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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 361365

COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

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

BRIEF OF APPELLANT

Shelby Barchasch,
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No. 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.

No. 3 The Superior Court erred in denying Plaintiff's motion for reconsideration.

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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 5th 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 the 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 and prohibit the party from ever speaking of the documentation. Pervasive 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 cannot be considered coercive.

VI. ARGUMENT

VI (a) The Protective Order Should Not Have Been Granted As CR 26(c) Is Only Intended To Protect A Party From Discovery From The Requesting Parties Use Of.

It has long been established that “Any system of prior restraints of expression comes...bearing a heavy presumption against its constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713 (1971) Court Rule 26(c) clearly states “Upon motion by a party or by the person from whom discovery is sought” Furthermore it has been established that “The discretion conferred by CR 26 affords the court many options in managing discovery.” *King v. Olympic Pipeline Company* 104 Wash.App. 338 (2001) A protective order granted in the discovery process, is intended to protect the health and free sharing of information between parties. *143 Wn.2d 895, O’CONNOR v. DSHS*. Civil Rule 26(b) provides the scope and limits of discovery. *ID. Seattle Times v. Rhinehart*: makes it very clear that protective orders are only for information gained through the discovery process. *754 P.2d 1243, 51 Wash. App. 561* “*Since the limitaitons imposed by a protective order pertain only to information produced via pretrial discovery...*” *Seattle Times Co. v. Rhinehart, 104 S. Ct.2208 (1984)*

It seems impossible to read the cases and Court Rules involving “CR 26(c) Protective orders” without understanding that its purpose is intended to protect an abuse of the discovery process. An abuse of discovery occurs when discovery is used to gain and disseminate information outside the court proceedings. CR 26(c) does not authorize the court to reach outside of discovery, order destruction of files and indeterminate prohibition on possession of documents, a party possessed prior to litigation. It was improper for the defense to bring this motion, seeing as nothing was being sought from the defendant. Unlike Defense counsel stated to the court, a parties desire to discover documents, does not bring those documents into the area covered by CR26(c).

Furthermore even if CR 26(c) was allowed to reach outside of discovery and attach to every document to have ever come into a parties possession, a parties desire to conceal documentation which was in the opposing parties' possession prior to litigation does not override the party possessing the information's first amendment right to speech or the right to invade the parties' constitutional right to privacy. Usually conflicting rights, however in this situation both violations occurred against Appellant's rights.

If the Defense's arguments in support of the protective order were proper, it would have a chilling effect on holding corporations accountable for their actions. Whistle-blowers would be limited to a situation where everything was based upon the “he said, she said”. The Superior Court should not have granted a protective

order under CR 26(c), for documents rightfully in Plaintiff's possession prior to any intention of litigation.

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.

In the case at hand Judge Dixon was presiding over a civil contempt proceeding. The order handed down however was clearly punitive in nature, as it is for a fix period of time and can only be enforced upon violation of the protective order. Appellant's right to due process was violated when Judge Dixon skipped the requirements of RCW 7.21.040 and handed down a criminal sentence under the pretext of a civil contempt hearing.

Appellant's right to due process was further violated by the additional prohibitions added to the protective order. Specifically the "threatening to release" documents, the only act for which any evidence was presented. A finding

of contempt requires that a party in contempt willfully violate the court order. A party cannot willfully violate terms which are not present in the original protective order. These terms were added as a result of the Trial Court's inability to reach the clear and convincing burden of proof required. No evidence was presented to establish Appellant violated the terms of the 26(c) protective order. Even if such evidence had been presented Judge Dixon only had the authority to impose remedial contempt sanctions, not punitive. RCW 7.21.040

VII. Cost

RCW 4.84.010 allows for the award of cost by the prevailing party. Appellant was deemed indigent by the Trial Court, however the Trial Court Clerk failed to file the consolidation of the appeals in this case prior to the review by the Washington State Supreme Court. Appellant should be awarded cost if he prevails in the matter.

VIII. CONCLUSION

This Court should reverse the protective order, as it was an abuse of the Court's discovery process. Furthermore this Court should reverse the finding of contempt and any sanctions ordered as a result of as it violates Appellant's right to due process and the record does not support a finding of willfully violating the protective order issued by the Trial Court and the sanctions were inappropriate for

a civil contempt hearing.

February 4, 2019

Respectfully submitted,

Shelby Barchasch
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Signature

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Appellants Brief
to Kelly Konright, Attorney for Gonzaga University & Sandra Simpson
at 717 W Sprague Ave STE 1600 Spokane WA 99001 postage prepaid, on
[date] 2/5/2014.


(Signature)

I certify (or declare) under penalty of perjury under the laws of the State of Washington
that the forgoing is true and correct:

2/6/2014
(Date and Place)


(Signature)