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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DANIEL L. BERGLUND, Plaintiff and Respondent, v. ARTHROSCOPIC & LASER SURGERY CENTER OF SAN DIEGO, LP, Defendant and Appellant.	D045218 (Super. Ct. No. GIC753465)

APPEAL from an order of the Superior Court of San Diego County, Linda B. Quinn, Judge. Reversed.

Higgs, Fletcher & Mack, John Morris, William A. Miller and Michael S. Faircloth for Defendant and Appellant.

Law Office of Marc O. Stern and Marc O. Stern for Plaintiff and Respondent.

Daniel L. Berglund, in the arbitral forum, subpoenaed documents from nonparty Arthroscopic & Laser Surgery Center, L.P. (ALSC). The arbitrator ordered ALSC to produce the documents for his in camera review. ALSC brought a motion for a

protective order in the superior court, which ruled it did not have jurisdiction to review the arbitrator's discovery order because the arbitrator had exclusive authority over the discovery dispute. ALSC appeals, contending the arbitrator was not authorized to enforce a discovery subpoena against it, as a nonparty to the arbitration agreement, and the court was required to exercise jurisdiction over its motion. Code of Civil Procedure sections 1283.1 and 1283.05[1] grant arbitrators authority to enforce discovery subpoenas even against nonparties in cases involving personal injury or death, but the trial court has jurisdiction to review the arbitrator's discovery ruling.

An additional issue is whether judicial review of an arbitrator's discovery decisions addressed to nonparties to an arbitration agreement is limited to the same extent as discovery decisions addressed to parties to an arbitration agreement. Courts have held that parties to an arbitration agreement may not, except on severely circumscribed grounds, challenge arbitral decisions in judicial proceedings. This strict limitation on judicial review of arbitral decisions is based on the consideration that parties to an arbitration agreement expect, in return for foregoing their right to full judicial review, they will receive a prompt and final disposition of their disputes. However, the severe limitation on judicial review of arbitral decisions may only be imposed on those who

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1 All statutory references are to the Code Civil Procedure unless otherwise specified.

have voluntarily agreed to have their disputes arbitrated or who have some relationship with one of the parties to the arbitration agreement. (§ 1283.05, subd. (d).)

In general, under section 1283.05, subdivision (c) parties to an arbitration agreement are bound by an arbitrator's discovery decisions to the same extent they are bound by the arbitrator's disposition of the merits of their dispute. When made under the provisions of section 1283.05, an arbitrator's discovery order addressed to *parties* to an arbitration agreement is subject to the same limited judicial review and will not be overturned even if on its face the order is erroneous and causes substantial injustice.

However, section 1283.05, subdivision (c) does not limit judicial review of arbitrators' discovery orders addressed to persons not parties to the arbitration and not otherwise aligned with the parties. Nonparties to the arbitration may seek judicial review of an arbitrator's discovery orders without the review limitations imposed on discovery orders addressed to parties.

FACTUAL AND PROCEDURAL SUMMARY

On August 23, 2000, Daniel L. Berglund filed a complaint in the San Diego Superior Court, alleging causes of action for breach of fiduciary duty and battery against Gary Losse, M.D; Oasis Sports Medical Group, Inc; David Chao, M.D.; Byron Kind, M.D.; Paul Murphy, M.D.; HealthSouth Arthroscopic & Laser Surgery Center, L.P. (ALSC); HealthSouth Rehabilitation Center; and, SHC San Diego, Inc. (collectively defendants). ALSC generally denied the claims.

During the trial court proceedings, Berglund served on ALSC a request for production of documents relating to missing medications, prescriptions or other chemical

substances for the period 1997 to 1999. ALSC objected to the request on the basis of privilege, and Berglund filed a motion to compel their production. On July 23, 2001, the trial court denied the motion.

According to Berglund's uncontradicted representation in his respondent's brief, in February 2001, the trial court granted the defendants' motion to compel contractual arbitration and a retired superior court judge, affiliated with JAMS, was appointed arbitrator. However, Berglund's case against ALSC remained in the superior court because ALSC was not a signatory to the arbitration agreement.[2]

On July 25, 2001, Berglund filed a first amended complaint, the operative pleading, which added causes of action for medical negligence and breach of Business and Professions Code section 17200 et seq. In October, 2003, the trial court approved the settlement of the case as between Berglund and ALSC, discharged ALSC from liability for claims by the codefendants, and dismissed with prejudice Berglund's first amended complaint against ALSC.

In July 2004, Berglund, in the arbitral forum, subpoenaed documents from ALSC, including "[a]ny and all 'drug logs,' memorandum or documentation[,] including but not limited to documents reflecting inventory lists of Narcotic medications which were discovered missing during the period of time from 1996 to January of 2000. For

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2 The appellate record does not contain a copy of the arbitration agreement or the trial court's ruling compelling arbitration.

purposes of this request, 'narcotic medications' is to include drug schedule II or III pain medications including, but not limited to, vicodin, percodan, percocet, lortab, norco, darvocet, codeine and/or tylenol with codeine and/or any other hydrocodone or oxycontin compound."

On August 3, 2004, ALSC, in the arbitral forum, objected to the subpoena on various evidentiary grounds, and claimed the documents sought were protected from discovery by Evidence Code section 1157; nonetheless, it agreed to produce some of the documents. On August 9, 2004, ALSC filed in the trial court a motion for a protective order to prohibit the production of documents, and reminded the trial court it previously had denied Berglund's request to compel production of some of the same documents.

On August 20, 2004, Berglund filed with the arbitrator a motion to compel from ALSC the documents sought by the subpoena. He argued the trial court had transferred jurisdiction of the case to the arbitrator two years earlier and therefore the trial court had no jurisdiction to issue a protective order. ALSC opposed the motion.

After a hearing and supplemental briefings, the arbitrator ruled on September 23, 2004, that he had jurisdiction to enforce the subpoena. The arbitrator also explained that the trial court's ruling on the privilege issue in the earlier discovery dispute was not binding on him. The arbitrator stated: "Much has happened in the . . . intervening three years. The documents sought are not exactly the same, and there has been testimony by the former certifying pharmacist for [ALSC] that State regulations required [ALSC] to maintain drug logs or inventories of narcotic medications, and also to account for missing drugs. Prima facie, records kept and maintained to comply with state law would owe

their origins to administrative regulations and would not emanate from committee proceedings or records under Evidence Code §1157." The arbitrator ordered ALSC to produce the subpoenaed documents for his in camera review. The arbitrator, at the hearing on his ruling, clarified he was not requiring ALSC to produce documents protected by the attorney-client privilege.

On October 7, 2004, the trial court ruled, "The court denies [ALSC's] motion for a protective order based on improper jurisdiction. Additionally, the Court cannot rule on [ALSC's] motion to strike improper evidence and related objection. The Court does not have jurisdiction over issues relating to the subpoena production of business records. [¶] Jurisdiction lies with [the arbitrator] and the particular matter has already been decided. An arbitrator has the authority to compel production under §1283.05(b) and has the power to rule on the admissibility of evidence."

On October 13, 2004, ALSC filed with this court a "Motion for Stay or Petition for Writ of Supersedeas, Prohibition and/or Other Appropriate Relief." That same day, ALSC filed in the superior court its notice of appeal of both the trial court's decision to deny the protective order and the arbitrator's discovery order. This court denied the writ petition on December 9, 2004.

On December 16, 2004, this court sent the parties a letter requesting they explain "why the superior court's October 7 order is appealable and why this court has jurisdiction to review an arbitration ruling that has not been confirmed or adopted by the superior court." On January 4, 2005, this court allowed a limited appeal to proceed "as to the court's October 7, 2004 order denying [ALSC's] motion for protective order."

DISCUSSION

I

Sections 1283.1 and 1283.05, read together, expand the generally limited discovery rights allowed in arbitration proceedings when, as here, the underlying claim is one "arising out of or resulting from an injury to, or death of, a person caused by the wrongful act or neglect of another." (Section 1283.1, subd. (a).) In all other arbitrations, the arbitrator may order discovery only if the parties' agreement so provides. When section 1283.1 applies, "[a]ll of the provisions of Section 1283.05 shall be conclusively deemed to be incorporated into, made a part of, and shall be applicable to, every agreement to arbitrate . . . ." (Section 1283.1, subd. (a); accord *Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1088 (*Alexander*).)

Section 1283.05, subdivision (a) states:

> "After the appointment of the arbitrator or arbitrators, the parties to the arbitration shall have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of Title 3 of Part 4, and in Title 4 (commencing with Section 2016.010) of Part 4, as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in subdivision (e) of this section."[3]

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[3] Section 1283.05, subdivision (e) did not present an impediment to discovery here. It states: "Depositions for discovery shall not be taken unless leave to do so is first granted by the arbitrator or arbitrators."

ALSC claims the arbitrator does not have authority to enforce a discovery subpoena against a nonparty to the arbitration. However, section 1283.05, subdivision (a) expressly incorporates section 2020.010, and therefore gives the arbitrator enforcement authority over deposition subpoenas of nonparties.[4] Moreover, nothing in sections 1283.1 or 1283.05 limits an arbitrator's enforcement authority to those subpoenas issued to the parties of an arbitration agreement. Rather, section 1283.05, subdivision (b) states:

> "The arbitrator . . . shall have power, in addition to the power of determining the merits of the arbitration, *to enforce* the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties *as can be or may be imposed in like circumstances in a civil action by a superior court of this* state under the provisions of this code, except the power to order the arrest or imprisonment of a person." (Italics added.)

"The plain and commonsense meaning of [section 1283.05, subdivision (b)] is that the arbitrator has the power . . . to impose discovery sanctions short of arrest or imprisonment." (*Alexander*, *supra*, 88 Cal.App.4th at p. 1090, fn. omitted.) In addition, section 1283.05, subdivision (c) provides, "The arbitrator . . . may consider, determine,

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[4] Section 2020.010 states:
"(a) Any of the following methods may be used to obtain discovery within the state from a person who is not a party to the action in which the discovery is sought:
"(1) An oral deposition under Chapter 9 (commencing with Section 2025.010).
"(2) A written deposition under Chapter 11 (commencing with Section 2028.010).
"(3) A deposition for production of business records and things under Article 4 (commencing with Section 2020.410) or Article 5 (commencing with Section 2020.510).
"(b) Except as provided in subdivision (a) of Section 2025.280, the process by which a nonparty is required to provide discovery is a deposition subpoena."

and make such orders imposing such terms, conditions, consequences, liabilities, sanctions, and penalties, *whenever necessary or appropriate at any time or stage in the course of the arbitration* . . . ." (Italics added.)

Based on these statutes, the arbitral forum, and not the trial court, was the proper venue for ALSC's initial motion for a protective order. The contested subpoena was issued under section 1282.6, which states in relevant part: "(a) A subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents and other evidence, at an arbitration proceeding or a deposition under section 1283, and if Section 1283.05 is applicable, for the purposes of discovery, shall be issued as provided in this section. In addition, the neutral arbitrator upon his [or her] own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence."

This conclusion is consistent with a secondary authority: "Although the statute does not expressly so provide, arbitrators apparently may quash a subpoena on whatever grounds a civil subpoena may be quashed--e.g., improper notice or service, burdensome or oppressive demands, records privileged or protected by a right of privacy. [Code Civ. Proc., § 1987.1.]" (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2005) ¶ 5:390.5, p. 5-210.)

The same secondary authority also states: "The California Discovery Act is deemed incorporated into any agreement to arbitrate claims for bodily injury or wrongful death. . . . The arbitrator has the same power as a judge to enforce discovery and impose sanctions. [Citations.] [¶] This apparently includes discovery from nonparties: e.g.,

business records subpoenas under CCP § 2020.410!" (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution, *supra*, ¶ 5:387.1, pp 203-204, italics omitted; accord Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law* (2004) 4 Pepperdine J.Disp.Resol. 1, 22 [section 1283.05 is the exception to the rule that arbitrators do not have the power to "enforce subpoenas for discovery purposes in the same manner as a judge does in a civil proceeding"].)

California's public policy favoring arbitration is advanced by our conclusion that sections 1283.1 and 1283.05 permit the arbitrator to enforce subpoenas against nonparties in cases alleging negligent bodily injury or death. "[A]rbitration has become an accepted and favored method of resolving disputes [citations], praised by the courts as an expeditious and economical method of relieving overburdened civil calendars [citation]." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706-707.)

ALSC contends that if the arbitrator has authority to issue and enforce discovery orders against nonparties, the arbitrator's orders are subject to judicial review and the trial court erred by ruling it did not have jurisdiction over issues relating to the subpoena for production of business records ruled on by the arbitrator. The term "absence of jurisdiction" has at least two general meanings. "[I]n its most fundamental or strict sense [it] means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) In its ordinary usage the expression may be applied to a case in which, "though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner,

or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Ibid.*)

Here, the trial court did have fundamental jurisdiction over the subject matter of the arbitration and the parties who signed the arbitration agreement, and had the power to act on ALSC's motion for a protective order. *Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482 addressed "the ability of a trial court to interfere in a matter that has been submitted to arbitration." After the trial court has formally relegated the case to private arbitration and stayed the underlying action, the trial court's jurisdiction over the case is circumscribed. (*Id.* at pp. 486-487.) "During that time, under its 'vestigial' jurisdiction, a court may: appoint arbitrators if the method selected by the parties fails [citation]; grant a provisional remedy [to a party] 'but only upon the ground that the award to which an applicant may be entitled may be rendered ineffectual without provisional relief' [citation]; and confirm, correct or vacate the arbitration award [citation]." (*Id.* at p. 487.)

Under the trial court's vestigial jurisdiction it may also review an arbitrator's discovery orders, and the trial court was authorized to exercise jurisdiction over ALSC's motion for a protective order to review the discovery order of the arbitrator. Generally, "discovery orders in arbitration [are subject] to the same limited judicial review as other arbitration orders." (*Alexander, supra,* 88 Cal.App.4th at p. 1090.)

II

ALSC claims on appeal "an arbitrator does not have the unilateral and unfettered authority to compel compliance with a discovery order (or any other order) from a

[*nonparty*], at least not without first affording that [nonparty] the opportunity to obtain substantive review of such order through ordinary judicial process. Otherwise, *any* arbitrator could order *any* nonparty to produce *any* information under *any* circumstances at *any* time, and that [nonparty]--with no standing to pursue even the very narrow issues that can be presented on appeal from an arbitrator's ultimate ruling -- would have *no recourse whatsoever*." This claim raises the issue of whether the scope of judicial review of an arbitrator's discovery orders addressed to nonparties to the arbitration is limited by the *Moncharsh*[5] standard of review, which on its facts applies to parties to the arbitration.

The California Supreme Court has outlined the criteria trial courts should employ in deciding whether, and under what conditions, they may review an arbitrator's award; the criteria are those the statutes mandate for vacation of an award (§ 1286.2)[6] and for

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5 *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*).

6 Section 1286.2 provides for vacation of an award on the following grounds: "(1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or [¶] (B) was subject to disqualification upon grounds specified in section 1281.91 . . . ."

correction of an award (§ 1286.6).[7] (*Moncharsh, supra,* 3 Cal.4th at pp. 12-13.) With regard to parties to an arbitration, these same criteria must be applied in reviewing the arbitrator's discovery rulings. (§ 1283.05, subd. (c).) Accordingly, "[a]bsent a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration, [an arbitrator's discovery ruling] should ordinarily stand immune from judicial scrutiny." (*Moncharsh,* at p. 32.)

Moncharsh's explanation of the risks attendant on the broad deference given to the arbitrator's award apply equally to the arbitrator's discovery rulings, at least as to parties to the arbitration: "It is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable for two reasons." The first reason refers to the parties' voluntary submission to arbitration, but that reason does not apply to nonparties to the arbitration. The second reason acknowledges the statutory safeguards that reduce the probability of errors: "A second reason why we tolerate the risk of an erroneous decision is because the Legislature has reduced the risk to the *parties* of such a decision by providing for judicial

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[7] Section 1286.6 sets forth the grounds for correction of an award as follows:

"(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

"(b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or

"(c) The award is imperfect in a matter of form, not affecting the merits of the controversy."

review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process. . . . [¶] . . . [¶] The Legislature has thus substantially reduced the possibility of certain forms of error infecting the arbitration process itself (§ 1286.2, [subd. (a)(1), (2), (3)]), of an arbitrator exceeding the scope of his or her arbitral powers (§§ 1286.2, subd. [(a)(4)], 1286.6, subd. (b)), of some obvious and easily correctable mistake in the award (§ 1286.6, subd. (a)), of one *party* being unfairly deprived of a fair opportunity to present his or her side of the dispute (§ 1286.2, subd. (e)), or of some other technical problem with the award. (§ 1286.6, subd. (c))." (*Moncharsh*, *supra*, 3 Cal.4th at pp. 12-13, italics added.) This second reason for the *Moncharsh* standard of limited judicial review does not apply here because it refers to the risk to parties of being deprived by erroneous arbitration rulings of an opportunity to present their side of the case. ALSC is not a party to the arbitration and *Moncharsh* makes no mention of the standards of judicial review of arbitrator's rulings as to nonparties.

The language of section 1283.05, subdivision (c) does not expressly extend its provisions related to limited judicial review to persons who are not parties to an arbitration agreement. More importantly, the rationale that makes arbitral decisions final and conclusive does not apply to nonparties. The "expectation of finality strongly informs *the parties' choice* of an arbitral forum over a judicial one. The arbitrator's decision should be the end, not the beginning, of the dispute. [Citation.] Expanding the availability of judicial review of such decisions 'would tend to deprive *the parties* to the arbitration agreement of the very advantages the process is intended to produce.'

[Citations.]" (*Moncharsh, supra,* 3 Cal.4th at p. 10.) Although parties to an arbitration agreement may rightfully expect a final resolution of their rights, nonparties have not made that bargain.

Courts have been careful to protect the rights of those who are not parties to arbitration agreements and in carefully interpreting the scope of arbitration agreements. "There is indeed a strong policy in favor of enforcing agreements to arbitrate, but there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate and which no statute has made arbitrable." (*Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d 473, 481.) "Arbitration is consensual in nature. The fundamental assumption of arbitration is that it may be invoked as an alternative to the settlement of disputes by means other than the judicial process solely because all parties have chosen to arbitrate them." (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244.) "Although California has a strong policy favoring arbitration (see [*Moncharsh, supra,* 3 Cal.4th at p. 9]; *Luster v. Collins* (1993) 15 Cal.App.4th 1338, 1344 . . .), our courts also recognize that the right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived. (*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1507 . . . ; *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 643 . . . .) Because the parties to an arbitration clause surrender this substantial right, the general policy favoring arbitration cannot replace an agreement to arbitrate. (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271 . . . ; *American Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 200 . . . .) Thus, the right to

compel arbitration depends upon the contract between the [parties] (*Blatt v. Farley* (1990) 226 Cal.App.3d 621, 625 . . . ; *Baker v. Sadick* (1984) 162 Cal.App.3d 618, 623 . . .), and a party can be compelled to submit a dispute to arbitration only where he [or she] has agreed in writing to do so. (*Boys Club of San Fernando Valley v. Fidelity & Deposit Co., supra*, 6 Cal.App.4th at p. 1271.)" (*Marsch v. Williams* (1994) 23 Cal.App.4th 250, 255.)

An interpretation of section 1283.05, subdivision (c) extending its standard of judicial review to nonparties would be a radical departure from these principles, which make arbitral decisions final as a means of protecting the expectations of the parties and which impose the severe limitations of arbitration only on parties[8] to arbitration agreements. In the absence of an express and unambiguous provision in the statute, it is difficult to conclude the Legislature intended to deny nonparties full judicial review of an arbitrator's discovery orders.[9]

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8 As the court in *County of Contra Costa v. Kaiser Foundation Health Plan, Inc., supra*, 47 Cal.App.4th 237 explained at page 246, arbitration has been properly imposed on nonsignatories, but only in cases where the nonparties were "third party beneficiaries of the arbitration agreement who by benefitting from the agreement should also be bound by it."

9 This interpretation of section 1283.05, subdivision (c) is consistent with federal authorities, which have interpreted similar provisions of section 7 of the Federal Arbitration Act (FAA)(9 U.S.C. § 7). "Because the parties to a contract cannot bind nonparties, they certainly cannot grant such authority to an arbitrator. Thus, an arbitrator's power *over nonparties* derives solely from the FAA. The contested subpoenas were issued by the arbitrator pursuant to section 7 of the FAA. 'The arbitrators . . . may summon in writing any person to attend before them or any of them

Although judicial review of an arbitrator's discovery decisions is not limited as to nonparties, by the express provisions of section 1283.05, subdivision (c), the Legislature intended that where the statute applies, the parties to an arbitration will be bound by an arbitrator's discovery decisions, with judicial review limited to the *Moncharsh* standard. The requirement that the parties to the arbitration be bound by an arbitrator's discovery decisions require that nonparties in the first instance seek relief from the arbitrator. If a nonparty obtains appropriate relief from the arbitrator, the party seeking the discovery is bound by that decision under the limited judicial review provided in section 1283.05, subdivision (c), and bargained for by the other party to the arbitration. If a nonparty is not satisfied with the arbitrator's decision, the nonparty may seek plenary judicial review in the trial court.

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as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.' [Citation.]

"Implicit within the power to compel compliance with an arbitrator's summons must be the power to quash that summons if it was improperly issued. (*Oceanic Transport Corp. v. Alcoa S.S. Co.*, 129 F.Supp. 160 (S.D.N.Y. 1954) [rejecting petition to sanction nonparty for failure to comply and vacating subpoena because evidence sought was not material].) The court may also consider a petition to quash; there is no requirement that a petition to compel be made first. (See *Commercial Metals Co. v. International Union Marine Corp.*, 318 F.Supp. 1334 (S.D.N.Y. 1970) [denying motion to quash subpoena duces tecum issued by arbitrator because evidence sought by arbitrator-- documents from a party--was relevant to inquiry].)" (*Integrity Ins. Co. v. American Centennial Ins. Co.* (S.D.N.Y. 1995) 885 F.Supp. 69, 71-72.)

In this case, the trial court had jurisdiction in both the fundamental sense and in the broader sense to hear ALSC's motion for a protective order. The limited judicial review provisions of section 1283.05, subdivision (c) do not bind persons or entities, like ALSC, who are not parties to the arbitration agreement. Thus, where, as here, an arbitrator has made a discovery determination under section 1283.05, a nonparty may seek judicial review of that order in the trial court without the review limitations expressed in *Moncharsh;* the nonparty's request for relief from the arbitrator's discovery order is subject to plenary judicial review.

DISPOSITION

The order appealed is reversed and the matter is remanded for further proceedings consistent with the views expressed in this opinion.

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McDONALD, J.

BENKE, J., concurring and dissenting

For the reasons set forth in Discussion II of the lead opinion, I believe the trial court's order must be reversed. I therefore concur in the judgment.

I do not join in Discussion I of the lead opinion.

BENKE, Acting P. J.

O.'Rourke, J.

I concur in the lead opinion with the exception of part two of the discussion. I respectfully dissent from part two of the discussion.

I agree that Daniel L. Berglund was permitted to serve a deposition subpoena for production of documents on Arthroscopic & Laser Surgery Center, L. P. (ALSC), even though it was a nonparty to the arbitration agreement. (See Code Civ. Proc., § 1283.05, subd. (a).)[1] I also agree that ALSC was required to bring its motion for a protective order in the arbitral forum because the arbitrator was authorized to determine the merits of the motion. (See §1283.05, subd. (b).) These two points are part of the holding of this case. The conclusion that the trial court was required to review the arbitrator's discovery ruling is also a holding of this case. However, I do not agree that — on this record — remand for the trial court's review was required.

The lead opinion fashions a two-tiered standard of review a trial court must apply in reviewing an arbitrator's discovery ruling. Only parties to an arbitration agreement obtain review under the standard enunciated in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 13 (*Moncharsh*), under which courts do not review the merits of the controversy, the validity of the arbitrator's reasoning, or the sufficiency of the evidence

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1 All statutory references are to the Code of Civil Procedure unless otherwise stated.

supporting an arbitrator's award. Under *Moncharsh*, a court may not vacate an award for legal or factual error even if the error clearly appears on the face of the award and it causes substantial injustice. (*Id.*, at pp. 27-28.) Nonparties, on the other hand, now are entitled to trial court review in which they can raise legal error and other factors precluded by *Moncharsh.* This entitlement is based solely on their status as nonparties to the arbitration agreement.[2]

At bottom, the expansion of rights accorded to nonparties beyond those set forth in the statute is founded upon a confused notion of due process. According to the lead opinion, because nonparties were not signatories to the arbitration agreement, they can suffer no diminution of the rights they enjoy in trial court actions. The same reasoning should logically lead to the conclusion that the arbitrator cannot order nonparty discovery at all. However, the lead opinion concludes that the arbitrator can order such discovery under section 1283.05 (a). Even though the lead opinion concedes the Legislature has the

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[2] The lead opinion attempts to buttress this conclusion with cases interpreting the Federal Arbitration Act (9 U.S.C. § 7) (lead opn., at p. 16, fn. 8); they are inapplicable because that statute, unlike Code of Civil Procedure section 1283.05, expressly authorizes district courts to enforce deposition subpoenas issued by arbitrators. Also inapplicable here are cases cited in the lead opinion (lead opn., at p. 15) that forbid parties to an arbitration agreement from compelling a nonparty to arbitrate a claim in the absence of a valid waiver by the nonparty. (See e.g. *American Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 200; *Boys Club of San Fernando Valley v. Fidelity & Deposit Co.*, (1992) 6 Cal.App.4th 1266, 1271.) The issue here is a routine discovery dispute; it does not implicate the "substantial right" to elect whether to resolve the merits of a claim in arbitration or in a judicial forum. (*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1507.)

power to order discovery in arbitration from nonparties, apparently this power is a little, and not a lot.

The fundamental requisite of due process of law is the opportunity to be heard. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267.) Here, the arbitrator, in the context of Berglund's motion to compel production of documents, heard and ruled on ALSC's objections. This hearing sufficed to safeguard ALSC's due process rights. The lead opinion overlooks that the self same "plenary" review it mandates in the trial court was already undertaken by the arbitrator in the first instance. Neither due process nor any other applicable principle of law mandates, or requires, duplicative review.

In my view, in the instances that a trial court exercises its "vestigial jurisdiction" to review an arbitrator's discovery ruling, the *Moncharsh* standard applies to both parties and nonparties. (*Titan /Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 487; § 1283.05, subdivision (c).) Here, ALSC did not make a showing that the arbitrator's ruling presented the kinds of defect that would require correction or vacation under the *Moncharsh* standard. For example, there is no showing the arbitrator was biased or committed fraud, corruption, or illegality. Rather, the arbitrator acted in accordance with section 1283.05 (c). His discovery ruling did not violate any public policy. Consequently, the trial court committed no error when it declined to rule on the merits of ALSC's motion for a protective order.

Because the lead opinion ignores the clear mandate of the Legislature and grants nonparties to arbitration "plenary" review in the trial court, the inevitable consequence is an erosion of California's public policy favoring arbitration. The promise of arbitration

as a "speedy and relatively inexpensive means of dispute resolution" will remain unrealized. (*Moncharsh*, *supra*, at p. 9.) The already clogged trial court dockets will swell with third-party discovery disputes that an arbitrator is empowered and best suited to resolve.

For the reasons stated above I would affirm the trial court's decision.

O'ROURKE, J.