian of an organization's records may not refuse to produce records even if those records might incriminate the custodian personally. *Paramount Pictures Corp*, 418 Mich at 715, citing *Wilson v United States*, 221 US 361; 31 S Ct 538; 55 L Ed 771 (1911).

Appellants cite *United States v Kordel*, 397 US 1, 8-9; 90 S Ct 763; 25 L Ed 2d 1 (1970), for the proposition that a corporation's action cannot trump an individual's Fifth Amendment rights. They read *Kordel* too broadly. *Kordel* holds that while an agent of the corporation may assert his Fifth Amendment privilege, the corporation cannot take advantage of that fact to avoid answering interrogatories addressed to the corporation. *Id.* at 7-8. The *Kordel* Court held that the corporation was obligated to appoint an agent who could answer the interrogatories without fear of self-incrimination and clearly stated that it would not permit the corporation to hide behind individuals' Fifth Amendment privileges. *Id.* at 8. Although it did not decide the point, the Court suggested that in a situation where no agent of the corporation could answer the interrogatories without incriminating herself, the appropriate remedy would be a protective order postponing discovery until any criminal action was settled. *Id.* at 8-9. However, later cases have not followed this dicta. See, e.g., *Bellis v US*, 417 US 85; 94 S Ct 2179 (1974); *Paramount*, 418 Mich 708.

Citing *United States v Doe*, 465 US 605; 104 S Ct 1237; 79 L Ed 2d 552 (1984), appellants also argue that small companies may have Fifth Amendment rights where the only persons who could testify on behalf of the corporation or produce requested documents are the same individuals whose personal Fifth Amendment rights are at stake. In *Doe*, the Supreme Court concluded that the owner of a sole proprietorship acts in a personal rather than a representative capacity, thereby allowing the owner to assert his personal Fifth Amendment privilege over his business documents. *Id.* at 608, 617. However, Go Mobile is a Pennsylvania corporation, and appellants do not even suggest that Go Mobile has only one owner. Moreover, the *Doe* Court noted that collective entities, meaning organizations with independent existence apart from their individual members, may not assert the Fifth Amendment privilege. *Id.* at 608 n 4, citing *Bellis*, 417 US at 92.

However, appellants' position is supported to some extent by dicta from *Bellis*. Though the *Bellis* Court held that independent entities may not take advantage of the privilege, it stated that the general rule might not apply to cases involving small family partnerships. *Bellis*, 417 US at 101. The key distinction recognized in *Bellis* is whether the person possessing the

organization's records holds them in a personal or a representative capacity. *Id.* If the former, the records are protected; if the latter, they are not.

In *Paramount Pictures Corp*, our Supreme Court considered the federal precedent and identified a three part test to determine whether the Fifth Amendment privilege may be used to prevent the production of an organization's documents:

> 1. Are the documents the records of the organization rather than those of the individual who has possession of them?
>
> 2. Does the custodian hold the records in a representative, rather than a personal, capacity?
>
> Assuming affirmative answers, in the case of a corporation the inquiry is ended because of the special nature of the corporate form and the state's reservation of visitatorial powers over corporations. In the case of non-corporate organizations, however, a third question arises:
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> 3. Does the organization have an established institutional identity which is recognized as an entity apart from its individual members? [*Paramount Pictures Corp*, 418 Mich at 720 (citations omitted).]

The Court in *Paramount Pictures Corp* also considered the reference in *Bellis* to small family partnerships and concluded that the *Bellis* language "was merely meant to restate that the papers required to be produced must not be the private and personal papers of the individuals held in a personal capacity." *Id.* at 725.

Applying the *Paramount Pictures Corp* test to the current case, we conclude that the CNS program would be a record of Go Mobile and not of the individual appellants. The program, if any of the appellants have it, would be used to further Go Mobile's business. For the same reason, it appears that if either of the individual appellants have the CNS program, they hold it in a representative rather than a personal capacity. Therefore, under *Paramount Pictures Corp*, the Fifth Amendment does not prohibit the compelled production of the CNS program. The individual appellants "cannot rely upon the privilege to avoid producing the records of a collective entity which are in [their] possession in a representative capacity, even if these records might incriminate [them] personally." *Bellis*, 417 US at 88.

We affirm the trial court's order that Go Mobile produce the required affidavit. However, with respect to Mason and Lobb, the order is reversed. We remand for entry of an order comporting with these instructions. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter