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No. 361365

COURT OF APPEALS, DIVISION 3  
OF THE STATE OF WASHINGTON

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Shelby Barchasch, Appellant,  
v.  
Gonzaga University and Sandra Simpson, Respondent

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REPLY BRIEF OF APPELLANT

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Shelby Barchasch,  
Pro Se  
13711 SE 256<sup>th</sup> Pl  
Kent, WA 98042

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## I. INTRODUCTION

The issue of debate in this matter is whether protective orders issued under CR 26(c) can be issued to apply to documents already in a parties possession prior to litigation and if granting a protective order which further extends to require the destruction of such documents is an abuse of discretion. Furthermore even if 26(c) were to extend beyond information gained through discover, would it violate Appellant's first amendment right to free speech and fourth amendment right of privacy. The Superior Court granted a discovery protective order, preventing plaintiff from possessing, discussing or revealing documents, many of which had been created by or pertained to Plaintiff, all of which had been in Plaintiff's possession for over a year at that time litigation began, and over two years from the time the order was issued.

This Court should reverse that order and all subsequent orders granting the Superior Court continued jurisdiction over the mater. It is undisputed in both case law and court rules that CR 26(c) applies to information gained through the discovery process, not all documents which are in a party's possession at the time of litigation.

Appellant further seeks review of the Trial Court's finding of contempt and order of sanctions on the issues of: 1) whether incarceration of Appellant for a predetermined, fixed period of time, enforceable only upon violation of the

original protective order can constitute coercive measures or punitive measures.

2) If the Trial Court's finding was supported by evidence. 3) Was it a violation of Appellant's 5<sup>th</sup> amendment right to procedural due process when the Trial Court failed to follow the statutory process laid out in RCW 7.21.040. 4) Was Appellant's right of due process violated when the Trial Court added prohibited acts to the protective order upon the second motion of contempt?

Appellant asks this Court to reverse the order of the Trial Court granting of the CR 26(C) order and the subsequent finding contempt and imposing sanctions on Appellant as it's findings have fact have no basis in fact or law.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in granting the CR 26(c) protective order for documents not being sought through discovery by Plaintiff; but were in fact in his possession for over a year prior to litigation.
2. The Superior Court erred in granting a CR 2(c) protective order that unconstitutionally violated plaintiff's first amendment freedom of speech and his right to privacy.
3. The Superior Court erred in denying Plaintiff's motion for reconsideration.
4. The Superior Court erred in retaining continued jurisdiction over the protective order after the dismissal of all claims.

5. The Superior Court erred in granting an order for which it was clearly uncertain, from the language “and/or”, whether Appellant had actually violated the protective order.
6. The Superior Court erred in granting an order of contempt for actions which were not prohibited by the original protective order.
7. The Superior Court erred in denying Appellant's right to due process by finding Appellant in contempt of Court and ordering punitive measures instead of remedial measures appropriate for a coercive contempt violation.
8. The Superior Court erred by abusing it's power of contempt when ordered Appellant sentenced to 48 hours in jail, if Appellant violates the order, as the Judge Dixon only possessed the authority in this situation, to impose remedial sanctions, not punitive as he did.

#### **IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does Court Rule 26(c) permit a party to place a protective order over documents in a party's possession for years before the discovery process begins? Errors: 1, 3 and 4.
2. Is it constitutionally permissible to place a prior restraint, using CR 26(c) on documents in a party's possession prior to the contemplation of litigation.

3. Can a fixed period of incarceration, for coercive contempt, enforceable only after Appellant violates the order, be considered a coercive measure?
4. Appellant's fifth amendment right to due process
5. Is it appropriate to use non-coercive, but instead punitive measures in a civil contempt proceeding where the finding and sentencing is ordered by the same Judge.

#### **IV. STATEMENT OF THE CASE**

When Defense counsel learned that Plaintiff had retained documentation proving evidence of their client's improper actions they sought the protective order at issue. (CP 17) Adams County Judge Steve Dixon granted the order and denied the reconsideration.(CP 34) (RP 16) Defendant's Counsel based their entire argument off CR 26(c)(7), citing their request for the files as the reason they pertained to discovery. (RP 16) This appeal stems from a lawsuit filed by Plaintiff after false statements were made to the Washington State Bar Association regarding him by Defendants and the protective order granted during those proceedings. (CP 5) (RP 16)

A second motion for contempt was made by Respondent. (CR 75) The Trial Court was clearly uncertain regarding what Appellant had done to violate the

Court's protective order. (CP 82) Understandably as no evidence was presented or found by the Court to support a finding of contempt other than Defendant's affidavit. (RP 20-26) To remedy this additional terms were added to the acts prohibited under the protective order. (CR 82) The Trial Court then sentenced Appellant to 48 hours incarceration should he violate the protective order. (CR 82). While allowing Plaintiff to purge the contempt by not engaging in violation of the protective order, giving the guise of remedial contempt. (CR 82) The order however was one appropriate for punitive contempt. (CR 82)

## **V. SUMMARY OF ARGUMENT**

Court Rule 26(c) gives the trial Court the authority to place limitations on the discovery process. It does not authorize the court to invade a party's privacy to destroy documents obtained outside of discovery and prohibit the party from ever disseminating the information. Coercive contempt may be used so long as it serves a coercive function. Punitive Contempt, to punish a violation of a court order, requires due process be followed. After the prosecutor chooses to bring charges, a different Judge must preside over contempt hearings than the Judge initially finding contempt. A fixed period of incarceration, occurring after the Court's order has been violated, cannot be said to serve a coercive purpose.

## VI. ARGUMENT

### **VI (a) The Protective Order Should Not Have Been Granted, As CR 26(c) Is Only Intended To Prevent Abuse Of The Discovery Process, Not Shield A Party From Embarrassment Resulting From Information Gained Outside Of Discovery.**

Defendant's argument supporting the protective order granted in Spokane County Superior Court fails on every point. How two individuals licensed to practice law in Washington State, can in good faith, fail to understand that CR 26(c) governs the discovery process and information shared during discovery, is mind boggling. Defendant fails to address the ruling of the United States Supreme Court in *Seattle Times Co. v. Rhinehart*, 104 S. Ct.2208 (1984 which explicitly prohibits protective orders like the one at issue in this case.

Despite quoting the Court Rule in their reply brief, Defendant does not seem to understand the language of CR 26(c). Washington State Court Rule 26(c) in its text states "upon motion by a party or person **from whom discovery is sought**". Defendant seems unable or unwilling to understand that CR 26(c) is only intended to protect information a party shares with the opposing party during the discovery process. CR 26(c) does not authorize a Court authority to suppress

information a party gained outside of discovery. It is this limitation on CR 26(c) that keeps the rule from violating a parties First Amendment rights.

Defense counsel seems to believe there is a difference between the first amendment protection of the press and that of an individual. This, like all arguments asserted by Defense Counsel in this case are incorrect. Concepts understood by almost any law student who has taken constitutional law and civil procedure. Whether this is due to defense counsel's failure to understand the law involved or an intentional abuse of the legal process is unclear. However given *Rhinehart's* clear prohibition on the protective order and Defendant's failure to even address this prohibition; one would have to give Defendant more than the benefit of the doubt to believe the motion for the protective order and all supporting arguments since were made in good faith.

Plaintiff's interpretation and understanding of CR 26(c) is affirmed by the Washington State Supreme Court and the United States Supreme Court in *Seattle Times Co. v. Rhinehart*. *Rhinehart* unequivocally prohibits protective orders such as the one granted by Judge Dixon in this case. The words used by the United States Supreme Court could not have been clearer in *Rhinehart* stating, "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."

*Seattle times v. Rhinehart* 467 U.S. 20 (1984) pg 35

An attempt to intentionally use discovery rules to conceal information gained outside of Court proceedings constitutes an abuse of the legal process. However, whether this abuse was an intentional abuse of the discovery process or mere incompetence on the part of Mr. Konkright and Ms. Hanson is not the question before this Court. The ruling in Rhinehart, which the Defense chose not to address in their reply, leaves no room for interpretation on this matter. 26(c) only gives the Court the authority to restrict the dissemination of information gained through the discovery process. Granting Defense's motion for a protective order by Judge Dixon clearly constitutes an abuse of discretion and should be reversed.

**VI (b) The Order Of Contempt Judge Dixon Gave Was Clearly Punitive Contempt And Served No Coercive Purpose, Yet Followed The Procedure For Coercive Contempt.**

RCW 7.21 clearly establishes the difference between civil and criminal contempt and the procedures to be followed for each. RCW 7.21.010 clearly reads "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." RCW 7.21.040 lays out the process which must be followed to impose criminal or punitive sanctions.

Defendant states in their reply brief that a sentence is criminal if it is “determinate and unconditional.” Determinate is defined as having exact and determined limits or fixed. For example, incarceration for forty-eight hours would be said to have determined limits or be for a fixed period of time.

Defendant’s argument that the measures were coercive fails, as the contempt is only punishable after the violation of the court order occurs. Judge Dixon attempted to disguise his sentencing of criminal contempt as being coercive, clearly showing Judge Dixon had knowledge of the improper nature of his actions. There can be nothing coercive about a finding of contempt once the order has been violated. If that were the case, every single jail sentence handed out by a criminal Court would be coercive.

Furthermore the jail sentence is fixed, which cannot be said to have coercive powers. Fixed is a synonym for determinate, an element of criminal contempt. A fixed amount of time is only appropriate in cases of criminal contempt. In this case once the jail term is imposed Plaintiff has no keys to his release. Plaintiff only holds those keys prior to incarceration or violation of the Court order, not during the period of incarceration. This is by definition criminal contempt and was an abuse of authority on the part of Judge Dixon and should be reversed.

## VII. CONCLUSION

This Court should reverse the protective order, as it was an abuse of the Court's discovery process for defendant to ask the Court for the order and the ruling granting the order constituted a clear abuse of discretion. . Furthermore this Court should reverse the finding of contempt and any sanctions ordered as it violates Appellant's right to due process. Defendant has shown a clear lack of understanding or disregard for the legal process during these proceedings. Defendant abused the discovery process when requesting a protective order over documents not gained through discovery. Defendant further abused the proceedings when seeking a criminal contempt order and not objecting to it when ordered. Defendant has since defended their abuse of the legal process, despite unambiguous prohibitions for such protective orders established by the United States Supreme Court. At no time did Defendant challenge the Court's ruling in Rhinehart, they instead ignored the dictum all together. Finally Defendant has drug out the appeal proceedings through the request of unnecessary documents and motions for extensions of time.

Furthermore, the Defendant's entire argument amounts to the assertion that they shouldn't have to follow the law because they don't want to. Defendant seems to lack a rudimentary understanding of Court rules, the ability to properly research the applicable law and an improper understanding of which parties hold the right to confidentiality in the attorney/client relationship. This has resulted in

Defendant abusing the legal process and wasting a large amount of the Court and Plaintiff's time and resources. It would not be improper for this Court, in accordance with RAP 18.9 to order compensatory damages or sanctions against Defendant. Defendant's reply brief was so devoid of any legal or reasonable basis for any of their actions Plaintiff should be awarded cost and reasonable legal fees.

Defendant provided no legal basis on which challenged the United States Supreme Court ruling in *Rhinehart*. Which unequivocally rules a 26(c) protective order only applies to information gained **through the discovery process** and does not protect information gained through other sources. Furthermore, *Rhinehart* **authorizes** the dissemination of information, identical to that gained through discovery, if gained outside of discovery.

The difference between punitive and remedial contempt are clearly defined. The process which must be followed in each case and what authority a Judge has to impose sanctions is clearly defined. Defendant acknowledges a determinative sentence is only appropriate in punitive contempt. A sentence of forty-eight hours in jail is fix, or determinative.

Both of the rulings being appealed in this case constitute a clear abuse of Judge Dixon's discretionary authority. Both the protective order and the finding of contempt should be reversed.

May 14, 2019

Respectfully submitted,

Shelby Barchasch  
*Shelby Barchasch*

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Signature

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**CERTIFICATE OF SERVICE**

I HERBY CERTIFY that on the 15<sup>th</sup> day of May, 2019 I caused to be served a true and correct cop of the foregoing by method indicated below and addressed to all counsel of record as follows:

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