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FORD MOTOR COMPANY IS NOT REQUIRED TO TURN OVER ITS DOCUMENT DATABASES TO THE PLAINTIFF

There is perhaps no better way to harass a litigation opponent than by playing games with discovery. Discovery abuses come in many forms – some subtle and others not so subtle – but all forms of discovery abuses result in greater litigation expense and, typically, longer case schedules. The rules of civil procedure, and a court’s inherent authority, can be used effectively to curb these abuses provided the presiding judge is willing to do so. In *In Re: Ford Motor Company*, a district judge went a bit too far, according to a panel of the Eleventh Circuit.

In this case, Elizabeth Russell sued Ford claiming that the seatbelt buckle in her vehicle was defectively designed because it “inertially unlatched” during an accident, which caused her injuries. She served several requests upon Ford asking it to produce documents concerning claims by others relating to inertial unlatching of seatbelt buckles. Ford took the position that it had produced all relevant information called for under the document requests. Russell, on the other hand, asserted that Ford was not fully compliant with the discovery requests and failed to produce all responsive documents. Russell filed a motion to compel, in which she sought direct access to two Ford databases (one called “Master Owner Relations Systems I, II, and III” and the other called “Common Quality Indicator System”) to conduct her own searches for claims by others relating to seatbelt unlatching.

Less than fourteen days after the filing of the motion, and before Ford had a chance to respond to the motion, the district court granted Russell’s motion. Ford filed a motion for reconsideration. The issues were briefed by both parties, and the court held a hearing on the motion for reconsideration. The court ordered Ford to allow Russell direct access to the two databases. Ford filed a petition for a writ of mandamus or prohibition with the Eleventh Circuit Court of Appeals.

The Eleventh Circuit began its opinion by noting that mandamus is an extraordinary remedy that is available only to correct a clear abuse of discretion or usurpation of judicial power. It then analyzed the pertinent rules of civil procedure. Under Federal Rule of Civil Procedure 26, the parties may obtain discovery of any matter, not privileged, that is relevant to a claim or defense of a party. Here, there was no dispute that the information Russell sought was relevant. The issue was whether, under the rules, there was need for her to be given direct access to the databases. The appellate court examined Federal Rule of Civil Procedure 34 governing requests for production of documents. It interpreted the rule as allowing a requesting party to inspect and copy data compilations (whether that product was a document, disk, or other device) resulting from the respondent’s translation of the data into a reasonably usable form. In its view, the rule does not grant unrestricted direct access to database compilations. Under the rule, it is the duty of the responding party to locate and produce the relevant data and records; the rule does not give the party serving the request for production the right to conduct the actual search. The court found further support for its interpretation in the Advisory Committee Notes to Rule 34, and relying on the Notes determined that there may be times where, because of abusive conduct by the responding party, the requesting party may need to check a data compilation itself, but in that situation the district court must be careful to protect the responding party’s preservation of its records, the confidentiality of its non-discoverable information, and its costs.

Based on the record before it, the Eleventh Circuit held that Russell should not have been allowed to search the databases herself. First, although the district court was in the best position to decide whether Ford dealt with its discovery obligations improperly, it made no findings at all that Ford failed to comply with its obligations. Second, the district court did not discuss its analysis of Ford's objections to Russell's search of the databases and gave no substantive explanation for its ruling granting her access. Third, the district court established no protocols for the search and instead granted unlimited access to the databases, thereby granting Russell access to information that would not be discoverable without Ford having a chance to object beforehand.

In conclusion, the Eleventh Circuit ruled that some kind of direct access to databases might be appropriate in certain cases where there is a factual finding at the outset of noncompliance with the discovery rules, but this was not one of those cases. The far-reaching order entered in this case, especially without a finding of any discovery abuses, was a clear abuse of discretion. The court of appeals granted the petition for writ of mandamus and vacated the discovery order.

THE FEDERAL COURT LACKS JURISDICTION TO HEAR CLAIMS OF COPYRIGHT INFRINGEMENT IF THE COPYRIGHT HAS NOT BEEN REGISTERED

In *Home Design Services, Inc. v. Green Horne Corporation, Kermit Horne, and Annie Horne*, Home Design alleged that the defendants infringed on its copyrighted architectural work. The infringement took the form of advertising, designing, constructing, and participating in the construction of a number of homes that were either almost duplicates or exact copies of work by Home Design. In its complaint, Home Design alleged that it had complied with the federal Copyright Act and related laws, but it was still waiting to receive its Certificate of Registration from the Copyright Office. The defendants moved to dismiss the complaint. They claimed, in part, that the district court lacked subject matter jurisdiction over the case because Home Design did not register its copyright before filing suit.

The U.S. District Court for the Middle District of Florida agreed. Under the law of the Eleventh Circuit, an infringement action may not be instituted in the district court until the copyright claim has been registered. The court noted that some other circuits have differing interpretations of the pertinent statute, 17 U.S.C. §411, but the Eleventh Circuit cases hold that the registration requirement is a jurisdictional prerequisite. For this reason, the district court granted the defendants' motion and dismissed the case without prejudice to Home Design refiling suit when it received the Copyright Office's response to its registration application.

**AN EMPLOYMENT AGREEMENT PROHIBITING COMPETITION
WITHIN A TEN-MILE RADIUS OF ANY OFFICE IN A MULTI-OFFICE
MEDICAL PRACTICE IS FOUND TO BE REASONABLE**

Dr. Supinski was recruited by Omni Healthcare to work in one of Omni's offices in the Melbourne, Florida area. Omni is a physician-owned multi-specialty medical practice that operates medical offices exclusively in central and southern Brevard County. Dr. Supinski and Omni negotiated an employment agreement that contained a non-competition covenant providing that for a period of two years after his employment with Omni ended, Dr. Supinski would not compete against Omni within a ten-mile radius of its offices, and he would not solicit Omni's patients or employees. He also agreed that for a period of five years after his employment, he would not misappropriate any of Omni's trade secrets or confidential information.

Dr. Supinski worked for Omni for a little more than one and one-half years when he notified it that he was terminating his employment. As soon as his resignation became effective, he opened his own office approximately four miles from the Omni office where he had worked. Three days later, Omni sued Dr. Supinski asserting, among other things, that he was in violation of his non-compete agreement. Dr. Supinski alleged in pleadings and discovery that Omni had previously breached the employment agreement; however, he admitted that he established his new office within ten miles of an Omni facility, and forty percent of his patients were patients he treated while working for Omni.

The trial court held an evidentiary hearing to determine whether to enter a temporary injunction. After considering the evidence, the court ruled that the non-compete agreement was supported by legitimate business interests for a specific geographic location and marketing area, the terms were reasonable, Dr. Supinski breached the agreement by opening his office within the ten-mile proscribed area, Omni would suffer irreparable harm if an injunction was not issued, and the agreement did not violate public policy. The trial court entered a temporary injunction and set bond at \$50,000. Several months later, after retaining new counsel, Dr. Supinski filed a motion seeking to modify the temporary injunction. He claimed, in part, that it improperly precluded him from operating an office within ten miles of any Omni office and not just the specific office where he had been employed, and the bond amount was not supported by the evidence. The trial court declined to modify either the injunction or the amount of the bond. Dr. Supinski appealed.

In *Supinski v. Omni Healthcare*, Dr. Supinski argued to Florida's Fifth District Court of Appeal that the injunction should be limited to preventing him from treating only those patients he actually treated while employed by Omni. In support of this argument he relied on a First District Court of Appeal case styled *University of Florida v. Sanal*. There, the appellate court affirmed a ruling that a non-competition agreement prohibiting Dr. Sanal from opening a practice within fifty miles of any location of his major faculty clinical teaching assignment was unenforceable. The grounds for this decision were that the plaintiff had been unable to establish that Dr. Sanal provided care to any of its former patients and could not identify even one patient who had followed Dr. Sanal for continuing care. And, the plaintiff had not realized any notable decrease in its patient population since Dr. Sanal left and started working for a competitor – he treated only existing patients of the competitor's practice. The *Supinski* court distinguished this

case, though, because the trial court here expressly found, after considering the evidence of the origin of Dr. Supinski's patient base at his new practice, that he interfered with substantial relationships with prospective patients within the meaning of the non-compete statute.

Dr. Supinski also argued that the trial court improperly enjoined him from practicing within ten miles of any Omni office, and if anything, he should only be enjoined from opening an office within ten miles of the Omni office where he actually worked. The appellate court rejected this argument, too. It noted that this position might have some merit if the offices were widespread, but they all were in a relatively confined area of southern Brevard County. Thus, Dr. Supinski was free to open an office in the northern part of the county or any other county. The court believed that in these circumstances, measuring the geographic restriction from more than one office was irrelevant.

Further, Dr. Supinski took the position that Omni had breached the employment agreement so he was free to terminate it without the burden of the restrictive covenant. The court of appeal rejected this argument, too. It noted that a person against whom an injunction is sought may defend on the grounds that the movant has materially breached the contract and if that evidence is adduced, then the employer must show that it is likely to succeed on the merits of that defense. Here, the asserted breach was not material – Dr. Supinski claimed he was owed \$1,000 more than the approximate \$107,000 he had been paid as part of his compensation during the second year of his employment with Omni.

Finally, Dr. Supinski claimed that the amount of the bond was too high. There was some vague evidence in the record of a stipulation to the bond amount by Dr. Supinski's prior counsel, but there was no specific evidence as to the alleged stipulation, and Dr. Supinski denied it. The Fifth District decided that in these circumstances, the fairest thing to do was to affirm the issuance of the injunction but remand the case for an evidentiary hearing on the bond amount, including the issue of whether there was in fact a stipulation to the \$50,000 amount.

**MAKE SURE TO READ AND UNDERSTAND WHAT YOU ARE SIGNING:
SUBSTANTIAL TORT CLAIMS BY ANESTHESIOLOGISTS WERE BARRED
BY THE TERMS OF A STOCK PURCHASE AGREEMENT**

A group of twenty-five anesthesiologists sold their practice to a management company. The management company retained them as employees. Ten of the doctors subsequently sued their former president, their lawyer, and others alleging fraud, breach of fiduciary duty, conspiracy, legal malpractice, and securities law violations arising from the transaction. They claimed that they had been led to believe that they all were receiving the same deal in the buyout, and they all would have the same chance to be involved in the management and own stock in the new company. Contrary to these representations, their former president, Dr. Eisenberg, and lawyer, Jay Martus (and some others), were the only ones involved in the management of the new entity and had received shares in the new entity. The case was tried to a jury, which found for the plaintiffs on some of the counts but did not find any of the defendants liable for fraud. On post-trial motions practice, the trial court concluded that the counts on which the jury found

for the plaintiffs were barred as a matter of law by the documents they signed as part of the transaction. The plaintiffs appealed.

Florida's Fourth District Court of Appeal affirmed the decision in *Peebles, et al. v. Sheridan Healthcare, et al.* The stock purchase agreement each doctor signed specifically explained that Dr. Eisenberg would be involved in the management of the new company and would receive stock in the new company, and the others "may" be involved. The stock purchase agreement also contained a release in which each plaintiff released the new company and each of the present and former shareholders, directors, officers, employees, attorneys, and agents of the company and their prior medical practice from any and all claims and causes of action in connection with the transaction. Further, the plaintiffs acknowledged in the document that they had not relied on any representations, warranties, or agreements of any person other than those set forth in the stock purchase agreement.

Because the plaintiffs' claims were based on facts expressly contrary to the information set forth in the stock purchase agreement and its release, they were barred as a matter of law. The appellate court concluded its opinion with this simple admonition: "If [the deal] was not acceptable, plaintiffs should not have signed on. They cannot now claim that they relied on prior representations which were contrary to what was plainly explained in the documents."

ALL PARTIES SHOULD HAVE INPUT INTO THE CONTENT OF PROPOSED ORDERS BEFORE THEY ARE SUBMITTED TO THE COURT

The typical scenario in Florida courts is as follows: A party prepares and files a motion. That party sets the motion for hearing after confirming dates of availability with the judge's judicial assistant (and, as a matter of professionalism, opposing counsel, although sometimes – whether for valid reasons or as a matter of bully litigation tactics – hearings are set unilaterally). That party retains a court reporter for the hearing. The motion is heard by the judge on the scheduled date. At the conclusion of the hearing, the judge asks the party who has been successful on the motion to prepare a proposed form of order to be submitted to the court for review and entry.

At this juncture, one of two things can happen. The draft can be circulated to opposing counsel for comments. If there are no comments, or the comments are agreed upon, the proposed order is finalized and sent to the judge, who usually signs it without any changes. If there is disagreement as to the content of the proposed order, then each party submits its own version for consideration by the court. The second thing that can happen is that the initial draft of the proposed order can be sent directly to the court for entry without circulating it to opposing counsel for review. The former is the better and generally accepted approach. In a recent case, the Fourth District Court of Appeal explained why.

Jeffrey Ross and Hayley Botha had one child during their nine-year marriage. They were divorced in Illinois in 1999 and entered into a marital settlement agreement. Both parties relocated to Florida. Once here, the mother filed a petition to domesticate the Illinois judgment

and to enforce \$17,000 in child support arrearages, contributions to medical expenses, and to force the father to provide certain insurance. The father filed a counter petition seeking to modify his child support obligation. An agreed judgment was rendered. Within a few months, though, the father, acting without counsel, filed a motion for contempt alleging that the mother had denied visitation, had selected a therapist for their child unilaterally contrary to the agreed judgment, and had engaged in conduct attempting to alienate their child from him. The mother counter petitioned for modification of the terms of the agreed judgment and sought to hold the father in contempt. The petition and counter petition were set for hearing before the circuit judge. The mother was represented by counsel; the father was not. No court reporter was hired by either party, so there was no record of the hearing. The court did not announce its rulings in front of the parties at the hearing. After the hearing, the court asked the mother's attorney to prepare a proposed order, without identifying what should be contained in the order. The mother's attorney prepared the order and sent it to the court and the father simultaneously. The court signed the order without making any changes on the same day the father received it. The father appealed the entry of the order.

In *Ross v. Botha*, the Fourth District reversed the order because it was erroneous in several respects. One significant error concerned the manner in which the order was generated. After recounting the procedures by which the order was prepared and entered, the appellate court held that these procedures made the order *per se* reversible. It then explained its holding. First, it stated that a court should never direct one side to prepare an order without making sure that the opposing party has a chance to comment or object to it, or prepare its own form of order. Second, a court should not adopt proposed orders drafted by litigants without making in-court findings. The district court found it hard to believe that the wife's attorney could be such a mind reader as to the court's findings on the fact-intensive issues it considered during the hearing that the order could be correct, without any editing by the court, where the court announced no rulings during the hearing. The appellate court also noted that the practice employed here is especially troublesome in cases involving difficult issues and extreme conflict between the parties such as in this family litigation. It believed that the trial court's receipt of a proposed order from any party without it first being provided to and reviewed by an opposing party may amount to an inappropriate *ex parte* communication with the court. The problems are enhanced when a party is *pro se*.

The court of appeal concluded its opinion by providing a list of five questions that should be considered when reviewing what it termed "adopted" orders. These are: (1) whether the signed order is consistent with the verbal rulings of the trial court; (2) how much time passed between the hearing and the entry of the order; (3) are there irregularities or conflicts in terms included in the order; (4) did the judge entering the order participate in the hearing or trial; and (5) did the judge edit or modify the proposed order to conform it to his or her conclusions, or was it signed verbatim. An order must reflect independent decision-making by the judge, and the one at issue did not. "[T]he opportunity for both sides to have input as to the content of the order as well as careful scrutiny that the proposed order includes the necessary findings and language and reflects the independent conclusions of the court, are essential to perceptions of fairness and fundamental justice."

A little cooperation between the parties in the preparation of orders can go a long way in resolving many of the problems the Fourth District Court of Appeal faced in *Ross*.

**HAPPY HOLIDAYS FROM ALL OF US AT
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