COMMITTEE REPORT

A PRIVILEGED POSITION: WHEN DENIAL OF EVIDENCE JUSTIFIES DISMISSAL OF DEFAMATION CLAIMS

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All evidentiary privileges, it is said, "are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Thus, where an exploration of truth and falsity is at the heart of a civil action, as it invariably is in a defamation case, the invocation of an absolute privilege to withhold evidence from the defendant – whether grounded in attorney-client confidences, the potential for self-incrimination, doctor-patient privacy, government secrecy, or some other recognized exception to the compulsory provision of evidence – may give rise to a conundrum: Should a plaintiff be permitted to maintain a claim where the defendant is denied access to information bearing upon the truth of the very matters placed at issue by the suit?

The answer should be "No."

Not a Novel Proposition

There is ample authority outside of the defamation context, as a matter of rule and precedent, for dismissal of a case based upon the plaintiff's failure to disclose information about matters that the plaintiff has put in issue:

Caesar v. Mountanos, 542 F.2d 1064, 1068 (9th Cir. 1976) ("Every person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based.").

Founding Church of Scientology of Washington, D.C., Inc. v. Webster, 802 F.2d 1448, 1457-59 (D.C. Cir. 1986) (affirming dismissal of corporate plaintiff's case as discovery sanction where its founder refused to appear for deposition).

Upper Deck Co. v. Breakey Int'l, BV, 390 F. Supp. 2d 355, 362 (S.D.N.Y. 2005) (dismissing plaintiff's claim for lost royalties where plaintiff refused to divulge supporting information in discovery).

In re SCT Sec. Litig., No. 84–6004, 1988 WL 13263, at *1 (E.D. Pa. Feb. 18, 1988) (unpublished disposition) (stating that third-party plaintiff "'has no absolute right to both his silence and his lawsuit'" and dismissing third-party complaint for plaintiff's refusal to disclose information relevant to his claims) (citation omitted).

Wolford v. Cerrone, 584 N.Y.S.2d 498, 499 (N.Y. App. Div. 1992) (affirming dismissal of personal injury action where plaintiff failed to attend independent medical examination).

Nardella v. Datillo, 35 Pa. D. & C.4th 257, 261 (Pa. Ct. Com. Pl. 1996) ("[I]t would be fundamentally unfair to allow a litigant to make allegations about, and claim damages on the basis of, a mental or emotional condition and at the same time prevent a litigation adversary from testing those allegations or examining the asserted causal nexus.").

FED. R. CIV. P. 37 (b)(2)(A) (allowing dismissal of case when party commits discovery violations, such as failing to obey an order to provide or permit discovery).

Treatment of Requests for Privileged Information Outside of the Defamation Context

The assertion of privilege can arise from the everyday protections afforded by the attorney-client or doctor-patient privileges, from the more deliberate assertions of the Fifth Amendment's protection against self-incrimination, or from other, more sparingly applied privileges, such as the state secrets privilege. In each case, the impact of the assertion of the privilege must be individually weighed. Where the plaintiff asserts the privilege to withhold material evidence, there is ample precedent to support the proposition that the plaintiff must waive the privilege or risk dismissal of the lawsuit. Where the application of a privilege operates to deny either the plaintiff or the defendant information at the core of the lawsuit, courts likewise have concluded that dismissal may be warranted.

Attorney-Client and Doctor-Patient Privileges

Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000) ("Numerous courts . . . have concluded that, similar to attorney-client privilege that can be waived when the client places the attorney's representation at issue, a plaintiff waived the psychotherapist-patient privilege by placing his or her medical condition at issue") (citations omitted).

Maynard v. City of San Jose, 37 F.3d 1396, 1402 (9th Cir. 1994) ("[The plaintiff] waived any privilege protecting his psychological records when he put his emotional condition at issue during the trial.").

Heller v. Norcal Mut. Ins. Co., 8 Cal. 4th 30, 44 n.5 (Cal. 1994) (observing that rule of evidence provides that "the physician-patient relationship is waived 'as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by . . . [t]he patient'") (citation omitted).

Scheff v. Mayo, 645 So. 2d 181, 182 (Fla. Dist. Ct. App. 1994) (plaintiff who makes his mental or emotional condition an element of his claim cannot invoke the doctor-patient privilege).

Fetterhoff v. Zalezak, 34 Pa. D. & C.4th 67, 70 (Pa. Ct. Com. Pl. 1996) ("[W]here a plaintiff in a civil suit places his or her mental condition directly at issue, the [doctor-patient] privilege is waived as to that condition and the plaintiff must either consent to the disclosure of the information at issue or be precluded from pursuing claims related to his or her emotional and mental condition.") (citing *Rost v. State Bd. of Psychology*, 659 A.2d 626, 629 (Pa. Commw. Ct. 1995)).

In re Dow Corning Corp., 261 F.3d 280, 283 (2d Cir. 2001) (petition for writ of mandamus denied where district court ordered full disclosure of minutes acknowledged to

contain attorney-client privileged and work product material in shareholders' lawsuit, because court concluded "that production of the minutes was necessary for resolution of [defendants'] summary judgment motion").

The Fifth Amendment Privilege Against Self-Incrimination

Plaintiff's Assertion

Serafino v. Hasbro, Inc., 82 F.3d 515, 518 (1st Cir. 1996) ("while a trial court should strive to accommodate a party's Fifth Amendment interests, it also must ensure that the opposing party is not unduly disadvantaged") (citation omitted).

Black Panther Party v. Smith, 661 F.2d 1243, 1271-72 (D.C. Cir. 1982) (propriety of dismissal of a civil action in the face of the invocation of the Fifth Amendment by the plaintiff or its agent is determined by application of a balancing test) (citing *Wehling v. CBS,* 608 F.2d 1082, 1088 (5th Cir. 1979)), *vacated and remanded for dismissal with prejudice*, 458 U.S. 1118 (1982) (discussed *infra*).

Fremont Indem. Co. v. Superior Court, 187 Cal. Rptr. 137, 140 (Cal. Ct. App. 1982): "'[T]he gravamen of [plaintiff's] lawsuit is so inconsistent with the continued assertion of [the Fifth Amendment privilege against self-incrimination] as to compel the conclusion that the privilege has in fact been waived.' . . . [W]e hold that the plaintiff's filing of an action to recover on the fire insurance policy operated to waive his constitutional privilege against self incrimination with reference to any factual issues, particularly as to the applicability of the arson exclusion, tendered by the complaint. Even so, plaintiff finally may yet claim his privilege, but he will have to dismiss his lawsuit if he persists in doing so. As variously stated in the authorities

we have relied upon, "he cannot have his cake and eat it too.") (first quoting *Wilson v. Superior Court*, 134 Cal. Rptr. 130, 1131 (Cal. App. 1976).

Lyons v. Johnson, 415 F.2d 540, 542 (9th Cir. 1969) ("The scales of justice would hardly remain equal in these respects, if a party can assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim. If any prejudice is to come from such a situation, it must, as a matter of basic fairness in the purposes and concepts on which the right of litigation rests, be to the party asserting the claim and not to the one who has been subjected to its assertion. It is the former who has made the election to create an imbalance in the pans of the scales.").

Capanelli v. News Corp., 35 Med. L. Rep. (BNA) 1084, 1086 (N.Y. Sup. Ct. Jan. 26, 2006) ("A plaintiff who invokes the privilege [against self-incrimination] to deny a defendant substantive discovery to which it is entitled may not continue to maintain the action.") (citation omitted).

Jackson v. Microsoft Corp., 211 F.R.D. 423, 433-35 (W.D. Wash. 2002) (dismissal after the plaintiff's refusal to testify based on the Fifth Amendment), *aff'd*, 78 Fed. Appx. 588 (9th Cir. 2003).

In re Keller Fin. Servs. of Fla., Inc., 259 B.R. 391, 407 (Bankr. M.D. Fla. 2000) ("[A] person may not seek affirmative relief in a civil action and then invoke the fifth amendment to avoid giving discovery, using the fifth amendment as both a 'sword and a shield.'") (quoting DePalma v. DePalma, 538 So. 2d 1290, 1290 (Fla. App. 4th Dist. 1989). *Cf. United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995) ("the claim of [Fifth Amendment] privilege [by defendant] will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation"); *Resolution Trust Corp. v. Spagnoli*, 811 F. Supp. 1005, 1007-1013 (D.N.J. 1993) (negative inference from

defendant's invocation of Fifth Amendment in response to specific questions results in summary judgment for plaintiff).

Non-Party's Assertion

LiButti v. United States, 107 F.3d 110, 123-25 (2d Cir. 1997) (court should consider four factors when deciding whether to impose adverse consequences on the plaintiff based on a non-party's invocation of the Fifth Amendment privilege in civil litigation: (1) nature of the relevant relationships; (2) degree of control of the party over the non-party witness; (3) identity of interests of the party and non-party witnesses in the outcome of the litigation; and (4) importance of the non-party witness in the context of the litigation).

Federal Chandros, Inc. v. Silverite Const. Co., 562 N.Y.S.2d 64, 65 (N.Y. App. Div. 1990) (prohibition against using the Fifth Amendment as both a shield and a sword "applies with equal force where the privilege is asserted by the principal of a corporate plaintiff").

Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471, 1482 (8th Cir. 1987) (adverse inference properly drawn against plaintiff entity where individual who invoked privilege was "a key figure in this case").

United States ex rel. Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 61 n.25 (D.D.C. 2007) (applying *LiButti* factors to non-party assertion of Fifth Amendment privilege).

Dimensions Med. Ctr., Ltd. v. Principal Fin. Group, Ltd., No. 93 C 6264, 1996 WL 494229, at *7 (N.D. Ill. Aug. 21, 1996) (summary judgment appropriate where an officer of a corporate plaintiff refuses to testify: "[T]he plaintiff must *prove* each of his averments in his complaint (which is not evidence). Proof of the allegations in the complaint is impossible if the

plaintiff asserts his Fifth Amendment privilege against self-incrimination.") (emphasis in original) (citation omitted).

State Secrets Privilege

Totten v. United States, 92 U.S. 105, 107 (1875) ("[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. . . .).

Kasza v. Browner, 133 F.3d 1159, 1170 (9th Cir. 1998) (dismissal proper if "the very subject matter of [plaintiff's] action is a state secret").

Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547-48 (2d Cir. 1991) (dismissal proper if state secrets privilege "so hampers the defendant" that trier of fact is likely to reach an erroneous result).

In re United States, 872 F.2d 472, 476 (D.C. Cir. 1989) (dismissal proper "[i]f the [privileged] information is essential to establishing plaintiff's prima facie case").

Edmonds v. U.S. DOJ, 323 F. Supp. 2d 65, 79 (D.D.C. 2004) (dismissing civil action where "any effort . . . by the defendants to rebut [elements of plaintiff's claim] would risk disclosure of privileged information"), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir. 2005).

How This Works in Libel Cases

As the cases above demonstrate, when faced with the dilemma of the assertion of a privilege resulting in the withholding of material evidence, courts must decide whether to dismiss outright, stay the matter until the evidence becomes available (if ever), or impose an adverse

inference at the summary judgment stage or at trial.[1] The result should be no different in the defamation context, where the case will often turn on the outcome of an analysis of material falsity or substantial truth. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986).

Indeed, several courts have applied this principle in defamation cases, with a positive defensive result.

Outright Dismissal

Fitzgerald v. Penthouse International Ltd.

In *Fitzgerald v. Penthouse International Limited*, 776 F.2d 1236, 1237 (4th Cir. 1985), the Fourth Circuit affirmed the dismissal of a defamation case because the invocation of the state secrets privilege had prevented critical evidence from being available at trial. *Id.* at 1242. The plaintiff sued over a magazine article he claimed falsely implied that he sold "top secret marine mammal weapons system" technology to foreign countries. *Id.* The plaintiff planned to call expert witnesses to testify as to falsity, but the Navy objected that an adjudication of the defamation claim would likely lead to public disclosure of classified information, which, in turn, "'could reasonably be expected to cause grave damage to the national security.'" *Id.* at 1242-43 (citation omitted). After reviewing a classified affidavit filed by the Secretary of the Navy, the Fourth Circuit concluded that the district court had properly dismissed the case. "Due to the nature of the question presented in this action and the proof required by the parties to establish or refute the claim," the appeals court explained, "the very subject of this litigation is itself a state

[1] This outcome should be distinguished from the impact of a *defendant's* assertion of the reporters' privilege in shielding confidential sources in the course of defending against a libel lawsuit. Jurisdictions differ, but in Pennsylvania, for example, the Supreme Court has held that the finder of fact may make no adverse inference based on the protections afforded by the state's Shield Law. *See, e.g.*, *Sprague v. Walter*, 543 A.2d 1078, 1086 (Pa. 1988).

secret." *Id.* at 1243. Dismissal was necessary, the court said, because "truth or falsity of a defamatory statement is the very heart of a libel action." *Id.* at 1243 n.11.

Under the principle articulated in *Fitzgerald*, dismissal is appropriate when the merits of the controversy at issue are "inextricably intertwined with privileged matters." *Id.* If, however, the classified information can effectively be obtained elsewhere or is not highly material, dismissal may not be the appropriate remedy. *See DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001) (no dismissal where information subject to the state secrets privilege was "potentially relevant" but "not central to the question" of liability, and similar evidence was available elsewhere). But, when access to material bearing on core factual materials is denied on the basis on state secrets, *Fitzgerald* supports dismissal of the action.[2]

Trulock v. Lee

Nearly twenty years after *Fitzgerald*, the Fourth Circuit revisited the issue of privilege consequences in *Trulock v. Lee*, 66 Fed. Appx. 472 (4th Cir. 2003) (unpublished disposition), and reached the same conclusion. The *Trulock* case arose out of the government's investigation of Dr. Wen Ho Lee, a Taiwanese-American scientist employed at Los Alamos National Laboratory who was accused of mishandling sensitive documents concerning the United States' nuclear weapons. *Id.* at 473. In response to those allegations, Dr. Lee and his attorneys accused one of the investigators for the Department of Energy, Notra Trulock, of targeting Lee because of his ethnicity. Trulock sued Dr. Lee for defamation.

During discovery, the government sought to block the disclosure of certain classified documents, asserting that the rationale for its initial investigation of Lee – including information provided by Trulock – was covered by the state secrets privilege. *Id.* at 474-75. After a magistrate judge entered a protective order denying discovery of the investigative documents,

[2] "[B]eyond contexts involving military or state secrets privileges," the precedential value of *Fitzgerald* has been called into question. *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1514-15 (D. Minn. 1988), *aff'd*, 881 F.2d 1426 (8th Cir. 1989). In *Price*, an FBI agent brought a defamation action over a book about the federal government's treatment of Native Americans, and the defendants were prevented from learning the identities of FBI informants on the basis of the common law informer's privilege. *Id.* The district court expressed skepticism about whether the *Fitzgerald* rule should be applied in such circumstances and, in any event, denied a defense motion to dismiss because the information sought was not central to the litigation. *Id.*

the government intervened as a defendant and moved for summary judgment on the ground that the case against Lee could not be litigated without the privileged information. The district court agreed and dismissed the case.

On appeal, the Fourth Circuit observed that the state secrets privilege is properly invoked by the government whenever "'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *Id.* at 475-76 (citation omitted). Dismissal of a civil lawsuit pursuant to the state secrets privilege is required, the appeals court said, where (1) the privileged information is "critical to the resolution of core factual questions in the case"; (2) "the plaintiff's ability to prove his case necessarily depends on or threatens the disclosure of privileged information"; or (3) the absence of such information "deprives [the defendant] of a valid defense." *Id.* (citations omitted). Trulock's motivation for investigating Dr. Lee, the court held, was "itself a state secret" and therefore, because "basic questions about truth, falsity, and malice cannot be answered without the privileged information," summary judgment was properly granted to the defense. *Id.* at 476-77 (citation omitted).

Steele v. Mengelkoch

Earlier this year, the Minnesota Court of Appeals confronted this issue in a libel case and concluded that allowing the suit to go forward would be unfair to the defendant. In *Steele v. Mengelkoch*, the plaintiff sued a university professor and others for defamation based upon statements the professor allegedly made in an article and during a lecture accusing the plaintiff of sexually abusing and assaulting women. *See* No. A08-0791, 2009 WL 1182005, at *1 (Minn. Ct. App. May 5, 2009). During his deposition in the case, the plaintiff invoked his Fifth Amendment right against self-incrimination in response to a series of questions that were material to the truth of the underlying accusations of the plaintiff's misconduct. *Id.* at *2.

The appeals court affirmed an order dismissing the plaintiff's claims with prejudice, holding that "Minnesota law prohibits a civil plaintiff from prosecuting his claim while at the same time withholding information that might relieve a defendant of liability." *Id.* at *3. In such situations, the appeals court said, trial courts have wide discretion to require a plaintiff "to choose between his Fifth Amendment rights and his prosecution of the defamation suit." *Id.* at

*4. Although the plaintiff in *Steele* had argued for a less-drastic sanction, the Minnesota appeals court said a penalty short of dismissal "would not be appropriate, considering the prejudice to [the defendants]" – namely, that the plaintiff's refusal to testify had "made it 'impossible for [the defendants] to defend themselves effectively . . . .'" *Id.*

Eckhaus v. Alfa-Laval, Inc.

Defamation plaintiffs have likewise been deprived of their right to sue when an attorney-client privilege is implicated and the client is unwilling to waive the confidence. Such was the case in *Eckhaus v. Alfa-Laval, Inc.*, 764 F. Supp. 34 (S.D.N.Y. 1991), a defamation action brought by an attorney against his former employer, for whom he had briefly served as general counsel. In *Eckhaus*, the attorney-plaintiff asserted that he was defamed by his employer during a performance evaluation at which several officers of the company were present. *Id.* at 35. The company filed a summary judgment motion, arguing that continued prosecution of the case would require the attorney to reveal client confidences in violation of a state ethical rule relating to disclosure of client secrets. The attorney, on the other hand, asserted that an exception to the rule applied – namely, that such confidences could be revealed in response to a claim that the attorney had engaged in wrongful conduct.

The court concluded that the exception was inapposite because it applied only in cases where the client initiated the lawsuit against the attorney and made a formal accusation of misconduct, not when the lawyer was suing the former client. Accordingly, the court held that the attorney could not maintain his action because its prosecution would require him to disclose confidential communications with the client/defendant in violation of the rules of professional responsibility. *Id.* at 38.

Remedies Short of Immediate Dismissal

Wehling v. CBS

In some circumstances where invocation of a privilege obstructs discovery into issues of truth and falsity, termination of the litigation is not immediate. For example, in *Wehling v. CBS*, the Fifth Circuit suggested that a plaintiff's invocation of the privilege against self-incrimination should result in dismissal only as a last resort. 608 F.2d at 1088-89. The court of appeals in *Wehling* directed the district court to enter a protective order staying further discovery in the defamation action until the applicable statute of limitations for any criminal activity to which the plaintiff might be subject had run. The court's order resulted in a three-year stay. *Id.* at 1089.

In that case, Carl Wehling, the owner of several parochial and trade schools, alleged he had been libeled by a CBS news report stating that he had defrauded the government and his students. During discovery, Wehling refused to answer certain

questions in his deposition and then asserted his Fifth Amendment privilege against self-incrimination. Wehling sought a three-year stay of the litigation, but the district court granted CBS's motion to dismiss with prejudice. *Id*. at 1086.

On appeal, the Fifth Circuit reversed. Although the court of appeals emphasized that a "civil plaintiff has no absolute right to both his silence and his lawsuit," it stated that "[n]either, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege." *Id*. at 1088. The court of appeals recognized that what the plaintiff sought – a "three-year hiatus in the lawsuit" – was "undesirable," but it determined that "such inconvenience seems preferable at this point to requiring plaintiff to choose between his silence and his lawsuit." *Id*. at 1089. The court stressed, however, that its decision

> must not be read as requiring that the discovery stay be extended until the termination of all criminal proceedings, regardless of their duration. Although we have refused to presume that a three-year stay would necessarily prejudice CBS' efforts to defend against Wehling's claims, we are aware that a point may be reached where the likelihood of prejudice is so great that the trial court would be justified in requiring plaintiff to either submit to discovery or forego his lawsuit.

Wehling v. CBS, 611 F.2d 1026, 1027 n.* (5th Cir. 1980) (op. on pet. for reh'g).

Glunk v. KYW-3 TV

A case in Pennsylvania state court, *Glunk v. KYW-3 TV*, No. 02–08858 (Pa. Ct. Com. Pl., Chester Cty. 2004), addressed the potential consequences of a physician's assertion of patient privacy rights in the context of a defamation action relating to allegations about the doctor's professional competence. In *Glunk*, the plaintiff had been sued by the estate of a deceased patient for causing the patient's death, and in turn sued a television station for libel based upon its reporting on the malpractice lawsuit. When the doctor's deposition was taken, he refused to testify about his treatment of the deceased patient – an issue that went directly to the heart of his defamation claim – asserting that such testimony was barred by restrictions imposed by the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"), 42 U.S.C. § 1320d, and the common law physician-patient privilege. He also refused to respond to questions related to his hospital privileges and the outcome of his peer review experiences, claiming that the peer review proceedings were privileged under the Pennsylvania Peer Review Protection Act. 63 Pa. Cons. Stat. § 425.

The defendants moved to compel answers to these questions. With respect to the doctor's claims that he could not disclose information subject to HIPAA or the doctor-patient privilege, the court ruled from the bench that plaintiff would be compelled to reconvene his deposition so that the court could rule on each of the doctor's privilege claims on a question-by-question basis. With regard to the doctor's refusal to respond to questions concerning his peer review experiences, the court agreed with the defendants that the plaintiff must produce this information, which was highly material to his defamation action.

See Order, *Glunk v. KYW-3* TV, No. 02-08858 (Pa. Ct. Com. Pl. Chester Cty Jan. 29, 2004). The court held that the act protected against the use of such information in an action *against* the doctor but did not entitle the doctor to rely on the act to withhold information he put in issue in the case. As the court observed, the statutory privilege "was enacted to serve as a shield[, but the] doctor, in this instance, is attempting to use it as a sword." *Id.* at n.2. Shortly thereafter, the doctor withdrew his claim.

Conclusion

Although a plaintiff's attempt to withhold relevant information in a defamation case often operates to a defendant's disadvantage, it may also prove a boon to the defense and should always be evaluated for its potential to lead to the ultimate dismissal of the case.