

IN THE MISSOURI SUPREME COURT

SC90676

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STATE EX REL. LAWRENCE J. FLEMING,

Relator,

Vs.

THE HONORABLE DALE W. HOOD

Respondent.

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On Petition for Writ of Prohibition  
From St. Louis County  
Circuit Court No. 2106AC-11227

Honorable Dale W. Hood, Judge Presiding

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RESPONDENT THE HONORABLE DALE W. HOOD'S BRIEF

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Seltzer & Associates, L.C.

By: \_\_\_\_\_

Garry Seltzer (#27790)  
*mechliens@prodigy.net*  
Diane Gray (#43760)  
*dianegrays1@earthlink.net*  
222 South Central Ave., Suite 1004  
Clayton, MO 63105  
(314) 862-1720  
(314) 727-3343 (fax)

Attorneys for Plaintiff/  
Judgment Creditor Plaintiff and  
Respondent The Honorable Dale Hood

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## STATEMENT OF FACTS

This matter is before the Supreme Court to determine whether its preliminary writ prohibiting Respondent Judge Dale Hood from ordering Relator Lawrence Fleming to answer Plaintiff's interrogatories, and to waive his late-filed assertion against self-incrimination, issued pursuant to a Judgment Debtor Examination, should be quashed or made permanent; and to determine, in the alternative, whether Respondent is within his authority to order Relator to answer each interrogatory individually, and to demonstrate in those answers, without going so far as to incriminate himself, that a real danger of self-incrimination exists; and to order Relator to appear at a re-scheduled judgment debtor examination and to demonstrate in answers to questions put to him, without going so far as to incriminate himself, that a real danger of self-incrimination exists.

### *Preceding History of Case:*

On December 13, 1999, Plaintiff C. F. Sign Co. sued Relator Lawrence J. Fleming for legal malpractice. Relator filed for bankruptcy in November of 2000. Plaintiff's malpractice claim was not discharged in bankruptcy. Instead, on May 15, 2001, Relator entered into a written stipulation and agreement to pay Plaintiff \$25,000.00 in settlement. No payment was ever made.

On April 12, 2006, Plaintiff filed the underlying civil action in this proceeding, its "Petition for Money Damages", Cause No. 2106AC-11227 in St. Louis County, based upon Relator's failure to pay the Settlement that he had agreed to, supra, in an order with the Bankruptcy Court. Relator signed a consent judgment on August 9, 2006 for

\$36,250.00, payable at the rate of \$1,000.00 per month beginning November 1, 2006. (Exhibit 1 of Respondent's Exhibits filed February 9, 2010. Those Exhibits will be referred to henceforth as "2/9/10 Exhibit xx.") Again, Relator made no payments on that judgment. Several garnishments were filed to collect on this judgment against Relator; all were unsuccessful.

Recent History of Case:

On August 31, 2009, Plaintiff filed a "Motion for Examination of Judgment Debtor" pursuant to Section 513.380 RSMo. (1993) and Civil Rules 76.27 and 76.28. A file-stamped copy of the "Memo to Clerk" is attached hereto as Exhibit A showing receipt by the trial court on August 31, 2009. Filed with the motion were the "Citation to Judgment Debtor to Appear for Examination As to His Assets Subject to Execution" and Plaintiff/Judgment Creditor C.F. Sign Co.'s Interrogatories Directed to Defendant/Judgment Debtor Lawrence Relator As to His Assets Subject to Execution". Case.net reported the documents as filed on September 9, 2009.

Plaintiff's file-stamped court memo shows, in addition, that it served interrogatories on Relator pursuant to Rule 76.28 on August 31, 2009. Exhibit D-1 of Relator's Brief is Relator's Affidavit maintaining that he received them September 19, 2009. Relator admitted that he was served by the St. Louis County Sheriff with the motion, the citation, and with the interrogatories on September 19, 2009.

Counsel for Relator filed a limited entry of appearance on September 28, 2009, attached hereto as Exhibit B. Relator's counsel's entry recited that he had entered his appearance "only with regard to the currently scheduled debtor's exam and related

written discovery”. On November 3, 2009, he faxed “Defendant’s Motion to Quash Debtor’s Exam”, attached here as Exhibit C. No assertion, or even mention, of a Fifth Amendment or Missouri constitutional privilege was made in that motion.

When the interrogatories were still not answered on November 4, 2009, Plaintiff sent a letter to Relator’s counsel stating that while counsel had entered his limited appearance on September 28, 2009 “*only with regard to the . . . related written discovery,*” Relator still had not answered or objected or asserted any claim of privilege within the time required by law, and that the time to file objections, or to claim any privilege, if there were any, had passed. Plaintiff included its “Motion to Compel and Notice of Oral Argument”, filed it forthwith and set it for hearing on November 25, 2009. (Exhibits D and E). A copy of the interrogatories served was included in 2/9/10 Exhibit 2.

Thereafter, Relator faxed “Defendant’s Responses to Plaintiff’s Interrogatories” on November 6, 2009 to counsel for Plaintiff. (2/9/10 Exhibit 4.) Relator’s response to Plaintiff’s interrogatories was 37 days late (67 days after service upon Relator) if calculating service from August 31, and 18 days late (48 days after service upon Relator) if calculating service from September 19. To Plaintiff’s twenty-six pages of interrogatories, Relator filed a two-page document, in which he made a blanket assertion as to all of the interrogatories of “his rights under the Fifth Amendment of the United States Constitution.....and Sections 10 and 19 of the Missouri Constitution and declines to answer each and every interrogatory propounded or to produce documents requested.”

That was the first time that Relator asserted his privilege against self-incrimination under the Fifth Amendment and under the Missouri Constitution. Relator's counsel's statement, made for the first time in his brief submitted to this Court on April 9, 2010 was that an oral assertion of the privilege was made on October 7, 2009. The privilege is personal to Respondent and must be asserted by the holder of the privilege as many cases have held. As pointed out in *Brown v. Superior Court of Los Angeles County*, 180 Cal.App.3d 701, 712 (1986), "We can, of course, give no weight to defendant's vague unsupported assertions that they had orally informed plaintiff's attorney of their intention to invoke the Fifth Amendment, at some point prior to filing the written objections". On that date, October 7, counsel for parties did not even convene in court, not recognizing each other, and only a continuance Memo was filed by Relator's counsel. (Exhibit F). The memo did not claim any privilege against self incrimination notwithstanding the fact that Relator knew answers to discovery were coming due. On November 3, 2009, Relator filed "Defendant's Motion to Quash Debtor's Exam". Again, no assertion, or even mention, of a Fifth Amendment privilege was made in this motion. No representation that the privilege was verbally invoked was made in any documents previously filed with the trial court or with this Court, until Relator's brief of April 9.

On November 25, 2009, Plaintiff's Motion to Compel was heard. Plaintiff moved the Court to strike the untimely claim of privilege and to order Relator to answer the discovery. Relator's counsel did not ask the Court to have the hearing transcribed so that an appellate court could review his explanation, if any, as to why the privilege should be allowed to be claimed out of time. In fact, Relator's counsel offered no explanation and

made no effort to create or to preserve a record to review a claimed constitutional issue. He did not make an “Offer of Proof” or provide any other explanation of record as to why, in the context of these proceedings, his failure to abide by the rules should be excused. The court continued the examination to January 20, 2010 and sustained Plaintiff’s Motion to Compel. (2/9/10 Exhibit 5.) The trial court ordered Relator to answer Plaintiff’s interrogatories by December 9, 2009 and that the Relator may not claim any privilege in response. (Exhibit 7). Relator did not answer the interrogatories and instead filed a Motion for Reconsideration on December 9, 2009. At the January 20, 2010 court date, the court overruled Relator’s Motion for Reconsideration and ordered Relator to answer Plaintiff’s interrogatories with all objections being waived, including the privilege against self-incrimination, by Friday, January 29, 2010. (2/9/10 Exhibit 6.) The judgment debtor examination was reset for February 10, 2010 to allow time for Relator to answer the Interrogatories. For the second time, Relator again failed to make a written record of those proceedings, make an offer of proof, or otherwise take any action by which a reviewing Court could analyze the trial court’s ruling.

**POINT I RELIED ON:**

**RESPONDENT WAS WITHIN HIS AUTHORITY, DID NOT EXCEED HIS JURISDICTION AND DID NOT ABUSE HIS DISCRETION, WHEN HE STRUCK RELATOR'S UNTIMELY CLAIM OF PRIVILEGE AND ORDERED RELATOR TO ANSWER INTERROGATORIES BECAUSE RELATOR'S CLAIM OF THE PRIVILEGE AGAINST SELF-INCRIMINATION WAS UNTIMELY FILED AND THERE WAS NO EXPLANATION OF RECORD FOR THE UNTIMELY CLAIM OF PRIVILEGE. TAKING INTO ACCOUNT THE LIMITED SCOPE OF THESE PROCEEDINGS AND RESPONDENT'S CONTUMACIOUS FLOUTING OF COURT ORDERS, EVEN GIVEN SPECIAL DEFERENCE TO THE PRIVILEGE AGAINST SELF-INCRIMINATION, RESPONDENT'S ORDER OVERRULING THE LATE FILED CLAIM OF PRIVILEGE, IN THE CONTEXT OF THIS CASE, WAS NOT AN ABUSE OF DISCRETION.**

**Cases:**        *Maness v. Meyers*, 419 U.S. 449 (1975)

*Dunkin v. Citizen's Bank of Jonesboro*, 727 S.W.2d 138, 140 (1987);  
291 Ark. 588, 591 (1987)

*Brown v. Superior Court of Los Angeles County*, 180 Cal.App.3d  
701, 712 (1986)

*Chase Manhattan Bank v. Chandros*, 148 A.D.2d 567, 568 (1989)

**POINT II RELIED ON:**

IN THE ALTERNATIVE, SHOULD WAIVER OF RELATOR'S PRIVILEGE AGAINST SELF-INCRIMINATION NOT BE FOUND, RESPONDENT IS WITHIN HIS AUTHORITY AND JURISDICTION TO ORDER RELATOR TO SUBMIT INDIVIDUAL ANSWERS TO EACH OF PLAINTIFF'S INTERROGATORIES, IN THE FORM REQUIRED BY RULE 57.01, AND TO DEMONSTRATE IN THOSE ANSWERS, WITHOUT GOING SO FAR TO INCRIMINATE HIMSELF, THAT A REAL DANGER OF SELF-INCRIMINATION EXISTS, AND/OR TO SUGGEST HOW ANSWERING THE INTERROGATORIES POSED A GENUINE THREAT TO HIS PRIVILEGE AGAINST SELF-INCRIMINATION; AND TO ORDER RELATOR TO APPEAR AT A RE-SCHEDULED JUDGMENT DEBTOR EXAMINATION, AND TO DEMONSTRATE IN HIS ANSWERS TO QUESTIONS PUT TO HIM AT THE JUDGMENT DEBTOR EXAMINATION, WITHOUT GOING SO FAR TO INCRIMINATE HIMSELF, THAT A REAL DANGER OF SELF-INCRIMINATION EXISTS, AND/OR TO SUGGEST HOW ANSWERING THE INTERROGATORIES POSED A GENUINE THREAT TO HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

- Cases:        *Hoffman v. United States*, 341 U.S. 479, 484 (1951)  
                  *Starlight Intern'l, Inc. v. Herlihy*, 181 F.R.D. 494 (D. Kansas 1998)  
                  *Fonseca v. Regan*, 98 F.R.D. 694, 700 (E.D.N.Y. 1983)  
                  *Brock v. Gerace*, 110 F.R.D. 58, 63 (N.J. 1986)

## ARGUMENT

**POINT I RELIED ON: RESPONDENT WAS WITHIN HIS AUTHORITY, DID NOT EXCEED HIS JURISDICTION AND DID NOT ABUSE HIS DISCRETION, WHEN HE STRUCK RELATOR'S UNTIMELY CLAIM OF PRIVILEGE AND ORDERED RELATOR TO ANSWER INTERROGATORIES BECAUSE RELATOR'S CLAIM OF THE PRIVILEGE AGAINST SELF INCRIMINATION WAS UNTIMELY FILED AND THERE WAS NO EXPLANATION OF RECORD FOR THE UNTIMELY CLAIM OF PRIVILEGE. TAKING INTO ACCOUNT THE LIMITED SCOPE OF THESE PROCEEDINGS AND RESPONDENT'S CONTUMACIOUS FLOUTING OF COURT ORDERS, EVEN GIVEN SPECIAL DEFERENCE TO THE PRIVILEGE AGAINST SELF INCRIMINATION, RESPONDENT'S ORDER OVERRULING THE LATE FILED CLAIM OF PRIVILEGE, IN THE CONTEXT OF THIS CASE, WAS NOT AN ABUSE OF DISCRETION.**

The United States Supreme Court held in *Maness v. Meyers*, 419 U.S. 449 (1975) that the constitutional privilege against self-incrimination is not a self-executing mechanism and that it can be lost by not timely asserting it. *Id at 466*. If not asserted in a timely fashion, the privilege against self-incrimination can be waived. *Davis v. Fendler*, 650 F2d 1154, 1160 (9<sup>th</sup> Cir.1981). "To avail oneself of the guaranteed right, one must assert the right." *State ex rel. Long v. Askren*, 874 S.W.2d 466, 471 (1994). "A witness may waive the right against self-incrimination." *Id at 472*. The privilege is

personal. It must be claimed by the individual; it may not be claimed by someone, even a lawyer, on his behalf. *Brock v Gerace*, 111 F.R.D 58 (1986).

Civil Rule 76.28 of Missouri's Judgment Debtor Exam procedure allows for the filing of Interrogatories and Requests to Produce, which are to be interpreted as in Rules 57 and 58 (except for Rule 57.08). Missouri has created a large body of case law interpreting the interplay between the privilege against self-incrimination and the Rule 76.27 hearing, but very little case law looking at Rule 76.28. For our purposes then, the differences, if any, between the federal privilege and Missouri state privilege against self-incrimination are of little consequence. Decisions from other jurisdictions, while not necessarily binding in Missouri, may offer guidance on this issue of first impression.

Many federal district cases have held that the privilege against self-incrimination is waivable. In *Fonseca v. Regan*, 98 F.R.D. 694, 701 (E.D.N.Y. 1983) (overturned on other grounds), the court held that objections to interrogatories must be made within 30 days and, in the absence of extension or good cause, failure to meet this time limit constitutes waiver of objection, including assertion of the privilege. Fed.Rules Civ.Proc.Rule 33, 28 U.S.C.A. In *Brock v. Gerace*, 110 F.R.D. 58, 63 (N.J. 1986), the court stated that the privilege against self-incrimination is deemed waived unless invoked. The Plaintiff filed a motion for sanctions when the interrogatories were not timely answered. A motion for sanctions is discretionary with the court as to whether or not to grant it, and if so, what sanction to impose. In *Brock v. Gerace*, the nature of the proceeding was an action by the Secretary of Labor alleging breach of fiduciary duties of a dental plan operated on behalf of a labor union. The court in *Brock v. Gerace*

determined that within the particular facts of its case, even though the time to answer had expired, that the defendant would be given another chance to claim the privilege correctly. At that hearing the defendants advanced some reason to explain their out-of-time claim of privilege. In the case before this Court, Relator made no attempt of record to explain why, in his case, the deadline to answer should be extended.

The *Brock v. Gerace* court stated that an “intent to waive one’s privilege need not be shown, because such a waiver may occur in the absence of intent”. *Id.* “A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation.” *Id.*

The court in *Starlight International, Inc. v. Herlihy*, 181 F.R.D. 494 (D. Kansas 1998) re-iterated that “the privilege against self-incrimination is subject to waiver by untimely assertion”. “In the absence of good cause to excuse a failure to timely object, all objections not timely asserted are waived.” *Id.* Plaintiff filed a motion to compel when answers were not filed on time. A motion to compel appeals to the court’s discretion. The reviewing court, after looking at the circumstances of that case, concluded that a waiver of the privilege against self-incrimination should not be found on those circumstances. Because the late discovery response was attributable solely to the inadvertence and mistake of counsel, and was only two days late, the reviewing court found that the defendants had not automatically waived their privilege due solely to the untimeliness of the filing.

In an Arkansas Supreme Court decision dealing with the privilege against self-incrimination, the court held that the failure to object to a discovery request within the

time fixed by the applicable rule acts as a waiver of all available objections, even if the objection that the information sought is privileged. “The automatic waiver provisions that exist in conjunction with a number of the discovery rules, including interrogatories, make imperative the assertion of the privilege on a timely basis. Silence will cost the litigant all right to assert his privilege against self-incrimination in response to such discovery.” *Dunkin v. Citizen’s Bank of Jonesboro*, 727 S.W.2d 138, 140 (1987); 291 Ark. 588, 591 (1987). In *Dunkin v. Citizen’s Bank of Jonesboro*, the interrogated party was a woman facing a wrongful death civil suit over the murder of her husband. In the civil proceeding she claimed self-defense and attempted to plead the Fifth Amendment out of time to the plaintiff’s interrogatories. In considering all of the facts and circumstances of the case, the reviewing court agreed with the trial court that the privilege against self-incrimination may be waived by not timely asserting it. The answering party did attempt to offer a reason for the out-of-time answers, which was not found satisfactory by that court.

In *Chase Manhattan Bank v. Chandros*, 148 A.D.2d 567, 568 (1989), the appellate court held that the defendants had waived the Fifth Amendment privilege by failing to timely assert it. In *Brown v. Superior Court of Los Angeles County*, 180 Cal.App.3d 701, 712 (1986), the court ruled that the defendants had waived the privilege against self-incrimination by a failure to make a timely objection to interrogatories. There, the court stated that it was persuaded to treat the privilege against self-incrimination no differently than the other privileges which are waived by a failure to make a timely objection to interrogatories. *Id.* The court further gave no weight to the defendant’s assertions that

they had orally informed plaintiff's attorney of their intention to invoke the Fifth Amendment. *Id.*

All of the cases above, except for *State ex rel. Long v. Askren*, 874 S.W.2d 466, 471 (1994) and *Chase Manhattan Bank v. Chandros*, 148 A.D.2d 567, 568 (1989), spoke to matters arising during the pendency of an original case, that is during pre-judgment proceedings, and which span many areas of law. They were unlimited in scope, unlike a judgment debtor's examination. All of the cases except *Maness v. Meyers*, 419 U.S. 449 (1975) dealt with the privilege against self-incrimination in the context of discovery matters.

*State ex rel. Long v. Askren* dealt with discovery matters in the context of a judgment debtor examination and *Chase Manhattan Bank v. Chandros* dealt with post-judgment, judgment creditor information subpoenas. In *State ex rel. Long v. Askren*, the facts were materially different than the facts of the case at hand. There, the court dealt with the application of the privilege against self-incrimination (1) when the debtor testified at a debtor judgment examination, (2) when the debtor was requested to produce records by subpoena duces tecum, and (3) when third parties were subpoenaed to attend the debtor examination. The case did not deal squarely with the failure to timely respond to interrogatories propounded pursuant to a judgment debtor's examination and subsequent waiver of the privilege against self-incrimination. *Chase Manhattan Bank v. Chandros* dealt with facts similar to the facts found herein. In an effort to enforce a money judgment, the plaintiff served defendants with judgment creditor's information subpoenas, and when the defendants did not respond, the plaintiff sought to hold them in

contempt. The defendants then, at the contempt hearing and for the first time, invoked their Fifth Amendment privilege against self-incrimination. The court found that the defendants had failed to assert the privilege in a timely fashion and were deemed to have waived the privilege. In addition, the court found that the defendants did not make a particularized objection to each discovery request and that their blanket assertion of the privilege could not be sustained, and also that the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer. It is apparent from the language of the decision that the failure to timely assert the privilege was an independent reason for finding that the defendants had waived the privilege.

The privilege against self-incrimination may be invoked in a judgment debtor examination pursuant to *North v. Kirtley*, 327 S.W.2d 166 (Mo. banc 1959). That is established law. But this case is not about whether the privilege can be invoked at the hearing stage in a judgment debtor exam.

Missouri courts have extensively dealt with examining and determining whether any type of answer or explanation may be required from the party who invokes the privilege against self-incrimination. These cases are presented and cited herein, *infra*, for the purposes of Plaintiff's legal argument under Point II. Many of these cases emanate from pre-judgment proceedings or causes of actions, and case law is clear that if a defendant invokes his Fifth Amendment rights in a pre-judgment cause of action, he shall be precluded from asserting any affirmative rights. The court may strike pleadings if the information sought is relevant and material and peculiarly within the knowledge of the party refusing to answer. The basis of the rule is to prevent a party from obtaining an

advantage from invoking his Constitutional rights. *State ex rel. Lieberman v. Goldman*, 781 S.W.2d 802 (Mo.App.E.D. 1989). The courts also have the power to not allow the defendant to change his position and testify at trial to his benefit. *State ex rel. Webster v. Ames*, 791 S.W.2d 916, 924 (Mo.App.S.D. 1990). Invocation of the privilege at the discovery stage may well serve to preclude a defendant from controverting through his own testimony or records the evidence of the plaintiff at trial. *Id.* Also, the court or jury may take into consideration when reaching a decision that the party had refused to testify, either orally or through interrogatories or through requests to produce documents, and that consideration may be unfavorable to that party. *Dodson v. Dodson*, 855 S.W.2d 383, (Mo.App.1993).

To continue, in *State ex rel. Pulliam v. Swink*, which was not a judgment debtor examination, the court stated that its ruling, which made the writ permanent in prohibiting the trial court from striking relator's answer in a personal injury suit after asserting the privilege against self-incrimination, "does not mean that litigants may pick and choose that which they will allow to be discovered. Once the privilege has been invoked to preclude discovery, trial courts have the power not to allow the defendant to change his position and testify at trial to his benefit. Invocation of the privilege at the discovery stage may well serve to preclude a defendant from controverting through his own testimony or records the evidence of the plaintiff at trial." *Id. at 561.*

But, in a judgment debtor examination, which is the case at hand, the above-described consequences for a party who invokes his privilege against self-incrimination are largely if not completely absent. There is no prayer for affirmative relief; a judgment

has already been rendered. While the court *Pulliam v. Swink* envisioned detrimental and practical consequences for the party who invokes the privilege, there is little such detriment present in a judgment debtor examination proceeding.

Finally, some Missouri cases on the Fifth Amendment and judgment debtor exams have dealt with the issue of grant immunity. This case does not deal with any grant of immunity.

In sum, there is no Missouri case squarely on point, that deals with the waiver of the privilege against self-incrimination, in the context of judgment debtor examination, where the judgment debtor, after being served with interrogatories as allowed by Rule 76.28, does not answer the interrogatories within the time allowed by the civil rule and then invokes the privilege against self-incrimination out of time. Also, in this case at hand there were no requests for extensions of time to answer, and no explanation or excuse, and no record, of why the late filing should be excused. The holdings in the cases cited are not directly applicable, not only to judgment debtor examination proceedings, but to this case involving out-of-time discovery and a late assertion of a constitutional privilege.

Supreme Court Rule 57.01(c) requires that responses to interrogatories must be served within 30 days after the service of the interrogatories. If a party fails to answer interrogatories or file objections within the time provided by law, or if objections are filed which are thereafter overruled and the interrogatories are not timely answered, the court may make such orders in regard to the failure as are just. Rule 61.01(b). Additionally, any failure as described in Rule 61.01 to answer interrogatories may not be

excused on the ground that the discovery sought is objectionable unless the party failing to act has filed timely objections to the discovery request or has applied for a protective order.

It is clear that courts have wide discretion when it comes to rulings in discovery matters, with the authority to issue an order striking all or part of a party's pleadings, or dismissing the action or proceeding or any part of an action or proceeding, or rendering a judgment by default against a party that fails to comply with the discovery rules without the showing of a reasonable excuse. Rule 61.01. A trial court has broad discretion to apply appropriate sanctions. *Russo v. Webb*, 674 S.W.2d 695, 697 (Mo.App.1984); *Sonderman v. Maret*, 694 S.W.2d 864, 866 (Mo.App.1985). Where the record reveals a long course of failure or refusal to produce documents, or the facts clearly show a pattern of repeated disregard to comply with discovery, a court is justified in applying sanctions. *Id.* Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813 (Mo. 2000).

*State ex rel. Lieberman v. Goldman*, 781 S.W.2d 802 (Mo.App.E.D. 1989) looked at whether there was a pattern of repeated disregard to comply with the rules. The underlying suit charged fraud and false representations in contract against Lieberman. The court in that case found that during the pendency of that proceeding the relator's conduct was not contumacious, and that while relator responded to discovery somewhat late with the invocation of the privilege, extensions had been requested and granted

(citing Pulliam v. Swink where relator's conduct was not contumacious). Id. at 804, 807. Lieberman v. Goldman (nor Pulliam v. Swink) was not a judgment debtor examination but instead a pre-judgment cause of action.

The judgment debtor examination is a materially different proceeding from a civil cause of action. A judgment debtor examination is statutory, not common law, and is a post-judgment proceeding. It is supplementary and summary in nature. The principal purpose of a judgment debtor examination is to discover assets, to compel the defendant to disclose under oath all the assets of his estate, and, after this discovery, to authorize the court to say whether or not the debtor has assets that may be levied on by execution in favor of the judgment creditor. State ex rel the Rowland Group v. Koehr, 831 S.W.2d 930 (Mo. banc 1992).

When a matter has evolved to the point where the court has ordered the judgment debtor to appear for an examination as to his assets, the judgment debtor, by not paying the judgment amount, has already disregarded and defied a court's judgment. The debtor has refused to follow the court's order, and not just any order, but a final judgment.

In the case at hand, Relator entered into an agreement in 2001 to settle Plaintiff's legal malpractice claim but he paid nothing of the \$25,000.00 settlement amount. When no money was paid, Plaintiff filed this "Petition for Money Damages" in 2006. Relator voluntarily signed a Consent Judgment in 2006 to settle this case. But thereafter, once again, paid nothing. So Relator has flouted not one, but two court judgments.

As to the interrogatories and to Relator's claim of privilege against self-incrimination, the record shows that Relator was served on August 31, 2009 and again on

September 19, 2009 with Plaintiff's "Interrogatories Directed to Defendant/Judgment Debtor Lawrence Fleming As to His Assets Subject to Execution." Relator filed a one paragraph answer to Plaintiff's interrogatories via facsimile on November 6, 2009, in which he refused to answer the interrogatories and for the first time invoked the privilege against self-incrimination. Relator failed to answer the interrogatories or claim the privilege or any objections against self-incrimination within thirty (30) days or even within forty-five (45) days after service of the interrogatories. Relator's response to Plaintiff's interrogatories was 37 days late (67 days after service upon Relator) if calculating service from August 31, and 18 days late (48 days after service upon Relator) if calculating service from September 19.

Respondent was within his authority and did not abuse his discretion when he ordered Relator to answer Plaintiff's interrogatories. What factors should a Court consider when exercising its discretion and deciding whether or not to allow a late-filed claim of Constitutional privilege? A trial judge should consider, among other things, (1) the debtor's conduct in the full course of the proceedings, (2) the nature of the proceeding and (3) the reason for the delay.

A party's contumacious conduct and bad faith are to be considered when examining discovery or other issues in the context of the privilege against self-incrimination. *State ex rel. Lieberman v. Goldman*, 781 S.W.2d 802 (Mo.App.E.D. 1989); *State ex rel. Pulliam v. Swink*, 514 S.W.2d 559 (Mo. banc 1974). First, the very reason a judgment debtor examination is taking place is because the debtor failed to follow the court's order to pay the court's judgment. A court should be allowed to consider that fact

when exercising its discretion in promulgating its Orders. In the full context of the case from which the judgment debtor examination proceeds, Relator had failed and refused to satisfy two judgments against him, the first one for a period of five years and the second for a period of three years.

Second, and importantly, a condition that should not be overlooked is that a judgment has already been rendered in a judgment debtor proceeding, and the normal ramifications and negative consequences that flow or could flow to the party asserting the privilege do not exist. The judgment debtor has no request for affirmative relief pending which might have been stricken; the party's pleadings can not be stricken if the information sought is relevant and material and peculiarly within the knowledge of the party refusing to answer; the party will not be prevented from changing his position and testifying at trial to his benefit; the party will not be precluded from controverting through his own testimony or records the evidence of the plaintiff at trial; and there will no consideration of the party's refusal to provide answers or testimony by the court or jury when reaching a decision, a consideration that may be unfavorable to that party.

Third, Relator gave no explanation as to why his late filing should be excused and made no record of why his late filing should be excused. He did not explain why he had not sought a protective order, nor did he make an offer of proof or do anything permitted in the rules to preserve his claim, much less make a record of his constitutional claim which might have been reviewed by a higher court.

Respondent cited several cases from other jurisdictions, *supra*, where the court found that a party had waived the privilege against self-incrimination when the party

failed to timely assert it. All of these cases, and even other cases that found that a party had not waived their privilege when they were late in asserting it, were in the context of pre-judgment causes of action and there was some record of why the claim filed out of time. The courts generally considered the party's actions within that limited history of the pre-judgment proceeding. But in a judgment debtor examination, a court has a fuller history to consider and weigh in its determinations as to a party's contumaciousness and good faith. A judgment debtor examination is not analogous to a regular pre-judgment civil cause of action. In the context of the limited scope of a judgment debtor exam and Relator's contumacious disregard of court orders, and his lack of explanation as to the lateness of his assertion and the making of no record, it is proper to conclude that the trial court did not abuse its discretion when it ordered that Relator had waived his privilege against self-incrimination.

Respondent is not arguing that the privilege against self-incrimination should not be available in a judgment debtor examination. Because the privilege against self incrimination has Constitutional stature, its out-of-time assertion should be carefully examined. Out-of-time Constitutional claims should not automatically be lost. The trial court should hear counsel's explanation of the special circumstances of that case in deciding whether to allow an out-of-time claim of Constitutional privilege. A mere delay in filing should not be dispositive, but should be a factor to consider when a Judge is asked to exercise his discretion. A court should be allowed, in the exercise of its discretion, to consider the actions of the debtor in the case, the nature of the proceeding and the debtor's explanation of why he could not timely file a claim of privilege. In this

case, there was no record made of why Relator could not file his answer to interrogatories within the time and in the manner required by law. In the absence of an explanation and in consideration of the limited scope of the inquiry and the debtor's contumacious behavior throughout these proceedings, a reviewing Court should conclude that the trial court did not abuse its discretion in disallowing Respondent from claiming the privilege against self incrimination out of time.

### CONCLUSION

On the record before him, Respondent was within his authority and did not abuse his discretion when he ordered Relator to answer Plaintiff's interrogatories and ordered that Relator had waived his privilege against self-incrimination. To avail oneself of the right against self-incrimination, one must assert the right in a timely fashion. In a judgment debtor examination proceeding, a court may consider the debtor's actions in failing to follow the court's order and final judgment in the case from which the examination has emanated, the lack of negative consequences which exist in a pre-judgment proceeding that do not exist in a post-judgment proceeding, when ruling whether the party's discovery failure has acted to waive the privilege against self-incrimination. Further, Relator's failure in offering no explanation to his late-filed claim of privilege should be considered. Also, the failure to create a record explaining why his late claim of privilege should be excused leaves nothing upon which a reviewing court could analyze the propriety of the trial court's decision. There is nothing of record to convince a reviewing Court that the trial court abused its discretion.

ARGUMENT

**POINT II RELIED ON: IN THE ALTERNATIVE, SHOULD WAIVER OF RELATOR'S PRIVILEGE AGAINST SELF-INCRIMINATION NOT BE FOUND, RESPONDENT IS WITHIN HIS AUTHORITY AND JURISDICTION TO ORDER RELATOR TO SUBMIT INDIVIDUAL ANSWERS TO EACH OF PLAINTIFF'S INTERROGATORIES, IN THE FORM REQUIRED BY RULE 57.01, AND NOT TO SUBMIT A BLANKET ASSERTION AS TO ALL THE INTERROGATORIES, AND TO DEMONSTRATE IN THOSE ANSWERS, WITHOUT GOING SO FAR TO INCRIMINATE HIMSELF, THAT A REAL DANGER OF SELF-INCRIMINATION EXISTS, AND/OR TO SUGGEST HOW ANSWERING THE INTERROGATORIES POSED A GENUINE THREAT TO HIS PRIVILEGE AGAINST SELF-INCRIMINATION; AND TO ORDER RELATOR TO APPEAR AT A RE-SCHEDULED JUDGMENT DEBTOR EXAMINATION, AND TO DEMONSTRATE IN HIS ANSWERS TO QUESTIONS PUT TO HIM AT THE JUDGMENT DEBTOR EXAMINATION, WITHOUT GOING SO FAR TO INCRIMINATE HIMSELF, THAT A REAL DANGER OF SELF-INCRIMINATION EXISTS, AND/OR TO SUGGEST HOW ANSWERING THE INTERROGATORIES POSED A GENUINE THREAT TO HIS PRIVILEGE AGAINST SELF-INCRIMINATION.**

A. *Relator must respond to each interrogatory individually and not provide a blanket assertion as to all of Plaintiff's interrogatories of the privilege against self-incrimination.*

Missouri Rules of Civil Procedure require that the response to interrogatories must quote each interrogatory, including its original paragraph number, and immediately thereunder state the answer, or all reasons for not completely answering the interrogatory, including privileges, the work product doctrine and objections. Rule 57.01(c)(2).

Federal rules also provide that interrogatories be answered separately and fully. Blanket assertions of the Fifth Amendment privilege against self-incrimination are improper. *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d. 1204, 1212 (8<sup>th</sup> Cir.1973). Defendants must raise the privilege with specificity by asserting their Fifth Amendment privilege in response to each particular question. *Id.*; *Grey v. Abdulla*, 58 F.R.D. 1, 2 (N.D.Ohio 1973). Each interrogatory must, to the extent it is not objected to, be answered separately and fully and in writing under oath. Fed.R.Civ.P. 33, 28 U.S.C.A. A blanket assertion of privilege against self-incrimination in response to interrogatories may be proper if threat of self-incrimination is clearly evident from the circumstances; if not evident, however, then party asserting privilege bears the burden of showing that his answers may incriminate him, and a blanket assertion of privilege is not sufficient. *Fonseca v. Regan*, 98 F.R.D. 694, 701 (E.D.N.Y. 1983).

In the case at hand, Relator, in response to Plaintiff's interrogatories, which consisted of twenty-six pages and eighty interrogatories, made this response: "As to each and every interrogatory asserted this Defendant asserts his rights under the Fifth Amendment of the United States Constitution and Article 1, Sections 10 and 19 of the

Missouri Constitution and declines to answer each and every interrogatory propounded or to produce documents requested.”

Relator is required to answer each interrogatory separately and individually, pursuant to Missouri Rules of Civil Procedure as stated above, with further accordance from the Federal Rules of Civil Procedure and federal case law. Rule 57 provides that answers are to be signed under oath by the party, but that objections “shall be signed by the attorney making them.” Relator’s counsel may explain the basis of an objection or a claim of privilege.

*B. Relator must demonstrate in answering Plaintiff’s interrogatories and when responding during the debtor examination, that a real danger of self-incrimination exists, and/or to suggest how answering the interrogatories posed a genuine threat to his privilege against self-incrimination, without going so far as to incriminate himself.*

If a debtor asserts the privilege against self-incrimination, current Missouri law does not require a showing by the debtor in a judgment debtor examination that the danger of self-incrimination exists, should he be required to answer a question. Until the Supreme Court ruling in *State ex rel. Shapiro v. Cloyd*, 615 S.W.2d 41 (Mo. 1981), courts sometimes applied the burden of proof test or the rational basis test, putting some burden upon the party who claims the privilege to show why his answer may incriminate him or whether there was some rational basis upon which he might be subject to prosecution if he answered. *Presta v. Owsley*, 345 S.W.2d 649 (Mo.App.1961); *State ex rel. Hudson v. Webber*, 600 S.W.2d 691 (Mo.App.1980).

But the Court in State ex rel. Shapiro v. Cloyd ruled that once a witness claims the privilege, a rebuttable presumption arises that the witness' answer might tend to incriminate him, a presumption that can only be rebutted by a demonstration by the party seeking the answer that such answer cannot possibly have a tendency to incriminate. This was in the context of Article 1, Section 19 of the Missouri Constitution. The Shapiro v. Cloyd decision states that it will fall upon the court to decide whether the presumption has been rebutted and therefore, whether the witness must answer the question. Id. at 46.

So, the burden placed is now placed on the party seeking responses from the witness, at least under the Missouri Constitution, to determine whether the answer could possibly incriminate the witness. Practically speaking, this burden cannot be met. Even a question that asks the name of a witness could possibly "tend to incriminate", since it is conceivable that the witness is using aliases in order to conduct some nefarious activity. Certainly no meaningful question about assets is allowed when the privilege asserted.

In effect, the judgment debtor examination itself, pursuant to Section 513.380 RSMo. and the interrogatories that are allowed to be propounded pursuant Missouri Civil Rule of Procedure 76.28 are rendered ineffective. The intent behind the statute and the rule, to allow a judgment creditor to discover the assets of a judgment debtor, is wholly frustrated.

Federal case law on the Fifth Amendment privilege against self-incrimination, while not controlling, is helpful. There, the validity of the assertion of the Fifth Amendment privilege hinges not on the witness' say-so alone: the trial judge must

determine whether the witness' silence is justified. National Acceptance Co. of America v. Bathalter, 705 F.2d 924, 927 (7<sup>th</sup> Cir. 1983), and Davis v. Fendler, 650 F.2d 1154, 1159 (9<sup>th</sup> Cir.1981). Fonseca v. Regan, 98 F.R.D. 694, 701 (E.D.N.Y. 1983). In order to claim the Fifth Amendment privilege in response to a discovery request in a civil action, the court in Brock v. Gerace, 110 F.R.D. 58, 63 (N.J. 1986) required the defendant to respond to each interrogatory or production request under circumstances sufficient to demonstrate that a responsive answer could furnish a link in the chain of evidence to prosecute him, and that it was defendant's burden to show that an answer could have a real and appreciable tendency to incriminate him, and not one that is remote or fanciful. Also, Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 480 (1972)

As stated in People of the State of Illinois v. Urbano, 1986 WL 7680 (N.D.Ill.), the court must determine, after the defendant raises the privilege with specificity in response to each particular question, whether the Fifth Amendment privilege has been invoked properly. Also, Hoffman v. United States, 341 U.S. 479, 484 (1951). While defendants are not required to prove that they would incriminate themselves by answering interrogatories, they cannot stand on their simple declaration that answering the interrogatories would be incriminating. *Id.*

The cases also underscore the problems with blanket assertions of the privilege. "The assertion of the Fifth Amendment must be grounded on a reasonable fear of danger of prosecution, and a blanket assertion can preclude a judge from deciding whether the fear of prosecution is reasonable or realistic." United States v. Rodriguez, 706 F.2d 31,

36 (2<sup>nd</sup> Cir. 1983). Blanket assertions of the Fifth Amendment privilege are to be looked upon with disfavor because a trial judge cannot determine the validity of the claim unless it is invoked in response to specific questions from which the court can infer a particularized fear of self-incrimination. Fonseca v. Regan, 98 F.R.D. 694, 701 (E.D.N.Y. 1983).

The most recent federal case found by Respondent that requires that the defendants adequately demonstrate the applicability of the privilege against self-incrimination is Starlight International, Inc. v. Herlihy, 181 F.R.D. 494, 498 (D. Kansas 1998), where the defendants were required to produce a privilege log in accordance with Fed.R.Civ.P. 26(b)(5) (Exhibit G herein). The federal rule provides that when a party withholds information, otherwise discoverable, by claiming that the information is privileged, the party must describe the nature of the documents or communications not produced or disclosed - and do so in a manner that, without revealing information itself privileged or protected - will enable other parties to assess the claim.

Finally, Respondent cites and relies on the United States Supreme Court case of Hoffman v. United States, often quoted for support, for and against, requiring a witness to demonstrate a basis for assertion of the Fifth Amendment. The Court there stated: “But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself - his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that

he is mistaken. However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection the privilege is designed to guarantee. 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. The trial judge in appraising the claim “must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence”. (Emphasis added.)

While the Court in *Hoffman v. United States* decided in that case that the witness should not be compelled to answer the questions put to him, it did so with the observation that the setting of the controversy was a grand jury investigation of racketeering and federal crime, and the seven questions that were asked and to which the petitioner asserted his privilege could have directly linked him to criminal activity, and the petitioner had been publicly charged with being a known underworld character with a twenty year police record. So in this setting, the Court stated that it was not perfectly clear, from a careful consideration of all circumstances in the case, that the witness was mistaken and that the answer(s) could not possibly have such a tendency to incriminate.

Compare the facts of this seminal case to the setting herein. As is typical in judgment debtor examination proceedings, the debtor, with no circumstances linked in the proceeding or in the original cause of action to any criminal activity, has asserted the privilege against self-incrimination in order to avoid answering interrogatories. The

interrogatories are clearly fashioned to obtain information about his assets, so as to allow the creditor to collect on a judgment against the debtor. Respondent argues that it is not evident from the implications of the questions, in the setting in which they are 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. In appraising the claim, Respondent must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. Recalling from *Hoffman v. United States*, that the Fifth Amendment protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer, and that the witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself – Respondent argues that there must be some showing of record from the witness for the basis for his claim, that his answer would tend to incriminate him. Indeed, this is the rule in the federal courts. Otherwise, if the witness has no burden whatsoever, and the burden is on the party presenting the questions, the practical result is that, indeed, the witness’ say-so does effectively and conclusively establish the hazard of incrimination. Where it is stated that it is for the court to say whether his silence is justified, first in *Hoffman v. United States*, and then repeated in *Shapiro v. Cloyd*, the final application of the two statements is vastly different. According to the federal rules, the court is given some basic information from the witness to base its “say”; in Missouri, the court is, in effect, given no information and the witness’ assertion of the privilege is the end of the inquiry – the inquiry by the court as to whether the witness’ silence is

justified, and an end to the inquiry put forth by the judgment creditor as to the debtor's means to pay the judgment.

Respondent respectfully prays the Court evaluate the application and viability of a rule similar to Federal Rule 26(b)(5) in which a person who asserts their right against self-incrimination describe the nature of the communication not disclosed, and do so in a manner that, without revealing information itself privileged, will enable other parties to assess the claim.

### CONCLUSION

If the Court finds that Relator has not waived his privilege against self-incrimination, Respondent requests that the Court find, in the alternative, that Respondent is within his authority and jurisdiction to order Relator to submit individual answers to each of Plaintiff's interrogatories, in the form required by rule 57.01, and not to submit a blanket assertion as to all the interrogatories, and to demonstrate through counsel in those responses, without going so far to incriminate himself, that a real danger of self-incrimination exists, and/or to suggest how answering the interrogatories posed a genuine threat to his privilege against self-incrimination; and to order Relator to appear at a re-scheduled judgment debtor examination, and to demonstrate in his answers to questions put to him at the judgment debtor examination, and by counsel, without going so far to incriminate himself, that a real danger of self-incrimination exists, and/or to suggest how answering the interrogatories posed a genuine threat to his privilege against self-incrimination.

Seltzer & Associates, L.C.

By: \_\_\_\_\_

Garry Seltzer (#27790)  
*mechliens@prodigy.net*  
Diane Gray (#43760)  
*dianegrays1@earthlink.net*  
222 South Central Ave., Suite 1004  
Clayton, MO 63105  
(314) 862-1720  
(314) 727-3343 (fax)

Attorneys for Plaintiff/  
Judgment Creditor C. F. Sign Co. and  
Respondent The Honorable Dale Hood

*Certification of Compliance Regarding Type Size, Font, Number Of Words  
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Garry Seltzer

*Certificate of Service*

I hereby certify that on the 4<sup>th</sup> day of May, 2010, hand-delivered two true copies of the above, and a CD-ROM, scanned for viruses, and e-mailed a true copy of the foregoing to the following persons:

The Honorable Dale Hood  
St. Louis County Courthouse  
7900 Carondelet Avenue  
Clayton, MO 63105  
314.615.1534

Mr. J. Richard McEachern  
Attorney at Law  
7923 Big Bend Blvd.  
St. Louis, MO 63119  
314.918.7888

\_\_\_\_\_  
Garry Seltzer