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THE SELF-INCRIMINATION PRIVILEGE IN CIVIL DISCOVERY

Geldback Transport, Inc. v. Delay, 443 S.W.2d 120 (Mo. 1969)

Seeking to recover possession of its missing tractor, Geldback Transport brought a replevin action against Delay, a salvage yard operator, and Grassham Chevrolet, Co. At the time the action was filed, Grassham was in possession of the tractor, parts of which had been located by state police in several locations, including Delay's salvage yard, and had been collected under search warrants for storage with Grassham. Delay filed a cross-claim against Grassham for actual and punitive damages, alleging that Grassham was wrongfully interfering with his "lawful right of possession" by withholding return of the vehicle. Both the plaintiff, who had since dismissed Delay as a defendant, and Grassham served interrogatories on Delay seeking information relative to his initial acquisition of the vehicle. Claiming a privilege from self-incrimination, Delay refused to answer the interrogatories.[1] Based on this refusal, Grassham moved for, and was granted, a dismissal of the cross-claim. On appeal to the Missouri Supreme Court, the trial court's dismissal was affirmed. *Held*: If a cross-claimant refuses, on grounds of self-incrimination, to answer material interrogatories of an opposing party, the trial court may penalize such exercise by dismissal, with prejudice, of the cross-claimant's cause of action.[2]

The court, adopting a "you can't have the cake and eat it too" approach, reasoned that a party should not be permitted to seek affirmative relief in a civil action if unwilling, for whatever reason, to answer material interrogatories regarding the basis of the claim he put in issue. The court ruled that, by placing the basis of a claim in issue on his cross-claim, Delay "waived" any right to exercise the privelege prior to trial without penalty.[3] The court further supported its position by holding that, notwithstanding any imputed "waiver," a party in the position of a plaintiff in a civil action has no constitutional right to an unfettered exercise of the privilege against self-incrimination.[4]

Geldback is not the first Missouri decision to impute a waiver of the

1 The *Geldback* case does not present, therefore, the problem of a party refusing to answer only certain interrogatories. As regards that problem, *see generally* Brown v. United States, 356 U.S. 148 (1958); Comment, *The Privilege Against Self-Incrimination in Civil Litigation*, 1968 U. ILL. L.F. 75; Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 VA. L. REV. 322 (1966).

2 Geldback Transport, Inc. v. Delay, 443 S.W.2d 120 (Mo. 1969).

3 *Id* at 121-22.

4 *Id.* at 121.

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self-incrimination privilege in a civil action. As authority for its decision, *Geldback* cites *Franklin v. Franklin*,[5] a divorce action wherein plaintiff, on self-incrimination grounds, refused to answer pertinent interrogatories concerning her previous marriage. *Franklin* held that, while the plaintiff may properly refuse to answer, "her action must be judged in the same manner and by the same rules as though she had refused to answer any other pertinent written or oral interrogatories."[6] The exercise of her constitutional privilege thus justified imposing a penalty on her—striking her pleading in this case. *Franklin* held, in effect, that by putting certain matters in issue and bringing the action, the plaintiff waived any right to exercise the privilege free of penalty. This approach was based on other Missouri cases imputing similar waivers of evidentiary privileges, such as the patient-physician privilege.[7]

The distincion between common law or statutory evidentiary privileges and the fifth amendment privilege against self-incrimination is, however, apparent. Equation for waiver purposes cannot, therefore, be made without some conceptual difficulty. Consequently, imputed waivers have not been uniformly justified in other jurisdictions when trial court penalties imposed for exercise of the self-incrimination privilege have been challenged. Several jurisdictions have affirmed the imposition of a penalty through an "affirmative relief" test. The key under this test is whether the party claiming the privilege has brought the questions into issue by asserting a claim or an affirmative defense. If so, refusal to respond during discovery or at trial invites some form of sanction by the trial court.[8] Other courts have labeled their theory a "fairness" test, asserting that it is unfair for the privilege to be used as a "sword" to prevent an opposing party from discovering information material to his claim or defense.[9] *Geldback*, utilizing both theories

5. 365 Mo. 442, 283 S.W.2d 483 (1955).

6. *Id.* at 447, 283 S.W.2d at 486.

7. *E.g.*, State *ex rel.* McNutt v. Keet, 432 S.W.2d 597 (Mo. 1968) (auto accident claim wherein plaintiff, though alleging injury, refused to produce medical records at discovery—the privilege was held to be waived by the assertion of the bodily injury claim); State v. Swinburne, 324 S.W.2d 746 (Mo. 1959) (a criminal case wherein defendant asserted an insanity defense—the privilge against revealing pertinent information was held to be waived by placing sanity in issue); State *ex rel.* Kansas City Pub. Serv. Co. v. Cowan, 356 Mo. 674, 203 S.W.2d 407 (1947) (a party seeking court relief waives any privilege relative to the basis for such relief).

8. *E.g.*, Stockham v. Stockham, 168 So. 2d 320 (Fla. 1964); Annest v. Annest, 49 Wash. 2d 62, 298 P.2d 483 (1956).

9. *E.g.*, Independent Prod. Corp. v. Loew's, Inc., 22 F.R.D. 266 (E.D. N.Y. 1958); Christenson v. Christenson, 281 Minn. 507, 162 N.W.2d 194 (1968); Levine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S.2d 574 (1958), *aff'd mem.*, 7 App. Div. 2d 995, 183 N.Y.S.2d 868, *aff'd mem.*, 6 N.Y.2d 892, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1959).

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without distinguishing between them, apparently considered the tests identical. Although fewer in number, several jurisdictions have decided discovery-privilege confrontations with what is characterized as a "balancing" test. As is apparent from the title, this test, unlike either the "affirmative relief" or "fairness" doctrine, does not lead to automatic results. Instead, the "balancing" requires a court to measure the constitutonal value of an unfettered exercise of the privilege against costs to the opposing parties through their loss of discovery.[10]

Just as courts have used different tests in deciding who should be penalized, and when, for exercising the privilege against self-incrimination, they have empoyed a wide range of sanctions when a penalty is ruled appropriate: the opposing party has been allowed to comment on the claimant's use of the privilege;[11] other courts have permitted an adverse inference to be drawn by the jury;[12] part,[13] or all,[14] of a party's pleadings have been striken; and, courts have granted summary judgment upon refusal to answer pertinent questions.[15] While courts have commonly used dismissal of the party's action with prejudice as a sanction, at least one court has taken a more moderate approach, dismissing without prejudice,[16] thereby allowing him to bring suit on the same cause of action at a later date if changed circumstances relieve the party from his self-imposed silence.

Geldback merely affirms the trial court's dismissal with prejudice of Delay's cross-claim. The court's earlier decision, *Franklin v. Franklin*, made clear that the cross-claimant's privileged refusal to respond to interrogatories should be treated in the same manner and by the same rules as an unprivileged refusal to answer. In this regard, the Missouri Rules of Civil Procedure permit the trial court wide discretion in the selection of sanctions to be imposed when a party refuses to answer pertinent interrogatories. Rule 61.01 (b) provides for the imposition of such orders as are *just* if the party refuses to obey a court order to

10. *E.g.*, Laverne v. Laurel Hollow, 18 N.Y.2d 635, 219 N.E.2d 294, 272 N.Y.S.2d 780 (1966), *appeal dismissed*, 386 U.S. 682 (1967).

11. *E g.*, Morris v. McClellan, 154 Ala. 639, 45 So. 641 (1908).

12. *E g.*, Ikeda v. Curtis, 43 Wash. 2d 449, 261 P.2d 684 (1953).

13 Annest v. Annest, 49 Wash. 2d 62, 298 P.2d 483 (1956).

14. Rubenstein v. Kleven, 150 F. Supp. 47 (D. Mass. 1957).

15. *E.g.*, Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141 (W.D. Wis. 1968), *aff'd*, 416 F 2d 967 (7th Cir. 1969); Bauer v. Stern Furniture Co., 169 N.W.2d 850 (Iowa 1969), *cert. denied*, 396 U.S. 1008 (1969).

16 *E.g*, Zaczek v. Zaczek, 20 App. Div. 2d 902, 249 N.Y.S.2d 490 (194).

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respond at the discovery stage.[17] The court may order the disputed questions to be taken as established in accordance with the claim of the moving party, strike out part or all of the pleadings, dismiss, render a default judgment or perhaps do nothing at all. Speaking of this discretion, the court, in *State ex rel. N. W. Electric Power Cooperative v. Buckstead*,[18] stated: ". . . the authorization [provided in 61.01(b)] is not mandatory, but rather permissive. It says 'may' and does not say 'shall'. We believe, too, that broad discretion is left to the court . . . ."[19] Rule 61.01 (d) states the sanctions that may be imposed for wilful failure to comply. Its language too is permissive, implying the same "broad discretion" given the courts in Rule 61.01 (b).[20]

Franklin's implementation of these discretionary rules, which direct the trial court to impose such remedies as are "just", suggests that the court was flirting with a subtle "balancing" test. *Geldback*, however, suggests that the court has now decided to follow an automatic dismissal

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17. Mo. R. Civ. P. 61.01 (b) provides:

> If any party . . . refuses to obey any order made under paragraph (a) of this Rule requiring him to answer designated questions, or an order made under Rule 58 to produce any document or other thing for inspection, copying or photographing, or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 60, requiring him to submit to a physical or mental examintion, *the court may make such orders in regard to the refusal as are just*, and among other the following:
>
> (1) An order that the matters regarding which the questions were asked or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;
>
> (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;
>
> (3) An order striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. (Emphasis added)

18. 399 S.W.2d 622 (Mo. App. 1966).

19. *Id.* at 625. *See also In re* M ___ & M ___, 446 S.W.2d 508 (Mo. App. 1969) which states:

> Rule 61.01 (b) is not by its terms mandatory, but discretionary, for it provides that as a consequence of a party's refusal to obey a discovery order "the court may" (not "shall") make such orders as are just, including the striking of his pleadings or the rendering of a judgment against him by default. Whether the court makes or refuses to make such an order under the rules is within the discretion of the trial court in the first instance. Nevertheless that discretion must be applied with wisdom and justice.

Id. at 513.

20. The pertinent language states: ". . . the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party." Mo. R. Civ. P. 61.01 (d).

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rule under the "affirmative relief" doctrine. Thus, because the cross-claim placed Delay in the position of a plaintiff, his voluntary exercise of the privilege *required* the trial court to dismiss his claim with prejudice. The inflexibility of this result for parties in the position of a plaintiff was apparently thought by the court to follow as the logical reverse of those cases which have refused to impose any penalty for the exercise of the privilege by parties in a defensive posture.[21] Those cases have reasoned that fairness dictates that a party involuntarily brought into a claim should not be penalized for the exercise of a constitutional privilege.

Several recent Supreme Court decisions suggest that the constitutional concept of "fairness", due process, mandates that parties in a defensive posture be allowed to exercise the privilege without hindrance or penalty. For example, the Court stated in *Malloy v. Hogan*[22] that: "The fourteenth amendment secures against state invasion the same privilege that the fifth amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no *penalty* . . . for such silence."[23]

The following year, in *Griffin v. California*,[24] the Court invoked the "penalty" language from *Malloy* to justify its decision to overturn a conviction of murder. During the trial, the failure of the accused to testify was commented upon by both the prosecuting attorney and the court in its instructions. The Court held that the fifth amendment forbids such comment on the refusal to testify in a criminal case. "It is a penalty imposed by courts for exercising a constitutional privlege. It cuts down on the privilege by making its assertion costly.[25]

In two cases decided in 1967,[26] the Court found the threat of discharge and the sanction of disbarment to be penalties imposed for exercising the privilege and remaining silent. In *Spevack v. Klein*, the Court restated the *Griffin* language, explaining that the ". . . penalty is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, the imposition of any sanction which makes assertion of the fifth

21 *See, e.g.*, United States v. Second Nat'l Bank, 48 F.R.D. 268 (D. N.H. 1969); Abbate v. Nolan, 228 So. 2d 433 (Fla. Dist. Ct. App. 1969); Abramorvitz v. Voletsky, 47 Misc.2d 626, 262 N.Y.S 2d 991 (1965); Barbato v. Tuosto, 38 Misc.2d 823, 238 N.Y.S.2d 1000 (1963); McKelvey v. Freeport Housing Auth., 29 Misc.2d 140, 220 N.Y.S.2d 628 (1961).

22. 378 U.S. 1 (1964).

23 *Id.* at 8.

24 380 U.S. 609 (1965).

25 *Id.* at 614.

26 Spevack v. Kelin, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967).

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amendment privilege 'costly'."[27] Since it can be argued that the imposition of any sanction on a valid claim of privilege would be "costly", the Court could hold unconstitutional any sanctions currently imposed on any parties who exercise the privilege.

Geldback reasoned, however, that the Supreme Court intended to decide only those situations presented—that is, defendants in criminal cases or non-party witnesses, called to testify at the behest of a governmental agency.[28] Thus, while there is persuasive authority for the proposition that no penalty can be imposed on a defendant who exercises his privilege against self-incrimination, courts have used equally persuasive reasoning, without express Supreme Court contradiction, to justify the imposition of sanctions on a plaintiff or one who is in the position of a plaintiff in a civil action.[29] It is, however, a *non-sequitur* to reason, as *Geldback* may seem to imply, that, because a party in the position of a plaintiff should not be constitutionally protected on his exercise of the privilege, he should therefore be automatically dismissed out. In fact neither the "affirmative relief" or "fairness" tests nor the "balancing" test was designed to determine *what* penalty should attach to the exercise, but only whether *any* penalty is merited. This was the approach taken by the Missouri Supreme Court in *Franklin*.

Geldback, however, is based on circumstances which make it unnecessary to segregate those separate issues. In *Geldback*, the appellant cross-claimant was refusing to reveal during the discovery stage those elements of his case which would have to be revealed at trial in order to recover. Thus, Delay was claiming only a *limited* privilege of silence *until* trial. This claimed limited privilege seemingly does not call for the weighing or analysis of interests which *Spevack* arguably commands, primarily because an exercise of the privilege in this context is more an avoidance of discovery than self-incrimination. Delay

27. 385 U.S. 511, 515 (1967).

28. Geldback Transport, Inc. v. Delay, 443 S.W.2d 120, 121 (Mo. 1969).

29. The reasoning of the New York court in *Levine v. Bornstein* is representative of that in all those cases. 13 Misc.2d 161, 174 N.Y.S.2d 574 (1958). In *Levine*, plaintiff brought an action on assigned judgments and defendant sought to develop the affirmative defense of illegality. Plaintiff refused to answer questions, at a pre-trial examination, pertinent to the defense. In ordering dismissal of plaintiff's cause of action the court noted that the privilege

> . . . had always been claimed by a non-party witness or a defendant in court involuntarily, seeking only to defend. It does not follow that the protection of the privilege should be expanded to shield a plaintiff who with one hand seeks affirmative relief in court and with the other refuses to answer otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action.

13 Misc.2d at 163, 174 N.Y.S.2d at 577.

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eventually had to reveal the information he sought to keep secret or else be subject to a dismissal at the close of his case. This distinction, albeit unexpressed by the court, explains *Geldback's* affirmation of an automatic penalty of dismisal with prejudice. *Geldback* can be read as a rejection of the flexible "balancing" test approach for discovery-privilege confrontations. Closer consideration of the Missouri Supreme Court's decision, however, suggests that *Franklin* remains intact. Under *Franklin*, unlike *Geldback*, the trial court in a discovery-privilege dispute may weigh a large number of factors before selecting the most appropriate penalty for the privileges exercise. This flexible approach will best assure a *just* sanction for the exercise under the wide variety of circumstances which can occur, and, in addition, leaves room for consideration of the constitutional origin of the privilege being asserted.

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