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NO. 65111-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE, a
sole corporation,

Appellant,

v.

A.G., D.F., J.J., and J.B., M.B., D.L., individuals,

Respondents.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Archdiocese offers the following Reply to the Brief of Respondents (hereinafter “Respondents’ Brief”). As set forth in this Reply, and the opening Brief of Appellant, the Archdiocese respectfully requests this Court reverse the trial court’s Order Denying Defendant Archdiocese’s Motion to Enforce Protective Order and direct the trial court to enforce the original terms of the protective order.

REPLY ARGUMENT

I. The Archdiocese’s Appeal Merely Requests that the Original Terms of the Protective Order be Enforced; No One is Asking this Court to Destroy Original Documents or “Evidence.”

This appeal is about enforcement of a protective order requiring Respondents, through their counsel (hereinafter “Pfau Cochran”) to destroy their copies of documents produced in cases that settled six months ago pursuant to a stipulated protective order. Contrary to Pfau Cochran’s assertions, this appeal does not concern the destruction of original documents or “evidence.” Respondents’ Brief at 1, 2, 3, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 22, 23, 24, 25, and 26. Any references to Respondents’ copies of documents as “evidence” are unsupported by the record and should be dismissed. These documents were never admitted as evidence. The most the trial court did was allow these documents to be discoverable to Respondents in the *A.G.* and *J.B.* case.

The trial court never ruled that these documents were “evidence” of anything.

The Archdiocese also wishes to draw the Court’s attention to a factual inconsistency in Respondents’ Brief. Throughout their brief, Pfau Cochran refers to their clients as “boys.” *See e.g.* Respondents’ Brief at 4. However, as demonstrated by the record, Respondents have not been boys for several decades. A.G. CP at 3-38, J.B. CP at 1-27. To assert that these men are “boys” in a thinly veiled attempt to garner sympathy with this Court is contrary to the record and should be dismissed outright.

II. Contrary to Pfau Cochran’s “Statement of the Case,” the Stipulated Protective Order Was a Crucial Component of the Discovery Process, and Specifically Applied to the Documents Produced Pursuant to the August 25, 2009, Order.

Although Pfau Cochran does briefly mention the stipulated protective order in its “Statement of the Case,” (Respondents’ Brief at 8) it curiously finishes this section with the sentence “[n]owhere does the August 25, 2009, order require the evidence be destroyed.” Respondents’ Brief at 9. While Respondents’ Brief is correct in stating that the August 25, 2009, order did not specify any copies of documents were to be destroyed, this tells only half the story: the stipulated protective order – with its destruction and limited use provisions - specifically applied to the handling of documents pursuant to the August 25, 2009, order. A.G. CP at

78; J.B. CP at 210; Respondents' Brief at 9. The protective order applied to "the handling of all documents and/or records and/or things and/or information produced in response to the Court's August 25, 2009, order and designated as 'confidential.'" A.G. CP at 78; J.B. CP at 210. This is why the documents at issue were produced after the stipulated protective order was entered into by all parties and the trial court. A.G. CP at 115; J.B. CP at 623. The stipulated protective order was a "bookend" to the August 25, 2009, order, and must be considered together pursuant to their express terms.

III. Pfau Cochran's Attempts to Salvage the Jurisdictional Overreaching of the Trial Court are Unavailing. Respondent's Brief at 11-18.

Pfau Cochran's first contention with the Archdiocese's assignment of error is that the trial court's order does not govern the use of the protected documents in other cases before different judges. Respondents' Brief at 3, 11-16. Comparing Pfau Cochran's argument with the trial court's order demonstrates the absurdity of this contention. The trial court provided, "It is further ORDERED that the terms of the protective order at issue shall remain in place and **shall govern the use** of these materials in the pending litigations of [*K.A. et al.*, *L.W. et al.*, *Jane Doe*, and *D.C.* cases before different judges]," while Respondents' argue "the order **does not govern the use** of documents in other cases before different judges..."

A.G. CP at 390-391 (emphasis added); J.B. CP at 689-90 (emphasis added); *cf.* Respondents' Brief at 3 (emphasis added). The trial court's order imposes obligations in other cases before different judges.

To bolster the above argument, Pfau Cochran argues the last sentence of the trial court's order demonstrates "deference" to the other courts and ameliorates any jurisdictional overreach by providing, "should the parties in the [collateral cases] seek to modify the terms of the protective orders, they may do so before the judge assigned to the particular case." Respondents' Brief at 13-14; A.G. CP at 391; J.B. CP at 690. However, as demonstrated in Appellant's Brief, it is not "deference" to issue an order applicable to an entirely different court and then state that the collateral court can modify the order to comply with its stated language if the moving party can overcome some unstated burden already erected by virtue of an existing order. Appellant's Brief at 14. Nor does this sentence remedy the jurisdictional overreach of this trial court's order: the issue should never be placed in front of the collateral courts at all.

Not content with submitting arguments in opposition to the Appellant's Brief, Pfau Cochran attacks the Archdiocese's motives in exercising its right to appeal. Brief of Respondents at 15-16. Pfau Cochran asserts that "the Archdiocese is not concerned with confidentiality." *Id.* at 16. To the contrary, as set forth in Appellant's

Brief, confidentiality includes the provisions of the protective order which were stripped away by the trial court: use of the documents only in the *A.G.* and *J.B.* cases and destruction of Respondents' copies of documents after these cases were complete. Appellant's Brief at 22, 30, 36. These provisions are crucial protective conditions of the order, which is why the Archdiocese incorporated – and Respondents, Pfau Cochran, and the court agreed – that their copies would be destroyed and only used in the *A.G.* and *J.B.* cases. For Pfau Cochran to argue this stripped-down protective order is somehow adequate is disingenuous.

**A. Pfau Cochran's Reliance on *Foltz* is Misplaced.
Respondent's Brief at 14-16.**

As stated in Appellant's Brief, *Foltz* demonstrates how the trial court jurisdictionally overreached itself. Appellant's Brief at 12-14. Pfau Cochran's interpretation of *Foltz* to support its argument that the trial court respected proper jurisdictional boundaries is incorrect.

Respondents' Brief at 14-16; *see also*, *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). When determining if a protective order should be modified, the court that issued the protective order is to determine if the protective order should be modified, and the collateral court(s) then decide if the documents are discoverable in their own cases. *See Foltz*, 331 F.3d at 1133. In the instant case, the trial court

not only modified the protective order, but also allowed Pfau Cochran to retain the documents with express provisions governing their use in specific cases identified by cause number. A.G. CP at 390-91; J.B. CP at 689-90. The trial court, in one order, not only modified the protective order, but also allowed Pfau Cochran to retain the documents and set forth terms for using these documents in other cases. Contrary to Respondents' Brief, this is not the jurisdictional standard articulated in *Foltz*. Cf. Respondents' Brief at 22.

Pfau Cochran drafted the proposed order that was eventually signed by the trial court. A.G. CP at 390-391; J.B. CP at 689-90 (Pfau Cochran's firm name is at the bottom of the orders). The trial court's order provided that the protective order and its terms will govern the use of these documents in four separate cases. A.G. CP at 390-391; J.B. CP at 689-90. If Pfau Cochran's argument was true, and the order is consistent with *Foltz*, why even mention the protective order will govern the "use" of the documents in other cases, if Pfau Cochran only sought to have the order modified without intruding on the prerogatives of other courts? The answer is that Pfau Cochran received exactly what it asked for: modification of the protective order *coupled with* terms to use these documents in the four listed cases. *Id.* This is contrary to *Foltz*, necessitating reversal of the trial court's order in its entirety.

Additionally, *Foltz*, when read as a whole, does not support Pfau Cochran's position, and in fact, specifically rejected the contentions raised by Pfau Cochran. Preliminarily, the party seeking modification of the non-sharing protective order in *Foltz* was a third-party public interest group, whereas here, the party seeking modification was an original signatory to the protective order and not a public interest group. *Foltz*, 331 F.3d at 1130. More importantly, the Ninth Circuit in *Foltz*, as set forth in Appellant's opening brief, specifically rejected Pfau Cochran's tactics here when it reasoned that:

Among the goals furthered by protective order is reducing conflict over discovery and facilitating the flow of information through discovery. Where that has happened, changing the ground rules later is to be avoided because protective order that cannot be relied upon will not foster cooperation through discovery.

Appellant's Brief at 28-29 (citing *Foltz*). Pfau Cochran's contention that *Foltz* supports its position or that it is "ironic" that the Archdiocese cited *Foltz* in support of their position is misplaced. Respondents' Brief at 14. Instead, *Foltz* demonstrates both the dilemma of Pfau Cochran's position as a whole and the jurisdictional flaw in the trial court's order.

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B. The Trial Court Based its Decision on Inappropriate Considerations, Including Collateral Estoppel. Respondent's Brief at 17-18.

Pfau Cochran concedes that “[t]he trial court’s order was based on ... [five reasons], and (6) the Archdiocese is collaterally estopped from trying to re-litigate the same issues in the *K.A.* litigation that were litigated for many months in the *J.B.* and *A.G.* litigation.” Respondents’ Brief at 7, 17-18; A.G. CP at 171-73; J.B. CP at 679-82. However, Pfau Cochran claims it did not “ask the Court to conclude that the Archdiocese is, in fact, collaterally estopped in that [other] litigation.” Respondents’ Brief at 17.

Unfortunately for the Respondents, Pfau Cochran concededly did argue to the trial court that the Archdiocese was collaterally estopped from challenging the discoverability of these materials in other cases, the trial court then based its order on Pfau Cochran’s arguments, including collateral estoppel. A.G. CP at 390-91; J.B. CP at 689-90.

No reasonable judge would sign an order based on this application of collateral estoppel. To do so sullies the entire ruling and demonstrates an abuse of discretion in signing an order based, at least in part, on such a misapplication of law.

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IV. Respondents Provided No Examples of a Trial Court Modifying a Protective Order for the Same Reasons as the Court in the Instant Case.

Under an abuse of discretion standard, the decision of the trial court can be overturned when “no reasonable person” would arrive at the same conclusion. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 639 (2003). Apparently, Pfau Cochran can find no other judge in the country that arrived at the same conclusion as the trial court did in this case: when an original signatory to a protective order successfully modified a non-sharing protective order based on arguments of alleged judicial efficiency, collateral estoppel, and convenience. Respondents’ Brief at 7. Pfau Cochran offered no case law on this point. This omission supports the Archdiocese’s position that no reasonable person would come to the same conclusion as the trial court did in this case. In contrast, the Archdiocese provided several cases where modification of a protective order was denied, including appellate review overturning modification under an abuse of discretion standard. Appellant’s Brief at 16-27.

V. The Terms of the Protective Order Do Not Support Modification in These Circumstances. Respondent’s Brief at 21-22.

Pfau Cochran also argues that the Archdiocese specifically agreed that the protective order could be modified under the set of facts present in this case. Respondents’ Brief at 21-22. Specifically, Pfau Cochran argues

that the “Archdiocese fails to show how the trial court erred when the stipulation specifically allowed for modification.” *Id.* at 21. On the contrary, the Archdiocese set out in great detail how the trial court erred in modifying the protective order in these circumstances. *E.g.* Appellant’s Brief at 16-27. Pfau Cochran repeatedly asserts either party could modify the stipulation, but ignores the protective order’s surrounding language: “[N]othing in this Stipulation **shall prevent** the Court from modifying the Stipulation or resulting Order as the Court deems **necessary to comply with the law.**” A.G. CP at 78 (emphasis added); J.B. CP at 210 (emphasis added); Respondents’ Brief at 21-22.

A. Pfau Cochran’s Reasons for Modification of the Protective Order - Which Were Adopted Verbatim by the Trial Court - Do Not Rise to the Level of Being “Necessary” to Comply with the Law.

Pfau Cochran asserts modification was necessary because it didn’t want to go through the discovery process in other cases to receive these documents again and it would be convenient to their counsel since they already spent time organizing the voluminous documents. Respondents’ Brief at 16. Such reasons do not rise to the level of “necessary to comply with the law,” especially when the Archdiocese justifiably relied on this order before producing the documents at issue. *See* Appellant’s Brief at 16-27. Pfau Cochran argues that the trial court’s order was necessary “to

secure the just, speedy, and inexpensive determination of litigation.” Respondents’ Brief at 19. Indeed, first and paramount among the principles is “justice:” one can hardly imagine a more unjust outcome than allowing a party to sign an agreement, then refuse to honor their commitments once the other side performs their obligations. There is no basis to conclude that modification was **necessary** to comply with the law under these circumstances.

B. Pfau Cochran’s Tactics are to Blame for Any Alleged Judicial Inefficiency.

Judicial efficiency would have been better served by Pfau Cochran incorporating the terms they intended to follow in their protective order, rather than wait to request modification until the *A.G.* and *J.B.* cases settled and the Archdiocese moved to enforce the order. *Cf.* Respondents’ brief at 23-24. When the trial court abused its discretion and failed to uphold its own order, the Archdiocese was forced to file this appeal to enforce its rights. Judicial efficiency would have been promoted if Pfau Cochran had adhered to the stipulated protective order in the first place, rather than point fingers and blame the Archdiocese for additional litigation caused by the Archdiocese exercising its right to appeal.

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C. Pfau Cochran Offers No Plausible Explanation for Why it Waited Until After Settlement to Request they Be Released From the Protective Order's Obligations.

In defense of their inexplicable position of waiting until after the parties settled their claims to ask the court to modify the protective order, Pfau Cochran argues it was the Archdiocese that should have divined Pfau Cochran's intent to modify the stipulated order immediately following settlement. Respondents' Brief at 22. The status quo provided by the protective order was that Respondents' copies of documents would be destroyed after settlement and not used in any other cases. A.G. CP at 77-84; J.B. CP at 209-216. Accordingly, it is not "backwards logic" for the Archdiocese to demonstrate that Pfau Cochran should have sought to modify the status quo before settling the case. Respondents' Brief at 22.

Additionally, the fact that Pfau Cochran does not deny that they sent discovery requests in *K.A.* that are identical to the A.G. and *J.B.* litigation is important to note. Respondents' Brief at 23; Appellant's Brief at 32-33. The Archdiocese did not object to the discovery requests in *K.A.* until long after the stipulated protective order was signed, however, Respondents signed the stipulated protective order after they already knew they wanted the documents in other litigation - and had even asked for these documents - yet still signed a protective order promising to use these

copies only in the *A.G.* and *J.B.* litigation and destroy their copies after settlement. *Id.*

The record demonstrates that Pfau Cochran apparently signed a protective order they had no intention of honoring. It was error for the trial court to condone such tactics.

VI. The Court System is Better Served by Parties Honoring Their Agreements. Respondent's Brief at 21-22, 24-26.

Finally, Respondents conclude their brief by arguing that policy considerations and the court system is better served when parties can freely modify stipulated protective orders, rather than be bound by their terms. Respondents' Brief at 24-26.

Respondents assert that their "counsel would not have agreed to the stipulation at issue if they knew the Archdiocese would produce highly damaging evidence, try to use the stipulation to have the evidence destroyed, and then claim the stipulation could not be modified pursuant to its own terms." Respondents' Brief at 24-25. However, the record demonstrates¹ that Pfau Cochran did just this: they signed the stipulation to receive documents they thought had value,² the stipulation provided

¹ The Archdiocese does not concede, nor does the record support, Pfau Cochran's assertions that these documents are "evidence" of anything or "damaging."

² Respondents would likely have never requested such documents unless they thought it would be helpful to their case.

their copies would be destroyed, and modification was only allowed when necessary to comply with the law. A.G. CP at 77-84; J.B. CP at 209-216.

In another paragraph, Pfau Cochran argues that if this Court rules in favor of the Archdiocese, “a requesting party will have little incentive to agree to a protective order because the party will not be able to modify it based on what is produced, especially in cases with recurring litigants, recurring attorneys, or recurring subject matter.” Respondents’ Brief at 25. Again, this is exactly what Pfau Cochran did: they freely agreed to a non-sharing protective order with destruction provisions involving similar litigants, identical attorneys, and similar subject matter. Pfau Cochran had even requested these documents in at least one other case, yet soon thereafter signed an agreement to destroy the copies provided in the instant cases and not use them in any other cases. Policy does not favor modification under these terms and under these facts.

It is Pfau Cochran who is using the protective order “as a sword, not a shield.” Respondents’ Brief at 26. It is Pfau Cochran that received documents under one set of terms, and then used the protective order to repudiate some of the most crucial provisions.

No reasonable person would conclude, under these circumstances, that Pfau Cochran’s freedom to repudiate an agreement before fulfilling its terms somehow outweighs the Archdiocese’s justifiable reliance on the

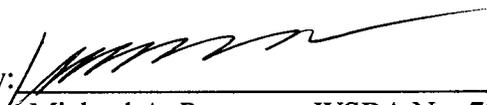
agreed terms after fulfilling its own obligations. The trial court abused its discretion when it condoned Pfau Cochran's tactics.

CONCLUSION

For the reasons stated above, the Archdiocese respectfully requests the Court reverse the trial court's order in its entirety and instruct the court to enforce the original terms of the protective order.

RESPECTFULLY SUBMITTED this 5 day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2010, I caused to be served and a true and correct copy of the foregoing document **Reply Brief of Appellant** as set forth below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington this 5th day of August, 2010.


Alison Forrest