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OCT 05 2022

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SUPREME COURT U.S.

ORIGINAL

22-553

In the Supreme Court of the United States

Osyve Derek Rodgers,

Petitioner,

V.

United Services Automobile Association,

Also known as USAA,

Respondent.

From the Fifth Circuit Court of Appeals

Cause Number 21-50606

Judgment July 8, 2022

Western District Court of Texas, San Antonio

Division

Cause No. 5:19-CV-620, Honorable David Alan Ezra

Judgment June 23, 2021

Petition for Review by way of Writ of Certiorari

A CIVIL PROCEEDING

Respectfully Submitted:

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I. QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Should Arbitrators deciding a Federal case have the duty and right to impose sanctions for violations of Federal Rules of Civil Procedure Rule 37, or any other Rule?

QUESTION 2: Should Arbitrators, District Courts, and Appellate Courts have the duty and right to file suit against a person discovered to be in violation of Rule 37, or any other rule?

QUESTION 3: Should Witness Coaching be considered a Federal Tort Offense?

QUESTION 4: Should Spoliation of Evidence be considered a Federal Tort Offense?

II. PARTIES TO THE PROCEEDINGS

(1) No. 21-50606, Derek Rodgers v. United Services Automobile Association ("USAA"), USDC No. 5:19-CV-620

(2) The undersigned certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this court may evaluate possible disqualification or recusal. The following constitutes a list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

| | |
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Osyve Derek Rodgers petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

V. OPINIONS BELOW

Pursuant to 5th Circuit Rule 47.5, the court of appeals determined that the opinion (App. A) should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4. The district court's post-arbitration order granting judgment as a matter of law in favor of respondent (App. B) is unreported.

VI. JURISDICTIONAL STATEMENTS

A. District Court's Jurisdiction

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, which granted the district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States." Petitioner's original suit against Respondent was based upon Section 105 and section 825.220 of the Family Medical Leave Act of 1993 ("FMLA"). The District Court denied Petitioner's Motion to Vacate Arbitration Award, granted Respondent's Motion to Confirm Arbitration Award, and dismissed the case with prejudice. Petitioner filed a timely notice of appeal.

United States law required the court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators, or either of them; where the arbitrators were guilty of misconduct, or in refusing to hear evidence pertinent and material to the controversy; or

of any other misbehavior by which the rights of any party have been prejudiced; or where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

The United States district court for the district wherein an award was made that was issued pursuant to United States Code Section 580 of Title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in Section 572 of Title 5.

In the matter pro se Petitioner was a United States citizen and resident of San Antonio, Texas. Petitioner was entitled to relief sustained as a result of the connivance of Respondent including: Petitioner, Osyve Derek Rodgers, respectfully requested the Court to issue an Order vacating the Arbitration Award; issue an Order for a new Arbitration with a new Arbitrator; or issue a Scheduling Order to proceed with the Original Complaint filed with the United States District Court June 6, 2019; and order any such other and further relief to which the Petitioner was entitled.

B. Court of Appeals Jurisdiction

The United States Court of Appeals Fifth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. § 2107. 9.

C. The Supreme Court of the United States has jurisdiction over this appeal of national importance and the validation of federal law pursuant to Supreme Court Part III, Rule 10, Considerations Governing Review on Certiorari Review subject to the Court's judicial discretion. Petitioner prays the following, neither controlling nor fully measuring the Court's discretion, indicate the compelling character of the reasons the Court considers: The United States Court of Appeals Fifth Circuit entered a decision has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

C. Timeliness of Appeal

The district court judgment was executed on June 23, 2021 and entered on June 24, 2021. Plaintiff filed a Notice of Appeal with The United States Court of Appeals Fifth Circuit on July 15, 2021 after the Judgment was entered pursuant to Federal Rules of Appellate Procedure 4(a)(4)(B)(i). The Fifth Circuit Court of Appeals Judgment was then rendered on July 8, 2022, where this Writ of Certiorari request for Review has been submitted within 90 days and on or before October 5, 2022 pursuant to Supreme Court Rule 13.

D. Final Judgment

The review pertains to a full settlement of all claims and counterclaims submitted to arbitration and confirmed by the district court.

VII. CONSTITUTIONAL PROVISIONS

Article 4, Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment V (Rights of Persons)

No person shall...be deprived of life, liberty, or property, without due process of law...without just compensation.

VIII. STATEMENT OF THE CASE

Indigence and the complexity of this case insist I ("Petitioner") am pro se, continuously increasing my awareness of an environment licensed attorneys in Texas (and with this Writ the nation) are already well accustomed to. Each of the Respondent's Counsel is licensed to serve under the Texas Supreme Court and has years, if not decades of education and experience practicing law. Though said attorney's occupation and background is such, Petitioner has been limited to self-education at the end of each work day and throughout weekends into the early morning hours. The experience has been one of the most intimidating and extraordinary Petitioner has endured and began with the untimely passing of his mother, following him being denied leave from work to attend a critical doctor's appointment with her while employed by the Respondent, the circumstances at the center of the concern.

Over the course of the past five years, Petitioner has been exposed to readings regarding attorneys who have chosen not to abide by the very

laws of their own profession. Here is not to imply that all or even a significant number of attorneys are less than great examples of their craft, but to recognize that the few who choose not to follow the letter of the law need to be constantly reminded the consequence is obstructed justice.

At times case law illustrates licensed attorneys abusing their power, side-stepping the courts' process and, in doing so, justice itself by interfering with the integrity of discovery. This case is an example of such behavior. Challenging is the concept that a lay person could have more integrity, respect, and intent for the judicial system than an attorney licensed by the Supreme Court of any state. Here, with dozens of legal actions and extensive resources dedicated to the cause, we are years from the alleged FMLA violations and the original purpose of this suit, having yet begun to address how best to enforce the FMLA act of 1993 at the heart of the case. Instead, the impact Respondent's Counsel's violations of law have had on due process and whether the case itself will earn the ability to trump the unprincipled acts of one defense attorney who was more than aware he was violating his sworn duty under oath.

This Writ of Certiorari review is offered to the United States Supreme Court not only as a plea for the original case heard in district court, but to call specific attention to the adverse impact any person, in this case an attorney licensed by the Texas Supreme Court, being allowed to both coach his witness and spoil associated evidence during a sworn deposition examination, has on due process.

In this case, an attorney employed to defend the Respondent intentionally, clearly and admittedly interrupted an evidentiary hearing by texting his client while she was being questioned during the

evidentiary deposition. Then, in an effort to hide the reason for the corruption, Respondent's Counsel admitted to instructing that same witness to delete proof of his conversations with her during the deposition as he had already done.

The arbitrator, a former judge, though without the ability to rule on the corruption itself, then chose to continue with the proceedings and did not acknowledge, report, or escalate that a Federal Rule had been blatantly and intentionally violated. The arbitrator was not given the right to sanction, according to the Respondent's forced arbitration clause. The arbitrator later ruled in favor of the Respondent having not acknowledged that the very evidence that would prove prima facie had been systematically withheld by Respondent up to and including the witness coaching incident...evidence that would significantly influence the arbitrator's decision and ruling.

Beyond arbitration, district, and appellate court decisions a complaint was filed with the Texas State Bar Office of the Chief Disciplinary Counsel, regarding the Respondent's Counsel's witness coaching and spoliation (See Appendix State Bar of Texas Complainant Explication Letter). The Texas State Bar initially refused the complaint stating the Respondent's Counsel's actions were "not a violation of the disciplinary rules" and the "grievance has been classified as an Inquiry and dismissed". Shortly thereafter on appeal, the Texas Supreme Court's Board of Disciplinary Appeals announced that "after reviewing the grievance as filed with the State Bar Chief Disciplinary Counsel's office and no other information, the Board [of Disciplinary Appeals] grants the appeal, finding that the grievance alleges a possible violation of the following Texas Disciplinary

Rules of Professional Conduct: Rules(s) 3.04 (a); 3.04 (d)" and returned the case to the Texas State Bar Office of the Chief Disciplinary Counsel for investigation.

Now accepting the investigation according to the instruction from the Texas Supreme Court's Board of Disciplinary Appeals, the Texas State Bar's Chief Disciplinary Counsel solicited input from the Complainant as well as Respondent's Counsel through his attorney and held a hearing on the matter. After the hearing, the majority being closed to the public as well as the Complainant, the Texas State Bar's Chief Disciplinary Counsel issued a decision announcing the, "District Grievance Committee found that there was not enough evidence to continue the investigation. Accordingly, the Chief Disciplinary Counsel's office has closed this investigation" and "dismissed the grievance and will take no further action." Indeed, the Respondent's Counsel deleting the text he had sent during the deposition (and spoliage instruction to the witness to do the same) were effective defense strategies.

Important to note is commentary from the Texas State Bar's Assistant Disciplinary Counsel overseeing the case following the ruling: "he [Respondent's Counsel] did something wrong, and it was stupid. And the panel...decided...it didn't affect the arbitration..." and "it doesn't have a collateral estoppel or some type of res judicata effect on the grievance. But it is a factor that the panel looked at".

Ironically, a few months prior Respondents' Counsel had submitted a motion to the appellate court arguing the Texas State Bar witness coaching complaint was "a proceeding that is of no moment to the instant matter" and that we "cannot tie those

purported ethical violations to the ultimate dismissal” of the case. Respondent's Counsel, on Respondent's behalf, declared the witness coaching concern is independent of rulings associated with the case itself.

Ultimately the Texas State Bar's Chief Disciplinary Counsel inferred that since Respondent's Counsel's witness coaching and spoliation did not impact the ruling in the case the behavior was not improper stating, “...they made it clear to him that he should not have texted. The issue does not appear to have affected the deposition or the arbitration or anything of that nature.”

IX. STATEMENT OF THE ISSUES

On September 16, 2020, Respondent's Counsel, an attorney practicing law in Texas for nearly three decades, made a surprisingly deliberate decision to initiate then carry on a text conversation with his client's witness while she was on record, under oath and being deposed by Petitioner's attorney. The deposition was being conducted through Zoom, a cloud-based video communications application that allows virtual video and audio conferencing, webinars, live chats, screen-sharing, and other collaborative capabilities. This electronic discovery process was the communication platform of choice for remote hearings and depositions. And unfortunately, this new environment has enabled a new form of connivance and resulted in a dimension of litigation directly related to a new form of spoliation. In 2007, the Federal Rules of Civil Procedure were amended in an attempt to address the problematic issues associated with e-discovery.

With this review, petitioner prays the Supreme Court of the United States will compel arbitrators, district courts, circuit courts, et al to ensure the

People's precious resources are focused on deliberating on the facts, not beyond a preponderance of the full extent of evidence unaltered by corruption.

Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document" and "the spoliation doctrine is invoked when a party alleges that its opposing party has caused a crucial piece of evidence to be unavailable" (See Federal Rule of Civil Procedure 37(e); Spoiling the Spoliation Doctrine; Hofstra Law Review, Vol 38, Issue 2, Art 11; Wright, Nicole D., 2009). With this, if an opposing party is responsible for the destruction of relevant evidence during a court hearing, it is within the trial court's discretion to impose sanctions on that party. This is not the standard with arbitration.

Spoliation of evidence occurs when someone with an obligation to preserve evidence with regard to a legal claim neglects to do so or intentionally fails to do so. Such a failure to preserve evidence can take place by destruction of the evidence, damage to the evidence, or losing the evidence. When spoliation occurs, the party responsible may be held accountable in court through a variety of different sanctions. Those sanctions vary greatly from state to state. In 1984, California was the first state to recognize the tort of spoliation" (See *Smith v. Superior Ct.*, 151 Cal. App.3d 491, 198, Cal. Rptr. 829, 831 (Cal. 1984). However, the majority of jurisdictions that have subsequently examined the issue have declined to create or recognize such a tort. Of the fifty states only ten, Alabama, Alaska, Florida, Indiana, Kansas, Louisiana, Montana, New Mexico, Ohio, and West Virginia have explicitly recognized some form of an independent tort action for spoliation. California later overruled its own precedent and decided to decline to

recognize first-party or third-party claims for spoliation. (Work Product of Matthiesen, Wickert & Lehrer, S.C., LAST UPDATED 1/7/2022).

Federal Rules of Civil Procedure 37(b)(2) explicitly authorize courts to impose sanctions on a party for failure to comply with a discovery order. This provision gives courts the authority to sanction parties that destroy documents in direct violation of a discovery order, though not arbitrators. The inherent authority of courts is also recognized as an additional source of power for courts to impose sanctions (See Civil Procedure - Federal District Courts Have Inherent Power to Sanction Attorneys for Abuse of the Judicial Process, Villanova University, Charles Widger School of Law, Vol 31, Issue 3, Art 9; Dessin, Carolyn L.; 1986). This enables courts to impose sanctions on parties who destroy evidence in contexts other than in direct violation of a discovery order (See Federal Rule of Civil Procedure 37(e): Spoliation the Spoliation Doctrine; Hofstra Law Review, Vol 38, Issue 2, Art 11; Wright, Nicole D., 2009). The inherent power of the courts to sanction is only limited by the requirement that sanctions be imposed when a party acts in bad faith, in order to allow the courts to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (See *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962)). Arbitrators do not have this inherent power.

As in *Trigon Ins. Co. v. United States*, even the government's failure to preserve certain documents relating to communication between experts and consultants materially prejudiced the plaintiff's ability to cross-examine witnesses. And noting that the spirit of the spoliation inference is captured in "the maxim omnia presumunter contra spoliatores, which means, 'all things are presumed against a

despoiler or wrongdoer" (See *Apple Inc. v. Samsung Electronics Co., Ltd.*, 2012). Even further; although a finding of bad faith on the part of the destructing party is not necessary, "it is definitely the primary factor to consider in weighing the appropriateness of the instruction." (See *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 U.S. Dist. LEXIS 24068, at *22 (E.D. Ark. Aug. 29, 1997), where the general proposition that an adverse inference instruction is appropriate where evidence was destructed intentionally, indicating fraud or a desire to hide the truth" (See e.g., *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1111-12 (8th Cir. 1988). Sanctions must be imposed in such a way to serve the "prophylactic, punitive, and remedial rationales underlying the spoliation doctrine" (See *BMG Rights Mgmt. LLC v. Cox Comms., Inc.*, 2016 WL 4224964, at *19 (E.D. Va. Aug. 8, 2016) & *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). Further, a sanction should "serve the function of restoration of the prejudiced party to the position it would have been in had the spoliation not occurred" (*Skeete v. McKinsey & Co.*, No. 91 Civ. 8093, 1993 U.S. Dist. LEXIS 9099, at *15 (S.D.N.Y. July 7, 1993), though arbitrators do not have the inherent power to sanction.

On a grand scale, "Florida courts have recognized the fact that lawyers are ethically prohibited from coaching witnesses..." (See *The Florida Bar v. James*, No. SC20-128 (November 18, 2021). In the Florida Supreme Court's *Bar v. James*, the Florida Bar itself filed a complaint against James, alleging that he engaged in misconduct by coaching a witness via text during a deposition. The employee receiving text from the offending counsel in that case was not sworn in, though the Respondent's witness

who received the text from Respondent's Counsel was sworn in and on the record. The Florida Bar's complaint was referred to a referee, who recommended offending counsel be found guilty of violating Florida State Bar Rules: 3-4.3 (Misconduct and Minor Misconduct) and 4-3.4(a) ("A lawyer must not ... unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document...."). The Florida Supreme Court later "determined that dishonesty in connection with the practice of law is prejudicial to the administration of justice" (*See Fla. Bar v. Feinberg*, 760 So. 2d 933, 938 (Fla. 2000), and that "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.", clarifying that the attorney who had text his client during her deposition had "engaged in conduct aimed at defeating the opposing party's lawful attempts to obtain evidence, undermining the adversarial process, and as a result, the trial court's intervention was required" (*See Florida Bar v. James*, 329 So. 3d 108 - Fla: Supreme Court 2021).

In 2011, The Federal Judicial Center issued a publication containing a study of motions for sanctions based on an allegation that the nonmoving party had destroyed evidence, especially electronically stored information (ESI). This destruction, or spoliation, has been defined as the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation" (11 West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999).

The spoliation doctrine is invoked when a party alleges that its opposing party has caused a crucial

piece of evidence to be unavailable (See E.g., *Moghari v. Anthony Abraham Chevrolet Co.*, 699 So. 2d 278, 279 (Fla. Dist. Ct. App. 1997)).

Though written some time before more modern remote video deposition platforms such as Zoom, and as the then-Chair of the Rules Committee noted at the time of Rule 37(e)'s adoption, "if it works [as to electronically stored information], we can think seriously about extending it to other forms of information" (Mins., Rules Comm. Mtg., April 10-11, 2014, at lines 1278-1280). Respondent's Counsel texted his witness during her sworn testimony and instructed Respondent's witness to delete the texts they exchanged during respondent's deposition, after deleting the same text conversation from his phone immediately following being discovered by Petitioner's counsel. Surprisingly, Respondent's Counsel and Respondent's witness' intentional failure to preserve electronically stored information was not recognized to be impactful to the evidentiary hearing, nor the arbitrator's (a former Texas state district judge and current Ethics Commission Chair), nor the district court's, nor the appellate court's ruling. Each either did not reference the witness coaching and spoliation or ruled the behavior was not impactful. However, the Texas State Bar Office of Chief Disciplinary Counsel refused to discipline Respondent's Counsel either due to the lack of evidence (Respondent's Counsel has intentionally destroyed) or because the coaching and spoliation "does not appear to have affected the deposition or the arbitration". This represents a conflict petitioner prays the Supreme Court of the United States can consider for Federal alignment.

According to USAA's Qualifications of the Arbitrator, "No person shall serve as an arbitrator unless s/he is a licensed attorney with employment

law experience.” And a “lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority”, according to the Texas Disciplinary Rules of Professional Conduct (See State Bar of Texas, Texas Disciplinary Rules of Professional Conduct (Including Amendments Effective July 1, 2021 and September 1, 2021). The arbitrator, a licensed attorney, should have followed the Texas Disciplinary Rules of Professional Misconduct (Rule 8.03(a) Reporting Professional Misconduct) and informed “the appropriate disciplinary authority” regarding the misconduct of Respondent’s Counsel.

The American Arbitration Association/ADR.org states, “Informed arbitrators should not shy away from their authority, if it exists in the case, to issue sanctions against a party who is not complying with the arbitrator’s orders or who is flagrantly participating in bad faith. Arbitration is intended to be a cost effective and efficient process, and when a party to an arbitration abuses the process, that abuse should not be tolerated by the Arbitrators.” (See Tracey Frisch, American Arbitration Association/ADR.org, Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide a Cost Effective and Expedition process & USC 9). Here, however, note Federal Rule of Civil Procedure 37 (discovery sanctions), where “an arbitrator would not have the authority to directly sanction attorneys for misconduct during arbitration because the attorneys are not parties to the arbitration agreement. The arbitrators’ authority is over the parties, not the attorneys” and since the

arbitrator did not have the ability to impose sanctions and chose not to inform "the appropriate disciplinary authority" regarding the misconduct of Respondent's Counsel according to the Texas Disciplinary Rules of Professional Conduct Rule 8.03(a), her duty as a licensed attorney, the arbitrator intentionally and coincidentally allowed for the corruption. The United States Western District Court of Texas had jurisdiction over the witness coaching, spoliation, and the influence each had during the production of evidence in the form of the deposition as well as the impact both had on the arbitrator's decision.

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use in pending or reasonably foreseeable litigation" (See *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009). And according to merriam-webster, the legal definition of spoliation is "the destruction, alteration, or mutilation of evidence especially by a party for whom the evidence is damaging" where the offense is now so common the American Bar Association published a 2018 article entitled, "Spoliation of Evidence: The Surest Road to Sanctions: Simple steps to avoid a claim of spoliation" (See Plant, Mathew C., American Bar Association, Spoliation of Evidence: The Surest Road to Sanctions/Simple steps to avoid a claim of spoliation, 2018).

Spoliation of evidence is an act prohibited by American Bar Association's Model Rules of Professional Conduct, Rule 37 of Federal Rules of Civil Procedure, and Title 18 United States Code. Sanctions for spoliation are preventative, punitive and remedial in nature. Separate tort actions are permitted, though Arbitrators do not have this inherent power. American Bar Association Rule 3.4

prohibits a lawyer from destroying or assisting another in destroying evidence pertaining to a case. Likewise Title 18 of United States Code prohibits a party from destroying or assisting another in destroying evidence, and provides for criminal prosecution against the wrongdoer. And Under Federal Rules of Civil Procedure Rule 37 possible sanctions are as follows: dismissal of the wrongdoer's claim; entering judgment against the wrongdoer; excluding expert testimony; and application of adverse inference rule. Additionally, Rule 37 imposes fines on the wrongdoer. Arbitrators do not have this inherent power.

This strongly suggests "a new evidence rule would provide uniform treatment of spoliation and would be a better answer to the problem than a separate tort action." (See *Spoliation of Evidence: Let's Have a Rule in Response*; Flanary, DH Jr; 60 Def. Counsel J. 553 (1993).

The Illinois Bar Journal defined Spoliation as "the destruction, significant alteration, or non-preservation of evidence that is relevant to pending or future litigation". Even then, though the "Illinois Supreme Court declined to recognize the tort of intentional spoliation, the court did decide that a claim for negligent spoliation could be stated under existing negligence law" (See *Journal Illinois Bar Journal* Volume: 85 Issue: 11 Dated: (November 1997) Pages: 530-535,541; Author(s) D A Bell; M M Koesel; T L Turnbull, 1997).

The South Carolina Supreme Court has stated that judges must use their authority to prevent abusive deposition tactics (See *In Re Anonymous Member of the South Carolina Bar*, 552 S.E.2d 10, 18 (S.C. 2001).

The American Bar Association Lawyer's Creed of Professionalism of the ABA Tort Trial and Insurance Practice Section. Section (B)(8), provides that "[i]n depositions . . . I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect." (See ABA Guidelines for Litigation Conduct (1998), Lawyers' Duties to Other Counsel, Sections 20-22; The Texas Lawyer's Creed, Section III, No. 17), "I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable."

In document discovery prior to the deposition of the same witness, Respondent's Counsel objected to Petitioner's request for discovery no less than 132 (one hundred and thirty two) instances, leading Petitioner to conclude the line of questioning being administered by the Petitioner's Arbitration counsel and interrupted by Respondent's Counsel would have discovered evidence critical to the case. Respondent counsel's actions were witnessed by those on the Zoom conference call, heard by all, captured on record by Davidson Reporting, and later acknowledged by the arbitrator (who was not on the call at the time of the witness coaching), though the arbitrator did not have the authority to sanction for the violation.

The United States District Court for the Southern District of Florida confirmed "if arbitrators are not permitted to impose the ultimate sanction of dismissal on [litigants] who flagrantly disregard rules and procedures put in place to control discovery, arbitrators will not be able to assert the power necessary to properly adjudicate claims" (See First Preservation Capital, Inc., 939 F. Supp. at 1566-67).

The arbitrator, in this instance, did not have the ability to impose sanctions. According to the Respondent's own arbitration rules, Dialogue: The USAA Dispute Resolution Program Description and Rules for Arbitration and Mediation, Section 28. Scope of Arbitrator's Authority. A, "The arbitrator's authority shall be limited to the resolution of legal Disputes between the Parties. As such, the arbitrator shall be bound by and shall apply applicable law, including that related to the allocation of the burden of proof, as well as substantive law. The arbitrator shall not have the authority either to reduce or enlarge substantive rights available under applicable law. The arbitrator shall be bound by and shall comply with the provisions of Respondent's arbitration descriptions, and rules. The Respondent's rules did not grant the arbitrator authority to impose sanctions. To this end, after Respondent's Counsel committed the act, the arbitrator acknowledged she "did not have authority" [to impose sanctions] while off the record with Petitioner's then Counsel.

According to the American Arbitration Association/ADR.org, "whether sanctions are available to punish abusive behavior depends upon the forum where the conduct occurs. If abusive conduct occurs in the judicial arena, the court's sanctioning power may be brought to bear. No agreement among the parties is required. However, if such behavior occurs in an arbitration proceeding, the arbitrator may sanction the party responsible for such conduct only if the parties' agreement explicitly or implicitly authorizes the arbitrator to impose sanctions. It is generally thought that an arbitrator does not have this power absent a contractual provision" (See Georgene Vairo, Arbitration Law, Sanctions and Arbitration Proceedings - Chapter 27).

The American Arbitration Association/ADR.org recognizes arbitration as, "the out-of-court resolution of a dispute between parties to a contract, decided by an impartial third party (the arbitrator)—is faster and more cost effective than litigation." However, with arbitrators often not having the ability to sanction, perhaps arbitration is an invitation to adverse behavior due to the apparent lack of authority of the arbitrator?

The Florida Supreme Court suspended the attorney after he was found coaching a deposition witness through text messages. The recent 2021 per curiam decision ruled the defense attorney "engaged in conduct aimed at defeating the opposing party's lawful attempts to obtain evidence, undermining the adversarial process, and as a result, the trial court's intervention was required" (See Florida Bar v. James, Fla: Supreme Court). This would not have been the case if the attorney had found coaching a witness during an arbitration hearing.

In fact the Western District of Texas (having initial jurisdiction over this case) Civil Rule 30(b) states, "An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question, except for the purpose of determining whether a claim of privilege should be asserted." In addition, Texas Rule of Civil Procedure 199.5(d) states, "Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted." Regardless, the witness coaching and spoliation that took place during the arbitration hearing were allowed. Here, it is apparent Respondent's Counsel neglected to ensure his witness was aware it is a violation of law for her to

communicate with him or any other person while a question is pending. Respondent's Counsel continued to conduct a text conversation with his witness for some time during her deposition, until petitioner's counsel called attention to the communication still during Respondent's witness' testimony.

Here, we must ask why a veteran attorney, representing a Fortune 500 company during a sworn deposition, would go so far as to intentionally manipulate a witness in this manner.

X. CONCLUSION AND REASONS FOR GRANTING THE WRIT

This pro se Petitioner's Writ, an appeal to the United States Supreme Court, is hereby submitted five years, three months and nineteen days from Petitioner's untimely separation from employment with Respondent. Three years and three months hence, a remote evidentiary deposition was attempted. On that date, due process was interrupted by the Respondent. The deposition was conducted in accordance with the Emergency Orders Regarding the Covid-19 State of Disaster. And as evidenced within the deposition transcript, Respondent's Counsel corrupted the arbitration proceedings by intentionally and continuously communicating with the Respondent's witness remotely by text while Respondent's witness was being questioned (also remotely and from a different location) through Zoom by Petitioner's Counsel regarding the very evidence withheld by Respondent and as prohibited by Rules 3.04(a) and 3.04(d) of the Texas Disciplinary Rules of Professional Conduct.

Respondent counsel's infringement of the law was not taken seriously. The admitted infraction was overlooked as an inconvenience, and the gravity of the

significance and impact were not at all taken into account.

Petitioner prays the United States Supreme Court grants the Writ for the following reasons:

- (1) To avoid instances where violations of Federal Rules that would not be allowed in Federal Courts would be allowed in Arbitration.
- (2) To avoid Arbitrators, District Courts, and Appellate Courts allowing violators of Federal Rules being allowed to go unsanctioned, when violating Federal Rules in those forums.
- (3) To avoid violators of Federal Rules intended to prevent Witness Coaching from alluding accountability for violating the associated law and corrupting due process.
- (4) To avoid violators of Federal Rules intended to prevent Spoliation of Evidence from alluding accountability for violating the associated law and corrupting due process.
- (5) To remand the case to the trial court, given this court has sustained a point raised by the petitioner indicating a cross-point requires the taking of additional evidence (Texas Rules of Appellate Procedure 38.2(b)(2)).

We the People pray the governments overseeing the balance between federal and state law recognize the opportunities to preserve the integrity of the states all the while deciding when sanctions for the violation of federal law are inconsistent among arbitrators, district and circuit courts. Corporate Personhood

aside, though the resources a business boasts lend more favorably to the Business' ability to place nexus in certain courts, Federal law should not be interpreted differently among the forums among the states.

We the People call on the Supreme Court of the United States to embrace the opportunities explained herein to align the states with the intent of the Constitution, the supreme law of the United States.

Respectfully submitted,
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