

NO. 42869-5-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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PATRICK ROJAS

Appellant,

vs.

DANIELLE LYNN SCHNEIDER and ERIC JOHN SCHNEIDER, jointly

and severally and the marital community thereof;

Defendants.

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APPELLANT'S REPLY BRIEF

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Patrick Rojas  
PO Box 645  
Port Orchard, WA 98366

253-237-2824

Appellant.

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**I. ARGUMENT**

**A. Appellant Can Utilize Fifth Amendment Privilege In Civil Matters**

The Fifth Amendment to the United States Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .” Despite the fact that the text of the Fifth Amendment appears to limit the right against self-incrimination to criminal matters, the Fifth Amendment protections have been deemed to apply to civil proceedings. See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The Fifth Amendment protections against self-incrimination can be asserted in any proceeding, be it civil, criminal, administrative, judicial, investigative or adjudicatory. See *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

In civil matters, the invocation of a person’s Fifth Amendment privilege is limited to those circumstances in which the person invoking the privilege reasonably believes that his disclosures could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner. See *United States v. Bodwell*, 66 F.3d 1000, 1001 (9<sup>th</sup> Cir. 1995). As a result, the “privilege against self-incrimination does not

depend upon the likelihood, but upon the possibility of prosecution” and also covers those circumstances where the disclosures would not be directly incriminating, but could provide an indirect link to incriminating evidence. See *United Liquor Co., v. Gard* 705 F.2d 1499, 1501 (9<sup>th</sup> Cir. 1983).

**B. Fifth Amendment Privilege To Be Analyzed On A Question By Question Basis**

According to the Ninth Circuit Court of Appeals, the only way the privilege can be asserted is on a question-by-question basis, and thus as to each question asked, the party has to decide whether or not to raise his Fifth Amendment right. *Jane Doe v. Glazer*, 232 F.3d 1258 (9<sup>th</sup> Cir. 2000), citing *Bodwell*, 66 F.3d at 1001.

In *Doe v. Glazer*, the Defendant invoked his Fifth Amendment privilege when he was asked during his deposition whether he had ever taken a penile plethysmograph. In *Glazer*, a civil case, it was alleged that Elroy Glazer had committed one or more acts of lewd and lascivious

conduct upon Doe. A penile plethysmograph test measures the reactions that a man has presented with certain visual stimuli.

The Plaintiff then attempted to use Glazer's invocation of his Fifth Amendment privilege to draw an inference adverse to Glazer but the Court refused to let the Plaintiff do so.

“The tension between one party's Fifth Amendment rights and the other party's right to a fair proceeding is resolved by analyzing each instance where the adverse inference was drawn, or not drawn, on a case-by-case basis under the microscope of the circumstances of that particular civil litigation. Glazer at 1265, citing Graystone Nash, Inc., 25 F.3d at 192.

**C. Competing Interests Of Parties Must Be Carefully  
Balanced In Each Circumstance**

In each particular circumstance, the competing interests of the party asserting the privilege and the party against whom the privilege invoked must be carefully balanced. “Because the privilege is constitutionally based, the detriment to the party asserting it should be no

more than is necessary to prevent and unfair unnecessary prejudice to the other side. *Graystone Nash, Inc.*, 25 F.3d at 192, cited by Glazer at 1265.

No negative inference can be drawn against a civil litigant's assertion of his privilege against self-incrimination unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information. Glazer at 1265 citing *Serafino*, 82 F.3d at 518-519.

The Respondent's argue that the trial court has the authority to dismiss a claim when the Plaintiff's assertion of their Fifth Amendment Privilege unjustly prevents the Defendant from defending themselves. While some courts have chosen the extreme remedy of dismissal, the facts of those cases are much different.

**D. Lyons is Different Than The Case At Bar**

For example, the Plaintiff in *Lyons* filed claims against the district attorney, some police officers, and a magistrate of a municipal court and against a court-appointed attorney for their actions in getting the plaintiff put into a state mental institution. *Lyons v. Johnson*, 415 F.2d 540, 541

(9<sup>th</sup> Cir. 1969). Lyons case was dismissed “because of appellant’s continued and unyielding refusal to submit herself to any depositions interrogation or discovery whatsoever in relation to her claims.” Lyons at 541.

Ms. Lyons’ actions went beyond a mere refusal. Ms. Lyons ignored a number of notices which had been served upon her for purposes of discovery. The Court then ordered Ms. Lyons to appear for deposition. Ms. Lyons “refused to answer any questions except to state her name. To all other inquiries made of her, she merely responded that she was invoking her privilege against self-incrimination under the Fifth Amendment.” Id.

A subsequent hearing was held and the trial Judge explained that if she wanted to use the shield of self-incrimination against any interrogation whatsoever regarding her claims, she would have to forego her right to prosecute the actions. The Appellant adamantly declared: “So I will not waive, and I will not acquiesce and I will stand under the Fifth Amendment even if my case is dismissed. I will merely carry it to a higher court.” Lyons at 541.

In its ruling, the Lyons Court explained its rationale: “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.<sup>1</sup> Lyons at 542.

The case at hand is much different from the Lyons case. Unlike Ms. Lyons, Mr. Rojas has not refused to be deposed with regard to his claims. Unlike Ms. Lyons, Mr. Rojas has answered the majority of all discovery presented to him. In contrast to Lyons, 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. This is not a case where the Appellant has in any way adversely affected the scales of justice. The Respondent knows in detail the basis of the Appellant’s claims and has not been prevented from obtaining information from the Appellant on each of his claims.

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<sup>1</sup> Emphasis added

For example, in Interrogatory No. 11 the Defendant asked the Plaintiff to provide the blog entries that were “untrue” and which placed the Plaintiff “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 dozens of pages of information in response. The Appellant provided the answers that form the basis of his claims. The Appellant did not raise his Fifth Amendment Privilege to any of the discovery requests that are central to his claims.

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 Defendant could argue that the Appellant was shielding information central to the Respondent’s defenses. That did not take place in this situation.

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. See *Bramble v. Kleindienst*, 357 F. Supp. 1028, 1035 (1973). 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 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 that 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's utilization of his Fifth Amendment Privilege on this narrow question that does not seek any information relating to the Appellant's claims or the Respondent's ability to defend the claims does not handicap the Respondent due to silence. See *Serafino v. Hasbro, Inc.* 82 F.3d 515 (First Circuit Court of Appeals) at 519.

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 question had nothing to do with the dozens of untrue statements by Respondent that constitute defamation, defamation by implication, tortuous interference,

and invasion of privacy that is contained in the Defendant's 254 blog entries. This interrogatory was based on a counter-claim alleging that the Appellant's grievances were based upon prior behaviors. All counter-claims were dismissed by the trial court (CP 60-64, 77).

**E. Defendant is Not Prevented from Defending the Appellant's Claims**

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

The Defendants have the ability and have exercised the ability to ask the Plaintiff 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 Plaintiff has

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

The Ninth Circuit Court of Appeals has held: “Because the privilege is constitutionally based the competing interests of the party asserting the privilege, and the party against whom the privilege is invoked must be carefully balanced and the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side.” *Doe ex rel. Rudy-Glazer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir.2000) (quoting *Graystone Nash*, 25 F.3d at 192)

The competing interests of the Appellant and the Respondent were not “carefully balanced” in this case. There is no record of Judge Buckner balancing, much less carefully balancing, the competing interests of the Appellant and Respondent (CP at 214, RP Sep. 16, 2011, at 25, RP Sep. 30, 2011, at 15 lines 8-9, 13-16, at 17, lines 5-6 and 23-25). Certainly the dismissal of all of the Appellant’s dozens of claims of defamation and defamation by implication and invasion of privacy was more than necessary to balance the case.

On the day that Judge Buckner made the determination that the Plaintiff's claims would be dismissed, there was no "careful balancing" and there was no effort to insure that the "detriment" to the Appellant was "no more than is necessary to prevent unfair and unnecessary prejudice" to the Respondent as the Glazer case required.

Judge Buckner stated: "...if the psychosexual evaluation was sealed by the court, then I will not dismiss the assertion of the Fifth Amendment privilege in this case. If the evaluation was not sealed, then I believe Patrick Rojas has to waive the Fifth Amendment or else have it dismissed" (RP Sep.16, 2011, page 23, lines 23-25).

Later on in the hearing Appellant's attorney argued that the dismissal of all of the Appellant's claims would be unwarranted. He stated "Well, I guess the waiving of his privilege may go to some of his claims, such as the defamation claims, but as far as the breach of privacy claims, Judge, whether—those claims—his claims still exist on those ones..." (RP Sep. 16, 2011, page 27, lines 19-23).

Judge Buckner ruled: "No. I want to make it clear that he would have to waive his Fifth Amendment Privilege or else have his case dismissed." Appellant's attorney asked for clarification. "As to all

claims?” Judge Buckner ruled: Yes, as to all claims.” (RP Sep. 16, 2011, page 28, lines 10-14).

Respondent’s attorney then stated: “And for paragraph 3, I set forth: The defendants may approach the court regarding lesser remedy to address prejudice caused by the assertion of the Fifth Amendment and discovery delays. And that was consistent with case law, Your Honor, which talk about if you don’t agree that dismissal is warranted, then you look at things such as, you know, if my client is unable to engage in discovery on a certain area, then inference can be drawn in favor of my client given her inability to respond. Perhaps a portion of claims should be dismissed, such as emotional distress claims for which my client cannot have a full opportunity to evaluate the claiming party on, those things. We would hope to have the opportunity to come back to the court and address those issues...” (RP Sep. 16, 2011, page 29, lines 1-15).

The Defendants (Respondents) did not exercise their right to approach the court regarding “lesser remedies” to address the potential prejudice related to the Appellant’s assertion of his Fifth Amendment Privilege. In fact, the Respondents never outlined to the Court what the

potential prejudice was and how it affected their ability to defend the claims asserted by Appellant.

None of the Orders entered in this matter by Judge Buckner contained the balancing that was to take place before the Appellant's claims were to be dismissed (CP at 206-211, 214).

For example, paragraph 2 of the Court Order dated September 16, 2011 simply stated: "Plaintiff shall confirm within two weeks whether the psycho-sexual evaluation was sealed by the Court and if not, Patrick's Fifth Amendment privilege shall be waived by him or else his case dismissed." (CP at 157).

Judge Buckner gave no reasoning for the basis of her ruling. There is no case law that supports Judge Buckner's decision to dismiss the dozens of separate claims of the Appellant of defamation and defamation by implication and invasion of privacy just because the Appellant's psycho-sexual evaluation was sealed. The majority of the Appellant's claims of defamation and defamation by implication and invasion of privacy were not based or predicated upon what the Respondent had written about regarding what was in or not in the Appellant's psycho-

sexual evaluation. Furthermore, the Appellant could not control whether the document was sealed.

The District Court in Serafino dismissed Serafino's claims upon concluding that 1) the information sought 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. Serafino had prevented the Defendants from discovering important information about the very benefits that he sued to recover. Serafino at 571. None of the factors that support the dismissal in Serafino exist in the present case.

In this case, the Appellant has answered each and every question underlying his claims and the basis for his claims. He has provided dozens of pages of information on which blog posts constitute defamation and defamation by implication and invasion of privacy. There is no credible argument that can be made that the Appellant has failed to disclose to the Respondent the information that is central to the Appellant's claims and central for the Respondent's defense of the claims (RP Sep. 30, 2011, at 7, lines 12-14; at 8, line 11).

A much higher burden (dismissal of all of his claims) was placed on the Appellant for the assertion of his Fifth Amendment Privilege than

was necessary to prevent unfair and unnecessary prejudice to the Respondent. See Serafino at 518, citing S.E.C. v. Graystone Nash, Inc. 25 F.3d 187, 192 (3<sup>rd</sup> Cir.1994). There has been no demonstrable prejudice to the Respondent. As a result, the Trial Court's decision to dismiss all of the Appellant's claims should be overturned.

## **II. CONCLUSION**

This is a case where the Appellant, Mr. Rojas was substantially prejudiced against by the court for asserting his Fifth Amendment privilege on a select few discovery requests. The trial court did not provide a legal basis for its decision to dismiss all his claims. Furthermore, the Respondents, in their brief, failed to provide evidence that the trial court made a sound, just and legal decision to dismiss Mr. Rojas' claims. This court should reverse the dismissal and remand this case for trial.

Respectfully submitted this 28<sup>th</sup> day of September, 2012

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

Patrick Rojas, Pro Se Appellant.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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DANIELLE LYNN SCHNEIDER and  
ERIC JOHN SCHNEIDER, jointly and  
severally and the marital community  
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Respondents.

**NO.: 42869-5-II**

**CERTIFICATE OF  
SERVICE**

I certify that on the 28<sup>th</sup> day of September, 2012, I caused a true and correct copy of the following document:

(1) Appellant's Reply Brief

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