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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/Defendant,

v.

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

Respondents/Plaintiffs.

BRIEF OF APPELLANT

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COURT OF APPEALS
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INTRODUCTION

Appellant, Corporation of the Catholic Archbishop of Seattle (hereinafter “Archdiocese”), requests that this Court reverse the King County Superior Court’s Order Denying Defendant Archdiocese’s Motion to Enforce Protective Order entered by the Honorable Judge Paris K. Kallas on March 10, 2010, and that this Court direct the superior court to enforce the terms of the original protective order signed by the parties.

The Archdiocese produced confidential documents only after opposing counsel (hereinafter “Pfau Cochran”) signed a stipulated protective order promising to only use the documents in the above-captioned litigation and destroy the documents after settlement. After the Archdiocese fulfilled its obligations under the stipulated order, and the above cases settled, Pfau Cochran refused to honor the agreement. This forced the Archdiocese to move the trial court to enforce the protective order. The Plaintiffs no longer had any need for the documents since they had just settled all their claims against the Archdiocese, but their counsel, Pfau Cochran, wanted to retain the documents to use in cases with other plaintiffs, in violation of the clear terms of the protective order.

The trial court not only denied the Archdiocese’s motion, it also modified the order to allow Pfau Cochran to retain the documents and use them in other cases pending before other judges.

Because the trial court manifestly abused its discretion when denying the Motion to Enforce Protective Order, the Archdiocese, compelled by fundamental principles of justice and fairness, appeals.

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court abused its discretion in entering the order of March 10, 2010, denying the Archdiocese's Motion to Enforce Protective Order.

Issues Pertaining to Assignment of Error

1. Did the trial court have jurisdiction to enter an order governing the use of documents in other cases before different judges?
2. Is alleged judicial efficiency a sufficient basis for modifying a stipulated protective order voluntarily signed by the parties at the request of an original signatory to that order?
3. Does the trial court's Order harm the credibility and integrity of the judicial process by countenancing "discovery by ambush," hindering cooperation between the parties in the discovery process, and "chilling" future protective orders?
4. Do fundamental principles of justice and fairness support the trial court's modification of the stipulated protective order?

STATEMENT OF THE CASE

I. Plaintiffs Dismissed All Their Claims Against the Archdiocese with Prejudice and Have No Further Need for the Protected Documents.

These cases involved claims by several Plaintiffs against the Archdiocese and Christian Brothers for alleged sexual abuse by former Christian Brother Edward Courtney in the 1970's and 1980's. A.G.

Clerk's Papers (hereinafter "CP") at 3-38; J.B. CP at 1-27.¹ The last remaining Plaintiff in the *J.B. et al. v. Archdiocese et al.* case settled his claims on January 14, 2010. CP at J.B. CP at 660. The last remaining Plaintiff in the *A.G. et al. v. Seattle Archdiocese et al.* case settled his claims on January 29, 2010. A.G. CP at 152. The order appealed by the Archdiocese does not directly concern these allegations of sexual abuse, but is instead related to the documents produced during the discovery process pursuant to a stipulated protective order. A.G. CP at 390-391; J.B. CP at 689-690.

II. The Archdiocese Produced Confidential Documents Only After the Plaintiffs and Pfau Cochran Signed a Stipulated Protective Order.

The confidential documents at issue have been the subject of months of litigation related to their production and use. *See* A.G. CP at 63-90; *See* J.B. CP at 63-617. The Archdiocese did not produce the confidential documents until the trial court ordered their production pursuant to a protective order signed by all the parties on November 24, 2009. A.G. CP at 77-84; J.B. CP at 209-216. This protective order followed the Court's August 25, 2009, order on the Archdiocese's Motion

¹ On May 25th, the *A.G. et al. v. Archdiocese et al.* and *J.B. et al. v. Archdiocese et al.* cases were consolidated for appeal by ruling of Commissioner Ellis. The index of clerk's papers was created for each individual case before consolidation. To avoid confusion, the Archdiocese sets out the citations to the record for both the *A.G.* and *J.B.* cases.

and the Court's November 16, 2009, order on *in camera* review. A.G. CP at 66-70, 77-78; J.B. CP at 63-67, 111-114, 209-210. Prior to signing the protective order, Plaintiffs' firm, Pfau Cochran, had at least four other pending cases against the Archdiocese and had already served discovery requests seeking the same documents as those it would receive after signing the protective order in the above-captioned cases. A.G. CP at 167-169, 172, 324-360, 391; J.B. CP at 675-677, 681, 690.

The parties' clearly written purpose in entering into the stipulation and protective order was to "specify 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. One of the primary reasons these documents were produced was because all parties recognized that confidentiality was crucial and could only be maintained through an appropriate protective order, as demonstrated by the order which provided, "[t]he parties acknowledge that confidentiality is critical to this Stipulation." A.G. CP at 81; J.B. CP at 213. Another specific area of the protective order that demonstrates how confidentiality was paramount is that if any person besides counsel to the parties and staff employed by counsel was authorized to access the confidential documents, that person must sign a

separate document acknowledging they agreed to be bound by the terms of the protective order. A.G. CP at 80, 84; J.B. CP at 212, 216.

The protective order specifically provided that the party receiving the information “shall not use, copy, or disseminate such Confidential Information for any purpose other than this litigation,” and further, that

[W]ithin 30 days after disposition or settlement, confidential and protected information and all copies of same, and all documents containing or referring to confidential or protected information, shall, at the option of the producing party or person, be destroyed.

A.G. CP at 78, 81; J.B. CP at 210, 213. The Archdiocese produced the documents at issue only after the Plaintiffs and Pfau Cochran agreed to these protective terms. A.G. CP at 115; J.B. CP at 623.

After additional motions practice, the Court issued an order on December 28, 2009, requiring the Archdiocese to produce additional documents. CP at J.B. CP at 219-614. Wholly relying on the stipulated protective order, the Archdiocese produced the documents on January 8, and January 12, 2010. CP at J.B. 616-617. The last Plaintiff settled his claims shortly thereafter on January 29, 2010. A.G. CP at 152.

III. Pfau Cochran Refused to Honor the Terms of the Stipulated Protective Order.

After settlement, the Archdiocese requested that Pfau Cochran either return or destroy their copies of the documents pursuant to the

stipulated protective order. A.G. CP at 150; J.B. CP at 658. Despite the specific language of the order, Pfau Cochran refused to destroy the documents and unilaterally declared it should be able to use the documents in other litigation. CP at A.G. 154-157; J.B. CP at 662-665. Pfau Cochran refused because there were pending cases against the Archdiocese² and counsel spent considerable time reviewing and organizing the documents. *Id.* Pfau Cochran's clients in the above-captioned cases settled all their claims against the Archdiocese at this point, and had no need for the documents. A.G. CP at 150; J.B. CP at 658.

Counsel for the Archdiocese contacted Pfau Cochran to discuss these issues. A.G. CP at 156-157; J.B. CP at 664-665. During this discussion, Pfau Cochran revealed that the Archdiocese's documents were "marked-up" with counsel's work-product. *Id.* Archdiocese's counsel responded that destruction of their copies of the documents was acceptable, but Pfau Cochran refused to destroy them. *Id.*

Only when the Archdiocese moved to enforce the protective order did Pfau Cochran deem it necessary to ask the court for modification. A.G. CP at 10-120, 167-175; J.B. CP at 618-628, 675-683. Pfau Cochran

² The last of the four cases cited in the trial court's order (*K.A. et al.*) was filed by Plaintiffs' counsel on October 26, 2009 – several weeks before the parties and the court signed the stipulated protective order. The other cases cited in the court's order were all filed in 2009: *L.W. et al.* on June 25, 2009, *Jane Doe* on February 9, 2009, and *D.C.* on July 1, 2009. A.G. CP at 390-391; J.B. CP at 689-690.

filed its response on March 2, 2010, asking the court to deny the Archdiocese's motion and requesting modification of the protective order. CP at A.G: 167-175; J.B. CP at 675-683. This request was several days after Plaintiffs' copies of the documents should have been destroyed pursuant to the order's terms. CP at A.G. 81, 174-175; J.B. at 213, 682-683. Pfau Cochran requested modification despite acknowledging that the protective order applied to the documents the Archdiocese produced, and further acknowledging that the Archdiocese may be 'technically' right in moving to enforce the protective order, although arguing the Archdiocese's relief was not 'practical.' A.G. CP at 172-173; J.B. CP at 680-681.

IV. Not Only Did the Trial Court Fail to Enforce Its Own Protective Order, it Also Abused its Discretion by Modifying that Order.

The trial court denied the Archdiocese's motion to enforce the protective order signed by the parties and entered by the court. A.G. CP at 390-391, J.B. CP at 689-690. The court ruled:

[T]he terms of the protective order at issue shall remain in place and shall govern the use of these materials in the pending litigations [involving the Archdiocese and Pfau Cochran]. Should the parties in the above cases seek to modify the terms of the protective orders, they may do so before the judge assigned to the particular court.

A.G. CP at 391; J.B. CP at 690.³ The court denied the motion “for the reasons stated in plaintiff’s response.” A.G. CP at 390; J.B. CP at 689. The reasons stated in Plaintiffs’ response were:

The Court should deny the Archdiocese’s motion because (1) the relief it seeks would result in inefficiency and a waste of resources for the parties and the judicial system, particularly where the Archdiocese is collaterally estopped on these discovery issues, and (2) the Archdiocese specifically agreed that the Court could modify the protective order as justice requires.

A.G. CP at 171; J.B. CP at 689. Compelled by principles of justice, the Archdiocese filed a timely Notice of Appeal on March 24, 2010. A.G. CP at 392-396; J.B. CP at 691-695.

The court’s Order contradicts its prior orders. A.G. CP at 66-70, 390-391; J.B. CP at 63-67, 611-614, 689-690. Previously, the Archdiocese could refer to documents produced in previous cases to satisfy pending discovery obligations, however, the trial court rejected this practice in its August 25, 2009, and December 28, 2009, orders. CP at A.G. 66-70; J.B. CP at 63-67, 614. The court’s December 28, 2009, order required the Archdiocese to produce the documents because the court

³ The pending cases cited by the court are: *K.A. at al. v. Corporation of the Catholic Archbishop of Seattle*, King County cause number 09-2-39247-1, *L.W. et al. v. Corporation of the Catholic Archbishop of Seattle*, King County cause number 09-2-23995-9, *Jane Doe v. Corporation of the Catholic Archbishop of Seattle*, King County Cause No. 09-2-07017-2, and *D.C. v. Corporation of the Catholic Archbishop of Seattle*, King County cause number 09-2-25059-6. A.G. CP at 390-391; J.B. CP at 689-690. None of these cases were before the Honorable Paris K. Kallas.

“rejected the argument that the defendant’s obligations in this case are fulfilled by production in other cases.” CP at J.B. CP at 614. However, after the Archdiocese produced these documents, the court then ruled documents produced in past litigation should be used in subsequent litigation. A.G. CP at 390-391; J.B. CP at 689-690.

SUMMARY OF ARGUMENT

The Archdiocese, Plaintiffs, and Pfau Cochran entered into a stipulated protective order ensuring the documents would only be used in the above-captioned litigation and their copies would be destroyed after settlement. The Archdiocese produced the documents and soon thereafter settled the case while relying on the protective order providing for destruction of Plaintiffs’ copies of the documents. When Plaintiffs counsel - Pfau Cochran⁴ - refused to destroy their copies, and the Archdiocese moved to enforce the protective order, the court refused to enforce its own order and allowed Pfau Cochran to keep the documents and use them in other cases before different judges. Because this order is arbitrary, based on untenable grounds, made for untenable reasons and is

⁴ Pfau Cochran was not a party in the above-captioned cases, but signed the stipulated protective order on behalf of the Plaintiffs. In this brief, the modifying entity is often referred to as Pfau Cochran as it was this firm that signed the original stipulated protective order and for all practical purposes it is Pfau Cochran, not the Plaintiffs, that is seeking to retain the documents for use in other litigation as the Plaintiffs in the above-captioned cases have settled all their claims against the Archdiocese. Furthermore, the four cases that Pfau Cochran requested they be allowed to use the documents in are all cases where other plaintiffs are represented by Pfau Cochran.

manifestly unreasonable, the Archdiocese seeks reversal of the trial court's order and an entry of an order enforcing the terms of the original stipulated protective order.

ARGUMENT

I. Standard of Review.

The Court normally reviews a trial court's order relating to documents produced during discovery for an abuse of discretion. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991). Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily and capriciously. *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 1062 (1956). Questions of law are reviewed de novo. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 578, 870 P.2d 299 (1994).

Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." *State ex rel. Clark v. Hogan*, 49 Wn.2d at 462. An appellate court will find an abuse of discretion when there is a clear showing that the trial court's exercise of discretion was

“manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court’s discretionary decision is “based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A court’s exercise of discretion is “manifestly unreasonable” if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’” *Id.* (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

II. The Trial Court Abused its Discretion When it Ordered that Pfau Cochran Could use the Protected Documents in Cases Before Other Judges. The Trial Court did not Have Jurisdiction to Issue Such an Order.

The trial court abused its discretion when it ordered that Plaintiffs’ counsel, Pfau Cochran, could use the documents produced in the above-captioned cases in other cases pending before different judges. Such an order is arbitrary and exercised for untenable reasons as the trial court had no jurisdiction to issue such an order.

A. The Trial Court’s Jurisdiction is Limited When Deciding Whether a Protective Order Should be Modified.

The trial court in *A.G. et al.* and *J.B. et al.* simply had no jurisdiction to issue discovery orders in other trial courts. The Ninth

Circuit's decision in *Foltz* outlines the jurisdictional boundaries between trial courts when one party wants to use documents subject to a protective order in another court. See *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). Although *Foltz* is concerned with a third party public interest group seeking access to documents in a case they were not a party to (whereas in the instant case, the part seeking to modify the protective order is an original signatory of the order and not a public interest group) the Ninth Circuit's analysis concerning the narrow issue of a court's jurisdiction when ruling on protective orders is helpful. *Id.* Furthermore, although *Foltz* specifically concerns interpretation of protective orders under Federal Rule of Civil Procedure CR 26, the Washington Supreme Court has said that when the language of a Washington Rule and its federal counterpart are virtually identical (such as Civil Rule 26 and Federal Rule of Civil Procedure 26), courts should look to decisions interpreting the Federal Rule for guidance. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 37-38, 499 P.2d 869, 871 (1972)(quoted by *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 n. 14, 104 S. Ct. 2199, 81 L.Ed.2d 17, *cert. denied*, 467 U.S. 1230, 104 S.Ct. 2690, 81 L.Ed.2d 884 (1984)).

In *Foltz*, once the court that issues the protective order is faced with a request to modify that protective order, "it does not decide whether

the collateral litigants will ultimately obtain the discovery materials.”

Foltz, 331 F.3d at 1133. “The disputes over the ultimate discoverability of specific materials covered by the protective order must be resolved by the collateral courts.” *Id.*

In the above-captioned case, the entity requesting to obtain access to the documents in other cases and the entity that already has the documents is the same: Pfau Cochran. The trial court’s order allowed Pfau Cochran to keep the documents despite the destruction provisions in the original protective order, and ruled that the protective order would govern their “use” in other cases. A.G. CP at 390-391, J.B. CP 689-690. *Foltz* rejected this practice by holding that the court which issued the protective order cannot ultimately rule on the discoverability of the protected materials in other cases. *Id.* at 1133.

The Ninth Circuit explained why the court which issued the protective order must not ultimately rule on discoverability in other cases.

These procedures also preserve the proper role of each of the courts involved: the court responsible for the original protective order decides whether modifying the order will eliminate the potential for duplicative discovery. If the protective order is modified, the collateral courts may freely control the discovery process in the controversies before them without running up against the protective order of another court.

Id. at 1133. Other courts use similar language when following *Foltz*. See e.g. *CBS Interactive, Inc. v. Etalize, Inc.*, 257 F.R.D. 195, 205-206 (N.D.

Cal., 2009)(“Whether a collateral litigant would ultimately obtain access to the discovery materials is not something this court can even determine.”); *Martinez v. City of Oxnard*, 229 F.R.D. 159, 163 (C.D. Cal., 2005)(“This court leaves it to the collateral court to determine whether the information [collateral litigant] now seeks is within the scope of its prior order partially re-opening discovery.”).

Here, the trial court’s order infringed on the jurisdiction of other courts. The order modified the protective order to prohibit destruction of Plaintiffs’ copies of documents, *and at the same time* allowed Pfau Cochran to use the documents in other litigation. The Order’s last several lines allowing these other courts to modify the protective order as they see fit does not cure this massive jurisdictional overreaching by the trial court. *See* A.G. CP at 391; J.B. CP at 690. Instead, such a directive only underscores the jurisdictional problem in the trial court’s Order: courts should not *amend* discovery orders issued by other courts that supposedly apply to their case.

The trial court’s order is based on untenable grounds and for untenable reasons because it rests on a faulty jurisdictional foundation. The trial court abused its discretion by issuing an order reaching far beyond its jurisdiction.

B. The Trial Court Cannot Prospectively Apply Collateral Estoppel to Bind Other Courts.

The trial court rested its decision on untenable reasons by ruling modification of the protective order was appropriate in part because the Archdiocese was collaterally estopped from challenging the discoverability of these documents in other cases. A.G. CP at 171-173, 390; J.B. CP at 679-682, 689. It was not the trial court's place to apply collateral estoppel. Collateral estoppel, or issue preclusion, prevents relitigation of a prior issue involving the same parties if all of the following elements are met: (1) that the issue decided in the **prior action** was identical to the issue presented in the **second action**; (2) that the **prior action** ended in a final judgment on the merits; (3) that the party to be estopped was a party or in privity with a party in the **prior action**; and (4) that application of the doctrine would not work an injustice. *State v. Vasquez*, 148 Wn.2d 303, 59 P.3d 648 (2002); 14A WAPRAC, Civil Procedure, §35.32, Tegland (2009).

“Collateral estoppel is a backward-looking doctrine. Courts apply it to avoid relitigation of, and inconsistency with, issues already decided by other courts.” *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999). The doctrine is used by a court when looking at whether decisions in **prior actions** will bind the **current action** before the court. Even if one assumes that all the elements of collateral estoppel are

met, which they are most assuredly not, the doctrine cannot be used to bind other courts that will be deciding unspecified issues with different plaintiffs and different facts.

The trial court was not empowered to issue an unsolicited ruling on the discoverability of materials in other trial courts. For a trial court to rule that its decision has prospective preclusive effect is an abuse of discretion.

III. The Trial Court Abused its Discretion by Basing Its Decision, in Part, on Judicial Efficiency. Alleged Judicial Efficiency is Not a Sufficient Basis for Modifying a Protective Order at the Request of an Original Signatory.

When the opposing party or counsel requests that the court allow it to renege on its promises, any alleged judicial efficiency is not a sufficient basis to allow an agreement to be breached. One of the bases for the trial court's decision was that enforcing the protective order would result in inefficiency and a waste of resources for the parties and the judicial system. A.G. CP at 171-173, 390; J.B. CP at 679-682, 689. As set forth below, this reasoning demonstrates an abuse of discretion because it is based on untenable grounds, untenable reasons, and is manifestly unreasonable by adopting a position that no reasonable person would take.

It is important to note that this case is different from many other precedential cases because the *party that requested modification of the protective order*, Plaintiffs, through their firm, Pfau Cochran, *is also one*

of the parties that signed the protective order. The same counsel that agreed to the provisions of the protective order to receive confidential documents now wants to change its terms after receiving the documents and after their clients have no further need for them.

Washington State case law is scarce when analyzing a situation where an *original party* seeks to modify a stipulated protective order. *See Marine Power & Equipment Company v. State Department of Transportation*, 107 Wn.2d 872, 734 P.2d 480 (1987)(upholding protective order modification by a third party collateral litigant involving public interest). Many cases from other jurisdictions similarly concern third party collateral litigants, public interest groups, or newspapers which seek to modify a protective order. *See State ex rel. Ford Motor Company v. Manners*, 239 S.W.3d 583, 587-88 n. 5 (Mo. 2007)(noting approaches from other jurisdictions apply modification “in the context of a third party seeking to intervene for the purposes of modifying a protective order to gain access to the documents for other pending litigation.”). However, there are some cases from other jurisdictions which can provide guidance to the Court for the situation presented in this case.

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A. The Court Must Undertake a Different Analysis When Determining Whether to Modify a Stipulated Protective Order Depending on Whether the Request for Modification is From an Original Signatory or a Third Party.

In a more recent decision by the Supreme Court of Missouri, the court held that the vacation of a non-sharing protective order after settlement, at the request of an original signatory, was an abuse of discretion. *State ex rel Ford Motor Company v. Manners* (hereinafter, “*Manners*”), 239 S.W.3d at 589. The court in *Manners* noted the issue presented to the court is different when “the party seeking modification was a party in the action where the non-sharing protective order was issued.” *Id.*

In *Manners*, the plaintiffs filed a wrongful death lawsuit against Ford Motor Company (hereinafter “Ford”) after their son was killed in an automobile accident. *Id.* at 583. After months of motion practice, Ford produced a number of documents pursuant to a non-sharing protective order that provided the documents would not be used in other cases. *Id.* at 584-85. The non-sharing protective order did not state what would happen to the documents after the case was over. *Id.* at 585. After the court issued the non-sharing protective order, the plaintiffs tried to vacate the protective order two times. *Id.* at 585. Plaintiff argued that sharing the documents with counsel in other cases would promote efficiency,

especially considering Ford's alleged history of discovery abuse. *Id.* Both times, the trial court refused to vacate the protective orders, noting that the protective orders were in place to expedite the discovery process. *Id.* at 585-86. After these motions, Ford further moved the court to require the plaintiffs to sign a non-sharing protective agreement for additional documents. *Id.* at 586. After initially refusing to sign the agreement, plaintiffs did so after being ordered by the trial court. *Id.*

Soon thereafter, the parties entered into a settlement agreement that did not contain any provisions addressing the non-sharing protective order. *Id.* After settlement, the plaintiffs moved the court a third time to vacate the non-sharing protective order and enter a sharing protective order in its place. *Id.* This time, the court granted the plaintiffs' motion. *Id.* The Missouri Court of Appeals denied Ford's attempt to stay enforcement of the trial court's order. *Id.*

The Missouri Supreme Court ruled that the trial court abused its discretion by modifying the protective order. *Id.* at 589. The court looked at approaches from other jurisdictions faced with a question of whether a protective order should be modified. *Id.* at 587-88. Many of these cases were dismissed by the *Manners* court as they involved third parties seeking to intervene and modify a protective order, whereas the case in *Manners* dealt with a different situation where "the party seeking

modification was a party in the action where the non-sharing protective order was issued.” *Id.* at 588 n. 5.

The Missouri Supreme Court ruled the trial court abused its discretion for four main reasons. This reasoning is applicable to the instant case.

First, Ford’s reliance on the non-sharing protective order was “manifest” as demonstrated by its continual refusal to produce many of the documents at issue until a protective order was entered which the plaintiffs’ attorneys were required to sign. *Id.* at 588. “It would be unreasonable to conclude that Ford would have insisted on this protection and allowed access to their company files if the non-sharing protective order was only to last until the settlement of the dispute.” *Id.* Similarly, in the instant case, the Archdiocese refused to produce the documents at issue until the parties signed a non-sharing protective order, agreed that Plaintiffs’ copies of the documents would only be used in the above-captioned cases, and agreed the documents would be destroyed at the conclusion of the case. The Archdiocese entered into a settlement agreement that did not contemplate any changes to the protective order. The clear intent of the parties was that the Plaintiffs’ copies of the documents would be destroyed after settlement, and this provision was

justifiably relied upon by the Archdiocese considering the acknowledged sensitivity of the documents.

Second, the court reasoned that the discovery process itself would be hindered if parties could not rely upon protective orders and agreements. *Id.* In so reasoning, the court specifically rejected the plaintiffs' arguments that modifying the protective order would facilitate the discovery process by avoiding duplicative discovery. *Id.* "If parties could not rely upon protective orders and agreements, during and after the trial process, all productions of sensitive material would require litigation to this Court." *Id.* As set forth in more detail below, this consideration is apparent in this case, as the Archdiocese has several pending cases involving Pfau Cochran in which measured cooperation in the discovery process is needed to avoid more motions practice in these courts.

Third, modifying the protective order to allow the documents to be used in other cases defeated the very purpose of the non-sharing protective order in *Manners*. *Id.* at 588 n. 9. The court rejected the plaintiffs' arguments that sharing the documents subject to broader confidential protective order would not harm Ford, because, the court reasoned, "Ford specifically asked for, and obtained, a non-sharing protective order." *Id.* The court distinguished cases reaching an opposite conclusion by noting that this case involved a *non-sharing protective order*, whereas other cases

did not. *Id.* (emphasis added). Similarly, the purpose of the protective order in this case was to ensure the documents were not used in other litigation because Plaintiffs' copies would be destroyed at the conclusion of litigation. Maintaining the confidentiality provisions of the protective order is not what was agreed to by the parties: like the defendant in *Manners*, the Archdiocese specifically asked for, and all parties stipulated to, a non-sharing protective order.

Fourth, the plaintiffs in *Manners* entered into a settlement agreement that did not address the protective order. *Id.* at 589. They were given the opportunity to change the terms or future application of the non-sharing protective order in the settlement process but refused to do so. *Id.* Having failed to do so, the trial court abused its discretion by vacating the non-sharing protective order after settlement. *Id.* Here, Pfau Cochran was given the opportunity to change the terms for the protected documents both at the time of signing the protective order and when it negotiated the settlement agreement. After settlement, Pfau Cochran then waited for the Archdiocese to move to enforce the protective order before finally asking for modification it deemed essential for the efficiency of the court system.

Furthermore, the Archdiocese's protective order provides even greater protection than the non-sharing protective order in *Manners*. A.G. CP at 77-81; J.B. CP at 209-214; *cf.* *Manners*, 239 S.W.3d at 584-585.

Because these documents are highly sensitive and confidential, the Archdiocese incorporated a destruction provision into the protective order to make sure Plaintiffs' copies of the documents were destroyed after settlement, judgment, or trial. The Archdiocese and Plaintiffs did not just sign a protective order providing for confidentiality only. The parties agreed to a protective order that kept the document confidential, prohibited use beyond the instant cases, and provided for destruction of Plaintiffs' copies of the documents after the case was over. The protective order at issue in *Manners* had no destruction provision like the protective order at issue here, yet the *Manners* court still held that the protected parties' reliance on the protective order was "manifest," necessitating reversal of the lower court's decision to modify the protective order. *Manners*, 239 S.W.3d at 585, 588.

It is also worth noting that the *Manners* court prohibited modification of the protective order under the same standard of review present in this case: an abuse of discretion standard. *Id.* at 589.

The different analysis the court undergoes when evaluating a request by a party to modify a stipulated protective order bearing its signature is also demonstrated in the *Omega Homes* case. *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403 (W.D. VA 1987). In this case, the plaintiff sought to modify a protective order that limited

the use of documents to the case in which they were produced. *Id.* at 403.

The court refused to modify the protective order. *Id.* at 404. The court noted there is a split among courts concerning who has the burden of proving there is good cause to lift the protective order or keep the protective order in place. *Id.* at 403-04. However, the court went on to distinguish these cases from its own:

When, however, the proposed modification affects a protective order stipulated to by the parties, as opposed to one imposed by the court, it is clear that the shared and explicit assumption that discovery was for the purposes of one case alone goes a long way toward denying the movant's request without more.

Id. at 404.

Just like the court in *Manners*, the *Omega Homes* court rejected the plaintiff's argument that modification to allow sharing and use in other cases would save judicial time and resources. *Id.* The court's reasoning is worth quoting in detail:

Omega and CAC fairly agreed to the protective order, apparently through negotiations by their sophisticated and well informed counsel. Throughout discovery CAC relied on that mutual understanding that the information it was disclosing was to be used solely for preparing this case. In effect, Omega is asking the court to rewrite the terms of the stipulated order and apply them retroactively.

Id.

The facts in *Omega Homes* are similar to the above-captioned cases. Here, the parties agreed to the terms of the stipulated protective order: the court did not simply issue a protective order. Similarly, Plaintiffs and Pfau Cochran are trying to rewrite the terms of a protective order they signed after the Archdiocese fulfilled its obligations. Like the order in *Omega Homes*, the stipulated protective order was “fairly agreed to” through negotiations by Plaintiffs’ “sophisticated and well-informed counsel.”

As demonstrated above, judicial efficiency is an insufficient basis to modify stipulated protective order fairly agreed to by the parties and their counsel. After one party fulfills its obligations, the agreement between the parties must be enforced, not altered by the court at the request of the party seeking to relieve itself of its obligations under the agreement.

B. A Protected Party Enjoys Heightened Protection When the Opposing Party Requests Modification of a Stipulated Order Bearing Its Signature.

The Archdiocese, as a protected party under a stipulated order, enjoys a heightened protection from modification of that order. This heightened protection is demonstrated by the court in *Jochims v. Isuzu Motors*. See *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499 (S.D. Iowa, 1992). The court in *Jochims* rejected a plaintiff’s attempt to modify a

protective order, noting “general unanimity among the courts that where a party to stipulated protective order seeks to modify that protective order, that party must demonstrate particular good cause in order to gain relief from the agreed to protective order.” *Id.* (citing numerous cases). The courts’ rationale was “a party which in good faith negotiates a stipulated protective order and then proceeds to produce documents pursuant to that protective order is entitled to the benefit of its bargain; namely, to rely upon the terms of the stipulated protective order.” *Id.* (citing cases). The court cited numerous cases in support of this position that there is “general unanimity” among courts that the modifying party must demonstrate particular good cause to modify the protective order. *See Richard Wolf Medical Instruments Corp. v. Dory*, 130 F.R.D. 389, 391-92 (N.D. Ill. 1990), *aff’d sub nom Richard Wolf Medical Instruments Corp. v. EDAP, S.A.*, 928 F.2d 410 (1991)(“The general rule, nevertheless, is that non-parties to litigation cannot obtain documents marked ‘confidential’ and nondisclosable under a protective order such as exists in this case”); *see also Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. at 403-04 (noting arguments by party proposing modification are not “compelling enough to justify abrogating the order previously agreed to.”).

The *Jochims* court specifically rejected the same argument Pfau Cochran made in the above-captioned litigation. *Id.* The plaintiffs in

Jochims argued that modification of the previous protective order would “reduce the cost and waste of repetitive discovery in similar lawsuits against” the same defendant. *Id.* The court noted that “[w]hile there is no doubt truth to this assertion, the circumstances which allegedly require modification of the protective order should have been apparent to *Jochims* at the time he entered into the protective order.” *Id.* The court concluded that *Jochims*’ counsel should have sought a suitable provision permitting disclosure incorporated into the protective order. *Id.*

In the instant case, Pfau Cochran has not demonstrated any good cause for modification of the stipulated protective order. Pfau Cochran does not point to any extraordinary circumstances justifying modification, nor to any changed circumstances between the time it signed the protective order and the time it sought modification. In fact, as set forth below, the main reason why Pfau Cochran sought modification - alleged judicial efficiency - aside from being an insufficient consideration under the facts of this case - was or should have been apparent to Pfau Cochran at the time it signed the stipulated protective order.

IV. The Court Abused its Discretion by Rewarding Pfau Cochran's Tactics, Necessarily Chilling Future Protective Orders, Countenancing "Discovery by Ambush," and Casting Doubt on the Reliability of Protective Orders Signed and Entered by the Court.

The trial court abused its discretion by rewarding a party that signs a protective order to receive documents, then asks the court to change the terms of the protective order to defeat its fundamental purpose. The trial court's acquiescence of this strategy rewards "discovery by ambush" and chills future protective orders. If the Archdiocese can no longer rely upon protective orders signed by opposing counsel and entered by the court, cooperation through discovery will be seriously compromised. The court's Order is arbitrary and manifestly unreasonable as it is a position no reasonable person would take.

Contrary to Pfau Cochran's argument that modifying the protective order promotes efficiency in the discovery process, the court's Order instead will impede the discovery process, as the Archdiocese can no longer rely on protective orders signed by Plaintiffs' counsel. A.G. CP at 171-173, 390; J.B. CP at 679-682, 689.

Cooperation among adversarial parties in the discovery process is essential to the just, speedy and efficient disposition of disputes. The Ninth Circuit in *Foltz*, quoted a passage from Wright, Miller & Marcus, § 2044.1, stating it is "axiomatic" that:

Among the goals furthered by protective orders 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 orders that cannot be relied upon will not foster cooperation through discovery.

331 F.3d at 1137. Where cooperation among the parties is hindered, the discovery process will also be hindered.

A. The Archdiocese Produced the Protected Documents Only After the Plaintiffs, Plaintiffs' Counsel, and the Court, Signed the Stipulated Protective Order.

The Archdiocese's reliance on the protective order is manifest when looking at the months of motions practice that preceded ultimate production of the documents. The Archdiocese's procedural maneuvers to protect these documents demonstrates the manifest and justifiable reliance on the protective order. As explained in *Foltz*, "[o]f course, the extent to which a party can rely on a protective order depends on the extent to which the order did reasonably induce the party to allow discovery as opposed to settling the case." 331 F.3d at 1137-38 (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992); see also *State Appx. rel. Ford Motor Company v. W. Manners*, 239 S.W.3d 583, 588 (2007)("It would be unreasonable to conclude that Ford would have insisted on this protection and allowed access to their company files if the non-sharing protective order was only to last until settlement of the dispute.").

The Archdiocese's interest in protection is exhibited by its previous discovery motions practice and the specific provisions regarding limited use and prompt destruction of Plaintiffs' copies of the documents in the protective order. The Archdiocese incorporated the destruction and limited use provisions in the protective order in part because documents the Archdiocese produced under seal in previous litigation were seen as attachments to an article in *The New York Times*. A.G. at 159-166; J.B. CP at 667-674. Limited use and ultimate destruction of the opposing party's copies are now the only ways the Archdiocese can ensure these documents stay out of the press.

B. The Trial Court's Order Harms the Credibility and Integrity of the Judicial Process.

The Archdiocese's reliance on the protective order was reasonable, and to arbitrarily modify such a crucial document is fundamentally unfair to the Archdiocese. Such an order by the trial court injures the integrity of the judicial system's oversight of the discovery process.

An appellate court decision from Missouri highlights not only the manifestly unjust and unreasonable nature of the trial court's decision, but also notes that the trial court's credibility is called into question when it unjustly modifies a protective order. *See State Appx. rel. Upjohn v. Belt*, 844 S.W.2d 467, 470 (Mo. App. 1992). In *Upjohn*, a third party drug manufacturer produced a criminal defendant's records pursuant to a

protective order that required that the documents only be used in the criminal case at hand. *Id.* at 468. After the jury found the defendant guilty of murder, she hung herself in her cell. *Id.* at 469. After the defendant's death, her attorney sought to dissolve the protective order and maintain the documents. *Id.* The trial court indicated it would allow the protective order to be dissolved unless it was prohibited from doing so, which the Missouri Court of Appeals then preliminarily prohibited. *Id.* After noting that the defendant's attorney did not have standing to seek modification of the protective order after the client died, the court went on to state:

[E]lementary precepts of fairness should prevent the entry of any order modifying the protective order. *Upjohn* produced the documents for [the attorneys] only after the court entered a protective order insuring to the greatest possible degree that the documents would remain confidential. For the *court to renege on its action* to protect the confidentiality of the documents would be manifestly unjust and unfair to *Upjohn*.

Id. at 470; also quoted in *Manners*, 239 S.W.3d at 588.

As noted by *Upjohn*, since it is the court that enters the protective order, if the court then goes back on this promise, the reliability of protective orders in the judicial system as a whole is called into question. Such an order is manifestly unreasonable.

C. Despite the Fact that Pfau Cochran had Other Pending Cases Against the Archdiocese, it Did Not Incorporate Provisions Into the Protective Order or the Settlement

**Agreement that it Now Deems Essential to the
Efficiency of the Discovery Process.**

Pfau Cochran had the opportunity and the information available to request the documents produced pursuant to the protective order should be used in other litigation at the time it signed the order. Instead, Pfau Cochran signed the protective order, then, after settlement, requested that the trial court change the protective order to allow it to use the documents in other litigation. The trial court did so and listed several cases in which Pfau Cochran could use the documents. The pending cases cited in the court's order (which was drafted by Pfau Cochran) were all filed by Pfau Cochran at the time the protective order was negotiated, stipulated, and entered.

Pfau Cochran's argument in support of their position (it would be efficient to use these documents in other litigation) was known⁵ at the time it signed the protective order. As pointed out by the Pfau Cochran in their Response to the Archdiocese's Motion to Enforce Protective Order, Pfau Cochran had even served discovery requests on the Archdiocese in the *K.A. et al. v. Archdiocese et al.* litigation asking for the very same

⁵ The last of the four cases cited in the trial court's order (*K.A. et al.*) was filed by Plaintiffs' counsel on October 26, 2009 – several weeks before the parties and the court signed the stipulated protective order. The other cases cited in the court's order were all filed in 2009: *L.W. et al.* on June 25, 2009, *Jane Doe* on February 9, 2009, and *D.C.* on July 1, 2009.

documents it was agreeing to only use in the above-captioned litigation.

A.G. CP at 324-360.

As set forth in documents attached to Plaintiffs' Opposition to Archdiocese's Motion to Enforce Protective Order, the Archdiocese signed their responses to Plaintiff K.A.'s discovery requests approximately thirty days after the stipulated protective order in the above-captioned case was signed by Pfau Cochran. A.G. CP at 324-360. Some of these discovery requests are identical to the discovery requests in the above-captioned litigation. A.G. CP at 330-339; *cf.* A.G. CP at 262-269.

Accordingly, Plaintiffs counsel was on notice they would want to use the documents subject to the protective order in other cases at the time they signed the *A.G.* and *J.B.* protective order which provided the documents would only be used in the *A.G.* and *J.B.* cases. Therefore, Pfau Cochran knew or should have known they would want the protected documents in other litigation, yet decided to sign the protective order limiting their use, and then moved for modification of that order after the Archdiocese produced the protected documents and settled the case.

To negotiate and stipulate to protective provisions that Pfau Cochran would try to change three months after receiving the documents constitutes bad faith on the part of Pfau Cochran.

As pointed out by the court in *Jochims*, Pfau Cochran should have sought omission of the destruction provisions of the stipulated protective order, knowing full well such documents could be arguably relevant to future cases. *See Jochims*, 145 F.R.D. 499. Pfau Cochran could have also addressed this issue in the settlement agreement as contemplated in *Manners*. 239 S.W.3d at 589. Instead, Pfau Cochran voluntarily promised to destroy these documents in order to receive them, then reneged on this promise after settlement. The *Jochims* court noted that specific policy considerations – that are present in the instant case as well – compelled the court to refuse modification of the protective order:

To permit *Jochims* to conduct discovery under one set of rules and then have the court abrogate those rules after *Jochims* has achieved his desired result would be to countenance discovery by ambush [citation omitted]. The obvious effect of such an approach to discovery would be to place a chill upon future stipulated confidentiality agreements. This in turn would likely impede the processing of cases as the courts are called upon to rule upon countless motions under Rule 26.

Id.

The court in *Omega Homes* similarly refused to reward tactics by one party to renege on its promises:

In effect, *Omega* is asking the court to rewrite the terms of the stipulated order and to apply them retroactively. *The court refuses to endorse Omega's tactic* of inducing broad disclosure under a set of ground rules and of then avoiding any limitations on itself by asking the court to come in and change those rules.

Omega Homes, Inc., 656 F. Supp. at 404 (emphasis added).

By rewarding Pfau Cochran's tactics, the trial court has encouraged "discovery by ambush," which will detrimentally affect the half-dozen pending cases before other judges. This result need not occur if this court reverses the trial court's order for an abuse of discretion.

V. Neither Legal Principles, Nor the Stipulated Protective Order, Support the Court's Ruling that Modification of the Protective Order was Necessary to Comply With the Law.

Pfau Cochran argued in its response to the Archdiocese's Motion to Enforce Protective Order that legal principles compelled the court to modify the protective order in the interests of judicial efficiency. A.G. CP at 171-173, 390; J.B. CP at 679-682, 689. Pfau Cochran further pointed to a prefatory paragraph of the protective order, which states:

Noting in this Stipulation shall prevent a party from requesting further relief from the Court regarding the information covered by this Stipulation and nothing 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 173; J.B. CP at 681 (emphasis added). Pfau Cochran argues that this prefatory language allows the court to modify the protective order at will. *Id.* Because the trial court's order states they were denying the Archdiocese's Motion for the "reasons set forth in plaintiff's response,"

this argument is apparently one of the bases for the court's order. A.G. CP at 390; J.B. CP at 689.

As set forth above, "the law" does not endorse modification of a stipulated protective order at the request of an original signatory. Any alleged judicial efficiency that results from setting aside some of the most crucial protective terms of the order is an untenable consideration for courts when the modifying party could have incorporated different terms in the protective order or re-negotiated the terms of the protective order in the settlement agreement.

When the party seeking modification is one of the original signatories to a protective order, the trial court - in the interests of justice, efficiency, and fundamental fairness - must refuse any modification, absent extraordinary circumstances not present here. Pfau Cochran signed a protective order to receive documents, then sought to strip the documents of crucial negotiated protections after receiving them. By condoning this practice, the trial court abused its discretion.

CONCLUSION

As set forth above, the trial court abused its discretion when it refused to enforce its own order and allowed Pfau Cochran to keep highly sensitive documents and use them in other cases before different judges. Because this Order is arbitrary, based on untenable grounds, made for

untenable reasons and is manifestly unreasonable, the Archdiocese seeks reversal of the trial court's Order and that this Court direct the superior court to enforce the terms of the original protective order signed by the parties.

RESPECTFULLY SUBMITTED this 7th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2010, I caused to be served and a true and correct copy of the foregoing document **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 7th day of June, 2010.



Alison Forrest