2-28-2006

Jessee v. Farmers Ins. Exch.

SUPREME COURT, STATE OF COLORADO Court Address: 2 E. 14th Ave. 4th Floor Denver, CO 80203	
District Court, Adams County, Colorado Hon. C. Thomas R. Ensor, Case No. 04CV1073 **In re:** Plaintiff: Ruth E. JESSEE Defendants: FARMERS INSURANCE EXCHANGE and FARMERS INSURANCE GROUP, INC.	▲ **COURT USE ONLY** ▲
Attorney: Benson & Associates PC Name: Jesse Howard Witt Address: 1301 Washington Ave., Ste. 300 Golden, CO 80401 Phone No.: (720) 898-9680 Fax No.: (720) 898-9681 E-mail: witt@bensonpc.com Atty. Reg. No.: 33241	Case No.: 05CA 370

BRIEF OF AMICUS CURIAE COLORADO TRIAL LAWYERS ASSOCIATION

Comes now Amicus Curiae the Colorado Trial Lawyers Association ("CTLA"), by and through its attorney, and hereby submits the following brief in support of Petitioner Ruth Jessee. Said brief is filed conditionally as allowed by C.A.R. 29, pending the determination of CTLA's motion for leave to appear as amicus curiae. CTLA's brief is being filed within the time permitted for Petitioner's reply pursuant to the Court's 16 February 2006 order.

I. INTRODUCTION

This proceeding presents the Court with an opportunity to address and clarify the proper standards and scope of protective orders under C.R.C.P. 26(c). A protective order is neither a means to restrict free speech nor a device to hide misconduct from public scrutiny. The plain language of the Rules makes clear that protective orders should be issued only upon a showing of good cause, and only then to shield a litigant from "annoyance, embarrassment, oppression, or undue burden or expense." Failing to enforce strict compliance with these requirements invites abuse by those who wish to conceal unfavorable evidence.

In the instant case, the trial court's protective order suffers from two fundamental flaws. First, the order goes beyond discovery matters and prohibits Ms Jessee and her counsel from even speaking of certain known facts, facts learned outside of the discovery process. Second, the order improperly requires Ms Jessee to disprove a claim of confidentiality to overcome this restraint, reversing the burden of proof set forth in Rule 26. If this order is upheld, it will establish unjust precedent for CTLA's members and their clients, and CTLA therefore urges this Court to make its rule absolute.

II. CTLA'S INTEREST

CTLA is an organization of trial attorneys who represent citizens throughout Colorado. CTLA works to preserve and improve the American judicial system through the advancement of trial advocacy skills, high ethical standards, and

professionalism, and to advance the cause of those who are damaged in person or property and must seek redress therefore at law. The attorney members of CTLA frequently represent persons such as the Ms Jessee in cases involving the wrongful denial of insurance coverage.

CTLA's practicing members often rely on expert witnesses and other consultants to help evaluate matters requiring specialized knowledge. CTLA's members and their clients would experience substantial harm if this Court were to rule that an opposing party could curtail such discussion by means of a protective order, and CTLA therefore has a strong interest in the outcome of this proceeding.

CTLA's members and their clients would likewise suffer if this Court were to abrogate Rule 26(c)'s prerequisite of good cause. The rules deliberately favor broad discovery so that the trier-of-fact may consider all pertinent evidence in reaching a just decision. Protective orders should, therefore, only be granted under limited circumstances, where one establishes good cause to withhold information to avoid annoyance, embarrassment, oppression, or undue burden or expense. If this Court were to approve the use of protective orders to conceal relevant, inculpatory facts, it would unduly prejudice the rights of many injured persons who lack the means to engage in costly discovery battles.

For these reasons, CTLA hopes that this Court will adhere to its long-standing policy in favor of broad discovery and make its rule absolute.

III. FACTUAL BACKGROUND

Ms Jessee had maintained insurance with Respondents (collectively "Farmers") for roughly twenty years when an underinsured driver crashed into a car in which she was a passenger, causing severe injuries. (Pet. R. Show Cause at Attach. 4 ¶ 4.) Although Ms Jessee had paid additional premiums for underinsured motorist coverage to provide security in case of such an event, Farmers refused to pay her more than $1000 on a shortfall estimated at $25,000. (*Id.* at Attach. 4 ¶¶ 8-9.) Farmers did not explain its refusal, but subsequent research suggested that Farmers's decision was the result of an internal system that encouraged its claims handlers to wrongfully deny payment in derogation of its duty to deal with its insureds in good faith, a system which has already led to extensive litigation in other states. (*Id.* at Attach. 4 ¶¶ 11-20.)

In 2004, Ms Jessee filed suit against Farmers seeking damages for breach of contract, bad faith, and deceptive trade practices. (*Id.* at Attach. 4 ¶¶ 21-48.) Although she was already in possession of a number of relevant documents, Ms Jessee later moved to compel production of various other materials that Farmers was withholding as confidential. (Resp. of Farmers Ins. Exch. to Order Show Cause at Attach. B.) When the parties could not agree on terms for the production of these materials, Ms Jessee offered to stipulate to a protective order that would have restricted publication of any documents produced through discovery. (Pet. R.

Show Cause at Attach. 9.) Apparently deeming this offer inadequate, Farmers responded and asked for an order restricting dissemination of *any* documents, even those that Ms Jessee had already obtained from the public domain. (*Id.* at Attach. 11, Ex. 1, contrasting the form of the two proposed orders.) In addition, Farmers asked the trial court to delegate to it the authority to declare any materials in the possession of Ms Jessee or her attorneys to be confidential unless they could prove otherwise. (*Id.*) After reviewing the parties' arguments, the trial court signed Farmers's proposed order and summarily denied Ms Jessee's motion for reconsideration. (*Id.* at Attachs. 1, 13.)

IV. ARGUMENT

A. The trial court's protective order violates the First Amendment

1. A protective order may not restrict publication of documents obtained outside of litigation

A protective order is neither a gag order nor a substitute for a confidentiality agreement. If a litigant obtains public information outside of discovery, the trial court has no jurisdiction to restrict publication of such information. Here, the trial court's order is an unconstitutional prior restraint of such communications, and it should be vacated.

As the United States Supreme Court has stated, modern rules of discovery[1] do not differentiate between private and public information. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984). "Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties." *Id.* To balance this broad right of access, courts may properly enter protective orders restricting dissemination of information *obtained through pretrial discovery.* *Id.* at 32. Neither Jessee nor Farmers contests this point.

What the parties do dispute is whether a trial court may use a protective order to restrict dissemination of information obtained outside of discovery. Here, Ms Jessee submitted a proposed order intended to balance her right to discovery with Farmers's concern over the dissemination of trade secrets. (Pet. R. Show Cause at Attach. 9.) When the trial court signed Farmers's competing order, however, its ruling went beyond discovery to encompass "Any documents which Plaintiff or her counsel currently have," including "documents that have been acquired from other sources in this litigation." (*Id.* at Attach. 1 ¶¶ 11-12.)

A protective order that seeks to restrain publication of information procured outside the court processes is a presumptively unconstitutional prior restraint of one's freedom of speech. *Rodgers v. United States Steel Corp.*, 536 F.2d 1001,

[1] *Seattle Times* arose under Wash. Super. Ct. Civ. R. 26, which is substantially identical to both Fed. R. Civ. P. 26 and C.R.C.P. 26. *See* 467 U.S. at 29 & n. 14.

1007 (3d Cir. 1976). As the Supreme Court ruled in *Seattle Times*, where "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and *does not restrict the dissemination of the information if gained from other sources*, it does not offend the First Amendment." 467 U.S. at 37 (emphasis added). The Court later explained that one of the crucial underpinnings of the *Seattle Times* decision was that the protective order under review had provided that same information "could be published with impunity" if the parties obtained it by other means. *Bartnicki v. Vopper*, 532 U.S. 514, 544-45 (2001), *distinguishing Seattle Times*, 467 U.S. at 34. This is a crucial distinction, and attempts to expand protective orders to materials procured outside of discovery have been repeatedly and uniformly struck down as violative of the First Amendment. *E.g. Stamy v. Packer*, 138 F.R.D. 412, 417 (D.N.J. 1990) (contrasting *Rodgers* with *Seattle Times*).

In Colorado, this Court has cited *Seattle Times* with approval and recognized the difference between information produced in discovery and information gleaned from other sources. *See In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 311 (Colo. 2003). In *Attorney E.*, the Court reiterated that prior restraints are generally "the most serious and least tolerable infringement on First Amendment rights," and that a protective order may constitute an improper prior restraint. *Id.*

at 309. The Court upheld the use of a protective order there only after verifying that the order was limited to information produced through discovery, observing that: "If [the attorney] obtained the same information outside of his attorney discipline case, the PDJ's order does not preclude him from disseminating such information." *Id.* at 311.

Here, the trial court did not limit its order to information that it compelled Farmers to produce in discovery; on the contrary, the order expressly applies to information that Ms Jessee and her attorneys had previously obtained from public sources. The order forbids Ms Jessee and her attorney from even discussing these facts with other professionals without the prior consent of Farmers or the approval of the court. (Pet. R. Show Cause at Attach. 1 ¶¶ 5(d), 12.) This effectively precluded Ms Jessee from speaking with her own retained expert, since he already had copies of the purportedly confidential documents and was unwilling to consent to a protective order that encompassed his property. (*Id.* at Attach. 2 ¶¶ 6-8.)

Such an order presents great concern for CTLA's members, who frequently rely on expert witnesses to evaluate potential claims. Our legislature has, notably, recognized that consultation with experts promotes efficiency and discourages frivolous claims. *See State v. Nieto*, 993 P.2d 493, 502 (Colo. 2000)(discussing basis for requiring certificate of review in professional negligence actions). Allowing an opposing party to block such communications by moving for a

protective order would advance a terrible public policy.[2] A protective order that goes beyond discovery and prohibits a party or attorney from discussing public facts with their expert is an improper prior restraint of speech that violates the First Amendment. The trial court's protective order here is improper, and this Court should therefore make its rule to show cause absolute.

2. DRI's reference to South Dakota law is irrelevant

In support of Farmers, Amicus Curiae Defense Research Institute ("DRI") further argues that differences in South Dakota and Colorado law give the trial court discretion to restrict Ms Jessee's speech, but this argument is specious.

As discussed in the parties' briefs, Farmers produced many of the disputed materials without restriction in the *Grong* matter underway in South Dakota. From the record, it does not appear that Farmers ever sought to appeal the *Grong* court's order compelling said production[3] or negotiate a confidentiality agreement when it

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[2] Motions for protective order take effect immediately upon filing and stay discovery until such time as the court rules on the motion. C.R.C.P. 121 § 1-12(1). This protocol holds a significant potential for abuse, and this Court should take care not to condone the use of motions for protective order to gain tactical advantage.

[3] DRI argues that Farmers's failure to appeal the order compelling production cannot constitute a waiver under *Stone v. Satriana,* 41 P.3d 705, 712 (Colo. 2002), but this case merely stated that a party has no duty to appeal an adverse judgment to mitigate the harm of legal malpractice; it says nothing on the issue of whether widespread and unrestricted publication of facts constitutes a waiver of confidentiality.

protective order when the parties to the *Grong* action published these documents outside of the case.[4] By the time the documents were received by Ms Jessee's attorney, they had been widely distributed throughout the United States, featured in at least one public seminar on insurance law, and were plainly in the public domain. (Pet. R. Show Cause at Attach. 5.) Thus, the question is not whether Colorado or South Dakota law governs Farmers's claims of confidentiality. The question is whether a Colorado trial court can unring a bell that sounded years ago in another jurisdiction.

Clearly, the court cannot. Even assuming arguendo that the disputed documents might have been confidential under Colorado law, Farmers waived any right to claim confidentiality by allowing their widespread publication following the *Grong* matter, and it would be an absurd waste of resources to relitigate the confidentiality of documents that are already in the possession of Ms Jessee, her expert, and numerous other former customers of Farmers.

[4] S.D. Codified Laws § 15-6-26(c), like C.R.C.P. 26(c), is patterned after Fed. R. Civ. P. 26(c) and authorizes similar relief for litigants in South Dakota court.

B. The courts should not abandon the good cause requirement of Rule 26

The second flaw in the trial court's order is the failure to enforce C.R.C.P. 26(c)'s requirement of good cause.

The purposes behind our discovery rules are to eliminate surprise at trial, discover relevant evidence, simplify the issues, and promote expeditious settlement of cases without the necessity of going to trial. *Cameron v. District Court*, 193 Colo. 286, 289, 565 P.2d 925, 928 (1977). To further these purposes, the rules contemplate broad discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Id.* at 290, 565 P.2d at 928. This Court has repeatedly held that discovery rules "should be construed liberally to effectuate the full extent of their truth-seeking purpose." and that "in close cases, the balance must be struck in favor of allowing discovery." *Id.*, 565 P.2d at 928.

Most pertinent here, "the party opposing discovery ***bears the burden of showing 'good cause'*** that he is entitled to a protective order." *Id.*, 565 P.2d at 928-29 (emphasis added). As explained in *Cameron*, this burden arose from a shift in the federal rules toward more open discovery: "In 1970, F.R.C.P. 34, the federal counterpart of our Rule 34, was modified to eliminate the 'good cause' requirement which served as a condition precedent to the right of discovery under the rule." *Id.* at 290 n. 1, 565 P.2d at 929 n. 1. Under the modern rules, litigants have a presumptive right to inspect any relevant documents, and the onus is on the party opposing discovery to prove good cause for entry of a protective order.

Here, Farmers has yet to make any showing of good cause for many of its documents beyond nonspecific references to "serious confidentiality and sovereignty" concerns. (Resp. of Farmers Ins. Exch. to Order Show Cause at 21.) Such unsupported statements are not sufficient to satisfy Rule 26(c)'s burden of proof. As the Third Circuit has stated: "The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-87 (3d Cir. 1994). In this case, the trial court did not enforce this burden but instead simply signed a proposed order giving Farmers the right to designate any documents as confidential and forcing Ms Jessee to disprove such confidentiality. (Pet. R. Show Cause at Attach. 1 ¶ 12.) This order turns the good cause standard on its head and ignores the intent of our modern discovery rules.

Amicus DRI, nevertheless, argues that Colorado courts "routinely enter protective orders" in commercial cases involving trade secrets. This argument illustrates the error in the trial court's reasoning. While legitimate trade secrets should be protected, the concept of a "routine" protective order is itself offensive to our system of laws. Colorado's discovery rules promote truth-seeking and abhor secrecy. Thus, there should be no such thing as a "routine" protective order. Protective orders halting discovery should only be granted where a litigant demonstrates specific good cause for relief from "annoyance, embarrassment,

oppression, or undue burden or expense." C.R.C.P. 26(c). That the documents may be harmful to the party's case is not a criterion on this list, and the courts should not restrict discovery based solely on vague references to confidentiality or privacy. A party seeking to hide inculpatory records must establish specific good cause for any materials it hopes to shroud in secrecy. *Cameron*, 193 Colo. at 290, 565 P.2d at 928. If any doubts exist, "the balance must be struck in favor of allowing discovery." *Id.*, 565 P.2d at 928. Farmers has failed to meet this standard, and the trial court should vacate its order.

V. CONCLUSION

CTLA has asked to appear in this case to voice its concern over the potential abuse of the protective order process. CTLA's attorney members and their clients often rely on documents in the possession of an opposing party to prove their claims, and this Court should not endorse an order that invites concealment of relevant evidence.

Our rules recognize the importance of presenting the trier of fact with all pertinent information. The rules therefore favor broad access and place a heavy burden on a party seeking to avoid discovery. This Court should require strict compliance with Rule 26(c) and make clear that vague assertions of confidentiality will not satisfy the Rule's burden of proof.

The Court should also make clear that, while good cause may often exist to limit discovery, protective orders have no effect on documents that a party has acquired by other means. If a litigant obtains information outside of discovery, he or she has a First Amendment right (and in some cases, a duty) to discuss the information with expert consultants, and the courts should not restrict this right.

In sum, the protective order in the instant case violates Rule 26 and the First Amendment and presents dangerous precedent for victims of insurance bad faith and other torts. CTLA therefore prays that this Court will make its rule absolute and mandate that the trial court vacate its order.

Respectfully submitted this 23rd day of February, 2006.

BENSON & ASSOCIATES, PC

Jesse Howard Witt

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of February, 2006, I served a true and correct copy of the foregoing on the following via U.S. Mail:

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