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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 361365

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION III

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SHELBY BARCHASCH

Appellant,

v.

GONZAGA UNIVERSITY and SANDRA SIMPSON

Respondents.

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**RESPONDENTS' BRIEF**

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## **I. INTRODUCTION**

Appellant, Shelby Barchasch, is a graduate of Gonzaga University School of Law (“Gonzaga”). In 2016, Mr. Barchasch completed an application for the Washington State Bar Association (“WSBA”) Examination. As part of the review process, Gonzaga received a request from the WSBA to complete a Law School Certificate (“Certificate”) which called for specific information and supporting documentation regarding Mr. Barchasch. Gonzaga completed and returned the Certificate. Based upon the responses and documentation provided, Mr. Barchasch sued Gonzaga and its Associate Dean for Academic Affairs, Sandra Simpson.

Mr. Barchasch filed his lawsuit against Gonzaga and Professor Simpson on March 16, 2017 in King County. The suit was later transferred to Spokane County. He has not been represented by counsel.

After initiating his lawsuit, Mr. Barchasch made a myriad of accusations against various individuals, including non-parties working in Gonzaga’s University Legal Assistance (the “Clinic”). Mr. Barchasch worked in the Clinic for a short period of time as a student. Mr. Barchasch’s work in the Clinic brought him into contact with Clinic clients and allowed him access to Clinic client files.

During the pendency of the lawsuit, Gonzaga learned that Mr. Barchasch had wrongfully obtained and retained confidential Clinic client files and documents following the end of his work at the Clinic. Mr. Barchasch is not a lawyer, he is not an employee of the Clinic, and has no legitimate claim to any of the files or documents related to Clinic clients. Mr. Barchasch bragged to counsel about holding the confidential client information. He made repeated statements threatening to release the confidential information to third parties.

Based upon Mr. Barchasch's statements and the knowledge that he had confidential information, Gonzaga repeatedly demanded the return of the files and documents and also requested them through discovery. Mr. Barchasch refused to produce the files and documents via discovery and regularly taunted counsel with continued threats to release the files and documents.

Accordingly, Gonzaga filed a motion for a protective order with the Superior Court. The Superior Court entered an order on May 10, 2018 requiring, among other things, that Mr. Barchasch produce all copies of past or present Clinic client files, documents, or any other material that included client communications or work product. The order further prohibited him from (a) disclosing such information to third parties or (b)

retaining copies of client files, documents, or any other confidential material related to Clinic clients (“Protective Order”).

Mr. Barchasch moved for reconsideration of entry of the Protective Order. The motion for reconsideration was denied.

Mr. Barchasch continued to act out, forcing Gonzaga to file motions with the Superior Court for an order of contempt. On May 23, 2018, Gonzaga filed a motion for contempt stating that Mr. Barchasch had failed to comply with the Protective Order. In response, Mr. Barchasch moved for a voluntary dismissal of his claims. On June 14, 2018, the Superior Court heard oral argument on the matter. Gonzaga requested that if Mr. Barchasch’s motion to dismiss his case was granted, the Superior Court retain jurisdiction over enforcement of the terms of the Protective Order. Mr. Barchasch stated to the Court that he did not object to continued jurisdiction and that “it makes sense....”.

Gonzaga filed another motion for contempt with the Superior Court on August 3, 2018. The motion was based upon Mr. Barchasch’s claims that he had retained confidential Clinic client information and intended to release such information to third parties. Mr. Barchasch failed to attend the hearing which took place on August 16, 2018. The Superior Court found Mr. Barchasch in contempt and ordered remedial sanctions.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The Superior Court did not err in granting Gonzaga's Motion for Protective Order because the records were requested pursuant to a legitimate discovery request, and Mr. Barchasch had no legitimate claim to retain the subject documents.

2. The Superior Court's entry of a Protective Order against Mr. Barchasch did not violate his First Amendment speech and Fourth Amendment privacy rights.

3. The Superior Court did not err in denying Mr. Barchasch's Motion for Reconsideration as he failed to articulate any reasonable basis for reconsideration.

4. The Superior Court did not err in retaining jurisdiction over the Protective Order because it had the authority to do so and Mr. Barchasch waived any objection.

5. The Superior Court did not err in finding Mr. Barchasch had violated the Protective Order and use of the words "and/or" does not demonstrate uncertainty by the court.

6. The Superior Court did not err in determining that Mr. Barchasch had violated the terms of the Protective Order and finding him in contempt.

7. The Superior Court did not err or deny Mr. Barchasch's due process rights by imposing remedial/coercive sanctions against him.

8. The Superior Court did not err in ordering remedial/coercive measures if Mr. Barchasch continued to violate the terms of the Protective Order.

### **III. STATEMENT OF THE CASE**

Mr. Barchasch was a law student at Gonzaga who worked in the Clinic for a short time. CP 471; CP 490. Upon the completion of his work in the Clinic, Mr. Barchasch was required to remove all files, documents, and information related to Clinic clients from his computer. CP 491 at ¶3(d), ¶4, ¶6, CP 500, CP 502. Mr. Barchasch acknowledged that all client files would be removed from his computer as required. *Id.*

After graduation from Gonzaga, Mr. Barchasch applied to become a licensed attorney with the Washington State Bar Association (hereinafter "WSBA"). *See* CP 261-291. As part of his application process, the WSBA required Gonzaga to fill out a Law School Certificate asking for several pieces of information regarding Mr. Barchasch's conduct. *Id.* Gonzaga completed the certificate and returned it to the WSBA. *Id.* Mr. Barchasch then sued Gonzaga and the Associate Dean of Student Affairs related to information provided by Gonzaga on the Law School Certificate. CP 471.

During the course of litigation, Gonzaga learned that Mr. Barchasch held an unknown number of confidential documents related to unnamed Clinic clients even though he was not an attorney and no longer associated with the Clinic. CP 514-517. Mr. Barchasch had wrongfully retained documents from his time as a student in the Clinic, despite having assured the Clinic that he would remove them from his computer, CP 489-492, CP 502, and had later downloaded additional documents without authority to do so, *see* CP 548-549.

In response, Gonzaga demanded the return of the confidential documents and requested them through formal discovery under the Washington Civil Rules. *See* CP 519; RP 16:3-5 (May 10, 2018). Mr. Barchasch refused to return the documents or produce them in discovery. CP 514; CP 519 (“In response to the discovery conversation...I [Mr. Barchasch] addressed [y]our client’s request for the documents in my response stating that the documents were work product, already in your client’s possession and contained confidential client information.”). Gonzaga moved the Superior Court for a Protective Order in order to (1) obtain the documents, and (2) protect the confidential information of Clinic clients from being disclosed to third parties. CP 477-488.

Gonzaga’s Motion for Protective Order was granted on May 10, 2018. The Superior Court explained during oral argument: “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.” RP 16 (May 10, 2018). The Protective Order (a) gave Mr. Barchasch one week to produce all confidential information; (b) destroy his copies of the records which he had no authority to retain; and (c) forbid him from disclosing the records to third parties. CP 16-17. Gonzaga brought a motion for contempt on May 23, 2018 stating that Mr. Barchasch had not complied with the May 10, 2018 Protective Order. CP 564-568.

On May 21, 2018, Mr. Barchasch filed a motion for voluntary dismissal of all of his claims. CP 575-577. In response, Gonzaga requested that the Superior Court retain jurisdiction to enforce the terms of the Protective Order in order to protect the confidential information of Gonzaga Clinic clients. CP 587-592.

During the hearing on the motions for contempt and dismissal, Mr. Barchasch stated under oath that he had already produced copies of all documents at issue and removed them from his computer. RP 13-15 (June 14, 2018). Gonzaga’s motion for contempt was denied. *See* RP 13-15 (June 14, 2018). When asked during the hearing by the Superior Court whether he objected to the court’s continued jurisdiction to enforce the

Protective Order, Mr. Barchasch did not object. RP 6:9-15 (June 14, 2018). Rather, he stated that “it makes sense” for the Court to retain jurisdiction.

Gonzaga brought a second motion for contempt on August 3, 2018 based upon renewed threats to release additional confidential Clinic client documents. CP 29-39. Mr. Barchasch did not attend the hearing. RP 20-21:4 (August 16, 2018). The Superior Court found Mr. Barchasch in contempt and imposed remedial sanctions. CP 84-86.

#### **IV. ARGUMENT**

Discovery orders are reviewed for an abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). Motions for reconsideration are likewise reviewed under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

A Superior Court abuses its discretion **only** if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons. *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 348, 16 P.3d 45, 50 (2000), as amended on reconsideration (Feb. 14, 2001) (*citing State v. Stenson*, 132 Wash.2d 668, 705, 940 P.2d 1239 (1997)). “Whether a court abuses its discretion in controlling discovery depends on the interests

affected and the reasons for and against the decision.” *Id.* (citing *Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 778, 819 P.2d 370 (1991)).

“The trial court possesses broad discretion to manage discovery in a fashion that will implement full disclosure of relevant information and at the same time protect against harmful side effects. To that end, the court can issue protective orders regulating the extent and manner of discovery.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 505-06, 933 P.2d 1036 (1997). A protective order may be granted to protect parties and third parties from various negative effects. CR 26(c). Upon motion and “good cause shown,” a court may “issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense.” *Id.* Good cause is demonstrated by showing that “specific prejudice or harm will result if no protective order is issued.” *McCallum v. Allstate Property and Cas. Ins. Co.*, 149 Wn.App. 412, 423, 204 P.3d 944 (2009).

**A. THE SUPERIOR COURT PROPERLY ISSUED A PROTECTIVE ORDER UNDER CR 26(C)**

Per Civil Rule 26(c):

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense....

CR 26(c) (emphasis added).

CR 26(c)'s broad scope encompasses Gonzaga's motion for a protective order to require Mr. Barchasch to both (1) produce the requested Clinic files and documents and (2) restrict his ability to retain and disseminate the confidential information. Mr. Barchasch admits that the confidential client documents and information were requested through discovery. CP 519-520 ("In response to the discovery conversation...I [Mr. Barchasch] addressed [y]our client's request for the documents in my response stating that the documents were work product, already in your client's possession and contained confidential client information.") The documents provided by Mr. Barchasch were received during litigation<sup>1</sup>.

Mr. Barchasch makes broad claims regarding CR 26(c) with little support. No language in CR 26(c) restricts the Court from compelling production of the requested client files as claimed by Mr. Barchasch. Rather, the clear language of CR 26(c) gives the Superior Court authority to act "upon motion by a party" and "for good cause shown" to "issue any

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<sup>1</sup>It remains unclear whether Mr. Barchasch ever actually produced all documents in his possession. Mr. Barchasch repeatedly implied that there were additional documents in his possession:

- "...you'll never know exactly what documents I have and don't have. CP 528.
- "...you can never really know where they've gone or are floating around online. No matter what I told you. You have no way of confirming what I tell you. You and your client will never know the answer with absolute certainty." CP 79.
- "Anyways [sic] as I was looking through things it turns out I did have more files than I realized." CP 45.

order which justice requires to protect a party or person...” CR 26(c) (emphasis added).

In its motion, Gonzaga demonstrated good cause, by specifically detailing the harm that would result if the Protective Order was not granted. CP 480-488, CP 529-534. Without the Protective Order, the information was vulnerable to breaches of attorney-client privilege and the work product doctrine. *Id.* In fact, Mr. Barchasch had specifically threatened to violate both of these important safeguards. CP 529-534; CP 524-528. Specifically, Mr. Barchasch made the following statements:

- “Keep an eye out in the Huffington post [sic] over the next couple of months.”
- “There is no point in your motion, the documents are already in the possession of members of the press and you’ll never know exactly what documents I have and don’t have.”

CP 524-528.

The attorney-client privilege “applies to any information generated by a request for legal advice.” *Soter v. Cowles Pub. Co.*, 131 Wn.App. 883, 903, 130 P.3d 840 (2006). The privilege protects “communications and advice between attorney and client.” *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981).

Mr. Barchasch wrongfully retained Clinic client files and documents. Mr. Barchasch had no authority to retain or obtain files and documents or remove them from the Clinic. Despite discovery requests for the documents and files, Mr. Barchasch refused to produce the documents based upon “confidentiality” and “work product.” CP 514-515, CP 519-520. While in the Clinic, Mr. Barchasch worked under the supervision and guidance of his supervisor, Genevieve Mann. CP 490. Under no theory could Mr. Barchasch reasonably deny producing the client files and documents based upon “confidentiality.”

Mr. Barchasch threatened that if he was “prevent[ed]...from practicing law, there [was] no reason for [him] to keep the[] documents confidential.” CR 519. Plaintiff’s statement is a thinly veiled threat to release the documents to the media if he does not achieve satisfaction. *See Id.*

Mr. Barchasch’s response to Gonzaga’s motion for protective order failed to offer *any* legal authority supporting his argument that the Protective Order should not be granted. CP 521-523. Instead, Mr. Barchasch attempted to justify his unreasonable possession of confidential client documents by making unrelated arguments about conspiracy theories related to the Clinic and Gonzaga. *Id.*

Under no theory, was Mr. Barchasch entitled to retain the confidential client documents. Mr. Barchasch is not an attorney and is not a clinic employee or student. Not being an attorney representing the Clinic's clients, he has no legitimate claim to retain Clinic client records much less any right to disclose them to third parties. Gonzaga demonstrated good cause existed through a credible threat to the attorney-client privilege and work product doctrine. The Superior Court properly issued the Protective Order to guard the security of Clinic client documents and confidential information contained therein.

**B. MR. BARCHASCH'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED**

Mr. Barchasch also makes broad claims alleging First and Fourth Amendment protection of the Clinic client documents held by him. Mr. Barchasch's claims of Constitutional protections are not founded.

**i. Mr. Barchasch is not Entitled to First Amendment Protection Regarding the Clinic Client Documents.**

Mr. Barchasch is not entitled to First Amendment protection to disclose confidential client documents wrongfully obtained by him. The First Amendment only protects disclosure of documents by persons who legally obtained them. *Bartnicki v. Vopper*, 532 U.S. 514, 515 (2001). It does not protect disclosure by persons who wrongfully or illegally obtained the documents. *Id.* Mr. Barchasch cites to *New York Times Co.*

*v. United States*, 403 U.S. 713 (1971) as support for his claim of First Amendment protection of the Clinic client documents in his possession. *New York Times Co.* does not support Mr. Barchasch's claim of protection.

In that case, the U.S. Supreme Court considered a claimed prior restraint on the press and protected the press' right to publish information (stolen by a third person) related to the Vietnam War, a matter of public concern. *Id.* In the present matter, Mr. Barchasch obtained the client files and the subject documents related to private individuals and their private disputes with third parties.

Notably, the Court in *New York Times Co.* did not discuss Constitutional protection for the one who wrongfully obtained the information. *Id.* The *Bartnicki* Court, 532 U.S. 515, in fact, determined that protection only extends to those who did not participate in wrongfully obtaining the information. Here, there can be no reasonable argument that Mr. Barchasch had any legitimate entitlement to any Clinic files or documents. Mr. Barchasch is not a lawyer, he is not a representative of any Clinic client, he is not an employee or intern working in the Clinic, and he certainly is not a member of the press who lawfully obtained the confidential information.

At the conclusion of his work in the Clinic, Mr. Barchasch was required to remove Clinic client files from his computer and assured Gonzaga that he was complying. CP 491 ¶6; CP 500; CP 502. Not only did Mr. Barchasch knowingly refuse to remove the files, 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. Mr. Barchasch has admitted that his motive for possessing the documents was personal. "...I thought there was a good chance I would have issues with Genevieve Mann. So I retained copies of my client case files, hours logged, etc... so that I would have evidence that what I was claiming about Genevieve was true." CP 519.

The Superior Court expressly noted that Mr. Barchasch had no legitimate reason to retain 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.")

As the individual who wrongfully obtained the confidential client documents, Mr. Barchasch is not entitled to First Amendment protection. *See Bartnicki v. Vopper*, 532 U.S. 514, 515 (2001). Moreover, Mr.

Barchasch is unable to articulate any reasonable public concern served by release of private parties' confidential legal documents.

ii. **Mr. Barchasch was not Entitled to Any Fourth Amendment Protection.**

Mr. Barchasch identifies “4<sup>th</sup> Amendment Privacy” as one of the “Constitutional Provisions” in the Table of Authorities of his Brief and makes a cursory statement that his constitutional right to privacy had been invaded by the Protective Order, but otherwise provides no discussion or argument related to the Fourth Amendment. *Brief of Appellant*, pgs. 4, 11. He provides no insight into how his alleged Fourth Amendment right to privacy was allegedly infringed upon. *Id.*

To invoke the protections of the Fourth Amendment, there must be a “justifiable,” “reasonable,” or “legitimate expectation of privacy” that is personal to the individual claiming invasion. *State v. Simpson*, 95 Wn.2d 170, 174, 622 P.2d 119 (1980) (negative treatment based on other grounds). Federal case law explains that a reasonable expectation of privacy is determined by analyzing whether a person has a subjective expectation of privacy and whether society is willing to accept that expectation as reasonable. *Katz v. United States*, 389 U.S. 347, 360 (1967). Mr. Barchasch provides no discussion into any of these issues.

It is unclear how Mr. Barchasch reasonably claims a right to privacy in documents he wrongfully obtained from Gonzaga which include confidential client documents that he seeks to make public. Mr. Barchasch has no justifiable, reasonable, or legitimate expectation of privacy in confidential client files obtained from Gonzaga and belonging to others.

**C. MR. BARCHASCH WAIVED ANY OBJECTION TO CONTINUED JURISDICTION CONCERNING THE PROTECTIVE ORDER**

Mr. Barchasch assigns error to the fact that the Superior Court retained jurisdiction to enforce the terms of the Protective Order after his case was voluntarily dismissed. Again, Mr. Barchasch offers no argument or law to support his assignment of error number 4.

Even if Mr. Barchasch had provided some argument as to this issue, he cannot escape the fact that he concurred in the ruling giving the Superior Court continued jurisdiction to enforce the Protective Order.

THE COURT: So you think the order should be dismissed without prejudice. What position do you take as to whether the Court should reserve jurisdiction to enforce the terms of the protection order?

MR. BARCHASCH: I don't really have a stance on that I guess. I know it makes sense, but I'm not sure who would retain jurisdiction.

RP 6:9-15 (June 14, 2018).

Where a party fails to object to a Superior Court ruling, the doctrine of waiver applies. *Magana v. Hyundai Motor America*, 123 Wn.App. 306, 314, 94 P.3d 987 (2004); *see also City of Seattle v. Harlaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960) (A party “cannot...remain silent as to claimed errors and later, if the verdict is adverse, urge his trial objections for the first time on appeal.”) Here, the facts are even clearer that Mr. Barchasch cannot now claim error based on the Superior Court’s continued jurisdiction. In the present matter, Mr. Barchasch did not just remain silent, instead, he affirmatively stated that he did not have an objection to continued jurisdiction, and in fact, believed that continued jurisdiction “makes sense.” RP 6:9-15 (June 14, 2018).

In any event, a Superior Court has authority to enforce violations of its orders even after dismissal. A violation of the Superior Court’s order is a “continuing contempt” and may be sanctioned as a new act independent of the underlying case—even if the Final orders have been entered in the underlying case. *See State ex rel. Ewing v. Morris*, 120 Wn. 146, 154 (1922); *see also State v. McCoy*, 122 Wn. 94, 95 (1922) (holding that the court had authority in a contempt proceeding to enforce a court order months after the case had been finally adjudicated).

**D. THE SUPERIOR COURT WAS CORRECT IN FINDING MR. BARCHASCH IN CONTEMPT AND ORDERING A REMEDIAL/COERCIVE SANCTION**

Whether a court has the *authority* to impose sanctions for contempt is a question of law, reviewed de novo. A *finding* of contempt, however is reviewed for an abuse of discretion. *King v Dep't of Soc. & Health Servs.*, 110 2d 793, 798, 756 P.2d 1303 (1988).

Courts have “statutory as well as inherent power to impose a civil contempt sanction.” *King*, 110 2d at 800, 756 P.2d 1303. “Intentional disobedience of a lawful court order is contempt.” *Id.* at 798, 756 P.2d 1303 (citing *Mathewson v. Primeau*, 64 Wn.2d 929, 934, 395 P.2d 183 (1964); *State v. Norlund*, 31 Wn.App. 725, 728, 644 P.2d 724 (1982)). There are two types of contempt sanctions approved by statute: remedial and punitive. Remedial sanctions are sometimes referred to as coercive sanctions, they are civil in nature and “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 7.21.010 (3).

Punitive sanctions, also known as criminal sanctions, on the other hand, are intended to punish an individual. *King*, 110 Wn.2d at 799-800, 756 P.2d 1303. “A contempt sanction is criminal if it is determinate and unconditional; the sanction is civil if it is conditional and indeterminate,

i.e., where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order.” *King*, 110 Wn.2d at 800, 756 P.2d 1303, (citing *In re Nevitt*, 117 F. 448, 461 (8th Cir.1902); *Shillitani v. United States*, 384 U.S. 364 (1966)).

Upon determining that a person “has failed or refused to perform an act that is yet within the person’s power to perform,” the court may enter a finding of contempt and impose a remedial sanction. RCW 7.21.030(2). RCW 7.21.030(2) gives the Superior Court discretion to impose remedial/coercive sanctions including imprisonment.

Mr. Barchasch seems to offer some argument in Assignment of Error 5 that the Contempt Order was inappropriate because the Superior Court’s use of the words “and/or” demonstrated that it was unclear whether a violation had occurred. Such argument is without merit and not supported by the facts. Mr. Barchasch admits that he had documents in his possession that violated the Protective Order.

**i. Mr. Barchasch Violated the Protective Order**

The relevant terms of the Protective Order unequivocally required Mr. Barchasch to (1) produce all client files, documents, and other client information, (2) not retain copies of client files and documents, and (3) identify the clients whose documents he had in his possession as of the date the Protective Order was entered. CP 25-26.

Following entry of the Protective Order, Mr. Barchasch sent Gonzaga's counsel emails including profanity, personal comments, and attempts to incite a response. CP 582; CP 44-45. In the emails, Mr. Barchasch informed counsel for Gonzaga that he still had access to the confidential documents, despite having represented otherwise to the Superior Court and despite being ordered by the Superior Court to remove them. CP 45.

“So interesting thing. Did you know you can recover files which have been deleted from a hard drive, so long as they haven't been written over! [sic] Pretty cool isn't it?”

*Id.*

Mr. Barchasch also stated that he had more files than disclosed under oath to the Superior Court:

“Anyways as I was looking through things it turns out I did have more files than I realized.”

*Id.*

The Protective Order clearly required Mr. Barchasch to provide copies of all files and documents and not retain copies. See CP 25-26. Despite having the ability to do so, Mr. Barchasch refused to bring himself into compliance with the Protective Order requirements. CP 44; CP 29-39.

Mr. Barchasch went on to express a clear intent to disseminate the confidential client documents in violation of the Protective Order.

“However it occurs to me with my case dismissed you lack much leverage to enforce the order. Which means, obviously I’m going public with the files now and have every intention of making this a big widely known story.”

CP 45. As Mr. Barchasch cannot disseminate that which he does not have, his threat is a clear admission that he had retained confidential documents in violation of the Superior Court’s Order.

Mr. Barchasch indisputably had the ability to comply with the Protective Order and not only chose not to comply, but reveled in making known that he was in violation and actively working to disregard the clear order of the Superior Court. Mr. Barchasch’s willful conduct amounted to contempt and a coercive sanction was rightfully imposed.

**ii. The Superior Court’s Contempt Order Was Remedial.**

A contempt sanction that gives the party the option to comply or be incarcerated is coercive because it is conditional and indeterminate. *Smith v. Whatcom County Dist. Court*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002) (“The defendant can avoid jail time by paying.”); *King*, 110 Wn.2d at 800, 756 P.2d 1303 (Finding a contempt provision to be punitive because it “provides for determinate jail sentences, allowing the contemnor no opportunity to purge himself of the contempt.”).

In the present matter, the Superior Court’s contempt order expressly stated that Mr. Barchasch may “*purge* the contempt by not disclosing...file materials....” CP 84-86 (*emphasis added*). In other

words, he was only required to serve 48 consecutive hours in the Spokane County jail *if* he disclosed client file documents, a prohibition contained in the Protective Order. CP 84-86. Mr. Barchasch “carrie[d] the keys of the prison door in his own pocket and [could] let himself out by simply obeying the court order.” *King*, 110 Wn.2d at 800, 756 P.2d 1303.

**E. THE SUPERIOR COURT PROPERLY DENIED MR. BARCHASCH’S MOTION FOR RECONSIDERATION**

Whether a motion for reconsideration is granted is within the discretion of the Superior Court and “should not be disturbed on appeal except on a clear showing of abuse of discretion.” *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). The moving party must demonstrate that the ruling was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* The superior court’s reasons should be stated in the order. *Id.*

In this case, Mr. Barchasch filed a motion for reconsideration of the Superior Court’s May 10, 2018 Protective Order. On May 22, 2018, the Superior Court denied the motion for reconsideration. CP 27. The Superior Court’s order of protection was grounded in CR 26(c) and the clear need for protection of attorney-client privileged documents and work product of third parties. In ruling on Mr. Barchasch’s motion for

reconsideration, the Superior Court explained: “all material submitted...have been reviewed by the court: finding no merit in said motion, it is hereby denied without further argument or preceding.” CP 27. There being a sound factual and legal basis on May 10, 2018 to order Mr. Barchasch to produce the documents, not retain copies, and not disclose the same to third parties, the Superior Court’s denial of Mr. Barchasch’s motion for reconsideration on May 22, 2018 cannot be said to be manifestly unreasonable or based on untenable grounds.

#### **V. 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 13<sup>th</sup> day of May 2019.

LUKINS & ANNIS, P.S.

By   
KELLY E. KONKRIGHT, WSBA #33544  
JENNIFER V. HANSON, WSBA #35476  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13<sup>th</sup> day of May, 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 <a href="mailto:sbarchasch@icloud.com">sbarchasch@icloud.com</a>
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MICHELE LINDQUIST, Paralegal