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Court of Appeals
Division III
State of Washington
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No. 361365

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION III

SHELBY BARCHASCH
Appellant

v.

GONZAGA UNIVERSITY and SANDRA SIMPSON
Respondents

REPLY TO RESPONDENTS' SUR-REPLY BRIEF

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I. INTRODUCTION

Defendant Gonzaga University and Sandra Simpson were granted a 26(c) protective order in Spokane County Superior Court over documents Plaintiff retained while an intern at University Legal Clinic. Defendant then went on to get an order of contempt against Plaintiff for violation of the Court's order. The finding of contempt and the issuance of the protective order are currently before this Court.

After failing to address *Seattle Times INC. v. Rhinehart* in their reply brief Defendant made a motion to file a sur-reply brief. Over Plaintiff's objections the motion was granted. Defendant used the sur-reply brief to misstate not only the holding in *Rhinehart*, but also to include two new cases which pertained to the issues at hand in no way and to falsely accuse Plaintiff of "unlawfully" or "wrongfully" coming into possession of the documents covered by the protective order.

II. ARGUMENT

A. SUMMARY OF THE ARGUMENT

In the Defense's sur-reply brief addressing the holding in *Seattle Times v. Rhinehart*, Defendant states that: 1) ***Rhinehart* does not address the scope of CR 26(c) and is limited to first amendment considerations;** 2) **that Plaintiff wrongfully took the documents covered under the protective order;** 3) **that Gonzaga University is the rightful custodian of the documents covered under the protective order;** 4) **that Plaintiff has no first amendment right in this matter;** 5) **that Plaintiff assured Gonzaga he had not retained client files.**

Each of the above listed statements are completely false.

1) *Rhinehart* clearly demonstrates that CR 26(c) protective orders are only intended to prevent the dissemination of information gained through the discovery process and established the frame work under which a protective order does not offend the first amendment. 2) Plaintiff created, drafted and was given all documents outside of case notes created by others who worked on the cases in; furthermore two clients have expressly waived confidentiality and a third was frequently told her actions during the case made confidentiality and privilege impossible. 3) **Gonzaga University has no lawful right to the documents they were granted a protective order over.** Gonzaga University and University Legal Assistance are two separate business entities. University Legal Assistance, who may arguably be a lawful custodian of the documents covered under the protective order had no legal standing to bring the motion for a protective order, as they were not a party to the proceeding and Gonzaga University is not in anyway a custodian of these documents. 4). The cases cited by Defendant have no relevance to the issue at hand. In neither case is there the issuance of a protective order, in both cases statutes were violated and in both cases the information was published. In the case at hand there **is a protective order, no statutes were violated** and the **information has not been published.** 5) No assurances were give Gonzaga University Legal assistance that Plaintiff did not retain confidential client files. Plaintiff DID NOT sign and return the standardized form stating that such was done at the end of the Fall 2015 semester.

**B. RHINEHART DOES EXAMINE, CLARIFY AND RULE ON THE SCOPE OF
CR 26(c)**

“We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.” *Seattle Times Inc. v Rhinehart*, 467 U.S. 20, 104 S.Ct. at 37.

“The Court today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment.” *id.* “The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.” *Seattle Times* at 35 & 36. “Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c).” *id.*

The notion put forth by Defendant on page 2 & 3 of their sur-reply brief that the quote below pertains only to the scope of the protective order in *SEATTLE TIMES INC.* is absolutely preposterous.

As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes.

Especially when taken in correlation with the other statements made by the Court. Defense counsel is very emphatic about the use of the words, “*As in this case,*”. Taking the words, “*in this case*” to mean the Court’s ruling only speaks of the single protective order at issue. However if that were the case the quote would read: “As in this case, the protective order prevents Appellant from...”. But this is not what the Court said. The Court said “such a protective order.” Furthermore, had Defendant bothered to read the remained of the paragraph from which they cited

“In sum, judicial limitations on a party’s ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context. Therefore, our consideration of the provision for protective orders contained in the Washington Civil Rules takes into account the unique position that such orders occupy in relation to the First Amendment.” *Seattle times v. Rhinehart page 34*

SEATTLE TIMES INC. v RHINEHART clearly establishes the purpose and scope of 26(c) Protective orders. The Court explicitly says “our consideration of the provision for a protective order...”. The Court lays out the purpose and the standards of appropriate protective orders, quite clearly.

The intended purpose of 26(c) protective orders is to “limit the dissemination of information gained through the civil discovery process.” This is because, “the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.” *Seattle Times INC. at 35 & 36.*

The Court clearly defines the scope of 26(c) protective orders as being. 1) entered on a showing of good cause 2) limited to the context of pretrial civil discovery, 3) cannot restrict the dissemination of the information if gained from other sources.

The protective order at issue in this matter was: 1) not limited to information gained through per-trial discovery. The documents at issue were in Plaintiff's possession for over two years at the time the protective order was issued. 2) These documents had no place in the litigation at hand. Defendant is not even certain what number of documents are covered by the protective order. No documents covered under the order were ever given to defense counsel through the discovery process. 3) The original protective order prohibited Plaintiff from even providing clients, the rightful owners of the files with them.

Plaintiff's interpretation of *Rhinehart* and the scope of 26(c) set out by the Court is further supported by a reading of the Washington State Practice. The Washington State Practice states the following regarding 26(c) protective orders:

(1.3.181) Protective Orders: Rule 26(c).

(1.3.182) Application. Applies to discovery generally

and is available to protect a party or other persons from

whom discovery is sought.

Despite Defendant's best efforts, it is impossible to state that, *Rhinehart* does not establish the frame work under which CR 26(c) protective orders may be issued and what may be covered. In the case at hand the protective order issued by Judge Dixon clearly violated the frame work set out by the United State's Supreme Court in *Seattle Times Inc. v. Rhinehart*.

**C. DEFENDANT IMPROPERLY CHARACTERIZES THE PARTIES, THEIR
STANDING IN THIS CASE AND THE POSSESSION AND RETENTION OF
THE DOCUMENTS COVERED BY THIS ORDER.**

In the sur-reply brief filed by Defendant Gonzaga University and Sandra Simpson defense counsel repeatedly asserted that Plaintiff wrongfully or illegally obtained the documents being covered by the protective order. Furthermore Defense counsel goes on to assert that Gonzaga University is the proper and lawful custodian of the client files. Both of these statements if not a flat out lie on the part of Defense counsel, are incorrect.

It was improper for Defendant Gonzaga University or Sandra Simpson to claim any right to ownership of the files protected by this order and a clear abuse of discretion for Judge Dixon to grant such an order for the following reasons:

Gonzaga University, the Defendant in this case, is not the same entity as University Legal Assistance. The Defendant in this case “The Corporation of Gonzaga University, UBI number 328 008 839 and the registered agent Maureen McGuire. University Legal Assistance, not a party to this case has a UBI number of 601 092 145, is their own registered agent and has entirely different governors as Gonzaga University. The fact that two separate companies share the same legal counsel and interests, does not give University Legal Assistance standing in this case. Nor does it authorize Gonzaga University to take action on behalf of or in place of University Legal Assistance.

Plaintiff was provided and acquired the documents covered under the protective order during his time at University Legal Assistance. However, Plaintiff did not sign or return to his clinic instructor the form stating that he had removed all client files and information from his computer at the conclusion of his time with the clinic. Furthermore, two clients have signed waiver of confidentiality agreements, as they just like Plaintiff wish to see the injustices and malpractice committed by Genevieve Mann righted. Considering that University Legal Assistance did not provide clients with the entirety of their case files at the conclusion of representation, yet lead clients to believe such, makes their lawful and proper custodianship, as asserted by defense counsel, of the documents under the protective order questionable.

**D. THE ADDITIONAL CASES CITED BY THE DEFENSE IN THEIR BRIEF
HAVE NO RELEVANCE TO THE CASE AT HAND.**

Defendant has included two, completely new cases in their brief dedicated solely to the examination of *Seattle Times INC*. The new cases used by Defendant are completely irrelevant in examining g Rhinehart or these proceedings. Defendant attempts to use *Peavy v. WFAA-TV INC*, as justification for denying Plaintiff's first amendment right, acknowledged by the United State's Supreme Court in *Seattle Times inc. v Rhinehart*. *Peavy* however, does not involve a protective order, the information was gained through direct violation of a statute and the information was disseminated. *Bartnicki v Vopper* on the other hand would hold a protective order which touches on "a matter of public interest" to strict scrutiny. Furthermore the holding

in the case was that a news outlet, who publishes illegally obtained information, provided by a third party is not civilly liable.

In the case at hand no law was violated, and the information has not been disseminated outside the opposing party and the clients. Mr. Konkright falsely asserts that Plaintiff “unlawfully” or “wrongfully” possessed the files at issue. Just as Mr. Konkright falsely asserts his client Gonzaga's legal or professional right to these documents. Plaintiff undoubtedly has more of a legal right to the documents than Defendant Gonzaga University or Sandra Simpson.

III. CONCLUSION

The Court cannot accept Defendant's ridiculous and self-serving interpretation of Rhinehart or the proper use of a 26(c) protective order. It was an abuse of the legal process for the Defendant to attempt to use a 26(c) protective order in the manner they did. Especially given the Defendant's had no legal standing to bring the motion and no right to the files protected by the order. It was an abuse of discretion on the part of Judge Dixon to grant such an order and the subsequent contempt order. Thus Defendant's interpretation cannot be seriously considered by this Court in finding Judge Dixon abused his discretion in granting what can only be called an abuse of the legal process.

RESPECTFULLY SUBMITTED THIS 6TH DAY OF JULY 2019.

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CERTIFICATE OF SERVICE

1. I HERE BY CERTIFY that on the 7th, day of July 2019, I cause to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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