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No. 69819-2-I

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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ANN P. GORES,

Plaintiff/Appellant,

v.

SAFEWAY INC.,

Defendant/Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT
ON CROSS-APPEAL

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I. ARGUMENT

1. **The Credit Card Statements Sought by Safeway Are Relevant, Not Privileged and Discoverable.**

The civil rules broadly allow discovery as to any matter which is relevant and not privileged. CR 26(b)(1); *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991); *Ollie v. Highland Sch. Dist. No. 203*, 50 Wn. App. 639, 642, 749 P.2d 757, review denied, 110 Wn.3e 1040 (1988). "Relevance" is also broadly defined: evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Gores cannot and does not dispute that her credit card statements for the period beginning only eleven months before her fall until after her fall are relevant. Gores placed her activities before and after her fall into issue in this matter. The records requested by Safeway will contain specific information about her activities before and after her fall, including where she went on specific dates and information about what she was doing. This evidence is relevant to her allegations that she is now unable to participate in activities she engaged in before her fall. These records are also calculated to

identify other sources of relevant records relating to activities Gores engaged in, such as records from places where she engaged in recreational or other activities which involve use of her legs or physical activity.

Similarly, Gores cannot and does not argue that there is any applicable privilege. There is no evidentiary privilege for records of credit card use. The only law relating to consumer financial information applies only to *financial institutions* and specifically recognizes *financial institutions'* obligation to disclose such information whenever required by law, including in response to a subpoena. 15 U.S.C. § 6802(e)(8). Gores' claim of "confidentiality" is wholly unsupported by any legal authority. She cites no case which holds or suggests that records of credit card use or consumer spending activities are privileged from discovery in a personal injury lawsuit where a plaintiff's activities before and after an alleged injury are in issue.

Since these records were relevant and not privileged, they were clearly discoverable. Gores does not have the right to seek damages from another person, based on her alleged level of activities before and after an event, without permitting that person to obtain

discovery of evidence relating to what her level of activities actually was.

Gores' assertion that credit card records are "duplicative" of other discovery is untrue. These records may contain the only independent, objective evidence available to judge the truth and accuracy of Gores' allegations about her level of activities. Gores' suggestion that Safeway should be limited to taking Gores' deposition and accepting whatever she says, or whatever documents she voluntarily produces, is contrary to the intent and purpose of Civil Rule 26(b), which allows discovery of any relevant evidence which is not privileged.

2. Authorities Cited by Gores Do Not Support a Denial of Discovery of Records of Gores' Credit Card Use.

The cases cited by Gores do not support denial of this discovery. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), affirmed a trial court order in a defamation action brought by religious group which compelled the plaintiff to identify persons who made financial contributions and amounts donated.

Howell v. Blood Bank, 117 Wn.2d 619, 818 P.2d 1056 (1991), affirmed a trial court order which allowed discovery of blood bank records and delayed a determination regarding identity of blood

donors until a showing of need could be established after the initial round of discovery.

T.S. v. Boy Scouts of America, 157 Wn.2d 416, 138 P.3d 1053 (2006), affirmed a trial court's order in child sexual abuse litigation which required the defendant to produce files relating to volunteers determined to be ineligible due to complaints of possible abuse, to redact all alleged victims' and perpetrators' names, and to replace perpetrators' names with codes so that alleged multiple offenders could be identified.

Harstad v. Metcalf, 56 Wn.2d 239, 351 P.2d 1037 (1960), was an action for an accounting upon dissolution of an engineering partnership where one partner apparently requested discovery of other partner's *personal* books and accounts, the Court stated "the trial court procured the production of all records that have been shown to be pertinent to the accounting." This case pre-dated the Civil Rule 26.

Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 232 P.3d 591, *review denied*, 169 Wn.2d 1029 (2010), denied a motion for discretionary review of pre-trial evidentiary rulings. It did not involve review of any discovery issue.

3. No Showing or Finding of Good Cause to Prohibit Discovery.

The trial court did not have discretion to enter a protective order under CR 26(c) absent a finding of “good cause.” A court may only grant a protective order upon a showing of “good cause.” CR 26(c); *McCallum v. Allstate*, 149 Wn. App. 412, 423, 204 P.3d 944 (2009).

To establish good cause, the party should show specific prejudice or harm will result if no protective order is issued. When possible, the party must use affidavits and concrete examples to demonstrate specific facts showing harm; broad or conclusory allegations of potential harm may not be enough.

Id. (internal citations omitted) (emphasis added). “The reasons for protecting a party or person must be found to exist and be stated as such.” *Doe v. Puget Sound Blood Center*, 117 Wn.2d at 777.

Safeway’s opening brief on its cross-appeal pointed out that Gores presented no specific facts showing harm or prejudice to her in allowing Safeway to obtain records relating to her activities before and after her fall. The declaration she filed in response to Safeway’s motion to compel did not show “concrete examples to demonstrate specific facts showing harm,” nor did it even allege that any prejudice

or harm would result if this discovery were allowed. (CP 41-43)
Gores did not establish “good cause” to prohibit this discovery.

On appeal, Gores makes no attempt to identify any fact in the record which constitutes good cause to prohibit this discovery. Her assertion of some “unique and compelling harm” (Gores Reply Brief and Opposition to Cross-Appeal, p. 26) – which she never identified – is conclusory and is not a showing of any specific harm. Her conclusory assertion is not “good cause” to deprive a party of relevant, nonprivileged evidence.

In light of the absence of any showing that “good cause” existed, it is unsurprising that the trial court’s order gave no reason for its action and lacks the essential finding necessary for an order prohibiting discovery. (CP 50-51) The trial court abused its discretion when it entered this order.¹

II. CONCLUSION

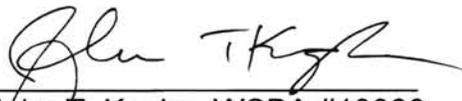
The superior court abused its discretion by prohibiting discovery of relevant, unprivileged information about Gores’ activities before and after the incident contained in her credit card statements.

¹ The trial court previously entered a protective order, upon the stipulation of the parties, which adequately protects any privacy interest Gores may have outside of this litigation. (CP 7-8)

It did so without a showing or finding of any harm or good cause for prohibiting this discovery as required by Civil Rule 26(c). The May 8, 2012, order which prohibited this discovery should be reversed and vacated.

Dated this 15th day of October, 2013.

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