IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

OPTIMISCORP, a Delaware corporation, Respondent, v. WILLIAM B. HORNE, an individual, Appellant.	No. 80513-4-I UNPUBLISHED OPINION

VERELLEN, J. — William Horne is a King County resident whose deposition testimony was sought locally by a defendant in pending Delaware civil litigation. Horne appeals a superior court order granting the defendant's motion to compel his attendance at a deposition and awarding attorney fees to the defendant in connection with expenses incurred in bringing the motion. We affirm.

FACTS

OptimisCorp, a "nominal" defendant in Delaware litigation, sought to depose William Horne, a King County resident and nonparty to the litigation. Consistent with the procedures set forth in the Washington Uniform Interstate Depositions and Discovery Act, chapter 5.51 RCW (UIDDA), OptimisCorp submitted a Delaware deposition subpoena to King County Superior Court. The clerk of the court

assigned a King County Superior Court cause number and issued the subpoena. OptimisCorp served Horne with the subpoena by abode service on June 5, 2019. The subpoena directed Horne to appear for a deposition on June 26, 2019, in Bellevue, Washington.

On August 6, 2019, approximately six weeks after the scheduled deposition date, OptimisCorp filed a motion in superior court seeking to compel Horne's attendance at a deposition. OptimisCorp alleged that Horne failed to appear as ordered by the deposition subpoena and failed to seek a protective order or motion to quash or modify the subpoena. In support of its motion, OptimisCorp filed the declaration of the process server and declaration of service. OptimisCorp requested attorney fees of $3,276 incurred in seeking to compel Horne's deposition.

Representing himself pro se, Horne opposed the motion to compel. Horne discussed his prior involvement with OptimisCorp and urged the court to deny the motion to compel because, in 2013 litigation involving OptimisCorp, he was deposed and testified "extensively" and that testimony would be "admissible in the subject Delaware litigation."[1] He also argued that the court should deny the motion because in the weeks leading up to the June 26 deposition date, he made reasonable, good faith efforts to coordinate the deposition with OptimisCorp and remained willing to travel to Delaware. Alleging that OptimisCorp acted in "bad

[1] Clerk's Papers (CP) at 38.

faith" by failing to disclose the ongoing negotiations, Horne informed the court that he intended to file a motion for a protective order in Delaware.[2] Finally, he asked the court to deny OptimisCorp's motion for attorney fees and requested that the court award him $2,000 for the "vacation day" he was required to take to respond to OptimisCorp's "frivolous" motion.[3] In support of his motion, Horne supplied an unsigned copy of the motion for a protective order he intended to file in the Delaware litigation. Horne also submitted evidence of e-mail exchanges between his and OptimisCorp's Delaware attorneys to show the parties' attempts to reach agreement regarding the scheduling and terms of his deposition.

Based on the pleadings, the superior court granted the motion to compel, ordered that the deposition be scheduled to occur within 30 days, and granted OptimisCorp's request for attorney fees. Horne appeals.

ANALYSIS

Horne challenges the court's order compelling his deposition and awarding attorney fees to OptimisCorp in connection with the motion to compel.

As a threshold matter, Horne asserts in his briefing that the superior court's order granting the motion to compel is subject to review under the discretionary review standards of RAP 2.3. OptimisCorp argues in response that Horne's appeal must be dismissed because he failed to file a motion for discretionary review. But the entirety of the "action" in Washington was the deposition under the

[2] CP at 39.

[3] CP at 41.

UIDDA. The court's order granting the motion to compel is arguably appealable as a matter of right under RAP 2.2(a)(3) because it is a decision "affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." The trial court's decision on the motion to compel left nothing to determine with respect to the King County Superior Court proceeding to enforce the Delaware subpoena. In these circumstances, we assume for purposes of this appeal that the order granting the motion to compel is appealable.

The UIDDA governs the process and procedures in Washington to compel a deponent residing in Washington to attend a deposition for an out-of-state case.[4] A party to the out-of-state lawsuit must request issuance of a subpoena under the UIDDA by submitting "a foreign subpoena to a clerk of the court in the county in which discovery is sought" and the clerk "shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed."[5] Once a subpoena is issued, Washington has personal jurisdiction over the deponent, and any subsequent application to the court for a protective order or to quash or modify a subpoena must comply with Washington's rules and statutes.[6]

Thus, after the superior court issued the subpoena and service was accomplished, Horne was required to comply with it, unless he obtained a

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[4] Ch. 5.51 RCW.

[5] RCW 5.51.020(1)-(2).

[6] RCW 5.51.050; see also RCW 5.51.040 ("Superior court civil rules (CR) 26 through 37 apply to subpoenas issued under RCW 5.51.020.").

protective order in accordance with the Washington superior court civil rules.[7] CR 26(c) gives superior courts broad authority to enter protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" in the context of discovery. But Horne did not seek a protective order in King County under CR 26. He apparently filed a motion for a protective order in Delaware, but not until after the date on which he was ordered to appear had passed and after OptimisCorp filed its motion to compel.

Horne claims that while he was negotiating the terms, timing, and location of the deposition, he never refused to appear in Bellevue on the scheduled date. He also points out that OptimisCorp does not represent or establish that the company's representatives were present and prepared to proceed with the deposition on June 26. The record indicates that negotiations between the company and Horne reached an impasse in 2019 when Horne rejected the company's position that its obligation to indemnify him as a former corporate officer for expenses incurred in appearing for a deposition would be capped at $10,000. About a week prior to the scheduled deposition date, Horne's Delaware counsel provided the terms on which Horne would agree to appear. Those terms included the condition that the deposition take place in Delaware during the week of July 22, 2019, and the condition that the company pay Horne a nonrefundable

[7] See Rhinehart v. Seattle Times, 98 Wn.2d 226, 256-57, 654 P.2d 673 (1982) (CR 26(c) provides a mechanism to seek relief from improper discovery requests), affirmed, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

fee of $10,000 for his expenses, in addition to travel expenses. Two days before the deposition was scheduled to occur, Horne's Delaware counsel again confirmed that Horne would agree to appear for a deposition during the week of July 22, 2019, in Delaware, if OptimisCorp would agree to his other terms.

This evidence clearly indicates that there was no final agreement to conduct a deposition in Delaware in lieu of the Bellevue deposition based on the subpoena authorized by the King County Superior Court and served on Horne. Horne did not seek or obtain any protective order in King County. He did not appear for the Bellevue deposition. The parties did not agree to waive compliance with the subpoena.

Horne raises various arguments as to why he believes that his Delaware motion was timely filed and why a Delaware protective order was warranted. But it is undisputed that on the date of his scheduled deposition in Bellevue, no court had issued a protective order. He was required to comply with the subpoena. The superior court did not abuse its discretion in granting the motion to compel.[8]

Horne also claims that OptimisCorp was not entitled to an award of attorney fees because he had legitimate reasons for opposing the deposition.

CR 37 addresses circumstances where parties fail to comply with discovery requirements and allows the party seeking discovery to bring a motion to compel.

[8] See Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 183, 313 P.3d 408 (2013) (decision on a motion to compel discovery is within the discretion of the superior court).

If the court grants a motion to compel, the court "shall" require the party or deponent whose conduct necessitated the motion to pay "reasonable" expenses incurred in obtaining the order "unless the court finds that the opposition to the motion was substantially justified or that other circumstances made an award unjust."[9]

Attorney fees awarded under CR 37 will not be disturbed on appeal except upon a clear showing of abuse of discretion.[10] The trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.[11]

Horne simply restates his reasons for opposing the deposition; namely, because he believed that the discovery sought was duplicative, overly burdensome, and OptimisCorp was using the discovery process as a means to harass him. But there is no evidence in the record that substantiates Horne's claims that the discovery sought was unnecessary or that the process was abused. Again, Horne did not seek a protective order in King County, and the evidence in the record does establish that he would have been entitled to such an order. Under these circumstances, the court did not abuse its discretion in awarding fees under CR 37 in conjunction with its order granting the motion to compel Horne's attendance at a deposition. To the extent Horne claims that discovery sanctions under CR 37 were warranted, there was no evidence before

[9] CR 37(a)(4).

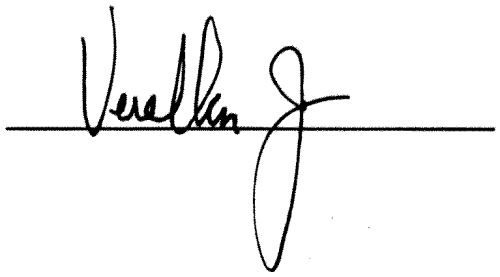
[10] Dalsing v. Pierce County, 190 Wn. App. 251, 261, 357 P.3d 80 (2015).

[11] Id.

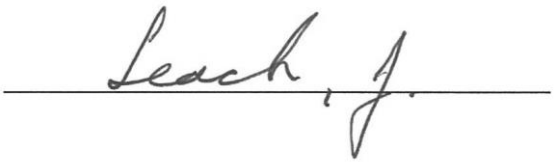
the court of OptimisCorp's noncompliance with a superior court discovery order or other compelling basis for sanctions.[12]

Citing RAP 18.1 and RAP 18.9, OptimisCorp requests attorney fees on appeal, arguing that Horne's appeal is frivolous. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant.[13] Although Horne's arguments are not persuasive, we do not find his appeal frivolous. We deny OptimisCorp's request for attorney fees.

Affirmed.



WE CONCUR:



[12] We decline to consider Horne's references to facts that are not supported by citations to the record and documents attached to his briefing that are outside the record on appeal. See RAP 10.3(a)(5), (8).

[13] Espinoza v. Am. Commerce Ins. Co., 184 Wn. App. 176, 202, 336 P.3d 115 (2014) (quoting Griffin v. Draper, 32 Wn. App. 611, 616, 649 P.2d 123 (1982)).