

FILING
COURT OF APPEALS
DIVISION II

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NO. 37537-1-II

STATE OF WASHINGTON

BY 8

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

In re:

RACHEL KANTOLA
Respondent

vs.

GILBERT J. JUVINALL
Appellant

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

The Honorable Gary Steiner, Judge

REPLY BRIEF OF APPELLANT

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The respondent asks this court to sustain the trial court's ruling limiting discovery based upon her claim that (1) this is a "summary proceeding" and the rules of discovery do not apply (2) this is a special proceeding and the rules of discovery do not apply or (3) the rules of discovery do apply and the court appropriately exercised its discretion. All three grounds are incorrect and should be rejected.

I. THIS IS A SUMMARY PROCEEDING AND THE RULES OF DISCOVERY DO NOT APPLY.

Respondent claim that this is a "summary" proceeding is based upon her belief that a "streamlined process" equates to a proceeding which excludes discovery. Interestingly enough respondent neither defines "streamlined process" or "summary proceeding", nor cites any authority for the use of these terms. Rather her authority she claims is found in ER 1101(c)4) and **Spence v. Kaminski**, 103 Wn.App. 325, 12 P.3d 1030 (2000). Neither authority supports the suspension of normal discovery rules.

ER 1101(c)4) is certainly an expansion/suspension of the rules of evidence, which in certain hearings/trial situations allows Judges to consider evidence they normally would not be allowed to consider. It does not deal with discovery matters. It

is specifically limited to certain proceeding and then only to Judges. It does not support a claim that normal rules of discovery do not apply.

Respondent's second claim of support for her argument that this is a "summary proceeding" and meant to be a "streamlined process" is found in the phrase "victims must have easy quick and effective access to the court system". Judge Schulthies clarified exactly what was meant by that remark when he prefaced it by stating "noting that victims of domestic violence often have difficulty completing the petition paperwork, the legislature in 1992 called for refinements in the standard petition form". **Spence v. Kaminski**, 103 Wn.App. 325, 329, 12 P.3d 1030 (2000). Thus the cited comment when put into context has again nothing to do with the procedure after the petition is filed and certainly does not support a suspension of normal discovery.

II. THE NORMAL RULES OF DISCOVERY DO NOT APPLY BECAUSE THIS IS A SPECIAL PROCEEDING.

Respondent claims that even though this a civil proceeding, it is a special proceeding and therefore normal discovery rules again do not apply. To support this claim respondent turns to CR 81. Her claim is that because this is a "summary proceeding and a streamlined process" CR 81 allows a suspension of the discovery process. She is incorrect, CR 81

simply states that if a rule or statute applicable to a special proceeding conflicts with the more general civil rule, then the more specific rules applies. Respondent fails to cite any rule or statute in this act which conflicts with normal discovery rules. Certainly, she can point to the expansion/suspension of the evidentiary rule found in ER 1101 (c)(4) or the limitation of evidence found in RCW 7.90.080, both however deal with evidentiary rules at trial not discovery.

As a corollary to this argument, respondent argues that the act does not specify a particular type of discovery and therefore normal discovery does not apply. The act does not have to specify that the civil rules apply, CR 1 specifies they apply. To follow respondent's logic to its ultimate end would require the legislature upon passage of an act to state that the rules of civil procedures apply. This is not the law in this state, and never has been the law.

III. IF THE CIVIL RULES APPLY THE TRIAL COURT APPROXIMATELY EXERCISED ITS DISCRETION IN LIMITING DISCOVERY.

Under this argument, at least both parties agree the Civil Rules apply and that the appropriate standard to judge the trial court's action is an abuse of discretion. Respondent claims the court found good cause to limit discovery. In fact it did not. The court's reason for doing what it did is exactly the opposite of

what the law requires as demonstrated.

The court started with the position that the appellant was entitled to no discovery and only because of a perceived due process requirement was the appellant allowed any discovery. This is the explanation for the court's failure to make findings of good cause in its order as required by **King v. Olympic Pipeline**, 104 Wn.App 338, 375 16 P.3d 45 (2000).

Respondent to this day has failed to demonstrate any cause much less good cause to limit discovery provided by the rules applicable to this procedure.

IV. THE ACT DOES NOT MANDATE A TRIAL.

This is respondent's most puzzling argument. Respondent appears to say that because the words "trial, cross examination, examined" are mentioned only in the section entitled evidence (RCW 7.90.090) therefore a trial is only mandated in the situation in which the defendant seeks to defend on the basis of previous sexual activity. This is somewhat of a red herring on the respondent's part because as the appellate court commissioner pointed out in the DV case of **Gourley v. Gourley**, 158 Wn.2d 460, 469 145 P.3d 1185 (2006), where no trial is allowed, the respondent was deposed.

RCW 7.90.090 in its opening sentence states that it applies to both proceedings to obtain a sexual assault order or for violation of an order. It then goes on to set forth a

procedure to determine whether the evidence is admissible at a trial. Similar language is not found in the DV statute. The lack of similar language in the DV statute is what sparked the discussion in **Gourley v. Gourley**, 158 Wn.2d 460, 145 P.3d 1185 (2006) about the type of hearing is required. Here the statute is written in plain language. The words are "trial, cross examination and examination". This is an expression of legislative intent and must be given its effect. **Arborwood Idaho LLC v. City of Kennewick**, 151 Wn.2d 359, 367 89 P.3d 217 (2004).

Respondent additionally argues that the inclusion of the evidentiary portion of RCW 7.90.080 in the act is intended as a protection for respondent, similar to the rape shield law. Again, respondent's claim is contra to the statute as illustrated by the following comment found in **Washington Practice 5c Evidence Teigland Pocket Part P. 17 § 1101.1**

"In addition, the amendment added language to subdivision (c) saying that the rape shield statute and ER 412 are also inapplicable in protection order proceedings under RCW 7.90, 10.14, and 26.50."

V. CONCLUSION

For all the reasons set forth in Appellant's Opening Brief and this response brief, appellant prays the court reverse the trial court's order of March 21, 2008 and allow appellant the

right to conduct normal discovery.

DATED this 4th day of September 2008.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to be 'S. Levy', written over a horizontal line.

STEVEN R. LEVY, WSBA# 4727
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 6
DEPUTY

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

In re:

NO. 375-37-1-II

RACHEL KANTOLA

Respondent,

DECLARATION OF SERVICE

vs

GILBERT JUVINALL

Appellant

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on the 5th day of September, 2008 I caused to be served in the manner noted below a true and correct copy of the Reply Brief of Appellant on the parties mentioned below as indicated:

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DATED this 5th day of September 2008, at Fife, Washington.

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