STATE OF MICHIGAN

COURT OF APPEALS

NEW PROPERTIES, INC., ROBERT W. KITCHEN, and HARRIET KITCHEN,

Plaintiffs-Appellees,

v

GEORGE D. NEWPOWER, JR.,

Defendant-Appellant,

and

RITA JACOBS, JASON NORTON, CHASTITY SCHAUB, CAROL FRANKLIN, RYAN DOBRY, GEORGE D. NEWPOWER, JR., INC., d/b/a HANSEN REALTY, LAKES OF THE NORTH REALTY, INC., a/k/a LAKES OF THE NORTH ASSOCIATION, a/k/a LAKES OF THE NORTH REAL ESTATE, INC., a/k/a LAKES OF THE NORTH, REGINA NEWPOWER, VIRGINIA L. NEWPOWER, MURIEL HART, FMB NORTH-WESTERN BANK, DIANNE BIHLMAN, Personal Representative of the Estate of DAVID BIHLMAN, Deceased, JAMES M. HUNT, PAMELA CANNON, and HOI POLLOI PRODUCTIONS, INC.,

Defendants.

UNPUBLISHED
October 15, 2002

No. 225570
Grand Traverse Circuit Court
LC No. 97-015769-CH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Defendant George Newpower, Jr. appeals by leave granted an order of the trial court compelling him to answer deposition questions, subject to a protective order issued by the trial court. We affirm in part, reverse in part, and remand.

I

In 1996, plaintiff Robert W. Kitchen and defendant George D. Newpower, Jr. (herein "defendant") formed a real estate development corporation (plaintiff New Properties, Inc.) in which plaintiffs Robert and Harriet Kitchen invested several hundred thousand dollars. Defendant subsequently pleaded guilty to embezzlement[1] of New Properties funds and in August 1997 was sentenced to six to ten years' imprisonment. Defendant later filed a petition for bankruptcy and ultimately stipulated that he owed a nondischargeable debt of $800,000 to plaintiffs. During the bankruptcy proceedings, plaintiffs deposed defendant concerning the financial transactions at issue and his involvement.

As discovery proceeded in the instant action, plaintiffs sought to again depose defendant. In response, defendant indicated that he would exercise his Fifth Amendment right against self-incrimination because he could be subject to federal prosecution under federal bank fraud and mail and wire fraud laws. Defendant filed a motion for a protective order to preclude questioning by plaintiffs. Following hearings in January 2000, the trial court ordered that defendant submit to the deposition, at which he could assert his Fifth Amendment rights to questioning as he deemed appropriate; however, the court ordered defendant to answer all direct and cross-examination questions within the scope of his prior deposition testimony in the bankruptcy proceeding and his guilty plea, subject to the trial court's protective order sealing the deposition testimony and limiting its use.

II

Defendant claims that the trial court erred in ordering him to provide deposition testimony despite his assertion of his privilege against self-incrimination and that his prior testimony in the bankruptcy proceeding does not preclude him from asserting the privilege in this case with regard to the same or related matters. We agree to the extent that the trial court's order directs defendant to answer any and all cross-examination questions within the scope of his prior testimony and/or his guilty plea without consideration of the particular questions posed.

A trial court's decision to grant or deny discovery, including the issuance of a protective order, is reviewed on appeal for an abuse of discretion. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 50, 55; 555 NW2d 871 (1996). However, constitutional questions are questions of law, which are reviewed de novo on appeal. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

"The Fifth Amendment provides that no person 'shall be compelled in any criminal case to be a witness against himself.'" *People v Wyngaard*, 462 Mich 659, 671; 614 NW2d 143 (2000). This privilege "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, 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

[1] MCL 750.174

incriminate him in future criminal proceedings.'" *Id.* at 671-672, quoting *Minnesota v Murphy*, 465 US 420, 426; 104 S Ct 1136; 79 L Ed 2d 409 (1984).[2]

Generally, voluntary testimony given in one proceeding does not constitute a general waiver of the Fifth Amendment privilege against self-incrimination in a subsequent proceeding. 81 Am Jur 2d, Witnesses, § 158, p 171; *People v Hunley*, 63 Mich App 97, 100; 234 NW2d 169 (1975). The privilege attaches to the witness in each particular case in which he is called to testify. 81 Am Jur 2d Witnesses, *supra*.

Unlike a criminal defendant's right to refuse to testify, the privilege against self-incrimination does not entitle a defendant to refuse to provide testimony in a civil action; rather, a defendant may invoke the privilege only after a potentially incriminating question has been posed. *Larrabee v Sachs*, 201 Mich App 107, 110; 506 NW2d 2 (1993); *People v Guy*, 121 Mich App 592, 612-613; 329 NW2d 435 (1982). When a witness invokes the protection of the Fifth Amendment, it is incumbent on the trial court to determine whether any direct answer can implicate the witness and, on that basis, to either compel the witness to answer or sustain his refusal to do so. *People v Joseph*, 384 Mich 24, 29-30; 179 NW2d 383 (1970); *People v Hoffa*, 318 Mich 656, 661-663; 29 NW2d 292 (1947). A trial judge is necessarily accorded broad discretion in determining the merits of a claimed Fifth Amendment privilege, *United States v Gaitan-Acevedo*, 148 F3d 577, 588 (CA 6, 1998), and the application of Fifth Amendment principles must take into consideration the particular facts and context of the case. *In re Morganroth*, 718 F2d 161, 167 (CA 6, 1983); *Joseph*, *supra* at 29-30; *Guy*, *supra* at 608-609. See also annotations, 42 ALR Fed 793, 72 ALR2d 830 and 5 ALR2d 1404.

We find no abuse of discretion in the trial court's determination that defendant was not entitled to a claim of privilege with respect to questions he previously answered under oath in the bankruptcy proceeding. An abuse of discretion may be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Bachman v Swan Harbour Ass'n*, ___ Mich App ___; ___ NW2d ___ (Docket No. 228841, issued August 9, 2002), slip op p 19.

Under the circumstances of this case, the trial court properly determined that requiring defendant to respond to the same questions previously posed did not present "'a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures.'" *Meyer v Walker Land Reclamation, Inc*, 103 Mich App 526, 533; 302 NW2d 906 (1981), quoting *Rogers v United States*, 340 US 367, 374; 71 S Ct 438; 95 L Ed 344; 19 ALR2d 378 (1951). Defendant had already responded under oath, and it was unlikely that responding again to the same questions would pose any further danger of a federal prosecution. Defendant's

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[2] The privilege to be free from compelled self-incrimination under the Michigan Constitution is no more or no less extensive than the privilege afforded by the Fifth Amendment; thus, the principles of the federal and state cases are equally applicable. *Paramount Pictures Corp v Miskinis*, 418 Mich 708, 726; 344 NW2d 788 (1984); *In re Stricklin*, 148 Mich App 659, 663; 384 NW2d 883 (1986).

admitted concern was not the repetition of the previously asked questions, but potentially incriminating cross-examination. Federal prosecution on the basis of the disclosures already made was remote, given that nearly two years had elapsed and there was no indication that any federal prosecution was likely. The court noted that defendant was advised of his right against self-incrimination with respect to his guilty plea, and he subsequently gave the deposition testimony in the civil case, certainly aware of the consequences of disclosures. Additionally, in light of the court's imposition of a protective order sealing the deposition testimony and strictly limiting its use, it is unlikely that defendant's reiteration of his previous responses in any way further subjects him to federal prosecution.

However, we find that the court abused its discretion in compelling defendant to answer any and all cross-examination questions within the scope of his prior testimony without regard to the particular question propounded. It is correct that in certain circumstances "[w]here the witness has waived his privilege, he must make a full disclosure with respect to the matter waived, and he therefore waives his privilege with respect to the details and particulars of the fact or transaction disclosed." 24 Michigan Law & Practice, Witnesses, § 150, pp 147-148 (footnotes omitted). Nonetheless, we find this rule inapplicable in the context of this case. See *Hoffa, supra* at 668; *Guy, supra* at 608-609.

First, the trial court's order includes no determination that defendant waived his privilege, and we find no basis for a finding of waiver as a matter of law on the facts presented. Defendant's deposition testimony in the prior, separate legal proceeding involved different parties. There is no indication that defendant voluntarily waived his Fifth Amendment right, and even if a waiver could be inferred for purposes of the prior proceeding, we find no basis for carrying such waiver over into this action to compel defendant's full response to cross-examination by those who were not parties to the prior action. The fact that defendant may have waived the privilege in a deposition in the prior civil proceeding does not affect his rights with regard to a subsequent deposition in a different civil action. See *Ionian Shipping Co v British Law Ins Co, Ltd*, 314 F Supp 1121, 1124 (SD NY, 1970). Cases involving the use of a defendant's prior testimony in a subsequent prosecution are inapposite as are cases in which a party seeks immunity from cross-examination on matters he himself has put in dispute for his own advantage. See 5 ALR2d 1404; *Garrelts v Garrelts*, 101 Mich App 71, 75-76; 300 NW2d 454 (1980); *Hunley, supra* at 99-100.

Second, the trial court's "carte blanche" ruling with regard to cross-examination is contrary to the procedural underpinnings of self-incrimination principles. The validity or invalidity of an asserted privilege is not properly subject to a blanket determination. See *In re Morganroth, supra* at 167-169. The privilege held by one not accused is a privilege to decline to respond to specific inquiries, not a prohibition against potentially incriminating inquiries. *Guy, supra* at 612-613. Where a Fifth Amendment privilege is claimed by a witness under oath, such claim must be accepted unless the court, as a matter of law, finds that any direct answer to the question cannot tend to incriminate the witness. *Hoffa, supra* at 663. Having found the principles of waiver inapplicable, we find no basis, as a matter of law, for a blanket determination that defendant is precluded from invoking his privilege against self-incrimination to any and all cross-examination questions within the scope of the prior questioning.

This Court has addressed analogous circumstances in the criminal context with respect to cross-examination, noting that the Fifth Amendment privilege of a witness must be distinguished from that of a criminal defendant:

> The fact that a witness answers a question on a particular subject without invoking the privilege would not waive his right to invoke the privilege in response to a subsequent question on the same subject, unless the answer to the subsequent question would reveal no more incriminating information than was revealed in the response to the earlier question. [*Guy*, *supra* at 609, citing McCormick, Evidence (2d ed), § 140, pp 296-297.]

We hold that defendant may assert his claim of privilege in response to deposition questioning on cross-examination, recognizing, however, that a witness may not use the safeguards of the Fifth Amendment to distort the truth to his own advantage or as a subterfuge. *In re Morganroth*, *supra* at 167; *Garrelts*, *supra* at 76. Upon defendant's assertion of his privilege, the trial court must properly consider whether any direct answer to a particular question can implicate the witness, and, thus, whether the defendant has a valid claim of privilege. *Hoffa*, *supra* at 662; see also *Ionian Shipping*, *supra* at 1123. To the extent that defendant's claims of privilege and the trial court's rulings raise issues affecting the ultimate admissibility of the evidence, see, e.g., *Guy supra* at 610-611, we do not intend by our decision to in any way foreclose the trial court's consideration of the merits of those subsequent issues.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens