No. 102986-1

Court of Appeals No. 57672-4-II

SUPREME COURT
OF THE STATE OF WASHINGTON

ASHLEY ELIZABETH BURKS, PETITIONER

v.

TRENT NELSON, RESPONDENT

ANSWER TO PETITION FOR REVIEW

LAW OFFICE OF SOPHIA M. PALMER, P.L.L.C.

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INTRODUCTION

The Court of Appeals was correct in overturning the trial court's contempt order finding Trent Nelson ("Trent") in contempt, when it held the trial court abused its discretion by concluding that Trent's actions violated the ambiguous restrictions outlined in the trial court's protective orders.

Nonetheless, Ashley Burks ("Ashley") continues to present Trent's actions as something they are not. With virtually no analysis, her attempt to argue the Court of Appeals decision in this case conflicts with Johnston v. Benefit Management Corp, 96 Wash.2d 708, 638 P.2d 1201 (1982), or Graves v. Duerden, 51 Wash.App 642, 754 P.2d 1027 (1988) is merely a pretext to argue that she does not like or accept the Court of Appeals ruling. This is not an argument permitted under RAP 13.4(b).

This Court should deny review.

I. IDENTITY OF RESPONDENT

Respondent, Trent Nelson, asks that this Court deny Ashley's Petition for Review.

II. COURT OF APPEALS DECISION

Division II of the Court of Appeals filed its decision reversing the trial court's order finding Trent in contempt on March 19, 2024. A copy of that decision is in the Appendix at pages A001 through A008.

III. RESTATEMENT OF ISSUES RAISED BY PETITIONER

1. Does the Court of Appeals, Division II's decision, strictly adhering to the clear precedent set forth in Johnston, that requires a court to find a plain violation of an order before finding contempt merit review under RAP 13.4(b)(1)?

2. Can this Court review Ashley's argument that the Court of Appeals decision conflicts with a published decision of the Court of Appeals pursuant to RAP 13.4(b)(2)when she failed to give this argument even passing treatment and offered no reasoned argument?

IV. RESTATEMENT OF THE CASE

1. Procedure

On February 16, 2022, amidst on-going litigation related to her dissolution from Trent, Ashley sought a Protective Order relating to, among other things, financial records requested by Trent. CP 37-47. On March 16, 2022, the trial court entered a Protective Order protecting Ashley's business financial records. CP 107-109.

On March 28, 2022, Ms. Young, Trent's then-attorney, filed a Notice of Intent to Withdraw. CP 638-640. Her withdrawal was effective April 11, 2022. Id. On April 11, 2022, while *pro se*, Trent sought to modify the March 16, 2022, Protective Order. CP 110-111. On April 22, 2022, the trial court amended its March 16, 2022, Protective Order. CP 159-162.

On May 3, 2022, Ms. Young filed a Limited Notice of Appearance for the sole purpose of receiving and facilitating the transfer of documents for subpoenas issued on Trent's behalf on April 8, 2022, and the issuing, receiving and

coordinating responses of future subpoenas. CP 641-642.

On July 27, 2022, Ashley filed a motion seeking a finding of contempt against Trent for violating the March 16, 2022, Protective Order, the April 22, 2022 Amended Order. CP 168-171.

On August 5, 2022, Ms. Young filed a Notice of Completion of her Limited Appearance. CP 643.

The trial court held an evidentiary hearing on September 9, 2022 on Ashley's Motion for Contempt. RP Volume 2. On November 2, 2022, the trial court issued an order finding Trent and Ms. Young, in contempt for violating the March 16, 2022 Protective Order and April 22, 2022 Amended Order. RP Volume 3. A written order on contempt was entered November 9, 2022. CP 622-625.

Trent filed a timely Notice of Appeal. CP 626-633.

2. Facts

The March 16, 2022, Protective Order provided in relevant part:

> If an individual document is designated "Confidential" it shall be deemed to be "Confidential Material". If the first page of a set of documents or similar substantive material is designated "Confidential", then all pages of said documents shall be deemed "Confidential Material"…
>
> "Confidential Material" shall only be provided to a third party such as an expert witness or consultant or any other legitimate litigation support personnel, the party providing the "confidential materials" shall ensure that the third party is aware of this protective order and certifies in writing that he shall abide by the same terms as the signatories hereto.
>
> "Legitimate" is defined as lawyers, staff for the lawyers and consulting experts. Business records or confidential information described herein shall not be provided to Respondent. Respondent may view confidential materials in the presence of his attorneys at their office and shall not take images…

CP 107-108.

On April 22, 2022, the trial court amended the March 16, 2022, Protective Order. During its oral ruling, the trial court

was primarily concerned with the dissemination of material marked "Confidential" to third parties. The court stated that a certified public accountant, or business evaluator retained by Trent was permitted access, so long as they were provided a copy of the Protective Order and signed a verification they agreed to be bound by the Protective Order, and subject to its consequences, "in the event materials are disclosed inadvertently or not." CP 551. CP 552. The trial court went onto clarify that Trent disseminating information to third parties "violates my protective order." CP 553.

In addition, the trial court gave Trent the option of viewing "Confidential Material" at the Bliss Law Offices, or at opposing counsel's office. CP 550. The trial court explicitly permitted Trent to use his laptop, take notes and create a spreadsheet from the "Confidential Material" he was provided, but cautioned the only audience for this data would be the attorneys representing the parties, the trial court, or Trent's retained expert. CP 550, CP 553.

The April 22, 2022 Amended Order states, in relevant part:

> The order issued 3/16/22, shall remain in full force and effect, except that: Any CPA or business evaluation expert may receive confidential documents so long as they sign the protective order and agree to be held responsible for any violations thereof.
>
> Mr. Nelson ***may*** view the documents in his prior attorneys (sic) office, or in Ms. Walker's office but shall not take images of any kind (screenshots, photos, video) but he may take notes. Notes taken by Mr. Nelson shall be treated as confidential information and shall not be disseminated to third parties outside of attorneys of record, business valuation experts, CPAs or the court (filed under seal).

CP 159-160 (emphasis added).

All discovery in this case was provided by Ashley to Ms. Young, electronically. CP 331. In a May 17, 2022, email, Ms. Young made Ms. Walker aware that Trent was viewing the documents electronically, from a USB drive, but only while at Bliss Law Office. CP 331-332. Despite knowing this, Ms.

Walker continued to send Ashley's discovery responses electronically to Ms. Young. CP 332.

In support of her Motion for Contempt, Ashley alleged that Trent violated the trial court orders when Trent was provided an electronic copy of "Confidential Material" on a USB drive by his prior attorney, uploaded the confidential materials to his personal laptop, and then uploaded the "Confidential Material" to his expert witness Brianne Tyler. Ashley further alleged that because of this, the "Confidential Material" was available to Trent in electonronic format indefinitely. Ashley further alleged that Trent admitted uploading "Confidential Material" into a software program made by him, to prepare Excel spreadsheets, effectively "copying" the "Confidential Material". CP 169-170.

Trent only viewed "Confidential Material" at the law office of his prior attorney, Bliss Law Offices. CP 328. He never had access to "Confidential Material" outside Bliss Law Office. Id. Trent did not create or generate any physical (hard

copies) of any "Confidential Material". Id. Trent did not take images, screenshots, photos, or videos of any "Confidential Material." Id. Trent did not email any "Confidential Material" to anyone, and he did not receive any "Confidential Material" by email from anyone. Id. Trent did not transfer any files to any remote file sharing site he could access remotely, such as OneDrive or Dropbox. Id. Prior to the April 22, 2022 Amended Order, Trent viewed all electronic files on a confidential laptop, and in Ms. Young's presence. CP 218.

All "Confidential Material" Trent reviewed was contained on a USB drive, kept only in Attorney Rebekah Young's possession. Id., 9/9/22 RP 34. Trent never removed the USB drive from Ms. Young's office. Id. The USB drive contained approximately 2500 .pdf files totaling 10 GB in size, equating to well over 20,000 pages of documents to review and process. Id. When Trent was reviewing documents, he would arrive at Bliss Law Office, obtain the USB drive from Ms. Young, and work in an assigned office. Id.

Between May 16, 2022 and August 4, 2022, Trent spent 186 hours at Bliss Law Group, reviewing "Confidential Material". CP 329, CP 358. When Trent reviewed the documents on his laptop, they were accessed directly from the USB drive. Id. The software Trent used to analyze the records on the USB drive, and generated resulting spreadsheets that were also stored on the USB drive. Id., 9/9/22 RP 34. No "Confidential Materials" were copied, backed up, or duplicated in such a way that they ever resided anywhere other than on the USB drive. Id. They were never copied to Trent's laptop, another USB drive, or to any electronic storage Trent could access outside of Bliss Law Office. Id. All "Confidential Material", Trent's notes and spreadsheets, regarding the "Confidential Material" at all times remained on the USB drive. Id., 9/9/22 RP 60. Trent never uploaded the documents to a website portal that allowed him to later download the uploaded files. Id. The software program Trent created did not store any confidential information on it. 9/9/22 RP 36, 59.

Trent engaged Brianne Tyler, who was employed at the Doty Group. CP 330. Trent uploaded documents to Ms. Tyler directly from the USB drive to Ms. Tyler's one-way portal. Id. No documents were copied to Trent's computer, and then uploaded to Ms. Tyler's portal. Id. Trent did not have access to the documents uploaded to Ms. Tyler's portal after they were uploaded. Id., CP 522-523, 9/9/22 RP 61.

Other than the upload to Ms. Tyler, Trent did not take any action that resulted in access to "Confidential Material" by anyone, including himself, outside the confines of Bliss Law Office. 9/9/22 RP 39, CP 330. Trent did not disseminate to any third party, any details contained in the "Confidential Material" to anyone other than Attorney Rebekah Young, and his retained expert, Ms. Brianne Tyler. Id.

Neither Ms. Walker, nor Ashley were present at Bliss Law Office when Trent was reviewing "Confidential Material" and therefore had no personal knowledge regarding procedures or processes that were followed while Trent viewed

"Confidential Materials". 9/9/22 RP 43.

After taking live testimony, the trial court found Trent in contempt. In so finding, the Court made the following oral Findings of Fact[1]:

1. When asked for reassurance of compliance the protective order, Ms. Young communicated to Ms. Walker that Mr. Nelson was being set up on a confidential computer in her office and was not being allowed to view the document when not in her presence and that she acknowledged that she was an officer of the court and was bound by the protective order.

2. Initially, that exact process was followed by Ms. Young and Mr. Nelson. In fact, the facts support that Ms. Young provided a computer to Mr. Nelson who could review the confidential data without the ability to copy, without the ability to email by attachment or otherwise gain access to or alter the confidential information.

3. These protocols were consistent with the protective order as well as it being amended and demonstrated by Ms. Young's understanding of its requirements, and she did, in fact reinforce with Mr. Nelson those same requirements of the protective order.

---

[1] The oral findings made by the court differ from those contained in the November 9, 2022 Order of Contempt. *See* 11/4/22 RP 116-119 and CP 620-625.

4. Those protocols changed. They changed after Ms. Young withdrew her representation from Mr. Nelson. Ms. Young testified that she was not required to be an "indentured servant" by retaining controls over the confidential information as she was not being paid by Mr. Nelson while he continued to come to her office to review those materials. Her statement at the hearing is a classic example of the conflict between the business aspect of running a for-profit law practice versus the professional responsibility of an attorney who is obligated to her profession and to the Court.

5. Mr. Nelson was provided an unencrypted thumb drive and that act was intentional. And that act was no different than providing him a hard copy of confident (sic) documents, except it allowed for more ready access to the records to be able to be copied, disseminated, and otherwise. It violated the protective order. The Court finds this act was a violation of the protective order.

6. Mr. Nelson is a computer expert, and his transference of the data from the thumb drive to his computer to copy the data to a spreadsheet was intentional, and it defied the Court's restrictive measures, which did not and never contemplated nor did it ever authorize this procedure used as a means to revie and copying the data, the confidential information. Rather the Court authorized separate notes. And from those separate notes, the creation of a spreadsheet.

7. Ms. Young's testimony that her paralegal did not

communicate the Court's comments at the April 22, 2022 hearing or the Court's admonition to Mr. Nelson relating to the protective order and it is not being amended as requested is not credible.

8. The conduct as referenced is in contempt of the Court's protective orders.

9. No remedial sanction is warranted as there is no evidence of monetary losses or economic damage to Ms. Burks at this time.

10. The Court may, in addition to remedial sanctions set forth in statute, order a person found in contempt of court to pay a party for the losses suffered by the party as well as any costs incurred in connection with the contempt proceeding, including reasonable attorney fees.

11. Ms. Burks incurred attorney fees in bringing this motion to the Court's attention. The hourly rate of $425.00 is reasonable for her lawyer, Ms. Walker, given her experience and given the relative complexity of the circumstances and case history. Further, the paralegal rates of $240.00 an hour are reasonable and customary within the South Puget sound reason (sic). I, therefore, award the sum of $8900 as legal fees for legal services related to the motion. And I award a judgment for said fees against Mr. Nelson and Ms. Young jointly and severally.

11/4/22 RP 116-119. The Order of Contempt entered with the court make the following findings of fact:

The background facts, evidence considered and referred, and the findings of fact provided by the Court on November 4, 2022, on the record, a copy of which is reflected in the transcript of proceedings and the ruling by the Honorable Judge Quinlan is incorporated herein by this reference as though fully restated and filed herewith.

Based on the testimony and records considered at the evidentiary hearing on September 8, 2022 and the reasoning and precedent set forth in the Court's oral ruling of November 4, 2022, the Court makes the following findings of fact, to wit:

1. When asked for assurances by Petitioner's counsel, Ms. Walker, that the Protective Order was being followed, Ms. Young asserted that Mr. Nelson was only being allowed to review confidential documents in her presence, on a confidential laptop and that he had not been permitted to review documents without their presence.

2. Ms. Young's testimony confirmed the protocols identified in paragraph 1 above

were initially followed.

3. The protocols recited in paragraph 1 above are consistent with the protective order as amended and demonstrate Ms. Young's understanding of the terms and restrictions contained within the Protective Orders.

4. This protocol changed sometime after Ms. Young withdrew her representation of Mr. Nelson. Ms Young testified that she was not an "indentured servant," however working at a for-profit law firm does not absolve an attorney of obligations owed as an officer of the court.

5. After her withdrawal as counsel, Ms. Young no longer supervised Mr. Nelson (sic) review of confidential information.

6. Rather, Ms. Young provided Mr. Nelson with an encrypted thumb drive with confidential documents for his unsupervised review in her office, which is no different than giving him hard copies, except that it might

be more readily available to disseminate.

7. Mr. Nelson is a computer expert, and his transference of the data from the thumb drive to his computer to copy the data to a spreadsheet was intentional, and it defied the Court's restrictive measures, which did not and never contemplate, nor did it ever authorize, this procedure used as a means to review and copying (sic) the data, the confidential information. Rather the court authorized separate notes, and from those separate notes, the creation of a spreadsheet.

8. Ms. Young's testimony that her paralegal did not communicate the Court's comments at the April 22, 2022, hearing or the Court's admonition to Mr. Nelson relating to the protective order and not being amended as requested is not credible.

9. The conduct as referenced is in contempt of the Court's protective orders.

10. Ms. Young and Mr. Nelson are in contempt of the March 16, 2022, Protective Order as well as the April 8, 2022[2] (sic) Order.

11. No remedial sanction is ordered and at this time, no damages are awarded as none have been incurred at this time.

12. The Court may, in addition to remedial sanctions set forth in statute, order a person found in contempt of court to pay a party for the losses suffered by the party as well as any costs incurred in connection with the contempt proceeding, including reasonable attorney fees.

13. Under statute, Ms. Burks is entitled to reasonable attorney fees and costs.

14. Ms. Walker's hourly rate of $425/ hour is reasonable based on her experience and the complexity of issues in this case and are reasonable and commensurate with those found in Pierce County. The paralegal

[2] There is no April 8, 2022, court order.

> rates of $240/ hour are reasonable and commensurate with those found in Pierce County. The gross and total sum of $8900 is reasonable as and for legal fees and costs incurred in this matter.
>
> 15. Ms. Burks is awarded the sum of $8900 against Mr. Nelson and Ms. Young, jointly and severally. Said sums hall (sic) accrue interest at the statutory rate from ten days from entry of this order.

CP 621-623.

No remedial measures were ordered. CP 620-625. No purge conditions were ordered. Id. The order contained only a finding of contempt, and an award of attorney fees owed by Trent and Ms. Young, jointly and severally, in favor of Ashley, in the amount of $8900. Id.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. THE COURT OF APPEALS DECISION FOLLOWED CLEAR AND CONTROLLING WASHINGTON PRECEDENT.

RAP 13.4 (b) provides:

> **(b) Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A court cannot hold a person in contempt for disobeying an order unless the facts constitute a "plain violation of the order." Johnston, 96 Wn.2d at 713. In contempt proceedings, courts strictly construe the language of the order that is the basis for the contempt motion in favor of an alleged contemnor. Graves, 51 Wn. App. at 647. "The purpose for this rule is to protect persons from contempt proceedings based on violation

of judicial decrees that are unclear or ambiguous, or that fail to explain precisely what must be done." Id. at 647-48.

a. Division II correctly applied the "plain language" standard consistent with precedent set out in Johnston v. Beneficial Management Corp. of America, 96 Wash.2d 708, 638 P.2d 1201 (1982).

In Johnston, Roger M. Leed, the attorney for petitioners in a class action lawsuit was held in contempt for violating a protective order prohibiting communications with actual or potential class members who were not formal parties to the action. Id. at 709. The Court of Appeals, Division One affirmed the finding of contempt. This Court reversed. Id.

There, at issue was whether Leed's contact with class members by mail violated the trial court's previously issued protective order. The order provided:

> All parties hereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of

the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees.

The communications forbidden by this rule include, but are not limited to, (a) solicitation, directly or indirectly, of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under sub-paragraph (b)(3) of CR 23; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes, and effects of the action, and of actual or potential court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal, and equitable obligations are unaffected by this rule.

This order does not forbid (1)

> communications between an attorney and his client or a prospective client who has, on the initiative of the client or prospective client, consulted with, employed, or proposed to employ the attorney; or (2) communications occurring in the regular course of business or office which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes, or effect of the action and orders therein.
>
> When appropriate, the Court may approve the substance of permitted communications and general descriptions of the circumstances under which the communication is approved, and general descriptions of the parties to whom it may be sent, and the parties who may send the communication.

Id. at 710-711.

On February 22, 1978, the parties reached an agreement that required Leed to mail a claim form to each beneficiary and publish the form. Id. at 711. Leed mailed notice of the proposed settlement and claim forms to class members on April 3, 1978. Id. A month later, Leed's legal assistant again wrote to class members, who were not formal parties to the action and who

had not yet filed a claim in response to the notice of the proposed settlement. Id. The letter reminded the class member to submit their claim form by May 19, 1978 in order to receive benefits from the settlement. Id. The second letter, sent by Leed's legal assistant, was sent without the express consent or approval of the trial court or the knowledge of the respondents or their counsel. Id. at 711-712.

Leed was found in contempt for the second communication. Id. at 712. He was fined $100 and ordered to pay respondent's attorney fees of $350. Id.

The Court of Appeals, Division I, affirmed the trial court and determined that the reminder letter of May 4 "violated the spirit of the order which was to prevent potential abuses in the management of the class action." Johnston v. Beneficial Management Corp. of America, 26 Wn.App. 671, 676, 614 P.2d 661 (1980).

In overturning the Court of Appeals, this Court reiterated long standing precedent that, "[i]n contempt proceedings, an

order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought." Id. at 712-713, citing State v. International Typographical Union, 57 Wash.2d 151, 158, 356 P.2d 6 (1960). This Court found that the Leed's actions were not contemplated by the protective order, and therefore could not constitute a plain violation of the court's orders. Id. at 713. In essence, violating the "spirit" of an order cannot be the basis of a contempt finding.

Here, in nearly identical facts as those in Johnston, *and citing* Johnston, the Court of Appeals, Division II, reviewed the two separate orders entered by the trial court and correctly found that Trent's actions did not plainly violate orders. The court reasoned that the two protective orders, "did not reflect the expansive prohibitions that were applied by the superior court in its contempt order." Opinion at 7, 8. Construing both the March 16, 2022, and the April 22, 2022, orders in Trent's favor, as the Court of Appeals was required to do, Trent's

actions do not constitute a plain violation of either of the trial court's orders and is consistent with the precedent set forth in Johnston. In analyzing this issue, the Court of Appeals properly found that the prohibitions the trial court *thought* were appropriate, or *wanted* to prohibit, were simply not reflected in the two protective orders issued by the court. Opinion at 7.

Nonetheless, Ashley argues that the Court of Appeals decision is in conflict with Johnston, because the appeals court failed to apply the proper legal principle to the protective orders in this case. This argument is wholly without argument and is simply an attempt to reargue the merits of her case.

Ashley reasserts her argument to this Court, that the April 22, 2022, protective order did not remove the "presence" requirement. Pet at 25. This is simply inaccurate. The April 22, 2022, order clearly states that Trent "***may*** view the documents in his prior attorneys (sic) office, or in Ms. Walker's office…" eliminating the "presence" requirement. CP 159-160.

The Court of Appeals did not "interpret orders by

implication" – it painstakingly and methodically analyzed the specific language contained in the protective orders, Trent's actions and the trial courts findings and then correctly concluded, that the orders simply did not prohibit the alleged contemptuous behavior[3].

She next argues that Trent admitted he took "images". This is a complete misstatement of the facts. Trent did not take images, screenshots, photos, or videos of any "Confidential Material." CP 328. Further, the trial court's November 9, 2022, Order made no such finding. CP 620-625.

Ashley next seems to argue that even if the protective orders did not specific prohibit Trent's actions, he should be found in contempt anyway in "consideration of the issues and purposes of the suit." This notion is in direction contradiction of the precedent set forth in Johnston that requires any contempt finding be based on a "plain violation of the order." Id. at 713.

[3] The Court of Appeals properly points out that a detailed protective order could have been drafted to impose the requirements intended by the trial court. Opinion at 8.

Ashley has failed to demonstrate that review is warranted under RAP 13.4(b)(1).

b. ASHLEY HAS FAILED TO DEMONSTRATE REVIEW IS WARRANTED UNDER RAP 13.4(b)(2)

Ashley next argues that Graves, "is violated in the same manner as described regarding this Court's decisions above" with no substantive argument. Pet at 27. Such "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wash.App. 533, 538, 954 P.2d 290 (1998). Accordingly, this Court should decline to review this issue.

2. CONCLUSION

Ashley has failed to demonstrate a basis under RAP 13.4 that merits review by this Court. This Court should deny review.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing answer complies with RAP 18.17 and contains 4651 words.

DATED: June 19, 2024.

LAW OFFICE OF SOPHIA M. PALMER, PLLC

Sophia M. Palmer

SOPHIA M. PALMER, WSBA No. 37799

CERTIFICATE OF SERVICE

I certify that on the 19th day of June 2024, I caused a true and correct copy of this Answer to Petition for Review to be served on the Petitioner in the manner indicated below:

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2024 WL 1174710
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

In the MATTER OF the Marriage of:
Ashley Elizabeth BURKS, Respondent,
v.
Trent NELSON, Appellant.

No. 57672-4-II
|
Filed March 19, 2024

Appeal from Pierce County Superior Court Docket No: 21-3-03109-4, Honorable Thomas Quinlan, Judge.

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UNPUBLISHED OPINION

Price, J.

***1** Price, J. — Trent Nelson appeals the superior court's order finding him in contempt for violating a protective order in his dissolution case with his ex-spouse, Ashley Burks.

The dissolution of Nelson and Burks' marriage was apparently acrimonious. Due to allegations of Nelson misusing Burks' financial information, the superior court issued a protective order to prevent the dissemination of her financial information. The protective order relied on Nelson's attorney, Rebekah Young, to monitor Nelson's access to the financial materials. But when Young later withdrew from Nelson's representation, the superior court issued an amended protective order that changed the procedures for protecting Burks' financial information.

At some point, Burks believed that both Nelson and Young had violated the original and amended protective orders. The superior court agreed with Burks, found Nelson and Young in contempt, and ordered them to pay Burks' attorney fees for bringing her contempt motion. Both Nelson and Young separately appeal.

In this appeal, Nelson argues that his conduct did not violate the superior court's protective orders.[1] Nelson also argues that even if his conduct did violate the protective order, Burks' motion was moot and he was not afforded the appropriate due process for the type of contempt Burks requested.

We reverse and hold that the superior court abused its discretion when it concluded that Nelson's conduct violated the superior court's protective orders.

FACTS

I. Protective Orders

Burks initiated divorce proceedings to dissolve her marriage with Nelson in September 2021. Nelson retained Young to represent him.

The dissolution proceedings did not go smoothly. Burks was a local business person, and she became concerned that Nelson might misuse her business-related financial information disclosed during discovery. In February 2022, Burks moved for a protective order "prohibiting [Nelson] from using any information received through [ ] discovery for any other purpose than this proceeding" and that those materials be marked confidential. Clerk's Papers (CP) at 38.

In March, the superior court granted the motion and imposed a protective order. The March protective order required that materials designated as " 'Confidential' " (including business records like tax returns, bank records, and client and shareholder lists) "only be provided to a third party such as an expert witness or consultant or any other *legitimate* litigation support personnel." CP at 107-08 (emphasis added). The superior court also defined "legitimate" and described the procedure Nelson could use to access the confidential materials:

> "Legitimate" is defined as lawyers, staff for the lawyers and consulting experts. *Business records or confidential information described herein shall not be provided to Respondent. Respondent may view confidential materials in the presence of his attorneys at their office and shall not take images*.

***2** CP at 108 (emphasis added). After the March protective order was in place and while she was still representing Nelson, Young was always with Nelson while he viewed the confidential materials.

But later that same month, Young and her law firm withdrew from representing Nelson. As a result of the loss of his lawyer, Nelson moved, pro se, to amend the March protective order. Nelson contended he needed an alternative method to view the confidential materials now that his former lawyer was no longer available to monitor his review of Burks' confidential materials. He requested an amendment to the procedure (italicized above), explaining,

> Removal of this clause is necessary now that I am proceeding with my case pro se. I no longer have attorneys, and thus, no means of access to Petitioner's discovery information. **Without access to Petitioner's discovery information, I am unable to conduct complete a [sic] thorough evaluation of Ms. Burks' discovery responses and our community assets.**

CP at 110.

Burks objected to Nelson's motion and advocated for a "special master to hold the discovery for [Nelson]." CP at 546.

In April, the superior court considered the motion to amend the March protective order. The superior court rejected Burks' request for a special master, but it agreed to modify the protective order. The superior court explained,

> My options are right now I do nothing or it stays the same. I modify it in some respect, which I may be inclined to modify in one limited respect, to tell you that you could view the documents that have been produced at your lawyer's office. And if that requires you to pay for the time to do so, then you do that. Or you can, similarly, review the documents at [Burks' attorney's] office in her conference room without taking copies of images. *You can then take handwritten notes to do your compilations*. For that matter, *you can bring your laptop and create an Excel spreadsheet, without getting the actual hard copies for purposes of any reason, including losing control of the instruments that may be potentially disclosed to third parties*, inadvertently or not.
>
> Also, to the extent that you retain a person that is qualified under Evidence Rule 700 series -- in other words, somebody that the Court would qualify as an expert, typically, if somebody with an accounting degree would like to evaluate the businesses or come to a book value, I will -- I'm inclined to modify the protective order and say that individual signs a verification that says that they will abide by the Court's protective order with consequences if they don't, including that of sanctions, that individual may have direct access to copies as well.
>
> But I'm not going to modify it to allow unfettered access. I'm not going to modify the protective order. I will simply indicate that I would encourage you to re-think whether you should -- re-think the possibility of hiring counsel to be of some assistance. I appreciate that things are getting expensive, especially if you've paid $100,000 in a case such as this. I appreciate that concern. It's a concern that I hear often.

CP at 550-51 (emphasis added).

Nelson asked for clarification of where he could access the confidential materials and what notes he could take, and the following colloquy took place:

> ***3** MR. NELSON: Before we move on, can I just seek some clarity on that -- you've mentioned that I can bring in my laptop if I need to transcribe and enter summary tables.
>
> THE COURT: Yes. You may create your own notes. You may not take images.
>
> MR. NELSON: Okay.
>
> THE COURT: You may not take screenshots. You may review and digest the information that has been presented. You may take -- you may then take your notes and put them on a laptop. You may take handwritten notes in anticipation for preparation for your trial.
>
> MR. NELSON: I would be more than willing to do that at my prior attorney's office. They would probably allow me to do that without a significant charge. I think the way that it was currently written is that I actually had a notepad -- they gave me a little notepad, and the notepad had to stay at the attorney's office. ... I can't do anything with that. If we were able to adjust that --

> THE COURT: Your notes -- well, I will tell you this, that if I find -- I will warn you that if I find that you have read a bank statement and you go out on April 3rd, 2022 and say she deposited "X" or she spent "Y" and that's disseminated to third parties, that violates my protective order.
>
> In order to prepare for the trial, *I'm allowing you to take notes and create your spreadsheet* and the only audience will be me or a retained expert or a lawyer that represents you or [Burks' attorney].

CP at 552-53.

On April 22, 2022, the superior court entered its amended protective order. The April amended protective order was handwritten and short; it stated that the original March protective order would remain in full effect, except that:

> Any CPA or business evaluation expert may receive confidential documents so long as they sign the protective order and agree to be held responsible for any violations thereof.
>
> Mr. Nelson may view these documents in his prior attorney[']s office or in [Burks' attorney's] office but shall not take images of any kind (screenshot, photo, video) but he may take notes. Notes taken by Mr. Nelson shall be treated as confidential information and shall not be disseminated to third parties outside of attorneys of record, business valuation experts, CPA's or the court.

CP at 159-60.

II. Nelson's File Access After the April Amended Protective Order

After Young consulted with her colleagues on how to best abide by the two protective orders—the original March protective order and the April amended protective order—she stressed to Nelson the importance of strictly following the orders and reminded Nelson multiple times about the requirements.

Nelson began viewing the materials at Young's office, although she was not usually in the room with him. Nelson initially used a computer provided by the law firm to view electronic versions of the materials. Young did not impose any procedures that would have prevented Nelson from copying Burks' confidential materials; Young merely relied on Nelson's word that he was not copying the materials in violation of the protective orders.

In May, Nelson hired a financial expert to assist in his case. To prepare documents for his expert, Nelson wished to use software programs that were not available on the office computers he previously used. So, thereafter, Nelson brought his personal laptop to Young's office and, with Young's cooperation, began to access Burks' financial information from a USB drive. Each time Nelson visited Young's office, he would receive the USB drive from Young and return it to her when he left.

***4** Nelson used a software program on his laptop which created a spreadsheet from the financial materials. The data was extracted from documents on the USB drive, raw data was temporarily stored within the software's "transient memory" in a form that was not viewable, and the software created spreadsheets from the raw data. 2 Verbatim Rep. of Proc. (VRP) at 59. The spreadsheets were then saved directly to the USB drive, not Nelson's personal laptop. At that point, the software closed automatically and erased all transiently-saved data. When the process was completed, Nelson uploaded the spreadsheets created by the software directly from the USB drive to a private, online file-sharing drive that only his financial expert could access. Once the files were uploaded for the expert, they were not available on the online file-sharing drive for Nelson to view or access.[2]

Nelson spent about 185 hours at Young's office during his review of the materials. Although Young was not in the same room with Nelson, she was always present at the office when he was there.

III. Contempt Proceedings

In July 2022, after receiving information about what Nelson was doing in his review of her financial information, Burks filed a motion for contempt against Nelson and Young for violating the two protective orders. Burks alleged that the process of uploading confidential materials to Nelson's personal laptop and, from there, uploading those materials to an online file-sharing drive for his financial expert's review was a violation. Burks contended that the confidential materials were effectively copied when Nelson prepared spreadsheets of the data using the software and were, thereafter, freely available to him.[3]

On September 9, the superior court held an evidentiary hearing on the contempt motion. Both Nelson and Young testified consistently with the facts above. Nelson further explained that he never saved any materials to his personal

laptop or a file-sharing drive that he could have thereafter accessed.

Two months after the evidentiary hearing, the superior court gave an oral ruling on Burks' motion, finding both Nelson and Young in contempt. The superior court explained that although Nelson wanted to remove the requirement that he could only view materials in "the presence of his attorneys" after Young withdrew, the superior court believed that requirement was still in place from the original March protective order. 3 VRP at 111. However, the superior court explained that the April amended order did allow for additional note-taking abilities for Nelson, stating,

> Ultimately, the Court did not modify the aforementioned restrictions in the protective order, but did allow Mr. Nelson to take notes and, from those notes, create a spreadsheet to assist him in preparing his case.

3 VRP at 113. The superior court also believed the amended order was clear about how Nelson should review the confidential materials and, critically, concluded that Nelson's review process violated the order:

> While the April 22, 2022 order is clear in all respects, the Court's verbal comments supplemented and were consistent with that order. In particular, the Court unambiguously stated: "You may create your own notes. You may not take images. You may not take screenshots. You may review and digest the information that has been presented. You may take handwritten notes in anticipation of preparation for trial."
>
> And later in the same colloquy, the Court again stated: "In order to prepare for trial, I'm allowing you to take notes and create your spreadsheet..."
>
> Now, based upon the undisputed testimony and evidence at the hearing, the Court has learned that Mr. Nelson was provided a thumb drive by Ms. Young containing the confidential information; that he took possession of the thumb drive and inserted the data from it onto his personal laptop computer; he cut and pasted the data and created a spreadsheet that was ultimately utilized in assisting his retained expert ... and in his presentation of the case.

***5** 3 VRP at 113-14 (alternation in original).

Later, the superior court issued its written order, which largely restated its oral ruling. The order stated, in relevant part,

> 5. After her withdrawal as counsel, Ms. Young no longer supervised Mr. Nelson['s] review of confidential information.
>
> 6. Rather, Ms. Young provided Mr. Nelson with an unencrypted thumb drive with confidential documents for his unsupervised review in her office, which is no different than giving him hard copies except that it might be more readily available to disseminate.
>
> 7. Mr. Nelson is a computer expert, *and his transference of the data from the thumb drive to his computer to copy the data to a spreadsheet was intentional, and it defied the Court's restrictive measures*, which did not ... contemplate, *nor did it ever authorize this procedure used as a means to review and copying the data*, the confidential information. *Rather, the court authorized separate notes and from those separate notes, the creation of a spreadsheet*.
>
> ....
>
> 10. Ms. Young and Mr. Nelson are in contempt of the March 16, 2022 Protective Order as well as the April 8, 2022 Order.

CP at 622-23 (emphasis added).

Nelson appeals.

ANALYSIS

I. Contempt Finding Was an Abuse of Discretion

Nelson argues that the superior court abused its discretion by finding him in contempt because his actions did not clearly violate the protective order. We agree.

A. Legal Principles

We review the superior court's decision on a contempt motion for an abuse of discretion. *See, e.g.*, *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). An "abuse of discretion" is present if there is a clear showing that exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons. *Id.*

A court cannot hold a person in contempt for disobeying an order unless the facts constitute a "plain violation of the order." *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982). In contempt proceedings, courts strictly construe the language of the order that is

the basis for the contempt motion in favor of an alleged contemnor. *Graves v. Duerden*, 51 Wn. App. 642, 647, 754 P.2d 1027 (1988); *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 768, 271 P.3d 331 (2012). "The purpose for this rule is to protect persons from contempt proceedings based on violation of judicial decrees that are unclear or ambiguous, or that fail to explain precisely what must be done." *Graves*, 51 Wn. App. at 647-48.

B. Application

Nelson argues the superior court abused its discretion because, when strictly construing the language of the protective orders, Nelson's actions did not violate the orders. Nelson contends his creation of the spreadsheet was authorized and he did not transfer usable documents to his personal computer. He argues that his review process and the creation of the spreadsheets were narrowly designed to meet the specific language of the protective orders.

We analyze Nelson's position in four steps. First, we restate the precise language of the two protective orders. Second, we briefly restate and review the superior court's contempt order rationale to discern how it interpreted the language of its protective orders. Third, we apply a strict construction in favor of Nelson to the language of the protective orders to determine what was clearly prohibited and whether those prohibitions comported with the superior court's expectations. Finally, we compare those prohibitions of the orders (when strictly construed) with Nelson's conduct to determine whether he "plain[ly]" violated the orders. *See Johnston*, 96 Wn.2d at 713.

1. Protective Orders' Language

***6** We begin with a close reading of the superior court's two protective orders. The original March protective order, entered when Nelson was represented by Young, allowed him to view the confidential materials "in the presence of his attorneys at their office" and essentially prevented him from making copies that would allow him to take the materials with him upon leaving. CP at 108. The specific language read:

> Business records or confidential information described herein shall not be provided to Respondent. Respondent may *view confidential materials in the presence of his attorneys* at their office and *shall not take images*.

CP at 108 (emphasis added). The short April amended protective order stated that the March protective order "shall remain in full force and effect," except it provided that Nelson could view the materials "in his prior attorney[']s office" and take notes. CP at 159-60. The specific language of the April amended protective order read:

> Mr. Nelson may view these documents in his prior attorney[']s office or in [Burks' attorney's] office but *shall not take images of any kind (screenshot, photo, video) but he may take notes*. Notes taken by Mr. Nelson shall be treated as confidential information and *shall not be disseminated to third parties* outside of attorneys of record, business valuation experts, CPA's or the court.

CP at 159-60 (emphasis added). And the superior court orally explained that under the amended protective order, Nelson would be allowed to create a spreadsheet:

> In order to prepare for the trial, *I'm allowing you to take notes and create your spreadsheet* and the only audience will be me or a retained expert or a lawyer that represents you or [Burks' attorney].

CP at 553.

2. Superior Court's Decision on Contempt

With this language in place, the superior court was apparently convinced that Nelson's electronic, unsupervised review of the materials violated the orders. The superior court also appeared to focus on Nelson's method for creating his spreadsheet. The superior court's written contempt order explained,

> 6.... Ms. Young provided Mr. Nelson with an unencrypted thumb drive with confidential documents for his unsupervised review in her office, which is no different than giving him hard copies except that it might be more readily available to disseminate.
>
> 7. Mr. Nelson is a computer expert, *and his transference of the data from the thumb drive to his computer to copy the data to a spreadsheet was intentional, and it defied the Court's restrictive measures*, which did not ... contemplate, *nor did it ever authorize this procedure used as a means to review and copying the data*, the confidential information. *Rather, the court authorized separate notes and from those separate notes, the creation of a spreadsheet*.

CP at 622 (emphasis added).

The superior court appeared to believe that the spreadsheet was only authorized to be created from handwritten notes Nelson personally created, not using software on his personal computer, and that Nelson was not allowed to view the

materials unsupervised. Thus, the superior court determined that Nelson's review method and spreadsheet creation violated the March protective order and the April amended protective order.

3. Construction of the Protective Orders

But contempt must be supported by strict construction of court orders in favor of alleged potential contemnors. *See* *Graves*, 51 Wn. App. at 647; *Tiger Oil Corp.*, 166 Wn. App. at 768. Although the superior court characterized one of the orders as "clear in all respects," the two protective orders collectively did not, on their faces, match the superior court's expectations. 3 VRP at 113.

***7** The original March protective order prohibited Nelson from reviewing the materials outside the "presence" of his attorneys and from taking "images" of any materials. CP at 108 ("Respondent may view confidential materials in the presence of his attorneys at their office and shall not take images."). The order did not specify what form Nelson must view the materials in (electronic or printed copies), nor did it specify how Nelson must take notes. The April amended order reiterated the requirement that Nelson could not make copies or take images ("Mr. Nelson ... shall not take images of any kind (screenshot, photo, video) ...."), but it, too, was silent about what form of document viewing Nelson was required to use. CP at 160.

As for notetaking, the April amended order permitted Nelson to "take notes," but it contained no limitation on the form of which the notes must have been taken—there was no reference to electronic or handwritten notes. The only specific requirement relevant to Nelson's notetaking was that he was prohibited from sending any confidential materials or notes to third parties other than his hired experts. CP at 159-60 ("Notes taken by Mr. Nelson shall be treated as confidential information and shall not be disseminated to third parties ....").

The April amended order made no mention of "spreadsheets," but the superior court's oral comments showed the superior court expected spreadsheets to be permitted. The superior court explained that Nelson would be permitted to create a spreadsheet, specifically stating Nelson could "take notes and create [his] spreadsheet." CP at 553. But, again, there was no specificity about the form permitted for the spreadsheets or how it must be created.

Finally, regarding being unsupervised, the April amended order shifted the requirement from the original March protective order that Nelson review the materials in the "presence" of his attorneys to just being "in his prior attorney[']s office." CP at 160 ("Nelson may view these materials in his prior attorney[']s office or in [Burks' attorney's] office ....").

Thus, when properly construed strictly in favor of Nelson, the language of the two protective orders did not reflect the expansive prohibitions that were applied by the superior court in its contempt order. *See* *Graves*, 51 Wn. App. at 647-48 (alleged contemnors are protected from contempt proceedings based on orders that are "unclear or ambiguous, or that fail to explain precisely what must be done"); *Tiger Oil Corp.*, 166 Wn. App. at 768 (order must be construed in favor of the alleged contemnor).

4. Nelson's Actions Did Not Violate the Protective Orders

As our last step, we compare Nelson's review and spreadsheet-creating process with the prohibitions of the two protective orders (strictly construed). After the imposition of the April amended protective order, Nelson could not copy "images" but could take notes and create spreadsheets and share those spreadsheets with an expert; nothing dictated the method of the notetaking or form of the spreadsheets. Nelson was required to be located in his former attorney's office; nothing required Young to be in the room with Nelson. Thus, Nelson's conduct complied with these prohibitions—he only viewed the confidential materials at Young's office, and never saved copies or images of the materials to his personal computer or any file-sharing drives that he would be able to access later.

It is true that Nelson's creation of spreadsheets using the software located on his computer pushed the boundaries of what was permitted on the face of the protective orders. But even these spreadsheets fell short of violating the protective orders (strictly construed). Nelson's software created the spreadsheets by using the data from documents on the USB drive, extracting the data, temporarily, transiently storing it in a raw form—not in a usable form that Nelson could view—and terminating the data upon creation of the final spreadsheet product. That spreadsheet was then saved directly on the USB drive. Thus, no "image" was ever stored on Nelson's personal laptop. The only data was raw data that was not usable and whose presence was merely temporary; this raw data was not akin to taking an image for use outside of Young's office at a later time.

***8** Thereafter, Nelson uploaded his spreadsheet to a file-sharing drive for his expert. The spreadsheet was uploaded directly from the USB drive and only the expert could access the spreadsheets after they were uploaded; Nelson had no further access to the spreadsheet after uploading the spreadsheet and leaving Young's office. Because Nelson did not create a pathway to access the confidential materials outside Young's office, neither the use of the software program nor the sharing of the spreadsheets with the expert was a violation of the protective orders (strictly construed).[4]

To be sure, Nelson's use of technology did not comport with the superior court's subjective view of what it ordered. It is apparent the superior court intended for Nelson to only access the materials and take notes in a nonelectronic manner. And the superior court also appears to have expected that Nelson would be supervised. Frustration is understandable when the superior court's subjective intentions were not followed, especially when those intentions were rooted in a justifiable concern for wrongful dissemination of sensitive information. And one might imagine a detailed protective order that would reasonably impose the requirements intended by the superior court.

But the specific language of these two protective orders, when properly construed strictly in favor of Nelson, do not match those intentions. Because Nelson's actions did not "plain[ly]" violate the restrictions in the protective orders, the superior court abused its discretion by finding Nelson in contempt. *See Johnston*, 96 Wn.2d at 713.[5]

II. Attorney Fees

Both Burks and Nelson request attorney fees for this appeal. Burks requests attorney fees for this appeal under RAP 18.1(a) and RCW 7.21.030(3). RAP 18.1(a) allows us to award attorney fees if applicable law allows. And RCW 7.21.030(3) allows courts to award attorney fees when a person has been found in contempt of court. Because we reverse the order finding Nelson in contempt, we deny Burks' request for attorney fees; no contempt remains to justify the award.

Nelson requests attorney fees under RCW 26.09.140. Pertaining to dissolution proceedings, the statute allows an appellate court to, "in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees." RCW 26.09.140. In determining whether to award attorney fees under the statute, "[w]e may 'consider the arguable merit of the issues on appeal and the parties' financial resources.' " *In re Marriage of Lesinski & Mienko*, 21 Wn. App. 2d 501, 518, 506 P.3d 1277 (2022) (quoting *In re Marriage of C.M.C.*, 87 Wn. App. 84, 89, 940 P.2d 669 (1997)); RCW 26.09.140. Nelson argues we should award him attorney fees because Burks' financial resources "far outweigh" his own. Br. of Appellant at 38. After considering Nelson's recently-filed declaration of his financial resources, we decline to award attorney fees to Nelson on appeal.

CONCLUSION

***9** We reverse, holding that the superior court abused its discretion in finding Nelson in contempt when his actions did not violate the requirements of the protective orders.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Cruser, A.C.J.

Lee, J.

All Citations

Not Reported in Pac. Rptr., 2024 WL 1174710

Footnotes

1 Young's appeal of the superior court's contempt order is the subject of a separate, linked appeal before us (No. 57679-1-II).

2 We acknowledge that this description of the process is derived solely from Nelson's testimony. But the record contains nothing that refutes this description.

3 Burks also alleged that Young was in contempt because she did not directly supervise Nelson's review of the confidential materials.

4 The superior court appeared to view Nelson's use of the software as actually transferring data *onto his computer* to create the spreadsheet *on his computer*. We view the facts in the record differently. But even if the superior court did not believe Nelson's testimony about how the software program worked, there remains no evidence in the record that Nelson actually made accessible copies of the confidential materials on his laptop during the process of creating the spreadsheets.

5 Nelson also argues, in the alternative, that the superior court erred in determining Burks' motion for contempt was not moot and that he was not afforded the appropriate due process for the type of contempt Burks requested. Because we reverse on other grounds, we do not address these arguments.

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