

FILED
DEC 23 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29335-1

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

AARON DOYLE,

Plaintiff/Respondent/Cross-Appellant,

v.

HALEY TAYLOR, PEGGY GRAY and ROBERT GRAY,

Defendants,

and

BRIAN CHASE,

Appellant/Cross-Respondent.

OPENING BRIEF OF APPELLANT BRIAN CHASE

William L. Cameron, WSBA No. 5108
Of Attorneys for Appellant Brian Chase

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I. INTRODUCTION

This case is one in a panoply of litigation that involves Quincy Police Officer Aaron Doyle and his attempt to seize control of Grant County. So far there are four District Court cases,¹ three Superior Court cases,² three Federal District Court cases,³ two cases in the Court of Appeals,⁴ and one in the Ninth Circuit Court of appeals.⁵ Collaterally, there are or were two superior court cases in Sierra County California, two criminal cases against Haley Taylor, both of which were dismissed, and two pending bar complaints, one against Angus Lee, the Grant County Prosecutor, and one against Brian Chase. The initial round of litigation was started by Haley Taylor and Robert and Peggy Gray with anti-harassment actions against Doyle. Doyle followed with this suit for defamation. Chase represented the Grays in this action, but when Doyle filed a Federal District Court Action against Chase and Taylor, Jack Burns began representing the Grays and Taylor.

¹ *Stuber v. Taylor* Y090016D; *Gray v. Doyle* Y090117D & Y090118D; *Taylor v. Doyle* Y090119D. The *Gray v. Doyle* cases later became Superior Court Cause Nos. 09-2-00209-2 and 009-2-00210-6 and *Taylor v. Doyle* became 09-2-00210-0.

² *Doyle v. Gray* 09-2-00169-0 (this case) and *Doyle v. Lee*, Kittitas Con. No. 10-2-00150-9 (this case is secret); *In re: The Order of Honorable Janis Whitener-Moberg issues on May 26 Regarding In Camera Discovery Issue and Denial of Aaron Doyle's Motion to Intervene In Grant County District Court Cause No. Q7320C, State v. Craig Lind*, 10-2-00831-1; and *City of Quincy v. Doyle*, 10-2-01727-1.

³ *Doyle v. Taylor* No. 09-158-RHW; 09-345 RHW (this case) and *Doyle v. Quincy* 10-0030 EFS.

⁴ *Doyle v. Taylor* Nos. 28537-5 and 29335-1 (both are this case).

⁵ *Doyle v. Taylor* No. 10-35545.

The rest of the litigation is over a thumb drive that Haley Taylor says she received in a letter from California. When Chase used some of the documents from the thumb drive in a deposition Doyle claimed the drive was stolen from him, that the matters on it were secret and that Taylor and Chase were guilty of various civil and criminal wrongs. None of Doyle's allegations were true, but Doyle convinced the trial court to order Chase to "return" Chase's copies of the material even though it was not acquired as part of this case. After Doyle had appealed this case, the Grays and Taylor had removed it to Federal District Court, the courts had dismissed it at least twice and entered judgment against Doyle for almost \$19,000, the trial court found Chase in contempt of court even though the court found that he had complied with its order to "return" the material. Chase appeals.

Chase's contention in this appeal is that the trial court lacked jurisdiction to hear Doyle's motion to force Chase to turn over his copy of the thumb drive and the material on it. The information was acquired by Chase's client independently of this action, and the original thumb drive is in the Moses Lake Police Department's evidence room. Even if the trial court has some power to force Chase to surrender his property to Doyle, Chase complied with the trial court's order long before any contempt hearing and cannot be cited for contempt or ordered to pay costs.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering its order of October 21, 2009, ordering Brian Chase to return records.
2. The trial court erred in entering its order of July 2, 2010 awarding Doyle his attorneys' fees against Brian Chase.

Issues Pertaining to Assignments of Error

1. Plaintiff Aaron Doyle made an application for a protective order and for return of property against the defendants Robert and Peggy Gray's former attorney, Brian Chase. Did the trial court exceed its jurisdiction in ordering Chase to deliver material in his possession that he had received from a client independently of this case? [Assignment of Error No. 1]
2. Did the trial court abuse its discretion under these facts by ordering Chase to "immediately return to counsel for the plaintiff, Aaron Doyle," materials and electronic documents given to Chase by a client? [Assignment of Error No. 1]
3. Did Brian Chase violate the trial court's order to "immediately return" the material to Doyle's attorneys? [Assignment of Error No. 2]
4. Did the trial court have authority to impose \$1,000 in attorney fees against Brian Chase for violating the October 21, 2009 order? [Assignment of Error No. 2]

5. Did the trial court have authority to impose \$1,000 in attorney fees against Brian Chase for discovery violations? [Assignments of Error Nos. 1 & 2]

6. Did the trial court abuse its discretion in awarding Doyle his attorneys' fees? [Assignments of Error Nos. 1 & 2]

III. STATEMENT OF THE CASE

Aaron Doyle brought this action against Robert and Peggy Gray for defamation and abuse of process. CP 218-24. The gravamen of the complaint was that the Grays told a pack lies to Doyle's municipal employer. The Grays, who were represented by Brian Chase, answered claiming immunity under RCW 4.24.510, CP 225-27. Jack Burns became the attorney of record, and the trial court entered judgment on the Grays' claim for \$18,752.00. CP 455-58. Doyle amended his complaint on September 4, 2009. CP 433-41. Doyle's amended complaint added Haley Taylor as a defendant (however, Taylor was never served with the Summons and Complaint in this matter). The Grays removed the case to Federal District Court, CP 460-84, and Doyle appealed to the Washington Court of Appeals. CP 206-17.

On April 23, 2009, Doyle filed a motion to prohibit Chase from deposing Doyle about his litigation in California and to return any originals and copies of that litigation. CP 284-92. While originally noted for May 1, 2009, it does not appear that any hearing was held on that date and Chase deposed Doyle on May 5, 2009. Chase describes the deposition in some detail in a declaration the next day, CP 322-29, as did a number of

people who were in attendance. CP 1-39. This motion lay dormant as Doyle sued Chase and Taylor for several claims that the Federal District Court later dismissed. The matter was renoted for a hearing on September 18, 2009.⁶ The trial court recited the relevant matters in his Memorandum of Opinion of May 29, 2010. Chase disagrees with some of the trial court's findings but sets forth those findings below, with those that Chase disputes appearing in italics:

During his representation of defendants, attorney Brian Chase came into possession of certain documents the property of plaintiff Aaron Doyle. Believing the documents were actually stolen from plaintiff's home by Ms. Taylor, with whom Doyle previously had a dating relationship, plaintiff moved to compel return of the documents.

Plaintiff's motion, and others, came before the court for oral argument on September 18, 2009, the defendants being then represented by attorney Jack Burns who had taken over the representation from Mr. Chase.

The court's oral ruling of September 18 is summarized in the following entry in the clerk's minutes:

[Court]...states documents acquired from Mr. Doyle were done unlawfully, states originals or any copies in hands of any party should be returned to [counsel] for Mr. Doyle; explains any document obtained from thumb drive, any

⁶ It is very possible that the motion heard on September 18, 2009, was actually filed in another case and is not part of this record. Certainly, the April 23, 2009, motion could not have concerned itself with the thumb drive, because Doyle did not know that it existed when he made that motion.

document received [by counsel from] Ms. Taylor, the Grays or Attys shall be returned.

Mr. Dano states he will draft an order and circulate.

Mr. Dano filed a proposed order and noted it for entry on October 16. On that docket, the hearing was stricken with a clerk's notation that Mr. Dano wished to present the order ex parte and have the court consider it.

The undersigned interlineated certain changes in the proposed order and entered it on October 21 without further proceedings. The operative provisions of the order were as follows:

2. The originals or any copies, paper or electronic, in the possession of any party to this action, or the counsel of any party to this action, or former counsel to any party in the action including, but not limited to, Jack Burns and Brian Chase, of any "document" as herein defined shall be immediately returned to counsel for Plaintiff, Aaron Doyle. No other use shall be made of the documents without leave of the court. The documents shall not be disseminated to any other person other than counsel for Plaintiff.

3. For the purposes of this order, "documents" is defined as any document relating to Plaintiff, Aaron Doyle, obtained from a thumb drive that was ever in the custody of Ms. Taylor, or obtained by her from the files of Plaintiff, or by any other person from said files, without the knowledge and consent of Plaintiff. The term "documents" shall also include, but not be limited to, any document(s) from or relating to Plaintiff's prior employment with the Sierra County, California, Sheriff's Office that were sealed by the Sierra County Superior Court.

On November 13, 2009, Mr. Burns on behalf of the defendants filed notice that this case had been removed to the United States District Court for the Eastern District of Washington. A week later, on November 20, the plaintiff filed a motion for an order requiring Brian Chase to appear on December 4, 2009, and show cause why he should not be held in contempt for his failure to comply with the order. The motion was supported by a copy of a pleading (not itself actually filed in this case until November 23) entitled NOTICE OF ENTRY OF ORDER ON PLAINTIFF'S MOTION FOR RETURN OF RECORDS AND REQUEST FOR PROTECTIVE ORDER. This document, mailed to Chase and Burns on October 29, advised them of entry of the written order on October 21, and included a copy of the order.

The contempt motion was also accompanied by copies of correspondence between Mr. Dano and Mr. Chase. On September 30, Mr. Dano reminded Mr. Chase of the court's oral ruling, and provided the original proposed written order and a note-up slip for the presentment on October 16. On October 6, Mr. Chase requested that Mr. Dano provide him a copy of the written order when it was entered by the court, so that he could "properly obey said order." On October 8, Mr. Dano replied, demanding immediate compliance with the oral order of September 18.

Being unaware of removal of the case to federal court (filed without bench copy), the undersigned issued an order directing Mr. Chase to appear on December 4 as moved by the plaintiff. Due to an irreconcilable schedule conflict, Mr. Chase moved to continue the show cause hearing to December 18. The continuance motion was heard telephonically on December 3.

Mr. Chase filed an affidavit on December 3, summarized as follows: He received a copy of the October 21 order (mailed by Mr. Dano on October 29) on November 3. Since then, he and his staff sifted through voluminous files

to gather all items covered by the order, completing the process on November 20. Since the items were cumbersome, Mr. Chase planned to physically hand them to Mr. Dano at a mediation scheduled for December 2. When he received the order to show cause on November 25, he immediately mailed the items to Mr. Dano.

At the continuance hearing, Mr. Dano advised the court he had been unavailable to receive Mr. Chase's requests to continue the contempt show cause hearing, and had no objection to continuance. The hearing was continued to December 18. On December 11, Mr. Dano filed a motion, also noted for December 18, asking the court to impose as sanctions, for Mr. Chase's contempt, attorney fees plus \$2,000 per day for each day Mr. Chase had the ability to comply with the court's oral order of September 18, and written order of October 21, and failed to do so.

At the hearing on December 18, the federal court removal was brought to my attention. I declined to rule on the motion for contempt until the federal court ordered or acknowledged that this court retained the authority to do so in light of the removal.

On February 3, 2010, the plaintiff filed a new motion for an order to show cause regarding Mr. Chase's alleged contempt. Counsel's supporting declaration reiterated the foregoing history, and explained: "*The matter pending in the federal court has now been resolved between the parties and is now un-removed from the federal court.*" The court ordered Mr. Chase to appear and show cause on February 12. Mr. Chase challenged the jurisdiction of this court to proceed because no formal order of remand had been entered in the federal court. The parties agreed to continue the contempt show cause to February 19.

*In furtherance of the settlement reached in federal court, the parties also filed a stipulation and order dismissing all claims between them in this cause, "without prejudice to Plaintiffs' motion for contempt against Defendant's Attorney, Brian Chase."*⁷

On February 18, the parties stipulated to further continuance of the contempt show cause hearing to February 26. Prior to that hearing, the plaintiff filed additional materials in support of his motion, including a transcript of the September 18, 2009 hearing (with the judge's oral ruling) and a portion of a deposition of Mr. Chase taken February 22.

The court understands the deposition testimony to establish that *Mr. Chase received a removable data storage device (thumb drive) that was the property of Aaron Doyle.* Before releasing *Doyle's thumb drive* to law enforcement in May, 2009 incident to investigation of Doyle's theft complaint, Chase made and retained copy of *Doyle's thumb drive* on Chase's thumb drive. Chase's thumb drive was delivered to Mr. Dano by mail on November 25, 2009 with the other materials within the definition of "documents" in the court's order of October 21. Before delivering Chase's thumb drive, Chase made a copy of it, *ostensibly* because he had used the thumb drive for other client matters. The copy was made on another thumb drive owned by Chase ("Chase thumb drive 2"). About a week after mailing the materials to Dano, Chase physically destroyed Chase thumb drive 2.¹

¹ While the deposition testimony is less than clear, I presume that Chase made a copy of the files on the Chase thumb drive to ensure that he didn't lose other client files when he deleted them from the thumb drive before sending

⁷ This stipulation was entered after the case had been dismissed. CP 601-02. The Stipulation and Order of Dismissal are devoid of such language. CP 589-90, 597.

it to Dano. When he had preserved the other client files from Chase thumb drive 2, he destroyed it.

At the February 26 hearing, the court concluded that it lacked jurisdiction to resolve the contempt motion because there had, as of then, still been no order of remand from the federal court. On March 19, the court entered a written order denying the contempt motion without prejudice on that basis.

On April 19, a certified copy of the federal district court's Order of Remand was filed herein. The order states that remand is for the purpose of enforcement of this court's orders relating to Brian Chase entered before removal. On May 6, the plaintiff obtained another show cause order, for hearing on May 14, on the plaintiff's renewed motion for contempt.

In addition to other materials previously filed, the plaintiffs renewed motion was also supported by deposition testimony from Mr. Chase's staff to the effect that staff did not significantly assist Mr. Chase in locating and assembling the documents which were mailed to Mr. Dano's office on November 25. Mr. Dano argued that Mr. Chase had been less than candid with this tribunal in his earlier declaration regarding that process.

Mr. Chase filed a declaration in which he attempts to clarify the various permutations of thumb drives. He avers that he was out of his office when the October 21 order was delivered by mail, first seeing it upon his return on November 9.

Following oral argument on May 14, the court took the plaintiff's motion for a finding of contempt and sanctions under advisement.

CP 169-74. Chase made a response to Doyle's allegation in a lengthy declaration filed August 10, 2009. CP 647-51. Chase laid out the sequence of events that showed Doyle's claim that the thumb drive was stolen from him was a fabrication. Until he learned that Chase had turned the thumb drive over to the police, Doyle never mentioned it and even denied its existence, claiming the only drive he had was in his car. *Id.*

IV. SUMMARY OF ARGUMENT

A. Doyle's underlying themes to the trial court are not supported legally or factually.

Three themes not directly related to the contempt citation but which permeate Doyle's claims need to be laid to rest. These claims are his theories (1) that the making of a copy of documents is tantamount to theft or conversion; (2) that his dismissal from employment in California is a private matter; and (3) that sealed documents are contraband. Neither logic nor law supports these contentions.

B. The trial court lacked jurisdiction to order Chase to deliver his copies of his client's material to Doyle's attorneys.

Irrespective of whose story is to be believed, Taylor acquired the thumb drive she later gave to Chase before this action was commenced. No statute, common law or court rule gave the trial court authority to conduct what was essentially an independent action by Doyle against Chase who was no longer involved in the case.

C. Chase did not violate the trial court's order to turn over his copies of material to Doyle's attorneys.

The trial court poorly worded its order requiring a “return” of material that Doyle had never possessed “immediately” to Doyle’s counsel. When the Chase did not return the material as quickly as Doyle thought he should, he obtained an order to show cause. By the time the hearing was or would have been held, Chase had completely complied with the order. The court lacked authority to find Chase in contempt or to order him to pay Doyle’s attorney’s fees.

V. ARGUMENT

A. The underlying bases of Doyle’s claims are meritless.

1. There was no conversion or theft.

Rooted in the common law action of trover, [conversion] occurs when, without lawful justification, one willfully interferes with, and thereby deprives another of, the other’s right to a chattel.

Davenport v. Wash. Educ. Ass’n, 147 Wn. App. 704, 722, 197 P.2d 686 (2008). If Taylor did steal documents from Doyle, Chase had no reason to believe that was true or that the documents he had were stolen. Making a copy of a document is not conversion.

The Seventh Circuit concluded that ‘The possession of copies of documents — as opposed to documents themselves — does not amount to an interference with the owner’s property sufficient to constitute conversion.’ *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 303 (7th Cir. 1990). The Second Circuit has similarly stated that ‘Merely removing one of a number of copies of a manuscript (with or without permission) for a short time, copying parts of it, and returning it undamaged, constitutes

far too insubstantial an interference with property rights to demonstrate conversion.’ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 201 (2nd Cir. 1983), *rev’d on other grounds*, 471 U.S. 539, 105 S. Ct. 2218, 85 L.Ed.2d 588 (1985). Likewise, the D.C. Circuit Court of Appeals, declared that a defendant who removes documents ‘from the files at night,’ photocopies them and returns them “to the files undamaged before office operations resumed in the morning” has not committed a sufficiently substantial deprivation of use to represent conversion. *Pearson v. Dodd*, 133 U.S. App. D.C. 279, 410 F.2d 701, 707 (D.C. Cir. 1969).

Internet Archive v. Shell, 505 F. Supp. 2d 755, 763 (D. Colo. 2007). To the extent that all Doyle’s claims rely on Chase’s, Taylor’s or some third parties’ supposed theft or conversion of the thumb drive and the material on it, they do not amount to a cause of action. Doyle’s thumb drive — if it is indeed his thumb drive — is in the Moses Lake Police Department evidence room where it has been since May 5, 2009. CP 324-25. If Doyle has been deprived of the thumb drive and the information on it, it is because he insisted that the police take it into custody. *Id.* The trial court accepted Doyle’s theory uncritically.

2. Sealed documents are not contraband.

Doyle implies there is something wrong with having copies of sealed documents. Doyle cites no case law for this, and no court has held that it is unlawful to possess an independent copy of a document that has been sealed in a court file.⁸ In *Rosado v. Bridgeport Roman Catholic*

⁸ For example, it is common practice (and required) in dissolution of marriage cases to seal all W-2’s, federal income tax returns, bank statements, employee pay stubs, and other financial documents filed with

Diocesan Corp., 276 Conn. 168, 884 A.2d 981 (2005), the court recognized its lack of jurisdiction to control records in the hands of the parties even if the court's own records were sealed.

The trial court clearly understood that whether a document was sealed in some other proceedings was not relevant to this case. The Court then took an illogical leap, unsupported by existing law, that if the documents were unlawfully obtained, it was appropriate to seal them.

I think whether or not these documents were sealed in some California setting is irrelevant, and I think whether or not the documents were sealed in another litigation, such as anti-harassment petitions is irrelevant, but I also think that if the court believes there is a basis to find that the documents were unlawfully acquired, that's the end of the game. They ought to be sealed, they ought to be returned and the parties who desired them should pursue them through legitimate discovery means.

CP 529.

3. California law does not apply in Washington

The law in California is different from the law in Washington. Washington's view of police personnel records are that they are readily discoverable and subject to public disclosure. This court need not look further than *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997). Amren, who had a confrontation with Kalama's chief of police, requested a copy of the State Patrol's report on the incident. Following Kalama's denial of his request for records, Amren filed an action seeking the court. Yet it is not unlawful for the IRS, banks, employers, or the parties to possess copies of these documents.

a writ of mandamus directing the city to produce the report under a provision of the public disclosure act. Kalama's argument is much like Doyle's.

The City of Kalama asserts that RCW 41.06.450 implicitly creates an exemption from disclosure in cases like the one at bar where an employee has been exonerated of wrongdoing. The City contends that by passing RCW 42.17.295 and RCW 41.06.450(1)(a) the Legislature determined that maintaining false information relating to alleged employee misconduct is unfair to employees and serves no useful function and, thus, the Legislature authorized the nondisclosure and destruction of the information. The City also asserts that the employing agency has unreviewable authority to determine the truth or falsity of the allegations of employee wrongdoing.

Id. at 32. Our Supreme Court found the argument wanting. Washington has a long history of permitting the public to review the allegations of wrongdoing by its public officials the outcome of disciplinary or other proceedings notwithstanding. *Cowles Pub. Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988). Doyle may not hide behind California law now that he has become a public officer in the State of Washington. His past conduct is subject to the same scrutiny as that of any other police officer. "We also conclude that a law enforcement officer's actions while performing his public duties or improper off duty actions in public which bear upon his ability to perform his public office do not fall within the activities to be protected under the comment to § 652D of Restatement (Second) of Torts as a matter of 'personal privacy'." 109 Wn.2d at 727.

4. Incorrect legal theories and motives have propelled this case.

If correspondence between two public officials over the performance of a police officer is a matter of public, not private, concern, the error inherent in the trial court's decision is patent. As our Supreme Court recently noted in the context of the Public Records Act:

[T]he PRA reflects a strong public policy favoring the disclosure and production of information, and exemptions are to be narrowly construed. RCW 42.56.030. Moreover, a party opposing the production of public records must establish that production would 'clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.' RCW 42.56.540; *see Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 756-57, 174 P.3d 60 (2007).

Seattle Times Co. v. Serko, No. 84691-0 (Wash. Supreme Ct. November 18, 2010).

The notion that Doyle has some inherent right to conceal every scrap of information about his employment in California is likewise indefensible. Copies of unpleasant documents are just that — copies. Unless the copies are trade secrets or copyrighted, they are not protected. One may not be charged with theft or conversion by the possession of a copy. A court ordering parties or their attorneys to turn over their copies of documents, especially when those documents are directly in issue in this defamation action, is unprecedented. More and more we see lawyers unable to defend their own clients, because they are themselves in the dock. It is a trial technique that should receive no succor from the bench,

but Doyle's attorneys make no bones that they want Chase's head on a pike. As outlined by Doyle's attorneys, Chase "engaged in criminal profiteering within the meaning of Washington's Criminal Profiteering Act. Ch. 9A.82 RCW, including without limitation: (1) theft, as defined in RCW 9A.56.030 and/or .040; and/or (2) extortion, as defined in RCW 9A.56.130 . . . [and] also violated the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030, including without limitation: (1) intentionally accessing a computer without authorization and thereby obtaining information, § 1030(a)(2)(C); and/or (2) intentionally accessing a computer without authorization and causing damage and loss. §1030(a)(S)(C)." CP 6-7. The law does not support the trial court's treatment of Chase. The trial court was legally incorrect, and whatever motivated its decision is bad policy made worse. This was a case with real litigants and baseless claims that were finally dismissed. Whatever lingers needs to be dismissed as well.

B. Because the issues before this court are primarily questions of law, the standard of review is *de novo*.

The Court of Appeals reviews errors of law *de novo*. *Trotzer v. Vig*, 149 Wn. App. 594, 203 P.3d 1056 (2009). The questions presented here are whether the trial court had the authority to issue the order of October 21, 2009, for the "immediate return" of material from Taylor's thumb drive or authority to impose \$1,000.00 in sanctions against Chase. The trial court had no such authority as to the October 21 order from want of form, statutory authorization, or jurisdiction over the issues or parties.

Thus the trial court had no authority to impose sanctions for violating its invalid order. Likewise, the trial court made findings inconsistent with its finding of contempt and had no basis for imposing the sanction either for contempt or for a discovery violation.

The trial court also abused its discretion in issuing the Order of October 21, 2009, and then imposing sanctions under the circumstances. If the court finds that the trial court had authority to do as it did, then this court should further answer the question of whether the trial court abused its discretion in doing so.

C. The trial court's order of October 21, 2009 was not lawful.

1. The hearing that led to the issuance of the trial court's October 21, 2009, order was not properly commenced.

The September 18, 2009, hearing was anything but an orderly presentation. Most of it was taken up by an unrelated privilege argument. CP 520-29. Jack Burns, the attorney for the Grays, had no idea of the essence of the motion, feeling it had been filed in other matters. CP 529-30. Absent even a motion, he argued there were no grounds to issue an order under GR15. *Id.* GR15, however, deals only with the court's own records, not the records in the hands of a party. The trial court set its own agenda declaring that if the documents were obtained illegally, they were to be returned. CP 529. If the parties were less than precise in their presentations, it is certain that they had little or no notice of what was actually in issue. CP 529-32. Chase was actually appearing in another

case. CP 532. His argument was that the material he had received was not and could not have been stolen. CP 532-34. Taylor was not present or otherwise represented at the September 18 hearing because she was never served with the Summons and Amended Complaint.

2. The motion was improperly cast as a discovery issue.

Doyle's motion, if that was even what was being argued, was in essence an action for replevin. CP 284-92. The trial court appears to have treated Doyle's application as if it were some sort of discovery motion and "the Court's inherent power to control the discovery process should override [the] procedural difficulty" of not having brought the motion in this case. CP 535. Doyle, in effect, was bringing an independent action against Chase without the formalities and safeguards attendant an independent action. The thumb drive and papers were not obtained in the course of discovery, or even in the course of this action. No authority exists to order a nonparty to deliver up goods simply because the court thinks it is the right thing to do. At least nothing cited by any of the parties or in the record would so indicate.

We thus have a hearing based upon motions that appear not even to be in the record over property that was beyond dispute acquired by a non-party even before this case was commenced. CP 649. The hearing resulted in what for all intent and purposes was a writ of replevin, and it was directed at a non-party's attorney.

3. The trial court could not properly determine a replevin action as a discovery motion.

An order is lawful if it is issued from a court with jurisdiction over the parties and the subject matter. *Deskins v. Waldt*, 81 Wn.2d 1, 4, 499 P.2d 206 (1972). Challenges to a court's jurisdiction to issue an order fall into two broad classes: jurisdiction over the party and jurisdiction over the subject matter. The first issue here is that the trial court exercised powers outside its jurisdiction by conducting a replevin action without the niceties of actually having someone file one. RCW 7.65. In the absence of a valid judgment, a person must follow the statutory steps to recover property. *Harvey v. Ivory*, 35 Wash. 397, 77 P. 725 (1904). The situation is like that in *State ex rel. Evans v. Winder*, 14 Wash. 114, 44 P. 125 (1896); or *Mead Sch. Dist. v. Mead Educ. Assoc.*, 85 Wn.2d 278, 534 P.2d 561 (1975), where the courts were found to have acted outside their jurisdiction in issuing orders. Our courts have recognized that, for a valid order or judgment, a party must be brought into court in the manner prescribed by statute and without such proceedings the judgment as to him is a nullity. *State ex rel. Boardman v. Ball*, 5 Wash. 387, 31 P. 975 (1892). Thus, where strangers to the action are brought in for the possession of property, they are not properly citable for contempt. *See, State v. Nansen*, 132 Wash. 563, 232 P. 327 (1925); *State ex rel. Boardman, supra*. As the court noted in *State ex rel. Boardman*, if a receiver finds property belonging to the defendant but under the control or possession of some third-party who refuses to deliver it, the receiver must proceed by an action in the ordinary course and try his right to it or make that third-party

a party to the action. Orders to the contrary are void. *State ex rel. Boardman*, 5 Wash. at 389.

Doyle should have brought an independent action to “recover” his property. It would doubtless have become obvious to the defendants that copies of documents or electronic documents were not a proper subject of a replevin action, and the issue of Taylor’s acquisition of the thumb drive would have required an evidentiary hearing. Because the trial court acted outside the scope of its authority in entering the order of October 21, 2009, the order was not valid.

D. If the trial court’s order of October 21, 2009, was not valid, Chase cannot be found in contempt.

Disobedience of an order entered without jurisdiction of the subject matter is not contempt. *State ex rel. News Publishing Co. v. Milligan*, 3 Wash. 144, 28 P. 369 (1891); *State ex rel. Hillman v. Superior Court*, 105 Wash. 326, 177 P. 773 (1919). Likewise, violation of an order void as to the defendant for want of jurisdiction is not contempt. *State ex rel. Boardman supra*. If this Court finds the October 21, 2009 order unlawful, no further issue need be resolved.

E. The trial court had no jurisdiction to entertain a motion for contempt after the case was dismissed.

1. The District Court’s dismissal deprived the court of jurisdiction.

Shortly after the trial court’s order to return property, the case was removed to Federal District Court. Three months later, the parties took a

voluntary dismissal of the entire case. CP 544-609. The effect of the Federal dismissal was to make the case a nullity⁹:

Because CR 41(a) follows the federal rule, Fed. R. Civ. P. 41(a), we look to decisions and analysis of the federal rule for guidance, but “we are by no means bound by those decisions.” *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982) (citing *American Discount Corp. v. Saratoga W.*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972)). Under FED. R. CIV. P. 41, the effect of a voluntary dismissal “is to render the proceedings a nullity and leave the parties as if the action had never been brought.” *Bonneville Assoc., Ltd. Partnership v. Barram*, 165 F.3d 1360, 1364 (Fed. Cir. 1999) (quoting *Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996) and *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995)).

Beckman v. Wilcox, 96 Wn. App. 355, 359, 979 P.2d 890 (1999). Once Doyle, Taylor, and the Grays dismissed the Federal action, it ceased to exist “as if the action had never been brought.” Consequently, there was no case upon which either the Federal District Court or Grant County Superior Court could act. Certainly, the Federal District Court could have remanded the case back to Grant County, but that was not the stipulation of the parties. The only action that the Federal District Court is permitted after it entered the order of Voluntary Dismissal was to award attorneys’ fees. *Sequa Corp. v. Cooper*, 245 F.3d 1036 (8th Cir. 2001). In that respect this case is similar to *Rosso v. Magraw*, 288 F.2d 840 (8th Cir. 1961), where the court held that once dismissed voluntarily, the court

⁹ An Order of Dismissal, separate from the Federal order of dismissal, was entered by the parties in Grant County Superior Court. CP 79-81.

lacked jurisdiction to reopen or otherwise entertain any motion in the case. Thus the Federal District Court's order remanding the case to Grant County was without jurisdiction.

The trial court refused to entertain the contempt citation in December 2009. Yet rather than seek a remand of the case or pursue contempt proceedings against Chase in Federal District Court, Doyle and the defendants chose first a voluntary dismissal. The trial court thus again refused to entertain Doyle's second contempt motion on March 19, 2010. VRP 15:14-16:3.

2. The trial court's dismissal deprived it of jurisdiction.

On October 6, 2009, the trial court entered judgment against Doyle and dismissed the case without prejudice for Doyle to file an amended complaint. CP 457. The court dismissed the case on remand as well. CP 79-81. Like Federal courts, Washington follows the rule the dismissal of a case effectively dismisses any civil contempt proceedings that came with it.

Since the complainant in the main cause is the real [party] in interest with respect to a compensatory fine or other remedial order in a civil contempt proceeding, if for any reason he becomes disentitled to the further benefit of the order, the civil contempt proceeding must be terminated. Inasmuch as the proceeding was not instituted to punish for a contumacious act in vindication of the court's authority, the court has no such independent interest in maintaining in force its order imposing a compensatory fine as would justify the court in transmuting the proceeding into one for criminal contempt, with the fine regarded as punitive. Thus, courts have held that at least with respect to a civil

contempt, on settlement of the main cause of which the contempt proceedings based on violation of an injunction were a part, the contempt proceedings must terminate.

State ex rel. Kerl v. Hofer, 4 Wn. App. 559, 564, 482 P.2d 806 (1971) quoting 17 AM.JUR.2d, Contempt § 49. While Doyle later filed an amended complaint, CP 433-41, Chase was no part of that matter being neither party nor representing any party in it. That amended case was then dismissed by the parties in the Federal action as noted above. CP 544-609.

Washington has adopted the same practice as have Federal Courts as laid down in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); where the Supreme Court carefully and completely distinguished civil and criminal contempt and held that the power to punish for civil contempt – even the imposition of a fine – abated when the underlying case is dismissed.

Following what appears to be the majority rule we, therefore, hold that when the underlying malpractice cause of *Kerl v. Hofer*, No. 52258 was dismissed with prejudice based upon a settlement of all matters in controversy between the parties, the pending civil contempt proceedings brought under RCW 7.20 were necessarily terminated.

State ex rel. Kerl v. Hofer, 4 Wn. App. at 566.

F. Chase did not violate the trial court's order.

- 1. The trial court's order of October 21, 2009 was ambiguous, and Chase cannot be charged with violating an ambiguous order.**

The order of October 21, 2009 was prepared by Doyle and any ambiguity or lack of clarity must rest with him. In a contempt proceeding,

a court's order will not be expanded by implication beyond the meaning of the terms used. The facts must constitute a plain violation of the order. *Johnson v. Benefit Mgt. Corp.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982). The first ambiguity is the word "return." Under no stretch of the imagination is it possible for Chase to have "returned" anything. The original thumb drive from which all the documents came was ensconced in the evidence room of the Moses Lake Police Department. There was nothing to "return" to anyone over anything. Chase's making a second thumb drive and placing on it the copies of the California proceedings, and then destroying his own drive because it contained client information, the eraser which he could not guarantee, is hardly a failure to "return", because both thumb drives were purchased and owned by Chase. If he had copies of these documents in his possession because he had printed them, those copies are not and never were Doyle's.

The second ambiguity is "immediately." The original court hearing was on September 18, 2009. The trial court's ruling was not reduced to writing and delivered to Chase until November 3, a month and a half later. If we look at the time it took to reduce the trial court's oral impressions to an enforceable order for the definition of "immediately," Chase's original intention to return the documents at mediation on December 2 is perfectly reasonable. Case law in Washington and elsewhere does not help us with definitions of the word "immediately" either. Fourteen months is not "immediately" when it comes to reporting service of the Summons and Complaint to an insurance carrier. *Sears v.*

Hartford Accident & Indem. Co., 50 Wn.2d 443, 313 P.2d 347 (1957). On the other hand, “immediately” can be as far away as the next legislative session. *Telburn v. Dept. of L&I*, 169 Wn.2d 396, 239 P.3d 544 (2010). “Immediately” also means occurring without any intervening agency, that is, without doing something else with the material such as passing out copies to others between receipt of the order and delivery to Doyle’s attorneys.

Moreover, it was impossible for Chase to comply with the “immediately” requirement beyond what he did. Again, Chase was not provided a copy of the trial court’s written order until November 3, 2009 (i.e., 14 days after its entry on October 21, 2009). Chase was not in his office during the week of November 2 through November 6, 2009. Consequently, he did not know of the order’s existence until November 9, 2009. Chase sent the documents and materials to Doyle’s attorneys within twelve business days of first learning about the order’s existence. What definition the trial court placed on the word “immediately” is unknown. But if the trial court’s definition of “immediately” was 14 days or less, then by Doyle’s argument, Chase was already in violation before his office even received the order in the mail.

Doyle or the trial court could have put a date certain in the order but chose instead “immediately,” a word that lacks precision. By the time the first hearing would have been conducted, Chase had fully complied with the trial court’s order. Other than venting his spleen, Doyle had

nothing further to gain by the convoluted sequence of events that led to seven court hearings between the fall of 2009 and the summer of 2010.

2. The trial court did not make findings to support its order of contempt.

The trial court's rulings are confusing. Consider his decision at the May 14, 2010, hearing:

Frankly, at this point, I'm satisfied after several times that this matter has been raised that the order could only be enforced upon its being made an order of the court on October 21, and that **the timeliness of Mr. Chase's response after having been provided that order was not contemptuous.**

So the issue that remains in regard to his alleged contempt is whether or not the manner in which he complied with the order contemptuously violated the order.

VRP 30:10-19 [emphasis added]. Compare this with his written opinion of May 29, 2010: "Since compliance was compelled, in substantial part, by the plaintiff's contempt motion, it is appropriate to compensate the plaintiff for his attorney fees in bringing the original motion." CP 173. The trial court's written order, however, clearly says that Chase is in contempt for not "responding immediately" to the October 21, 2009, order. CP 191. So which is it – costs for having to bring a motion or for contempt? The trial court dictated an order to counsel that is contrary to his original oral finding. VRP 52:20-53:4. Nonetheless, nothing in the discussion on July 2, 2010, suggests that the court was making different findings.

3. Any sanction imposed by the trial court was improper.

An order finding a party in contempt must be supported by findings. *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 113 P.3d 1041 (2005). “[E]xercise of the contempt power is appropriate only when ‘the court finds that the person has failed or refused to perform an act that **is yet within the person’s power to perform.**”¹⁰ Thus, a threshold requirement is a finding of current ability to perform the act previously ordered.” *Id.* at 933-934 (emphasis added). On the other hand, if this is a matter of a trial court managing a discovery issue, Doyle failed to certify he had complied with CR 26(i) before filing his motion for contempt and that motion is devoid of any indication that he complied with the rule. RP 57-73. Had he done so, he would have found out Chase had the material ready for delivery and he would have had no reason to make the motion for sanctions that he did.

Doyle is entitled to no sanctions, because the trial court’s findings indicate and the undisputed facts confirm that Chase was not in contempt of court. Any costs incurred by Doyle were the product of his failure to make a phone call as required by CR 26(i).

G. The trial court lacked authority to assess attorneys’ fees against Chase.

The trial court correctly analyzed the contempt statute and came to the conclusion that, because Chase had complied with the order before

¹⁰ RCW 7.21.030(2)

there was a hearing on Doyle's motion, the court could not find him in contempt under RCW 7.21.030.

Only remedial, not punitive, sanctions are available to address Mr. Chase's contempt. In determining the propriety of any sanction, the court has in mind (1) that recovery of sensitive personal documents was a compelling and central issue for the plaintiff; (2) that before the time noted for initial hearing of the contempt motion, Mr. Chase had complied with the court's order; and (3) no losses other than attorney fees were incurred by the plaintiff by virtue of Mr. Chase's noncompliance.

CP 173. There was nothing left to coerce. Nonetheless, the court imposed attorneys' fees.

Under these circumstances, neither imprisonment nor an RCW 7.21.030(2)(b) forfeiture is appropriate since no disobedience occurred "after notice and hearing." Since compliance was compelled, in substantial part, by the plaintiffs contempt motion, it is appropriate to compensate the plaintiff for his attorney fees in bringing the original motion.

Id. This was apparently under the authority of RCW 7.21.030(3) which provides:

The court may, in addition to the remedial sanctions set forth in §§ (2) of this section, order the person found in contempt of court to pay ... reasonable attorney fees.

This is the only statute that authorizes attorneys' fees, but the trial court made no finding that "return" of anything was "yet within [Chase's] power to perform." Quite the opposite, the trial court found Chase had performed by November 25, 2009. Consequently, while the trial court

might have concluded that Chase was in contempt of court, he was not still in contempt of court, because he had by the time of the hearing complied with the trial court's order.¹¹ The trial court lacked authority to impose fees under the statute or otherwise.

VI. CONCLUSION

The court should reverse the trial court's decision of July 2, 2010, ordering Brian Chase to pay \$1,000, in attorneys' fees and vacate the order of October 21, 2009. The trial court lacked jurisdiction to settle the right to possession of Chase's copies of his client's material. Chase completely complied with the trial court's ambiguous order and, consequently, was never in contempt.

Respectfully submitted this 22nd day of December 2010.

LEE SMART, P.S., INC.

By: 
William L. Cameron, WSBA No. 5108
Of Attorneys for Brian Chase

¹¹ By the time of the May 14, 2010 contempt hearing, it had been nearly seven months since Chase had complied with the trial court's order to return property.

APPENDIX

CHAPTER 7.21. CONTEMPT OF COURT

§ 7.21.010. Definitions

The definitions in this section apply throughout this chapter:

(1) "Contempt of court" means intentional:

(a) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

(b) Disobedience of any lawful judgment, decree, order, or process of the court;

(c) Refusal as a witness to appear, be sworn, or, without lawful authority, to answer a question; or

(d) Refusal, without lawful authority, to produce a record, document, or other object.

(2) "Punitive sanction" means a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.

(3) "Remedial sanction" means a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform.

§ 7.21.020. Sanctions -- Who may impose

A judge or commissioner of the supreme court, the court of appeals, or the superior court, a judge of a court of limited jurisdiction, and a commissioner of a court of limited jurisdiction may impose a sanction for contempt of court under this chapter.

§ 7.21.030. Remedial sanctions -- Payment for losses

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

(2) If the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform, the court may find the

person in contempt of court and impose one or more of the following remedial sanctions:

(a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.

(b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.

(c) An order designed to ensure compliance with a prior order of the court.

(d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

(3) The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees.

(4) If the court finds that a person under the age of eighteen years has willfully disobeyed the terms of an order issued under chapter 10.14 RCW, the court may find the person in contempt of court and may, as a sole sanction for such contempt, commit the person to juvenile detention for a period of time not to exceed seven days.

§ 7.21.040. Punitive sanctions -- Fines

(1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.

(2) (a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(d) If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(3) The court may hold a hearing on a motion for a remedial sanction jointly with a trial on an information or complaint seeking a punitive sanction.

(4) A punitive sanction may be imposed for past conduct that was a contempt of court even though similar present conduct is a continuing contempt of court.

(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars or imprisonment for not more than one year, or both.

§ 7.21.050. Sanctions -- Summary imposition -- Procedure

(1) The judge presiding in an action or proceeding may summarily impose either a remedial or punitive sanction authorized by this chapter upon a person who commits a contempt of court within the courtroom if the judge certifies that he or she saw or heard the contempt. The judge shall impose the sanctions immediately after the contempt of court or at the end of the proceeding and only for the purpose of preserving order in the court and protecting the authority and dignity of the court. The person committing the contempt of court shall be given an opportunity to speak in mitigation of the contempt unless compelling circumstances demand otherwise. The order of contempt shall recite the facts, state the sanctions imposed, and be signed by the judge and entered on the record.

(2) A court, after a finding of contempt of court in a proceeding under subsection (1) of this section may impose for each separate contempt of court a punitive sanction of a fine of not more than five hundred dollars or imprisonment for not more than thirty days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction under this subsection may not exceed more than five hundred dollars for each day the contempt continues.

§ 7.21.060. Administrative actions or proceedings -- Petition to court for imposition of sanctions

A state administrative agency conducting an action or proceeding or a party to the action or proceeding may petition the superior court in the county in which the action or proceeding is being conducted for a remedial sanction specified in RCW 7.21.030 for conduct specified in RCW 7.21.010 in the action or proceeding.

§ 7.21.070. Appellate review

A party in a proceeding or action under this chapter may seek appellate review under applicable court rules. Appellate review does not stay the proceedings in any other action, suit, or proceeding, or any judgment, decree, or order in the action, suit, or proceeding to which the contempt relates.

§ 7.21.900. Severability -- 1989 c 373

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on December 22, 2010 I caused service of the foregoing on each and every attorney of record herein:

VIA FIRST CLASS MAIL

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Renee S. Townsley, Clerk
Court of Appeals, Division III
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DATED this 22nd day of Dec. at Seattle, Washington.


Jeanne Perrin, Legal Assistant