

No. III-290051

FILED

FEB 11 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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OF THE STATE OF WASHINGTON

CARLOS DIAZ AND ROSALINDA DIAZ, Respondents,

v.

THE WASHINGTON STATE MIGRANT COUNCIL, Appellant

**OPENING BRIEF OF APPELLANT WASHINGTON STATE
MIGRANT COUNCIL**

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I. INTRODUCTION

The Washington State Migrant Council seeks reversal of three trial court orders. All of these orders relate to the trial court's decision to compel immigration-related discovery, and then to sanction the Council for not fully providing this discovery, after some non-party members of the Council's all-volunteer Board of Directors invoked their personal Fifth Amendment privileges when asked to provide information or documents about their personal citizenship or immigration statuses. The trial court rulings under review were erroneous in several ways.

First, the trial court should not have ordered the Council to do the impossible by providing the immigration-related discovery at issue, which was neither within the Council's possession, custody or control nor relevant to the Council's business. Moreover, the trial court's analysis of whether to compel this extremely sensitive discovery was fatally flawed, because the court failed to balance this discovery's scant potential probative value against its highly prejudicial nature. Instead of compelling the immigration-related discovery, the trial court should have granted a protective order against this discovery, because the wrongful termination claim turns on the decision making Board's *motive*, not on the actual personal citizenship or immigration statuses of individual Board members.

Second, the trial court erred in its contempt and sanctions rulings against the Council. The trial court once again failed to conduct the proper legal analysis, this time by failing to make any findings about whether the Council's failure to provide the immigration-related discovery was "substantially justified." Here, the Council plainly was substantially justified in not providing all of the immigration-related discovery sought by plaintiff Carlos Diaz,¹ given the impossibility of the Council obtaining the missing personal information and documents belonging to individual Board members. Thus, the trial court should not have imposed any sanctions whatsoever on the Council. Further, even if this Court were to hold some discovery sanction appropriate, despite the Council's strong urgings otherwise, this Court should reverse the trial court's sanction of an adverse inference jury instruction that would go well beyond the conduct the trial court found sanctionable, and that would improperly comment on the evidence and invade the jury's fact finding function.

Compounding these errors, the trial court imposed \$1,500 in terms on the Council in its final sanctions ruling without giving the Council any opportunity to respond to Diaz's request for terms. Diaz made this request only in his motion asking for a second reconsideration of the trial court's

¹ His wife is also a plaintiff; however, her claims are irrelevant to this appeal, so we use the singular for ease of reference.

discovery sanctions ruling – a reconsideration motion to which the Council was neither allowed nor asked to respond.

Third, separately from the trial court's adjudication of the parties' dispute over immigration-related discovery, while the Council's motion for summary judgment was being briefed, another judge of the trial court pre-judged the merits of that summary judgment motion by ruling – solely based on the discovery dispute – that the Council could not pursue one element of its pending summary judgment motion: *i.e.*, the argument that the Council had an overriding justification for discharging Diaz. This pre-judgment violated CR 56 and once again deprived the Council of due process of law.

The Washington State Migrant Council respectfully asks the Court of Appeals to correct all of the above errors, so as to preclude Diaz from using immigration-related discovery for tactical gain and *in terrorem* effect, as well as to restore due process and to promote proper trial court proceedings in the rest of this action. For the reasons below, the Court of Appeals should reverse the trial court's erroneous order compelling immigration-related discovery, as well as the other trial court rulings under review that depend upon the erroneous order compelling discovery.

II. ASSIGNMENTS OF ERROR

1. The trial court erroneously ordered the Council to provide discovery about the actual citizenship and immigration statuses of its volunteer Board members where: (a) this discovery was not within the Council's possession or control, nor relevant to its business, and the trial court found that the five Board members at issue lawfully invoked their personal Fifth Amendment privileges; and (b) the trial court failed to properly balance the low probative value of this discovery against the extreme danger of unfair prejudice associated with such highly political and emotionally charged information.

2. The trial court violated the Migrant Council's due process rights when it sanctioned the Council for not providing discovery about the actual citizenship and immigration statuses of five of its volunteer Board members where the Council was more than "substantially justified" in not providing this discovery, given that the Council had no legal right to obtain the personal information and documents sought, and the five Board members had lawfully invoked their Fifth Amendment privileges.

3. The trial court abused its discretion when it relied on the purported discovery violation to order an overly broad adverse inference instruction that will improperly comment on the evidence and invade the jury's fact finding role.

4. The trial court again violated the Migrant Council's due process rights when it summarily imposed \$1,500 in terms on the Council for the purported discovery violation without notice that the trial court was considering doing this or allowing the Council any opportunity to respond.

5. The trial court also violated the Migrant Council's due process rights when it improperly relied on the dispute over immigration-related discovery to pre-judge and limit the Council's summary judgment arguments before the summary judgment briefing was even completed.

III. STATEMENT OF THE CASE

A. Background of Claims

This case principally involves a claim of wrongful termination in violation of public policy brought by Diaz, the Migrant Council's former CEO. The Migrant Council, a non-profit, provides Head Start and Early Head Start services to low income, migrant and seasonal farm workers and families in rural communities throughout Washington.² As the Head Start Act requires, the Council's Board is comprised mainly of parents whose children do or did participate in the Council's Head Start programs.³ The Board members volunteer their time; they are not paid any wages.⁴

² <http://www.wsmconline.org>; 42 U.S.C. § 9801 *et seq.*; Clerk's Papers (CP) at 1756 ¶ 2.

³ 42 U.S.C. § 9837(c)(1).

⁴ CP at 1569-1570 ¶ 3.

Because the Council's Board members are not employees, the Council is not required to complete I-9 forms that are used to verify an employee's right to work in the United States.⁵ The Council's by-laws do not have any citizenship or immigration status requirements for Board members, so the Council does not make or keep records of its individual Board members' personal legal statuses within the U.S.⁶ Diaz admitted in deposition that the Council did not require information regarding a Board member's citizenship or immigration status throughout his time as CEO.⁷

In December 2007, the Council's Board unanimously voted to discharge Diaz, citing poor performance, gross mismanagement and misconduct.⁸ Diaz sued the Council, alleging wrongful termination in violation of public policy.⁹ He contends some of the decision making Board members were in the U.S. illegally, and that his discharge was motivated by his alleged requests that these Board members resign.¹⁰

⁵ The Employment Eligibility Verification Form "I-9" must be completed by *employers* to verify an *employee's* right to work in the United States. See 8 C.F.R. § 274a.2(a)(2).

⁶ CP at 1231 (Ex. A at 463:4-15), 1569-70 ¶¶ 3, 6.

⁷ CP at 1230-1231 (Ex. A at 462:23-463:15). See also CP at 1327:18-24 (testimony of Board chair R. Mendoza).

⁸ CP at 621:18-22 (Diaz testimony), 695-696 (termination memorandum mentioned in Diaz testimony).

⁹ CP at 1760-1761 ¶ III.

¹⁰ CP at 1651:22-1652:5.

B. Relevant Procedural History

1. Trial Court Proceedings

This appeal originates in Diaz’s motion to compel the Council to provide discovery about the actual citizenship and immigration status of certain individuals who were or are on its Board of Directors.¹¹ The Council opposed this intrusive and *in terrorem* discovery, including seeking a protective order against any discovery that would elicit information about any Board member’s actual immigration status.¹² In doing so, the Council pointed out that it did not possess, nor did it have a legal right to obtain, responsive material because the Board members are not its employees.¹³ The Council also emphasized that it did not collect information about Board members’ immigration statuses because it had no business reason to do so. It further argued that the immigration-related discovery was not “reasonably calculated to lead to the discovery of admissible evidence”¹⁴ – especially given Diaz’s express admission that, to prevail on his claim of wrongful discharge, “*he need not prove that any of the Migrant Council board members were illegal aliens.*”¹⁵ Next, the Council argued that the extreme sensitivity of immigration issues and the

¹¹ CP at 1594:15-25.

¹² CP at 24-33, 1581-1589.

¹³ CP at 25:10-17, 30:15-19, 1584:3-19.

¹⁴ CP at 1584:6.

¹⁵ CP at 1651:5-7 (emphasis added).

associated high risk of unfair prejudice from this information far outweighed its admittedly low probative value, such that the trial court should prohibit discovery about actual immigration or citizenship status.¹⁶

In contrast, the Council did not resist discovery about any *conversations* that Diaz may have had with any Board members about their personal immigration statuses, which the Council recognized as more probative of motive than mere conceptual information about individual Board members' actual immigration statuses.¹⁷ Diaz acknowledged the Board members' individual rights to assert their personal Fifth Amendment privileges about their immigration statuses.¹⁸

Instead of properly examining the constitutional rights at stake, the high risk of intimidating Board members, and the extreme prejudice potentially associated with discovery of personal immigration or

¹⁶ CP at 30:9-14, 1586:5-1587:2; RP 9/8/09 at 8:15-25.

¹⁷ CP at 1587:7-16. When the Council's motion for protective order was argued, the parties were days away from Diaz taking the depositions of several Board members, so the Migrant Council sought the trial court's guidance both about the immigration-related discovery that had been propounded on the Council, as well as the immigration-related questions that were likely to arise in the Board members' depositions. CP at 1582:11-1583:3.

¹⁸ In moving to compel, Diaz expressly stated "the board members are free to assert the fifth amendment [*sic*] to the United States Constitution." CP at 1594:24-25. Similarly, the trial court acknowledged, when considering the parties' competing discovery and default motions, that the Board members could assert their Fifth Amendment rights – although the trial court said this was "not without consequences." RP 10/30/09 at 29:12-14; RP 11/18/09 at 18:3-8, 21:17-22.

citizenship status, the trial court entered an order compelling the Council to provide Diaz with discovery about the individual Board members' statuses and denying the Council's motion for protective order limiting immigration-related discovery.¹⁹ The trial court largely based its ruling on its conclusion that the "public" has a "right to know" Board members' immigration status because the Council received federal funding and the Board members put themselves in "jeopardy" by volunteering for the Board.²⁰ The court also drew no distinction between former or current Board members, even though four of the Board members who voted to terminate Diaz were not (and still are not) active members at the time of Diaz's discovery requests.²¹

The following week, plaintiffs deposed six former or current Board members.²² As Diaz recognized could occur,²³ several of these Board members lawfully asserted their personal constitutional rights against self-

¹⁹ CP at 1515:10-13.

²⁰ RP 9/8/09 at 33:20-23, 35:11-13, 36:4-7, 40:9-23.

²¹ CP at 1515:16-19; RP 10/29/09 at 19:20-25.

²² Diaz deposed the following current or former Board members: Jaime Avalos (former) (CP at 1351-53), Rodolfo Mendoza (current chair) (CP at 1282-1284), Margarita Sanchez (CP at 1292-94), Paula Contreras (CP at 1339-41), Ildefonso Mendoza (CP at 1309-1311), and Agustin Garcia (former chair) (CP at 1322-24). CP at 1197 ¶¶ 3-8, 11-15, 1162 ¶ 2. *See also* CP at 1740:19-20. All of these Board members were represented by their personal immigration counsel at their depositions. CP at 1162 ¶ 2, 1284:13-15.

²³ CP at 1594:24-25, 1595:12-13.

incrimination²⁴ when asked about their citizenship or immigration status.²⁵ This included four out of the eight members of the unanimous Board who voted to discharge Diaz.²⁶ However, all of the deposed Board members answered the questions they were asked about discussions with Diaz about immigration status.²⁷

After these depositions, the Migrant Council attempted to comply with the trial court's order compelling responses to Diaz's immigration-related written discovery by following up with the target individual Board members, either directly, in the case of Board members who had not asserted any personal Fifth Amendment privilege, or through personal immigration counsel, in the case of the five Board members who were

²⁴ U.S. Const. amend. V and the parallel provision of Wash. Const. Art. I § 9.

²⁵ These deponents were J. Avalos (CP at 1203 ¶ 15, 1357:22-23), P. Contreras (CP at 1201 ¶ 15, 1345:20-1346:5), I. Mendoza (CP at 1199 ¶ 13, 1314:21-1315:2), and M. Sanchez (CP at 1198 ¶ 12, 1297:10-17). Former Board chair Agustin Garcia also invoked his Fifth Amendment rights during his deposition, but Garcia had resigned from the Board before it voted to discharge Diaz. CP at 1162 ¶ 4, 1200 ¶ 14, 1329:14-18, 1334:17-18, 1388 ¶ 8, 1392-1393 ¶¶ 3, 5, 1396 (listing Board members who were present for that vote).

²⁶ See CP at 1392-1393 ¶¶ 3, 5, 1396, 1162 ¶¶ 3-4; RP 10/30/09 at 9:19-24.

²⁷ J. Avalos (CP at 1357:25-1358:16), M. Sanchez (CP at 1297:18-1298:6), P. Contreras (CP at 1346:6-1347:11), A. Garcia (CP at 1327:18-24, 1330:12-14, 1333:15-22), I. Mendoza (1303:15-1304:17, 1315:9-21), and R. Mendoza (CP at 1287:2-25). See also CP at 1162 ¶ 4, 1196-1204 ¶¶ 8-15.

invoking this personal privilege.²⁸ The Council requested information and documents about the target Board members' citizenship and immigration status to use in supplementing its discovery responses. Personal immigration counsel responded that his clients declined to provide discovery beyond their deposition answers, noting that his clients were not parties, had not been served with document subpoenas, and had no obligation to answer written discovery directed to the Council.²⁹ However, ultimately, four other unrepresented members of the decision making Board voluntarily provided information and documents reflecting their legal immigration status or their U.S. citizenship, which the Council in turn produced to Diaz.³⁰ Thus, in the end, the Council provided immigration or citizenship information for four of the eight Board members who voted to discharge Diaz. The only discovery sought but not provided was for the five Board members who invoked their Fifth Amendment rights, only four of whom were on the decision making Board.³¹

²⁸ CP at 1204 ¶¶ 16-17, 1386-1389 ¶¶ 2, 7, 1774-1775 ¶¶ 9-10.

²⁹ CP at 1163-1164 ¶¶ 6-8, 1204 ¶ 17, 1387 ¶ 7, 1774-75 ¶¶ 7-8.

³⁰ CP at 1204 ¶¶ 16-17, 1388-1389 ¶¶ 8-11, 1774-75 ¶¶ 9-10.

³¹ Although Garcia asserted the Fifth Amendment, he had resigned from the Board before it voted to discharge Carlos Diaz. CP at 1162 ¶ 4, 1200 ¶ 14, 1329:14-18, 1334:17-18, 1388 ¶¶ 8, 1392-1393 ¶¶ 3, 5, 1396 (listing who was present for the vote).

Diaz filed a Motion to Hold Defendant in Contempt,³² and the trial court originally granted his motion.³³ Although the trial court recognized the Board members lawfully invoked their Fifth Amendment rights,³⁴ it still sanctioned the Migrant Council. First, it entered default against the Council regarding liability.³⁵ Next, after allowing Diaz to respond to the Council's reconsideration motion,³⁶ the trial court set aside the default and imposed lesser sanctions: (1) the Council "shall be deemed to have admitted" that the Board members who lawfully invoked their personal Fifth Amendment privileges were not lawfully in the U.S. as of Diaz's termination date, and (2) plaintiffs "shall be entitled to an adverse inference jury instruction regarding the immigration status of [those] Board members*...the specific content of which shall be determined by the trial judge."³⁷ At the asterisk, the trial court made the following

³² CP at 1510-1511, 1438-1446.

³³ CP at 1763-65. *See also* RP 12/11/09 at 6:18-22 (orally granting default).

³⁴ RP 11/18/09 at 18:3-21:24-22:2.

³⁵ CP at 1763-65. *See also* RP 10/30/09 at 25:5-9, 26:21-2; RP 11/18/09 at 18:3-4; RP 12/11/09 at 6:18-22.

³⁶ CP at 1082-1103 (the Council's reconsideration motion), 999-1016 (additional authority for the Council's reconsideration motion), 977-996 (Diaz's response to the Council's reconsideration motion). *See also* CP at 968-973 (the Council's objection to Diaz's reconsideration "response," which raised new issues).

³⁷ CP at 252 ¶¶ 4-5. The court held hearings discussing the contempt sanctions on November 18, 2009 (RP 11/18/09), December 11, 2009 (RP 12/11/09) and February 5, 2010 (RP 2/5/10). It entered the final order

handwritten interlineation:

*the jury may, but is not required to, infer that Mr. Diaz was discharged by the Board for raising the issue of their immigration status.^[38]

The trial court's Contempt Order did not distinguish those Board members who voluntarily provided information about their individual immigration or citizenship statuses from those Board members who invoked their personal constitutional privileges.³⁹

In that same Contempt Order, the trial court also awarded Diaz fees without giving the Council any opportunity to respond to Diaz's belated fees request. Diaz did not request fees in his original or amended contempt motions.⁴⁰ Instead, Diaz sought fees only in his motion seeking reconsideration of the trial court's oral decision to moderate its ruling on his contempt motion by imposing lesser sanctions than the original default.⁴¹ However, the trial court did not ask or allow the Council to respond to Diaz's reconsideration motion. Rather, expressing a desire to

on the contempt issue on April 6, 2010. CP at 248-252; RP 04/6/10 at 19:7.

³⁸ CP at 252:8-25.

³⁹ CP at 251:8-252:25.

⁴⁰ CP at 560-562, 1510-1511.

⁴¹ CP at 456.

avoid further hearings, the trial court simply awarded Diaz \$1,500 in fees and set a deadline for the Council's payment.⁴²

Meanwhile, the Migrant Council timely moved for summary judgment, making legal arguments about the clarity, jeopardy and overriding justification elements of Diaz's claim for wrongful discharge in violation of public policy.⁴³ A different trial court judge presided over this summary judgment motion and related proceedings.⁴⁴ Diaz argued that the Council should be prohibited from seeking summary judgment due to the immigration-related discovery issues.⁴⁵ Citing these discovery issues, this second trial court judge limited the elements that the Migrant Council could argue in its pending summary judgment motion – before the Council's summary judgment briefing was even completed.⁴⁶

2. Court of Appeals Proceedings

After the trial court entered its final ruling on Diaz's motion to hold the Migrant Council in contempt, the Council appealed the Contempt Order to this Court as a matter of right based under RCW 7.21.010, and it

⁴² RP 4/6/10 at 19:22-22:6 (The presentment hearing on the final Contempt Order closed with the trial court stating "I'll allow \$1500 for these attorneys fees and we'll get on with it, and we don't have to have additional hearings...because you're going to be moving on."); *id.* at 23:6-10 (similar); CP at 144-145.

⁴³ CP at 785-812.

⁴⁴ *See* RP 4/19/10 at 1 (Judge Spanner, rather than Judge Matheson).

⁴⁵ CP at 454:21-22.

⁴⁶ RP 4/19/10 at 13:17-14:15; *see also* CP at 153:24-28.

also sought discretionary review under RAP 2.3 of the other two orders now under review.⁴⁷ Commissioner McCown agreed that the Contempt Order is appealable as of right, because it is a final order of contempt.⁴⁸ The Commissioner also found that discretionary review was warranted because the trial court committed obvious or probable error as contemplated by RAP 2.3(b)(1) or (2), because “a sanction for a discovery violation may be an abuse of discretion if the conduct being sanctioned was not ‘willful,’” in the sense of being “‘without a reasonable excuse,’” and the Migrant Council’s justification that Board members had asserted their Fifth Amendment rights was a “justification [that] appears to be reasonable and thus not ‘willful.’”⁴⁹

IV. ARGUMENT

A. Summary of Argument

The trial court abused its discretion and violated the Migrant Council’s due process rights when it ordered the Council to do the impossible: to produce documents and information about the actual immigration status of its current or former volunteer Board members.

⁴⁷ Motion for Confirmation of Appealability as of Right and Motion for Discretionary Review, filed May 20, 2010.

⁴⁸ Commissioner’s Ruling Dated June 24, 2010 at 1.

⁴⁹ Commissioner’s Ruling Dated June 24, 2010 at 2.

Although a trial court has the discretion to control discovery⁵⁰ and to decide whether and what contempt sanctions are warranted,⁵¹ a trial court abuses its discretion if its ruling is based on an erroneous view of the law or on an incorrect legal analysis.⁵² Here, the trial court erred in its discovery rulings because it ignored two fundamental principles: (1) a party is only obligated to produce what it has a legal right to obtain; and (2) a party has not “willfully” violated a court order if it has a justifiable excuse. Further, even if the trial court had the power to order the Migrant Council to produce personal information and documents about Board members’ actual individual immigration and citizenship statuses, the trial court abused its discretion in finding a discovery violation because the Council could not provide this discovery in light of certain Board members’ lawful assertions of their personal Fifth Amendment privileges.

The trial court compounded its erroneous discovery rulings by also: (1) summarily ordering the Migrant Council to pay terms without notice or an opportunity to be heard; (2) ordering an overly broad “adverse inference” instruction that will improperly comment on the evidence; and

⁵⁰ *Shields v. Morgan Financial, Inc.*, 130 Wn. App. 750, 759 (2005) (affirming grant of a protective order).

⁵¹ *In Re Estates of Smaldino*, 151 Wn. App. 356, 364 (2009).

⁵² *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833 (2007).

(3) limiting the issues on which the Council could move for summary judgment before this briefing was completed.

For these reasons, and as explained in further detail below, this Court should hold that the trial court erred in issuing the order compelling discovery of actual immigration or citizenship status, and in holding the Council in contempt. The Council respectfully asks this Court to reverse the trial court's Contempt Order as well as the related orders under review.

B. The Trial Court Erred by Ordering the Migrant Council to Produce Non-Party Board Members' Personal Immigration Information and Documents.

1. The Trial Court Had No Power to Order the Council to Provide Discovery that Is Beyond the Council's Possession, Custody and Control, and that Is Protected by Personal Privileges.

The Court of Appeals may review a contempt order to determine whether the order was properly entered.⁵³ Although a trial court has the authority to find parties in contempt for failing to obey a valid discovery order,⁵⁴ the validity of a discovery sanctions order initially depends on the validity of the underlying discovery order.⁵⁵ Here, the Contempt Order is

⁵³ *Griffin v. Draper*, 32 Wn. App. 611, 614 (1982).

⁵⁴ In listing examples of permissible sanctions, CR 37(b)(2)(D) specifically recognizes the trial court's authority to enter "an order treating as a contempt of court the failure to obey any orders."

⁵⁵ *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997) (Sanctions under Federal Rule of Civil Procedure 37 depend "on the propriety of the earlier compel order."); *International Union, UAW v.*

invalid, because it is based on an erroneous discovery order that “compelled” the Council to do the impossible: to produce information and documents that are unrelated to its business and are outside its possession, custody and control. A court has no power to order a party to produce material that the party has no certain way to obtain.⁵⁶

CR 33 requires a party to respond to interrogatories with information that is in its possession or that is available to it upon reasonable inquiry. CR 34 similarly requires a party to produce all responsive documents within its “possession, custody, or control.” Diaz had the burden to show the Migrant Council’s control over the discovery he sought about Board members’ personal immigration statuses,⁵⁷ but he did not satisfy this burden. Instead, Diaz admitted that the Council did not require or maintain this information throughout his time as its CEO.⁵⁸ Diaz also admitted that he could not point to any provision of the Head Start

National Right to Work Legal Def. & Educ. Foundation Inc., 590 F.2d 1139, 1152 (D.C. Cir. 1979) (same).

⁵⁶ *7-UP Bottling Co. v. Archer Daniels Midland Co.*, 191 F.3d 1090, 1108 (9th Cir. 1999) (“Ordering a party to produce documents that it does not have the legal right to obtain” is “futile, precisely because the party has no certain way of getting those documents.”).

⁵⁷ *E.g., United States v. International Union of Petroleum & Industrial Workers (“IUPIW”)*, 870 F.2d 1450, 1452 (9th Cir. 1989).

⁵⁸ CP at 1230-1231 (Ex. A at 462:23-463:15).

Act that required Board members to be legal immigrants or U.S. citizens.⁵⁹ Rather than show that the Migrant Council had the right to force current and former Board members to provide this sensitive personal information, Diaz merely implied that the Council had “control” over the immigration-related discovery he sought simply because the Council could ask for Board members for it.⁶⁰ But as this case well illustrates, the practical ability to make an inquiry is not the same thing as legal control.

When a party does not have actual possession, “control” means constructive possession, or the “legal right” to obtain information or documents from other sources upon demand.⁶¹ Thus, under CR 33, information sought is not within a corporation’s “control” unless the corporation has a legally enforceable right to secure the information from the source.⁶² A corporate officer must furnish discovery about corporation matters that is available to the corporation through reasonable efforts, but this does not extend to personal information or documents that the corporate officer acquired outside the scope of her official duties.⁶³

⁵⁹ CP at 1646:15-17; RP 5/26/09 at 31:2-6 (Counsel for Diaz admitted “Mr. Diaz cannot point to a specific provision that says no illegal alien shall serve on the Head Start Migrant Council Board.”).

⁶⁰ RP 10/30/09 at 12:1-6; CP at 1443:22-25.

⁶¹ *IUPIW*, 870 F.2d at 1452.

⁶² *See Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 138 (3d Cir. 1988).

⁶³ *See Gerling Int’l Ins.*, 839 F.2d at 138 (Contempt order against corporation was error without finding that president had a duty to supply

The undisputed record shows that the Council does not collect or possess information or documents about the personal citizenship or immigration statuses of its volunteer Board members.⁶⁴ And neither the Washington Non-profit Corporation Act⁶⁵ nor the Council's By-Laws includes any immigration or citizenship qualifications.⁶⁶ In fact, Washington's Non-profit Corporation Act specifies that directors do not even need to be Washington residents.⁶⁷

In sum, the Migrant Council had no legal right to demand personal immigration-related information or documents from its volunteer Board members. Likewise, these Board members had no duty to provide the Council with such sensitive material. As already noted, neither the Migrant Council nor its Board members had any legal duty to complete I-9 papers concerning the Board members' volunteer roles with the Council.

information concerning personal holding.). *See also United States v. White*, 322 U.S. 694, 698-700 (1944) (The Fifth Amendment privilege is a personal one that may be asserted only by the person as to personal papers, not as to an organization's official records that the person holds in his or her official capacity.). *Cf. RCL Northwest, Inc. v. Colorado Resources, Inc.*, 72 Wn. App. 265, 267, 271-72 (1993) (affirming default against corporation in derivative action where president refused inspection of corporate books).

⁶⁴ CP at 1569-1570 ¶¶ 3, 6. The one exception was Yesenia Selgado, who was a Council employee before joining the Board; thus the Council produced a copy of her I-9 form. CP at 1388 ¶10. She was not included in the Contempt Order, CP at 252:8-20.

⁶⁵ Chapter 24.03 RCW.

⁶⁶ CP at 1230-1231 (Ex. A at 462:23-463:15).

⁶⁷ RCW 24.03.095.

The Council also could not force any Board member to disclose similar information, because legal authorization for employment in the U.S. had nothing to do with the Board members' official duties as volunteer directors of a non-profit agency. And the Council certainly had no authority to force any Board member to waive his or her personal constitutional rights in response to its request that he or she voluntarily provide the immigration-related discovery at issue. Notably, the Board members here did *not* invoke their Fifth Amendment rights regarding *corporate records, or information related to the corporation's business*, a crucial distinction from the cases upon which Diaz has relied.⁶⁸ Finally, any argument that the Council "controlled" Board members is even more of a stretch for those persons who were no longer on the Board when the

⁶⁸ See, e.g., *Delany v. Canning*, 84 Wn. App. 498, 505, 507-508 (1997) (default judgment against a partner who willfully and deliberately failed to turn over documents when the partnership sued for damages for *failure to keep corporate records*); *RCL Northwest, Inc. v. Colorado Resources, Inc.*, 72 Wn. App. 265, 267, 271-72 (1993) (default against company president in shareholder derivative action after he willfully violated order granting the shareholder's motion to compel *inspection of the corporation's books*); *Curcio v. United States*, 354 U.S. 118, 122 (1957) (union's records custodian could not assert the Fifth Amendment in response to *a request to the union for union records*). See also *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 588 (9th Cir. 1983) (affirming sanctions under Federal Rule of Civil Procedure 37 where defendant corporation's officers gave false sworn *testimony about the corporation's payment of rebates*); *United States v. White*, 332 U.S. at 702 ("The official union books and records are distinct from the personal books and records of the individuals" who are union members.).

trial court ordered the Council to provide discovery about their personal immigration or citizenship statuses.⁶⁹ This Court should hold the trial court erred by ordering the Migrant Council to do the impossible: that is, to produce personal information and documents which the Council had no legal right to obtain.

2. The Trial Court Failed to Correctly Balance the Low Probative Value of Actual Immigration or Citizenship Status Against the Extreme Risk of Unfair Prejudice From Such Sensitive, Highly Political and Emotionally Charged Information.

The trial court also erred when it denied the Migrant Council's request for a protective order and ruled that Diaz could discover personal information and documents about current and former Board members' actual immigration or citizenship statuses. A protective order to limit the scope of discovery is appropriate where a party shows good cause for an order that "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."⁷⁰ Decisions about protective orders are reviewed for abuse of discretion.⁷¹ Whether a court abuses its discretion in controlling discovery depends on the interests

⁶⁹ See CP at 1392-1393 ¶¶ 3, 5, 1396 (providing the Board meeting minutes that list who was present for the Board's vote to discharge); RP 10/29/09 at 19:20-25.

⁷⁰ CR 26(c); *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 424, *rev. denied*, 166 Wn.2d 1037 (2009).

⁷¹ *King v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 348 (2000).

affected and the reasons for and against the decision.⁷²

Courts recognize that immigration-related discovery inherently includes substantial risks of individual harm, including oppression, embarrassment and chilling of the exercise of rights or privileges. Indeed, shortly after the trial court rulings at issue here, the Washington Supreme Court recognized such concerns in an opinion about the admissibility of immigration-related trial evidence. In *Salas v. Hi-Tech Erectors*, our state’s highest court noted that “immigration is a politically sensitive issue,” and that immigration issues “can inspire passionate responses that carry a significant danger of interfering with the fact finder’s duty to engage in reasoned deliberation.”⁷³ Real and significant harm may result from forced disclosure of a person’s actual immigration status, regardless of the person’s actual immigration status. *See also State v. Avendano-Lopez*, 79 Wn. App. 706, 719 (1995) (recognizing that questions regarding parties’ nationality and immigration status are highly prejudicial and “are...designed to appeal to the trier of fact’s passion and prejudice”) (quoted by the Washington Supreme Court with approval in *Salas*, 168 Wn.2d at 672).

⁷² *King*, 104 Wn. App. at 348.

⁷³ *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672 (2010).

Although no Washington case addresses the precise issue here, of limitations upon immigration-related discovery, in *Rivera v. NIBCO, Inc.*, the Ninth Circuit upheld a protective order similar to what the Council sought here, barring discovery about the actual immigration status of former employees.⁷⁴ Similar to *Salas*, the Ninth Circuit recognized that the immigration-related discovery at issue there was irrelevant to the issue of liability. Also consistent with *Salas*, the *Rivera* court recognized several risks of serious harm from forced disclosures of immigration-related matters. For example, people who were found to be undocumented might face criminal prosecution and deportation, which could deter them from bringing meritorious claims.⁷⁵ Documented persons might fear that their own immigration statuses could be changed, or might fear collaterally exposing immigration problems of their family or friends. People might be intimidated by the prospect of having their personal immigration histories examined in a public proceeding.⁷⁶ After examining these considerations, and applying the parallel federal rule about protective orders, the *Rivera* court concluded that the potential harms, the substantial burdens on the persons from whom the immigration discovery was sought, and the

⁷⁴ *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) (adjudicating a discrimination claim under Title VII of the Civil Rights Act of 1964).

⁷⁵ *Rivera*, 364 F.3d at 1604.

⁷⁶ *Rivera*, 364 F.3d at 1065.

chilling effect on the public interest in enforcing Title VII all supported the trial court's decision there to issue a protective order.⁷⁷

In *Snedigar v. Hoddersen*, the Washington Supreme Court considered whether to permit discovery of information protected by a First Amendment constitutional privilege, applying a balancing test similar to what the Ninth Circuit later used in *Rivera*.⁷⁸ The court in *Snedigar* weighed claims of a chilling effect on a political party's First Amendment associational privilege against the need for disclosure of the political party's meeting minutes.⁷⁹ Our state's highest court found that to make a threshold showing of the privilege, as necessary to support a party's resistance to discovery, the party needed to demonstrate only *some probability* that its First Amendment rights will be harmed by the discovery sought. The party need not show that the discovery would *in*

⁷⁷ *Rivera*, 364 F.3d at 1074-75. See also *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 214 (N.D. Ill. 2010) (granting protective order barring discovery regarding plaintiffs' immigration status and recognizing that "a number of courts have recognized that allowing discovery of a plaintiff's immigration status would have an *in terrorem* effect"); *Avila-Blum v. Casa de Cambia Delgado, Inc.*, 236 F.R.D. 190, 191-92 (S.D.N.Y. 2006) (agreeing with *Rivera* and with other courts' "concerns...and decisions...that have balanced the imperatives of optimal discovery, the introduction of unduly prejudicial evidence, and the chilling effect of inquiry into immigration status in connection with evidence sought in discrimination and employment-related cases"; collecting cases).

⁷⁸ 114 Wn.2d 153, 158 (1990).

⁷⁹ *Snedigar*, 114 Wn.2d at 158.

fact infringe on its constitutional right.⁸⁰ Then, once this threshold showing is made, the court held that the burden shifts to the party seeking discovery to establish the relevancy and materiality of the information sought, and to show that reasonable efforts to obtain the information by other means have failed.⁸¹

The trial court here should have applied a test similar to the approaches taken by the courts in *Snedigar* and *Rivera* – particularly where, here, as in *Snedigar* – the discovery at issue involves a constitutional right. Instead, however, the trial court’s approach here to the immigration-related discovery requests improperly required Board members to decide whether to subjugate their individual Fifth Amendment rights – which concern personal matters wholly unrelated to the Council’s business – to the Council’s obvious organizational interest in avoiding other discovery sanctions or follow-on problems in Diaz’s lawsuit, a suit to which the Board members are not parties. This situation is similar to the chilling effect on the exercise of First Amendment rights that the

⁸⁰ *Snedigar*, 114 Wn.2d at 163.

⁸¹ *Snedigar*, 114 Wn.2d at 164. Here, Diaz did not make these showings. In fact, his counsel suggested during oral argument of the Migrant Council’s protective order motion that at least some of the immigration status information was “public information.” RP 9/8/09 at 22:17-20. Regardless of whether this contention is correct, it illustrates that Diaz did not meet his burden in seeking the immigration-related discovery.

Washington Supreme Court recognized in *Snedigar*.⁸² As recognized in *Rivera*, even documented persons might fear adverse alterations of their immigration statuses, or that revealing immigration-related information might cause immigration issues for their family or friends.⁸³ Further, both documented and undocumented persons might fear accusations of criminal conduct.⁸⁴

⁸² *Snedigar*, 114 Wn. 2d at 159.

⁸³ *Rivera*, 364 F.3d at 1064 (9th Cir. 2004) (affirming district court's grant of a protective order denying discovery of plaintiffs' immigration status due to substantial risk of prejudice); *Sandoval v. Rizzuti Farms, Ltd.*, 2009 U.S. Dist. LEXIS 37631 (E.D. Wash. April 7, 2009) (relying on *Rivera* and finding that "the overriding interest in preventing the chilling of rights justifies a protective order" to prohibit immigration-related discovery before summary judgment), *reconsideration granted*, 2009 U.S. Dist. LEXIS 60745 (E.D. Wash. July 15, 2009) (entirely barring discovery into Plaintiffs' immigration status "to prevent manifest injustice and a chilling of Plaintiffs' private right of action"). *See also Barrera v. Boughton*, 2010 U.S. Dist. LEXIS 26081 at *14-*19 (D. Conn. 2010) (immigration status discovery could not be justified as relevant to witness credibility; "whatever value the information might hold as to impeachment is outweighed by the chilling and prejudicial effect of disclosure"; collecting cases); *Garcia v. Palomino, Inc.*, 2010 U.S. Dist. LEXIS 131817 at *4 (D. Kan. 2010) (refusing to reopen discovery to allow information regarding plaintiffs' actual immigration statuses because any relevance was greatly outweighed by danger of prejudice); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 502 (W.D. Mich. 2005) (denying discovery of immigration status because "the prejudice which would result to Plaintiffs if discovery into their immigration status is permitted far outweighs whatever minimal legitimate value such material holds for Defendants").

⁸⁴ Indeed, that is exactly what has occurred in this case, with Diaz's briefs repeatedly making baseless accusations of criminal misbehavior based on the Migrant Council's relationship with the former or current Board

These very real and significant harms clearly outweigh whatever low probative value might be associated with information about various Board members' actual immigration or citizenship statuses. Diaz has admitted that he "*need not prove that any of the Migrant Council board members were illegal aliens*" to prevail on his public policy wrongful discharge claim.⁸⁵ Moreover, "a person's legal status has no bearing on that person's propensity for dishonesty," so it would be error to find the Board members' legal statuses relevant to their credibility.⁸⁶ Similarly, immigration-related discovery has no relevance to whether Board members are fiscally responsible Board members, despite the trial court's apparent view to the contrary.⁸⁷ This is particularly true in light of Diaz's admissions that the allegedly "illegal" Board members took their fiduciary responsibilities as seriously as any other Board member, and that none of them engaged in any conduct that violated their fiduciary duties.⁸⁸ Any

members who have invoked their Fifth Amendment privileges. CP at 986-991, 1650; RP 5/26/09 at 33:19-34:11.

⁸⁵ CP at 1651:5-7 (emphasis added).

⁸⁶ *Holis v. Saraphino's Inc.*, 2010 U.S. Dist. LEXIS 131189 at *6 (E.D. Wis. 2010).

⁸⁷ See RP 9/8/09 at 33:20-23 (stating "if this entity is handling what appears to be millions of dollars of government funding, doesn't the public have a right to know who's on the board and what their status is?"). See also CP at 1646:12-18 (arguing plaintiff's position that "one cannot safeguard federal funds and legally and fiscally oversee United States government programs without being a citizen").

⁸⁸ CP at 636 (Ex. A at 490:6-24).

argument that immigration-related discovery is relevant because undocumented individuals may breach fiduciary responsibilities to a grantee agency rests on invidious and discriminatory stereotypes. In short, it is beyond dispute that the immigration-related discovery has only minimal (if any) probative value as to the central issue in this case: wrongful discharge in violation of public policy.

Diaz's only other claim is the novel assertion that his termination was "not legal" because the asserted immigration issues precluded the Board of Directors from being "legally constituted" when it decided to discharge him.⁸⁹ This novel theory does not render Board members' immigration statuses relevant, because Washington law does not recognize any cause of action by a private sector employee for wrongful termination based on a contention that the employer's action was *ultra vires*. As a private sector employee "at will," Diaz was subject to termination at any time, and for any reason, unless he could show that some exception to Washington's general rule of employment at will applies.⁹⁰ Washington's employment-at-will exceptions do not include any exceptions for *ultra vires* action, nor for the alleged unlawful composition of a private sector

⁸⁹ CP at 1761 ¶ IV.

⁹⁰ See *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226-232 (1984) (discussing Washington's employment-at-will doctrine and its exceptions); see also CP 1642:12 (admitting that the Board had "the sole authority to fire and discipline Diaz").

decision making body.⁹¹ Thus, Diaz's assertion that the Board was not "legally constituted" when it voted to discharge him once again cannot justify his requested discovery.

The trial court should have found that the low potential probative value of the personal immigration-related information sought by Diaz was substantially outweighed by the extreme risk of unfair prejudice from such sensitive, highly political and emotionally charged information. Even if this information were of some marginal relevance to the determination of this action, any scant relevance was greatly outweighed by the risk of embarrassment, damage, and prejudice to the individual, non-party, target Board members, and by its *in terrorem* effect on the assertion of legal rights.⁹² The Contempt Order is coercive because it impliedly pressures the Council to urge its Board members to waive their personal Fifth Amendment privileges to avoid a default.⁹³ If this case proceeds to trial

⁹¹ *Thompson*, 102 Wn.2d at 226-232.

⁹² *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004). *See also State v. Avendano-Lopez*, 79 Wn. App. 706, 719 (1995) (recognizing that questions regarding parties' nationality and immigration status are highly prejudicial); *State v. Suarez-Bravo*, 72 Wn. App. 359, 367 (1994) (reversing conviction due to a "substantial likelihood that the jury's verdict was affected by the State's examination regarding Suarez-Bravo's residence, job and ethnic heritage").

⁹³ The Contempt Order is against the Council, yet only Board members, as individuals, have the power to provide the subject discovery. As such, the Contempt Order goes beyond what prior cases involving contempt recognize as "coercive," *i.e.*, in prior cases the contempt order compelled

with the trial court's orders in place, the Board members will have to testify with the threat of default against the Council hanging over them – a highly intimidating context. The trial court erred by not considering the potential chilling and harmful effects of ordering this discovery on Board members' valid exercises of their personal Fifth Amendment rights. Instead of granting Diaz's motion to compel, the trial court should have granted in full the Migrant Council's motion for protective order against Diaz's immigration-related discovery.

Moreover, even assuming *arguendo* that the trial court had the power to order the Migrant Council to provide discovery about the volunteer Board members' actual immigration or citizenship statuses, the court still should have granted the Council's motion for a protective order limiting discovery regarding immigration matters to the discovery the Council agreed was proper: questions about immigration-related *conversations* that individual Board members may have had with Diaz.⁹⁴ Instead, however, the trial court compelled discovery about actual immigration and citizenship status, then held the Migrant Council in contempt, threatening a default judgment against it, and entering sanctions

the *party* against whom it was entered to comply. See *Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n*, 41 Wn.2d 22, 26 (1952); *Smaldino*, 151 Wn. App. at 363; *Seattle Northwest Securities Corp. v. SDG Holding Co.*, 61 Wn. App. 725, 733 (1991).

⁹⁴ CP at 1581-1588.

against it, including ordering an adverse inference jury instruction that preserves the threat of default.⁹⁵ All of this only serves to chill or penalize Board members' exercise of their personal Fifth Amendment privileges.

In sum, the trial court abused its discretion when it failed to properly weigh the constitutional rights at issue, and the highly sensitive immigration-related information sought by Diaz, against his purported need for this discovery. This Court should reverse the trial court's order compelling this discovery and the trial court's corollary denial of the Migrant Council's motion for a protective order against this discovery.

C. The Discovery Sanctions Exceeded the Trial Court's Power and the Bounds of Due Process.

The trial court's Contempt Order also violated the limits of due process because the Migrant Council did all it could to obey the trial court's order compelling discovery, even though it was impossible for the Council to control whether individual Board members would provide the requested personal information and documents. Even in a situation where (unlike here) a party has control of the discovery at issue, "[f]air and

⁹⁵ RP 2/5/10 at 18:17-20:13 (stating that if "I were to conclude during the course of a trial where these people are taking the 5th and they are board members and it's frustrated the plaintiffs' claim to too great an extent, I would still consider default on the issue or direct verdict").

reasoned resistance to discovery is not sanctionable.”⁹⁶ And due process limits a trial court’s discretion to order discovery sanctions. Any sanction must be “just,” and it must be specifically related to the particular “claim” implicated by the order to provide discovery.⁹⁷ Here, in contrast, the trial court compounded its obvious error by continuing to hold the Migrant Council in contempt and awarding sanctions even after the Council showed it was impossible to comply with the trial court’s discovery order, given that several former or current Board members lawfully invoked their individual privileges against self-incrimination after that order was issued.

Moreover, the trial court clearly erred by making *no finding* about whether the Migrant Council acted “willfully” merely because the Council did not provide immigration-related discovery that it did not possess or control about the former and current Board members who invoked their Fifth Amendment rights.⁹⁸ When a trial court chooses one of the harsher remedies in CR 37(b), its reasons “should, typically, be clearly stated on the record so that meaningful review can be had on appeal.”⁹⁹ Failing to

⁹⁶ *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 586 (2009) (internal quotation omitted).

⁹⁷ *See Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

⁹⁸ *See* CP 248-253 (the trial court’s final discovery sanctions order).

⁹⁹ *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494 (1997).

make such findings is reversible error, and the trial court here plainly committed just such an error.¹⁰⁰

Here, however, there is no need to remand to the trial court for a finding about willfulness. The trial court's failure to find "willfulness" simply reflects the dearth of evidence from Diaz that the Council acted "willfully" by not providing the full immigration-related discovery he requested. A party "willfully" fails to provide discovery only if the record shows that its conduct is "without reasonable excuse" or justification.¹⁰¹ A party's refusal to obey a discovery order based on a valid assertion of a constitutional privilege clearly is *not* "willful" or "without reasonable excuse."¹⁰² And a contempt order is not proper if the party took "all the reasonable steps" it could to comply.¹⁰³

Plainly, the Migrant Council did all that it could to comply with the trial court's order compelling discovery. The Council requested personal immigration information and documents from all of the target Board members – even those who had invoked their Fifth Amendment

¹⁰⁰ *Snedigar v. Hodderson*, 114 Wn.2d 153, 170 (1990) (reversing default order for discovery violations where there was no showing of willfulness).

¹⁰¹ *Magana*, 167 Wn.2d at 584.

¹⁰² *Snedigar*, 114 Wn.2d at 168.

¹⁰³ *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 466 (9th Cir. 1989).

rights at deposition.¹⁰⁴ And the Council ultimately did provide this information for four of the eight Board members who voted to discharge Diaz.¹⁰⁵ The Council had no power to force the remaining former or current Board members to waive their Fifth Amendment rights.

The trial court properly acknowledged the Board members' individual rights to invoke their Fifth Amendment privileges.¹⁰⁶ Nonetheless, in explaining its decision to sanction the Council for these individual invocations of personal rights, the court stated:

[T]he question is it either has consequences for Mr. Diaz or consequences for the Washington Migrant Council.

...
The problem is that you lose a lawsuit if your board members take the 5th. That's what happens. How else can we litigate this issue?^[107]

The trial court's reasoning is flawed. The present case is readily distinguishable from cases applying the principle that a corporation's officers cannot invoke a Fifth Amendment privilege to avoid producing records related to the corporation's business.¹⁰⁸ The situation here simply

¹⁰⁴ See CP at 1196 ¶ 2, 1204 ¶¶ 16-17, 1386-1389 ¶¶ 7, 12, 1773-1776 ¶¶ 7-12, 1157-58 ¶¶ 4-9, 1161-64; RP 11/18/09 at 5:14-8:25.

¹⁰⁵ RP 11/18/09 at 7:2-8:2. See also *supra* note 104.

¹⁰⁶ RP 10/30/09 at 25:5-9, 25:15-17, 26:15-17; CP at 252:8-14.

¹⁰⁷ RP 10/30/09 at 25:8-9, 17-18, 24-25; RP 11/18/09 at 13:24-14:4.

¹⁰⁸ See, e.g., *Bellis v. United States*, 417 U.S. 85, 88-89 (1974) (stating that "an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a

is not analogous to a case where a CEO disobeys a court order to provide discovery related to the corporation's business, or where a corporate officer violates his fiduciary duties to the corporation.¹⁰⁹ No such business connection exists here.

Due process does not permit a non-party's valid exercise of a personal Fifth Amendment privilege to support a discovery sanction against a party organization.¹¹⁰ Here, despite the Council's inability to control its volunteer Board members' exercises of their personal privileges, the Council took all the steps that it could to comply with the trial court's order compelling discovery.¹¹¹ Yet several of the current or former Board members lawfully chose to continue asserting their individual constitutional rights. It was unjust to punish the Migrant Council for these lawful decisions by Board members about personal matters that are irrelevant to their former or current corporate duties. The

representative capacity, even if these records might incriminate him personally.”).

¹⁰⁹ Cf. *Delany v. Canning*, 84 Wn. App. 498, 505 (1997) (affirming default where partnership investors sued the investment's promoter and partner for an accounting and damages for failing to keep record and the defendant wholly failed to respond to the discovery); *RCL Northwest, Inc.*, 72 Wn App. at 267.

¹¹⁰ See *Bomar v. Moser*, 251 S.W.3d 234, 240 (Ark. 2007) (holding that the plaintiff could *not* show that the defendant avoided discovery by improperly asserting its Fifth Amendment privilege); *Belmonte v. Lawson*, 750 F. Supp. 735 (E.D.Va. 1990) (denying a motion to compel testimony withheld under the Fifth Amendment privilege).

¹¹¹ See *supra* note 104.

trial court erred by entering the Contempt Order, given that the Migrant Council's purported "failure" to provide discovery was due to individual Board members' valid exercises of personal Fifth Amendment privileges.

D. The Adverse Inference Instruction Far Exceeds the Scope of the Discovery Dispute, and Impermissibly Comments on the Motive of the Entire Board.

As already discussed above, the Council complied with the trial court's discovery order as much as it could, providing the requested discovery for half of the Board members who voted to terminate Diaz. However, despite the Council's extensive efforts to comply with the trial court's order compelling discovery, the trial court abused its discretion when it awarded Diaz the sanction of an adverse inference instruction. This section focuses on why it was error for the trial court, during the presentment hearing on the Contempt Order, to make a handwritten interlineation on the final Contempt Order specifying that "the jury may, but is not required to, infer that Mr. Diaz was discharged by the Board for raising the issue of their immigration status."¹¹² The Council continues to firmly maintain that *no* discovery sanctions whatsoever should have been ordered here. But even if this Court were to disagree, and even if this Court were to conclude that some sanction was warranted, this Court should still find that the trial court's adverse inference jury instruction is

¹¹² CP at 252:8-25.

overly broad and amounts to an improper comment on an ultimate issue of fact: the entire Board's motive for terminating Diaz.

Fundamentally, the trial court's adverse inference instruction is overly broad because it goes far beyond anything that arguably is needed to give Diaz the fair equivalent of the evidence he contends he would have had, if *all* of the target Board members had provided the disputed discovery. Under CR 37(2)(A), if a party fails to obey an order compelling discovery, the trial court may make any order about the failure as is "just," including ordering "that the matters regarding which the order was made or any other designated facts shall be taken to be established." No Washington case law interprets this rule. However, in considering a predecessor version of this rule, the Washington Supreme Court recognized that "the refusal of a party to answer interrogatories may be treated as an implied admission of facts *in relation to which a discovery was sought.*"¹¹³ Similarly, courts elsewhere interpreting the present-day version of this rule recognize that the purpose of an adverse inference instruction is to "restor[e] the prejudiced party to the same position he

¹¹³ *Mitchell v. Watson*, 58 Wn.2d 206, 212 (1961) (emphasis added; internal quotations and citation omitted) (reversing a default judgment against a defendant reporter who refused to identify his sources where the relevance of the withheld information appeared limited to the defense of mitigation of damages).

would have been in absent the wrongful [withholding] of evidence by the opposing party.”¹¹⁴

Thus, even assuming – again, without conceding – that an adverse inference instruction was proper, its scope should have been limited to allowing the jury to infer that the four decision making Board members who invoked their personal Fifth Amendment privileges were not lawfully in the U.S. when they voted to discharge Diaz.¹¹⁵ But the trial court’s erroneous instruction does not stop here. Instead of crafting an instruction that was tailored in some manner to the disputed immigration status discovery, the adverse inference instruction outlined by the trial court will broadly comment on an ultimate factual issue: the *entire* Board’s motive for discharging Diaz.¹¹⁶

The trial court’s adverse inference instruction is unnecessarily broad because Diaz has not been prevented from exploring individual Board members’ motives for his termination. The decision making Board members who asserted their personal Fifth Amendment privileges only did so when asked questions about their actual citizenship or immigration

¹¹⁴ *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998), overruled on other grounds by *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000). As already discussed, the Council disagrees it “wrongly” withheld any immigration-related discovery.

¹¹⁵ See CP at 252:8-14 (imposing this lesser sanction).

¹¹⁶ CP at 252:15-25.

statuses.¹¹⁷ *None* of these Board members invoked privilege when asked about *conversations* with Diaz about immigration status.¹¹⁸ Thus, their individual invocations of personal privileges did not preclude Diaz from exploring their motives in discovery. The trial court erred when it added language to its adverse inference instruction that went beyond “restoring” Diaz to the evidentiary situation that would have existed, had some Board members not invoked their personal Fifth Amendment privileges.

The trial court’s expansion of the adverse inference instruction also was erroneous because the expanded instruction would be an improper comment on the evidence and would invade the jury’s role as the ultimate fact finder. Although the instruction does not order the jury to infer a certain motive, the instruction improperly comments on an ultimate issue in the case: the reason why the Council’s decision making body – its Board of Directors – voted to discharge Diaz. This is not a question about

¹¹⁷ These Board members were J. Avalos (CP at 1203 ¶ 15, 1357:22-23), P. Contreras (CP at 1201 ¶ 15, 1345:20-1346:5), I. Mendoza (CP at 1199 ¶ 13, 1314:21-1315:2), and M. Sanchez (CP at 1198 ¶ 12, 1297:10-17). (Former Board chair Agustin Garcia also invoked his Fifth Amendment rights during his deposition, but Garcia resigned from the Board before it voted to discharge Carlos Diaz. CP at 1162 ¶¶ 3-4, 1200 ¶ 14, 1329:14-18, 1334: 17-18, 1388 ¶¶ 8, 1392-1393 ¶¶ 3, 5, 1396 (listing who was present for the vote).

¹¹⁸ J. Avalos (CP at 1357:25-1358:16), M. Sanchez (CP at 1297:18-1298:6, 1305:15-1304:17), P. Contreras (CP at 1346:6-1347:11), A. Garcia (CP at 1327:18-24, 1330:12-1331:21, 1333:15-22), I. Mendoza (1315:9-21), and R. Mendoza (CP at 1287:2-25). *See also* CP at 1162 ¶ 4, 1197-1204 ¶¶ 8-15.

the motive of any one individual, but a question about the overall motive of the decision making Board. The expanded adverse inference instruction directly comments on this ultimate issue, explicitly inviting the jury to conclude that “Diaz was discharged *by the Board* for raising the issue of their immigration status.”¹¹⁹

Under Washington’s Constitution,¹²⁰ a trial judge may not convey his or her personal attitudes about the merits of the case, nor instruct a jury that “matters of fact have been established as a matter of law.”¹²¹ A trial court improperly comments on the evidence if it makes a statement that implies or allows the jury to infer the court’s views about the merits of a disputed issue.¹²² “[T]he jury is the sole judge of the credibility and weight of the evidence,” and any trial court comments made before the jury “may have great influence upon the final determination of the issues.”¹²³ Thus, the standard for reversal is low: the comment is assumed prejudicial and is

¹¹⁹ CP at 252:24-25.

¹²⁰ Wash. Const. Art. IV § 16.

¹²¹ *State v. Becker*, 132 Wn.2d 54, 64 (1997) (an improper comment is equal to a directed verdict).

¹²² *State v. Lane*, 125 Wn.2d 825, 838 (1995).

¹²³ *Heitfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 699 (1950).

reversible error unless the record affirmatively shows that the party could not have been prejudiced by the trial judge's statement.¹²⁴

Here, the trial court's interlineation improperly communicates an attitude about the overall Board's motive and other fact issues in several ways. First, its language *assumes* that Diaz actually raised issues about various Board members' immigration statuses and that Diaz encouraged them to resign – all of which the Council disputes. Second, the instruction improperly lumps together the four decision making Board members who invoked their Fifth Amendment rights with the other four decision making Board members, who provided evidence of their lawful status or U.S. citizenship. Next, the instruction improperly suggests that Diaz supposedly raising immigration status issues about *some* Board members infected *all* of the Board members' motives. The instruction paints those Board members who did not invoke the Fifth Amendment with the same motive brush as those who did invoke it. Last, the instruction improperly slants the jury instructions against the defense and undermines the jury's role as the ultimate decision maker by putting the trial court's imprimatur on Diaz's theory of the case.

¹²⁴ *Seattle v. Arensmeyer*, 6 Wn. App. 116, 121-122 (1971). *See also Becker*, 132 Wn.2d at 65.

In short, even if some form of sanctions was proper here (which the Council strongly contests), this discovery dispute does not warrant an adverse inference about the motive of each and every decision making Board member, much less the Board as a whole. The trial court's adverse inference instruction was error.

E. When Entering the Erroneous Contempt Order, the Trial Court Ordered the Council to Pay Terms Without Notice or the Opportunity to be Heard.

After the trial court orally granted the Migrant Council's reconsideration motion and stated it would not proceed with a default against the Migrant Council, Diaz moved for reconsideration of this ruling and – for the first time – sought terms against the Council based on the immigration-related discovery dispute.¹²⁵ Diaz gave scant authority to support his request for a terms award for the alleged discovery violation.¹²⁶ Similarly, during the presentment hearing to enter the final written ruling on Diaz's contempt motion, the trial court did not cite any authority for its after-thought award of terms.¹²⁷

In awarding terms, the trial court possibly may have relied on CR 37(b)(2)(E), which allows a trial court to impose terms caused by a party's failure to obey a discovery order, "unless...the failure was

¹²⁵ CP at 556, 567-568.

¹²⁶ See CP at 567-568.

¹²⁷ RP 4/6/10 at 20:18-21:3.

substantially justified or...other circumstances make an award...unjust.” The trial court’s basis for its terms award was not developed because the court did not allow the Council to respond to Diaz’s eleventh hour fees request.¹²⁸

Had the trial court given the Migrant Council a proper opportunity to respond to Diaz’s “pile on” request for fees, the Council again would have explained that it was substantially justified in not providing all of the immigration-related discovery at issue because the Council could not force former or current Board members to provide this personal information, and some Board members had properly invoked their individual Fifth Amendment privileges, as they were legally entitled to do. Moreover, ordering the Council to pay terms was unjust, as this once again punishes the Council for non-parties’ lawful assertions of their personal Fifth Amendment rights. This Court should reverse the trial court’s award of fees against the Migrant Council.

¹²⁸ In awarding fees, the trial court merely stated “this is an issue that was brought about in part by the individual interests of the board members, and the board was stuck with that, but they were their board members.” RP 4/6/10 at 20:21-24. Here again the trial court improperly held the Council responsible for non-party conduct that the Council could not control.

F. The Trial Court Improperly Limited the Council's Summary Judgment Arguments Before Briefing Was Even Completed.

The trial court compounded its errors by ordering that the Council cannot argue the “overriding justification” element at summary judgment while this briefing was underway.¹²⁹ This “pre-decision” based on the discovery dispute¹³⁰ improperly limits the Council’s ability to attack the legal sufficiency of Diaz’s *prima facie* case through the established mechanism of summary judgment. And the trial court cited no authority to support its decision to limit the Migrant Council’s summary judgment arguments.¹³¹ The trial court later denied limiting the scope of the Council’s summary judgment arguments as a discovery sanction, but it did not identify any other authority for this ruling,¹³² which is contrary to the summary judgment procedures established in CR 56. And, as the trial court apparently recognized, it would have been error to rely on the authority in CR 37(b)(2)(B) to award discovery sanctions, as this would improperly impose additional discovery sanctions after the trial court

¹²⁹ CP at 153:24-28.

¹³⁰ RP 3/29/10 at 6:15-7:14 (argument by Diaz), 15:7-17 (argument by the Migrant Council), 19:4-14 (remarks by the Court: “I think it could be patently unfair to allow the defendant to move for summary judgment on the bases of those last four elements because of the discovery violation that Judge Matheson found, number one...”).

¹³¹ *See supra* notes 129-130; RP 4/19/10 at 13:13-17.

¹³² RP 4/19/10 at 13:13-17.

(through a different judge) had finally determined its contempt remedy after substantial briefing and five hearings.¹³³ Any reliance here on CR 37 would merely underscore the trial court's error.

V. CONCLUSION

For multiple reasons, this Court should reverse the trial court's erroneous order compelling the Migrant Council to provide discovery about the actual citizenship and immigration statuses of its volunteer Board members, and denying the Council's competing motion for a protective order against this discovery:

- ***The trial court ordered the Council to do the impossible.*** The immigration-related discovery at issue simply was not within the Council's possession, custody or control. Without dispute, the Council did not make or keep records of this personal information about its Board members – information that is not relevant to the Council's mission as a non-profit organization.
- ***The Council had no legal right to obtain the immigration-related discovery that Diaz sought about the target Board members.*** The trial court correctly concluded that several of the target former or current Board members lawfully invoked their personal Fifth Amendment privileges. Again, the Council

¹³³ RP 4/19/10 at 13:13-17.

lacked any control over the discovery compelled by the trial court.

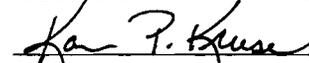
- In ruling on the parties' competing motions to compel and for a protective order, the trial court failed to correctly balance the low probative value of the discovery at issue against its high likelihood of unfair prejudice stemming from the highly political and emotionally charged nature of this information.

For these reasons, the Court of Appeals should reverse the trial court's order compelling immigration-related discovery. Moreover, if this Court reverses the order compelling discovery, then all of the other trial court rulings under review also must be reversed, because the sanctions rulings, its award of terms, and its preclusion of summary judgment arguments all depend upon the erroneous order compelling discovery.

The Court of Appeals should correct all of the above errors, and should preclude Diaz from using immigration-related discovery for tactical gain and for *in terrorem* purposes against parent volunteers.

RESPECTFULLY SUBMITTED this 10th day of February 2011.

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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury, under the laws of the State of Washington, that on February 10, 2011, I caused a copy of the Opening Brief of Appellant Washington State Migrant Council (With Citations to Corrected Clerk's Papers) to be sent via electronic mail on February 11, 2011, as well as sent via Federal Express overnight courier to be personally hand delivered on February 11, 2011, to:

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2415 West Falls Avenue
Kennewick, WA 99336-3068

Signed this 10th day of February 2011, at Seattle, Washington.


Deborah A. Hatstat