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Affirmative Defenses and the Fifth Amendment--Both Sword and Shield in Missouri

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Recent Cases

AFFIRMATIVE DEFENSES AND THE FIFTH AMENDMENT – BOTH SWORD AND SHIELD IN MISSOURI

State ex rel. Pulliam v. Swink[1]

Defendant was involved in an automobile collision in which the driver of the other vehicle was killed. The wife of the deceased filed suit for the wrongful death of her husband. Defendant's answer generally denied the plaintiff's allegations and asserted contributory negligence as a defense. Both parties appeared at the appointed time for the taking of depositions. The plaintiff's deposition was taken first and she answered all questions. The defendant was then sworn and plaintiff's counsel began to take his deposition. The defendant gave only his name and address and thereafter refused to answer any questions on the ground that to do so might incriminate him. At trial, the plaintiff moved to strike the defendant's answer pursuant to section 491.180, RSMo 1969, which provides:

> If a party, on being duly summoned, refuse [sic] to attend and testify, either in court or before any person authorized to take his deposition, besides being punished himself as for a contempt, his petition, answer or reply may be rejected, or a motion, if made by himself, overruled, or, if made by the adverse party, sustained.

The trial judge indicated his intention to sustain the plaintiff's motion. The defendant sought and obtained a preliminary writ of prohibition from the Missouri Court of Appeals, St. Louis District. The writ was transferred to the Supreme Court of Missouri where it was made permanent. The court held that where a defendant seeks no affirmative relief and makes a good faith assertion of his constitutional privilege to remain silent at the first opportunity, a trial court would exceed its jurisdiction if it entered an order striking the defendant's answer.

Although in both the United States and the Missouri constitutions the privilege against self-incrimination is phrased in terms of criminal proceedings, the privilege is available to witnesses in both criminal and civil actions.[2] Generally speaking, a penalty may not be imposed against a party who makes a valid assertion of this privilege.[3] However, a majority of

1. 514 S.W.2d 559 (Mo. En Banc 1974).

2. For a general discussion as to the scope and problems of the privilege, see 8 J. WIGMORE, EVIDENCE §§ 2254-66 (McNaughton rev. 1961); *see also* State *ex rel.* North v. Kirtley, 327 S.W.2d 166 (Mo. En Banc 1959); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

3. Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Malloy v. Hogan, 378 U.S. 1 (1964). In none of these cases was the party seeking any affirmative relief or asserting any affirmative defenses.

jurisdictions[4] have refused to allow either a plaintiff[5] or defendant[6] to obtain affirmative relief while refusing to testify on matters which, if known, might bar the granting of such relief. The rationale behind this approach is that the fifth amendment was not intended to be "both a sword and a shield."[7]

Under this reasoning, the privilege against self-incrimination is analogous to the doctor-patient privilege. A patient has the right to prevent his physician from testifying;[8] however, this privilege is waived if the patient files a suit for personal injuries because such a suit places the patient's physical condition in issue.[9] Similarily, if a party's cause of action is based on facts peculiarly within his knowledge, that party waives the privilege against self-incrimination as to these facts when he seeks such affirmative relief.[10] The *Pulliam* court endorsed this reasoning, saying: "It is not unfair to preclude one who invokes the assistance of the courts from recovery when he refuses to produce evidence peculiarly within his knowledge pertinent to his right to recover."[11] The question to be pursued by this note is whether asserting an affirmative defense constitutes "invoking the assistance of the courts."

Some courts have refused to allow the assertion of an affirmative defense by a defendant who invokes the fifth amendment in connection with the proceedings. In *Rubenstein v. Kleven*[12] an unmarried woman brought an action against a married man for breach of a contract under which the plaintiff was to render companionship and other services to the defendant. The defendant's answer asserted the illegality of the alleged contract as a defense. At deposition, the defendant asserted the privilege against self-incrimination in response to certain questions to which an affirmative answer might have indicated adultery. The United States District Court of Massachusetts held that the defendant could not assert the affirmative defense of illegality, based on a criminal act involving himself, while claiming the privilege against self-incrimination. The court said further

4. *See generally* Annot., 4 A.L.R.3d 545 (1965).

5. Stockham v. Stockham, 168 So.2d 320 (Fla. 1964); Minor v. Minor, 232 So. 2d 746 (Fla. Ct. App. 1970); Franklin v. Franklin, 283 S.W.2d 483 (Mo. En Banc 1955); Schrad v. Schrad, 186 Neb. 462, 183 N.W.2d 923 (1971); Levine v. Bornstein, 6 N.Y.2d 462, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1959); *see also* Note, 28 FORDHAM L. REV. 537 (1959); Note, 107 U. PA. L. REV. 426 (1959), both noting the *Levine* case.

6. Brown v. United States, 356 U.S. 148 (1958), *reh. den.*, 356 U.S. 948 (1958); Nuckols v. Nuckols, 189 So. 2d 832 (Fla. Ct. App. 1966); Berner v. Schlesinger, 175 N.Y.S.2d 579 (1957); Annest v. Annest, 49 Wash. 2d 62, 298 P.2d 483 (1956).

7. *See generally* Independent Products Corp. v. Lowe's, Inc., 22 F.R.D. 266, 277 (S.D.N.Y. 1958); Annot., 4 A.L.R.3d 545 (1965); Annot., 72 A.L.R.2d 818 (1960).

8. § 491.060, RSMo 1969.

9. State *ex rel.* McNutt v. Keet, 432 S.W.2d 597, 601 (Mo. En Banc 1968).

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

11. 514 S.W.2d at 561.

12. 150 F. Supp. 47 (D. Mass. 1957).

that the defendant could not use "the testimony of any witness" or establish that the acts occured "simply by inference" while claiming the privilege against self-incrimination.[13]

The United States Court of Appeals for the Eighth Circuit recently upheld the dismissal with prejudice of a defendant's affirmative defenses and counterclaims where the defendant had refused to answer interrogatories on the ground that to do so might incriminate him.[14] The decision was based on a finding of bad faith on the part of the defendant, but the following language indicates the court's position in relation to the invocation of the fifth amendment by a party asserting an affirmative defense:

> [T]he right to assert the privilege does not, *a priori,* free the claimant of the responsibility to respond in pre-trial discovery when information sought bears upon the claimant's own counterclaim and *affirmative defenses.*[15]

In *Pulliam* the Missouri Supreme Court discussed and expressly affirmed[16] *Franklin v. Franklin.*[17] *Franklin* was a divorce case in which the plaintiff wife, relying on the fifth amendment, refused to answer written interrogatories regarding the status of her previous marriage. This refusal was held to justify striking her pleadings. The court recognized her right to assert the privilege, but said she may not by virtue of that privilege obtain affirmative relief.[18]

The *Pulliam* court also expressly affirmed[19] *Geldback Transport, Inc. v. Delay.*[20] *Geldback* was a replevin action against two defendants wherein one defendant cross-claimed alleging that he was entitled to possession of the chattel in question. His co-defendant sought by interrogatories to discover how and from whom this right to possession was obtained. Following the cross-claimant's refusal to answer on the ground that to do so might incriminate him, the trial court dismissed the cross-claim. The appellate court affirmed the dismissal on the basis that a party should not be allowed to seek affirmative relief without disclosing the basis of his claim.[21]

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13. *Id.* at 48.

14. General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204 (8th Cir. 1973). The dismissal was based on FED. R. Civ. P. 37 (b) (2), which provides:

> [T]he court in which the action is pending may make such orders in regard to a failure to obey an order to provide discovery as are just, and among others the following:
>
> . . . .
>
> C. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

15. 481 F.2d at 1213 (emphasis added).
16. 514 S.W.2d at 561.
17. 283 S.W.2d 483 (Mo. En Banc 1955).
18. *Id.* at 485.
19. 514 S.W.2d at 561.
20. 443 S.W.2d 120 (Mo. 1969).
21. *Id.* at 121.

The affirmation of *Franklin* and *Geldback* by the *Pulliam* court maintained the long-standing position of the Missouri Supreme Court that if the privilege against self-incrimination is asserted by a party seeking affirmative relief, the trial court may strike that party's pleadings.[22] The application of this statutory sanction[23] is generally held to be within the discretion of the trial court, to be reversed only in cases of clear abuse.[24] Such a striking is not a violation of due process.[25] The importance of *Pulliam* is that implicit in the court's decision is the concept that a party is not "invoking the assistance of the courts" when he asserts an affirmative defense. *Pulliam* stands for the proposition that a party in Missouri can both plead an affirmative defense and invoke the fifth amendment during all phases of the proceeding. As pointed out by the dissenting opinion of Judge Finch,[26] the majority's refusal to equate an affirmative defense with affirmative relief is open to criticism.

The defendant in *Pulliam* not only denied his own negligence, but also asserted that the plaintiff's deceased was negligent. Contributory negligence is an affirmative defense[27] with the burden of proof on the defendant.[28] The existence of contributory negligence on the part of the plaintiff is a complete bar to his recovery.[29] Assuming that the defendant in *Pulliam* was in fact negligent, there arose in the plaintiff a right of action, such right being the personal property of the plaintiff.[30] Assume also that, in the absence of contributory negligence, a jury would award damages of $50,000, thereby assigning a dollar value to his "property." If the defendant is successful in establishing a defense of contributory negligence, the plaintiff will be unable to collect any of this claim. As a practical matter, the defendant is seeking affirmative relief from the court in the full amount of plaintiff's claim. If the defendant was seeking a set-off of all or part of plaintiff's claim via a counterclaim, and at the same time asserting a privilege against self-incrimination as to some element of his counterclaim, the court would deny him this affirmative relief.[31] Yet, the court in *Pulliam* said that absent some bad faith or waiver on the part of the defendant, a trial court would exceed its jurisdiction by striking the affirmative defense of contributory negli-

22. Franklin v. Franklin, 283 S.W.2d 483 (Mo. En Banc 1955).
23. § 491.180, RSMo 1969.
24. Graveman v. Huncker, 139 S.W.2d 494 (Mo. 1940); Frankel v. Hudson, 271 Mo. 495, 196 S.W. 1121 (1917); State v. Buckstead, 399 S.W.2d 622 (K.C. Mo. App. 1966); State v. Reagan, 382 S.W.2d 426 (St. L. Mo. App. 1964); Kaiser v. Gardiner, 211 S.W. 883 (St. L. Mo. App. 1919); Dustin v. Farrelly, 81 Mo. App. 380 (1899).
25. Miles v. Armour, 239 Mo. 438, 144 S.W. 424 (1912).
26. 514 S.W.2d at 562.
27. FED. R. CIV. P. 8 (c); MO. SUP. CT. R. 55.10.
28. MO. APPR. INST. §§ 32.01-.06 (1969).
29. W. PROSSER, THE LAW OF TORTS § 65 at 425 (4th ed. 1971).
30. *See generally* C.J.S. *Property* § 9 at 175; Clark v. Baker, 186 Ga. 65, 196 S.E. 750 (1938); Cincinnati v. Hafer, 49 Ohio St. 60, 30 N.E. 197 (1892).
31. Geldback Transport, Inc. v. Delay, 443 S.W.2d 120 (Mo. 1969).