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PARTY CANNOT PROTECT A "TESTIFYING" EXPERT WITNESS FROM DISCOVERY BY RE-DESIGNATING HIM A "CONSULTING" WITNESS AFTER HIS OPINIONS HAVE BEEN DISCLOSED

Para v. Anderson

(Ct. Appeals, Division One, November 1, 2012)

Plaintiff sued Dr.'s Para and Khoury for negligence and wrongful death. Plaintiff disclosed Dr. Pantilat as a testifying expert, and he opined in a preliminary

affidavit that Dr. Khoury was negligent. Dr. Khoury later settled out. Dr. Para then named Dr. Khoury a non-party at fault and notified plaintiff of his intention to use Plaintiff's previous disclosure of Dr. Pantilat's opinions against Dr. Khoury. Plaintiff sought to avoid this by re-designating Dr. Pantilat as a consulting expert only, and moved for a protective order. The court granted Plaintiff's motion.

The court of appeals reversed. A party retaining an expert has the choice whether to allow the expert's information and opinions to be subjected to discovery. Re-designation is effective to institute those discovery protections only before expert opinion evidence is disclosed. An expert witness whose opinions have been disclosed cannot be shielded from discovery by subsequently re-designating him a non-testifying expert.

FEDERAL MALICIOUS PROSECUTION CASE MUST BE BASED ON FOURTH AMENDMENT, NOT SUBSTANTIVE DUE PROCESS

Yanes v. Maricopa County

(Ct. Appeals, Division One, November 8, 2012)

While Plaintiff Yanes was being processed into jail for allegedly molesting and murdering his 11-month-old son, one of the Detention officers allegedly assaulted him and then falsely reported that Yanes was the aggressor. Yanes was charged with aggravated assault but was not prosecuted while his murder charge was pending. Yanes was ultimately acquitted of the murder. The aggravated assault charge was eventually dismissed.

Yanes brought a federal malicious prosecution claim, among other things, alleging that he was charged for aggravated assault without probable cause, and that this violated his substantive due process rights. He did not make a Fourth Amendment claim. The Arizona Court of Appeals, relying on *Albright v. Oliver*, 510 U.S. 266 (1994), held that a claim of prosecution without probable cause had to be brought under the Fourth Amendment, not the Fourteenth Amendment. While the filing of baseless charges could be based on substantive due process in other contexts, the facts of this case did not give rise to such a claim. Because Plaintiff's federal claim was reversed, the court also reversed the jury's award of punitive damages and attorneys' fees which had been awarded under § 1983. In a separate unpublished opinion, the court also reversed the jury's verdict for intentional infliction of emotional distress and abuse of process, but affirmed that part of the judgment based upon state malicious prosecution.

remaining money in escrow. SVP sued in Maricopa County Superior Court, and the Robson Entities sought to compel arbitration. SVP made three arguments as to why the arbitration clause should not be enforced: (1) the partnership agreement's arbitration clause did not apply to disputes arising from the construction contract; (2) suits grounded in common law and remedies grounded in statutes were issues for a court, not arbitration; and (3) Robson, a non-signatory to the contract, could not enforce the arbitration clause.

The court of appeals held the arbitration clause enforceable. The arbitration clause in the partnership agreement could apply to the construction contract as long as its language was sufficiently broad to encompass claims related to a separate agreement. If the language is sufficiently broad, courts consider four factors: (1) whether the agreements incorporate or reference each other; (2) whether the agreements are dependent on each other or relate to the same subject matter; (3) whether the arbitration clause specifically excludes certain claims; and (4) whether the agreements are executed closely in time and by the same parties. Here, the language "arising under or related to" in the partnership agreement's arbitration clause was very broad, and could encompass claims stemming from the construction contract. Further, because the sole purpose of the partnership agreement was the construction of the Apartments, and the construction contract was executed on the same day as the partnership agreement, the arbitration clause applied to both agreements.

Second, claims arising from common law or created by statute (i.e., based on legal rights and remedies not found in the contract) can be arbitrated if resolving those claims would require some reference to the contract. Arizona law confers broad power on arbitrators, authorizing them to order remedies typically reserved to courts, as long as those orders relate to the underlying contract.

**NON-SIGNATORY CAN COMPEL
ARBITRATION AGAINST SIGNATORY
BASED ON CLAUSE IN ONE OF TWO
RELATED CONTRACTS**

Sun Valley Ranch v. Robson, et. al
(Ct. Appeals, Division One, November 20, 2012)

In February of 2000, the parties signed a partnership agreement establishing the Sun Valley Ranch Limited Partnership ("SVP"), naming five partners, including several entities controlled by Steve Robson. That agreement contained an arbitration clause requiring the parties to arbitrate "any" dispute "arising under or related to" the partnership agreement. The partnership then entered into a construction contract formed for the purpose of constructing the Apartment Complex. The construction contract did not contain an arbitration clause. Upon completion and sale of the apartments, a dispute arose between SVP and the Robson entities over the

Finally, even though Robson was not actually a signatory to the partnership agreement, he could enforce the contract's arbitration clause. A non-signatory may demand arbitration to the same extent as a signatory, as long as the claims the signatory make refer to or presume the existence of the written agreement. SVP's claims against Robson in his individual capacity were subject to arbitration because they were directly related to the written agreement.

ABOUT THE EDITOR



Ms. Eileen Dennis GilBride heads up Jones, Skelton & Hochuli's appellate department and concentrates her practice on federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage.

Substantive areas of her appeals have included constitutional, contracts, torts, insurance coverage and defense, employment, municipal and school defense, civil rights, prisoner cases, professional malpractice, Indian law, legislative, administrative, personal injury, wrongful death, divorce, child custody and support, property rights and trusts.

Eileen has spoken at many seminars, is a former Judge Pro Tempore, is a past Chair of the State Bar Appellate Practice Section, a past Chair of the Arizona Supreme Court Committee on Examinations and is recognized as one of The Best Lawyers in America® in the area of appellate law.

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