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COA No. 345734-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ESTATE OF MICHAEL DEMPSEY, by and through its Personal
Representative, ELLEN SMITH, and ELLEN SMITH, Appellants
v.

SPOKANE WASHINGTON HOSPITAL COMPANY LLC d/b/a
DEACONESS HOSPITAL, et al., Respondents

REPLY TO ANSWER TO PETITION FOR DISCRETIONARY
REVIEW

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I. IDENTITY OF THE REPLYING PARTIES

This reply is respectfully submitted by the Defendants below and Appellees before the Court of Appeals: Spokane Washington Hospital Company, LLC dba Deaconess Medical Center (hereinafter “Deaconess”); Rockwood Clinic (hereinafter “Rockwood”) and Michael Wukelic, M.D. (hereinafter collectively the “Defendants”). The Defendants submit this reply pursuant to RAP 13.4(d).

II. REPLY ARGUMENT

The Estate of Michael Dempsey (hereinafter the “Estate”) raised new issues in its answer regarding discretionary review; this reply addresses three new issues.

The Estate failed to demonstrate that review is appropriate with respect to those newly raised issues.

The Estate's arguments are inconsistent with the facts of this case.

The Estate's arguments are inconsistent with Rule 45.

The Petitioners (Defendants below), therefore, respectfully ask the Court to reject the Estate's newly raised issues.

A. THE ESTATE DID NOT IDENTIFY ANY BASIS FOR DISCRETIONARY REVIEW.

The Estate's primary request is that the Court accept discretionary review of the Court of Appeals' denial of the Estate's request for attorneys'

fees. The Estate, however, did not address, much less satisfy, any of RAP 13.4(b) considerations or criteria for discretionary review.¹ Separate and apart from any of the substantive failures in the Estate's argument, the Estate's failure to identify any basis for discretionary review (any conflict with prior case law, any Constitutional question, or any implication for due process) requires the Estate's cross-petition to be denied.

B. THE ESTATE'S ANALYSIS OF CR 45 IS INCONSISTENT WITH THE FACTS OF THIS CASE.

The Estate's assertion that the Court of Appeals should have quashed the Defendants' subpoena is based upon an incorrect analysis of CR 45 and is without support in the record. Contrary to the Estate's insinuations, Dr. Simons was not involved in the dispute. The Estate was the only person who objected to the subpoena. The Defendants, therefore, had no reasonable alternative but to bring a motion to compel. And by the time the issue reached the Court of Appeals, there was no pending subpoena that could be quashed.

- 1. Though CR 45 does not permit a litigant to object to a subpoena, once the Estate did so, the Defendants had no reasonable alternative but to bring a motion to compel.***

CR 45 permits the person to whom a subpoena is directed to serve

¹ The Estate incorrectly asserts that this Petition involves an interlocutory order of the Court of Appeals and is, therefore, subject to RAP 13.5. *See* The Estate's Answer, p. 12. Though the Court of Appeals' decision arose from an interlocutory trial court order, the Court of Appeals' decision was one terminating review. RAP 13.4, therefore, applies.

a written objection on the party who issued the subpoena. CR 45(c)(2)(B). Once such an objection is served, the party issuing the subpoena must obtain a court order in order to secure compliance with the subpoena. *Id.* A proper objection, therefore, effectively quashes a subpoena. *Id.*

Nothing in CR 45, however, permits a litigant to object to a subpoena. *See generally*, CR 45. Instead, the Rules require a party who wishes to oppose a subpoena to bring an affirmative motion to quash or narrow the subpoena in accord with CR 37.

The Defendants issued a subpoena to Dr. Simons, a non-party expert witness. CP 38-43. Dr. Simons did not provide any response to the subpoena; instead, the Estate served an objection to the subpoena. *See* CP 45-47.² Though no Rule or procedure empowered the Estate to object to the subpoena, the Defendants brought a motion to compel compliance with the subpoena. CP 22-24.

The Defense motion to compel production went before the discovery master and then the trial court, and both held that the Estate had waived any work product protections that may have otherwise applied to documents and information in Dr. Simons' possession. CP 188-91, 275-

² The Estate included a “countermotion to quash” the subpoena along with its response to the Defendants' motion to compel. CP 52. The discovery master specifically denied the Estate's motion to quash. CP “all respects.” CP 276.

76. It was based upon those holdings that the discovery master and trial court rejected the Estate's objection, thereby clearing the way for the Defendants to obtain production from Dr. Simons. *See id.*

The Estate's assertion that some other procedure should have applied is not supported by the record. Once the Estate submitted an objection (improper as it was), the Defendants had no reasonable alternative but to bring a motion to compel production.

Accepting the Estate's assertions regarding CR 45 would have required the Defendants to disregard the Estate's objection (because there is no procedure by which a litigant can prevent compliance with a third-party subpoena by a mere objection) and pursue a contempt finding against Dr. Simons when he failed to produce documents by the appointed time. That would have been an illogical and inefficient elevation of formalism.

The Estate was the party raising objection. The Defendants' decision to bring a motion to compel was, therefore, the only reasonable procedural mechanism available to bring the issue before the court.

2. *By the time this matter reached the Court of Appeals, there was no pending subpoena.*

The crux of the Estate's mistaken analysis asserts that the Court of Appeals should have ordered the Defendants' subpoena quashed once the

Court of Appeals had determined that there was an applicable privilege. As noted above, however, the facts demonstrate that the subpoena was no longer pending by the time the Court of Appeals considered this case.

Pursuant to CR 45, once an objection is made, “the party serving the subpoena shall not be entitled to inspect and copy the material or inspect the premises except pursuant to an order of the court.”

CR 45(c)(2)(B). A proper objection, therefore, operates in the same manner as an order quashing a subpoena. *See id.*

As discussed above, the Defendants had no reasonable alternative but to regard the Estate's objection as effective. Thus, once the Estate's objection was made, there was no pending subpoena, there was no mandate that Dr. Simons produce any material on any specified date, and there was nothing to quash. Phrased differently, by choosing to file an objection (improper as it was), the Estate forced the Defendants to file a motion to compel. The discovery master/trial court properly analyzed and resolved the issue, rejected the Estate's objection, and ordered production.

By the time that this matter came before the Court of Appeals, the subpoena's date for production had long since passed. By its terms, the subpoena set a production date of April 28, 2016. CP 38. That date came and went without any attempt, effort, or threat to hold Dr. Simons in contempt. *See generally*, CP 1-297.

The Estate made the decision to interject itself into the subpoena process by filing an objection. The Defendants had no choice but to treat that objection as effective. And once that occurred there was no risk of enforcement against Dr. Simons. *See id.*, *see also U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp.2d 270, 278 (D.D.C. 2002) (recognizing that courts have generally read CR 45's timeliness requirement to “mean within the time set in the subpoena for compliance”). There was no subpoena pending that required action by the Court of Appeals.

C. CR 45'S ATTORNEYS' FEE PROVISION PROVIDES RECOMPENSE TO NON-PARTIES WHO SUFFER DAMAGES AS A RESULT OF AN IMPROPER SUBPOENA; THAT PROVISION IS NOT IMPLICATED BY THIS CASE.

The Estate's arguments regarding CR 45 are in service of the Estate's request for an award of attorneys' fees. CR 45's attorneys' fees provision, however, does not apply to the type of situation presented by this case. CR 45's attorneys' fees provision is narrowly drawn to address prejudice to a non-litigant.

CR 45(c)(1) imposes a duty (on the party issuing a subpoena) to “take reasonable steps to avoid imposing undue burden or expense on a person subject to [the] subpoena.” The Rule also empowers the court to issue an award of attorneys' fees to “enforce [that] duty.” CR 45(c)(1).

Nothing in CR 45 allows a litigant to recover attorneys' fees based upon the court's ruling on a motion to compel compliance with a subpoena or on a motion to quash a subpoena. A litigant's only avenue for attorneys' fees in the context of subpoena enforcement is through CR 26 and CR 37.

The trial court stated that initially the issues in this case concerned CR 45, relating to subpoenas, but once the subpoenas were issued, the parties responded, which brings into play, in my opinion, the exercise of the Court's discretion in dealing with the issue of attorney's fees. And, indeed triggers CR 37 and the attorney's fees provision and under CR 26.

Eugster v. City of Spokane, 121 Wn. App. 799, 815 (2004). Pursuant to CR 26 and CR 37, the Court's determination regarding whether to award attorneys' fees must be based upon whether the party's arguments and assertions are "substantially justified." *Eugster*, 121 Wn. App. at 815.

The Court of Appeals' analysis of the Estate's request for attorneys' fees was consistent with CR 45, CR 26, and CR 37. The Court of Appeals correctly held that CR 45 did not permit an award of attorneys' fees to a litigant who opposes another litigant's third-party subpoena. Slip Op. at 14. And the Court of Appeals correctly held that CR 37 was not implicated by the Defendants' positions in this case. *Id.* Thus, the Court of Appeals correctly denied the Estate's request for attorneys' fees.

D. THE ESTATE'S ARGUMENT IS CIRCULAR AND PRESUMES THE VALIDITY OF ITS PRIVILEGE CLAIM.

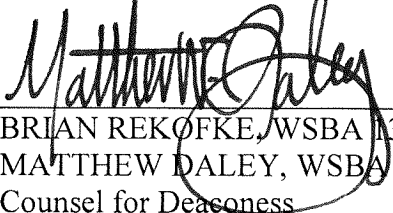
Brief comment regarding the circular nature of the Estate's argument is necessary. The Estate's entire argument is based upon a false and faulty premise – that is, that the Court of Appeals was correct to hold that a privilege exists between a party and a testifying expert. As illustrated by the Defendants' petition, decades of Washington State authority and decades of federal authority establish that no such privilege exists. The same authority holds that sharing privileged information with a testifying expert results in a waiver of that privilege. Once the Court of Appeals' error is corrected, the Estate's arguments will all be rendered moot.

III. CONCLUSION

Based upon the foregoing, the Court file, and the pleadings therein, The Defendants respectfully ask the State Supreme Court to accept discretionary review and correct the Court of Appeals' discovery errors regarding the work product privilege. The Defendants also ask the Court to reject the issues raised in the Estate's cross-petition for review. The Court of Appeals' analysis of CR 45's attorneys' fees provision was correct, and the Court of Appeals' denial of the Estate's request for attorneys' fees pursuant to CR 26 and CR 37 was correct.

RESPECTFULLY SUBMITTED, this 22nd day of February, 2018.

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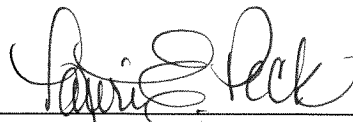
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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 22nd day of February, 2018, the foregoing was delivered to the following persons in the manner indicated:

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