CIVIL PROCEDURE

Civil Procedure: Arbitration and Discovery

Tenet Healthcare Corp. v. Maharaj,
859 So. 2d 1209 (Fla. 4th Dist App. 2003)

Judicial review is not available for an arbitrator's order compelling the discovery of documents that a party claims are undiscoverable because of the attorney-client privilege.

FACTS

The first time the Fourth District Court of Appeal ruled on *Tenet Healthcare Corp. v. Maharaj*, the court held that an agreement between the parties required a settlement of all issues via arbitration. 787 So. 2d 241, 243 (Fla. 4th Dist. App. 2001). During that arbitration, the arbitrator ordered the defendants to produce a document. The defendants claimed, however, that the attorney-client privilege protected the document. When the arbitrator rejected their claim, the defendants sought judicial review of the arbitrator's order. The plaintiffs argued that the arbitrator's order was unreviewable and asked the Fourth District Court, in its second ruling, to enforce its original mandate that the entire dispute be settled through arbitration, rather than through judicial review. In response, the defendants argued that the arbitrator erred in compelling production of the allegedly privileged document. The Fourth District Court agreed with the plaintiffs and dismissed the defendant's appeal. The court held that judicial review is not available for an arbitrator's order compelling discovery.

ANALYSIS

The Florida Arbitration Code explicitly authorizes an arbitrator to compel production of documents. Fla. Stat. § 682.08(1) (2004). The Code allows some judicial review in arbitration cases. However, the Code restricts the review to specified final judgments, and is silent as to judicial review of discovery orders. The Fourth District Court interpreted this silence as a legislative decision to not allow such a review.

The court also explained that ordinary civil litigation does not afford a right to appeal discovery orders. These reviews are purely

discretionary and are subject to strict limitations. Reviews are granted only when the discovery "order departs from essential requirements of law . . . and leav[es] no adequate remedy on appeal." *Tenet Healthcare*, 859 So. 2d at 1211. While this sort of judicial intervention may be granted in civil cases for discovery orders involving privileged information, judicial intervention to review an arbitrator's discovery order would significantly disturb the intended efficiency of the arbitration process. Therefore, parties who choose arbitration as an alternative to judicial proceedings give up the right to interlocutory appeal.

SIGNIFICANCE

This case clarifies that a party has no ability to appeal an arbitrator's order compelling the production of documents. Therefore, when parties choose resolution through arbitration, rather than through the courts, they submit their cases to the arbitrator's unreviewable discovery orders.

RESEARCH REFERENCES

- Thomas H. Oehmke, *Treatment of Discovery,* 2 Commercial Arbitration § 89.4 (last updated Nov. 2004).
- Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution*, 47 Emory L.J. 1289 (1998).

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Civil Procedure: Motion for Trial De Novo

***Morgan v. Southeast Service Corp.*,**
861 So. 2d 1224 (Fla. 2d Dist. App. 2003)

When a party files a motion for a trial de novo following court-ordered, nonbinding arbitration, under Florida Statutes § 44.103(5), the court will review all issues relating to each cause of action disputed in the motion. A party may not restrict the proceeding to exclude specific issues within a disputed claim.

FACTS AND PROCEDURAL HISTORY

Mildred Morgan injured herself when she slipped and fell outside of a Bath & Body Works store located in a shopping mall. Morgan subsequently filed a claim against the shopping mall owner, Bath & Body Works, Inc., and Southeast Service Corp., the mall's janitorial-service provider. The trial court, acting under Florida Statutes § 44.103 (2002) and Florida Rule of Civil Procedure 1.800, ordered the parties to participate in nonbinding arbitration. The arbitrator determined the percentage of liability applicable to each of the defendants and the total amount of damages to be awarded to Morgan. Following arbitration, Southeast Service filed a motion requesting a limited trial de novo, under Florida Statues § 44.103(5), concerning only the issue of liability—not the issue of damages. Neither Morgan nor the remaining defendants filed motions for a trial de novo. When the trial court granted Southeast Service's motion, Morgan appealed to the Second District Court of Appeal, claiming that the trial court erred in allowing a trial de novo concerning only the issue of liability, rather than both liability and damages.

ANALYSIS

Following court-ordered, nonbinding arbitration, either party has the right to file a motion to proceed to a trial de novo in lieu of the arbitrator's holding. However, prior to *Morgan*, the Florida Second District Court of Appeal had not decided whether a party may request a trial de novo concerning only one issue of a single claim involving multiple issues. In *Morgan*, the court considered its decision in *Bacon Family Partners, LP v. Apollo Condominium Assn.*, 852 So. 2d 882 (Fla. 2d Dist. App. 2003). *Bacon Family Partners* involved a motion for a limited trial de novo in a case with multiple causes of action. The plaintiff filed a claim seeking damages and an injunction, while the defendant filed a counterclaim for damages. After court-ordered, nonbinding arbitration, the defendant filed a motion for a trial de novo concerning only two causes of action: the injunction and the counterclaim for damages. In its motion, the defendant did not seek review of the plaintiff's claim for damages. The Second District Court subsequently held that, when the case involves multiple claims, either party has the right to restrict its motion for a trial de novo to issues contained within one or more of the contested causes of action. Any issue that does not relate to a cause of action raised in

the motion cannot be tried de novo. Thus, the court remanded the case for trial on only the issues of the injuction and the counterclaim for damages, and it prohibited the trial court from considering the issue of the plaintiff's claim for damages.

In *Morgan*, however, the Second District Court distinguished *Bacon Family Partners* on the basis of the number of separate, discrete claims at issue in each case. Southern Service sought to limit the trial de novo to only the issue of liability, although the original claim also concerned the issue of damages. The court held that the trial court improperly granted Southern Service's motion to restrict the de novo proceeding to the issue of liability and bind Morgan to the arbitrator's award for damages. Under the *Bacon Family Partners* holding, if the issues of liability and damages had arisen under separate, discrete claims, Southern Service's motion may have been proper. However, because the case involved multiple issues under a single cause of action, the court remanded the case for trial on all issues between the two parties.

SIGNIFICANCE

The *Morgan* holding establishes a bright-line rule regarding post-arbitration requests for a trial de novo in cases involving a single claim with multiple issues. If a party wishes to request a trial de novo following court-ordered, nonbinding arbitration, that party must be prepared to dispute all of the issues relevant to the cause of action. Therefore, if a party is satisfied with an arbitration decision concerning one or more issues, but wishes to challenge another issue relating to the same claim, that party must also be willing to risk losing the favorable determination during the trial de novo. Importantly, *Morgan* does not overrule the *Bacon Family Partners* holding. A party to a case involving separate, discrete claims may still request a trial de novo that is limited to only one or more of the disputed causes of action decided during the nonbinding arbitration.

RESEARCH REFERENCES

- *Florida Civil Practice Guide*, vol. 1-20, § 20.30 (Matthew Bender 2004).
- 3A Fla. Jur. 2d *Arbitration and Award* § 155 (2002 & Supp. 2004).

J. Jervis Wise

Civil Procedure: Work-Product Privileges and Expert Witnesses

***In re McRae*,**
295 B.R. 676 (Bankr. N.D. Fla. 2003)

When an expert witness relies upon an attorney's interoffice memorandum, regardless of whether it contains attorney work product, the entire document is discoverable by the opposing party pursuant to Federal Rule of Civil Procedure 26(a)(2)(B).

FACTS AND PROCEDURAL HISTORY

The defendant hired Richard E. Blankenship as an expert witness. Before trial, the plaintiff served Blankenship with a subpoena, which demanded production of interoffice memoranda that the defendant's attorney had provided him in anticipation of his trial testimony. The defendant partially objected to the subpoena because it sought the production of privileged work product. The Bankruptcy Court for the Northern District of Florida overruled the defendant's objections to the plaintiff's subpoena, thus requiring production of the interoffice memoranda.

ANALYSIS

Federal Rule of Civil Procedure 26(a)(2)(B) requires disclosure of "the data or other information considered by the [expert] witness in forming [his or her] opinions." The *McRae* court addressed two issues: (1) whether this case was distinguishable from other cases that required the production of only those communications that were specifically directed toward the expert witness; and (2) whether Blankenship had to disclose only the parts of the interoffice memoranda that contained facts, not the attorney's legal theories. The court ruled in the negative as to both issues.

First, the court compared *McRae* with *TV-3, Inc. v. Royal Insurance Co. of America*, 193 F.R.D. 490 (S.D. Miss. 2000), and *Weil v. Long Island Savings Bank FSB*, 206 F.R.D. 38 (E.D.N.Y. 2001). In *TV-3* and *Weil*, the courts held that Rule 26 required disclosure of all communications between an attorney and an expert witness, regardless of whether they contained attorney work product. Those courts based their decisions upon the desire to en-

sure that expert testimony was as fair and reliable as possible by revealing the extent of the attorney's influence. Even though *TV-3* and *Weil* dealt with direct communications between an attorney and an expert witness, the *McRae* court noted that "the Advisory Committee Notes to the 1993 Amendment [to the Federal Rules of Civil Procedure] make no such distinction [in Rule 26] as to whom correspondence furnished to experts was previously directed towards." *McRae*, 295 B.R. at 678. The court also noted that the Advisory Committee Notes supported this blanket application by requiring an expert to "disclose the data and other information considered by the expert." *Id*. Therefore, the court found that Blankenship had to disclose the interoffice memoranda, even though it was not directed towards him.

Second, the court disagreed with the holdings in *Smith v. Transducer Technology, Inc.*, 197 F.R.D. 260 (D.V.I. 2000), and *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995). In *Smith* and *Haworth*, the courts required the disclosure of only the facts considered by the expert witness, not the attorney's legal theories. The *McRae* court stated that Rule 26(a)(2)(B) made no such distinction between treatment of facts and legal theories. Again, the court cited the Advisory Committee Notes, which state that, "given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure." *McRae*, 295 B.R. at 678. Therefore, the court found that Blankenship had to reveal the entire contents of the interoffice memoranda.

SIGNIFICANCE

Any data that is given to an expert witness is discoverable, regardless of whether it contains privileged work product. Accordingly, attorneys should be careful from the outset as to what information they provide to their expert witnesses. Attorneys should provide only the information that is relevant and necessary to the expert. They should be careful not to include superfluous information for which they do not want to waive the work-product privilege.

RESEARCH REFERENCES

- Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:33 (2d ed., West last updated Mar. 2004).
- Hon. Barry Russell, *Bankruptcy Evidence Manual* § 501.13 (West 2005).

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