IN THE FLORIDA SUPREME COURT

CASE NO. 83,149

Florida Bar No. 184170

ALLSTATE INSURANCE COMPANY,

Petitioner,

vs.

JOYCE LANGSTON on behalf of minor child, SHANARD LANGSTON,

Respondent.

FILED
SID J. WHITE
JUL 18 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL
CASE NO. 93-2354

BRIEF OF PETITIONER ON THE MERITS
ALLSTATE INSURANCE COMPANY

(With Appendix)

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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); AND NUMEROUS DECISIONS OUT OF THIS COURT AND OTHER DISTRICT COURTS; 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

Overview

This is an ordinary automobile case involving a claim for uninsured motorist benefits. The sole issue below was whether there was UM coverage and there are no claims of bad faith. However, the Fourth District ordered the production of all types of irrelevant material in direct conflict with established law. This is one of the hundreds of cases where the Plaintiff requested voluminous documents and financial information allegedly to impeach the Defendant's medical witnesses and in hopes of stumbling upon some basis to sue for bad faith. These legal issues regarding the production of 1099s tax forms, patient lists, client lists, agencies hiring doctors to do IMEs, etc., are inundating our trial and appellate courts.

It should be bourne in mind throughout that in the Answer Allstate admitted there is coverage, and this is therefore a routine uninsured motorist case, with the only issues being routine liability and damage issues.

Langston is a case of first impression, involving the latest trend to use the discovery process in personal injury cases, to harass defendants, their insurance carriers, the IMEs physician, and sometimes even the plaintiff's own insurance carrier. Plaintiffs routinely are filing requests to produce clearly irrelevant, immaterial, and burdensome discovery, in order to extract settlements in cases and using them as a tool to force particular doctors from being involved in the judicial process at

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all by serving as independent medical examiners (IMES). The now routine requests for voluminous amounts of financial information, 1099s, income tax forms, client lists, letters to doctors who might do IMEs, etc., from any doctor who is planning on testifying for defendants, as well as requests for massive amounts of concededly irrelevant and immaterial discovery was spawned by the Fourth District's decision in McAdoo, infra.

Now the Fourth District has held in an ordinary uninsured motorist case where the issues are negligence and damages, and no bad faith is alleged, that the insurance carrier must produce all types of internal memorandums, claims procedural manuals, company standards, which the Fourth District recognized as totally immaterial and irrelevant discovery. Allstate Insurance Company v. Langston, 627 So. 2d 1178 (Fla. 4th DCA 1993).

It should be noted that most of the material could not even be used at trial and some is irrelevant, as noted in the decision. Similarly, the other matter discussed in this Brief, namely using a 1099 form to impeach an IME would be improper to use at trial, since it would be an improper attempt to impeach a witness on a collateral matter using extrinsic evidence.

This court now has the opportunity to put a stop to this widespread abuse of the discovery process in personal injury cases in Florida, which will result in judicial economy as well as substantial savings and economy in routine insurance litigation, to put discovery back on the right track and resolve the direct and express conflict; which requires reversal of the

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Fourth District's decision below.

Specific Facts

Langston was a passenger in a car hit by an alleged uninsured motorist. Langston sued Allstate Insurance Company and GEICO for uninsured motorist benefits. Allstate answered admitting that its policy provided UM coverage, that Langston was an insured under its policy with Mrs. Graves, but that Langston was not entitled to recover UM benefits for this particular accident, because of a dispute as to the value of the claim based on issues of negligence and damages.

Subsequently, Langston filed a Request to Produce to Defendant, Allstate Insurance Company, for:

> 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 (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, 1178.

Allstate filed timely objections to items 3 through 5 on the

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basis of work product privilege and relevance; and that the requests were vague and overbroad; and work product as to item 6. Langston, 1178-1179.

A hearing was held regarding Allstate's objections on July 6, 1993. The judge overruled Allstate's objections, finding that the requested production was not for the entire claim file, but for the procedure used in processing claims in general. Langston, 1179. In response to the judge's blanket Order overruling the objections to paragraphs 3, 4, 5, and 6, Allstate asserted again that the lawsuit did not involve any claims of bad faith, and that, even if it did, the claim file was still not "automatically discoverable."

The appellate court granted certiorari regarding paragraph 6, which requested letters to and from any doctor's office or agency hired to select doctors for independent medical exams. Langston, 1179. The Fourth District required in camera inspection of those documents first. It also ordered the production of all the items listed in 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, 1179.

The Fourth District did not find that the requested 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, 1179.

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Furthermore, the court noted that the Plaintiff did not even offer any explanation as to how these documents could be possibly relevant to her routine UM lawsuit. Langston, 1179.

The Fourth District, however, decided that even though the routine claims manuals, etc., were completely irrelevant, the documents still had to be produced because Allstate could not establish "material injury of an irreparable nature;" i.e., threat of physical harm. Langston, 1179.

Allstate petitioned for review of Langston on the basis that it was in direct and express conflict with Kilgore, Brooks, and Martin-Johnson, infra, as well as numerous district court decisions that have held that completely irrelevant discovery does not have to be produced, even absent a showing of irreparable harm. In addition, the Fourth District had abrogated Fla. R. Civ. P. 1.280; and the case involved a question of great public importance regarding whether irreparable harm is presumed from an Order to produce irrelevant discovery, especially where it is virtually impossible for the proponent to show irreparable harm where the discovery sought is irrelevant to the litigation. Moreover, if this decision in Langston is upheld, it will make routine uninsured motorist litigation much more expensive, needlessly. This court accepted jurisdiction to resolve the direct and express conflict, and now has the opportunity to rule in a case of first impression on the increasing trend to misdirect the discovery process; using it instead to harass defendants and insurance carriers in personal injury cases, to

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force settlements, to eliminate doctors from their participation in the judicial process, and to conduct fishing expeditions through an insurance carrier's business manuals, standards of procedures, etc., in the hopes of finding some basis to sue the carrier for bad faith.

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SUMMARY OF ARGUMENT

This is a routine case involving a claim for uninsured motorist benefits where the issues are solely negligence and damages, and no claims of bad faith are involved. However, following the current trend to use the discovery process as a tool to force settlement and to keep doctors from doing IMEs, the Plaintiff requested voluminous documents having nothing whatsoever to do with uninsured motorist coverage. The Fourth District recognized that the requested material was totally irrelevant, but ordered it produced anyway, because Allstate could not establish irreparable harm. Such harm is presumed when the discovery is not in anyway related to the Plaintiff's lawsuit and the Order below must be quashed.

The material ordered produced in this case, would not be relevant, as noted by the decision. Similarly, this Brief discusses the other "harassment discovery" situation that is now being used to harrass insurance carriers and IME doctors, namely production of 1099 forms. The 1099s would not be allowed as evidence at trial since they would be excluded as attempted impeachment of a witness on a collateral matter using extrinsic evidence, and are solely harrassment.

This court must put a stop to the ever increasing abuse of discovery in personal injury cases, which started with requests to produce 1099s and has escalated to include personal financial information of virtually any medical witness, as well as requests for all types of private and irrelevant business documents,

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procedures, policies, etc. The Fourth District started us down this slippery slope and it must end with reversal of the Fourth's latest decision in Langston.

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ARGUMENT

THE DECISION BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH FLORIDA RULE OF CIVIL PROCEDURE 1.280(b)(1); AND NUMEROUS DECISIONS OUT OF THIS COURT AND OTHER DISTRICT COURTS; 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.

This is a routine case involving a claim for uninsured motorist benefits where the issues are solely negligence and damages, and no claims of bad faith are involved. However, following the current trend to use the discovery process as a tool to force settlement and to keep doctors from doing IMEs, the Plaintiff requested voluminous documents having nothing whatsoever to do with uninsured motorist coverage. The Fourth District recognized that the requested material was totally irrelevant, but ordered it produced anyway, because Allstate could not establish irreparable harm. Such harm is presumed when the discovery is not in anyway related to the Plaintiff's lawsuit and the Order below must be quashed.

This is a case of first impression regarding the new trend to misdirect and subvert the discovery process, as it is now being used in personal injury cases as a tool to force particular doctors from being involved in the judicial process at all by conducting independent medical examinations, and/or to extract settlements in individual cases. LeJeune v. Aikin, 624 So. 2d 788, 790 (Fla. 3d DCA 1993), Chief Judge Schwartz specially

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concurring. The discovery process is being used in a two-fold manner to harass defendants, insurance carriers and the doctors who may become defense expert witnesses. They are being routinely bombarded with voluminous requests for financial discovery, 1099 forms, income tax forms, client lists, lists of insurance companies hiring doctors; as well as massive requests for insurance carriers to produce every piece of paper the insurance company uses in its business.

Little, if any, of this requested material has anything whatsoever to do with the personal injury case itself. Rather, it is a form of harassment which began with the Fourth District's decision in McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991) and has cumulated with the Fourth District's decision in Langston, which requires the production of admittedly irrelevant material contrary to established Florida law.

This court has the opportunity in this case of first impression to remind the trial bar of the purposes behind modern discovery and to reestablish that only relevant discovery must be produced. Plaintiffs are not entitled to fishing expeditions through the corporate papers of every insurance carrier and defendant, in the hopes of stumbling upon something that could form the basis for a later bad faith lawsuit. Nor are they entitled to every financial detail from the Defendant's witnesses. In one case, a plaintiff tried to obtain 1099s and personal financial information from her own treating physician, who was going to be a defense witness. State Farm Mutual

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Automobile Insurance Company v. Harris, Case No. 94-810 (Fla. 4th DCA, Petition filed March 24, 1994).

The abuse of the discovery process has grown so widespread and has gotten so far out of control that some appellate judges in the Third District and Fourth District are now writing opinions, stating that this discovery wildfire needs to be curbed. This case must be used to put the fire out and put us back on the track of real discovery, which has always been limited to only relevant evidence; and to remind us that discovery is not a device to be used to the harassment of the opposing party, nor as a device to prevent a defense in the case.

The improper discovery procedures being used fall into two categories. The first is requests to insurance carriers for their general claims manual, standards, procedures, etc., which are concededly irrelevant and completely unrelated to any uninsured motorist claim. Apparently, this discovery is an attempt to find some type of basis for suing the insurance carrier for bad faith. The second catagory includes the voluminous amounts of discovery directed at defendants, insurance carriers, doctors, doctors offices and agents, allegedly to impeach the doctor who has done the independent medical examination, will do the independent medical examination, or will be a defense witness at trial. We will address each one of the prongs separately, as both of them are implicated in the Langston case.

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Order to Produce Irrelevant Material Must be Quashed.

In a truly bizarre ruling, the Fourth District in this case expressly recognized that the documents sought in paragraphs 3, 4, and 5, consisting of the insurance company's internal procedure memos, claims manuals, standards for proper investigation of claims, etc., were irrelevant to the Plaintiff's UM claim; especially where there was no claim for bad faith or unfair claim practices made. Langston, 1179. In spite of this, the Fourth District still required the production of this completely irrelevant material, on the basis that the Defendant had failed to show irreparable harm from having to produce completely irrelevant material; expressly holding that although it is irrelevant, it nonetheless must be produced:

> The petitioner contends that the trial court compelled irrelevant and privileged discovery.
>
> * * *
>
> 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.
>
> Langston, 1179.

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This holding is in direct and express conflict with cases out of this court, cases out of the district courts, and with the Florida Rules of Civil Procedure.

The first reason why the discovery Order below must be quashed is that the information sought is totally irrelevant and immaterial to the personal injury lawsuit against the Defendant. The sole issues in this lawsuit are the issues of liability and damages, and the amount of uninsured motorist benefits, if any. The blanket discovery Order doing away with Allstate's privileges and compelling the Defendant to produce all procedural manuals, standards, etc. is therefore totally improper.

Therefore, this is improper discovery because it could not be at trial. The opinion expressly notes that it is irrelevant. Similarly, in the other "harrassment discovery" situation which is now frequently used to harrass the insurance company and the IME doctors, namely production of 1099 forms; the 1099 forms should not be used at trial to impeach the doctors, since it would constitute an improper attempt to impeach on a collateral matter using extrinsic evidence, and would result in a "mini-trial" on an improper matter. Doremus v. Florida Energy Systems of South Florida, Inc., 634 So. 2d 1106 (Fla. 4th DCA 1994).

The law is totally settled that only matters relevant to the subject matter of the litigation are discoverable. Hoogland v. Dollar Land Corporation, Ltd., 330 So. 2d 509 (Fla. 4th DCA 1976); Begel v. Hirsch, 350 So. 2d 514 (Fla. 4th DCA 1977), cert.

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denied, 361 So. 2d 830 (Fla. 1978); Graphic Associates, Inc. v. Riviana Restaurant Corporation, 461 So. 2d 1011 (Fla. 4th DCA 1984). It is also well settled in Florida that evidence is properly excluded that has no relevance to any issue in the case. Knight v. Empire Land Co., 55 Fla. 301, 45 So. 1025 (1908).

Furthermore, Fla. R. Civ. P. 1.280(b)(1) requires that matters sought to be discovered be relevant to the subject matter of the action. In the present case, there is absolutely no relevance whatsoever to memos, standards and claims manuals utilized by Allstate and the only legal issues in this lawsuit; which is whether there is UM coverage for this particular accident, and if so, how much. Even the Fourth District recognized this. Langston, 1789.

The Fourth District defined relevancy in Zabner v. Howard Johnson's Incorporated of Florida, 227 So. 2d 543, 544 (Fla. 4th DCA 1969) as follows:

> Relevancy describes evidence that has a legitimate tendency to prove or disprove a given proposition that is material as shown by the pleadings... Relevancy has been defined as a tendency to establish a fact in controversy or to render a proposition in issue more or less probable.

Similarly, the Florida Evidence Code, §90.401, states that relevant evidence is evidence tending to prove or disprove a "material fact".

The procedures used by Allstate (or any insurer) to process UM claims obviously have no relevance, nor are they material in any way to the Plaintiff's lawsuit. The issue below is liability

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and damages, and the amount, if any, recoverable. The office policies and procedures are not material or relevant to the defenses, that the benefits were recoverable from collateral sources, that the Plaintiff was comparatively negligent, etc.

Evidence as to immaterial matters is inadmissible for any purpose. Erp v. Carroll, 438 So. 2d 31 (Fla. 5th DCA 1983); Masker v. Smith, 405 So. 2d 432 (Fla. 5th DCA 1981). For more than 60 years, Florida case law has held that facts should not be submitted to the jury unless they are logically relevant to the issues in the case. Atlantic Coast Line R. Co. v. Campbell, 104 Fla. 274, 139 So. 886 (1932). Relevancy is the result of a relationship between an item of evidence and a matter properly provable in the case.

The test for admissibility is relevancy. The test of inadmissibility is the lack of relevancy. Reddish v. State, 167 So. 2d 858 (Fla. 1964); Johnson v. State, 130 So. 2d 599 (Fla. 1961); Dixie-Bell Oil Company, Inc. v. Gold, 275 So. 2d 19 (Fla. 3d DCA 1973).

The court in Zabner held that the admission into evidence of prior lawsuits filed by the plaintiff was reversible error, since the litigious nature of the plaintiff was not material or relevant to her personal injury claims. In Graphic, the court quashed a discovery order compelling production of corporate records and books; because the material sought was not relevant to any issue in the breach of contract action for lost profits. Graphic, supra. See also, Gribbel v. Henderson, 154 Fla. 78, 16

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So. 2d 639 (1944)(one could not have corporate books and records brought into court for inspection on nothing more than a mere suspicion that they contained evidence pertinent to the cause of action). Similarly in Jenkins v. State, 177 So. 2d 756 (Fla. 3d DCA 1965), it was held reversible error for the trial court to admit testimony regarding the defendant's pretrial statement; such testimony was immaterial and irrelevant to the issue of the defendant's guilt.

The Third District granted certiorari and quashed another discovery order as being overly broad and irrelevant in Cabrera v. Evans, 322 So. 2d 559 (Fla. 3d DCA 1975). In Cabrera, the interrogatories sought information as to the appellant's formal education, requested answers as to corporate structure, even though the plaintiff was an individual, and sought information as to the character of the neighborhood, where the incident took place. The Third District found that the interrogatories were so burdensome to the appellant as to be oppressive and that the trial court erred in overruling the appellant's objections to them. Cabrera, 560.

The court noted that there are limits to the trial judge's discretion in his order as to discovery procedure. See also, Orlowitz v. Orlowitz, 199 So. 2d 97 (Fla. 1967). Relying on its earlier decision in Dade County v. Jordan Marsh Company, 219 So. 2d 756 (Fla. 3d DCA 1969), the court approved the statement that under the Rules of Civil Procedure, discovery is not intended to be utilized for the purposes of exploring all minute details of a

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controversy, delving into immaterial and inconsequential matters, under the guise of discovery. Cabrera, 560; Travelers Indemnity Company v. Salido, 354 So. 2d 963 (Fla. 3d DCA 1978). In other words, no fishing expeditions are allowed.

It has been repeatedly held that items which would not be admissible at trial are not discoverable. In East Colonial Refuse Service, Inc. v. Velocci, 416 So. 2d 1276 (Fla. 5th DCA 1982), the court held that although the Rules of Civil Procedure generally provide for broad discovery in civil trial matters, discovery is not unlimited, but rather must be relevant to material issues and must lead to matters admissible at trial. In the present case, the discovery requested and ordered has no relevance to the personal injury action against Allstate and would not be probative of any issue at trial, nor admissible. Therefore discovery should not be allowed; especially where the discovery is apparently sought only for the Plaintiff to decide if she should sue the Defendant for bad faith, just as in State Farm Fire and Casualty Company v. Von Hohenberg, 595 So. 2d 303 (Fla. 3d DCA 1992).

In Von Hohenberg, the plaintiff was injured after being assaulted at her condominium. The insurance company for the condominium undertook an investigation of the woman's claim including surveillance of the plaintiff. Von Hohenberg, 303-304. Von Hohenberg then sued State Farm for invasion of privacy and State Farm had this claim severed from the personal injury suit. However, during the personal injury suit, Von Hohenberg moved to

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compel discovery from the insurance carrier requiring it to produce its claim file and everything that it contained including memorandums, etc. The trial judge at least agreed that the claim file and all the documents did not have to be produced during the personal injury suit, but required that it be produced once the personal injury trial was over. Von Hohenberg, 304. However, the judge ruled that State Farm would not be able to assert any work product or attorney/client privilege whatsoever regarding any of its files, documents or communications. Von Hohenberg, 304.

State Farm filed for certiorari review of the blanket discovery order stripping it of its work product and attorney/client privileges and the Third District Court of Appeal quashed the discovery order citing the Fourth's decision in General Accident Fire and Life Assurance Corporation, Ltd. v. Golding, 436 So. 2d 1108 (Fla. 4th DCA 1983). The Third District found that the order was so broad that it constituted a departure from the essential requirements of law. Von Hohenberg, 304.

As the Third District noted, whether all or a portion of the information sought by the plaintiff to be discovered was protected by work product or attorney/client privilege remained in question, since the judge had not seen a single document that he ordered to be produced. Von Hohenberg, 304. The Third District also noted that if certain of the information sought to be produced by the plaintiff was protected by work product, but not attorney/client privilege, the plaintiff had still failed to

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demonstrate that an appropriate showing of good cause had been made under Fla. R. Civ. P. 1.280(b). Von Hohenberg, 304; State Farm Mutual Automobile Insurance Company v. Kelly, 533 So. 2d 787 (Fla. 4th DCA 1988)(insurer entitled to certiorari relief from production of office files and documents based on privilege).

Just as Allstate has asserted in the present case, State Farm argued that the materials sought by the plaintiff were not relevant to the subject matter of the plaintiff's personal injury lawsuit against the insurance carrier, nor could it lead to admissible evidence. The Third District held that even if the material was relevant to the plaintiff's suit against State Farm and admissible or reasonably calculated to lead to admissible evidence, particular items of information sought to be discovered could still be privileged and therefore beyond permissible discovery. Von Hohenberg, 304; East Colonial, supra.

Finally, the Third District noted that the burden was on the plaintiff to overcome the work product objection by showing a need for the documents sought and demonstrating that the plaintiff was unable without undue hardship to obtain the discovery by any other means. Von Hohenberg, 304.

Underlying Von Hohenberg's claim for invasion of privacy of course was an alleged bad faith claim, which is why Von Hohenberg sought discovery of State Farm's claim file, documents, memorandums, etc. However, under similar circumstances to those in the present case against Allstate, the discovery order was held to be overbroad and was quashed. Von Hohenberg, 304.

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Nonetheless, it is totally settled law that any third party bad faith claim may not be litigated and discovery obtained, until after the bodily injury claim has been resolved and liability is established. That is because any alleged bad faith claim is not ripe at this point in the present litigation, where there has been no liability established and no judgment entered against the insurer. Blanchard v. State Farm Mutual Automobile Insurance Company, 575 So. 2d 1289, 1291, (Fla. 1991). Blanchard dealt with the issue of when an insured's first party claim for bad faith accrues in a UM case.

It was already totally settled law that a third-party, like Langston, has no right to bring any claim for bad faith or obtain any discovery until he has obtained a judgment against the insured. Fla. Stat. §627.726(2)(1989); Lucente v. State Farm Mutual Automobile Insurance Co., 591 So. 2d 1126 (Fla. 4th DCA 1992); Insurance Company of North America v. Whatley, 558 So. 2d 120 (Fla. 5th DCA 1990); Universal Security Insurance Company, Inc. v. Spreadbury, 524 So. 2d 1167 (Fla. 2d DCA 1988); Cincinnati Insurance Company v. Moffett, 513 So. 2d 1345 (Fla. 1st DCA 1987); Fla. Stat. §624.155(1989); Lucente, supra; Fortson v. Saint Paul Fire & Marine Insurance Company, 751 F.2d 1157 (11th Cir. 1985); Cardenas v. Miami-Dade Yellow Cab Company, 538 So. 2d 491 (Fla. 3d DCA), review dismissed, 549 So. 2d 1013 (Fla. 1989).

Therefore, any discovery sought for the purposes of an alleged later bad faith claim is not discoverable until the

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initial cause of action, out of which the bad faith allegedly arose, has been determined. Colonial Penn Insurance Company v. Mayor, 538 So. 2d 100 (Fla. 3d DCA 1989).

Florida Rules of Civil Procedure, 1.280 and 1.350, generally provide for broad discovery in a civil trial. However, this discovery is not unlimited. Although a liberal construction is to be given to the rules of discovery, and trial courts are granted broad discretion in discovery matters, such discovery must be exercised within the permissible scope of the discovery, as set forth in Rule 1.280(b). Argonaut Insurance Company v. Peralta, 358 So. 2d 232 (Fla. 3d DCA 1978); Hoogland, supra; National Convenience Stores, Inc. v. Embrey, 375 So. 2d 358 (Fla. 4th DCA 1979).

Even if the material sought through discovery was relevant to the subject matter of the case, and is admissible or otherwise, reasonably calculated to lead to admissible evidence in a case, particular items or information sought to be discovered may be privileged and beyond permissible discovery. Von Hohenberg, supra; East Colonial, supra; Florida Rules of Civil Procedure 1.280(b).

The Fourth District ignored all of this case law and ruled that irrelevant discovery must be produced if the Defendant could not establish irreparable harm. To date undersigned counsel has been unable to find a case in Florida that requires the production of irrelevant and immaterial discovery because the Defendant could not prove irreparable harm; let alone a threat of

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physical harm, which is the standard suggested by Langston.

In McAdoo, supra, the Fourth District opened the flood gates to massive amounts of litigation over discovery regarding 1099s, IRS forms, patient lists, clients lists, etc. Now the Fourth District has gone a step further and opened the gates further, allowing the Plaintiff to discover admittedly immaterial and irrelevant matters, and has permitted the classic fishing expedition, repeatedly condemned by this court.

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." Langston, supra.

However, harm is presumed when irrelevant discovery has been ordered to be produced. East Colonial, supra. In East Colonial, the Fifth District found that common law certiorari was an appropriate remedy, in direct conflict with the Fourth District's finding in Langston, due to the irreparable harm involved when an order impermissibly granted discovery of an irrelevant item. In East Colonial, the production requested was completely irrelevant. Even in Judge Dauksch's specially concurring

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opinion, which 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 is incredible that in this day and age we must cite this court's 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 was the appropriate procedure to quash the ordered production of the irrelevant material, contrary to the finding in Langston.

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 did it 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. As Judge Schwartz noted in LeJeune, current discovery in personal injury cases is being used as a strategic tool to gain an advantage over the opponent. LeJeune, supra. The irrelevant material ordered to be produced could not possibly further the real goals of

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discovery, which is the production of relevant evidence so that the case can be tried on its full merits.

This court, in Brooks, also recognized that if the order of the trial court was in violation of the essential requirement 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 is 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, which the Fourth District used to deny certiorari in Langston. Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987). 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 correctable on appeal and those which violated some type of

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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 its entire business operation, which should not be subject to the type of fishing expedition the Fourth District has allowed. This is especially true where 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 procedural manuals, claims manuals, standards, etc., used by the insurance carrier were in any way relevant to the lawsuit. Langston, 1179.

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 injure 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

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carrier in some later lawsuit; and this is exactly the type of material that should be protected under Martin-Johnson, Kilgore, and Brooks.

Furthermore, it is virtually impossible for a petitioner to establish irreparable harm, when irrelevant discovery is required to be 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. In this type of situation 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 petitions for certiorari, where the first test 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

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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 of Police, 346 So. 2d 100 (Fla. 3d DCA 1977); Hoogland, supra; 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 material. 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 rule that irrelevant evidence does not have to be produced has been restated again in three recent cases. Orange Lake Country Club, Inc. v. Levin, 19 Fla. L. Weekly, D612 (Fla. 5th DCA, March 18, 1994)(petition for certiorari granted, quashing order compelling production of documents which were irrelevant to the plaintiff's case; specifically relying on this court's decision in Martin-Johnson, for the policy that irreparable harm could result from the disclosure of information which could be used by an unscrupulous litigant to injure a party outside the context of the litigation; mere speculation by

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counsel as to possible uses of material sought in discovery does not stand as satisfactory evidence of relevance and ordered production of irrelevant evidence required the granting of certiorari and quashing of the discovery order); HTP Ltd. v. Lineas Aereas Costarricenses, S.A., 19 Fla. L. Weekly, D659 (Fla. 3d DCA, March 22, 1994)(granting certiorari and quashing discovery order because the items ordered to be produced were not shown to be reasonably related to any actual issue in the case), citing, Fla. R. of Civ. P. 1.280(b)(1); Krypton Broadcasting of Jacksonville, Inc. v. MGM-PATHE Communications Co., 629 So. 2d 852 (Fla. 1st DCA 1993)(information sought in discovery must relate to issues involved in litigation as framed in all the pleadings; discovery order requiring the defendant to produce documents was a substantial departure from the essential requirements of law where the plaintiff requested exhaustive biological information and voluminous documents having no relationship to the issues in the case).

It should once again be pointed out that no bad faith has been pled, and the only issues are the routine issues of liability and damages.

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. It has given permission to plaintiffs to conduct classic fishing expeditions into files, manuals, procedures, standards, etc. of all insurance carriers, in any

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type of claims, in hopes of being able apparently to find some type of basis for suing an 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 however is the Fourth District's abrogation of Florida Rule of Civil Procedure 1.280(b)(1), and the overruling of not only numerous cases out of the Fourth District, but the direct and express conflict with the decisions of this court and other courts; which have recognized that an 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 Insuance Company v. Kelly, 533 So. 2d 787 (Fla. 4th DCA 1988); Zabner, supra.

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 is simply more permitted harassment of defendants and insurance carriers by the Fourth District.

More important, Langston is in direct and express conflict with existing established case law throughout Florida. It is interesting that the appellate court that is cited more frequently for its definition of relevance, in determining whether discovery should be produced or not, is the very same

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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, 1179; Zabner and Martin-Johnson, supra.

It is respectfully submitted that the Fourth District has completely misconstrued this court's decision in Martin-Johnson. When totally irrelevant discovery is being sought, a presumption of irreparable harm arises and the discovery Order must be quashed. Kilgore; Brooks; Martin-Johnson; East Colonial; supra. To hold otherwise opens another flood gate to discovery requests in every type of case, for material that is totally irrelevant to the litigation, which could be used by unscrupulous litigants to injure the opposing party, outside the context of the litigation; and which Order could not 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, sets an extremely dangerous precedent, allowing the production of all types of completely irrelevant material in any case, and it must be reversed by this court. It is in direct and express conflict with the decisions of this court and other appellate courts, which conflict must be resolved by this court. Only relevant material should be subject to discovery in any case and there should be no requirement that irreparable harm be shown, to be protected from producing

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irrelevant material.

The McAdoo Morass

The other problem implicated in the Langston decision stems from the "1099" type request for correspondence to doctors, agencies selecting IMEs, etc. Again, this is just another example of the harassment technique being used in personal injury cases to virtually eliminate any real defense to the plaintiff's claims. What started out as a simple discovery procedure, allegedly to impeach IME physicians by use of 1099s, has mushroomed into voluminous requests for discovery of all types, of not only corporate information and financial information from doctors, but even requests for personal financial information. Furthermore, the requests to produce are being sent not only to the IME, but to any doctor testifying for the defendants, including treating physicians. Recently, jugdes in the Third and Fourth District Courts of Appeal have called for a re-evaluation and limitation on the discovery that has been spawned by the Fourth District's decision in McAdoo.

In McAdoo, the Fourth District opened Pandora's Box to discovery from independent medical examiners, who testify for defendants as experts at trial, regarding the IMEs' 1099s, IRS forms, billing information, the identity of the various insurance companies an IME might work for, attorneys who hire them, number of patients, etc. McAdoo, 1085. The court noted that resolution of the issue regarding this type of discovery was a balancing

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test between the competing interest of the relevancy of the discovery information sought, as information to impeach the medical expert opinion of the IME, against the burdensomeness of the production of the information, and whatever confidentiality interests of the doctor were involved. McAdoo, 1085; see also, North Miami General Hospital v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033 (Fla. 3rd DCA 1981). McAdoo resulted in a plethora of appellate court opinions and even more petitions for certiorari, as parties attempt to "impeach" medical expert witnesses with all types of financial, business and personal information, or to prevent them from testifying at all. LeJeune, supra.

After opening the door, the Fourth District has lately attempted to shut it, by calling for a limitation on the types of discovery plaintiffs are entitled to seek from the defense. Plaintiffs routinely claim that McAdoo requires everything they want be produced.

In the same year as McAdoo, in Dollar General, Inc. v. Deangelis, 590 So. 2d 555 (Fla. 3d DCA 1991), the Third District held that a physician's past work as a defense expert for any insurer or law firm was relevant on the issue of his credibility, as an expert witness for the defendant in a slip and fall; and that records of such work were discoverable, if not unduly burdensome to produce. Dollar General, 556. The Third District allowed the plaintiff to depose the doctor on remand, to inquire whether the records requested, particularly the 1099s, were in

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another form which would not be unduly burdensome to produce. Dollar General, 556. Therefore, on remand, if the IME physician could not show that it was burdensome to comply with the plaintiff's request, financial information would have to be produced, in order for the plaintiff to use this material as impeachment of the defendant's IME. Dollar General, 556.

The following year, four more cases addressed the McAdoo situation, where discovery was being sought of independent medical examiners, or the plaintiff's medical expert, who was going to testify at trial. In Wood v. Tallahassee Memorial Regional Medical Center, Inc., 593 So. 2d 1140 (Fla. 1st DCA) review denied, 599 So. 2d 1281 (Fla. 1992), the court held that the discovery order was appropriate and required all the plaintiff's non-treating medical expert witnesses, who would testify at trial, to produce for in-camera inspection their tax returns for five years; and all documents which revealed cases in which the expert had provided testimony in deposition, arbitration, mediation, or at trial, in five years. The court adopted the balancing test set out in McAdoo, and the Third District's decision in Dollar General. Wood, 1142. The First District agreed with the trial court that the past earnings and past testimony of non-treating medical experts were material matters subject to discovery; and were relevant issues for consideration, as to the credibility of the expert witness by the jury. Wood, 1142.

The Fourth District, again, in Lambe v. Dewalt, 600 So. 2d

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1201 (Fla. 4th DCA 1992), denied a petition for certiorari from financial discovery from an IME, based on the court's decision in McAdoo. Lambe, 1201.

Once again, in Crandall v. Michaud, 603 So. 2d 637 (Fla. 4th DCA 1992), the court again addressed the plaintiff's discovery directed to the defendant's IME. Crandall, 637. However, in Crandall, the court held that the IME was not required to comply with the discovery request; where the plaintiff was seeking reports on patients, which reports were prepared for defense firms or insurance companies, and narrative medical reports, rather than just financial disclosure. The court pointed out that, if the object is merely to show how beholden a physician is to the insurers and defense firms, because of the amount of business he receives from them, there are alternative ways of obtaining this kind of information, without delving into the medical records of other people. Crandall, 639.

The last McAdoo type case in 1992 was Bliss v. Brodsky, 604 So. 2d 923 (Fla. 2d DCA 1992), where the court held that based on Wood and McAdoo, defense counsel could inquire into matters pertaining to the person who had arranged for a physician to serve as an expert witness, as long as discovery was limited to financial arrangements, etc. Bliss, 924.

The 1993 McAdoo cases began with the decision in Young v. Santos, 611 So. 2d 586 (Fla. 4th DCA 1993). In Young, the court once again addressed the issue of how much and what type of discovery would have to be produced from the defendant's IME. In

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Young, the IME filed an uncontradicted affidavit that it cost nearly $10,000 to produce the payment records requested by the plaintiff. The trial court had ordered the payment of $400, which the appellate court held was insufficient. The doctor was ordered by trial court to produce copies of bills, checks, and payment records regarding medical exams done at request of insurance companies and law firms, as well as tax returns, for a three-year period. The doctor's overall income was held not discoverable and the court observed that other less intrusive means of discovering information should be explored first. Young, 587.

The court held that the production of the IME's personal tax returns was improper, because the IME had not relinquished his right of privacy entirely simply by becoming a potential witness in the litigation. Young, 587.

In Young, Judge Warner, in a specially concurring opinion, noted how the appellate courts, since the Fourth District's decision in McAdoo, have been bombarded with petitions for certiorari; directed to the discovery requests regarding income from litigation sources. Young, 587. Judge Warner advised that perhaps the trial bar needed to consider whether the expense was worth the information gained; and that over use of the discovery process was increasing exponentially the cost of litigation, which could end up destroying the process to the greater detriment of all the litigants. Young, 587-588. The present case is a perfect example of what Judge Warner's warning was

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about.

Several weeks after Young, the Second District held that IRS 1099 forms of IMEs' were subject to discovery as reasonably calculated to lead to relevant evidence concerning bias. Bissell Brother, Inc. v. Fares, 611 So. 2d 620 (Fla. 2d DCA 1993). On the other hand, the portion of the orders requiring the production of doctors' 1099 forms, appointment calendars for three years, and time records which did not exist, was quashed.

The Fourth District continued to be bombarded with petitions for certiorari, regarding McAdoo type of discovery; and the next case was Abdel-Fattah v. Taud, 617 So. 2d 429 (Fla. 4th DCA 1993). The court first found that certiorari review was appropriate, where the petitioner was not a party. The Fourth District held that a non-party, IME, was entitled to certiorari relief from a trial court order, compelling him to attend a deposition and to provide information as to the insurance company's/defense counsel's requested examinations done by him within a one year period prior to the deposition. Even though this procedure was suggested in Young, the court, in Abdel-Fattah, held that the non-party did not have to comply with the deposition ordered. Abdel-Fattah, 430. Once again, the Fourth District reminded the trial court that a reasonable cost had to be awarded to the non-party physician in order to comply the information sought by the plaintiff from this IME. Abdel-Fattah, 430.

The Third District in Trend South, Inc. v. Antomarchy, 623

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So. 2d 815 (Fla. 3rd DCA 1993) held that a physician IME was required to provide authorization to obtain 1099s directly from IRS, so that this financial information could be used to impeach the defendant's medical expert witness. The Third District ordered that the 1099 forms be sent directly to the trial court for an in-camera inspection, since they may contain information not relevant and privileged. Trend South, 816. In his dissenting opinion, Judge Jorgenson noted that the extent to which IME's must reveal personal data was not only implicating privacy interests, but the outer bounds of good taste as well. Trend South, 816. Judge Jorgenson observed that he would have granted certiorari and remanded for further development of the witness' alleged bias, before requiring production of personal financial information, such as the personal 1099 forms. Trend South, 817. Judge Jorgenson joined Judge Warner in her suggestion, that deposing the medical expert, and not the filing of the massive requests to produce, would be the preferred form. Trend South, 817.

As the abuse of the discovery process widened, the Fifth District in Winn-Dixie Stores, Inc. v. Miles, 616 So. 2d 1108 (Fla. 5th DCA 1993) held that treating physicians, unlike IMEs or a plaintiff's expert witness, were not subject to the voluminous discovery being directed to the medical experts for impeachment purposes, thereby holding that IMEs are subject to the harrassment discovery.

In Syken v. Elkins, 18 Fla. L. Weekly 2581 (Fla. 3d DCA,

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December 7, 1993), the plaintiff scheduled the deposition of the record custodian and bookkeeper of the defendant's orthopedic expert. The deposition sought required documentation of the income earned from the IME for a three-year period, as well as the percentages of IMEs performed, the amount charged for IMEs, the amount charged for reviewing medical records, impairment ratings, court appearances, attorney conferences, etc. Syken, supra. The trial judge even went to the extent of having the IME appear at an evidentiary hearing, to substantiate his affidavit as to the cost of producing all the requested information. Then the trial judge entered an omnibus order; requiring the IME to keep detailed records, including a list of every defense exam and the date, an accounting of every dollar billed for defense exams, including a breakdown of all charges with number of hours spent for medical review, trial testimony, travel, etc. The judge also ordered the IME to start listing every party billed for defense exams and testimony, whether the charges were paid by the attorney, the insurance company, or some other entity; and that noncompliance would prevent the expert from ever testify in that judge's courtroom. Syken, supra.

Not surprisingly the Third District quashed all portions of the court's order requiring the IME to create all of these new records of billings, etc. The court affirmed the doctor's assertion that requiring information presently contained in the doctor's files was over burdensome, and could not pass the test of relevancy versus burdensomeness set out in McAdoo. Syken,

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supra. Ultimately, the only thing that was required to be produced by the defendant's IME was the 1099s, for which a reasonable cost had to be paid to the defendant's IME physician.

Most recently, Chief Judge Schwartz, in a specially concurring opinion in LeJeune, supra, expressed his concern regarding the misdirection of discovery in personal injury cases; noting that the intrusiveness of this type discovery greatly outweighs its alleged value. LeJeune, 789. The facts in LeJeune involve a trial court order requiring the doctor to create records which could later be used to impeach the defendant's IME at trial. LeJeune, 789. In this case, the plaintiffs in this personal injury automobile accident sought discovery of the doctor's records, as well as records from the insurance company. LeJeune, 789. The petitioner's claim that compliance with the court's orders was unduly burdensome and the orders invaded the privacy rights of a doctor's patients. LeJeune, 789. Once again, the trial court had ordered an IME to create detailed records from the day following the court's order to the date of trial:

> "determining the source of doctor Ramirez' Professional Association's fees for professional services and the amounts of same for acting as an IME and/or expert witness," which records "shall be provided [to plaintiff's counsel] every 30 days until trial;" and to allow plaintiff's counsel, with a court designated party...to review the last 3 years of Dr. Ramirez' records by randomly selecting up to 500 files per year to determine if any [IME] report remains in said file and if so, whether said report was

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addressed to attorneys and/or insurance carriers.

LeJeune, 789.

The Third District noted that while there was case authority authorizing discovery of the income sources of IMEs in these personal injury cases under "certain limited circumstances," there was no authority requiring an IME to create in futuro records. LeJeune, 789. Additionally, there was absolutely no legal authority to allow a plaintiff's attorney to conduct an audit of an IME's patient files, without any notice to or consent of the parties involved, because such an audit clearly violated the statutory confidentiality of the file. LeJeune, 789.

The request to produce to the insurance carrier, to provide any supporting documents showing the amount of monies paid to IMEs and specifically the amount paid to the IME, in that case for the past three years was also quashed. The insurance representative established by testimony that a record was kept by the carrier as to the total amount of monies paid in professional fees, but no records were kept as to whom such money was paid and for what year. LeJeune, 789. The audit directed to the insurance carrier was quashed, with the court observing there was no legal authority to order the discovery of non-existent records. LeJeune, 789.

LeJeune clearly reached the outer boundaries of discovery and as Chief Judge Schwartz observed, legal opinions in this field, including the Third District's own decisions in Dollar General and Trend South, have gone much too far in permitting

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inquiry into private financial affairs of the physicians in question. LeJeune, 789. Chief Judge Schwartz observed that the intrusiveness of the discovery greatly outweighed its alleged value, because the information only served to emphasize a wholly unnecessary detail that everyone knows to be the case and that could be made apparent to the jury on the simplest cross examination. The fact that certain doctors are consistently chosen by a particular side in a personal injury case, to testify on its respective behalf, was a fact that could easily be brought to the attention of the jury without this voluminous, massive amount of intrusive and improper discovery. Defendants have been arguing this exact common sense principle since the decision in McAdoo came out.

Chief Judge Schwartz went on to note that he believed that the courts misbalanced the competing interest that would be served by granting discovery, or by denying it, with a possible result that the discovery process was being used improperly as a tool to force particular doctors from becoming involved in legal proceedings; or in the alternative to extract case settlements. LeJeune, 790. Chief Judge Schwartz ended his specially concurring opinion by noting that if appropriately presented in the future, he would re-examine the correctness of this line of appellate decisions. LeJeune, 790.

This court has the opportunity now to examine the entire trend and misdirection of discovery in personal injury cases in Florida, which caused this geometric increase in the judicial

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labor required to address the incredible discovery requests, under the guise that McAdoo allows anything and everything to be discovered from anybody in any personal injury case. The needless expenses of litigating even a standard automobile accident case have become vastly increased because of this discovery harrassment trend. The Langston opinion simply lends credence to this position, by requiring the production of completely irrelevant material from the insurance carrier. The McAdoo decision and the cases following it, up to and including Langston, show the trend to ask for any and all types of discovery for any reason whatsoever, even if completely unrelated to the lawsuit to the harassment of the opposing party, in an attempt to completely do away with the defense in personal injury cases.

Unfortunately, it is not in every case that the defendant, the doctor, or the carrier, has the authority or financial ability to appeal every single one of these harassing, burdensome, and overreaching discovery orders, that are routinely being filed in virtually every personal injury case in Florida. It is time for this court to put everyone back on track and remind the trial bar that it is only relevant discovery that should even be requested; that relevant discovery does not include invasion into the private finances of expert witnesses at trial; and that irrelevant evidence should never have to be produced. The Fourth District's decision in Langston must be reversed, with instructions that the trial court's Order

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requiring the production of concededly irrelevant and immaterial documents must be quashed.

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CONCLUSION

The Fourth District's decision in Langston is in direct and express conflict with the decisions of this court and other appellate courts as cited in this Brief; 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; and this court has jurisdiction to resolve the conflict and quash the Fourth District's abrogation of Fla. R. Civ. P. 1.280(b)(1).

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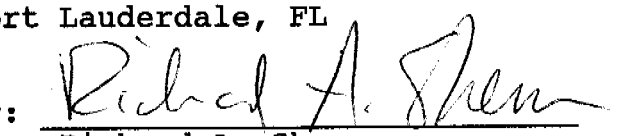
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of July, 1994 to:

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By: Richard A. Sherman
Richard A. Sherman

/mn

APPENDIX

ALLSTATE INSURANCE COMPANY, Petitioner,

v.

Joyce LANGSTON on behalf of minor child, Shanard LANGSTON, Respondent.

No. 93-2354.

District Court of Appeal of Florida, Fourth District.

Oct. 27, 1993.

Rehearing and Rehearing En Banc Denied Jan. 4, 1994.

Insured brought action against insurer to recover uninsured motorist benefits on behalf of child. The Circuit Court, Broward County, Miette K. Burnstein, J., overruled insurer's discovery objections. Insurer requested relief by writ of certiorari. The District Court of Appeal, Pariente, J., held that: (1) insurer was not entitled to relief as to internal procedural memos, claims manual, and copy of standards for investigation, and (2) trial court should have conducted in camera inspection of items allegedly protected by work product doctrine or attorney-client privilege.

Order vacated in part.

1. Certiorari ⇐17

Insurer failed to establish material, irreparable injury from granting to insured discovery of apparently irrelevant documents consisting of internal procedural memos, claims manual, and copy of standards for investigation of claims, and, thus, insurer was not entitled to certiorari.

2. Pretrial Procedure ⇐411

Trial court was required to conduct in camera inspection of items allegedly protected by work product doctrine or attorney client privilege. West's F.S.A. RCP Rule 1.280(b)(3).

3. Pretrial Procedure ⇐411

While failure to file timely objections ordinarily constitutes waiver of most discovery objections, failure to assert attorney-client privilege timely does not prevent trial court's later in camera examination to determine if privilege applies to specified documents. West's F.S.A. RCP Rule 1.280(b)(3).

Richard A. Sherman, Law Offices of Richard A. Sherman, P.A. and David L. Taylor, Law Offices of Leonard C. Bishop, Fort Lauderdale, for petitioner.

Darryl L. Lewis, William N. Hutchinson, Jr., P.A., Fort Lauderdale, for respondent.

PARIENTE, Judge.

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 tr
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graph 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."

[1] 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.

[2] 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).

[3] 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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David RAMBARRAN, et al., Appellants,

v.

BARNETT BANK OF SOUTH FLORIDA, N.A., Appellee.

No. 93–582.

District Court of Appeal of Florida, Third District.

Nov. 2, 1993.

An Appeal from the Circuit Court for Dade County; Rosemary Usher Jones, Judge.

Freedman & Verebay and Layne Verebay, North Miami Beach, for appellants.

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.

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