**PODCAST:**

**INVOKING FIFTH AMENDMENT IN CIVIL CASES**

**3/26/2023**

**Hello folks and welcome to another edition of the Good Judge-ment podcast. I’m Wade Padgett.**

*And I’m Tain Kell. Today we touch on a subject that doesn’t come up very often, but when it does, it almost always comes out of nowhere.*

**Yeah, and making a quick decision on this particular matter can be really difficult “on the fly” so we thought that it might be good to give you folks a little guidance on it for future reference.**

*The topic for today is “Invocation of the Fifth Amendment in Civil Cases”.*

**That’s right, just a little refresher:**

**5th Amendment**

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

*And, of course, the 5th Amendment is applicable to the states through the 14th Amendment.*

**But Tain, that clearly applies to testimony in criminal cases. How does that affect someone’s rights in the civil context?**

*Good question. A long line of Georgia cases states that a person may not be compelled to answer questions in a civil case that might tend to incriminate that person in a criminal context.*

*And that makes sense if you think about it. What good would it do if you had a right against self-incrimination in the criminal context but it could be circumvented by filing a civil action?*

**Civil forfeitures, TPOs, etc. could be the exceptions swallowing the rule. But how does this rule apply in the civil context?**

*Across the board.*

*Discovery: depositions, interrogatories, requests for admissions, etc.*

*Of course, trial testimony*

**Let’s look at some cases:**

*Parham v. Stewart*, 308 Ga. 170 (Ga. 2020)

In Parham, the Appellant claimed error because the trial court refused to compel the Appellee to answer interrogatories and deposition questions to which Appellee claimed a 5th amendment privilege and Appellant objected.

The Supreme Court pointed out:

It is well settled that when a witness asserts his privilege against self-incrimination in a civil case, **"he must respond to each question asked, asserting the privilege to those questions he deems necessary."** Axson v. Nat. Sur. Corp. , 254 Ga. 248, 249, 327 S.E.2d 732 (1985). If a motion to compel is made, **"the trial court must determine whether the privilege has been validly raised to each question."** Id.

Parham v. Stewart, 839 S.E.2d 605, 308 Ga. 170 (Ga. 2020)

In other words, the privilege is analyzed on a question-by-question basis and the person responding must assert the right as to each question.

Right, and then the trial court has to make a determination, with respect to each question, whether the privilege is validly asserted.

And then determine whether and how to compel the person to answer.

Right. The Parham court, citing another case, *Page v. Page*, said:

**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.**

*Page v. Page* , 235 Ga. 131, 133, n.1, 218 S.E.2d 859 (1975).

Parham v. Stewart, 839 S.E.2d 605, 308 Ga. 170 (Ga. 2020)

SOUNDER: READING LAW IS NOT AWESOME

Takeaway:

On a motion to compel, analyze each question and the potential implications of each question to the person being asked to respond.

*So Wade, have you ever had this come up in the midst of trial?*

What did you do?

Excuse the jury, hold a mini-hearing on the person’s right to assert the 5th?

[Comes up in criminal cases more often.]

So what are the implications???

There is a very instructive footnote in Parham that is helpful:

**In civil cases, every time a witness invokes his or her Fifth Amendment right, a trial court *may* draw an adverse inference against that witness's testimony, as the inference is "based upon an implied admission that a truthful answer would tend to prove that the witness had committed the act."** Hathcock v. Hathcock , 249 Ga. 74, 75, 287 S.E.2d 19 (1982) (citing Simpson v. Simpson , 233 Ga. 17, 21, 209 S.E.2d 611 (1974) ).

**However, our case law does not require a trial court to draw such an inference, nor does it state that the adverse inference is irrefutable.**

Parham v. Stewart, 839 S.E.2d 605, 308 Ga. 170 (Ga. 2020)

So the result of the invocation of the Fifth Amendment is that the trial court *can, but is not required to,* draw anadverse inference that the person invoking the right, in fact, committed the act as alleged.

This brings up two separate and interesting points:

1. How does this affect use of evidence in pretrial (and potentially post-trial) motions?
2. How do we instruct the jury when it happens in a civil trial?

In the Parham case, the Appellant insisted that the Appellee’s invocation of his 5th amendment right, coupled with other evidence, required the trial court to grant summary judgment to the Appellant.

But the Supreme Court pointed out:

“To the extent that Appellant is arguing that the trial court was required to draw an adverse inference that could not be rebutted by other evidence, this is incorrect."

Parham v. Stewart, 839 S.E.2d 605, 308 Ga. 170 (Ga. 2020)

The Court pointed out that the inference is not *required,* and it is *always rebuttable.* So, while the inference could be applied in the context of ruling on a motion for summary judgment, for example, it is not required to be applied.

What if it happens at trial?

**JURY INSTRUCTION**

I think that in the context of a civil trial, after having the mini-trial I suggested earlier, once the witness invokes the right for the first time, it would be prudent to make an immediate instruction to the jury- almost like a limiting instruction- as to how to handle the evidence.

I suggest that the instruction include:

1. An affirmation that it is the witness’s *right* to invoke his/her right against self-incrimination;
2. That the witness, in properly invoking the right, is not required to answer the question;
3. That the jury may draw “**an adverse inference against that witness's testimony, as the inference is ‘based upon an implied admission that a truthful answer would tend to prove that the witness had committed the act.’”;**
4. That the inference may be drawn, but is not required; and,
5. That the inference is rebuttable.

I would also suggest that this instruction be given again in the final charge to the jury.

At trial, like in discovery, the questioner must ask every question, and the witness must invoke the right as to each question. The questioner must then ask the Court to compel the witness to answer (if desired), and the Court must rule on each question.

For example, a witness may be called to testify about possible incriminating acts and might refuse to state his name. Obviously, this question is not incriminating and the questioner would ask the Court to compel the answer.

If the Court compels an answer and the witness refuses, the trial judge should explain the potential for contempt penalties and direct the witness to answer. If he refuses, the Court may hold him in contempt.

What if the witness shows up at trial with his own lawyer?

Again, I would suggest that the jury be excused, a hearing be conducted, allowing the witness’s lawyer to participate by suggesting when the witness should/should not answer. The trial judge can then make a preliminary ruling on each question.

Once the jury returns, I would probably not allow the witness’s attorney to actively participate.

The questions would be asked again, with the witness answering or asserting the privilege as previously instructed.

Last thing,

WHAT IF THIS COMES UP UNEXPECTEDLY DURING TRIAL?

STOP, DROP AND ROLL!

Just joking. Just stop.

Does the witness need a lawyer to instruct him/her?

Can you get them one?

Do you explain their rights to them and the possible negative inference?

What is it is a criminal trial?

The main rule is TAKE YOUR TIME!

RECAP:

1. Witnesses have the right to invoke the 5th Amendment in civil matters;
2. Judge must rule on each individual question (implications of criminal activity);
3. Judge must instruct witness to answer if no 5th Amendment implications;
4. Jury should be instructed how to handle the evidence;
5. Negative inference can be drawn, but is not mandatory; and
6. The negative inference, if drawn, is rebuttable.

You may also need to decide if you, the judge, or an attorney needs to advise the witness of his/her rights against self-incrimination.

**Folks, I hope this edition of the Good Judge-ment Podcast has, as always, been helpful. I’m Wade Padgett**

**SILENCE**

**AREN’T YOU GOING TO SIGN OFF, TAIN?**

*“Under my rights granted to me under the 5th amendment to the United States Constitution, I choose not to answer that question on the grounds that it may tent to incriminate me…”*

**UGH!**