

STATE OF MICHIGAN
COURT OF APPEALS

CADLE COMPANY II, INC.,

Plaintiff-Appellee,

v

LAKESIDE MACHINE, INC., and PAUL D.
PAULSON JR.,

Defendants,

and

DIXIE PAULSON,

Defendant-Appellant.

UNPUBLISHED

October 22, 2009

No. 290426

Delta Circuit Court

LC No. 04-017487-CK

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendant Dixie Paulson (defendant) appeals as of right the trial court's order granting plaintiff Cadle Company II, Inc.'s motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion.¹

This action arises from a default on a revolving loan issued to defendant Lakeside Machine, Inc. (Lakeside), and guaranteed by Lakeside's owners, including defendant Paul Paulson. The loan was originally issued by Old Kent Bank, and was later serviced by plaintiff's predecessor in interest, Fifth Third Bank (referred to collectively hereafter as Fifth Third), which assigned its interests in the loan documents underlying this action to plaintiff in 2006.

¹ Plaintiff was also granted judgment against defendant Paul Paulson, based on a consent judgment entered in Paulson's separate bankruptcy proceeding. Paulson has not appealed that judgment. Plaintiff's claim against defendant Lakeside Machine was dismissed for lack of prosecution, and likewise, it is not at issue here.

Pursuant to the loan agreement between Lakeside and Fifth Third, the amount of revolving loan advances that Lakeside was eligible to receive at any given time was based on a percentage of its accounts receivable and inventory. Consequently, Lakeside obtained loan advances by submitting “collateral reports,” specifying the value of Lakeside’s accounts receivables and inventory as of a specific date, to Fifth Third. These collateral reports were prepared by inserting certain financial information into computer software provided by Fifth Third.

Paulson served as Lakeside’s controller and chief financial officer after joining the company in 1990. Generally, Paulson prepared Lakeside’s collateral reports for submission to Fifth Third. However on at least eight occasions in October and November 2002, defendant, who was Lakeside’s officer manager at that time, was asked by Paulson to generate, sign and submit these reports, based on financial information provided to her by Paulson. On November 19, 2002, Lakeside provided Fifth Third with a “restated” collateral report, signed by Paulson, which indicated that Lakeside had overstated its accounts receivable and/or inventory in previously submitted collateral reports. Subsequently, an independent review of Lakeside’s records, commissioned by Fifth Third, revealed that Lakeside had overstated its accounts receivable and inventory by more than \$2 million. As a result, Fifth Third concluded that it had “overadvanced” \$2,196,918 to Lakeside under the revolving loan facility. Thereafter, Fifth Third declined to provide Lakeside with any additional credit. Lakeside ceased operation in November 2002; its affairs were wound up by March 2003.

In February 2004, Fifth Third filed suit in February 2004, in Delta Circuit Court, seeking to recover the deficiency on the Lakeside indebtedness remaining after liquidation of all collateral. Fifth Third alleged claims for breach of contract against Lakeside, and its owners, including Paulson, each of whom had signed personal guarantees. Fifth Third also asserted a fraud claim against Paulson, arising from the misrepresentation of Lakeside’s financial data in collateral reports.

In June 2004, Paulson filed for Chapter 7 bankruptcy relief and the state court action was stayed.² In September 2004, Paulson was subjected to a debtor’s examination as part of his bankruptcy proceeding. During that examination, Paulson declined to answer a series of questions, addressing responsibility for the preparation of the financial data contained in the collateral reports and for providing that data to Fifth Third, on Fifth Amendment grounds.

In September 2005, the pertinent parties resolved the question whether the Lakeside debt was dischargeable in bankruptcy and the automatic stay of proceedings was lifted. Thereafter, plaintiff moved to amend its complaint in the state court action to add a claim of fraud against defendant, based on her having signed collateral reports submitted in the fall of 2002. During discovery in this state court action, plaintiff deposed defendant; it did not depose Paulson.

² Defendant, who was married to Paulson by that time, was not a party to Paulson’s bankruptcy proceedings.

During her deposition, defendant testified in pertinent part that she had worked for Lakeside for nearly 25 years prior to its closing, beginning with the company as a secretary and becoming its office manager in the mid 1980's. From the time Paulson joined the company, in 1990, he was defendant's supervisor. Defendant testified that on those occasions on which she was asked to do so, she generated collateral reports, based primarily on financial information provided to her by Paulson, and then signed and submitted them to Fifth Third. Defendant did not verify the information Paulson gave her for the collateral reports; she was not asked to do so and the maintenance of that data was not within her job duties. Defendant testified that she submitted collateral reports to Fifth Third only after being instructed to do so, that she was "absolutely not" making any representations or warranties in her individual capacity, and that she was only "the person that faxed the reports."

In May 2008, plaintiff moved for summary disposition of its claim against defendant, pursuant to MCR 2.116(C)(10), asserting that defendant's failure to verify information provided to her by Paulson before submitting the collateral reports to Fifth Third constituted reckless disregard of the truth of those statements sufficient to constitute fraud. In response, defendant submitted an affidavit from Paulson that, in part, confirmed defendant's deposition testimony that she was acting in a ministerial role when she inserted financial information provided by Paulson into the collateral reports, signed them on behalf of Lakeside, and submitted them to Fifth Third, and further that defendant had no responsibility or authority for maintaining or auditing the financial data at issue.

After Paulson's affidavit was filed with the trial court, plaintiff filed a memorandum of law in further support of its motion, asserting that the trial court should not consider Paulson's affidavit because "he previously invoked the Fifth Amendment when questioned in his deposition about the very matters he testifies to in his affidavit." In its memorandum, plaintiff mistakenly asserted that Paulson was deposed *in this case* and it cited numerous federal cases holding that a party may not invoke its Fifth Amendment privilege against self-incrimination during discovery and then later submit evidence on issues on which it declined to testify in opposition to a summary judgment motion. Plaintiff attached the transcript of Paulson's September 2004 debtor's examination in the bankruptcy proceedings to its memorandum.

The trial court granted plaintiff summary disposition on its fraud claim against defendant, refusing to consider Paulson's affidavit on the grounds asserted by plaintiff. In so doing, the trial court made no mention of the fact that Paulson's prior invocation of his Fifth Amendment privilege against self-incrimination was in response to questions tendered to him during his debtor's examination in the Chapter 7 bankruptcy proceedings.

On appeal, defendant argues that the trial court abused its discretion by refusing to consider Paulson's affidavit. We agree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when a trial court's decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, if the trial court's decision involves an examination of the meaning of the Michigan Rules of Evidence, or of the applicability of a legal doctrine or rule, this Court's review is de novo. *Davis v Forest*

River, Inc, 278 Mich App 76, 80; 748 NW2d 887 (2008), rev'd on other grds, 482 Mich 1123 (2008), recon gtd 483 Mich 985 (2009); *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003); *LeGendre v Monroe County*, 234 Mich App 708, 721; 600 NW2d 78 (1999). And, a trial court abuses its discretion when it misinterprets, misunderstands or misapplies the law. *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002); *Miller v Varilek*, 117 Mich App 165, 170; 323 NW2d 637 (1982).

There being no Michigan case law discussing the issue, plaintiff cites and the trial court relied on federal case law for the proposition that Paulson could not invoke his Fifth Amendment privilege as a shield during his “deposition” and then later submit an affidavit in opposition to plaintiff’s motion for summary disposition. We recognize that a range of federal appellate, district and bankruptcy courts have adopted the rule that a “civil litigant who raised the Fifth Amendment privilege against self-incrimination during discovery may be barred from presenting evidence on that issue during trial and/or in response to a motion for summary disposition.” *Dunkin’ Donuts, Inc v Taseski*, 47 F Supp 2d 867, 871 (ED Mich, 1999); see also, *Traficant v Comm’r of IRS*, 884 F2d 258, 265 (CA 6, 1989); *In re Edmond*, 934 F2d 1304, 1308-09 (CA 4, 1991); *US v Parcels of Land*, 903 F2d 36, 43 (CA 1, 1990); *Pedrina v Han Kuk Chun*, 906 F Supp 1377, 1398 (D Haw, 1995), aff’d 97 F3d 1296 (CA 9, 1996). However, we need not decide whether that rule applies under Michigan law, because the rule would not extend so far as to warrant the trial court’s refusal to consider Paulson’s affidavit under the circumstances presented here.

In *Dunkin’ Donuts, Inc v Taseski*, 47 F Supp 2d 867, 871 (ED Mich, 1999), the case relied on by the trial court in its opinion granting plaintiff’s motion, the United States District Court for the Eastern District of Michigan addressed the issue whether a “civil litigant who raised the Fifth Amendment privilege against self-incrimination during discovery may be barred from presenting evidence on that issue during trial and/or in response to a motion for summary disposition.” The plaintiff in that case sought to recover damages resulting from the defendants’ conduct in underreporting sales. The defendants stipulated to liability, but then refused to answer any questions regarding the amount of the underreported sales or the amount of restitution owed. The court held that it would not allow the defendants “after invoking the privilege against self-incrimination and refusing to answer questions on the matter, to introduce testimony or other evidence in support of their version of the damages amount.” *Id.* at 872, 874. The court reasoned as follows:

Plaintiff directs the Court to several cases holding that once a civil litigant invokes his Fifth Amendment privilege on an issue, he will be barred thereafter from introducing other evidence on that issue. See *Traficant v. Comm’r of I.R.S.*, 884 F.2d 258, 265 (6th Cir.1989); *In re Edmond*, 934 F.2d 1304, 1308-09 (4th Cir.1991); *U.S. v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir.1990); *Pedrina v. Han Kuk Chun*, 906 F.Supp. 1377, 1398 (D.Haw.1995), *aff’d*, 97 F.3d 1296 (9th Cir.1996), *cert. denied*, 520 U.S. 1268, 117 S.Ct. 2441, 138 L.Ed.2d 201 (1997); *U.S. v. Island Park*, 888 F.Supp. 419, 431-32 (E.D.N.Y.1995); *U.S. v. All Assets & Equip. of West Side Bldg. Corp.*, 843 F.Supp. 377, 382-83 (N.D.Ill.1993), *aff’d*, 58 F.3d 1181 (7th Cir.1995). Federal courts find such a preclusive effect grounded in the following reasoning:

[a] defendant may not use the fifth amendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial.

* * * * *

Because claimant has asserted a fifth amendment claim in discovery, this court holds that he may not now waive the privilege and testify. Neither may he submit affidavits in opposition to the government's motion for summary judgment.

U.S. v. Sixty Thousand Dollars in U.S. Currency, 763 F.Supp. 909, 914 (E.D.Mich.1991) (Gadola, J.).

In *Trafficant*, a taxpayer appealed a United States Tax Court decision imposing a penalty for fraud due to the taxpayer's alleged failure to report bribes as income. 884 F.2d at 260. The Sixth Circuit held that "it was proper under principles of reciprocity for the Tax Court to bar Trafficant, once he had invoked the privilege against self-incrimination on the authenticity of the statement and the tapes, from introducing other evidence on that matter." *Id.* at 265. The court further held that "[s]uch limits are properly within the scope of cases holding that a party to civil litigation or other non-criminal proceedings may encounter costs imposed in exchange for the assertion of the Fifth Amendment privilege as long as they are not so high as to force abandonment of the privilege." *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515, 87 S.Ct. 625, 628, 17 L.Ed.2d 574 (1967) and *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976)).

Because of the potential expansiveness of such a rule of preclusion, the Sixth Circuit in *Trafficant* was careful to note that "when the issue is whether a court may impose broad limits on the admissibility of evidence, the cases permit only limits *directly related* to the scope of the asserted privilege." *Id.* (citing *Securities and Exchange Commission v. Cymaticolor*, 106 F.R.D. 545 (S.D.N.Y.1985) and *In re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364 (M.D.Pa.1979)) (emphasis added).³

³ The general rule articulated in *Trafficant* is also regularly applied in the summary judgment context. See, e.g., *In re Edmond*, 934 F.2d 1304, 1308-09 (4th Cir.1991) (holding that debtor's refusal to submit to a deposition, based upon assertion of privilege against self-incrimination, justified bankruptcy judge's decision to strike the debtor's affidavit in support of his motion for summary judgment); *U.S. v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir.1990) (holding that district court had ample authority to strike claimant's affidavit offered in opposition to government's motion for summary judgment in forfeiture action after claimant invoked Fifth Amendment and refused to answer government's deposition questions); *Pedrina v. Han Kuk Chun*, 906 F.Supp. 1377, 1398 (D.Haw.1995), *aff'd*, 97 F.3d 1296 (9th Cir.1996), *cert. denied*, 520 U.S. 1268,

117 S.Ct. 2441, 138 L.Ed.2d 201 (1997) (holding that party may not rely on its own testimony or affidavits to support its version of disputed fact issue in connection with summary judgment motion where party has asserted Fifth Amendment right not to answer questions concerning that very issue); *U.S. v. Island Park*, 888 F.Supp. 419, 431-32 (E.D.N.Y.1995) (holding that because of potential for abuse of privilege against self-incrimination by defendants who use it to obstruct discovery only to waive it and subject the plaintiff to surprise testimony at trial, courts recognize appropriateness of imposing sanctions for civil defendant's assertion of the privilege during discovery; decision to assert privilege during pretrial depositions may be valid grounds for precluding defendant from testifying at trial, as well as for striking affidavits opposing summary judgment motions); *U.S. v. All Assets & Equip. of West Side Bldg. Corp.*, 843 F.Supp. 377, 382-83 (N.D.Ill.1993), *aff'd*, 58 F.3d 1181 (7th Cir.1995) (holding that district court need not consider evidence claimant presented to show that property subject to forfeiture proceedings was not acquired with proceeds of claimant's husband's drug trafficking activity, where claimant refused, on Fifth Amendment grounds, to answer government's deposition questions concerning same topics).

[*Id.* at 872-874.]

The court then concluded that summary judgment was warranted, pursuant to Federal Rule of Civil Procedure 56, because, the plaintiff having satisfied its initial burden of establishing damages, defendants were “unable to satisfy [their] burden [of setting forth specific facts showing a genuine triable issue] because, as discussed, they are precluded from offering evidence on the topic of damages due to their invocation of the Fifth Amendment privilege.” *Id.* at 874.

In *In re Edmund*, *supra* at 1308-1309, the United States Court of Appeals for the First Circuit likewise upheld the lower court's exclusion of a debtor's affidavit in a nondischargeability proceeding, because the debtor previously refused to submit to deposition, asserting his Fifth Amendment privilege “throughout discovery.” The court explained

By selectively asserting his Fifth Amendment privilege, [the debtor] attempted to insure that his unquestioned, unverified affidavit would be the only version. But the Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion.

The Supreme Court has written, “That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.” In the context of cross-examination, courts have struck testimony when the defendant has invoked the Fifth Amendment to refuse to respond to cross-examination questions.

The same principle applies when a party seeks to invoke the Fifth Amendment to avoid discovery while offering an affidavit to compel a certain result on summary judgment.

Similarly, in *Parcels of Land*, *supra* at 43, the United States Court of Appeals for the First Circuit held:

. . . that the district court had ample authority to strike [a party's] affidavit after he invoked the fifth amendment and refused to answer the government's deposition questions. It is well-accepted that a witness' direct testimony can be stricken if she invokes the fifth amendment on cross-examination to shield that testimony from scrutiny. *See, e.g., Lawson v. Murray*, 837 F.2d 653, 655-56 (4th Cir.), *cert. denied*, 488 U.S. 831, 109 S.Ct. 87, 102 L.Ed.2d 63 (1988); *Klein v. Harris*, 667 F.2d 274, 287-89 (2d Cir.1981); *see also McGautha v. California*, 402 U.S. 183, 215, 91 S.Ct. 1454, 1471, 28 L.Ed.2d 711 (1971) ("It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination."); *Brown v. United States*, 356 U.S. 148, 155-56, 78 S.Ct. 622, 626-27, 2 L.Ed.2d 589 (1958). The power to strike is grounded in the principle that once a witness testifies, she may not invoke the fifth amendment privilege so as to shield that testimony from scrutiny. To allow her to do so would constitute "'a positive invitation to mutilate the truth.'" *Lawson v. Murray*, 837 F.2d at 656 (quoting *Brown v. United States*, 356 U.S. at 156).

A number of federal courts have further explained that the authority to prevent a party from engaging in such duplicitous behavior arises from the court's discretion to sanction conduct that impairs or threatens the purposes of discovery. For example, as the United States District Court for the Eastern District of Michigan explained, in *Sixty Thousand Dollars*, *supra* at 914, quoting *Gutierrez-Rodriguez v Cartagena*, 882 F.2d 553 (CA 1, 1989).]:

Trial courts have broad discretion in fashioning remedies during discovery. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643, 49 L.Ed.2d 747, 96 S.Ct. 2778 [2781] (1976). Discovery sanctions are appropriate "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.* The viewpoint of *National Hockey League* was echoed in the advisory committee note to the 1983 amendment of Fed.R.Civ. p. 26: "Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." Courts have not been afraid to bar a party from testifying where doing so was necessary to prevent the "thwarting [of] the purposes and policies of the discovery rules." *Meyer v. Second Judicial Dist. Court. etc.*, 95 Nev. 176, 591 P.2d 259 (1979); *see Lyons v. Johnson*, 415 F.2d 540, 541-42 (9th Cir.1969), *cert. denied*, 397 U.S. 1027, 90 S.Ct. 1273, 25 L.Ed.2d 538 (1970).

The district court's decision to bar [the defendant] from testifying at trial due to his previous refusal to testify during discovery is supported by ample precedent. The Federal Rules contemplate that there be "full and equal mutual discovery in advance of trial" so as to prevent surprise, prejudice and perjury. "It is an effective means of detecting and exposing false, fraudulent, and sham claims and defenses." 4 Moore, Federal practice para. 26.02[2] at 1034-35. The court would not tolerate nor indulge a practice whereby a defendant by asserting the privilege against self-incrimination during pre-trial examination and then voluntarily waiving the privilege at the main trial surprised or prejudiced the opposing party. . . .

* * * * *

. . . The district court's decision to bar [the defendant's] testimony did not burden his due process rights, it merely forced him to abide by his decision and protected plaintiff from any unfair surprise at trial. A defendant may not use the [F]ifth [A]mendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial.

Similarly, in *Traficant*, *supra* at 265, the United States Court of Appeals for the Sixth Circuit noted that case law "permit[s] only limits [on the admissibility of evidence] directly related to the scope of the asserted privilege." This is because,

[w]hen one party invokes the privilege, he receives a benefit from that invocation in that he need not divulge information which he believes may incriminate him. However, this invocation is not without consequences. The trier of fact and the opposing party are handicapped by the denial of possibly relevant information. To compensate for this handicap, courts have imposed a cost on the claimant to facilitate the proceeding or to "level the playing field" for the party opposing the claimant.

* * *

[Nevertheless, case law has established that a] negative consequence may not be used solely to punish a claimant for having invoked his privilege. It may, however, be used to compensate the non-invoking party or to better administer the proceeding. [*In re Moses*, 792 F Supp 529, 538 (ED Mich, 1992).]

As the United States Court of Appeals for the Third Circuit has explained, more fully:

In a civil trial, a party's invocation of the privilege may be proper, but it does not take place in a vacuum; the rights of the other litigant are entitled to consideration as well. One of the situations in which that concern comes into play arises when one party invokes the Fifth Amendment during discovery, but on the eve of trial changes his mind and decides to waive the privilege. At that stage, the

adverse party—having conducted discovery and prepared the case without the benefit of knowing the content of the privileged matter—would be placed at a disadvantage. The opportunity to combat the newly available testimony might no longer exist, a new investigation could be required, and orderly trial preparation could be disrupted. In such circumstances, the belated waiver of the privilege could be unfair.

* * *

A trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment. *Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side.* [SEC v Graystone Nash, Inc, 25 F3d 187, 191-192 (CA 3, 1994) (emphasis added).]

Because of these considerations, the determination of the appropriate “effect that an invocation of the privilege against self-incrimination will have in a civil suit depends to a large extent on the circumstances of the particular litigation.” *Id.* And, an appellate court will reverse a trial court's decision to exclude evidence based on a prior assertion of the privilege where the opposing party cannot show that it would be prejudiced by the admission of that evidence. See, *Id.* at 193.

Each of the cases cited by plaintiff and relied on by the trial court involve factual scenarios in which the affiant/witness declined to submit to discovery on the basis of the Fifth Amendment privilege against self-incrimination *in the same action* as they later sought to submit testimony at trial or by way of affidavit. The reasoning set forth above makes clear that the ability to bar the testimony arises from the trial court's authority to sanction discovery abuses that, if not sanctioned, would result in unfairness by preventing “full and equal mutual discovery in advance of trial” and allowing one party to surprise the other(s) with self-serving testimony that the other(s) may no longer test. See, e.g., *Sixty Thousand Dollars*, *supra* at 914. The overriding concern of the courts in each of these cases is one of fairness; it is patently unfair to permit a litigant to invoke the Fifth Amendment privilege against self-incrimination as a shield during discovery, to refuse to answer difficult questions about his or her conduct, only to later have that litigant attempt to testify to a self-serving version of events, which the remaining parties were then unable to effectively challenge.

Of significance here, a party's invocation of the Fifth Amendment privilege against self-incrimination does not carry over from one proceeding to another separate and distinct proceeding; rather, the privilege must be invoked or waived in each separate proceeding or forum. *Parcels of Land*, *supra* at 43 (“[I]t is true that had [the] affidavit been filed and [the] deposition taken in separate, distinct proceedings, neither would have affected the treatment of the other.”); *Nationwide Life Ins Co v Richards*, 541 F3d 903, 911 (CA 9, 2008) (“[A] waiver of the Fifth Amendment privilege is limited to the particular proceeding in which the waiver occurs.”). Thus, where as here, a party invokes the privilege during discovery in proceedings in one forum and then submits an affidavit during subsequent separate and distinct proceedings in a different forum, the previous invocation of the privilege does not to impact a court's consideration of the subsequent affidavit. *Parcels of Land*, *supra*. Consequently, under the federal rule as articulated above, Paulson's invocation of his privilege against self-incrimination

during his prior debtor's examination in his bankruptcy proceedings does not prevent him from testifying, by way of affidavit or otherwise, in this state court action because Paulson was never deposed, and has not asserted the privilege, in this case. Thus, the trial court abused its discretion by declining to consider Paulson's affidavit when ruling on plaintiff's motion for summary disposition.

Furthermore, considering the purpose and policy behind the federal rule, there is no basis arising from Paulson's conduct in this case to bar consideration of his affidavit. This is underscored by the fact that, while recognizing that a party to civil proceedings "may encounter costs imposed in exchange for the assertion of the Fifth Amendment privilege," *Dunkin' Donuts, supra* at 873, the federal courts have employed a cautious approach to barring the admission of testimony or evidence because a party has previously asserted the privilege. As is apparent from nearly every case discussing the issue, the overriding concern is one of fairness and prejudice. Thus, the federal courts have aptly noted that, when considering the appropriate effect of a party's prior invocation of the privilege, trial courts should impose limitations on the subsequent admission of evidence only in so far as is sufficient to "to prevent unfair and unnecessary prejudice to the other side." *Graystone Nash, supra* at 192.

When balancing the interests of plaintiff and defendant in the instant matter, we find it dispositive that plaintiff did not attempt to depose Paulson and Paulson did not invoke the privilege against self-incrimination in this case. Thus, there is nothing unfair about defendant's submission of Paulson's affidavit in response to plaintiff's motion for summary disposition. It cannot be said that plaintiff was unable to effectively challenge Paulson's testimony or that plaintiff was otherwise unfairly or unnecessarily prejudiced by the submission of Paulson's affidavit in this action. Consequently, the trial court's refusal to consider the affidavit was not justified by the circumstances of this particular litigation, or by any showing of prejudice resulting to plaintiff from submission of the affidavit. *Graystone Nash, supra* at 192.

Additionally, such a conclusion is further warranted by the fact that the trial court extended the rule to bar consideration of Paulson's affidavit in the context of plaintiff's claims against defendant. In the cases discussed above, the barring of testimony was considered an appropriate response to a prior assertion of the privilege against self-incrimination because the party invoking the privilege was assumed to have acquiesced to certain costs or consequences of that decision in exchange for receiving the benefit of not having to provide incriminating information. *In re Moses, supra* at 538. Here, the trial court imposed costs on a party other than the party asserting the privilege, and it did so absent any showing of prejudice or unfairness to justify that result.

Plaintiff does not point this Court to any case with a similar outcome. The United States District Court for the Western District of Michigan did prevent the plaintiffs from relying, in support of their motion for summary judgment, on the affidavit of a defendant based on that defendant's subsequent assertion of the privilege, in *Tolliver v Federal Republic of Nigeria*, 265 F Supp 2d 873, 875-876 (WD Mich, 2003). However, it did so because to do otherwise would have been "grossly unfair" to the other defendants, who were implicated by that affidavit and yet were rendered unable to test the statements in it through discovery and cross-examination. In other words, other parties would have been prejudiced by the court's consideration of the affidavit. Again, the same is not true here. Paulson never asserted the privilege in the instant case and thus, neither defendant, nor plaintiff, was prevented from testing the statements in that

affidavit during discovery in this case. And, plaintiff made no showing of any prejudice, under these circumstances, resulting from the submission of Paulson's affidavit. To the contrary, in the absence of any attempt by plaintiff to take discovery from Paulson in the instant case, fairness considerations favor allowing defendant to rely on the Paulson affidavit, the pertinent content of which is corroborated by those portions of defendant's own deposition testimony placed before the trial court by plaintiff in support of its motion for summary disposition.

Having determined that the trial court should have considered Paulson's affidavit, we conclude that the trial court erred by granting plaintiff summary disposition of its fraud claim against defendant. As our Supreme Court has explained:

The elements constituting actionable fraud or misrepresentation are well-settled in this jurisdiction. In *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919), we set forth those elements:

"The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery."

See also, *A&A Asphalt v Pontiac Speedway*, 363 Mich 634, 639; 110 NW2d 601 (1961); *Marshall v Ullmann*, 335 Mich 66, 73; 55 NW2d 731 (1952); *Waldbauer v Hoosier Casualty Co*, 285 Mich 405, 408; 280 NW 807 (1938). The burden of proof rests with plaintiffs. Fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence. *Youngs v Tuttle Hill Corp*, 373 Mich 145, 147; 128 NW2d 472 (1964). [*Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).]

Plaintiff argued, and the trial court determined, that it was entitled to summary disposition because, by signing collateral reports containing information provided to her by her supervisor and then submitting them to Fifth Third as instructed by that supervisor without independently verifying the information contained therein, there can be no question but that defendant made a material misrepresentation recklessly without knowledge of its truth and as a positive assertion, and that as a result, plaintiff is entitled to judgment as a matter of law. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). Whether a representation was made recklessly, without knowledge of its truth is a factual question. *Hi-Way Motor*, *supra* at 336.

In his affidavit, Paulson indicated that defendant performed a “purely ministerial function by entering” the information he provided to her into the collateral reports and sending them, as instructed, to Fifth Third.³ The question thus posed is, generally, whether an employee can be said to have acted recklessly, and thus to have committed fraud, by following the direction of a supervisor to forward certain information, which the employee has no responsibility or authority over, to a third party, without first verifying that information; the question more specifically, is whether considering the fact presented, defendant acted recklessly, as a matter of law, by doing so here.

This Court has explained that “[r]eckless misconduct is not willful in the sense that there is actual intent to cause harm,” but rather that reckless misrepresentations are the functional equivalent of willfully made misrepresentations because they exhibit a level of indifference to whether harm will result that is equivalent to a willingness that it does. *Echelon Homes, LCC v Carter Lumber Co*, 261 Mich App 424, 443-444; 638 NW2d 171 (2004), rev’d in part on other grds, 472 Mich 192 (2005). The determination whether an employee, who is acting as requested by a supervisor in the ordinary course of her employment to forward information provided by that supervisor without first verifying the accuracy of the information provided, has “exhibited a level of indifference to whether harm will result” that is “equivalent to a willingness that” such harm result, is a factual determination to be made based on the circumstances presented. *Hi-Way Motor, supra* at 336. Considering the evidence submitted before the trial court, by way of Paulson’s affidavit, we conclude that there is a genuine issue of material fact as to whether defendant acted with reckless indifference to the truth of the representations being made by Lakeside as to its financial status by not verifying the financial data provided to her by Paulson, especially where the evidence submitted establishes that neither the maintenance of that information, nor the auditing of it, was within the purview of defendant’s job responsibilities or authority. We also note that plaintiff has not conclusively established that by signing the report, defendant was herself representing or warranting any financial information. Rather, the evidence presented suggests that it was Lakeside, the “Borrower,” that was making the representations, as well as the warranties, set forth in the collateral reports. With these and similar fact questions unresolved, summary disposition was improperly granted against defendant.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto

³ Because we determine that Paulson’s affidavit suffices to create fact questions sufficient to protect defendant from summary disposition, we need not consider the other issues raised on appeal.