

NO. 37537-1-II

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

In re:

RACHEL KANTOLA
Respondent

vs.

GILBERT J. JUVINALL
Appellant

FILED
COURT OF APPEALS
DIVISION II
08 JUL 29 PM 1:46
STATE OF WASHINGTON
BY
CLERK

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Gary Steiner, Judge

OPENING BRIEF OF APPELLANT

Steven R. Levy & Dennis J. Twichel
Attorney for Appellant
3700 Pacific Highway East Suite 406
Fife WA 98424
(253) 926-1494

(ORIGINAL)

TABLE OF CONTENTS

A. Assignments of Errors 1
 I. Issues Pertaining to Assignment of Error 1
B. Statement of the Case 1
C. Summary of Argument 3
D. Argument 3
E. Conclusion 8

TABLE OF AUTHORITIES

WASHINGTON CASES

John Doe v. Blood Center, 117 Wn.2d. 772, 782 819 P.2d 370 (1991) 3,4

Flowers v. TMA Industries Inc, 127 Wn.App. 13, 38 111 P.3d 1192 (2006) 4

Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 232 654 P.2d 673 (1982) 4

Gillett v. Conner, 132 Wn.App. 818, 822 133 P.3d 960 (2006) 4

Barfield v. City of Seattle, 100 Wn.2d 878, 676 P.2d 438 (1984) 4

Cook v. King County, 9 Wn.App. 50 510 P.2d 659 (1973) 5

King v. Olympic Pipeline, 104 Wn.App 338, 375 16 P.3d 45 (2000) 5

In re Marriage of Kinnan, 131 Wn.App. 738, 750 129 P.3d 807 (2006) 5

Gourley v. Gourley, 158 Wn.2d 460, 469 145 P.3d 1185 (2006) 6, 7, 8

Killian v. Atkinson, 147 Wn.2d 16, 34 50 P.3d 638 (2002) . 7

RULES, STATUTES, & OTHER AUTHORITIES

RCW 7.90.110 1, 3, 6

CR 26, 30, 33, 34 1, 2, 3, 5

RCW 7.90.080(2) 1, 7, 8

CR 26(c)	1, 2, 3, 4
RCW 7.90.005	3
RCW 7.90.090 (1)(a)	3
CR 1	3, 6
CR 26-37	3
RCW 7.90.080(2)	7
ER 1104	6
RCW 7.90.050	6
RCW 26.50	7
RCW 7.90.120(3)	8

CASES FROM OTHER JURISDICTIONS

Miles v. Boeing Co , 154 FRD 112 (ED PA 1994)4
Welsh v. City and County of San Francisco , 887 F. Supp. 1293 (ND Cal 1995)	4
<u>Kiblen v. Retail Credit Company</u> , 76 FRD 402 (Ed Wash 1977).	4

A. ASSIGNMENT OF ERROR

The trial court erred in its order of March 21, 2008 by granting petitioner's request for a blanket protective order, denying respondent the right to depose petitioner, the use of written interrogatories and the use of request for production.

I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a respondent in a civil case brought under RCW 7.90.110 have the right to engage in discovery authorized by CR 26, 30, 33, 34 prior to a trial mandated by RCW 7.90.080(2).

2. Did the court by granting a protective order under CR 26(c), limiting discovery in a case brought under RCW 7.90.110 to an interview of petitioner under oath in the presence of a certified court reporter abuse its discretion.

3. Does the trial court in granting a protective order under CR 26(c) commit reversible error due to its failure to identify in the specific grounds for granting the protective order.

B. STATEMENT OF THE CASE

1. On the 20th day of June 2007, Kantola filed a petition for a sexual assault protective order. CP 1

2. On the 20th day of June 2007, Kantola was granted a temporary protection order with a hearing date of July 3, 2007. CP 2

3. By order dated July 17, 2007, the temporary sexual assault protective order was extended until July 31, 2007. CP 3

4. By order dated July 31, 2007, the temporary sexual assault protective order was extended until further order of the court and the trial was set for the 27th day of August 2007. CP 4

5. By stipulation and order dated August 22, 2007, the Court extended the temporary sexual assault protective order until February 25, 2008. The trial date was reset for February 25, 2008.

6. The respondent on February 8, 2008 pursuant to CR 30, 33 and 34 sent out interrogatories and request for production and notice of deposition to the petitioner.

7. The petitioner filed a motion for a protective order on February 14, 2008. CP 5

8. By order dated February 19, 2008, the court reissued the temporary sexual assault protection order and renoted the trial for April 28, 2008. CP 6

9. The Court Commissioner on March 3, 2008, denied respondent's motion to remove petitioner's attorney and declined to hear the motion for protective order. CP 7

10. On March 13, 2008, petitioner filed her motion for protective order before the Superior Court. CP 8

11. On March 21, 2008, the petitioner's motion for a protective order under CR 26(c) was heard. The trial court

entered an order prohibiting the respondent from using interrogatories, requests for admissions or deposition as discovery tools and authorizing only an interview of petitioner before a certified court reporter. CP 11

C. SUMMARY OF ARGUMENT

The court should find the trial court abused its discretion by denying the respondent the right in civil suit brought under RCW 7.90.110 the use of interrogatories, request for production and a deposition as authorized by CR 30,33 and 34. The court should do so based on either the trial courts failure to articulate the reason for granting a CR 26(c) protective order or because the court had no legally recognizable reason for denying the request to use the discovery tools authorized by CR 30, 33 and 34.

D. ARGUMENT

This is a civil case. The legislature expressly made it so in RCW 7.90.005. It put to rest any argument about whether this is a civil matter in RCW 7.90.090 (1)(a) by establishing a burden of proof of "preponderance of the evidence." According to CR 1, the Civil Rules apply to this proceeding. The court rules (CR 26-37) "grant a broad right of discovery which is subject to the relatively narrow restriction of CR 26(c). **John Doe v. Blood Center**, 117 Wn.2d. 772, 782 819 P.2d 370 (1991). "This broad right of discovery is necessary to ensure access to the

party seeking discovery. It is common legal knowledge that extensive discovery is necessary to effectively pursue either plaintiff's claim or defendant's defense." **Flowers v. TMA Industries Inc**, 127 Wn.App. 13, 38 111 P.3d 1192 (2006).

The trial court is given broad discretion to control the discovery process to permit the disclosure of relevant information. **Rhinehart v. Seattle Times Co.**, 98 Wn.2d 226, 232 654 P.2d 673 (1982). Its orders are reviewed for an abuse of discretion. **Gillett v. Conner**, 132 Wn.App. 818, 822 133 P.3d 960 (2006). It is an abuse of discretion when a ruling is either manifestly unreasonable or exercised on untenable grounds or for untenable reasons. **Barfield v. City of Seattle**, 100 Wn.2d 878, 676 P.2d 438 (1984).

The burden of establishing good cause for issuance of a protective order liming discovery permitted by the rules is on the party seeking the order. **Miles v. Boeing Co**, 154 FRD 112 (ED PA 1994). Mere allegations of harm are not sufficient to sustain the issuance of a protective order. **Welsh v. City and County of San Francisco**, 887 F. Supp. 1293 (ND Cal 1995).

In the case at bar, despite all the language set forth above, and all the language not set forth above which cautions the trial court that protective orders are disfavored, **Kiblen v. Retail Credit Company**, 76 FRD 402 (Ed Wash 1977) the trial court prohibited all forms of

discovery allowed under CR 30-34. Having done that, it granted the respondent the "right" to interview the petitioner under oath in front of a court reporter. CP 11 The trial court's order left the respondent with no way to prepare for the interview, no means to compel the interview, no means to compel answers to questions asked and ultimately no sanctions if answers were not forthcoming. In short, it reduced respondent's trial preparation (a trial mandated by RCW 7.90.080(2)) to asking a chair which may or may not be occupied by petitioner questions which petitioner may or may not answer with no sanctions if she chose not to.

The trial courts order laying waste to the idea that discovery rules are to be liberally construed **Cook v. King County**, 9 Wn.App. 50 510 P.2d 659 (1973) is silent as to its reason for doing so. This alone is reason to reverse the trial court, under the authority of **King v. Olympic Pipeline**, 104 Wn.App 338, 375 16 P.3d 45 (2000), **In re Marriage of Kinnan**, 131 Wn.App. 738, 750 129 P.3d 807 (2006). Respondent can only presume that the trial court granted the protection order based on one or both of petitioner's articulated reasons for do so. Petitioner claimed that either the civil rules did not apply to this proceeding or that to allow discovery would thwart

the legislative intent to have a “summary proceeding” conducted quickly. Neither reason is sufficient alone nor are they together sufficient to sustain a protective order much less an order of the breadth granted by the trial court in this matter.

The petitioner claimed to the trial court that the civil rules do not apply to proceedings under RCW 7.90.110. The petitioner cited no authority for this position. The civil rules apply to all other civil cases (CR 1) including domestic violence. **Gourley v. Gourley**, 158 Wn.2d 460, 469 145 P.3d 1185 (2006). There is no legal justification either by statute or case law or in the rules themselves making the rules inapplicable to proceedings under RCW 7.90.110. Unfortunately for petitioner, when she chose to bring this action, she like every other plaintiff is subject to the court rules, unless they specifically do not apply.¹ If the trial court’s ruling was based on this argument it untenable.

Additionally, Petitioner argued to the trial court because of RCW 7.90.050, requires a hearing to be held

¹The petitioner argued at the court below that ER 1104 demonstrates that the civil rules do not apply because hearsay is allowed. This argument is incorrect. In fact it demonstrates the Supreme Court believes the evidence rules apply unless excluded.

within 14 days of the issuance of the temporary order, to allow discovery would thwart the legislative intent to have a "summary proceeding". Petitioner cited no authority for this claim. The authority in fact is in favor of discovery.

RCW 7.90.080(2) requires a trial² at which witnesses are examined and cross examined. This court must presume the legislature when it used the words trial, witness examination and cross examination in the statute knew the meaning of those words. **Killian v. Atkinson**, 147 Wn.2d 16, 34 50 P.3d 638 (2002). According to Justice Sanders in **Gourley vs. Gourley**, 158 Wn.2d 460, 480 (2006) "cross examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth." It is hard to fathom how an attorney can fulfil his professional obligation to his client or be prepared to cross examine a witness if he is not allowed to access materials to do so through discovery. The fact that discovery has its own time table is not a reason to prohibit it in this or any other civil action.

² The court should note this is the major distinguishing factor between this statute and RCW 26.50 the domestic violence statute. See also Gourley v. Gourley, 158 Wn.2d 460, 469-470 (2006)

The statute requires that a hearing be held within 14 days. A hearing is not synonymous with the trial mandated trial under RCW 7.90.080(2) **Gourley v. Gourley**, 158 Wn.2d 460, 469 145 P.3d 1185 (2006). At the hearing the court may issue a final order or continue the temporary order under the authority of RCW 7.90.120 (3). The court is free to schedule the trial at any time, both to accommodate its calendar as well as normal trial preparation. The petitioner is not prejudice by the delay because the temporary order is in place. The respondent is allowed sufficient time to prepare for a civil trial.

E. CONCLUSION

This court should vacate the protective order dated March 21, 2008, either because it failed to state grounds upon it issued the protective order or because the grounds upon which it were issued were untenable or it is manifestly unreasonable.

DATED this 24th day of July 2008.

RESPECTFULLY SUBMITTED,



STEVEN R. LEVY, WSBA# 4727
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

08 JUL 29 PM 1:46

STATE OF WASHINGTON
BY [Signature]
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re:

RACHEL KANTOLA

Respondent,

vs

GILBERT JUVINALL

Appellant

NO. 375-37-1-II

DECLARATION OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on the 25th day of July, 2008 I caused to be served in the manner noted below a true and correct copy of the Opening Brief of Appellant on the parties mentioned below as indicated:

Kevin Rundle
405 Broadway
Tacoma WA 98402

By: First Class Mail Fax Messenger

DATED this 25th day of July 2008, at Fife, Washington.

[Signature]
Amy Warner, Legal Assistant

(ORIGINAL)

A Steven R. Levy W
Attorneys at La

3700 Pacific Highway E., Ste. 406, Fife, WA 98424

Tel: (253) 926-1494 * Fax: (253) 926-1496

Steven R. Levy * Dennis J. Twichel