[Cite as *Barrow v. Living Word - Dayton*, 2018-Ohio-4641.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

SAMUEL BARROW	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 27935
	:	
v.	:	Trial Court Case No. 2017-CV-2301
	:	
THE LIVING WORD – DAYTON, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 16th day of November, 2018.

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FROELICH, J.

{¶ 1} Samuel Barrow appeals from an order of the Montgomery County Court of Common Pleas, which granted the motion of The Living Word-Dayton, Dr. N. Patrick Murray, and Mrs. Jackie Murray (collectively, "The Living Word Defendants") to compel production of electronically-stored information and overruled Barrow's motion to reconsider that order. For the following reasons, the trial court's order will be reversed, and the matter will be remanded for further proceedings.

I. Factual and Procedural History

{¶ 2} In May 2017, Barrow, an alleged author and former member of The Living Word-Dayton church, filed this lawsuit against The Living Word-Dayton, the Murrays, and Antoinette Nartker. He alleged tortious interference with a business relationship, defamation, invasion of privacy, intentional infliction of emotional distress, civil conspiracy, conversion (Nartker only), and replevin (Nartker only). Barrow's underlying factual allegations are not relevant to this appeal. All defendants denied Barrow's claims, raised several affirmative defenses, and counterclaimed that Barrow was a vexatious litigator.

{¶ 3} On December 20, 2017, The Living Word Defendants filed a motion to compel the production of all electronically-stored information, namely emails and witnesses statements, in their "native electronic format." They indicated, as prefatory information, that this was Barrow's third lawsuit against them and that Barrow had previously engaged in felonious and fraudulent behavior.[1]

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[1] Barrow previously filed a similar lawsuit, *Barrow v. Nartker*, Montgomery C.P. No. 2015 CV 475, which was voluntarily dismissed, pursuant to Civ.R. 41(A). He also filed a

{¶ 4} With respect to the discovery dispute, The Living Word Defendants stated that Barrow had responded to their interrogatories and document requests with approximately 900 pages, which were hard copies that he had scanned into .pdf format. The production included 184 emails referencing attachments, but no attachments were produced with their corresponding emails. Consequently, The Living Word Defendants did not understand the meaning of the emails. The Living Word Defendants further stated that Barrow's production included 13 witness statements, 9 of which referenced The Living Word Defendants. Barrow also identified 68 witnesses as having information relevant to his claims.

{¶ 5} In their motion to compel, The Living Word Defendants proposed the following solution to the trial court:

> Mr. Barrow has more than one email account, so the Living Word Defendants proposed that Mr. Barrow provide his email accounts and passwords to their expert, Binary Intelligence. Then, the expert would download all of Mr. Barrow's emails in their native format. Then, Binary Intelligence would run search terms across the email database, largely the names of the 68 witnesses Mr. Barrow identified. Then only the emails that were hits for the search terms would be culled out and produced to both [Barrow's then-current counsel] and to counsel for the Living Word Defendants. As stated during the recent status conference, the Living

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federal action, *Barrow v. Living Word Church*, Case No. 3:15-CV-341 (S.D. Ohio). The federal claims were dismissed, and the federal court declined to exercise supplemental jurisdiction over the state law claims. The federal court therefore dismissed the state claims without prejudice to being refiled in state court. This action followed.

> Word Defendants also would agree to a two-week review period for counsel only, after the production from Binary Intelligence. If emails are captured by the search terms and produced to counsel that are not relevant or likely to lead to the discovery of admissible evidence, then counsel for the parties would confer and either agree to exclude them from disclosure to the parties or, if they cannot agree, would submit the disputed emails to the Court for in camera review. Finally, the Living Word Defendants offered to implement the above-stated solution at no cost to Mr. Barrow.
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> * * *
>
> Finally, to the extent that Mr. Barrow's 13 witness statements are not in email format in the Binary Intelligence search production or are not attached in native format to the produced emails, we also want [Barrow's current counsel] to produce all of Mr. Barrow's witness statements in their native format, e.g., Word files, so that we can examine their metadata to determine if they are authentic or if they are more fraudulent statements prepared by Mr. Barrow.

{¶ 6} Barrow opposed The Living Word Defendants' motion. He indicated that, in response to the Defendants' inability to match emails with attachments, he had offered to forward the produced emails to defense counsel's email account or to a separate account created for that purpose. Barrow asserted that The Living Word Defendants then asked him to provide the emails in .psi format, so that the metadata associated with those emails would be preserved. Barrow stated that he offered to permit a third party to export the specified emails from Barrow's account, in accordance with a stipulated protective order,

to preserve the metadata associated with those emails and to resolve defense counsel's concerns. Barrow argued that The Living Word Defendants' current request – to allow a third party to search his emails – went beyond The Living Word Defendants' discovery request and was unreasonable in the absence of a "requisite background of noncompliance with discovery requests by Mr. Barrow." As to all but one witness statement, Barrow stated that he had informed The Living Word Defendants that he had received the witness statements in hard copy and had scanned and emailed them to his attorney; Barrow asserted that he never had those witness statements in electronic format. Barrow attached to his opposition memorandum copies of several emails from his counsel to The Living Word Defendants' counsel that substantiated the offers he had made to resolve the issue.

{¶ 7} On February 6, 2018, the trial court granted the motion to compel, and it entered an order drafted by counsel for The Living Word Defendants. The order (quoted *infra*, ¶ 21), however, did not include a protocol for culling communications between Barrow and his current and former attorneys. Rather, as reflected in the solution proposed in The Living Word Defendants' motion, the order required an expert to search Barrow's emails using search terms comprised "predominantly" of the names of Barrow's identified witnesses. The expert would then produce to counsel for both Barrow and The Living Word Defendants the emails and attachments found by the search terms.

{¶ 8} Approximately a week later, Barrow asked the trial court to reconsider its order. He argued that the order "requires Mr. Barrow to provide the Living Word Defendants with access to attorney-client privileged communications, in addition to the fact that he has already provided the discovery [that was the] subject of the Living Word

Defendants' discovery requests." Barrow noted that during a December 15, 2017 telephonic status conference, Barrow raised, and the court acknowledged, the concern that attorney-client communications would be disclosed. (The record does not contain a transcript of that status conference, and it is unclear whether the December 15 status conference was conducted on the record.) Barrow also stated that his email accounts contained "most if not all" of the written communications between his attorneys and him.

{¶ 9} With respect to the privilege argument, The Living Word Defendants responded that the trial court's order contemplated the culling of attorney-client protected communications by stating that the emails would be searched using "predominantly" the names of Barrow's identified witnesses. They asserted that the third-party expert would search for Barrow's counsels' names and any emails with "hits" to those names would be provided to Barrow's current counsel only for review. The Living Word Defendants thus asserted that any emails identified by Barrow's counsel as privileged due to attorney-client privilege would not be produced to The Living Word Defendants.

{¶ 10} On March 2, 2018, the trial court denied Barrow's motion for reconsideration.

{¶ 11} Barrow appeals from the trial court's grant of Defendant's motion to compel and the denial of his motion for reconsideration, raising two assignments of error.

II. Final Appealable Order

{¶ 12} Upon an initial review of this appeal, we questioned whether the trial court's February 8, 2018 order granting the motion to compel and the March 2, 2018 decision denying reconsideration were final appealable orders. We asked Barrow to show cause why this matter should not be dismissed for lack of a final appealable order. After both

Barrow and The Living Word Defendants responded, we took the matter under advisement and ordered the parties to address this issue in their merit briefs.

{¶ 13} This court has jurisdiction to review only final orders or judgments of the lower courts in its district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶ 14} Under R.C. 2505.02(B)(4), an order is final and appealable if it is:

> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(A)(3) defines a provisional remedy as "a proceeding ancillary to an action, including, but not limited to * * * discovery of privileged matter." An ancillary proceeding is "one that is attendant upon or aids another proceeding." *State v. Jeffery*, 2d Dist. Montgomery No. 24850, 2012-Ohio-3104, ¶ 10, quoting *Bishop v. Dresser Industries, Inc*., 134 Ohio App.3d 321, 324, 730 N.E.2d 1079 (3d Dist.1999).

{¶ 15} The Supreme Court of Ohio has held that "an order requiring the production of information protected by the attorney-client privilege causes harm and prejudice that

inherently cannot be meaningfully or effectively remedied by a later appeal. Thus, a discovery order that is alleged to breach the confidentiality guaranteed by the attorney-client privilege satisfies R.C. 2505.02(B)(4)(b) and is a final, appealable order that is potentially subject to immediate review." *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, ¶ 2. The *Burnham* court concluded that the discovery order before it was a final appealable order, because the appellants had "plausibly alleged that the attorney-client privilege would be breached by disclosure of the requested materials." *Id*. at ¶ 3.

{¶ 16} In reaching its conclusion, the Ohio Supreme Court emphasized that "[t]he main purpose behind the attorney-client privilege is to promote " 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " *Id.* at ¶ 16, quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The supreme court continued:

> Exposure of the information that is to be protected by attorney-client privilege destroys the confidentiality of possibly highly personal or sensitive information that must be presumed to be unreachable. *Taylor v. Sheldon*, 172 Ohio St. 118, 121, 173 N.E.2d 892 (1961). We have already recognized that an order compelling production of material covered by the attorney-client privilege is an example of that for which there is no effective remedy other than immediate appeal as contemplated by R.C. 2505.02(B)(4)(b). *[State v.] Muncie*, 91 Ohio St.3d [440,] 451, 746 N.E.2d 1092 (2001), citing *Cuervo v. Snell*, 10th Dist. Franklin Nos. 99AP-1442,

99AP-1443, and 99AP-1458, 2000 WL 1376510 (Sept. 26, 2000).

Id. at ¶ 25. "Any order compelling the production of privileged or protected materials certainly satisfies R.C. 2505.02(B)(4)(a) because it would be impossible to later obtain a judgment denying the motion to compel disclosure if the party has already disclosed the materials." *Id*. at ¶ 21.

{¶ 17} The Living Word Defendants claim that the trial court's order compelling production of electronically-stored information is not a final appealable order. They argue, generally, that *Burnham* does not make immediately appealable every discovery order challenged based on attorney-client privilege; The Living Word Defendants assert that, where the order did not determine the privilege issue, that issue has not yet been resolved for purposes of R.C. 2505.02(B)(4). As to the orders before us, The Living Word Defendants claim that the discovery order contemplates attorney-client communications and that emails that respond as hits to Barrow's attorneys' names would be culled out and provided only to Barrow's current counsel. The Living Word Defendants further claim that, consequently, the trial court's order did not require the immediate production of attorney-client communications to opposing counsel.

{¶ 18} In this case, Barrow's motion for reconsideration expressly argued that the trial court's order would result in the production of communications that are protected by attorney-client privilege. The trial court summarily rejected Barrow's argument and denied reconsideration. Barrow therefore has raised the attorney-client privilege issue below, and the trial court has expressly rejected his privilege claim. Upon a cursory review of the trial court's order, discussed in detail below, Barrow plausibly claims that the order does, in fact, breach the confidentiality guaranteed by the attorney-client

privilege. Notably, on its face, the order directs the expert to provide the results of its searches to counsel for both parties; it does not restrict disclosure to Barrow's current counsel or to the court for an in camera review. *Contrast Daher v. Cuyahoga Community College Dist.*, Ohio Slip Opinion No. 2018-Ohio-4462 (discovery order requiring disclosure of grand jury materials to the trial court for an in camera review did not grant a provisional remedy and, thus, was not a final appealable order). In accordance with *Burnham*, we conclude that the trial court's order compelling production and its denial of the motion for reconsideration satisfy R.C. 2505.02(B)(4)(b).

III. Motion to Compel

{¶ 19} Barrow raises two assignments of error, which we will address together:

> I. The trial court erred by ordering Mr. Barrow to permit the Living Word Defendants to search his email accounts so as to necessarily disclose privileged attorney-client communications and confidential information
>
> II. The trial court erred by ordering Mr. Barrow to permit the Living Word Defendants to search his email accounts after he already provided the requested discovery.

{¶ 20} "Ordinarily, a discovery dispute is reviewed under an abuse-of-discretion standard." (Citation omitted.) *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 13. If, however, the discovery dispute involves a question of privilege, "it is a question of law that must be reviewed de novo." *Ward* at ¶ 13; *Harvey v. Cincinnati Ins. Co.*, 2d Dist. Montgomery No. 27470, 2017-Ohio-9226, ¶ 7.

{¶ 21} The disputed discovery order states in full:

> Before the Court is Defendants' The Living Word – Dayton, M.

Patrick Murray, and Jackie Murray (the "Living Word Defendants") Motion to Compel Plaintiff Barrow to produce relevant electronically stored information in his possession, custody or control, namely emails and witness statements in their native electronic format. Having considered the arguments of the parties, the Court hereby ORDERS Plaintiff Barrow to provide all of his email account addresses and passwords to the Living Word Defendants' expert in electronically stored information ("ESI") so that the expert can download all of Mr. Barrow's emails with their attachments, *search them using search terms comprised predominantly of the names of Mr. Barrow's identified witnesses*, *and then produce to counsel for Mr. Barrow and counsel for the Living Word Defendants the emails and attachments found by the search terms.*

For two weeks following the production of the search results, *only counsel for Mr. Barrow and counsel for the Living Word Defendants will be permitted to review the search results.* During this two-week, attorneys' eyes only review period, counsel are to confer regarding any search results that may not be relevant to the claims or defenses in the case or likely to lead to the discovery of admissible evidence. If counsel are not able to resolve their concerns, any questionable emails are to be submitted to the Court for in camera review.

Further, Mr. Barrow is ORDERED to produce to the Living Word Defendants his 13 witness statements in their native format. The native format is the software format in which the email or witness statement was

> created. For instance, if a witness statement was created using Microsoft Word, then the native format would be Microsoft Word, not a pdf image version of the witness statement.
>
> The Living Word Defendants are to pay for the expenses associated with their ESI expert's download, search and production of Mr. Barrow's emails in native format.
>
> IT IS SO ORDERED.

(Emphasis added.)

{¶ 22} We conclude that the trial court's order compelling the production of electronically-stored information is overbroad and requires the disclosure of communications protected by attorney-client privilege. The plain language of the order belies The Living Word Defendants' repeated claim that the emails will be narrowed by the expert to prevent the disclosure of attorney-client communications. There is nothing in the order that requires the expert to narrow the search results by Barrow's attorneys' names. The order's statement that the emails would be narrowed by searching "predominantly" for the names of witnesses provides no instruction to the expert that he or she must cull the emails by the names of Barrow's current and former counsel. Although The Living Word Defendants may have intended the word "predominantly" to mean that the emails would be culled by Barrow's attorneys' names, we are constrained by the language of the order, which does not require, or even suggest, that emails including Barrow's attorneys' names must be separately identified. We note that, in arguing that the order contemplates and protects against disclosure of attorney-client communications, The Living Word Defendants cite to their memorandum in opposition to

Barrow's motion for reconsideration, not to any language in the trial court's order.

{¶ 23} Moreover, even if the order could be interpreted as requiring emails involving Barrow's attorneys to be culled (an interpretation we reject), the order does not require the expert to provide the culled emails only to Barrow's counsel for review during the two-week review period. To the contrary, the order states that the results of the expert's searches would be provided to counsel for *both* Barrow and The Living Word Defendants and that, for two weeks following the production of the search results, "only counsel for Mr. Barrow and counsel for the Living Word Defendants will be permitted to review the search results." While we have absolutely no doubts concerning the integrity of any of the current counsel, such disclosure does not protect arguably attorney-client communications from disclosure.

{¶ 24} Additionally, there is nothing in the order that expressly requires the expert to maintain the confidentiality of Barrow's emails. The Living Word Defendants proposed, and the court ordered, that Barrow's email account addresses and passwords be provided to *The Living Word Defendants'* expert in electronically-stored information, not to an independent expert designated by the court. And, the expert will be paid by The Living Word Defendants. While we do not suggest that an independent court-appointed expert is required, the court's order did not include any instruction expressly limiting disclosure by The Living Word Defendants' expert to The Living Word Defendants or anyone else, except as otherwise provided in the order. In the absence of such an instruction, neither Barrow nor the trial court would have any recourse against the expert for the improper release of electronically-stored information to The Living Word Defendants or anyone else.

{¶ 25} Barrow informed the trial court that most, if not all, of his communications with his attorneys occurred by email. The trial court's order provides no procedures to identify communications that may be protected by attorney-client privilege and to protect against the production of those communications by the expert directly to opposing counsel. In the absence of those protections, the order must be reversed. We decline to address whether the additional procedures identified by The Living Word Defendants in their memorandum in opposition to Barrow's motion for reconsideration and on appeal (which are not included in the trial court's order) would be adequate to protect Barrow from the production of attorney-client communications.

{¶ 26} Barrow's first assignment of error is sustained.

{¶ 27} Barrow further asserts that, regardless of whether the order was narrowly tailored to protect privileged communications, the trial court nevertheless erred in granting Defendant's motion to compel, because he had already provided the requested discovery. Barrow emphasizes that The Living Word Defendants have not claimed that he engaged in misconduct.

{¶ 28} Civ.R. 26(B)(1) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." As part of discovery, a party may request the production of electronically-stored information from another party. Civ.R. 26(B)(4); *Townsend v. Ohio Dept. of Transp*., 10th Dist. Franklin No. 11AP-672, 2012-Ohio-2945, ¶ 15. Specifically, Civ.R. 26(B)(4) provides:

> A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel

> discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the following factors when determining if good cause exists:
>
> (a) whether the discovery sought is unreasonably cumulative or duplicative;
>
> (b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;
>
> (c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and
>
> (d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.
>
> In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

{¶ 29} At this juncture, Barrow has provided hard copies of electronically-stored communications, and he has offered to forward those emails to The Living Word Defendants' counsel. Barrow has not claimed that the production of electronically-stored

information would impose an undue burden or expense. Although the trial court could have elected to adopt the proposal offered by Barrow concerning his production of electronically-stored emails, the trial court enjoys broad discretion in controlling discovery, including the manner of production of electronically-stored information. Significantly, electronically-stored information is necessarily limited to those items that can be forwarded to another individual. As stated in *Townsend*,

> " 'Contrary to popular belief, * * * computer data is not safe from disclosure merely because it has been "deleted" from a system or is contained in a damaged disk or hard drive. Using sophisticated computer programs, electronic mail messages or computer files thought to be deleted can be retrieved from the deep recesses of a computer data base long after they have disappeared from the screen.' " [*State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs*., 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 24], quoting Annotation, Discovery of Deleted E-mail and Other Deleted Electronic Records, 27 A.L.R.6th 565, 576, Section 2 (2007). In *Toledo Blade*, which involved public record requests, the Supreme Court of Ohio stated, at ¶ 28, that "[a]s long as [the deleted] e-mails are on the hard drives * * *, they do not lose their status as public records." The same rationale applies to the discoverability of deleted electronic information. *See Ameriwood Industries, Inc. v. Liberman*, E.D.Mo. No. 4:06CV524-DJS (Dec. 27, 2006). The *Ameriwood* court quoted the advisory committee notes to Fed.R.Civ.P. 26(f), as follows: " 'Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes

> referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image.’ ” The court allowed mirror imaging where, despite the defendants’ failed search for emails, deleted emails might have existed on the defendants' computers.

Townsend at ¶ 21.

{¶ 30} We cannot conclude that the trial court abused its discretion in determining, generally, that The Living Word Defendants’ motion to compel had merit and that the use of a third party expert was appropriate to ensure that all discoverable electronically-stored information was provided to The Living Word Defendants.

{¶ 31} Barrow’s second assignment of error is overruled.

IV. Conclusion

{¶ 32} The trial court’s order compelling production of electronically-stored information will be reversed, and the matter will be remanded for further proceedings.

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HALL, J. and TUCKER, J., concur.

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