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Evidence - Privileged Communications - Attorney-Client Privilege in Stockholders' Suit. Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 39 U.S.L.W. 3411 (U.S. March 23, 1971)

Michael D. Horlick

exclusionary rule,[37] and that any other result would permit unconstitutional dragnet arrests simply for the purpose of holding a lineup.[38] This decision is a logical extension of the rule promulgated in *Wong Sun* and will not preclude the use of identification testimony resulting from an arrest made in good faith which turns out to have been illegal because of a lack of probable cause.[39] Patently, exclusion of such evidence would not serve the deterrent purpose of the exclusionary rule.[40] The decision, however, will preclude the use of evidence secured by an arrest for the very purpose of exhibiting a prisoner before the victim with the intent of having a resulting identification duplicated at trial. Such an arrest is a violation of the fourth amendment,[41] and the use of the evidence derived from it is as much an exploitation of the "primary illegality" as where a defendant is arrested without probable cause in the expectation that a search will yield evidence, and the illegally seized evidence is introduced at trial.[42]

WOODROW TURNER, JR.

Evidence—PRIVILEGED COMMUNICATIONS—ATTORNEY-CLIENT PRIVILEGE IN STOCKHOLDERS' SUIT. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3411 (U.S. March 23, 1971).

Stockholders of the First American Life Insurance Company brought a class action against the corporation and its officers alleging violations of federal and state securities laws and common law fraud. The cor-

37. *Id.* The court, further, felt they would be required to exclude the testimony as an exercise of their supervisory power. 432 F.2d at 585. *See also* Terry v. Ohio, 392 U.S. 1, 13 (1968); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Weeks v. United States, 232 U.S. 383, 392 (1914).

38. 432 F.2d at 584 n.7, quoting from Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 535 (1963).

39. *Id.* at 584.

40. One commentator has suggested that the following question should be asked to determine whether the exclusionary rule applies.

> What goals do policemen have in mind in acting in this improper way? What unexpected fruits . . . could or should be expected of the impropriety, according to our experience? Is the exclusionary rule invoked in this case calculated to deter such impropriety? Will, in fact, exclusion in this case help to serve the policy ends of the rule?

Ruffin, *Out On a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. REV. 32, 38 (1967).

41. *See* note 5 *supra.*

42. 432 F.2d at 584.

poration's attorney was questioned concerning advice he had given the corporation relevant to the matters in issue. The corporation (and the attorney, himself[1]) objected that the attorney-client privilege barred the revelation of the substance of these communications.[2] These objections were overruled by the trial court.[3] The Court of Appeals for the Fifth Circuit remanded for further proceedings, promulgating a series of tests to be considered in determining the existence of the corporate attorney-client privilege in a derivative suit.[4]

The question of when a corporation may invoke the attorney-client privilege[5] against its stockholders apparently had not been litigated prior to *Garner* in a court of record in the United States.[6] While the privilege has been viewed as a concept personal in nature,[7] a corporation has been held to be an entity capable of asserting it against strangers.[8]

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1. The appellate court noted that the objection was the *client's* to invoke; not the *attorney's*. Garner v. Wolfinbarger, 430 F.2d 1093, 1096 n.7 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3411 (U.S. March 23, 1971).

2. Wigmore's statement of the attorney-client privilege:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. 1961).

3. Garner v. Wolfinbarger, 280 F. Supp. 1018, 1019 (N.D. Ala. 1968). Cases which have followed the lower court ruling include: Dahlke v. Morrison, No. 69-497 (N.D. Ala., Oct. 3, 1969); Fischer v. Wolfinbarger, Nos. 5911, 5919 (M.D. Tenn., Aug. 29, 1969); Fischer v. Wolfinbarger, 45 F.R.D. 510 (W.D. Ky. 1968).

4. 430 F.2d at 1104. *See* note 18 *infra*.

5. There seems to be general acceptance of Wigmore's four fundamental conditions necessary to establish a privilege against disclosure:

> (1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*. (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. . . . In the privilege for communications between attorney and client, for example, all four are present, the only condition open to any dispute being the fourth.

8 J. WIGMORE, *supra* note 2, § 2285.

6. *See* Comment, *The Attorney-Client Privilege In Shareholders' Suits*, 69 COLUM. L. REV. 309, 311 n.13 (1969).

7. *See* Radiant Burners, Inc. v. American Gas Ass'n., 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). *See also* Simon, *The Attorney-Client Privilege As Applied To Corporations*, 65 YALE L. J. 953 (1956).

8. Radiant Burners, Inc. v. American Gas Ass'n., 320 F.2d 314, 324 (7th Cir. 1963).

Historically, courts have granted equitable relief in disputes between stockholders and corporate directors on the basis of a trustee theory.[9] Consistent with this approach, English cases have denied the corporation the right to assert a privilege against its stockholders on the grounds that the fiduciary relationship existing between them was hostile to the secrecy contemplated by the privilege.[10] In stockholder suits against corporations in this country, courts have dealt similarly with the certified public accountant-client privilege which may in some respects be analogous to the attorney-client privilege. In *Pattie Lea Inc. v. District Court*,[11] a derivative action in which the corporate privilege in respect to a certified public accountant was denied, the court adopted the English rule that a corporate entity acts only on behalf of its stockholders. The court commented that when the corporation hires an accountant, it does so for the benefit of all of its stockholders.[12]

A traditional exception to the attorney-client privilege exists where two persons have as joint clients employed the same attorney to act for them; the attorney-client communications in such a case are not privileged *inter sese*.[13] This exception is based upon the ground that the common interest and employment forbids concealment of information by either client from the other.[14]

The court in *Garner* was confronted with the existing state of the law which made the presence or absence of the attorney-client privilege depend upon the court's conception of the corporation-stockholder relationship. To regard this relationship as one of trustee-beneficiary would require the destruction of the attorney-client privilege of the corporate entity as against its stockholders.[15] To deny the public policy which dictates that the corporate management must be free

9. *See* 12 WM. & MARY L. REV. 125 n.9 (1970).

10. *See, e.g.*, Dennis & Sons Ltd. v. West Norfolk Farmer's Manure & Chemical Co-Operative Co., [1943] 1 Ch. 220 (C.A. 1943); Gourand v. Edison Gower Bell Telephone Co., 59 L.T.R. (n.s.) 813 (Ch. 1888).

11. 161 Colo. 493, 423 P.2d 27 (1967).

12. *Id.*

13. 8 J. WIGMORE, *supra* note 2, § 2312; PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES R. 5-03, 46 F.R.D. 161, 251 (1969).

14. 8 J. WIGMORE, *supra* note 2, § 2312.

15. Had the court adopted the trustee theory under the English rule, the privilege would have been unavailable to the corporation by reasoning analogous to that of the court in Pattie Lea Inc. v. District Court, 161 Colo. 493, 423 P.2d 27 (1967).

from undue harassment would be to deny reality.[16] *Garner* avoided the problem by refusing to categorize the relationship.[17]

Apparently, the court has taken cognizance of the detached relationship between today's large corporations and their multitude of shareholders by refusing to adopt, without limitation, the trustee theory followed by *Pattie Lea* in its application of the joint client exception. In its place, *Garner* has provided a more flexible set of indicators to be used, on a case by case basis, in determining whether or not a group of stockholders is in sufficient privity to the corporation to justifiably preclude the corporation from asserting the privilege against them. Among the factors,[18] which the court will consider in determining the presence of the privilege are: the nature of the claim, the characteristics of the claimants, and the availability of other means of securing the information.[19]

MICHAEL D. HORLICK

Torts—PROXIMATE CAUSE. *Haft v. Lone Palm Hotel*,—Cal. 3d—, 478 P.2d 465, 91 Cal. Rptr. 465 (1970).

In an action to recover from a motel owner for the unwitnessed drownings of a father and son in the motel pool, plaintiffs alleged that defendant's failure to comply with the statutory requirement that a

16. *Cf. In re* Prudence Bonds Corp., 76 F. Supp. 643 (E.D. N.Y. 1948). Part of the managerial task is to seek counsel when desirable, and obviously, management prefers that it confer with counsel without the risk of having the communication revealed at the instance of one or more dissatisfied shareholders.

17. The court discussed the various theories concerning the corporation-stockholder relationship but declined to adopt any of them.

18. The court's test emphasized the following factors:

> [T]he bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

430 F.2d at 1104.

19. The only definite conclusion this court reached as to the lower court's holding was that this case involved a federal question with ancillary state aspects. It was not a diversity case. Consequently the law of the forum state, Alabama, was not binding. *Id.* at 1098.