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Evidence—Procedure—Discovery Not Permitted of Photographs Taken Immediately After Accident

Admitting the necessity for a reformation, or at least a control, of our law enforcement methods, the writer cannot help but conclude that judicial legislation on a principle repeatedly rejected by the legislature is not the answer. It is the writer's position that the view taken by the Missouri courts that illegal detention has no place in the test of voluntariness is correct.

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COMMENTS

EVIDENCE—PROCEDURE—DISCOVERY NOT PERMITTED OF PHOTOGRAPHS TAKEN IMMEDIATELY AFTER ACCIDENT

State ex rel. *Terminal Ry. Assn. of St. Louis v. Flynn*, 257 S.W. 2d 69 (Mo. 1953)

Davis sued relator for injuries sustained in an accident which occurred while he was employed by relator. By a pre-trial motion Davis sought discovery of four photographs that had been taken by one of relator's claim agents immediately after the accident. The motion for discovery was sustained by the trial court. Relator brought an original proceeding in prohibition in the Missouri Supreme Court to prevent the issuance of the order. The court granted prohibition and held that the photographs were exempt from discovery because they constituted a privileged communication made by an agent not in the regular course of business but in preparation for the defense of reasonably anticipated litigation.[1]

A litigant will not be forced to produce a document for discovery if at the trial he could refuse to disclose its contents on the ground that it would violate the attorney-client privilege.[2] The fact that a client has given his lawyer a document will not be sufficient in itself to make the document exempt from discovery. As Professor Wigmore points out, the lawyer is not being asked to testify as to what his client

1. State *ex rel.* Terminal Ry. Assn. of St. Louis v. Flynn, 257 S.W.2d 69 (Mo. 1953). The court order was issued pursuant to MO. REV. STAT. § 510.030 (1949):

> Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may
>
> (1) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control . . . .

For an excellent discussion of discovery procedure in Missouri, see Crawford, *Written Interrogatories to Parties Under the Missouri Code*, 1953 WASH. U.L.Q. 1.

2. State *ex rel.* Chicago, R. I. & P. R.R. v. Woods, 316 Mo. 1032, 292 S. W. 1033 (1927); *In re* Hyde, 149 Ohio St. 407, 79 N.E.2d 224 (1949); Cully v. Northern Pac. R.R., 35 Wash. 241, 77 Pac. 202 (1904).

told him, but is only being asked to produce a physical object, the document itself.[4] The lawyer can refuse to produce the document only if his client could claim that the document is a privileged communication.[4] Unless the document was intentionally prepared by the client as a communication to the lawyer it is not a confidential communication and the client has no privilege.[5] A document prepared by the client's agent is privileged only if it was prepared as an aid in securing legal advice and not as an ordinary business record.[6]

There is a split of authority as to whether an accident report is privileged when it is made by an agent immediately after an accident before legal advice is sought or litigation is threatened. Some courts have held that such a report is privileged because it was prepared in reasonable anticipation of litigation.[7] Other courts, including the federal courts (reflecting their liberal discovery policy), have held that these facts alone do not establish any privilege.[8] The party claiming the privilege has the burden of proving that the report was prepared for the bona fide purpose of being sent to an attorney for advice and that it was not prepared as an ordinary business record.[9] The fact that it was prepared after an accident and that the agent might have had some suspicion that litigation might result is not sufficient to establish the privilege; the preparation might have been part of the usual business routine intended for use as data for statistical studies or to fill out required accident reports for the government.[10]

In addition to the exemption given to confidential communications, there is a recent trend toward the exemption from discovery of material that was compiled in the actual preparation of a client's case. The Supreme Court of the United States, in *Hickman v. Taylor*,[11] held that in addition to the exemption of privileged communications a

3. 8 WIGMORE, EVIDENCE § 2307 (3d ed. 1940).

4. Andrews v. Ohio & Mississippi R.R., 14 Ind. 169 (1860); Jones v. Reilly, 174 N.Y. 97, 66 N.E. 649 (1903); *In re* Keough, 151 Ohio St. 307, 85 N.E.2d 550 (1949).

5. 8 WIGMORE, EVIDENCE § 2307 (3d ed. 1940).

6. Wise v. Western Union Telegraph Co., 36 Del. 456, 178 Atl. 640 (1935); Robertson v. Commonwealth, 181 Va. 520, 25 S.E.2d 352 (1943).

7. New York Casualty Co. v. Superior Court of San Francisco, 30 Cal. App. 2d 130, 85 P.2d 965 (1938); Atlantic Coast Ry. v. Williams, 21 Ga. App. 453, 94 S.E. 584 (1917); *In re* Keough, 151 Ohio St. 307, 85 N.E.2d 550 (1949).

8. Kulich v. Murray, 28 F. Supp. 675 (S.D.N.Y. 1939); Wise v. Western Union Telegraph Co., 36 Del. 456, 178 Atl. 640 (1935); Robertson v. Commonwealth, 181 Va. 520, 25 S.E.2d 352 (1943).

9. Wise v. Western Union Telegraph Co., 36 Del. 456, 178 Atl. 640 (1935); State *ex rel.* Terminal Ry. Assn. v. Flynn, 257 S.W.2d 69 (Mo. 1953); Robertson v. Commonwealth, 181 Va. 520, 25 S.E.2d 352 (1943).

10. Robertson v. Commonwealth, 181 Va. 520, 25 S.E.2d 352 (1943). See Morgan, *Law of Evidence, 1941-45*, 59 HARV. L. REV. 490, 566 (1946), where he criticizes the holding in Palmer v. Hoffman, 318 U.S. 109 (1943), that carrier reports required by law were not made in the course of normal employment and therefore did not fall under the business record exception to the hearsay rule.

11. 329 U.S. 495 (1947).

special exemption from discovery should be given to the work product of an attorney in the preparation of his case. This exemption, unlike the one accorded confidential communications, is conditional and does not apply if the party requesting discovery can show special hardship.

The Missouri Supreme Court has held that only evidence admissible at trial is open to discovery, and that evidence subject to objection is exempt.[12] In *State* ex rel. *Miller's Mutual Fire Ins. Co. v. Caruthers*,[13] the Missouri Court adopted the theory of the *Hickman* case and held that the special exemption given to the work product of the lawyer extends to the work of claim agents when they are aiding in the preparation of a case.

It is not clear whether the principal case was decided on the basis that the photographs were a privileged communication or on the basis that they were the work product of an agent in preparation for litigation. The opinion included both a discussion of privileged reports not made in the normal course of business and also a citation to the *Caruthers* case as a precedent in Missouri for exemption of evidence under the theory of the *Hickman* case. The *Caruthers* case was concerned with exempting evidence from discovery that did not constitute a privileged communication. Once the court in the principal case had decided that the agent was not acting in the normal course of business and that the photographs were exempt as a privileged communication, there was no need to invoke the special exemption found in the *Caruthers* case. Moreover there was no indication in the opinion in the principal case that discovery would be allowed even if special hardship were shown. This limitation is an essential element of the *Hickman* concept but is inapplicable to privileged communications. It is therefore submitted that the court actually exempted the photographs from discovery as confidential communications, not as the work product of the lawyer.

By this decision the Supreme Court of Missouri has thus restricted discovery, at least in the case of railway agents' reports.[14] It is sug-

12. State *ex rel.* Miller's Mutual Fire Ins. Co. v. Caruthers, 360 Mo. 8, 226 S.W.2d 711 (1950); State *ex rel.* Kansas City Public Service Co. v. Cowan, 356 Mo. 674, 203 S.W.2d 407 (1947); State *ex rel.* Thompson v. Harris, 355 Mo. 176, 195 S.W.2d 645 (1946). See Crawford, *supra* note 1, at 11, where the writer advocates the more liberal federal rule which would permit discovery of any evidence that might be admissible evidence, FED. R. CIV. P. 26 (b). (This rule does not affect the exemption of privileged communications.)

13. 360 Mo. 8, 226 S.W.2d 711 (1950). The federal courts have not seen fit to extend any special exemption to the work of agents. Hughes v. Pennsylvania R.R., 7 F.R.D. 737 (E.D.N.Y. 1948). See Note, 62 HARV. L. REV. 269 (1948), where it is suggested that the exemption has not been extended to agents because the courts have felt that discovery is not the same deterrent to their investigations that it might be to a lawyer. Florida has exempted agents' reports from discovery. Sea Board Air Line v. Timmons, 61 So.2d 426 (Fla. 1952).

14. See note 7 *supra*.

gested that this is an unfortunate step backward in view of the modern trend towards greater discovery, and the fact that one of the purposes underlying this trend has been to equalize the opportunities of large corporate defendants and less pecunious plaintiffs to obtain the facts needed to present their respective cases.[15]

TORTS—WRONGFUL DEATH ACTIONS—PRENATAL INJURIES
Steggall v. Morris, 258 S.W.2d 577 (Mo. 1953)

A car negligently operated by the defendant collided with the car of a pregnant woman. The child was born alive but subsequently died as a result of injuries allegedly sustained in the accident. Suit was brought against the defendant under the Missouri "wrongful death" statute.[1] The trial court dismissed the case for failure to state a cause of action. The Supreme Court of Missouri reversed and held that since a child may maintain a suit for negligently caused injuries received while viable and *en ventre sa mere*, under the statute the representatives of the child may recover where the injury results in death.[2]

Most courts do not allow recovery for the negligent injury of an unborn child.[3] In the leading case of *Dietrich v. Inhabitants of Northampton*,[4] Mr. Justice Holmes, denying recovery for prenatal injuries, reasoned that the unborn child is part of the mother, that the mother can recover for injuries not too remote, and that therefore the child need not recover. Other reasons which have been advanced for the denial of recovery are: that there is no person in existence to whom a duty could be owed at the time of the accident;[5] that to allow recovery would increase the probability of false claims;[6] that there was no common law right of action, and the right, if created, should arise

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15. Martin v. Lingle Refrigeration Co., 260 S.W.2d 562 (Mo. 1953). This recent case apparently cited the principal case as holding that the photographs were exempt as a privileged communication.

1. MO. REV. STAT. § 537.080 (1949):
Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, *and in every such case*, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. [Italics added.]

2. Steggall v. Morris, 258 S.W.2d 577 (Mo. 1953).

3. RESTATEMENT, TORTS § 869 (1939): "A person who negligently causes harm to an unborn child is not liable to such child for the harm." See 12 MD. L. REV. 223, 224 (1951), for an enumeration of the few jurisdictions which allow recovery.

4. 138 Mass. 14 (1884).

5. PROSSER, TORTS 188-190 (1941).

6. Bliss v. Passanesi, 95 N.E.2d 206 (Mass. 1950).