

65395-4

COURT OF APPEALS
DIVISION ONE

No. 65395-4-I

65395-4

JUN 28 2011

**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION ONE**

MAUREEN MCCASLIN, *Appellant*

v.

KATHLEEN CAROVANO, *Respondent*

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CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
OLYMPIA, WA

CORRECTED OPENING BRIEF

Maureen McCaslin
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**ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR
REVIEW**

A. ASSIGNMENTS OF ERROR

1. The trial court violated the immunity clause for mandatory and permissive reporters in RCW 74.34.050 when it awarded over \$11,000 in attorney fees and a VAPA order against the appellant for making good faith complaints to the police concerning a vulnerable adult.

2. The trial court orders of forbidding the appellant from reporting to authorities without substantial basis violated both the state and federal constitution.

3. The trial court improperly dismissed the appellant's motions for revision on the basis of untimeliness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the immunity clause for mandatory and permissive reporters in RCW 74.34.050 prevent the court from issuing VAPA orders and attorney fee awards against the appellant when the reason for the orders was the appellant reporting in good faith possible abuse against her mother, Wanda Bell?

2. Are the Superior Court orders that required the appellant not to file reports of abuse to authorities an unconstitutional prior restraint in violation of both the state and federal constitution?

3. Was the trial court's actions of refusing to process the appellants motions for revision an abuse of discretion when the appellant had substantially complied with the court rules?

STATEMENT OF THE CASE

A. PROCEDURAL FACTS

A Petition for Vulnerable Adult Order for Protection was filed on May 19, 2008 by Kathleen Carovano on behalf of Wanda Bell (CP 1-17). On the same date a declaration was filed by Maureen McCaslin (McCaslin) in support of a petition for Guardianship. (CP 18-19). A temporary Order for Protection and Notice of Hearing was also filed on that date by Judge Bruce Gardiner (CP 20-23) following a hearing (Tr. May 19, 2008). An Order for Protection was then entered on December 15, 2008 following a hearing by Commissioner Velategui. (CP 24-27)(Tr. 12-15-08). On December. 26, 2008, a motion to Terminate the Order for Protection was sought by Maureen McCaslin citing RCW 74.34.035. This was treated as a motion to modify on March 27, 2009 by Judge Erlick, who upheld the

order of protection which he stated still preserved Ms. McCaslin's right to complain to authorities. (CP 40-45).

On February 8, 2010, a motion to modify the order for protection was made by Kathleen Carovano in order to require the respondent Maureen McCaslin to pay for any future visits by paying for a "qualified supervisor" selected by Carovano. She also sought fees and costs. (CP 46-56). The basis for the modification was the fact that McCaslin had reported the fall by her mother to the Bellevue Police department. (CP 58, 66).

On February 23, 2010, Court Commissioner Watness entered an Order which further restricted the appellants right to visit her mother. (CP 81-85.)

On March 4, 2010, Maureen McCaslin filed a motion to terminate the protection order of Commissioner Watness. (CP 86-104.) A note for motion was filed on March 12, 2010 for hearing on March 24, 2010.

On March 16, 2010, Maureen McCaslin filed a response opposing the award of attorney fees (CP (111-136). Kathy Carovano filed a reply on (CP 137-158).

Commissioner Watness entered an order setting attorney fees and a judgment on March 22, 2010. (CP 159-161).

On March 24, 2010, Judge Shaffer entered an order striking hearing for failure to file a timely motion. She also claimed that the petitioner had not filed the working papers and a copy of the recording of the hearing. (CP 162-163)

On March 29, 2010, Maureen McCaslin filed a note for motion on the motion for revision of attorney fees. (CP 164-170) which included a written copy of the motion arguing she had immunity under RCW 74.34. She submitted additional argument in an amended motion for revision until April 6, 2010. (CP 196-198)

However, Judge Shaffer dismissed the revision on the order for the attorney fees on April 6, 2010 without holding a hearing. (CP 195)

B SUBSTATIVE FACTS

This petition is brought by Maureen McCaslin, who is a resident of Bellevue Washington, and the middle daughter of Wanda Bell, the alleged vulnerable adult in this case. (CP 89). Her older sister, Kathleen Carovano has power of attorney over her mother. (CP 89). She is a Masters Level

Social Worker and has extensive training in assessing abuse and neglect (CP 89).

Commissioner Velategui issued a Vulnerable Adult Protection Order against the petitioner on December 15, 2008, but did not make specific findings as to why this order was issued under VAPA. Although there was some testimony that McCaslin may have violated an earlier restraining order inadvertently, (12-15-2008 transcript p. 2, l. 4-26) the court specifically made a finding that Ms. McCaslin's actions were "not bad faith" (12-15-2008 transcript p. 10, l. 17).

Commissioner Velategui also issued a finding that

The order does not prevent Ms. McCaslin from making reports. She has a right to make those reports. You can't prevent her from doing that but the court has left in however, it that after the reports are investigated, if found that they're not well founded, the court retains the right to address the issue, pay the fees incurred by the guardian. (12-15-2008 transcript p. 9, l. 16-19.)

Commissioner Velategui's order was also consistent with the earlier order of Commissioner Gardiner, who also ruled he was not going to award attorney fees at that time. (5-19-2008 transcript p. 1, l. 19-20)

Petitioner McCaslin then appealed Commissioner Velategui's order on December 26, 2008, contending, among other things, that the court's order infringed upon her rights to file reports pursuant to RCW 74.34.035.

(CP 29). Although the appellant characterized her appeal as a “motion to terminate the protection order” the ex parte and subsequently the appeals judge treated it as a motion for revision. (3-27-2009 Tr. P. 11, l. 4). Kathleen Carovano opposed the appeal, again asking for attorney fees to be paid by McCaslin. (CP 39)

On March 27, 2009, Judge Erlick upheld the order signed by Commissioner Velategui primarily because “intentionally or not, Ms. McCaslin violated the May 19, 2008 protective order.” (CP 42). While the court expressed some concern that “excessive use of the litigation process will jeopardize the financial stability of Wanda Bell’s estate” (CP 42), some of the complaints were not “well founded” (3-27-2009 tr. 11, l. 17), the court did not reverse Velategui’s finding that McCaslin’s actions were in good faith.

Judge Erlick further delineated what his order meant in the hearing when he stated:

...but I’m going to put you on notice, Ms. McCaslin that, uh should there be further litigation and action taken with you with respect to either the guardianship or the protection order and it is determined that there is no legal or factual basis for you to prosecute these claims, that uh, fees should be awarded and that they should not be restricted just for that motion but may include the fees for your motion before this court today. So in essence, the fees today is denied without prejudice for request to renew should there be further litigation by Ms. Mc.Caslin. 3-27-2009 tr. 13 p. 22-28).

When Kathleen brought her motion to revise the protection order, on February 5, 2010, she brought a motion to allow the attorney in fact to allow audio electronic monitoring of her mother believing it was “necessary and appropriate to protect my mother in case she falls while alone in her room” (CP 52). In bringing this motion, she implicitly admits that more could have been done to protect her mother from falling. Yet in the same breath, she demanded that the appellant pay for the costs of bringing this motion. (CP 52). There is no explanation why McCaslin should be forced to pay for a motion to allow her mother to be adequately taken care of, when it was McCaslin who pointed out the care was inadequate. (CP 46-52).

In her motion Carovano complained primarily about a request for a welfare check made to the Bellevue police on or about December 24, 2009 about the care of her mother. Carovano admits that Bell took a fall and also implicitly admitted the fall might have been prevented with better monitoring. (CP 52). In her evidence in support of her motion she submitted evidence that Wanda Bell suffered two black eyes and had to have a bandage put across her nose and swelling around her eyes. (CP 73).

Carovano also claimed there was harassing behavior by McCaslin when she took a picture of the caretakers 13 year old daughter. She also claimed that she suspected that McCaslin had been recording conversations

and purposely setting off her mothers alarm. However, she offered no proof that either of the latter actions was occurring.

On March 16, 2010, Maureen McCaslin filed an eight page declaration rebutting the charges of Carovano. (CP 111, 123-130). In her declaration she stated that she had requested the police do a welfare check on her mother because of the injury sustained by the fall. She did not initiate any litigation. She stated that the reason she took the picture was that all the caretakers and the thirteen year old daughter were preparing to leave, leaving alone 6 vulnerable adults. She stated that her mother had a history of falls and in one case she filed a complaint against a previous caregiver that was sustained. (CP 124, 95-96). She claimed that the present care givers had assured her they would give Wanda Bell “advanced care” to prevent any further falls. (CP 124).

She also attached documentation to back up her claims. She provided a sworn police statement that stated that Wanda Bell’s nose was broken in the fall. (CP 132). She pointed out a glaring discrepancy in the versions of what various witnesses told the police. In two versions the caregiver claimed Wanda Bell had fallen in the bathroom. (CP 58, 77). However, the caregiver told the police that Wanda was in her room and fell on the carpet. (CP 73)

On February 23, 2010, Commissioner Watness issued a protection order. (CP 81-85) In his oral decision he gave his reason as to why the protection order should issue:

I'm not going to grant the continuance. I don't see what benefit a continuance is going to make. In the futility of what I've read here and what I know about the case from the past. It's real clear to me that you're unhappy with the fact that the protection order was granted, that Ms. Carovano is continuing as the attorney at fact, that the guardianship petition has been dismissed. I also believe you are unhappy with the care your mother is receiving and that resulted in law enforcement coming to interview her, adult protective services beginning and concluding an investigation and the Ombudsman has been there, there have been reports made to the agencies that supervise adult family homes as well, so there have been at least four governmental arms that have taken a look at the situation with their eyes on your mother's situation at the home and there have been no findings of abuse of her, no findings that substantiated the concerns you had. (inaudible) and on top of that the operators of the home are concerned about your behavior in the home and its disruptiveness there. There has been no evidence to show otherwise. The effort that you've made previously to effect Mrs. Bell care was rebuffed by the court you continue that campaign and that is not in Wanda Bell's best interest. And so, I find that there is every reason in the world that I can see here to grant the modification of the protection order. Mr. Palmer just handed up the attorney fees being sought today, I think that is what is being sought today.

Commissioner Watness, therefore, used as the basis of the order, only that the petitioner had complained to government authorities. He did

not rule that McCaslin had initiated litigation. He did not rule that McCaslin had inappropriately snapped photographs. He did not rule that McCaslin had interrogated other residents at the residence of Wanda Bell.

On March 16th, 2010, McCaslin filed a response to the motion for attorney fees. McCaslin argued that her reports to governmental authorities as a mandatory or permissive reporter were protected by RCW 74.34.050 which states that either a mandatory or permissive reporter is immune from liability. McCaslin also argued that since the speech was constitutionally protected speech, Judge Erlick's order could not have been interpreted to ban constitutionally protected speech.

When McCaslin attempted to revise Commissioner Watness's order, both the revision of the protection order and the order of attorney fees were dismissed on procedural grounds. As a result, Judge Catherine Shaffer never dealt with the substantive issues.

ARGUMENT

1. THE TRIAL COURT IGNORED MCCASLIN'S ARGUMENT THAT SHE IS IMMUNE FROM LIABILITY FOR MAKING REPORTS TO GOVERNMENT AUTHORITIES UNDER RCW 74.34.050.

As shown above, the McCaslin repeatedly made the argument throughout this case that RCW 74.34.050 shielded her from liability for making her reports to the police. Also, as shown above, the trial court consistently ruled that while her complaints were not sustained or that they

may have not been filed with sufficient support, they were made in good faith.

Both Commissioner Velategui and Judge Erlick conceded that the that the statute gave her the right to make those reports. Yet in the end, in spite of the clear language of the language of the statute, the court has held the petitioner liable for \$11,000 in damages and more importantly, has had her reputation stained with a VAPA order which critically damages her right to practice as a professional social worker, merely for making reports to the Bellevue police department about possible abuse to her mother. Commissioner Watness, in issuing orders and judgments against McCaslin, clearly used the incorrect standard as to whether she supported her reports with sufficient foundation rather than the statute which states that her complaints had to be made in good faith. In his oral comments, he made no findings to support his award other than the petitioner had gone to the police with her complaints

The record amply supports McCaslin's contentions that the complaints were in good faith. Her declaration establishes that the owners of the residence in question was warned of Bell's propensity for falls and promised "advanced care" to prevent it. The photographs and other evidence establish that Wanda Bell suffered two black eyes and a broken nose ... injuries that were more consistent with a battered woman rather

than a fall, amid conflicting testimony from the caregiver who was supposedly present, as to how and where the injuries occurred.

McCaslin also presented testimony of a personal observation that 6 vulnerable adults were left alone while the caregiver and her daughter were about to leave in a car.

There was no finding of bad faith by Commissioner Watness, nor should there have been given the above observations by McCaslin.

2. THE CONDUCT FOR WHICH MCCASLIN WAS SANCTIONED WAS NOT IN VIOLATION OF PREVIOUS ORDERS OF THE COURT BECAUSE THEY WERE UNCONSTITUTIONAL.

Prior restraints on speech and press are governed by article 1, section 5 of the Washington Constitution, which states:

Freedom of Speech. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Unlike the first amendment to the United States Constitution, the plain language of Const. art. 1, § 5 seems to rule out prior restraints under any circumstances, leaving the State with only post-publication sanctions to punish abuse of free speech rights. **Washington v. Coe**, 101 Wash. 2d 364, 679 P.2d 353 (Wa. 03/22/1984)

Furthermore, the orders themselves are unconstitutional under the federal constitution because an order that is prior restraint must be must be

tailored as precisely as possible to the exact needs of the case. **Shelton v. Tucker**, {81 S. Ct. 247, 5 L. Ed. 2d 231 (1960)}.

These orders do not meet that standard because it is unclear from the orders exactly what types of speech are forbidden. **In re Marriage of Suggs**, 93 P.3d 161, 152 Wash.2d 74 (Wash. 07/08/2004)

3. JUDGE SHAFFER FAILED TO ADEQUATELY ADDRESS MCCASLIN'S APPEAL EVEN THOUGH SHE HAD SUBSTANTIALLY COMPLIED WITH THE PROCEDURES FOR REVISING A COMMISSIONER'S DECISION

Kathleen Carovano claims that this appeal is untimely and splits her argument into two time periods. She claims that Judge Shaffer original order became final on April 1, 2010 because a motion for reconsideration on the original revision became final on that date.

What she overlooks is that order had not become final yet, because the court specifically continued the hearing held on February 23 to determine attorney fees. It made no difference that the appellants original motion for revision was untimely, because the order had not become final for the purposes of either RAP 2.2(10) or RAP 2.2(13). Ms. Carovano's motion for attorneys fees were part of a motion for modification of a previous judgment and the order had not become final because the court specifically continued the hearing on the motion to determine attorney fees.

The attorney's fees were the final order on the motion and that was determined on March 22, 2010. What Judge Shaffer and the respondent

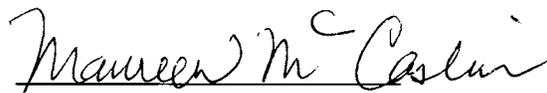
both leave out of their reasoning, is that the Motion for Revision was then filed on March 31, 2010 and that was timely. (CR 164-170), which shows the that the motion was timely filed on March 31, 2010 which was within ten days of March 22, 2010. Judge Shaffer then dismissed this motion, without reading it, on April 6, 2010. (CR 195))

Even if the court considers the orders as requiring two separate revisions, the court should have addressed both. The motion to revise the original order was filed in a timely manner on March 4, 2011. Only the note for motion and the revision papers were missing. The court had discretion under CR 6(b) to enlarge these deadlines in the event of excusable neglect and should have done so in response to the Motion for Reconsideration filed on March 31, 2011 (CP 186-189). The court at a minimum should have considered the revision on the order for attorney fees as all the necessary prerequisites for filing a revision had been met in a timely manner (CP 186-192).

CONCLUSION

For the reasons given in this brief, the order modifying the protection order and the order awarding attorney fees should be reversed.

Dated this 23 day of June, 2011


Maureen McCaslin, pro se

I hereby certify that on June 28, 2011, I caused to be served a copy of this document by first class mail, postage prepaid

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