IN THE SUPREME COURT OF THE STATE OF OREGON

RYAN GAYLOR, Plaintiff-Relator, v. K. F. JACOBSEN & CO., INC.; and ROSS ISLAND SAND & GRAVEL, CO., Defendants-Adverse Parties.	Multnomah County Circuit Court No. 120709372 SC No. S061320 **MANDAMUS PROCEEDING**

RELATOR'S (REDACTED) BRIEF UNDER ORDER CONDITIONALLY GRANTING MOTIONS TO FILE REPLY BRIEF AND SUPPLEMENTAL EXCERPTS OF RECORD

Appeal from the Order of the Multnomah County
Circuit Court dated April 11, 2013
The Honorable John Wittmayer

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RELATOR'S (REDACTED) REPLY BRIEF AND (SUPPLEMENTAL) EXCERPT OF RECORD

ARGUMENT

A. The Alternative Writ of Mandamus Preserved Both Assignments of Error.

Adverse Parties contend that this Court's alternative writ of mandamus (SER 409) preserved only Relator's first assigned error pertaining to disqualifying Relator's attorney of choice. Adverse Parties cite *State ex rel. Kashmir Corp. v. Schmidt*, 291 Or. 603, 633 P.2d 791 (1981); *Int'l Transp. Equip. Lessors, Inc. v. Bohannon*, 252 Or. 356, 449 P.2d 847 (1969); and *Woodburn v. Domogalla*, 1 Or. Tax 292, 303 (1963) *rev'd on other grounds sub nom. City of Woodburn v. Domogalla*, 238 Or. 401, 395 P.2d 150 (1964) as support for their position. Those cases, however, do not support Adverse Parties' argument that the alternative writ in this case encompassed only Relator's first assignment of error.

An alternative writ of mandamus serves the same function as a complaint. *Int'l Transp.*, 252 Or. at 360. Here, the alternative writ of mandamus states: "By this reference, all well-pleaded allegations in the petition are incorporated in this writ as if set out in full." The petition at issue clearly alleged that part of the relief sought in the mandamus action was for the trial court "to vacate the Order signed April 9, 2013 and entered April 11, 2013 that disqualified the Relator's attorney from further participation in the case and compelled the Relator to return all copies of all documents that the Relator had removed from the Adverse Parties' premises

while the Relator worked for the Adverse Parties." Petition for Peremptory Writ of Mandamus, p. 1; *see also* SER 406-408. Adverse Parties responded to Relator's arguments that the documents should be returned. By incorporating all "well-pleaded allegations in the petition," the alternative writ of mandamus preserved the second assignment of error.

B. *Bryant* Allows for Jurisdiction over Disqualification Matters.

Adverse Parties cite dicta from the case of *State ex rel. Bryant v. Ellis*, 301 Or. 633, 723 P.2d 811 (1986) for the proposition that this Court lacks jurisdiction to issue a peremptory writ in this matter. The *Bryant* Court, after issuing its ruling that circuit courts in this state have the equitable power to disqualify a party's attorney, in fact commented that by issuing its ruling, the Court did not mean "to invite future petitions for mandamus whenever a party is dissatisfied with a court's grant or denial of relief against a lawyer...." 301 Or. at 640. The *Bryant* Court then cited two cases in which a motion to disqualify an attorney had been *denied* as examples of its expressed wish.

Bryant thus implied that using mandamus proceedings in attorney disqualification matters should be treated as the courts treat summary judgment motions. Generally, when a trial court denies a summary judgment motion, the decision is not a "final" decision and not appealable. Granting such a motion, however, is an appealable decision. Granting a motion to disqualify an attorney terminates the parties' right to counsel of his/her choice for the remainder of the case, and thus is a "final" decision. Having to wait to appeal until after judgment does not afford the affected party speedy and adequate relief, as the damage of

being denied one's counsel of choice is complete by the time judgment is entered. Thus, while denials of motions seeking to dismiss counsel ordinarily should not allow for mandamus to proceed, granting such motions, as in this case, is a proper basis for such proceedings.

C. Adverse Parties Voluntarily Produced Documents that they now Claim are Confidential.

This matter may, at first blush, present a fundamental issue involving the tension between allowing employees to copy documents evidencing corporate wrongdoing that may not be exposed through normal discovery, and honoring the sanctity of the discovery process in the judicial system. The trial court found that no such tension exists, as in the trial court's expressed opinion, no employee ever has the right to remove any document from his employer's premises without specific permission to do so. SER 386 and 388. The trial court's decision thus presents one extreme of this issue. The other extreme - allowing employees essentially unfettered freedom to take documents - was addressed in *Herrera v. Clipper Group, L.P.*, 97-CIV-560 (SAS) 1998 WL 229499, *1 (S.D.N.Y. 1998) in which the court frowned upon an argument presented "which amounts to an assertion that anything not nailed down can permissibly be stolen."

The answer to the question of whether, and under what conditions, an employee can remove documents that evidence purported illegal activity from an employer's premises lies in a policy falling somewhere between the two extremes. Relator's opening brief attempted to supply the Court with possible frameworks for such a policy. Adverse Parties' answering brief, however, raises issues and

arguments (mostly by omissions in the brief and Supplemental Excerpt of Record) that not only can no longer be ignored, but allow for this Court to decide that regardless of the considerations governing such matters, KFJ's own actions in this case establish that they did not consider the documents worthy of protection and thus that Relator did nothing wrong in taking the documents.

1. Whether the documents were confidential is paramount.

Before discussing the undisputed facts that establish that Adverse Parties themselves did not treat the very documents at issue as confidential, several general arguments made by Adverse Parties in their answering brief merit address. First, Adverse Parties repeatedly state that the documents at issue and that formed the basis for the trial court disqualifying Relator's attorney are "confidential."[1] Adverse Parties fail to ever define this critical term using case law or any other legal source. Adverse Parties admit that they did not have any policy in place that prohibited removing any documentation from their premises, or defining any of the documents produced by Adverse Parties in the course of their businesses to be confidential and/or proprietary. The only factual support for Adverse Parties' insistence that the documents were confidential is the extremely self-serving (and disputed) claim by Relator's supervisor, Mr. Chuck Hicks, that he told Relator that the documents were considered confidential. SER 202, ¶ 7.

Secondly, Adverse Parties repeatedly imply that Relator took all of the subject documents during three allegedly unauthorized computer sessions in

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[1]Adverse Parties apparently have abandoned their earlier insistence that at least some of the documents constituted trade secrets, as they use that term only once toward the end of the answering brief when referring to the documents at issue. Answering Brief, at 61.

December 2011 when, they speculate, Relator used a fellow employee's computer password to gain otherwise unauthorized access to KFJ's computer system. Adverse Parties sum up this allegation on page 57 of their answering brief, where they claim: "Relator opted to compromise a computer assigned to another employee multiple times in order to obtain the purloined documents." The problem with this argument is that Adverse Parties know that Relator made the subject computer disk - containing the majority of the documents at issue - in July 2011. SER 97. They also know that they cannot produce any evidence whatsoever that Relator in fact took any documents off the premises after November 2011 and that, despite having access to Relator's personal home computer for over seven months now, cannot provide a single document that Relator sent to his home computer or otherwise removed from KFJ's premises in December 2011.

Thirdly, Adverse Parties insist on making the facially false claim that Relator took the documents at issue in December 2011 in the hope of buttressing their argument that Relator took the documents after he had been denied access to KFJ's computer system. The only existing evidence suggesting that Relator was denied access to KFJ's computer system is Mr. Hicks' self-serving and hearsay testimony that sometime in or after July 2011 when Mr. Hicks removed Relator from his quality control position, "[Relator]'s access to company computers was revoked and [Relator] was told he was no longer authorized to access electronic information by use of a company computer." SER 202, ¶ 8. (Again, this testimony is both uncorroborated and denied.) Adverse Parties ignore the argument that Relator presented to the trial court that Relator's computer username and password were not removed from the KFJ computer system, which would have eliminated

Relator's ability to use KFJ's system. SER 144-45. As long as Relator had a working username and password, he could access KFJ's entire computer system. *Id.* This fact certainly calls into question Mr. Hicks' testimony regarding this issue, and created a factual issue that should have caused the trial court at least to seek additional evidence before accepting Adverse Parties' version of this and many other alleged facts.

The three issues listed above are all relevant to the one most critical issue involved in both assignments of error in this matter; namely, were the documents that the Relator removed from KFJ's premises "confidential?" If they were confidential, then the argument that Relator's counsel should have returned the documents immediately upon discovery of them to Adverse Parties and never looked at them is more plausible. If the documents were confidential, the trial court arguably was more justified in ordering their return, as such nature would enhance Adverse Parties' claim of prejudice. If the documents truly were confidential, Relator may have been prohibited from removing them in the first place.

The problem with the trial court's decision, however, was that the trial court never examined the questioned documents and thus could not evaluate their true nature and determine if they were in any way confidential.[2] Faced with Relator's claims (having been one of very few people to have actually reviewed the documents themselves) that the documents were public documents or simply

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[2]Relator's counsel offered to "inform the court...exactly what each document is and identify with specificity exactly which of the documents the [Adverse Parties] willingly...produced." SER 334 (at n. 5).

Relator's personal documents with a few exceptions, the trial court chose not to evaluate whether the documents were confidential and announced that the issue was irrelevant. SER 388. To this day, the documents at issue have not been seen by any court (despite Relator's counsel's offer to the trial court to allow such examination), forcing the trial court, federal court and now this Court to operate somewhat in a vacuum.

2. Adverse Parties gave examples of all documents to BOLI and Relator.

The vacuum caused by a lack of access to the documents ends with this brief. Adverse Parties submitted redacted copies of some of the documents at issue, namely those that Relator's attorney supplied to the Oregon Bureau of Labor and Industries, as part of the Supplemental Excerpt of Record. SER 166-187. On the bottom of those pages of the SER are Bates stamp numbers, starting with "KFJ-G00142" and continuing sequentially (with three numbered pages missing) through "KFJ-G00166."[3] These numbers fall within the Bates stamp numbers beginning with "KFJ-G00001" that Adverse Parties counsel provided to Relator's counsel as part of Adverse Parties' document production requests. ER 83 (submitted with documents filed confidentially). Critically, Adverse Parties supplied these documents to Relator's counsel without requesting that they be produced pursuant to a protective order. These documents, having been produced by Adverse Parties themselves, were not subject to the trial court's order that all copies of all documents that Relator removed from KFJ's premises had to be returned to Adverse Parties.

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[3](REDACTED)

Relator attaches the complete copies of documents Bates stamp numbered (by Adverse Parties' counsel) as KFJ-G00142-166 to this brief as ER 84-108)(ER 83 is the cover page referred to above). (REDACTED)

Moreover, Adverse Parties previously in this matter have taken the position that unsigned copies of the test results are entirely internal and therefore confidential.[4] The fact that Adverse Parties willingly turned over some unsigned documents without a protective order in discovery evidences a waiver of this argument. Adverse Parties should not now be allowed to argue that the documents are confidential when they knowingly turned them over to Relator without so much as requesting that a protective order be put in place.

The extent of Adverse Parties' waiver of any possible claim of confidentiality is broadened by Exh. D to Eric J. Fjelstad's Declaration in Support of Plaintiff's Response to Defendants' Motion for Relief, included by Adverse Parties as SER 343-346. (Adverse Parties did not include Exh. D to the declaration as part of the record. Relator now attaches it for ease of reference as ER 46-74.) Exhibit D contains "Attachment G" to Adverse Parties' response to Relator's complaint to the Oregon Bureau of Labor and Industries (ER 56-74). In other words, Adverse Parties' counsel submitted Attachment G to a public agency, where it became part of the permanent, public record. Adverse Parties have not asked BOLI to keep Attachment G confidential, as they claim to have done with the documents that Relator's counsel sent to BOLI upon request. (SER 166-187.)

Attachment G (ER 56-74) is extremely relevant to the issue of whether the documents at issue in this case are in any way confidential. Adverse Parties

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[4]Relator disputed this allegation. See SER 344, ¶ 5.

maintain in their answering brief and throughout this case that the documents that Relator removed from KFJ's premises were confidential for a host of reasons, set forth in detail on pages 7 and 8 of their answering brief. Of the 12 bulleted items listed on those pages, the contents of Attachment G cover the first five. (For more detailed argument relating to this issue, see SER 334-338.) The information that Adverse Parties claim is confidential and could damage their business if revealed to competitors they thus voluntarily made a part of the public domain.[5] The documents that Adverse Parties provided to Relator's counsel without a protective order cover the remaining bulleted items.

Adverse Parties consistently maintain that the documents removed by Relator from KFJ's premises were "confidential." The nature of the documents as protected or not is the most relevant issue to both assignments of error that Relator has raised. Documents can be "confidential" by their nature (personnel records, communications between high-ranking management personnel regarding company business, private information relating to individual employees, etc.), because the law renders them confidential by definition, or because the employer has policies in place protecting the documents from disclosure. None of these considerations regarding confidentiality is present in this case. Moreover, at a minimum, a party promoting the alleged confidentiality of documents itself should be required to treat the documents as confidential.

Adverse Parties voluntarily have exposed the documents at issue in this case to the general public. Based on their own actions, the competitors that Adverse

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[5]Adverse Parties also submitted Attachment G to BOLI on April 1, 2012, about 18 days before Relator's counsel submitted ER 84-108 to BOLI.

Parties claim could use the information contained in the documents to Adverse Parties' disadvantage have had access to the information since April 1, 2012 and continue to have such access today.

If the documents' nature is a factor in this matter - as it is in all of the cases and secondary sources cited by either side to date - no dispute can exist that the documents at issue in this case were not confidential. They certainly could not constitute trade secrets, nor were they proprietary or privileged. The question in this case thus may reduce to what penalties, if any, are merited when an employee removes non-protected documents from his employer's premises. Viewed in this light, the trial court's order was a clear abuse of discretion regarding both disqualifying Relator's attorney of choice and ordering a return of all of the non-confidential documents, thus risking that they will never be seen in the course of this litigation again.

This argument is furthered by Formal Ethics Opinion 2011-186.[6] Formal Ethics Opinion No. 2011-186 states that attorneys need *not* notify opposing counsel upon receipt of documents "that may have been stolen or otherwise taken without authorization from opposing party." The lawyer who receives such documents also need *not* return them to the opposing party. Formal Opinion No. 2011-186 also expresses Relator's main point in this matter; namely, the nature of the documents (i.e., whether they are privileged, subject to a confidentiality obligation, etc.) determines whether an employee can remove and possess

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[6]While a formal ethics opinion may not have substantial weight in this context, attorney disqualification issues often turn on whether the attorney violated any ethical rules. *See Bryant*, 301 Or. at 636.

documents from his employer's premises. Formal Opinion No. 2011-186 provides that documents "may be entitled to protection under substantive law of privilege or otherwise. *See Burt Hill, Inc.*, 2010 US Dist Lexis 7492 at 2-4 n 6." Thus, unless an attorney knows or reasonably should know that documents removed from an employer's premises are privileged or subject to some other substantive law protecting their status (such as the Uniform Trade Secrets Act or contract law), the attorney need not return them to the employer or even notify the employer that the attorney possesses the documents. Knowing (or at least believing) that this was the state of the law is why Relator's counsel believed that the documents were not confidential and why he asked Adverse Parties' counsel to inform him of any facts that may have indicated that the documents were confidential. SER 97. Formal Ethics Opinion 2011-186 provides further support for the argument that non-confidential documents can be removed from an employer's premises without permission, that the attorney need not return the documents to the employer and that the attorney does nothing wrong by retaining and using the documents.

Upholding the trial court's order in this matter would create an unworkable precedent for future litigators and employees. The trial court held that employees can never remove any document from an employer's premises, unless granted the "right" to do so by expressed permission. The slipperiness of the slope created by such a rule would rival that of black ice. New employees would have to ask to take an employee manual home to read and could not copy any pertinent portions without seeking permission first. Employees could not copy emails containing work-related instructions from a company-issued laptop computer while out of town without calling a supervisor first. Employees exchanging union-related

communications could not take those communications home without authorization from the employer.

Whether the documents that Relator removed from KFJ's premises were confidential, privileged, proprietary or contained trade secrets is the pivotal issue relating to both of Relator's assignments of error. Every authority cited by either party directly or indirectly emphasizes and differentiates between documents thus protected and those that are not.[7] Adverse Parties eliminated any doubt about whether the documents that Relator removed were to any degree confidential. Adverse Parties had the burden of proving that the documents were somehow protected. *E.g., Rem Metals Corp. v. Logan*, 278 Or 715, 721, 722 (1977). Their failure to do so should have resulted in denial of Adverse Parties' motion for relief. The trial court's granting of the motion without finding that Adverse Parties carried their burden of proof was an abuse of discretion.

3. The evidence suggests Adverse Parties will not produce the documents.

Relator provided precedents discussing possible criteria to consider regarding a balancing test to apply when determining if an employee can engage in self-help discovery in his opening brief. Adverse Parties claim that any possible

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[7] *E.g., Furnish v. Merlo*, 1994 WL 574137 (D. Or. 1994)(employee broke into supervisor's desk and removed documents that she knew she was not authorized to possess); *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 256-57 (4th Cir. 1998)(plaintiff terminated for removing documents that were "confidential by nature"); *Bedwell v. Fish & Richardson, P.C.*, 2007 WL 4258323 (S.D. Cal. 2007)(ordering return only of all confidential/privileged information); Helen Hierschbiel, *Bar Counsel: Ill-Gotten Gains; Rules for Privileged or Purloined Documents*, Oregon State Bar Bulletin, July 2012 (potential disciplinary problems relating only to retaining "privileged" or stolen documents)(SER 193).

balancing test regarding this issue cannot favor Relator in large part because no evidence suggests that Adverse Parties would not readily have produced the subject documents if requested in a "proper" discovery request. The problems for Adverse Parties with this argument are legion. First, Adverse Parties complain earlier in their answering brief that Relator's counsel used the removed documents to fashion very specific production requests naming the actual documents sought. Adverse Parties objected vehemently and without basis to every one of those very specific production requests. ER 2, Rec. 19. Adverse Parties' insistence that it would have produced the documents had they been "properly" requested thus is belied by their own conduct.

Evidence from the federal court proceeding that KFJ filed against Relator concerning the exact documents at issue in this matter provide further proof that Adverse Parties in fact have no intent of producing the documents that evidence their fraudulent conduct. Relator submits ER 75-83, the docket sheet for U.S. District Court Case #3:12-cv-02062-AC, and asks this Court to take judicial notice of this docket sheet. Rec. 51 of the docket sheet notes that Judge Acosta on September 5, 2013 ordered KFJ to "provide as many documents as possible to defendant by 9/19/13, *with the emphasis being on documents defendant had returned to plaintiff, because of a ruling in the related state court case.*" (Emphasis added.) The next three entries show that on September 17, 2013 KFJ filed a motion for a protective order seeking to allow KFJ to avoid producing the documents as ordered. (The notes show that KFJ's basis for requesting the protective order was the proceedings in this case.) Entry 58, dated October 22, 2013, then notes the procedure ordered by Judge Acosta that would ensure that

KFJ turned over exactly the same documents that are at issue in this case by no later than three business days following the entry of a protective order, which would occur by November 22, 2013 at the latest. ER 82.

Entry 59 then shows that on November 4, 2013 - the day before KFJ was to provide the court with a stipulated protective order that would have kickstarted the three business days by which KFJ had to produce the documents (see Entry 58) - KFJ filed a motion to dismiss its entire case. In other words, KFJ chose to dismiss a federal lawsuit that it had been pursuing for a year that was based entirely on the documents at issue in this matter, rather than produce those documents.

Amicus Oregon Trial Lawyers Association noted in its amicus brief that assuming that parties will always abide by discovery rules is not a wise policy in today's world. Relator's counsel informed the trial court that he feared that the subject documents "may never be seen in the context of this litigation again," based on the discovery practices that Adverse Parties already had exhibited by the date of the hearing central to this matter. Adverse Parties' conduct since Relator turned over the documents provides ample evidence that both OTLA and Relator were very likely correct. If the Court decides that a balancing test regarding Relator's alleged self-help discovery is appropriate, and a component of that test is the likelihood that the evidence will be produced or constitute "smoking gun" type of proof, such component must favor the Relator in this particular action.

CONCLUSION

The issue of whether the documents that Relator removed from KFJ's premises in the summer and fall of 2011 are protected "confidential" documents is central to both of Relator's assignments of error. The evidence leaves no doubt

that Adverse Parties themselves have not treated the documents as confidential. Adverse Parties voluntarily turned over identical and similar documents to a state agency, where they remain available today for any member of the public to peruse. Adverse Parties further produced some of the subject documents to Relator without asking for a protective order. The trial court abused its discretion in granting Adverse Parties' motion for relief despite these facts.

Relator asks that this court issue a peremptory writ reversing the April 11, 2013 trial court order disqualifying Relator's attorney of choice and mandating return of the documents that Relator removed from KFJ's premise, and remand this case for further proceedings consistent with that order.

Dated December 19, 2013.

SMITH & FJELSTAD

By: /s/ Eric J. Fjelstad
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CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a) is 4267 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Smith & Fjelstad

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PROOF OF SERVICE

I certify that I directed that the original copies of RELATOR'S CONFIDENTIAL BRIEF UNDER ORDER CONDITIONALLY GRANTING MOTIONS TO FILE REPLY BRIEF AND SUPPLEMENTAL EXCERPTS OF RECORD and RELATOR'S (REDACTED) BRIEF UNDER ORDER CONDITIONALLY GRANTING MOTIONS TO FILE REPLY BRIEF AND SUPPLEMENTAL EXCERPTS OF RECORD be filed electronically with the Appellate Court Administrator for the State of Oregon on December 19, 2013.

I further certify that I directed that two copies of the Relator's Opening Brief to be served on the Adverse Parties' attorney and on counsel for amicus Oregon Trial Lawyers Association on December 19, 2013 by United States mail, with postage prepaid, in envelopes addressed to:

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