

IN THE MISSOURI SUPREME COURT

SC90676

STATE EX REL. LAWRENCE J. FLEMING,

Relator,

vs.

THE HONORABLE DALE W. HOOD,

Respondent.

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

Honorable Dale W. Hood, Judge Presiding

RELATOR'S BRIEF IN SUPPORT OF WRIT OF PROHIBITION

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**BRIEF OF RELATOR IN SUPPORT
OF WRIT OF PROHIBITION**

JURISDICTION

This brief is submitted in response to the Court's order issued February 9, 2010 which granted a preliminary writ of prohibition prohibiting any further action by Respondent, the Honorable David W. Hood, in connection with St. Louis County Case No. 2106AC-011227. A written return to the Petition was ordered to be filed on or before March 11, 2010 and was, in fact filed on or about March 10, 2010.

The jurisdiction of this Court is invoked pursuant to Article V, Section 4.1 of the Missouri Constitution and Missouri Rule 97. Relator previously petitioned the Missouri Court of Appeals, Eastern District, for the relief requested in the present action. The Court of Appeals issued its order denying the petition on February 1, 2010. The authority of no other court is interposed between that of the Circuit Court and that of this Court. Consequently, this brief is filed pursuant to Rule 84.24(i).

STATEMENT OF FACTS

According to the docket entries in this case (which are attached hereto as Appendix A), Plaintiff C.F. Sign Company filed its Motion for Examination of Judgment Debtor on September 9, 2009 and attached thereto were interrogatories directed to Defendant/Relator. The docket entries further indicate that a summons was issued on September 10, 2009 and Defendant/Relator was personally served on September 19, 2009. However, the interrogatories attached to the summons contained a "Certificate of Service by Mail" which indicated that they were mailed on August 31, 2009 (nine days

prior to the filing of the motion and ten days prior to the issuance of the summons).

There was no explanation as to why interrogatories would have been mailed prior to the motion and prior to the issuance of the summons.

Counsel for Defendant/Relator filed a limited entry of appearance on September 28, 2009, seven days after service of the summons and appeared at the scheduled hearing on October 7, 2009. Counsel indicated that Defendant/Relator would contest the ability of the Plaintiff Company to bring this action since it was not a corporation in good standing and also indicated that Defendant/Relator would, in any event, assert his Missouri and Federal Constitutional Rights against self incrimination and would refuse to answer the interrogatories or any questions at the scheduled examination. The hearing was then continued and rescheduled for November 25, 2009.

On November 6, 2009 Plaintiff C.F. Sign Company filed its Motion to Compel Defendant/Relator to Answer the Interrogatories and the Motion was set for hearing on November 25, 2009. At that hearing, which was not transcribed, Respondent, over Relator's objections, entered an order compelling Defendant/Relator to answer the interrogatories by December 9, 2009 and stating that Defendant "may not claim any privilege in response thereto." (Appendix B)

On December 9, 2009 Defendant/Relator filed his Motion for Reconsideration of the November 25, 2009 order and attached thereto his affidavit indicating that the first time he had been aware of the interrogatories was when he was served with the motion and summons on September 19, 2009. (Appendix C and D) As indicated, he had asserted

his rights against self-incrimination on October 7, 2009 when he appeared in response to the summons.

On January 20, 2010 Respondent entered an order denying the Motion for Reconsideration and compelling Defendant/Relator to Answer the interrogatories by January 29, 2010 “all objections, including the privilege against self-incrimination having been waived,” and further “failure to answer the interrogatories by that date shall result in an order of contempt.” (Appendix E)

Defendant/Relator then filed his Petition for Writ of Prohibition in the Court of Appeals for the Eastern District of Missouri on January 28, 2010 and, upon denial of that Petition, filed his Petition for Writ of Prohibition in this Court which issued its preliminary order on February 9, 2010.

In his answer filed in this Court on March 10, 2010 Respondent “admits that Relator invoked his rights against self-incrimination and refused to answer the Plaintiff’s discovery, but further states that Relator’s privilege claim was invoked out of time, that is, after discovery was due.” (Answer para. 4.) So there is no question that Relator invoked his constitutional rights in the proceeding below.

In the alternative Respondent requests “that this Court order Relator to provide individual answers to each of Plaintiff’s interrogatories, indicating a basis for his claim that the answer may incriminate him.” (Answer page 4.)

Consequently, two issues are raised before this Court:

1. Whether there was an implied waiver of Relator’s rights against self-incrimination guaranteed by the United States and Missouri Constitutions; and

2. Whether Relator may be compelled to state the basis for his constitutional assertions as to each question.

POINTS RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDERS OF NOVEMBER 25, 2009 AND JANUARY 20, 2010 BECAUSE TO DO SO WOULD VIOLATE RELATOR'S CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION IN THAT RELATOR DID NOT WAIVE AND CANNOT BE CONSIDERED TO HAVE WAIVED HIS RIGHTS AGAINST SELF-INCRIMINATION AS PROVIDED IN THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19 OF THE MISSOURI CONSTITUTION WITHOUT EXPLICITLY DOING SO, AND THE RESPONDENT ERRED AND EXCEEDED THE COURT'S JURISDICTION IN SO FINDING AND THREATENED TO DEPRIVE RELATOR OF HIS CONSTITUTIONAL RIGHTS UNDER THE FOREGOING PROVISIONS.

State ex rel. Munn v. McKelvey, 733 S.W.2d (765 Mo. 1987)

State ex rel. Long v. Askren, 874 S.W.2d (Mo. App. W.D. 1994)

Smith v. United States, 337 U.S. 137 (1949)

State ex rel. Shapiro v. Cloyd, 615 S.W.2d 41 (Mo. banc 1981)

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM REQUIRING RELATOR TO STATE WHY A PARTICULAR ANSWER MAY INCRIMINATE HIM IN THAT AN INDIVIDUAL MAY NOT BE COMPELLED TO PROVIDE AN EXPLANATION AS TO WHY A PARTICULAR ANSWER MAY INCRIMINATE HIM AS A PREREQUISITE TO ASSERTING HIS CONSTITUTIONAL RIGHTS AGAINST SELF INCRIMINATION SINCE, UNDER ARTICLE I, SECTION 19 OF THE MISSOURI CONSTITUTION, THERE IS A PRESUMPTION THAT A WITNESS' ANSWER MAY TEND TO INCRIMINATE HIM WHICH CAN BE REBUTTED ONLY BY AN AFFIRMATIVE DEMONSTRATION BY THE PARTY SEEKING THE ANSWER THAT SUCH ANSWER CANNOT POSSIBLY HAVE A TENDENCY TO INCRIMINATE.

State ex rel. Shapiro v. Cloyd, 615 S.W.2d 41 (Mo. banc 1981)

State ex rel. Munn v. McKelvey, 733 S.W.2d 765 (Mo. banc 1987)

Hoffman v. United States, 341 U.S. 479 (1951)

State ex rel. Long v. Askren, 874 S.W.2d 466 (Mo. App. W.D. 1994)

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDERS OF NOVEMBER 25, 2009 AND JANUARY 20, 2010 BECAUSE TO DO SO WOULD VIOLATE RELATOR’S CONSTITUTIONAL RIGHTS AGAINST SELF-INCRIMINATION IN THAT RELATOR DID NOT WAIVE AND CANNOT BE CONSIDERED TO HAVE WAIVED HIS RIGHTS AGAINST SELF-INCRIMINATION AS PROVIDED IN THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 19 OF THE MISSOURI CONSTITUTION WITHOUT EXPLICITLY DOING SO, AND THE RESPONDENT ERRED AND EXCEEDED THE COURT’S JURISDICTION IN SO FINDING AND THREATENED TO DEPRIVE RELATOR OF HIS CONSTITUTIONAL RIGHTS UNDER THE FOREGOING PROVISIONS.

It is now without question that the privilege against self-incrimination is clearly available in civil litigation. As this Court stated in State ex rel. Munn v. McKelvey, 733 S.W.2d 765 (Mo. 1987) at page 758:

A witness’ privilege against self-incrimination “not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38

L.Ed.2d 274 (1973). See also State ex rel. North v. Kirtley, 327 S.W.2d 166, 167 (Mo. banc 1959).

It is also without question that the availability of the privilege against self-incrimination in debtor/creditor procedures in the Courts of Missouri is well recognized. See State ex rel. Hudson v. Webber, 600 S.W.2d 691 (Mo.App. 1980); State ex rel. Shapiro v. Cloyd, 615 S.W.2d 41 (Mo. 1981); State ex rel. Anderson v. Hess, 709 S.W.2d 526 (Mo. App. 1986) and State ex rel. Lieberman v. Goldman, 781 S.W.2d 802 (Mo. App. 1989).

However, in this case it was the position of Plaintiff's counsel below, and was the finding of the Respondent, that the Relator waived his privilege against self-incrimination by failing to answer or object to the Plaintiff's discovery in a timely manner. No case authority was asserted for this proposition and Relator's counsel was not allowed to argue whether or not the position of Plaintiff was supported by facts and no record was made as to the factual basis for the Plaintiff's asserted argument of waiver. The Affidavit of the Relator (Ex. 2) shows there was no waiver in that the privilege against self-incrimination was invoked in his responses to Plaintiff's discovery and was asserted at the first appearance on the summons on October 7, 2009. This appearance occurred only 18 days after the summons and interrogatories had been served upon Relator. This is, of course, contrary to the statement in the Certificate of Service contained in the interrogatories which asserted that the interrogatories had been mailed to Relator on August 31, 2009, nine days before the motion had even been filed. Again, no record was made to establish if and when the interrogatories were mailed, and Relators's affidavit denies that he ever

received them by mail or email, and that the first time they came to his attention was when he was personally served on September 19, 2009.

Nevertheless, Respondent defends his actions in ordering Relator to answer the interrogatories and in overruling the Motion for Reconsideration on two theories, neither of which find support under Missouri case law.

The first is that Defendant/Relator “waived” his rights against self-incrimination by not asserting those rights within the time provided for answers to interrogatories under Rule 57.01(c)(2).

This, of course, ignores the issue as to when Relator was served with the interrogatories. According to Respondent Relator was served by mail on August 21, 2009, as indicated on the Certificate of Service, but by no other entry on record. This, of course, would have been nine days **prior** to the filing of the Motion for Examination and ten days **prior** to the issuance of the summons by the clerk and eighteen days **prior** to service of the summons with the attached interrogatories on September 21, 2009. It also ignores the fact that Relator appeared before the Court on October 7, 2009, eighteen days after he was personally served and at that time indicated through counsel that he would assert his constitutional rights as to all the interrogatories.

Consequently, even if it were assumed **arguendo** that assertions of constitutional rights must be made within the 30 day answer period under Rule 57.01(c)(2) at the risk of an implied “waiver” such assertion was nevertheless timely when made at the October 7, 2009 Court appearance, within 30 days of the date indicated on the Certificate of Service by Mail.

However, a threshold, and more fundamental, issue is whether a waiver of constitutional rights can **ever** be implied by a failure to assert those rights within a specified period of time. Relator asserts that such an “implied waiver” can never be applied to the right against Self-Incrimination. To do so would create a new and untenable exception to this constitutional protection, and not surprisingly Respondent cites absolutely no authority for this “waiver by delay” proposition. To follow such a principle would be absolutely contrary to the rule that such waivers must be found to be intentional and unequivocal.

In State ex rel. Long v. Askren, 874 S.W.2d 466 (Mo. App. W.D. 1994) a Writ of Prohibition was made absolute with regard to Judge Askren’s order that a defendant had to answer certain questions posed to him. Counsel for the respondent there argued that there had been a waiver of the privilege by the party invoking the privilege. In making the writ absolute the Court of Appeals noted that waiver of the privilege would not be found without clear and unequivocal evidence. The Court stated:

A witness may waive his right against self-incrimination. For example, the court in Cavanaugh [State ex rel. Lee v. Cavanaugh, 419 S.W.2d 929 (Mo. App. 1967)] stated:

[O]nce the witness has admitted the whole of an incriminating situation, testimony as to the details [of the situation] cannot [then] further incriminate the witness, and thus the court can say, as a matter of law, as to such detail questions, that the answer cannot further incriminate the witness, or as the Supreme Court said in Rogers v. United States, [340 U.S.

367, 71 S.Ct. 438, 95 L.Ed. 344 (1951)], the answer to the detailed questions do not add ‘any real danger’ of further incrimination of the witness. 419 S.W.2d at 936. However, the court in Cavanaugh stated that once a witness invoked his right against self-incrimination, “a waiver of such [right] against self-incrimination will not be held to have occurred upon vague and uncertain evidence.” Id., quoting Smith v. United States, 337 U.S. 137, 69 S.Ct. 1000, 93 L.Ed. 1264 (1949). The Cavanaugh court also noted that it “would indulge every reasonable presumption against waiver [of the right against self-incrimination] and that **a waiver would not be declared unless it clearly appeared that the witness intended to and did knowingly waive his rights.**” Cavanaugh, *supra* at 936. (Emphasis supplied.)

Consequently, even if Relator had failed to assert his privilege within some time limit assumed by the Court such a failure could not be considered a clear and unequivocal waiver. While it is possible that the Court may not allow an “objection” to interrogatories to be made after such time, a constitutional assertion against self-incrimination is far more significant than an objection on merely procedural grounds. It can never be assumed or implied and is available throughout the discovery and trial process.

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM REQUIRING RELATOR TO STATE WHY A PARTICULAR ANSWER MAY INCRIMINATE HIM IN THAT AN INDIVIDUAL MAY NOT BE COMPELLED TO PROVIDE AN EXPLANATION AS TO WHY A PARTICULAR ANSWER MAY INCRIMINATE HIM AS A PREREQUISITE TO ASSERTING HIS CONSTITUTIONAL RIGHTS AGAINST SELF INCRIMINATION SINCE, UNDER ARTICLE I, SECTION 19 OF THE MISSOURI CONSTITUTION, THERE IS A PRESUMPTION THAT A WITNESS' ANSWER MAY TEND TO INCRIMINATE HIM WHICH CAN BE REBUTTED ONLY BY AN AFFIRMATIVE DEMONSTRATION BY THE PARTY SEEKING THE ANSWER THAT SUCH ANSWER CANNOT POSSIBLY HAVE A TENDENCY TO INCRIMINATE.

A good exposition of Missouri Law on this issue is found in State ex rel. Webster v. Ames, 791 S.W.2d 916 (Mo. App. 1990).

In Ames the trial court entered a default judgment as to liability against defendant who had refused to answer three of at least eleven interrogatories claiming her privilege under the Fifth Amendment. (She did not specifically assert a privilege under Article 1, Section 19 of the Missouri Constitution.)

The Missouri Court of Appeals reversed and remanded the case citing State ex rel. Munn v. McKelvey, 733 S.W.2d 765 (Mo. banc 1987) and State ex rel. Lieberman v. Goldman, 781 S.W.2d 802 (Mo. App. 1989).

As to the extent and presumptions of the privilege, the Court of Appeals quoting extensively from McKelvey, supra, noted:

“The privilege against self-incrimination is secured by the Fifth Amendment to the United States Constitution and by Article I, Section 19 of the Missouri Constitution. The principles to be followed in applying these two provisions are consistent.

A witness' privilege against self-incrimination 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official question put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in the future criminal proceedings'. The privilege extends not only to answers which would in themselves support a conviction of a crime but likewise embraces those answers which would simply furnish a link in the chain of evidence needed to convict the witness. Once a witness invokes his constitutional privilege against self-incrimination, a rebuttable presumption arises that his answer might tend to incriminate him. This presumption can be rebutted by a demonstration by the questioner that the answer cannot possibly have a tendency to incriminate the witness. Only after the questioner makes such a demonstration may a court compel an answer to the question in derogation of the privilege against self-incrimination (Citations omitted).

The Court of Appeals found that Plaintiff had not overcome the “rebuttable presentation” referred to in Munn, supra.

As noted in McKelvey, supra, the privilege in Missouri has always been very aggressively enforced without a showing of possible incrimination. For example, in State ex rel. Hudson v. Webber, 600 S.W.2d 691, 692 (Mo. App. 1980), involving an examination of a judgment debtor, the Court explained the “rational basis” test then in effect:

In Cantor v. Saitz, supra, the correct rule is to be found: A court cannot compel answers to questions in derogation of the privilege unless the court can say, as a matter of law, that it would be impossible for an answer to incriminate the individual.

It is not required that any charge of criminal conduct be either prior to the examination, see State ex rel. Howard v. Allison, 431 S.W.2d 233 (Mo. App. 1968). The privilege is available where an answer “may or not incriminate the witness,” see United States v. Burr, 25 Fed.Cas.No. 14,-692e, pages 38, 40, 1 Burr’s Trial 244.

The court is not unmindful that this privilege might be asserted arbitrarily. This problem was also addressed in Cantor v. Saitz, supra, wherein the court declared that the witness or the counsel for the witness could be required to describe “in general terms” a rational basis upon which the witness’s answer could conceivably incriminate him. Once a rational basis is foreseen by the court or pointed out by the witness, it would follow

that the court would be precluded from saying, as a matter of law, that it would be impossible for the witness to incriminate himself. Such a rational basis in general terms can be found in the response to question no. 1 above.

One year after Hudson, *supra*, this Court expanded and strengthened the privilege in State ex rel. Shapiro v. Cloyd, 615 S.W.2d 41 (Mo. banc 1981). In Shapiro, the Court said, in effect, that Article 1, Section 19 of the Missouri Constitution provides even greater protection than the Fifth Amendment and placed a very heavy burden on the Plaintiff in overcoming a “rebuttable presumption” that the privilege was properly invoked. The “rational basis” test was specifically rejected for an assertion of the Fifth Amendment and Article I, Section 19 of the Missouri Constitution and a burden was imposed that it must be shown that the testimony sought “cannot possibly” have a tendency to incriminate. The Court stated (at p. 45):

By requiring the witness to state a “rational basis,” it is possible that the witness will “surrender the very protection which the privilege is designed to guarantee.” Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). “Logically, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door’s being set a little ajar, and while at times it permits the suppression of competent evidence, nothing better is available.” United States v. Weisman, 111 F.2d 260, 262 (2d Cir. 1940). Both the “burden of proof” requirement and the less stringent “rational

basis” requirement involve an element of compulsion which we find inconsistent with the principles underlying the privilege.

We may neither “add to nor subtract from the mandates of the United States Constitution,” North Carolina v. Butler, 441 U.S. 369, 376 99 S.Ct. 1755, 1759 60 L.Ed.2d 286 (1979). However, in order to assure that the protection given by Article I, §19, of the Missouri Constitution, is meaningful, we hold that once a witness claims the privilege afforded him under that provision, a rebuttable presumption arises that the witness’ answer might tend to incriminate him, a presumption that can be rebutted by a demonstration by the party seeking the answer that such answer “‘cannot possibly’ have such tendency to incriminate.” (Emphasis original.)

Once again the opinion in State ex rel. Long v. Askren, 874 S.W.2d 466 (Mo. App. W.D. 1994) provides an excellent summary of long standing Missouri law on this issue: (at p.p. 471, 472)

The privilege against self-incrimination is guaranteed by the Fifth Amendment of the United States Constitution and Article I, Section 19 of the Missouri Constitution. To avail oneself of the guaranteed right, one must assert the right. State ex rel. Lee v. Cavanaugh, 419 S.W.2d 929, 935 (Mo. App. 1967). The privilege extends to judgment debtors examined pursuant to Section 513.380. State ex rel. Hudson v. Webber, 600 S.W.2d 691, 692 (Mo. App. 1980). Thus, a judgment debtor examined pursuant to Section 513.380, who invokes the privilege against self-incrimination,

cannot be compelled to answer a question the answer to which may tend to incriminate him. An answer that incriminates is “an answer which discloses a fact that would form a necessary and essential part of a crime, which is punishable by the laws.” Cantor v. Saitz, 562 S.W.2d 774, 777 (Mo. App. 1978), quoting United States v. Burr, 25 Fed. Cas. No. 14,692 E, pages 38, 40, 1 Burr’s Trial 244. The privilege extends “not only to refusing to answer the question asked, but also to refusing to explain how the answer might incriminate the witness.” Saitz, 562 S.W.2d at 778, quoting Cavanaugh, 419 S.W.2d at 934. Once a witness invokes the right against self-incrimination, a rebuttable presumption arises that the answer to the question posed might tend to incriminate him. State v. Carey, 808 S.W.2d 861, 865 (Mo. App. 1991).

Consequently, the law is clear that it is not Relator’s burden to show that a particular question may tend to incriminate him. Rather it is Plaintiff’s burden to show on a question by question basis that there is no possibility of incrimination based on an answer to the particular question.

CONCLUSION

For the foregoing reasons, the Preliminary Writ of Prohibition, heretofore issued by the Court should be made absolute.

Dated _____.

Respectfully submitted,

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PROOF OF SERVICE

A true copy of the foregoing was mailed to Respondent Dale W. Hood to his chambers in the St. Louis County Courthouse, 7900 Carondelet, Clayton, MO 63105 and to Gary Seltzer, attorney for Plaintiff via facsimile to (314)727-3343, by e-mail to cechliens@prodigy.net, by hand-delivery or by postage-paid first class mail to Suite 1004, 222 S. Central Ave., St. Louis, Missouri 63105-3316 this _____ day of April, 2010.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of Mo.Sup.Ct.R. 84.06(b). It contains no more than 7,750 words of text (specifically, containing 3,732 words). It was prepared using Microsoft Word 2003 for WINDOWS. The enclosed floppy disk also complies with the Mo.Sup.Ct.R. 84.06(g) in that it has been scanned and is virus free. The files on the floppy disk contain the brief in both Microsoft Word for WINDOWS and "saved as" MSWord _____ formats.

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