

NO. 42869-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

PATRICK ROJAS

Appellant,

vs.

DANIELLE LYNN SCHNEIDER and ERIC JOHN SCHNEIDER, jointly

and severally and the marital community thereof;

Defendants.

APPELLANT'S OPENING BRIEF

Patrick Rojas
PO Box 645
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253-237-2824

Appellant.

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I. INTRODUCTION

Pro Se Appellant, Patrick Rojas requests this court reverse the dismissal of all his claims against Danielle Lynn Schneider and Eric John Schneider, Respondents, and asks that the case be remanded back to the trial court.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court erred when it dismissed the Appellant's dozens of claims of defamation, defamation by implication, invasion of privacy, and tortuous interference of a business expectancy because the Appellant asserted his Fifth Amendment privilege during discovery in only a small number of his invasion of privacy claims.

Assignment of Error No. 2. The trial court erred when it dismissed all of the Appellant's claims of defamation, defamation by implication, invasion of privacy, and tortuous interference of a business expectancy because the Appellant's psycho-sexual evaluation was not a sealed document when the majority of the Appellant's claims of claims of defamation, defamation by implication, invasion of privacy, and tortuous interference have nothing to do with the psycho-sexual evaluation and there is no case

law in Washington nor any legal principle that would necessitate that all of the Appellant's claims be dismissed if the document was not sealed.

III. STATEMENT OF THE CASE

A. Background of Mr. Rojas

The Appellant Patrick Rojas, brought this case due to the Respondents, Eric and Danielle Schneider, causing him to lose his job and suffer emotional and financial harm because of publications they have made about him on the World Wide Web (CP at 1-3, 33, 139-141, 145-146, 152. RP Sep. 16, 2011 at 10). Mr. Rojas pled guilty to a misdemeanor charge of Communicating with a Minor for Immoral Purposes against the Respondents' daughter, Jane Doe Schneider, and was sentenced on August 17, 2007 (CP at 2, 137. RP Sep 16, 2011 at 10).

Mr. Rojas took responsibility for his actions, originally sought help voluntarily (CP 137, 140, 142, 191), and then successfully completed treatment prescribed by the court on May 19, 2010 (CP at 138. RP Sep 16, 2011 at 11).

Mr. Rojas was also required by the court to complete a psycho-sexual evaluation by Dr. Joe Jenson as a part of his plea agreement (CP at 2, 138. RP Sep 16, 2011 at 10). This document was confidential and protected by law (RCW 42.56, 42.56.050, 42.56.360(2), 70.02, 71.05 and 71.06. CP at 138, 143, 160-162, 164, 184, 195, 197. RP Sep 16, 2011 at 11).

Mr. Rojas worked regularly with a computer services company beginning in January 2009 (CP at 13. RP Sep 16, 2011 at 13).

Mr. Rojas made a dedicated and conscious effort to establish himself well in the community, take responsibility for his past actions and do all that was possible to become a better person (CP at 143. RP Nov 4, 2011 at 4).

B. Schneider's Begin to Blog about Mr. Rojas

The defendants began an internet blog in March 2009 (<http://ourstoryhelp.blogspot.com>) and have published information that is not true along with statements that significantly invade Mr. Rojas' privacy (CP at 2; RP Sep 16, 2011 at 11). Some of the information published comes directly from Mr. Rojas' confidential psycho-sexual evaluation (CP at 2; RP Sep 16, 2011 at 11-13, 18).

The Respondents have published as fact that Mr. Rojas has committed multiple felonies (CP 189), did not cooperate with law enforcement (CP at 184, 189) and that he is a predator, a pedophile and a danger to the community (CP at 144, 185, 187-188), all of which are false.

The Respondents state as fact that Mr. Rojas will re-offend (CP at 188-189). They express vial hatred toward Mr. Rojas both online and in private communication (CP at 2). The Respondents have published this information maliciously and with intent to harm Mr. Rojas and his attempts to reestablish himself in the community (CP at 145-146, 186-192).

The Respondents have mocked our laws and the justice served in the criminal case concerning Mr. Rojas (CP at 139, 186).

C. Effects of the Respondent's Blog

In the fall of 2008, Mr. Rojas was attending adult-only church services at Pacific Lutheran University with full support of his probation officer and treatment group but was contacted and told to never come back due to efforts on the Respondents' part (CP at 139, 144. RP Sep 16, 2011 at 13).

Multiple churches have advised Mr. Rojas to seek another church after reading defamatory information from the Respondents' blog (CP at 139).

In March 2010, Mr. Rojas was terminated from his employment at Olympic IT Services as a direct result of the Respondents' publications (CP at 139-140, 144-145. RP Sep 16, 2011 at 10, 13).

Mr. Rojas has been unable to find a job (CP at 3, 140).

Mr. Rojas has been subject to public humiliation and ridicule with threats on his life because of the publications by the Respondents and subsequent media involvement (CP at 140-141, 145-146, 184. RP Sep 16, 2011 at 14).

D. Attempts for Resolution & Lawsuit

From the outset, Mr. Rojas has been compassionate and concerned for the Respondents considering his actions toward their daughter (CP at 146, 151-152. RP Sep 16, 2011 at 13-14. RP Nov 4, 2011 at 3-4). Mr. Rojas pleaded through his attorney for the Respondents to cease and desist (CP at 147. RP Nov 4, 2011 at 5-6). They ignored his request. Mr. Rojas

then filed a complaint for damages on June 21, 2010 for invasion of privacy, defamation, defamation by implication and tortuous interference with business expectancy (CP at 3, 173).

The Respondents counter-sued but voluntarily dismissed their claims (CP at 5, 60). Mr. Rojas tried multiple times to reconcile with the Respondents through mediation and negotiations through their attorney (CP at 69, 72, 151-152. RP Nov 4, 2011 at 5-6). All of which were unsuccessful *Id.*

E. Discovery & Dismissal

During discovery, the Appellant, Mr. Rojas, provided meaningful answers and documents to all questions and took a 5th amendment privilege on only five interrogatories and one request for production (RP Sep 16, 2011 at 18-19. RP Sep 30, 2011 at 7. RP Oct 10, 2011 at 9-10. Exhibit A).

Regarding defamation, defamation by implication and tortuous interference with business expectancy, Mr. Rojas' claims are not based on information within the psycho-sexual evaluation (CP at 175-176. RP Nov. 4, 2011 at 4-8). Mr. Rojas' claim of invasion of privacy referenced information obtained from the psycho-sexual evaluation *in addition to*

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other published information (RP Sep 16, 2011 at 18. RP Nov. 4, 2011 at 6-7).

F. Motion to Dismiss and Motion for Reconsideration

The Respondents filed a motion to dismiss all claims regardless of whether the 5th amendment privilege taken by the Appellant was relevant or not (CP at 90). The Respondents also argued that Mr. Rojas' case should be dismissed for failing to file meaningful and timely discovery which was overturned (RP Oct 28, 2011 at 3-11).

Mr. Rojas' case was partly dismissed on September 30, 2011 fully on October 28, 2011. His motion for reconsideration argued on November 4, 2011 was denied (RP Nov 4, 2011 at 27-28).

No case law or statute supports the trial court's dismissal (RP Nov 4, 2011 at 2).

Mr. Rojas filed his timely appeal on December 2, 2011 (CP at 212).

IV. STANDARD OF REVIEW

The trial court dismissed the Appellant's claims with no legal basis and this case should be reviewed *de novo*.

V. ARGUMENT

A. Appellant Has Not Raised Fifth Amendment Privilege on a Majority of His Claims.

The Appellant has not raised his Fifth Amendment privilege on the majority of his dozens of claims. In response to five of the twenty-six interrogatories, the Appellant asserted his Fifth Amendment privilege against self-incrimination on a small portion of the invasion of privacy claims because the interrogatories asked for any victim names.

Through her 291 blog posts, many more than a page in length, from March 2009 to the present date, the Respondent made dozens of statements constituting defamation, defamation by implication, tortious interference, and invasion of privacy. The Appellant has largely answered every interrogatory and provided the requested documents regarding these dozens of claims with no assertion of his Fifth Amendment.

Each of the Respondent's defamatory blog statements constitutes a separate cause of action. The Appellant has not asserted his Fifth Amendment Privilege for the majority of these claims and it was an error of law for the Court to dismiss 100% of the Appellant's claims when he asserted his Fifth Amendment privilege on only a small percentage of his claims.

The only claims of the Appellant the Court should have dismissed are the small percentage of his claims that relate to his psycho-sexual evaluation and whether he had any past victims.

In his declarations before the Court, the Appellant outlined numerous separate blog postings that constitute either separate claims for defamation, defamation by implication, tortuous interference or an invasion of privacy. The claims were not related to the Appellant's psycho-sexual evaluation.

B. The Appellant Is Not Gaining an Unfair Advantage-A
Balancing Must Occur on Each Claim

When the Fifth Amendment privilege is invoked in a civil context, the court must fashion a remedy that ensures that any burden placed on the party asserting the privilege is no greater than what is “necessary to prevent unfair and unnecessary prejudice to the other side.” *Serafino v. Hasbro*, 82 F.3d 515, 517 (1st Cir. 1996); *see King*, 104 Wn. App. at 350-76.

Any remedy must properly balance all interests to ensure that the party asserting the privilege does not impermissibly convert it from a shield to a sword. “The plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to gain an unequal advantage against the party he has chosen to sue. To hold otherwise would, in terms of the customary metaphor, enable plaintiff to use his Fifth Amendment shield as a sword. This he cannot do.” *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087 (Fifth Cir. 1979).

When a party invokes the Fifth Amendment during a civil proceeding, the court must balance the interests of the party asserting the privilege against the opposing party's interest in conducting civil discovery and pursuing a meaningful defense. Although a remedy that prevents

unfair prejudice to both parties is preferred, dismissal of a lawsuit may be warranted if the court determines that postponing the civil proceedings pending resolution of the criminal issues will unduly “prejudice” the opposing party's case. *Wehling*, 608 F.2d at 1089.

The remedy of dismissal of all of the Appellant’s claims is not a preferred remedy in this case because it unfairly penalizes the Appellant for asserting his Fifth Amendment privilege on a small portion of his claims. This remedy by the Trial Court unfairly prejudiced the Mr. Rojas because dozens of his other claims that had nothing to do with his Fifth Amendment privilege were dismissed.

The Fifth Amendment permits a person to refuse to answer official questions asked in civil proceedings where the answer might tend to incriminate him in criminal proceedings. *State v. King*, 130 Wn.2d 517, 523-24 (1996).

C. Case Law Does Not Support the Dismissal of All Claims

Case law does not support the Court's ruling that all of the Plaintiff's claims be dismissed if the Plaintiff asserted his Fifth Amendment privilege on just a small portion of his claims.

For example, in *Bramble v. Kleindienst*, 357 F. Supp. 1028 (1973), the Plaintiff, Bramble, was arrested by law enforcement in Colorado and charged with possession of marijuana. His 1969 Volkswagen automobile was seized and forfeited and Bramble subsequently pled guilty to possession of marijuana. Bramble sought remission of his forfeited vehicle from the Attorney General arguing that it was a taking without just compensation. After filing his claim for remission and mitigation, Bramble invoked his Fifth Amendment privilege in the course of discovery and refused to answer questions at his deposition.

In his claim, *Bramble* was asserting his Fifth Amendment privilege against self-incrimination on the very claim that he was asserting against the Attorney General. The Court held: "It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiff's to fend off

questions, the answers to which may constitute a valid defense or materially aid the defense.” Bramble at 1035.

As support for its ruling, the Court in *Bramble* cited *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969). In that case, during discovery the Plaintiff refused to cooperate in any manner. *Id.* at 1035. The Court in *Lyons* outlined the equitable principles involved in that Court’s decision to prevent Lyons from using the Fifth Amendment as both a sword and a shield. The *Lyons* Court stated:

“The naked question therefore simply was whether a plaintiff can refuse to submit to any discovery whatsoever upon his lawsuit, by asserting a Fifth Amendment privilege against any interrogation of him and then demand that he nevertheless be permitted to continue with the legal pursuit of his claim, no matter what prejudice or possible unequal protection there might be involved to the defendant...”

The LYONS Court determined that injustice would be committed if a person could use the Fifth Amendment as a sword and as a shield. “The scales of justice would hardly remain equal in these respects, if a party can

assert a claim against another and then be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim.”

In contrast to *Lyons* and *Bramble*, the Appellant is not attempting to block “all” discovery attempts against him. He has asserted his Fifth Amendment privilege on only five of twenty six interrogatories and on only one of the fourteen requests for production.

In Interrogatory No. 11 the Respondent asked the Appellant to provide the blog entries that were “untrue” and which placed the Appellant “in a false light” and which “implied untrue information about the Plaintiffs.” This interrogatory goes to the heart of the Appellant’s claims. The Appellant fully answered Interrogatory No. 11 by providing a total dozens and dozens of pages of information in response. The Appellant provided the answers that form the basis for his dozens of claim and the Appellant did not raise his Fifth Amendment privilege.

In Interrogatory No. 12 the Respondent asked the Appellant to provide examples where the Respondent’s statements were false by implication. The Appellant fully answered Interrogatory No. 12. If the

Appellant had asserted his Fifth Amendment Privilege and sought a shield to protect him from answering Interrogatory No. 11 and No. 12, then the Respondent could honestly argue that the Appellant was shielding information central to the Respondent's defenses. The Appellant has not taken such action.

The Appellant answered each and every Interrogatory and Request for Production relating to the facts that make up his claims of defamation, defamation by implication, invasion of privacy, and tortuous interference with a business relationship.

This distinction has been pointed out by the *Lyons* and *Bramble* Courts in determining whether an Appellant's claims should be dismissed when raising the Fifth Amendment Privilege. In both *Bramble* and *Lyons*, the Appellants refused to participate in **any** discovery. On the other hand, in this case, the Appellant asserted his Fifth Amendment Privilege on only five of twenty six Interrogatories and one of the fourteen Requests for Production.

In this case, the Appellant is not asserting his Fifth Amendment privilege in the majority of his claims. In this case, the Appellant fully

engaged in discovery including the answering of most of the interrogatories and providing documents responsive to requests for production in the majority of all of his claims. The Appellant is not asserting the Fifth Amendment privilege as a sword and a shield.

In the limited number of the Appellant's claims where he asserts the Fifth Amendment privilege, the Appellant realizes that he cannot use the privilege as a shield and a sword and he is not seeking remedies based upon these limited number of claims.

In discovery, the Appellant only utilized his Fifth Amendment privilege when he was asked to identify persons who may have knowledge of the Appellant's prior sexual contact with minor children including the names of minors that may be involved. The Appellant asserted his Fifth Amendment privilege to this interrogatory.

In another interrogatory the Appellant was asked to describe all allegations that he had engaged in improper conduct with a minor involving a sexual or romantic motivation. The Appellant asserted his Fifth Amendment privilege to this limited question.

The answer to this interrogatory and the Appellant's Fifth Amendment privilege have nothing to do with the dozens of untrue statements by Respondents that constitute defamation, defamation by implication, tortuous interference, and invasion of privacy that is contained in the Respondent's 291 blog entries.

D. The Respondent is Not Prevented from Defending the Appellant's Claims

At the center of each and every case where a Court has ruled that Claimant's claims must be dismissed when the Claimant has used the Fifth Amendment as both a shield and a sword is where the Respondent is prevented from defending their claims. The Respondents are not prevented from defending their claims as a result of the Appellant's use of his Fifth Amendment privilege.

The Respondents have the ability and have exercised the ability to ask the Appellant about the dozens of cognizable claims he has asserted of defamation and defamation by implication and invasion of privacy through Interrogatories and Requests for Production that the Appellant has

fully answered without the Appellant ever asserting the shield of the Fifth Amendment.

The dismissal of all of the Plaintiff's claims is an unfair and inequitable solution. The Plaintiff should not be unduly penalized for asserting his Fifth Amendment privilege on a limited number of his claims at the expense of having all of his claims dismissed. The claims upon which the Plaintiff is asserting his Fifth Amendment privilege can be dismissed, the remainder of his claims that have no involvement with his Fifth Amendment privilege should not be dismissed.

E. The Standard for Dismissing a Plaintiff's Claims Is High

The United States Supreme Court has indicated that the "assertion of the privilege may sometimes disadvantage a party." *Serafino v. Hasbro, Inc.* 82 F.3d 515 (First Circuit Court of Appeals). In *Serafino*, the Plaintiff, George Serafino, sued the Defendant for wrongful discharge and unpaid wages. When the Plaintiff was deposed, he was asked a series of questions concerning improprieties and acts of potential dishonesty that formed the basis of the Defendant's defense against the Plaintiff's claims.

During the deposition, Serafino refused to answer these questions asserting his Fifth Amendment privilege. In asserting his Fifth Amendment privilege, Serafino prevented Hasbro from discovering important information about the very benefits that he sued to recover. Hasbro's questions about Serafino's actions were "central to the case." Serafino at 518.

The Court dismissed Serafino's claims based upon a strict standard concluding that Serafino was withholding information that was "central to defendants' defense" and that there was no effective substitute for Serafino's answers and that there was no adequate alternative remedy to dismissal." Serafino at 518. The Court recognized that "while a trial court should strive to accommodate a party's Fifth Amendment interests, it also must ensure that the opposing party is not unduly disadvantaged." Serafino at 518. In this case, the Respondent's have not been unduly disadvantaged because the Appellant provided full and complete answers to the Respondent's discovery requests. The Appellant answered the majority of the Interrogatories he was asked and he provided documents to a majority of the requests for production. The Appellant asserted his Fifth Amendment Privilege only when he was asked questions that may have lead to self-incrimination.

In the present case, the Appellant's assertion of his Fifth Amendment privilege has not prevented the Respondent from receiving information that was "central" to their defense in a majority of the Appellant's claims. The Appellant is willing and has answered questions regarding all of his claims of defamation, defamation by implication, tortious interference, and invasion of privacy where he has not asserted his Fifth Amendment privilege. The Appellant has not nor will he in his deposition prevent the Respondent learning information that is "central" to his claims or the Respondent's defenses.

In *Serafino*, the Court held: "We reiterate that the balance must be weighted to safeguard the Fifth Amendment privilege: the burden on the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *Serafino* at 581. The Court held that "the Fifth Amendment privilege should be upheld unless defendants have substantial need for particular information and there is no other less burdensome effective means of obtaining. *Id.*

Judge Buckner did not provide the weighted safeguard of the Fifth Amendment privilege toward the Appellant. Judge Buckner's decision did not consider other alternatives. Lastly, Judge Buckner's decision was unfair

and prejudicial to the Appellant. The Respondent did not have a substantial need for the names of any of the Appellant's other victims because such information was not central to their defense of the case.

The *Serafino* Court dismissed Mr. Serafino's claims after concluding that 1) the alleged illegal conduct underlying the outside benefits was central to defendants' defense, 2) there was no effective substitute for Serafino's answers, and 3) there was no adequate alternative remedy to dismissal. None of these factors apply in the present case. The information being sought by the Respondent in a limited number of interrogatories was not central to the defendants' defense. Judge Buckner's dismissal was an error of law.

F. No Legal Basis for Dismissing the Appellant's Claims

Because the Appellant's Psycho-Sexual Evaluation was not Sealed.

There is no legal basis for the trial court dismissing the Appellant's claims for defamation, defamation by implication, tortuous interference, and invasion of privacy. The Court ordered that because the Appellant's psycho-

sexual evaluation was not sealed, the Appellant's claims should be dismissed.

The fact that the psycho-sexual evaluation was not sealed should have no bearing on the Appellant's claims of defamation, defamation by implication, invasion of privacy, or tortuous interference with a business relationship. Appellant knows of no defenses to Appellant's claims of defamation, defamation by implication, invasion of privacy, or tortuous interference with a business relationship that would require their dismissal due to the Appellant's psycho-sexual evaluation not being sealed.

Appellant knows of no case law that would support the trial court's dismissal of the Appellant's claims for defamation, defamation by implication, invasion of privacy, or tortuous interference with a business relationship due to the Appellant's psycho-sexual evaluation not being sealed. Judge Buckner stated that she believed that the "refusal to answer questions about the psycho-sexual evaluation under these circumstances go to the heart of every one of these claims and would therefore result in the appropriateness of the dismissal of all the claims in this case."

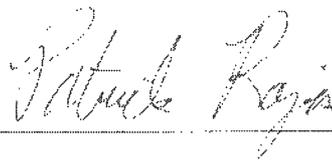
Judge Buckner provided no legal reasoning for her decision. She did not cite a rule or case law or an affirmative defense in deciding that

because the psycho-sexual evaluation was not sealed, that all of the Appellant's claims (the majority of which had nothing to do with his psycho-sexual evaluation) should be dismissed.

VI. CONCLUSION

This is a case where the trial court erred when it ruled that Mr. Rojas' entire case would be dismissed if the psycho-sexual evaluation was not sealed and Mr. Rojas further did not waive his Fifth Amendment privilege asserted on a limited number of interrogatories and one request for production. This court should reverse the dismissal and remand this case for trial.

Respectfully submitted this 11th day of June, 2012

A handwritten signature in cursive script, reading "Patrick Rojas", written in black ink. The signature is positioned above a horizontal line.

Patrick Rojas, Pro Se Appellant.

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of February, 2012, I caused a true and correct copy of the following documents:

(1) Appellant's Opening Brief

to be served on the parties listed in the manner indicated below:

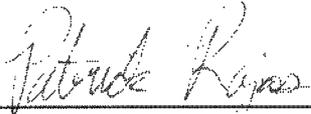
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