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NO. 67230-4

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

JAY RANDOLPH CERF and ELLEN LYNN CHAPMAN,
Petitioners

v.

KAREN SNEE, *Respondent*

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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BRIEF OF APPELLANT

Gregory S. Worden
WSBA # 24262
BARRETT & WORDEN, P.S.
2101 Fourth Avenue, Suite 700
Seattle, Washington 98121
(206) 436-2020
Attorney for Petitioner's Cerf and Chapman

ORIGINAL

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I. INTRODUCTION

This case is a personal injury claim resulting from a rear end accident involving vehicles driven by Plaintiff Dr. Karen Snee and Defendant Randy Cerf. Plaintiff Snee seeks damages from Cerf and his spouse Dr. Lynn Chapman.

On May 6, 2011, the Superior Court entered an order which contained the following language that provided that the assets of the Defendants' marital community were discoverable: "since she is a named party in this cause of action and the assets (beyond insurance policies) of the community are discoverable."¹ Defendants brought a motion for partial reconsideration which requested reconsideration of the order allowing such financial discovery and which sought a protective order prohibiting Plaintiff from asking deposition questions or making discovery requests regarding the Defendants' assets and finances:

CR 26 limits discovery to information reasonably calculated to lead to discovery of admissible evidence. Evidence regarding a tort defendant's finances is not admissible, and discovery of a tort defendant's finances is not allowed. However, this Court's 5-6-11 order provides that the Defendants' assets are discoverable. Defendants request reconsideration of that provision and entry of a protective order prohibiting Plaintiff from asking deposition questions or making discovery requests regarding the Defendants' assets and finances.²

On May 23, 2011 the Superior Court denied that motion for partial reconsideration.³ Defendants sought discretionary review and review was granted on July 1, 2011 in a notation ruling where Commissioner James Verellen explained that discovery of a defendant's financial assets is not reasonably calculated to lead discovery of admissible evidence:

In a rear end collision case, identifying the defendant's assets is not reasonably calculated to lead to the discovery of admissible evidence. Discovery of a defendant's insurance agreements is expressly allowed under CR 26(b)(2), but that provision does not extend to allow discovery of the assets of a defendant just because the damages may exceed the amount of insurance coverage. Snee

¹ CP 111

² CP 118

³ CP 153-154

provides no authority authorizing discovery of the assets of Chapman. Discovery of the defendant's assets in this setting would await supplemental proceedings after a judgment is obtained.⁴

The Commissioner further noted that there was a "complete absence of any authority for the discovery of a tort defendant's assets" and characterized the Superior Court's ruling as "a far departure from the accepted course of judicial proceedings."⁵

Defendants now ask this court to reverse the Superior Court's order allowing financial discovery and to direct entry of a protective order prohibiting Plaintiff from asking deposition questions or making discovery requests regarding the Defendants' assets and finances.

I. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering an order containing a provision that provided that the assets the Defendants' marital community were discoverable, in denying the Defendants motion for reconsideration of that provision, and in denying Defendants' request for a protective order prohibiting Plaintiff from asking deposition questions or making discovery requests regarding the Defendants' assets and finances.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CR 26 limits discovery to information reasonably calculated to lead to discovery of admissible evidence. Evidence regarding an auto tort defendant's finances is of a private nature and is not reasonably calculated to lead to discovery of admissible evidence. Did the Superior Court err in allowing for such financial discovery?

III. STATEMENT OF THE CASE

This is a tort case where Plaintiff Snee claims damages arising from an automobile collision between her vehicle and the vehicle driven by Defendant Randy Cerf.⁶

Plaintiff sought to take the deposition of Defendant Dr. Ellen Chapman, who is Mr. Cerf's spouse, and who was not present at the time of the accident.

⁴ Appendix A NOTATION RULING at page 2

⁵ Appendix A at page 2

⁶ CP 1-3: Complaint

Former counsel for Defendants then brought a motion for protective order seeking to quash the deposition of Dr. Chapman on the grounds that Dr. Chapman had no relevant discoverable knowledge and that Plaintiff noted her deposition for improper purposes such as attempting to discover information as to the Defendants' assets.⁷ Plaintiff filed an opposition to that motion.⁸

On May 6, 2011, the Superior Court then entered an order which denied Defendants' motion for a protective order quashing the deposition of Dr. Ellen Chapman, and, which, in addition, contained the language "Plaintiff shall be entitled to depose defendant Dr. Chapman since she is a named party in this cause of action and the assets (beyond insurance policies) of the community are discoverable."⁹ (emphasis original)

Defendants, through their present counsel, then sought reconsideration of the 5-6-11 order to the extent that it allowed financial discovery, and requested that the Court enter a protective order prohibiting Plaintiff from asking deposition questions or making discovery requests regarding the Defendants' assets and finances.¹⁰

On May 23, 2011, the Superior Court denied that Motion for Partial Reconsideration,¹¹ and thus left the Defendants' finances open to discovery.

Defendants sought discretionary review, discretionary review was granted, and the issue is now before this Court.

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⁷ CP 15

⁸ CP 35

⁹ CP 111

¹⁰ CP 118-126

¹¹ CP 153-154

IV. ARGUMENT

For at least the three reasons below, the Superior Court erred in issuing an order that allowed discovery regarding the defendants' finances and erred in rejecting Defendants' request for a protective order to prevent such financial discovery.

First, per CR 26(b)(1), discovery is limited to information that is "reasonably calculated to lead to the discovery of admissible evidence," and the finances of Mr. Cerf and Dr. Chapman would not be relevant evidence admissible at trial. As was set out in the Defendants' Motion to Quash¹², the cases of *Cramer v. Van Parys*¹³ and *Lockwood v. AC &S, Inc.*,¹⁴ provide that the financial circumstances of a defendant are not relevant at trial.

The Plaintiff's Response did not dispute the holdings of those cases, but only asserted that they did not apply at the discovery stage.¹⁵ Nor did Plaintiff's Response offer an explanation of how questions about the Defendants' assets and financial status could lead to discovery of admissible evidence at trial. Nor did the Plaintiff's Response cite any case that allowed such financial discovery.

Because questions about the Defendants' finances and assets could not lead to discovery of admissible evidence, the Superior Court's orders exceed the Superior Court's discretion. The fact that a Plaintiff asserts her claim is worth more than the limits of an insurance policy does not expand the scope of discovery allowed by CR 26.

Second, the courts in Washington and elsewhere do not allow for discovery regarding a defendant's finances in tort cases until, and unless, judgment is entered and there are

¹² CP 20

¹³ 7 Wn.App. 584, 593, 500 P.2d 1255 (1972)

¹⁴ 109 Wn.2d 235, 744 P.2d 605 (1987)

¹⁵ CP 41 (Response to Motion to Quash page 7 lines 10-16).

supplemental proceedings.¹⁶ For example, in *Crown Controls, Inc. v. Smiley*, the Court of Appeals stated, “Typically, as here, the creditor does not take discovery of defendants' assets before judgment is entered and discerns the judgment debtor's financial worth through supplemental proceedings.”¹⁷ Such a limitation is consistent with Washington statute regarding supplemental proceedings, RCW 6.32.010 et.seq., which has been recognized as “the exclusive method for obtaining the information necessary to collect money awarded by the court.”¹⁸

Washington’s practice of limiting financial discovery in tort cases is consistent with authority in other jurisdictions which similarly does not allow tort plaintiffs discovery regarding a defendant’s assets and financial information.¹⁹

Third, in addition to being irrelevant, such requests for financial information are recognized to be an invasion of privacy. For example, in the *Sawyer v. Boufford* case previously cited, the New Hampshire Supreme Court vacated a trial court order allowing financial discovery and described discovery of a defendant’s financial assets as an “unwarranted invasion of the defendant’s right to privacy in this area:”

In the present case, however, the disclosure of substantial assets by the defendant is not likely to produce a settlement advantageous to him. The benefit which would result to the plaintiff from a disclosure by facilitating the decision to settle or go to trial is considerably outweighed by the unwarranted invasion of the defendant's right of privacy in this area. See *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964). A groundless claim could become an excuse to make full inquiry into all the confidential assets of a defendant involved in an automobile accident before his liability is adjudicated. Furthermore an imaginative plaintiff is not helpless. By other means such as examination of public records and by private investigation he can usually obtain sufficient information without the

¹⁶ See *Crown Controls, Inc. v. Smiley*, 47 Wn.App. 832, 846-847 (1987)

¹⁷ 47 Wn.App. at 846-847.

¹⁸ *Splash Design, Inc. v. Lee*, 104 Wn.App. 38, 44, 14 P.3d 879 (2000)

¹⁹ See for example, *Travelers Ins. Co. v. Hindle*, 748 A.2d 256, 259 (R.I.2000)(rejecting request for financial discovery and recognizing that “ordinarily, the federal discovery rules and similar state rules do not permit discovery of facts regarding a defendant’s financial status”); *Sawyer v. Boufford*, 312 A.2d 693, 694 (N.H. 1973) (holding that a defendant could not be forced to reveal his financial worth prior to the adjudication of his liability in a tort action); *Doak v. Superior Court for Los Angeles County*, 65 Cal.Rptr. 192 (Cal App. 1968) (holding in a wrongful death case, that to allow discovery of a defendant’s financial condition would be an abuse of the inherent rights of the defendant and contrary to well established public policies). These cases were provided to the Superior Court per local rule and are contained in the Clerk’s Papers at CP 129- 150.

need to invade the right of privacy of the defendant by deposition before trial. We are not prepared under the circumstances of this case and at this stage of the proceeding to sustain an order requiring the defendant to disclose his financial worth. Farnum v. Bristol-Myers Co., 107 N.H. 165, 219 A.2d 277 (1966); Doak v. Superior Ct., 257 Cal.App.2d 825, 65 Cal.Rptr. 193 (1968); see Beal v. Zambelli Fireworks Mfg. Co., 46 F.R.D. 449 (W.D.Pa.1969); Helms v. Richmond-Petersburg Turnpike Auth., supra; Fed.R.Civ.P. 26(b); Annot., Pretrial Discovery of Defendant's Financial Worth on Issue of Damages, 27 A.L.R.3d 1375 (1969); F. James, Civil Procedure 6.12, at 215 (1965). The order of the trial court is vacated.²⁰

The *Boufford* case was a wrongful death action where the defendant had only a \$25,000 insurance policy limit.²¹ That case both reflects the well settled view that a tort defendant's assets are not discoverable, and exemplifies the point that a potential excess exposure does not make such financial information discoverable.

There was no case cited to the Superior Court standing for the proposition that such financial discovery of a defendant is allowed, and the Superior Court's orders allowing such discovery were an abuse of discretion and were error because they allowed for discovery beyond the scope of that authorized by CR 26. Further, given the contrast between absence of authority allowing such discovery and the cases cited to the Superior Court which did not allow such discovery, the Superior Court's allowance of such discovery was also such a departure from the accepted and usual course of judicial proceedings as to call for appellate reversal.

V. CONCLUSION

This situation does not come up often in appellate cases: probably because courts do not tend to order such financial discovery and because there are relatively fewer interlocutory appeals. But the cases that have considered the issue show that it is error to allow such financial discovery.

Given the authority cited above, the Superior Court erred by allowing for discovery of a defendant's finances. This error altered the status quo because, if not reversed, it would allow

²⁰ *Bouffard*, 312 A.2d at 695

²¹ *Boufford*, 312 A.2d at 694

the Plaintiff a window into the Defendants' confidential finances and thus an unfair advantage in any future negotiation, and because it could potentially open the Defendants' finances to scrutiny by any person or entity to whom the Plaintiff disclosed that private information.

Accordingly, this Court should reverse the Superior Court's order allowing financial discovery and direct entry of a protective order prohibiting Plaintiff from asking deposition questions or making discovery requests regarding the Defendants' assets and finances.

DATED THIS 22nd day of August 2011.

BARRETT & WORDEN, P.S.



GREGORY S. WORDEN, WSBA 24262
Attorneys for Petitioners CERF & CHAPMAN

CERTIFICATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on August 22nd, 2011, I caused service of the foregoing Brief of Appellant by legal messenger to:

Counsel for Plaintiff:

Lish Whitson
800 Fifth Avenue, Suite 4000
Seattle, WA 98104

Counsel for Intervenor:

Mary E. Owen
600 University Street, Suite 400
Seattle, WA 98101


Angie Tarabochia

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
One Union Square
600 University
Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-
5505

July 1, 2011

Lish Whitson
Lish Whitson PLLC
800 5th Ave Ste 4000
Seattle, WA, 98104-3180
lish.whitson@whitsonlaw.com

Mary Elaine Owen
GEICO Staff Counsel
600 University St Ste 400
Seattle, WA, 98101-4176
mowen@geico.com

Gregory S. Worden
Barrett & Worden PS
2101 4th Ave Ste 700
Seattle, WA, 98121-2393
gworden@barrett-worden.com

CASE #: 67230-4-I

Jay Randolph Cerf & Ellen Lynn Chapman Petitioners v. Karen Snee, Respondent

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on July 1, 2011:

NOTATION RULING
Cerf and Chapman v Snee No. 67230-4
July 1, 2011

Jay Cerf and Ellen Chapman seek discretionary review of the trial court order allowing Karen Snee's attorneys discovery of the assets of Cerf and Chapman. In this rear collision case, Snee sued the marital community of Cerf and Chapman. Cerf was driving and Chapman was not present when the collision occurred. Cerf and Chapman sought a protective order under CR 26(c) to quash Chapman's deposition. The trial court ruled that Snee was entitled to depose Chapman "since she is a named party in this cause of action and the assets (beyond insurance policies) of the community are discoverable." Cerf and Chapman moved for reconsideration seeking to preclude inquiry into the assets of the community. The trial court denied the motion for reconsideration.

Discretionary review is available if the trial court has far departed from the ordinary and usual course of judicial proceedings. RAP 2.3(b)(3).

The trial court has broad discretion on discovery matters and discovery orders are reviewed for abuse of discretion. Howell v. Spokane & Inland Empire Blood Bank, 117 Wash.2d 619, 629-30, 818 P.2d 1056 (1991). A party may obtain discovery on any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, but the requested discovery must be reasonably calculated to lead to the discovery of admissible evidence. CR 26(b)(1). Rhinehart v. Seattle Times Co., 98 Wash.2d 226, 232, 654 P.2d 673 (1982), aff'd. by, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

In a rear end collision case, identifying the defendant's assets is not reasonably calculated to lead to the discovery of admissible evidence. Discovery of a defendant's insurance agreements is expressly allowed under CR 26(b)(2), but that provision does not extend to allow discovery of the assets of a defendant just because the damages may exceed the amount of insurance coverage. Snee provides no authority authorizing discovery of the assets of Chapman. Discovery of the defendant's assets in this setting would await supplemental proceedings after a judgment is obtained.

Snee contends that the ruling does not substantially alter the status quo because the question of evidence to be admitted at trial remains unresolved. Although discretionary review of discovery rulings may be rare, there is no "safe harbor" precluding any review of a discovery order just because the trial court may not admit the evidence at trial.

An error in a discovery ruling would not normally be a far departure, but in the complete absence of any authority for the discovery of a tort defendant's assets, the trial court ruling is a far departure from the accepted course of judicial proceedings. Chapman is not compelled to either submit to the discovery on this topic or to risk a contempt citation before obtaining review.

Cerf and Chapman also request a stay of their depositions set for July 18 and 21, but a stay is not required because of the limitations on the trial court's authority while the appeal is pending. RAP 7.2.

Therefore, it is
ORDERED that discretionary review is granted and the clerk shall set a perfection schedule.

James Verellen
Court Commissioner

Sincerely,



Richard D. Johnson
Court Administrator/Clerk
ssd