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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 42869-5-II**

**PATRICK ROJAS
Appellant,
And
DANIELLE LYNN SCHNEIDER and ERIC JOHN SCHNEIDER,
jointly and severally and the marital community thereof,
Respondent.**

Brief of Respondent

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I. STATEMENT OF THE CASE

This lawsuit arises from plaintiff Patrick Rojas' molestation of the defendants' minor daughter, "Jane Doe" Schneider. Patrick's father was a pastor at the Schneider's church, and Patrick groomed his way into the Schneider family where he took advantage of young "Jane Doe". CP 7-9.

Patrick was convicted for his molestations in Kitsap County Superior Court, where he entered into a plea bargain. CP 2, Complaint, par. 1.4. Patrick pled guilty to a gross misdemeanor in order to avoid prosecution for serious felony molestations of the defendants' young girl, who was 11 years old at the time Patrick molested her. See CP 9, Answer. As a condition of the plea agreement Patrick had to undergo a psychosexual evaluation. VRP IV, p. 3 (November 4, 2011).

Patrick's psycho-sexual evaluation uncovered a severe and untreated propensity for molestation, with numerous sexual assaults and molestations on victims ranging in age from 1.5 years to 11 years old. See CP 8; VRP IV pp. 18-20. It was also revealed that Patrick's parents, brother and church leaders knew of his dangerousness and nonetheless encouraged his association with young members of their church. CP 8-10. When officials sought to interview the Rojas family regarding the uncharged criminal behavior, Patrick's father (the Schneiders' pastor) fled the country with Patrick's young sibling victims, thereby allowing Patrick

to avoid further prosecution. See CP 7; VRP IV pp. 18-20.

Despite counseling, Jane Doe still suffers in the aftermath of Patrick's repeated immoral visits to her bedroom. See CP 9-12. Jane Doe's mother, Danielle Schneider, created a blog which discusses the unfortunate impact of sexual abuse, calls attention to the dangers of hidden abuse within church communities, and seeks to protect others from the harm inflicted by the Rojas family upon the Schneider family. This blog included information embarrassing to Patrick, giving rise to his lawsuit against the Schneider parents. See CP 2-3, Complaint; CP 66; VRP III, pp. 18-20 (November 4, 2011); VRP I, pp. 4-5 (September 16, 2011).

In March of 2011, the Schneiders submitted Interrogatories and Requests for Production to Patrick. CP 69, Dec. of Abolins. The interrogatories sought information necessary to defend the Schneiders from Patrick's legal claims. For instance, the Schneiders sought information needed to rebut Patrick's claims that blog statements were false, and were not of public concern because Patrick was completely rehabilitated and no longer a threat. The Schneiders also needed to defend themselves from Patrick's emotional distress claims, in which he sought to blame the Schneiders for severe mental disturbances, without allowing them to discuss the true extent of his pre-existing emotional problems which included years of molestation. See CP 81. For instance,

the Schneiders sought information about: (1) Patrick's continuing risk of engaging in improper contact with their daughter (interrogatory 15); (2) steps taken to protect persons (including Jane Doe Schneider) from Patrick's potential danger to engage in improper contact with a minor (interrogatory 16); and (3) prior claims that Patrick engaged in improper conduct with minors. CP 80-81.

Patrick failed to submit timely, meaningful responses or objections to these discovery requests. Repeated requests for responses went unanswered, as did efforts to hold a discovery conference. CP 69-74; CP 206-207.

As a result, the Schneiders' attorney was forced to file a Motion to Compel discovery responses which had been submitted nearly six months prior. CP 65-74. On August 12, 2011, the trial court (the Honorable Rosanne Buckner) entered its Order Compelling Answers to Interrogatories and Awarding Sanctions. CP 75-76. The Order required Patrick to submit meaningful discovery responses (without objection) within ten days. The trial court warned that if the Order was not complied with, "Plaintiff's Complaint shall be dismissed with prejudice." CP 76.

On August 23, 2011, after the court ordered discovery deadline, the Schneiders received an e-mail from Rojas' attorney, with an electronic copy of discovery responses from Patrick Rojas. CP 87 (cover e-mail).

The responses from Patrick were unsigned, incomplete and unorganized. CP 80. In addition, Patrick refused to answer at least eight requests, including a blanket refusal to respond to several interrogatories, citing the Fifth Amendment. CP 80-81, Dec. of Abolins, re: dismissal. Additional efforts by defendants to confer on the plaintiffs' incomplete discovery responses failed to resolve the ongoing problems. CP 81 and 89.

With trial approaching, the Schneiders were prejudiced in their ability to fairly and timely prepare for and defend against the alleged claims. CP 68 and 81; VRP I pp. 5, 8-9 (Sept. 16, 2011). On August 31, 2011, the defendants issued a notice of intent to schedule a CR 35 examination of Patrick, with a request for available dates. There was no response. CP 126-127.

On September 2, 2011, the Schneiders moved for a discovery sanction of dismissal under CR 37(b)(2), based on the Rojas' willful disregard of an order to provide discovery. The Schneiders' motion detailed the ongoing discovery violations which had frustrated their right to gather information for their defense, and also explained why Patrick could not pursue litigation against the Schneiders while hiding relevant information behind the Fifth Amendment. CP 90-96, motion to dismiss; CP 79-89, Declaration of Abolins, re: dismissal; and CP 97-120 (federal authorities). The Schneiders also filed a motion to compel Patrick's CR

35 Examination. CP 121-136.

Patrick's untimely response to the Schneider's motion for discovery sanctions provided a one-sided factual statement about the perceived equities of his alleged claims. The response failed to address the discovery violations and sanctions before the court. CP 142-149); CP 153-156 (Reply).

On September 16, 2011, after a lengthy hearing, the trial court ruled that Patrick's case would be dismissed unless he confirmed within two weeks that his psycho-social evaluation had been sealed by the Kitsap County Superior Court. CP 157; VRP I (September 16, 2012). If the report were not sealed, Judge Buckner indicated that Patrick's case would be dismissed unless he changed his mind and waived the privilege. CP 157. The court also directed counsel to confer on outstanding discovery matters, and on appropriate adjustments to the court schedule necessitated by the delayed and incomplete responses. CP 170.

Two weeks later, on September 30, 2011, the trial court held an additional hearing on the pending motion to dismiss. The parties confirmed that the psycho-social evaluation in question was never sealed by the Kitsap County Court. Patrick refused to waive the Fifth Amendment privilege with regard to discovery. CP 169-170.

After considering the arguments of counsel, the trial court entered

a new Order giving Patrick additional time to decide whether he would answer the discovery requests. The trial court ruled that the case shall be dismissed unless he waived his Fifth Amendment privilege as to discovery responses by noon on October 5, 2011. CP 171.

By October 5, 2011, Patrick did not change his position on refusing to answer the Schneiders' discovery requests. Accordingly, the trial court entered an Order Granting Motion for Dismissal. CP 206-208. Judge Buckner's Order set forth a number of findings supporting dismissal, including findings that: (1) Patrick "substantially prejudiced defendants' ability to prepare for trial"; (2) Patrick's election to exercise the Fifth Amendment for several interrogatories "impaired the defendants' right to obtain information that may significantly aid in their defense", and (3) the Schneiders "do not have adequate alternatives for gathering the information requested from other sources, and there is no adequate alternative remedy to address prejudice to defendants". CP 207, par.s 11 and 12. The trial court also found that Patrick had engaged in "willful and unexcused" discovery delays, and had failed to provide complete discovery responses in accordance with the court's order to compel. CP 206, par. 2-4. The trial court also found that Patrick's assertion of the privilege was based largely on information in an unsealed psycho sexual evaluation. CP 207, par. 5-6.

Patrick moved for reconsideration of the trial court's ruling that the case should be dismissed based on Patrick's ongoing refusal to answer discovery responses. CP 172-182. In his motion, Patrick admitted that certain claims "should have been dismissed" to the extent that they related to his psycho-sexual evaluation and his past victims. CP 176, lines 3-5. However, in an effort to avoid complete dismissal, Patrick offered a new theory. He argued that he had "dozens of claims", and that he was only asserting his Fifth Amendment privilege on a small (unspecified) number of those claims. CP 175-176. Therefore, Patrick argued that the court should only dismiss the "small percentage of his claims that relate to his psycho sexual evaluation and whether he had any past victims." CP 176. The Schneiders responded to the motion, and explained why meaningful discovery responses were needed to defend themselves from Patrick's basic claims. CP 198-205.

On November 4, 2011, the trial court heard extended argument on the motion for reconsideration. VRP IV (March 26, 2012). Although Patrick had months to do so, neither he nor his attorney ever filed a motion to define and/or dismiss any claims in order to remedy the unfair prejudice to the Schneiders. See VRP IV, p. 22-23. Even on reconsideration, they failed to explain what claims might possibly survive without confronting the Schneiders with the same fundamental unfairness.

VRP IV, pp. 18-22, 24-25, 27. The trial court determined that Patrick's refusal to answer questions about the psycho-sexual evaluation impaired the Schneiders' ability to defend themselves from every one of his claims; the failure to respond "substantially prejudiced defendants' ability to prepare for trial". VRP IV, p. 27; see CP 206-207 (findings in Order). The motion for reconsideration was denied. CP 209-211.

II. ARGUMENT

A. A Trial Court May Properly Dismiss A Claim When The Plaintiff's Assertion Of The Fifth Amendment Unjustly Prevents The Defendants From Defending Themselves.

It was within the trial court's sound discretion to dismiss Patrick's claims based on his refusal to respond to discovery on Fifth Amendment grounds. Lyons v. Johnson, 415 F.2d 540, 541 (9th Cir. 1969) (finding no abuse of discretion in dismissing where plaintiff asserted Fifth Amendment to discovery requests); Serafino v. Hasbro, 82 F.3d 515, 516 and 518-19 (1st Cir. 1996) (abuse of discretion standard applied to trial court's dismissal of claims where Fifth Amendment silence unfairly hampered defense). Courts across the nation have recognized the propriety of dismissing the claims of a plaintiff whose assertion of the Fifth Amendment is prejudicial to a defendant's right to a fair trial. Lyons v. Johnson, 415 F.2d 540, 542 (9th Cir. 1969) (dismissal was proper where civil plaintiff asserted Fifth Amendment privilege to his defendant's

discovery requests); see also Stop & Shop Cos. v. Interstate Cigar Co., 110 F.R.D. 105, 108 (D. Mass. 1986) (where plaintiff invokes the privilege, “the Court has the power to dismiss the Complaint despite the fact that the plaintiff has not disobeyed an order” under Rule 37); Serafino v. Hasbro, Inc., 82 F.3d 515, 518-19 (1st Cir. 1996) (wrongful discharge claim dismissed with prejudice where plaintiff refused to answer questions relating to improper business arrangements); Penn Communications Specialties, Inc. v. Hess, 65 F.R.D.510 (E.D. Pa. 1975) (corporation’s claim for judicial relief subject to dismissal with prejudice where its president invoked Fifth Amendment privilege in response to relevant deposition questions); Bramble v. Kleindienst, 357 F. Supp. 1028, 1035-36 (D.C. Colo. 1973) (plaintiff’s refusal to answer pertinent questions based on Fifth Amendment privilege justified dismissal of claims); Brown v. Ames, 346 F. Supp. 1176, 1177-78 (D. Minn. 1972) (dismissing claims of teenager plaintiffs who elected to assert Fifth Amendment privilege as to deposition questions). By electing to “create an imbalance in the pans of the scales” of justice, Patrick’s claims were properly subject to dismissal under the basic principles of fairness upon which all litigation rests. Lyons, 415 F.2d at 541 and 542.

In this case, Judge Buckner’s dismissal of Patrick Rojas’ claims was squarely within her discretionary power, and is supported by express

findings that Patrick's refusals to answer had substantially impaired the Schneiders' ability to defend themselves at trial. CP 206-207.

The record reflects the trial court's careful balancing of Patrick's interest in silence under the Fifth Amendment, the unfair prejudice to the Schneiders' right to defend themselves, and the lack of adequate alternatives to remedy this prejudice. See Serafino, 82 F.3d at 518-19; VRP IV (March 26, 2012); CP 206-208. Over the course of multiple hearings, Judge Buckner carefully reviewed the predicament raised by Patrick's untimely assertion of the Fifth Amendment. Ultimately, Patrick was unable to offer any meaningful remedy to the prejudice arising from the Schneiders' inability to seek discovery necessary to properly defend themselves from Patrick's attacks.

When faced with a motion to dismiss, Patrick finally admitted that an unspecified subset of his claims needed to be dismissed. But he never presented the court with any reasonable specification of what portion of his claims should be dismissed, and he never explained how he could pursue any of his claims without confronting the Schneiders with the basic unfairness that the trial court was properly concerned with. See CP 206-207; CP 201-203; VRP IV. As a result, Judge Buckner was well within her discretion to enter an order dismissing Patrick's claims.

B. The Trial Court Properly Balanced The Relevant Serafino Factors Before Dismissing Patrick's Claims.

The trial court's discretionary decision is supported by a careful balancing of the relevant interests, including the importance of Patrick's responses to the defense, the lack of alternative sources for the information, and the lack of less drastic remedies. The leading case of Serafino v. Hasbro provides a useful example of how these interests support dismissal in this case.

In Serafino v. Hasbro, George Serafino sued his former employer, Hasbro, on claims of retaliation and wrongful discharge. Serafino claimed that Hasbro unlawfully terminated certain business arrangements and, later, his employment, because his daughter had made a discrimination claim. Serafino, 82 F.3d at 516.

During discovery Serafino refused to answer questions about alleged improprieties surrounding the business arrangements, invoking the Fifth Amendment. The trial court found that Serafino's silence unfairly hampered the defendants' ability to defend themselves, and the claims were dismissed with prejudice. Id.

On appeal, Serafino argued that the trial court abused its discretion by concluding that Serafino's constitutional interest was outweighed by possible prejudice to defendants. Serafino, 82 F.3d at 517. The Court of

Appeals affirmed the trial court's discretionary decision. First, the Court noted that in the civil context one party's assertion of a constitutional right should not obliterate another party's right to a fair proceeding. Id. at 518 (citations omitted). Instead, the Court of Appeals approved the trial court's application of a balancing test. Specifically, the trial court had balanced: (1) the importance of the information to the defendants' defense; (2) the availability of an effective substitute for plaintiff's answers; and (3) the lack of an adequate alternative remedy to dismissal. Id. at 518-19.

The Court of Appeals agreed that all three factors supported dismissal. First, the Court of Appeals agreed that Serafino's answers were important to Hasbro's defense – the answers were relevant to the legitimate and nonretaliatory reasons for Hasbro's actions. The answers were also important from a damages perspective – Hasbro's ability to investigate Serafino's illegal on the job conduct went “to the heart of the damages sought” by Serafino, and could diminish his recovery. Serafino, 82 F.2d at 519.

Second, there were no alternative means for getting the information sought. Even if paper trails might show irregularities, this would be a “poor proxy for Serafino's testimony”, and the Hasbro defendants would be “handicapped in their defense by Serafino's silence.” Id. at 519.

Finally, there were no meaningful less drastic remedies. At oral argument, Serafino listed several possible remedies, such as a stay until expiration of the statute of limitations. However, Serafino failed to recommend any reasonable alternative to dismissal. The Court of Appeals noted, “upon considering Serafino’s failure to file a motion [to stay] ... the district court refused to *sua sponte* impose a stay. We cannot say this constitutes an abuse of discretion.” Id. at 519. The Court of Appeals held that the trial court did not abuse its discretion in balancing the interests at stake, and dismissing the claims.

As in Serafino, Judge Buckner exercised her discretion carefully, balanced the relevant interests, and entered supporting findings of fact. First, Judge Buckner specifically found that the information sought was important to the Schneiders’ defense. CP 207; see VRP IV, p. 24. Without answers to the discovery, the Schneiders could not effectively respond to disputed claims that: (1) Patrick was a rehabilitated and well-adjusted man who posed no continuing risk to Jane Doe Schneider and the public, (2) the Schneiders’ blog was full of false statements; and (3) the Schneiders must pay general damages for all of Patrick’s emotional problems and disturbances. See, e.g., CP 1-4 (complaint seeks general damages for “emotional distress, embarrassment, humiliation, stress, anxiety, etc.”); VRP IV; see CP 143 (“Patrick successfully completed

treatment ...”, and has “true empathy for victims, and respect for children.”); CP 144 (the blog paints “a very dark, untrue persona of who the Plaintiff is ...”); CP 192 (Patrick asserts that defendants’ “statements are completely false”).

Although Patrick claimed he had “hundreds” of claims for which his answers were not relevant, he basically had two claims: defamation and invasion of privacy. For both claims Patrick sought general damages, including emotional distress allegedly suffered because of Danielle Schneider’s blog. CP 12. His emotional distress claims were based on the fundamental assumption that he was a repentant, cured individual, whose emotional problems can be blamed on the mother of the child he sexually molested. These contentions were hotly disputed. Ms. Schneider was entitled to investigate her contention that substantially all of Patrick Rojas’ emotional disturbance arises from a long history of sexual deviancy, which includes repeated sexual crimes on others. It would be impossible for a finder of fact to fairly evaluate Rojas’ claims for damages for any of these claims, without a full assessment of his psycho-social history – the very history he now wants to conceal, as he attacks his defendant.

The only way for the Schneiders to fairly defend themselves from Patrick’s attacks was through proper discovery of evidence revealing the extent to which Patrick is in fact a serious pedophile who had never been

held accountable for a shocking history of predatory behavior against children, and whose emotional disturbance arises primarily from an engrained history of undeterred pedophilia that was never properly addressed through the judicial system. The trial court did not abuse its discretion when it determined that Patrick could not sue the Schneiders, and then prevent them from effectively defending themselves by hiding information behind the Fifth Amendment.

Patrick's refusals to answer discovery also prevented the Schneider's from developing evidence that was important to other elements of Patrick's defamation and privacy claims. Patrick's defamation and privacy claims took issue with numerous statements in Ms. Schneider's blog, where she calls attention to the tragic circumstances of her daughter's molestation at the hands of a pastor's son, the ensuing escape from justice that followed, and the ongoing risks to the community and prior victims. Patrick repeatedly claimed that statements and concerns in the blog were false, and unreasonable.

A private plaintiff alleging defamation must prove "falsity" as a central element, as well as the lack of privilege. See Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005); Yeakey v. Hearst Communications, Inc., 156 Wn. App. 787, 234 P.3d 332 (2010). In responding to Patrick's defamation claims, the Schneiders were entitled to defend themselves by

confirming the full extent to which blog statements about Patrick Rojas' background and history of sexual deviancy were true. Patrick's answers were necessary to address this central issue.

Similarly, in responding to Patrick's privacy claims, the Schneiders were entitled to discover and explore these same facts in order to effectively put on a case of what would be "reasonable" or "offensive" to a juror, and what would be of "legitimate public concern". See Reid v. Pierce County, 136 Wn.2d 195, 205, 961 P.2d 333 (1998). The Schneiders could not fairly defend themselves without Patrick's answers to questions about the true extent and nature of his behavior before and after the molestation of their daughter.

Second, Judge Buckner correctly found that the Schneiders had no alternative means for obtaining the information sought. CP 207. As in Serafino, there was no effective substitute for Patrick's answers. Only Patrick could testify to the true nature and extent of his deviancy, and the scope of untreated dysfunction. Patrick's father was a fugitive from justice, having fled the country – taking several of Patrick's victims with him. As a result, Patrick's testimony was absolutely necessary to provide the background necessary to properly evaluate the true sources and extent of his alleged emotional damage. Patrick's answers were also central to help investigate his professed lack of dangerousness, and his claims of

rehabilitation and risk free employment.

Finally, Judge Buckner expressly found there were no less drastic alternative remedies to alleviate the Schneiders' prejudice. CP 207. Like Serafino, Patrick's attorney only suggested a vague and impractical remedy during oral argument – admitting that some unspecified subset of claims could be dismissed. But nowhere did Patrick define the claims for dismissal, or how this would prevent the prejudice to the Schneiders.

On appeal, Patrick relies on the same meritless argument presented to the trial court. He insists that a dismissal of an unspecified “small percentage” of numerous claims will somehow remedy the fundamental unfairness of the situation. Again, Patrick never moved to dismiss any specific claim at all. Even if he had specified which claims to dismiss, a limited dismissal would not remedy anything. Patrick's untimely attempt to hide behind the Fifth Amendment impaired Danielle Schneider's ability to defend herself against every one of his claims.

In his brief, Patrick attempts to distinguish the Lyons case on the ground that the plaintiff in that case refused to provide any discovery at all. Patrick fails to distinguish the cases which confirm that dismissal is justified where a plaintiff answers some but not all discovery responses. These cases confirm that dismissal is proper where a plaintiff's limited discovery responses significantly impairs the defendant's ability to gather

information for a defense. Serafino, 82 F.3d at 518-19 (wrongful discharge claim dismissed with prejudice where plaintiff refused to answer certain questions relating to improper business arrangements); Penn Communications, 65 F.R.D.510 (corporation's claim for judicial relief subject to dismissal with prejudice where its president invoked Fifth Amendment privilege in response to relevant deposition questions); Bramble, 357 F. Supp. at 1035-36 (plaintiff's refusal to answer pertinent questions based on Fifth Amendment privilege justified dismissal of claims). Patrick could not on one hand dispute the Schneiders' claim that their blog is truthful, reasonable and in the public interest, and then on the other hand foreclose discovery calculated to support these defenses.

The law does not allow criminals to pummel their opponents with arguments of innocent suffering and/or psychological damage, while hiding the truth of their admitted histories of psychological disturbance and unrelenting manipulative abuse of others. Judge Buckner properly addressed this case, and her ruling should be affirmed.

III. CONCLUSION

The Fifth Amendment cannot be used as an unjust sword to strike down a defendant's right to defend herself in a civil matter. Here, the trial court's ruling was sound and just, and the appeal is clearly without merit.

The Schneiders respectfully ask that this Court affirm the trial court.

RESPECTFULLY SUBMITTED this 29th day of August,
2012.

 #13270

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STATE OF WASHINGTON

BY

DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PATRICK ROJAS,

Plaintiff,

and

DANIELLE LYNN SCHNEIDER and ERIC
JOHN SCHNEIDER, jointly and severally and
the marital community thereof;

Defendants.

No. 42869-5-II

**DECLARATION OF
SERVICE**

THE UNDERSIGNED, hereby declares as follows:

That I am now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to the above entitled action and competent to be a witness therein. That on the 28th day of August, 2012, she caused a copy of the following documents:

- (1) Brief of Respondent

to be served on the parties listed below by the method(s) indicated:

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regular first class U.S. mail
 facsimile
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 personal delivery via ABC Legal Messengers
 via electronically to patrickdr02@yahoo.com.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Puyallup, Pierce County, Washington this 28th day of August, 2012.


Michelle A. Lea