

1992

# Brian Burns v. Cannondale Bicycle Company, the Bicycle Center, and John Does I through V : Reply Brief

Utah Court of Appeals

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DOCKET NO. 920708

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IN THE UTAH COURT OF APPEALS

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BRIAN BURNS,	:	
	:	
Plaintiff/Appellant,	:	<b>REPLY BRIEF OF THE DEFENDANT/</b>
	:	<b>APPELLEE/CROSS-APPELLANT</b>
vs.	:	<b>THE BICYCLE CENTER</b>
	:	
CANNONDALE BICYCLE COMPANY,	:	Case No. 920708-CA
THE BICYCLE CENTER and JOHN	:	
DOES I THROUGH V,	:	District Court No. 900901567
	:	
Defendants/Appellees/	:	Category No. 15
Cross-Appellants.	:	
	:	

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**FILED**  
Utah Court of Appeals

JUN 23 1993

  
Mary T. Neuman  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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**ARGUMENT**

**POINT I**

**THE PROTECTIVE ORDER SHOULD BE VACATED BECAUSE THE  
ORAL AGREEMENT OF THE PARTIES ONLY COVERED SPECIFIC  
PORTIONS OF THE PLAINTIFF'S DEPOSITION TESTIMONY**

In appealing the protective order entered by the trial court in favor of the Plaintiff/Appellant ("Dr. Burns"), the Defendant/Appellee/Cross-Appellant The Bicycle Center ("BC") and the Defendant/Appellee/Cross-Appellant Cannondale Bicycle Company ("CBC") argued that the order should be vacated because: (1) Dr. Burns failed to show "good cause" for the entrance of such an order; (2) Dr. Burns misrepresented the scope of the stipulation agreed to by the parties during Dr. Burns' deposition; (3) Dr. Burns waived his confidentiality claim in his business records by producing them months before he motioned the court for a protective order; and (4) the records in question indicate that Dr. Burns violated the statutes enacted by the legislature governing the professional conduct of chiropractors. See BC's Brief at pp. 32-44 and CBC's Brief at pp. 9-18.

In response, Dr. Burns ignored the arguments advanced by BC and CBC on the issues of "good cause" and "waiver" and, instead, simply re-asserted his belief that the protective order entered by the trial court should not be disturbed because "the protective order was issued in this instance to enforce an oral agreement made by the parties prior to release to Defendants of the records at

issue." (See Dr. Burns' Reply Brief at p. 4.) However, an examination of the agreement of the parties reveals that Dr. Burns misrepresents the terms of the oral agreement when he claims that the protective order merely memorializes the parties oral agreement.

**A. The Oral Agreement Applied To Portions Of Dr. Burns' Deposition Which Dealt With His Theory of "Working Smarter" In His Profession - Nothing Else.**

A careful review of the "oral agreement" which Dr. Burns purportedly relies on in asserting that the parties stipulated to a general confidentiality agreement covering all of his business records reveals, instead, that the agreement was very narrow and only encompassed Dr. Burns' deposition testimony on the specific subject of "working smarter."

Specifically, when Dr. Burns indicated during the deposition that he was concerned that BC was approaching a sensitive area, the following discussion between counsel took place on the record:

Mr. Hansen - Counsel for BC: I would agree that what your client tells me, his secrets of good management, not be divulged to any other person with the exception of the insurance carrier, State Farm, expert witnesses whom we may retain and members of my office staff and attorneys who are involved in this litigation.

\* \* \*

With respect to the deposition from this point forward, it is agreed by all counsel and the deponent that the deposition from this point forward will be sealed with the exception of the employees of State Farm, employees of Aetna Insurance, employees of the law firm of Morgan & Hansen, employees of the law firm of [Williams & Hunt]

and also expert witnesses excluding from the definition of expert witnesses another chiropractor. Its also agreed that before this portion of the deposition is presented to an expert witness chiropractor, that we will obtain a court order from the court allowing us to present this information to a chiropractor, unless of course, you would stipulate to that, but that's up to you. Is that agreed.

Mr. Wells - Counsel for Dr. Burns: And with the caveat that the people who by definition are allowed to see this will . . . also be bound not to disclose the contents to any person to whom it is not allowed to be shown by the terms of the stipulation.

Mr. Hansen: Correct.

Mr. Ferguson - Counsel for Cannondale Bicycles: Agreed.

R. 384-385 & 420-422 (emphasis added).

Examination of the statements by each parties counsel reveals that the agreement was limited to a portion of Dr. Burns' deposition testimony given at that time. Consequently, Dr. Burns' contention that the protective order should not be vacated because of this alleged agreement is without merit because the record reveals that the parties never even contemplated the subject records in entering the stipulation.

**B. Dr. Burns' Assertion Of An Oral Confidentiality Agreement Is Inconsistent With His Testimony.**

The fact that Dr. Burns did not believe that he had a blanket confidentiality agreement is best illustrated by the fact that when he was deposed by CBC's and BC's attorneys in April of 1991, Dr. Burns testified that he did not have a fee sharing arrangement with Dr. Robert Morrow. Specifically, Dr. Burns testified as follows:

Q. Do you have any type of partnership arrangement with Dr. Robert Morrow?

A. No.

Q. Any fee sharing arrangement?

A. No. We were originally going to, but it didn't pan out.

R. 414.

However, several months later when Dr. Burns produced his business records in response to discovery requests by CBC and BC, it was discovered that there were several substantial cash transactions between Dr. Burns and Dr. Morrow and that a portion of these transactions were pursuant to a fee-sharing agreement. Specifically, the agreement was that Dr. Burns paid Dr. Morrow 20% of the fee he received from the parties who were referred by Dr. Morrow to Dr. Burns. (See R. 400; BC's Brief at 42 & CBC's Brief at 16.) As indicated above, BC and CBC did not discover this relationship through the deposition of Dr. Burns, but instead, several months later when they reviewed business records which had been produced in response to their discovery requests. In view of the fact that Dr. Burns deceived BC and CBC with respect to his financial relationship with Dr. Morrow and the fact that this deception was only discovered because Dr. Burns subsequently produced business records which contradicted his testimony, he should not be allowed to avoid the consequences this relationship



may present by misrepresenting the boundaries of the deposition stipulation entered into by the parties.

**C. Dr. Burns Has Waived His Confidentiality Claim.**

In order to maintain the confidentiality of information contained in documents produced during the course of discovery, the Utah Rules of Civil Procedure requires that a party obtain a protective order prior to producing the documents to be covered by the protective order. Utah R. Civ. P. 26(c)(7). Consequently, because the Plaintiff did not move for a protective order until after the documents in question were produced, Dr. Burns is deemed to have waived his claim for confidentiality. See Gold Standard v. American Resources, 805 P.2d 164 (Utah 1990) (the Utah Supreme Court held that the defendant voluntarily waived its work product protection by inadvertently disclosing documents in response to the plaintiff's discovery requests).

**D. Plaintiff Has Provided No Showing Of Good Cause.**

As a condition precedent to the issuance of a protective order, Rule 26(c) of the Utah Rules of Civil Procedure requires a showing of good cause. Specifically, Rule 26(c) states:

[U]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, [the court] may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .

Utah R. Civ. P. 26(c) (emphasis added).

In moving the trial court for a protective order, not only did Dr. Burns fail to show "good cause" for the requested protection, but it is clear from the content of the documents in question that Dr. Burns moved the court for a protective order in order to conceal the fact that he had entered into a fee-sharing agreement with Dr. Robert Morrow, a relationship that is expressly prohibited by the statutes which govern the activities of chiropractors and medical doctors in the State of Utah.

Thus, in determining whether or not the trial court abused its discretion in this case, this Court should ask itself one question: can Dr. Burns meet the "good cause" standard set-forth in the Utah Rules of Civil Procedure when the purpose of that motion, at least in part, is to suppress documents previously produced and which reveal a pattern of illegal conduct that is contrary to the parties prior deposition testimony?

BC submits that a desire to conceal illegal behavior does not constitute "good cause" as contemplated by Rule 26(C) and, as a result, asks this Court to vacate the protective order entered by the trial court in this matter.

#### **CONCLUSION**

BC respectfully submits that the protective order entered in favor of Dr. Burns should be vacated because:

1. The oral agreement of the parties was limited to discrete portions of Dr. Burns' deposition testimony;

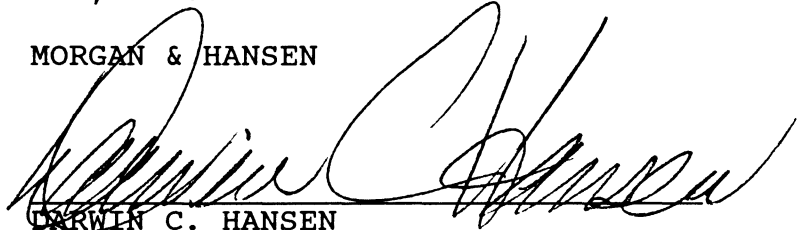
2. Dr. Burns lied about his relationship with Dr. Morrow in his deposition and is now attempting to cover it up through the Court's protective order;

3. Dr. Burns waived any confidentiality claim he may have had in the documents by producing them before he obtained a Court order; and

4. Dr. Burns has not shown "good cause" for a protective order.

DATED this  day of June, 1993.

MORGAN & HANSEN



DARWIN C. HANSEN

RANDALL D. LUND

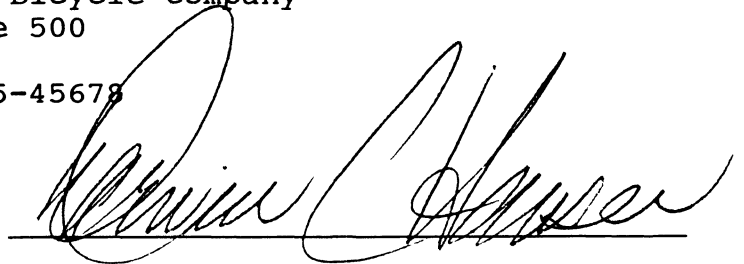
Attorneys for Defendant/Appellee/  
Cross-Appellant The Bicycle Center

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25 day of June, 1993, a true and correct copy of the foregoing **REPLY BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT THE BICYCLE CENTER** was mailed, by first-class mail, postage pre-paid, to the following:

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A handwritten signature in black ink, appearing to read "Robert Debry", is written over a horizontal line.