



ATTORNEY GENERAL OF WASHINGTON

Torts Division

Background on case no. 03-2-27609-0 SEA (2003)

August 25, 2006

Case Background. There is extensive discovery in civil cases, even those involving crime victims. In this case, both DSHS and YouthCare sought accurate information about all the facts in this case so that the appropriate compensation could be agreed upon. This was always a case of statutory rape—at no time did the defense say otherwise. There was never an attempt to argue that the minor had not been raped and obviously damaged. Once Lynn's lawyer stated that the rape had been physically violent and an aggressive threatening assault, the question of how the physical contact (rape) actually occurred became relevant for purposes of determining the level of damages stemming from the rape. The discovery process was not intended to downplay or discredit the fact that the rape occurred; as all parties and their counsel acknowledged this did occur.

Court-regulated discovery occurred in this case. In this specific context, the court allowed discovery into what occurred between Lynn and Gregory, as well as past information concerning Lynn's prior allegations of past rape, to specifically include questioning about "consensual" contacts. The court determined if the minor experienced a recent rape then she would have been suffering emotional distress from this prior event—and knowing this may be relevant in determining if there were damages from this first event that neither DSHS or YouthCare were liable for in tort. The court ruled this information was discoverable. The initial evidence received by DSHS—when Lynn was questioned immediately following the rape by YouthCare—that "we did something." Next her lawyer claimed she was violently physically assaulted and had significant physical injuries. All the evidence after her medical exam was negative for physical injuries. This is why the prior AAG denied there physical evidence of a "sexual assault" but continued to be keenly aware that statutory rape occurred.

Other discovery issues. The affirmative defense of failing to mitigate damages is often (but not always) made at a time before discovery is done. This defense must be stated in writing to allow a defendant the opportunity to later bring in evidence if it proves to be accurate *and* to allow the plaintiff to go to court to block this kind of discovery. Here, the court specifically allowed and limited the discovery as indicated in its order allowing the past sexual history of Lynn to inquired into for assessing damages. Discovery is the process by which the facts unfold so that justice, in this case, appropriate compensation can be agreed upon. In this case, the DSHS and YouthCare investigated the level of harm caused by the rape. There was never any dispute that the sexual contact was a crime and was harmful to Lynn.

The discovery into the personal lives of plaintiff crime victims is to be done with sensitivity to the privacy rights of the crime victim (and this is why many of the records on this issue remain sealed in the court files) and yet, like the public's right to know, defendants have a right to know the evidence that leads to the full development of the level of damages being sought. In DSHS and YouthCare's review of this case, the investigation into the details of what occurred does not diminish the criminal aspect of the statutory rape at the hands of YouthCare's employee.

Case resolution. DSHS resolved this case as quickly as it could for the best interests of Lynn, including immediate resources for counseling and other needs Lynn had both as a rape victim and as a child from a very troubled family background. DSHS made no attempt to hide its failings here in timely conducting a background check on the YouthCare employee. YouthCare took responsibility for its allowing Gregory to have unsupervised contact with Lynn, a clear violation of its agreement with DSHS. Virtually no time was spent on arguing these events did not occur; rather the discovery was focused on determining the level of damages that occurred as a result of the statutory rape.

Sanctions. Sometimes there are legitimate defenses to discovery requests that don't go your way. It is part of conducting difficult, and occasionally contentious, litigation. Here the court determined that the DSHS records were difficult to decipher and that DSHS had to do more than provide its records under the Business Records exception to answering detailed interrogatories, and the DSHS employees needed to sign the discovery. The sanction was not related to the defense seeking information on the background of Lynn. In fact, the court specifically allowed this line of questioning.

The Torts Division looked at sanctions over a recent three-plus year period. The division found that it was awarded money from sanctions and got sanctioned as often as its opposing counsel. It appeared that the calls were going both ways. Sometimes the division won sanctions and at other times, it was on the receiving end. It's something that happens in complex litigation.

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