2025 VT 10

No. 24-AP-214

In re Department of Financial Regulation
(Travelers Casualty & Surety Company, Appellant)

Supreme Court

On Appeal from
Superior Court, Washington Unit,
Civil Division

January Term, 2025

Timothy B. Tomasi, J.

James M. Cooley of Cooley, Cooley & Foxx, Inc., Burlington, and John Maloney of Gimigliano Mauriello & Maloney, Morristown, New Jersey, for Appellant.

Charity R. Clark, Attorney General, Debbie Stevens and David Cassetty, Assistant Attorneys General, Montpelier, for Appellee.

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PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **WAPLES, J.** Travelers Casualty & Surety Company appeals an order quashing its subpoena to the Vermont Department of Financial Regulation (DFR) for records pertaining to a Vermont captive insurance company. DFR may only release such records if certain statutory criteria are satisfied. Because we conclude Travelers did not make the necessary showing, we affirm.

¶ 2. This case arises out of mass tort litigation against Johnson & Johnson, Inc., (J&J) over bodily injury claims arising from exposure to various J&J products. Travelers, along with other insurers, is party to a pending New Jersey declaratory-judgment action that seeks to resolve the insurers' obligations to provide coverage for the tort claims. Middlesex Assurance Company, another party to that case, is J&J's Vermont captive insurer.

¶ 3. Section 6002 of Title 8 requires a captive insurance company[1] to file certain information with DFR before receiving a license to do any insurance business in Vermont. Middlesex, as a Vermont captive insurer, is subject to these requirements. Under § 6002(c)(3), "[i]nformation submitted pursuant to this subsection, including any subsequent updates . . . shall be and remain confidential, and may not be made public . . . without the written consent of the company," except for certain enumerated exceptions. 8 V.S.A. § 6002(c)(3).

¶ 4. The relevant statutory exception to the default rule of confidentiality provides:

> (A) such information may be discoverable by a party in a civil action or contested case to which the captive insurance company that submitted such information is a party, upon a showing by the party seeking to discover such information that:
>
> (i) the information sought is relevant to and necessary for the furtherance of such action or case;
>
> (ii) the information sought is unavailable from other nonconfidential sources; and
>
> (iii) a subpoena issued by a judicial or administrative officer of competent jurisdiction has been submitted to the Commissioner

[1] A captive insurance company is a company "that provides coverage for the group or business that established it." Captive Insurance, Black's Law Dictionary (12th ed. 2024). The "creation of a captive insurance company can bring tax, economic, and commercial benefits" and "can serve as a way to insure risks that are otherwise difficult to insure on the traditional insurance market." J. Plitt et al., 3 Couch on Ins. § 39:2 (Dec. 2024).

8 V.S.A. § 6002(c)(3)(A).[2] Per this provision, information within DFR's possession "may be discoverable"[3] if it is both "relevant to and necessary for" third-party litigation and "unavailable from other nonconfidential sources." Id.

¶ 5. As contemplated under the statute, Travelers served a civil subpoena for out-of-state discovery on DFR. Travelers sought documents Middlesex filed with DFR and documents related to DFR's supervision of Middlesex. DFR resisted production, and Travelers filed a motion in the civil division of the Vermont superior court to enforce the subpoena. DFR cross-moved to quash the subpoena. After a hearing, the trial court granted DFR's motion to quash and denied Traveler's motion to enforce the subpoena.

¶ 6. The trial court first found that Travelers failed to show that the requested documents were necessary to the furtherance of the New Jersey action because Travelers did not state clearly "what is being sought." Second, the court found that Travelers failed to show the records sought from DFR were unavailable from other nonconfidential sources. The court reasoned that discovery in the New Jersey action involving Travelers and Middlesex was ongoing, and thus information requested from DFR by Travelers could be obtained from Middlesex, a nonconfidential source with respect to Travelers. Accordingly, the court concluded that Travelers had failed to

[2] The Legislature repealed this statutory provision in 2024. See 2023, No. 110 (Adj. Sess.), § 8. All references to this statute in this opinion are to the prior version, operative at the time that Travelers issued its subpoena to DFR. The subsequent repeal of the statute at issue here does not change our analysis. See 1 V.S.A. § 214 (providing that "repeal of . . . statutory provision . . . shall not . . . affect the operation of the act or provision prior" to the repeal).

[3] Neither party raised any arguments related to the phrase "may be discoverable," though such statutory language appears to be permissive rather than mandatory. 8 V.S.A. § 6002(c)(3)(A) (emphasis added). See, e.g., State v. Boyajian, 2022 VT 13, ¶ 22, 216 Vt. 288, 278 A.3d 994 ("The plain, ordinary meaning of the word 'may' indicates that a statute is permissive and not mandatory." (alteration and quotation omitted)). Accordingly, we will not address that portion of the statutory language and instead proceed as briefed by the parties. See Rowe v. Brown, 157 Vt. 373, 379, 599 A.2d 333, 337 (1991) ("Issues not raised on appeal are deemed waived.").

demonstrate that it satisfied the exception contained within 8 V.S.A. § 6002(c)(3)(A) and the records sought were properly retained by DFR as confidential.

¶ 7. On appeal, Travelers contends that the trial court erred in finding that Travelers failed to show the requested documents were necessary to the New Jersey action. Travelers further argues that the court erred in finding that the requested information was available from other nonconfidential sources. We conclude that the trial court correctly determined the second issue, and therefore do not reach Travelers' arguments concerning necessity. 8 V.S.A. §§ 6002(c)(3)(A)(i), (ii) (requiring both requirements to be met for DFR to release records).

¶ 8. We review a trial court's decision to quash a subpoena for abuse of discretion. State v. Simoneau, 2003 VT 83, ¶ 21, 176 Vt. 15, 833 A.2d 1280. The trial court abuses its discretion if it either withholds its discretion or "exercise[s] it on clearly unreasonable or untenable grounds." Id. However, "[w]hether a trial court properly interprets a statute is a question of law which we review de novo." State v. Eldredge, 2006 VT 80, ¶ 7, 180 Vt. 278, 910 A.2d 816. In construing a statute, our primary goal is to carry out the legislative intent. State v. Blake, 2017 VT 68, ¶ 8, 205 Vt. 265, 174 A.3d 126. We first must look to the plain language of the statute; if the statutory language "is clear and unambiguous, we implement the statute according to that plain language." Burnett v. Home Improvement Co., 2024 VT 41, ¶ 9, __ Vt. __, 325 A.3d 33 (quotation omitted). "The words of a statute are not to be read in isolation, however, but rather in the context and structure of the statute as a whole." In re Vt. Verde Antique Int'l, Inc., 174 Vt. 208, 211-12, 811 A.2d 181, 184 (2002). A proper statutory interpretation must further the entire statutory scheme. Holmberg v. Brent, 161 Vt. 153, 155, 636 A.2d 333, 335 (1993).

¶ 9. As explained above, for DFR to release information about a Vermont captive insurer, the requesting party must show that "the information sought is unavailable from other

nonconfidential sources." See 8 V.S.A. § 6002(c)(3)(A)(ii). This requirement has two components: (1) the information must be "unavailable" (2) from any "other nonconfidential sources." Id.

¶ 10. We first consider the meaning of "other nonconfidential sources." To inform our interpretation of the phrase, we must put it in context. Holmberg, 161 Vt. at 155, 636 A.2d at 335. Section 6002(c)(3) provides that information submitted by a captive insurance company to DFR is generally confidential. Section 6002(c)(3)(A) creates an exception to the default rule of confidentiality to allow DFR to release information. Thus, in its context, "other nonconfidential source" means a source of information, other than DFR, that is not prohibited from disclosing the information by law, as DFR is bound by § 6002(c)(3).

¶ 11. This Court has previously used the term "nonconfidential" the same way. See Finberg v. Murnane, 159 Vt. 431, 435 n.1, 623 A.2d 979, 981 n.1 (1992). The issue in Finberg was whether a plaintiff was entitled to a list of names and addresses of taxpayers subject to a special gross receipts tax. The Court considered the Public Records Act and other statutes preventing the disclosure of tax returns. Id. at 433-35, 623 A.2d at 981. The Finberg court distinguished between "confidential" and "non-confidential" to explain how to interpret an exception within the Public Records Act. See id. at 436, 623 A.2d at 982 (explaining that list of taxpayers could have been generated from source other than tax returns and so "[t]o the extent the information came from a non-confidential source, it is subject to disclosure even if it also came from a confidential source"). Contrary to Travelers' assertions, the term "non-confidential source" in Finberg did not mean that the information had to be publicly available; it meant that the information came from a source that was not expressly prohibited from disclosure by statute. See id. at 435 n.1, 436, 623 A.2d at 981 n.1, 982. Indeed, if the information at issue in Finberg was

"available from another nonconfidential source" and that meant it was publicly available, the plaintiff would not have needed to sue under the Public Records Act to access it. Id. at 435 n.1, 623 A.2d at 981 n.1.

¶ 12. Having defined the phrase "nonconfidential source" as a source not prohibited by law from disclosing the sought-after information, we must next consider whether the trial court correctly concluded that Middlesex was such a source. Here, Travelers and Middlesex are involved in litigation in New Jersey state court. In New Jersey, as in Vermont, parties in civil litigation are required by court rule to respond to proper discovery requests from their opponents. See N.J. Ct. R. 4:18-1 (providing that a party served with a discovery request "shall serve" a response); V.R.C.P. 26; see also 27 C.J.S. Discovery § 2 (2024) ("[A]mong the basic objectives of the discovery process . . . is the goal of affording all parties a fair opportunity to obtain facts pertinent to pending litigation, and to discover the true facts and compel disclosure of these facts wherever they may be found."). Discovery rules mandate disclosure between parties of nonprivileged information that is relevant to a claim or defense and proportional to the needs of the case. N.J. Ct. R. 4:10-2(a), (g); V.R.C.P. 26(b)(1). Thus, discovery results in parties to litigation becoming "nonconfidential sources" with respect to each other for information that may not be generally available to the public.

¶ 13. Travelers argues that the discovery order in the New Jersey action, which restricts sharing documents received in discovery within the receiving party's organization, means Middlesex is not a "nonconfidential source." We are not persuaded. New Jersey courts must "issue appropriate protective orders to ensure that discovery of . . . confidential materials is not unnecessarily broad and that access to such materials is limited." Dixon v. Rutgers, 541 A.2d 1046, 1048 (N.J. 1988). The discovery order allows all parties who "are required to participate in

decisions" in the New Jersey action to review any disclosed material. Obligating the receiving party to prevent the sharing of disclosed information does not affect the nature of the relationship between the receiving and the sharing party. The New Jersey court's imposition of restrictions on the sharing of information within and outside of Travelers does not modify Middlesex's status as a nonconfidential source with respect to Travelers.

¶ 14. We next consider the requirement that information is "unavailable." The trial court found that Travelers had "not reasonably exhausted efforts" to obtain the documents sought in the New Jersey action and therefore failed to show unavailability. Travelers contends this was error because "[n]othing in the statute requires that all efforts to obtain discovery from other sources be exhausted." We disagree; the statute plainly requires that the information be "unavailable" before DFR may provide it. 8 V.S.A. § 6002(c)(3)(A)(ii).

¶ 15. The statute does not define "unavailable." When a statute does not define relevant terms, "we may look to dictionary definitions to determine the plain and ordinary meaning of the language." State v. Perrault, 2017 VT 67, ¶ 13, 205 Vt. 235, 173 A.3d 335. "Unavailable" means "[i]ncapable of being resorted to; legally invalid." Unavailable, Black's Law Dictionary (12th ed. 2024); see also Unavailable, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/unavailable [https://perma.cc/R77A-57LD] (defining unavailable as "not possible to get or use;" "unable or unwilling to do something"). For documents or information to be "unavailable" to a requesting party, they must not be possible to acquire. Thus, the trial court correctly interpreted the statute as requiring Travelers to exhaust its efforts to obtain discovery from other sources.

¶ 16. Travelers contends that this construction of the statute would "render it impossible to ever obtain documents under the statute." We disagree. For example, a Vermont captive insurer

involved in litigation might no longer be in possession of certain documents and could file an affidavit with the trial court attesting that it had no further documents to produce in response to legitimate discovery requests. In that situation, documents the insurer has attested that it does not have might be unavailable from a nonconfidential source and therefore potentially available from DFR.

¶ 17. The trial court found "[t]he record is clear that discovery in [the New Jersey action] is ongoing, and Travelers has not reasonably exhausted efforts to obtain what it seeks in that forum." Further, the court explained that there is a "Special [Discovery] Master in that case that can address Travelers' needs for discovery should Middlesex fail to produce needed documents without proper excuse."

¶ 18. Travelers argues that the trial court overlooked that Middlesex most likely failed to produce the requested documents because it does not possess them. This speculation is unsupported by the record. New Jersey courts "liberally construe" their discovery rules which allow a requesting party to "file a motion to compel discovery" after a "responding party declines to turn over requested documents." Brugaletta v. Garcia, 190 A.3d 419, 433 (N.J. 2018) (citing N.J. Ct. R. 4:23-5(c)). On the record before us, it does not appear that Travelers ever moved to compel production of the documents requested. The only evidence of "unavailability" offered was that Travelers did not think that Middlesex's responses to Travelers' requests for production and interrogatories were "complete." Without Travelers' use of any discovery remedies available in the New Jersey action, its bare assertions that Middlesex must not have the requested documents cannot support a finding of unavailability.

¶ 19. Given that discovery was ongoing in the New Jersey action and Travelers did not move to compel production by Middlesex, the trial court reasonably concluded that Travelers

failed to show the information was "unavailable." Accordingly, we conclude that the trial court did not abuse its discretion in quashing the subpoena. Simoneau, 2003 VT 83, ¶ 21.

Affirmed.

FOR THE COURT:

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Associate Justice