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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 361365

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION III

SHELBY BARCHASCH

Appellant,

v.

GONZAGA UNIVERSITY and SANDRA SIMPSON

Respondents.

RESPONDENTS' SUR-REPLY BRIEF

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I. INTRODUCTION

Appellant Shelby Barchasch (hereinafter “Mr. Barchasch”) filed Appellant’s Brief on or about February 4, 2019. Respondents Gonzaga University and Sandra Simpson (collectively referred to as “Gonzaga” herein) filed Respondents’ Brief on May 13, 2019. Mr. Barchasch filed his reply brief on or about May 14, 2019.

In Appellant’s Reply Brief, Mr. Barchasch cited *Seattle Times, Inc. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199 (1984), for the proposition that protection orders cannot prevent the dissemination of information that was requested during discovery if the party restricted by the protection order obtains the same documents through alternative and wrongful means. Mr. Barchasch did not argue this proposition in his opening brief. Accordingly, Gonzaga filed a motion to allow Gonzaga to file a sur-reply brief to address Mr. Barchasch’s treatment of the *Rhinehart* case in Appellant’s Reply Brief.

Mr. Barchasch opposed Gonzaga’s motion, and filed a motion for sanctions against Gonzaga. The hearing on both motions occurred on June 26, 2019. On June 27, 2019, Court of Appeals Commissioner Wasson granted Gonzaga’s motion to file a sur-reply brief and denied Mr. Barchasch’s motion for sanctions.

In accordance with Commissioner Wasson's order, Gonzaga files this sur-reply brief limited strictly to addressing Mr. Barchasch's discussion of *Seattle Times, Inc. v. Rhinehart* in Appellant's Reply Brief.

II. ARGUMENT

In his reply briefing, Mr. Barchasch asserts that *Seattle Times, Inc. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199 (1984), held that CR 26(c) limits protection orders only to information obtained exclusively through the discovery process. In other words, if the information was *also* obtained wrongfully outside discovery (as it was here by Mr. Barchasch), then Appellant argues that the *Rhinehart* holding prevents courts from issuing any protection order. *Reply Brief of Appellant*, p. 11-12. Mr. Barchasch's assertion is incorrect for the reasons discussed below.

A. *RHINEHART* DOES NOT RULE ON THE SCOPE OF CR 26(C).

The language relied upon by Mr. Barchasch does not rule on the scope of CR 26(c). Rather, it only describes the scope of the specific protection order at issue in that appeal.

In his response brief, Mr. Barchasch quotes only a portion of *Rhinehart*. The full quote is set forth below:

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.

Rhinehart, 467 U.S. at 34; 104 S.Ct. at 2208 (emphasis added). This quote merely states that the language of the protective order in the *Rhinehart* case (i.e. "in this case") prevented dissemination of information obtained through discovery. This language does not express any opinion on whether CR 26(c) allows for the protection of sensitive information which was both requested during discovery and wrongfully possessed by Mr. Barchasch.

B. *RHINEHART'S* HOLDING IS LIMITED TO FIRST AMENDMENT CONSIDERATIONS THAT ARE NOT IMPLICATED IN THIS MATTER.

The issue in *Rhinehart* was whether the First Amendment of the United States Constitution prevents a trial court from issuing a protection order which forecloses a litigant from disseminating information that they obtained (1) lawfully and (2) only through the litigation discovery process. *Rhinehart*, 467 U.S. at 34; 104 S.Ct. at 2208.

The issue before this Court is starkly different than the issue presented in *Rhinehart*. The issue here is whether the First Amendment prevents the trial court from issuing a protection order which prevents Mr. Barchasch from disseminating information (1) which consists of confidential attorney-client information regarding third parties, (2) for

which Gonzaga is the lawful custodian, (3) which Mr. Barchasch obtained wrongfully, (4) which Gonzaga learned during discovery was unlawfully in Mr. Barchasch's possession, and (5) which Gonzaga thereafter requested from Mr. Barchasch via discovery.

The First Amendment of the United States Constitution does not confer a right on individuals to disclose records which they – like Mr. Barchasch – wrongfully obtained. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 193 (2000) (government action prohibiting person from disseminating information they wrongfully obtained does not violate First Amendment of United States Constitution). Indeed, the United States Supreme Court has never held that the First Amendment confers a right on a person to publish information which they wrongfully obtained. *Bartnicki v. Vopper*, 532 U.S. 514, 528-29; 121 S.Ct. 1753, 1762 (2001).

Here, it is clear that Mr. Barchasch's possession of confidential law clinic client records is wrongful, and therefore he does not have a First Amendment right to disclose the same. Mr. Barchasch had possession of such documents only by virtue of the fact that he participated in the Gonzaga law clinic ("Clinic") while he was a law student. At the time Mr. Barchasch commenced his lawsuit, he was no longer a student at Gonzaga, and hence did not have any continued involvement in the Clinic. At the conclusion of his work in the Clinic, Gonzaga's express policy

required Mr. Barchasch to remove all Clinic client files from his computer. CP 491, ¶ 6; CP 500; CP 502. Mr. Barchasch assured Gonzaga that he complied with the policy, but his assurance was false. *Id.*

Not only did Mr. Barchasch retain the records in violation of the Clinic's policy, but he later wrongfully accessed the Clinic computer system and downloaded additional documents. RP 7-8 (May 10, 2018); CP 519; see CP 502 compared to CP 548-549.

Based on the above, the Superior Court expressly noted that Mr. Barchasch had no legitimate right to possess client files. RP 16 (May 10, 2018) ("With respect to the Motion to Compel, Mr. Barchasch, those records are not yours. You are not a lawyer. Those records belong to the clinic, and you, frankly, should not have them nor should you discuss them nor are you an attorney any longer with those clients.").

Based on the facts of record and both the *Peavy* and *Bartnicki* holdings, *Rhinehart* does not mean, and indeed cannot be interpreted to mean that the protection order in this case violates the First Amendment. The facts remain that the information is attorney-client privileged information regarding Gonzaga's law clinic clients, Mr. Barchasch has no right to possess the information, and Mr. Barchasch took the information without Gonzaga's permission or the permission of Gonzaga's law clinic clients.

Per the *Peavy* holding, Mr. Barchasch does not have a First Amendment right to disclose documents wrongfully in his possession. Since Gonzaga sought the information (which Mr. Barchasch wrongfully took) through the litigation discovery process, the protections of CR 26(c) were and remain available to the trial court to prevent Mr. Barchasch from following through with his threats to publicly disclose the attorney-client privileged information of third parties.

III. CONCLUSION

For the foregoing reasons, Gonzaga respectfully requests that the Court find that the Superior Court did not err by issuing the Protective Order, finding Mr. Barchasch in contempt, and issuing remedial sanctions against him and that the court affirms the Superior Court's rulings.

RESPECTFULLY SUBMITTED this 2nd day of July, 2019.

LUKINS & ANNIS, P.S.

By


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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July, 2019, I caused 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:

Shelby Barchasch P.O. Box 403 Rearden, WA 99029 Pro Se	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (FAX) <input checked="" type="checkbox"/> Via email <u>sbarchasch@icloud.com</u>
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