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Summary of Club Vista Financial Servs. v. Dist. Ct., 128 Nev. Adv. Op. No. 21

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Club Vista Financial Servs. v. Dist. Ct., 128 Nev. Adv. Op. No. 21 (May 17, 2012)[1]

CIVIL PROCEDURE – DEPOSITION OF OPPOSING PARTY'S FORMER ATTORNEY

Summary

The Court considered what circumstances are necessary to allow for the deposition of an opposing party's former attorney during discovery. The Court balanced the competing interests of discovering vital information to a litigant's case and the importance of the attorney-client privilege.

Disposition/Outcome

The Court adopted the framework espoused by the Eighth Circuit Court of Appeals in *Shelton v. American Motors Corp*.[2] Under the Shelton analysis, the party seeking to depose opposing counsel must demonstrate that information sought cannot be obtained by other means, is relevant and nonprivileged, and is crucial to the preparation of the case.[3] The district court did not apply the Shelton factors and the Court remanded the case back to the district court to conduct an analysis based on those factors.

Factual and Procedural History

Petitioners Club Vista Financial Services, Gary Tharaldson, and Tharaldson Motels II, Inc., entered into a real estate development project with respondents Scott Financial, Bradley J. Scott, Bank of Oklahoma, Gemstone Development West, Inc., and Asphalt Products Corporation. Respondents were lenders on a multimillion dollar loan guaranteed by petitioners. When the loan went into default petitioners filed suit against respondents, alleging that respondents had failed to ensure that certain pre-funding conditions were satisfied before they advanced money on the loan. In their initial disclosures under NRCP 16.1, petitioners identified their attorney, K. Layne Morrill, as a person who may have discoverable information.

Tharaldson and two of his employees denied having personal knowledge of factual allegations underlying the complaint. Tharaldson did, however, indicate that his attorneys might have such information. Respondents informed Morrill that they intended to take his deposition regarding the factual basis for the allegations in the complaint. Respondents obtained a deposition subpoena in Arizona for Morrill, which Morrill filed a motion to quash or for a protective order preventing respondents from taking his deposition. In the meantime, petitioners filed a supplementary disclosure under NRCP 16.1, stating that it did not believe that Morrill had any discoverable information relevant to the suit. Shortly thereafter, the Arizona court granted the motion filed by Morrill.

Morrill filed a motion in the Nevada district court for a protective order to preclude respondents from taking his deposition. The discovery master recommended that the district court deny the motion. On review, the district court upheld the discovery master's recommendations, noting that attorneys would be able to object to questions they believed to be

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[2] 805 F.2d 1323 (8th Cir. 1986).

[3] *Id*. at 1327.

privileged. The Court also concluded that dismissing the motion was appropriate because respondents only intended to ask questions about factual issues. After a petition for writ of mandamus was filed, other counsel was substituted for Morrill, no longer making him the attorney of record for petitioners.

Discussion

Justice Cherry wrote for the unanimous Court. First, the Court examined the requirements for granting a writ of relief. The Court can grant a writ of prohibition when the district court proceedings are in excess of its jurisdiction.[4] Further, writ relief is generally not available if the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law."[5] The Court has discretion to grant writ relief.[6] Petitioners bear the burden to demonstrate that relief is warranted.[7] Additionally, the Court stated that discovery matters are within the discretion of the district court and that it would not disturb such a ruling unless the court had abused its discretion.[8] The Court determined that granting the writ of prohibition was appropriate because a later appeal would not cure any improper disclosure of information. Therefore, the petitioners did not have a plain, speedy, and adequate remedy at law.

Next, the Court examined when it is appropriate to allow for the deposition of an opposing party's former attorney. The Court noted the different policies on either side of the issue. They pointed out that requiring attorneys to participate in depositions may increase the time and costs of litigation, create delays in the attorney's work, distract the attorney from representation of the client, and discourage clients from openly communicating with their attorneys. The Court said, further, that courts across the country "have disfavored the practice of taking the deposition of a party's attorney."[9] However, the Court added that opposing counsel should not have absolute immunity from being deposed, but that such depositions should only be permitted under exceptionally limited circumstances.

To help determine when such depositions are appropriate, the Court turned to the Eighth Circuit Court of Appeals. The Court of appeals outlined a three factor test. Under that test, in order to take the deposition of an opposing party's counsel the party seeking the deposition has the burden of proving that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case."[10] The Court further noted that the district court should consider whether the attorney is a percipient witness to the facts giving rise to the case.[11] Finally, the Court added that when the facts allow for a party to depose opposing counsel, the district court should provide specific limiting instructions in order to protect against improper disclosure.

Conclusion

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[4] NEV. REV. STAT. § 34.320 (2007).
[5] NEV. REV. STAT. § 34.330 (2007).
[6] Smith v. Dist. Ct., 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).
[7] Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).
[8] Matter of Adoption of Minor Child, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002).
[9] Theriot v. Parish of Jefferson, 185 F.3d 477, 491 (5th Cir. 1999).
[10] Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).
[11] Kerr v. Able Sanitary, 684 A.2d 961, 967 (N.J. Super. Ct. App. Div. 1996).

Because the discovery master and district court failed to conduct their analysis based on the *Shelton* factors, the Court granted the writ in part and directed the district court to reconsider the motion in light of those factors. The Court denied the petition to the extent that it sought an order compelling the district court to issue a protective order. Instead, the Court left the decision to the discretion of the district court after conducting an analysis based on the *Shelton* factors.