w/app

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,149

Florida Bar No: 184170

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

JOYCE LANGSTON on behalf of minor child, SHANARD LANGSTON,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 93-02354

**BRIEF OF PETITIONER ON JURISDICTION**
ALLSTATE INSURANCE COMPANY

(With Appendix)

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## TABLE OF CITATIONS



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## POINT ON APPEAL

THE DECISION BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH FLORIDA RULE OF CIVIL PROCEDURE 1.280(b)(1); THE DECISION OF THIS COURT IN KILGORE; BROOKS; MARTIN-JOHNSON, INFRA; AND THE DECISIONS OF THE DISTRICT COURTS IN EAST COLONIAL; MANATEE COUNTY; SALIDO, INFRA; AND PRESENTS A QUESTION OF GREAT PUBLIC IMPORTANCE REGARDING THE PRODUCTION OF CONCEDEDLY IRRELEVANT DISCOVERY AND THE INHERENT IRREPARABLE HARM IN HAVING TO PRODUCE THESE DOCUMENTS.



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## STATEMENT OF THE FACTS AND CASE

The Fourth District has completely abrogated Florida Rule of Civil Procedure 1.280(b)(1) and has now ruled that conceded irrelevant and immaterial discovery in an ordinary first party UM case, must be produced, unless the Defendant proves it is in danger of physical harm if the discovery is produced. Allstate Insurance Company v. Langston, 18 Fla. L. Weekly D2295 (Fla. 4th DCA October 27, 1993).

Mrs. Langston sued Allstate for uninsured motorist benefits for personal injuries resulting from a car accident. Langston, D2295. Mrs. Langston's Complaint does **not** contain any claims of bad faith or unfair claims practices. However, Mrs. Langston requested production of the following documents:

> 3. All internal procedural memos regarding the handling of uninsured motorist claims in effect during the last twelve (12) months.
>
> 4. Your latest claims manual on processing and handling of uninsured motorist claims in general.
>
> 5. A copy of your standards for the proper investigation of claims that were in effect at any time during the last twenty-four months (24) months.
>
> 6. All correspondence to or from anyone, including any insurance agencies, any doctors' offices, any employers, any agencies hired to select doctors for "independent medical examinations" and any law enforcement agencies for the uninsured motorist claim involved herein.
>
> Langston, D2295.

While the appellate court granted certiorari regarding paragraph 6 and required an in camera inspection of those



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documents, it ordered the production of paragraphs 3, 4, and 5; which Allstate had objected to on the basis that they were work product and that the request to discovery was irrelevant. Langston, D2295. While the Fourth District did not find that the claims manuals, standards, etc. were work product, the court did find that all of these documents were irrelevant to the lawsuit; especially where the Plaintiff had no claim whatsoever for bad faith or unfair claim practice against Allstate. Langston, D2295. Furthermore, the court noted that the Plaintiff did not even offer any explanation as to how these documents could be possibly relevant to her UM lawsuit.

The Fourth District, however, decided that even though this discovery was completely irrelevant, it was still discoverable because Allstate could not establish "material injury of an irreparable nature," i.e. threat of physical harm. Langston, D2295.

## SUMMARY OF ARGUMENT

The Fourth District recognized that the materials sought by the Plaintiff was completely irrelevant to her uninsured motorist claim against Allstate and that the Plaintiff's Complaint does not contain claims of bad faith or unfair claim practices. However, the Fourth District required the production of material, it acknowledged as completely irrelevant to the Plaintiff's claim, solely on the basis that the carrier had failed to prove irreparable harm. The opinion in Langston is in direct and express conflict with decisions out of this court and other



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district courts; has completely abrogated Florida Rule of Civil Procedure 1.280(b)(1); and involves a question of great public importance as irreparable harm is presumed from an Order to produce irrelevant discovery, especially where it is virtually impossible to show irreparable harm when the discovery sought is irrelevant to the litigation.

## ARGUMENT

THE DECISION BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH FLORIDA RULE OF CIVIL PROCEDURE 1.280(b)(1); THE DECISION OF THIS COURT IN KILGORE; BROOKS; MARTIN-JOHNSON, INFRA; AND THE DECISIONS OF THE DISTRICT COURTS IN EAST COLONIAL; MANATEE COUNTY; SALIDO, INFRA; AND PRESENTS A QUESTION OF GREAT PUBLIC IMPORTANCE REGARDING THE PRODUCTION OF CONCEDEDLY IRRELEVANT DISCOVERY AND THE INHERENT IRREPARABLE HARM IN HAVING TO PRODUCE THESE DOCUMENTS.

The Fourth District has created new law in abrogating Rule 1.280(b)(1), which states that "parties may obtain discovery regarding any matter, not privileged, that is **relevant** to the subject matter of the pending action...." The Fourth District ordered the production of discovery, such as general claims manuals, standards, etc., which the appellate court expressly found to be completely irrelevant to the pending uninsured motorist claim. The Fourth District asserted that it could do this because the insurance carrier failed to show "irreparable harm." However, harm is presumed when irrelevant discovery has been ordered to be produced. East Colonial Refuse Service, Inc. v. Velocci, 416 So. 2d 1276 (Fla. 5th DCA 1982). In East Colonial, the Fifth District found that common law certiorari was an appropriate remedy, in direct conflict with the Fourth



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District's finding in Langston, due to the irreparable harm involved when an order impermissibly grants discovery of an irrelevant item. In East Colonial, the production requested was completely irrelevant and even in Judge Dauksch's specially concurring opinion, while he expressed his reluctance to grant certiorari review for pre-trial orders, he found that certiorari was required in order to prevent the production of material that was irrelevant at the time of bringing the petition. East Colonial, 1277-1278.

It seems incredible that we must cite to this court cases that hold that only relevant discovery must be produced and that if the discovery order is in violation of the essential requirements of law, the reasonable result is injury to the defendant not subject to remedy by appeal. Kilgore, infra. Therefore, certiorari is the appropriate procedure to quash the production of irrelevant material. In Brooks v. Owens, 97 So. 2d 693 (Fla. 1957), this court relying on Kilgore, expressly found that certiorari was the proper procedure to review pre-trial discovery orders, noting that the rules of discovery were designed to secure the just and inexpensive determination of every action, but that did not mean, nor permit discovery merely to place one party in a more strategic position; there must be "some connection between the information sought and the action itself." Kilgore v. Bird, 149 So. Fla. 570, 6 So. 2d 541 (Fla. 1942); Brooks, 699. This court in Brooks, also recognized that if the order of the trial court was in violation of the essential



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requirements of controlling law, such as the Order in the present case requiring the production of concededly irrelevant discovery, "the reasonable result would be an injury to the defendant not subject to remedy by appeal." Brooks, 696. In other words, irreparable harm from having to produce irrelevant discovery was presumed, as reaffirmed 25 years later by the Fifth District in East Colonial.

Kilgore and Brooks formed the basis for the Supreme Court's decision in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987), which the Fourth District used to deny certiorari in Langston. Apparently, the Fourth District accepted Langston's argument that unless there was a threat of physical harm involved, certiorari could not be granted, even from a discovery order requiring the production of concededly irrelevant material. It is important to remember that Martin-Johnson involved a motion to strike a claim for punitive damages and the discovery sought was financial information. This court found that the litigants' finances were not the type of irreparable harm contemplated by the standard of review for certiorari. Going back to Kilgore, this court noted the difference between discovery orders which merely violate rules of evidence and those that could be corrected by reversal and those which violated some type of fundamental right causing harm that could not be remedied on appeal. Martin-Johnson, 1099. In the present case, the insurance carrier has the fundamental right to maintain the integrity of his entire business operation, which should not be



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subject to the type of fishing expedition the Fourth District has allowed. This is especially true when the Fourth District noted that it found the material irrelevant and even went further to note that the Plaintiff had offered no explanation whatsoever as to how all the procedure manuals, claims manuals, standards, etc., used by the insurance carrier were in any way relevant to the lawsuit. Langston, D2295.

It is respectfully submitted that to allow certiorari relief in the present case, where irreparable harm is presumed, is not violative of the standard set forth by this court in Kilgore, Brooks, or Martin-Johnson. Rather, this is the very type of harm envisioned by this court, when it referred to "cat out of the bag" material, that could be used by an unscrupulous litigant to injury another person or party outside the context of the litigation. Martin-Johnson, 1100. There simply is no reason in a routine uninsured motorist coverage case to reward the Plaintiff for requesting all the printed materials of the insurance carrier, on matters concededly irrelevant to the Plaintiff's claim. Apparently, the Plaintiff is seeking all standards, procedure manuals, etc. in hopes of discovering something that the Plaintiff can use against the insurance carrier in some later law suit; and this is exactly the type of material that should be protected under Martin-Johnson, Kilgore, and Brooks.

Furthermore, it is virtually impossible to establish irreparable harm when irrelevant discovery is required to be



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produced, since the Defendant has absolutely no way of knowing what the Plaintiff plans on doing with this irrelevant material, or how she is going to use it. This is not a situation like the one in Martin-Johnson, where financial information was being requested in order for the Plaintiff to recover punitive damages. Clearly, there the purpose of the information was understood to both sides, and financial information was relevant to the plaintiff's claim for punitive damages. In the present case, the Fourth District has found that all the materials required to be produced are irrelevant to the Plaintiff's claim. It is in this type of situation that irreparable harm must be presumed, as the Defendant has a fundamental right to prevent this type of unlimited expedition into all the printed materials of the Defendant's business.

It goes without saying that there are literally dozens and dozens of decisions involving a petition for certiorari where the first rule applied is whether the discovery is relevant and can reasonably lead to admissible evidence. Brooks, supra; Manatee County v. Estech General Chemicals Corporation, 402 So. 2d 75 (Fla. 2d DCA 1981)(we start our review by noting that discovery is usually permitted only on matters reasonably calculated to lead to admissible evidence). Therefore, the right to discovery does not extend to matters which are not directly relevant and which cannot reasonably lead to relevant matters. Manatee, 76; City of Miami v. Fraternal Order or Police, 346 So. 2d 100 (Fla. 3d DCA 1977); Hoogland v. Dollar Land Corporation, Ltd., 330 So.



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2d 509 (Fla. 4th DCA 1976); Travelers Indemnity Company v. Salido, 354 So. 2d 963 (Fla. 3d DCA 1978). In Manatee, because the questions were not relevant and could not lead to relevant matters, certiorari was granted and the discovery order was quashed. Manatee, 76. It is respectfully submitted that this is the correct procedure to use when the discovery involved is only admittedly irrelevant evidence. Even the Fourth District itself held that even when discovery was not confined solely to pending issues, a party could "fish," but this fishing must be within the limits stated by the Rules of Civil Procedure; citing the predecessor to Rule 1.280. Parker v. Parker, 182 So. 2d 498 (Fla. 4th DCA 1966).

The bottom line in this case is that the Fourth District has rewarded the Plaintiff's request for completely irrelevant material, which the Fourth District recognized as being totally irrelevant to the lawsuit, and it has allowed the Plaintiff to conduct a classic fishing expedition into files, manuals, procedures, standards, etc. of all insurance carriers, in any type of claims in hopes of being able apparently to find some type of basis for suing the insurance carrier for bad faith. This type of fishing expedition has never been allowed as a matter of established Florida law.

The more important question in this case however, is the Fourth District's abrogation of Florida Rule of Civil Procedure 1.280(b)(1), and its overruling of not only numerous cases out of the Fourth District, but the direct and express conflict with the



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decisions of this court and other courts which have recognized that the order to produce irrelevant discovery causes irreparable harm per se and the discovery Order must be quashed. Kilgore; Brooks; Martin-Johnson; East Colonial; Manatee; Allstate Insurance Company, Inc. v. Walker, 583 So. 2d 356 (Fla. 4th DCA 1991); State Farm Mutual Automobile Insurance Company v. Kelly, 533 So. 2d 787 (Fla. 4th DCA 1988); Zabner v. Howard Johnson's, Incorporated of Florida, 227 So. 2d 543 (Fla. 4th DCA 1969). There is now a decision on the law books, Langston, stating that in any standard uninsured motorist case, the carrier will be required to produce manuals, procedures, standards, etc. which are admittedly completely irrelevant. Of course, this would result in harassment to the insurance carrier, but more importantly Langston is in direct and express conflict with existing case law throughout Florida. It is interesting that the appellate court that is cited most frequently for its definition of relevance, in determining whether discovery should be produced or not, is the very same court that has now created new law by ruling that any type of irrelevant material must be produced, unless the party can show some type of irreparable harm apparently in the nature of a physical injury, based on this court's decision in Martin-Johnson. Langston, D2295; Zabner, supra.

It is respectfully submitted that the Fourth District has completely misconstrued this court's decision in Martin-Johnson, and that where totally irrelevant discovery is being sought, the presumption of irreparable harm arises and the discovery order



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must be quashed. Kilgore; Brooks; Martin-Johnson; East Colonial, supra. To hold otherwise would open a flood gate of discovery requests in every type of case, for material that is totally irrelevant to the litigation and certainly subject to being used by unscrupulous litigants to injure the opposing party, outside the context of the litigation; and cannot be quashed through a petition for certiorari unless physical danger or harm is involved. Certainly this was not the intent of this court in Martin-Johnson. The Langston decision, which sets extremely dangerous precedent regarding the production of all types of completely irrelevant material in any case, must be reviewed and reversed by this court. It is in direct and express conflict with the decisions of this court in Kilgore; Brooks; Martin-Johnson, as well as in direct and express conflict with East Colonial; Manatee; Salido; and numerous other cases holding that only relevant discovery must be produced.

## CONCLUSION

The Fourth District's decision in Langston is in direct and express conflict with the decisions of this court in Kilgore, Brooks, and Martin-Johnson, as well as in direct and express conflict with numerous district court decisions, and presents a question of great public importance involving the standard for certiorari review when the trial court has ordered legally irrelevant discovery to be produced. This court has jurisdiction to review the Fourth District's abrogation of Florida Rule of Civil Procedure 1.280(b)(1).



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of February, 1994 to:

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By: Richard A. Sherman
Richard A. Sherman

# APPENDIX

**Civil procedure—Discovery—In action for uninsured motorist benefits not alleging bad faith or unfair claims practices, trial court did not err in compelling insurance company to disclose internal memos regarding handling of uninsured motorist claims, latest claims manual on processing and handling of such claims, and copy of standards for investigation of claims where there was no basis in record for insurer's assertion that documents were work product or within attorney-client privilege—Insurer failed to demonstrate that disclosure of the materials may reasonably cause material injury of irreparable nature to support granting of writ of certiorari—Error to fail to conduct in camera review of correspondence claimed by insurer to be work product or within attorney-client privilege—Failure to timely assert attorney-client privilege during discovery does not prevent trial court's later in camera examination to determine applicability of privilege**

ALLSTATE INSURANCE COMPANY, Petitioner, v. JOYCE LANGSTON on behalf of minor child, SHANARD LANGSTON, Respondent. 4th District. Case No. 93-2354. L.T. Case No. 93-10397 21. Opinion filed October 27, 1993. Petition for writ of certiorari to the Circuit Court for Broward County; Miette K. Burnstein, Judge. Richard A. Sherman of Law Offices of Richard A. Sherman, P.A. and David L. Taylor of Law Offices of Leonard C. Bishop, Fort Lauderdale, for petitioner. Darryl L. Lewis of William N. Hutchinson, Jr., P.A., Fort Lauderdale, for respondent.

(PARIENTE, J.) Allstate Insurance Company requests relief by writ of certiorari from an order compelling discovery of materials claimed to be irrelevant and privileged.

The respondent, Joyce Langston, on behalf of her minor child, filed a complaint seeking uninsured motorist benefits for personal injuries resulting from a motor vehicle accident. The complaint does not contain claims of bad faith or unfair claims practices. The respondent requested production of the following documents as part of a multi-paragraph discovery request:

> 3. All internal procedural memos regarding the handling of uninsured motorist claims in effect during the last twelve (12) months.
>
> 4. Your latest claims manual on processing and handling of uninsured motorist claims in general.
>
> 5. A copy of your standards for the proper investigation of claims that were in effect at any time during the last twenty-four months (24) months.
>
> 6. All correspondence to or from anyone, including any insurance agencies, any doctors' offices, any employers, any agencies hired to select doctors for "independent medical examinations" and any law enforcement agencies for the uninsured motorist claim involved herein.

Petitioner filed timely objections to paragraphs 3, 4 and 5, asserting "work product, irrelevant, overbroad and vague" and raising a "work product" objection only as to paragraph 6.[1] The trial court overruled all objections finding that the request for production did not seek "any specific claims file, but the procedure followed in processing claims files in general."

The petitioner contends that the trial court compelled irrelevant and privileged discovery. We find no basis in the record for petitioner's assertion that the documents requested in paragraphs 3, 4 and 5 are work product or within the attorney-client privilege. We do agree that from the face of the request that the documents sought in paragraphs 3, 4 and 5, consisting of internal procedural memos, claims manuals and standards for proper investigation of claims, appear irrelevant to a lawsuit involving a claim for uninsured motorist benefits where no claim of bad faith or unfair claim practices has been made. The respondent has not offered an explanation regarding the purported relevancy of such discovery in this lawsuit. However, even if the discovery were irrelevant, that alone is not a basis for granting the extraordinary remedy of certiorari, unless the disclosure of the materials "may reasonably cause material injury of an irreparable nature." *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987). Petitioner has not demonstrated that the requested materials fall within this exception.

As to paragraph 6, the petitioner raised only a blanket work product objection. The record does not indicate whether a preliminary showing was made that any of the documents sought constituted work product; and if so, whether respondent made the requisite showing of need and inability to obtain the materials without undue hardship, as required under Florida Rule of Civil Procedure 1.280(b)(3). However, the trial court did not conduct an in camera inspection of the items claimed to be work product as required. *See Allstate Ins. Co. v. Walker*, 583 So. 2d 356 (Fla. 4th DCA 1991).

The petitioner also raises the attorney-client privilege. This claim is apparently being raised by petitioner for the first time in this petition for writ of certiorari. While failure to file timely objections ordinarily constitutes a waiver of most discovery objections, failure to assert the attorney-client privilege timely does not prevent a trial court's later in camera examination to determine if the privilege applies to specified documents. *Gross v. Security Trust Co.*, 462 So. 2d 580 (Fla. 4th DCA 1985).

Accordingly, certiorari is granted and the order under review is vacated in part insofar as it compels production of items in paragraph 6 claimed to be either work product or within the attorney-client privilege. The trial court shall conduct an in camera inspection of the specific items claimed by petitioner to be work product and attorney-client privilege in paragraph 6 without prejudice to the right of respondent to make the required showing of an exception to work product documents under rule 1.280(b)(3). (STONE and WARNER, JJ., concur.)

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[1]The respondent has indicated that the items sought in paragraphs 3, 4 and 5 may or may not exist. This court does not find objections of "overbroad" and "work product" raised about non-existent documents to be consistent with the good faith requirement underlying the discovery process. In an appropriate case, such conduct could be subject to sanctions.

* * *

**Torts—Product liability—Evidence—Expert witnesses—Exclusion of deposition of expert on football helmet device**

DONALD RAY ELDRIDGE, as Personal Representative of the Estate of JEFFREY A. ELDRIDGE, deceased, Appellant, v. RIDDELL, INC., Appellee. 4th District. Case No. 92-0875. L.T. Case No. 88-9358 AA. Opinion filed October 27, 1993. Appeal from the Circuit Court for Palm Beach County; Edward Rodgers, Judge. Joel D. Eaton of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., and Spence, Payne, Masington & Needle, P.A., Miami, for appellant. Francine D. Holbrook of Merritt, Sikes & Ennis, P.A., Miami, for appellee.

ON MOTION FOR REHEARING

[Original Opinion at 18 Fla. L. Weekly D1366]

(PER CURIAM.) We deny appellant's motion for rehearing. (GLICKSTEIN and FARMER, JJ., concur. WARNER, J., concurs specially with opinion.)

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(WARNER, J., concurring specially.) I withdraw my original concurring opinion and substitute the following in its place.

This is an appeal from a jury verdict in favor of Riddell, Inc., a sporting goods manufacturer, in a suit against it by appellant as personal representative of his son's estate. The son died as a result of neck injuries he suffered in tackling an opponent in a football game. Appellant claimed that Riddell had negligently failed to market an accessory chin roll to a football helmet which, if used, would have prevented the type of injury suffered by the