83,149

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.

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

REPLY BRIEF OF PETITIONER ON THE MERITS
ALLSTATE INSURANCE COMPANY

(With Appendix)

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REPLY ARGUMENT

Preface

The trend the last few years in personal injury actions has been discovery solely for the purpose of harassing the opposing side. It has become standard to seek harassment discovery from IME doctors of financial records and federal income tax returns of the doctors solely to harass them, and to seek confidential claims manual, claims handling memoranda, and even personnel files of insurance adjusters in routine cases where there is no coverage defense or bad faith claim, solely to harass the defendant.

The Third District sitting en banc issued the Syken v. Elkins, infra, decision to end the practice of harassment discovery in the jurisdiction of the Third District, and it is submitted that this is an appropriate point in time and an appropriate case for this Honorable Court to announce a rule of law for the state, and end the practice of harassment discovery, and return personal injury lawsuits to their proper purpose of litigating the issues of liability and damages.

Conspicuously absent from the Brief of Respondent is both a complete lack of any justification for the requested discovery and the total absence of any legal discussion whatever of the cases that are in direct and express conflict with Langston. Allstate Insurance Company v. Langston, 627 So. 2d 1178 (Fla. 4th DCA 1993); Brooks v. Owens, 97 So. 2d 693 (Fla. 1957); Kilgore v. Bird, 149 Fla. 570, 6 So. 2d 541 (Fla. 1942).

Also absent from the Brief of Respondent is any meaningful

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discussion or defense of 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 exams, and/or to extract settlement in individual cases. LeJeune v. Aikin, 624 So. 2d 788 (Fla. 3d DCA 1993). The discovery process is being used in a two-fold manner to harass defendant's insurance carriers and doctors, who may become expert witnesses at trial, and sometimes even including the plaintiff's own treating physicians. These entities are being routinely bombarded with voluminous requests for financial discovery, 1099 forms, income tax forms, client lists, lists of insurance companies hiring doctors, lists of companies doctors work for, as well as massive requests for insurance carriers to product virtually every piece of paper the insurance company uses in business.

Little, if any at all, of this requested material has anything to do with the personal injury case itself and the Third District en banc has put a complete stop to this "overkill discovery." Syken v. Elkins, 19 Fla. Law Weekly, D2109 (Fla. 3d DCA, October 5, 1994). In Syken, the court reversed the panel decision in Syken and quashed the discovery orders in that case and a companion case. The orders required production of documents of an IME's income, number of IMEs performed, amount charged, number of impairments, court appearances, conferences, names of every patient seen for an IME, bills to insurance

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carriers, journals, ledgers, and 1099 forms, etc. Syken, D2109-2110.

The Third District began its analysis with the following statements of Florida law on the two limitations to discovery:

> Florida Rule of Civil Procedure 1.280 allows for discovery of any matter, not privileged, that is relevant to the subject matter of the action. The scope of this rule, while recognized as being broad, Argonaut Ins. Co. v. Peralta, 358 So. 2d 232 (Fla. 3d DCA), cert. denied, 364 So. 2d 889 (Fla. 1978), is not without limitation. First, as the rule indicates, irrelevant and privileged matter is not subject to discovery. Fla. R. Civ. P. 1.280(b)(1). Second, the discovery of relevant, non-privileged information may be limited or prohibited in order to prevent annoyance, embarrassment, oppression or undue burden or expense. Fla. R. Civ. P. 1.280(c); 1.410(b)(d)(1); South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798 (Fla. 3d DCA 1985), approved, 500 So. 2d 533 (Fla. 1987); Dade County Medical Ass'n. v. Hlis, 372 So. 2d 117, 121 (Fla. 3d DCA 1979).
>
> Syken, D2110.

As correctly found in Syken, irrelevant material is not subject to discovery at all. Therefore, the decision below, now in direct conflict with Syken, is just plain wrong. Allstate did **not** have to prove irreparable harm to be entitled to certiorari relief. The discovery Order below deviated from the essential requirements of law and irreparable harm is presumed as irrelevant matter is never subject to discovery. Syken, D2110. The Opinion below must be quashed.

The Third District has now fully adopted Chief Judge

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Schwartz' specially concurring Opinion in LeJeune, supra, and Judge Jorgenson's dissenting Opinion in Trend South, Inc. v. Antomarchy, 623 So. 2d 815 (Fla. 3d DCA), review denied, 630 So. 2d 1103 (Fla. 1993). These are the very Opinions and legal reasoning Allstate has relied on in this case. It is respectfully submitted that the limitations imposed by the Third District fully comply with the law and spirit of modern discovery in Florida and support reversal of the Fourth District's Opinion below.

Syken has properly closed the floodgates opened by the Fourth District's decision in McAdoo, infra. The analysis and conclusion in Syken should be adopted by this court, as it strikes the proper balance required regarding discovery in personal injury cases.

The Respondent claims that there is no evidence that she plans to use the requested discovery in any other litigation, and says there is no basis for such an assumption by Allstate. Of course, that is the very problem with the case. The Plaintiff has not shown how in any manner whatsoever the requested discovery, including claims manuals, procedure manuals, memorandums, etc., is in any way related to this or any other lawsuit. The Petitioner can simply speculate that the material must be related to some other lawsuit because it clearly has no relevancy to this personal injury case whatsoever. Furthermore, the only other type of lawsuit that this information could be even remotely relevant to would be a subsequent bad faith suit

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against an insurance carrier, after having obtained a judgment in the personal injury case.

This court has the opportunity in this case of first impression to remind the trial bar of the purposes behind modern discovery and to re-establish that only relevant discovery must be produced, as the Third District had in Syken. 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 would later form a basis for a bad faith or some other unidentified type of lawsuit; nor are they entitled to every financial detail from the Defendant's witnesses. As aptly put in Syken:

> A review of decisions of other jurisdictions supports our conclusion. In Ex Parte Morris, 350 So. 2d 785, 787 (Ala. 1988), the Alabama Supreme Court reviewed an order compelling certain expert witnesses to produce their income tax records and other information regarding their sources of income. There, reversing the trial court's order, the court concluded that while the old cry of "fishing expedition" does not preclude inquiry into the facts underlying an opponent's case, there comes a point where "[I]nstead of using rod and reel, or even a reasonably sized net, [the requesting party] would drain the pond and collect the fish from the bottom." Id. (citation omitted), citing, In Re: IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D., 39, 42 (N.D. Cal. 1977).
>
> Syken, D2110-2111.

The Plaintiff claims that the relevancy of the discovery is completely unrelated to the issue on appeal. She asserts that once the Fourth District determined that Allstate had failed to

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prove irreparable harm under this court's decision in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987), the matter was closed. In other words, what the Plaintiff is arguing is that, even though the material she requested to be produced by the insurance carrier is completely and totally irrelevant to any issue in her personal injury lawsuit, it still must be produced because the Defendant is unable to show irreparable harm. She asserts that this court cannot look to "the merits" of her Request to Produce because it makes no difference what material is being requested if the Petitioner fails to show irreparable harm. This faulty reasoning cannot support the Fourth District's decision because if the Respondent were correct, it would give plaintiffs carte blanche to delve into the most minute details of the Defendant's life and business, on totally unrelated matters, simply to harass the Defendant; or in hopes of finding some basis for some other type of lawsuit.

The Plaintiff does not take issue with the wealth of Florida law that is totally settled that only matters relevant to the subject matter of 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. denied, 361 So. 2d 830 (Fla. 1978); Graphic Associates, Inc. v. Riviana Restaurant Corporation, 461 So. 2d 1011 (Fla. 4th DCA 1984); Syken, supra. Furthermore, Rule 1.280, requires that the matters sought to be discovered be relevant to the subject matter of the action. Syken, D2110.

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The Plaintiff's justification for ignoring all of this established law is that the court does not have to look to the fact that the material she requested is completely irrelevant, it simply has to find that the Petitioner failed to show irreparable harm; and therefore, the Plaintiff would be entitled to discover whatever irrelevant material she chooses. This simply cannot be the law in Florida. If it were, there would be no need for this wealth of case law and Rules of Civil Procedure limiting requested discovery to those matters which are relevant to the litigation.

Furthermore, the requested discovery cannot even lead to admissible evidence and so once again, there was simply no basis for the Fourth District to require its production.

The Fourth District ignored completely established Florida law and ruled that irrelevant discovery must be produced if the Defendant could not establish irreparable harm. As previously mentioned, undersigned counsel has been unable to find a single 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 physical harm, which was the standard suggested by the Plaintiff below. In other words, in the trial court, the Plaintiff argued that the insurance company would have to prove a threat of physical harm in order to establish irreparable injury; and in the absence of such evidence, the discovery, even if irrelevant, had to be produced. Apparently, the Plaintiff has abandoned this argument in the

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Supreme Court and is now simply arguing that the failure to prove irreparable harm means that irrelevant and immaterial discovery must be produced.

It is important to remember that the Plaintiff has not cited a single case to support her position. Rather, she simply takes issue with Allstate's reliance on East Colonial, infra, claiming there was no presumption of irreparable harm from the ordered production of irrelevant material. East Colonial Refuse Service, Inc. v. Velocci, 416 So. 2d 1276 (Fla. 5th DCA 1982). East Colonial is cited for the principle that due to the irreparable harm involved when an Order impermissibly grants discovery of a non-discoverable item, which would include irrelevant material, common law certiorari is the appropriate remedy to an Order compelling such production. East Colonial, 1277. Not only can this principle be inferred from East Coast; but, in fact, in footnote 1, this exact principle is cited by the Fifth District relying on two of its prior cases. East Coast, 1277; citing, Travelers Insurance Company v. Habelow, 405 So. 2d 1361 (Fla. 5th DCA 1981); Palmer v. Servis, 393 So. 2d 653 (Fla. 5th DCA 1981).

Even more recently, the Fifth District again upheld a denial of a request to produce irrelevant material, even where the plaintiff alleged that the requested discovery was relevant and necessary to proceed with their action. Orange Lake Country Club, Inc. v. Levin, 633 So. 2d 1148 (Fla. 5th DCA 1994). In fact, the Fifth District cited Martin-Johnson for the principle that irreparable harm could result from the disclosure of

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information which could be used by an unscrupulous litigant to injure a party outside the context of the litigation. Orange Lake, 1149. Again, the court is presuming irreparable harm from the fact that the litigant must disclose information, which is not relevant to the lawsuit and may be used to harm the party outside the context of the litigation. We could only assume that Langston has some plan for using this irrelevant material she seeks below and since she has not shared this plan with anyone, we can only presume that the information is being sought to be used in some manner to harm Allstate outside the context of this personal injury litigation, otherwise why would she want it?

The bottom line is, however, that when irrelevant discovery is being sought irreparable harm is presumed and certiorari is a proper remedy. In Orange Lakes, certiorari was granted and the production order quashed, just as it was in East Colonial, supra.

It is quite clear that if the Plaintiff has no plan for using this irrelevant discovery and she certainly has not given anyone even a hint as to why the discovery would be relevant to her current personal injury lawsuit, we are left to presume that the current discovery request is being used as a strategic tool to gain an advantage over the opponent, a practice condemned by the Third District in LeJeune and Syken, supra. The irrelevant material ordered to be produced by the Fourth District could not possibly further the real goals of discovery, which are the production of relevant evidence so that a case can be tried on its full merits.

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As previously noted, the Plaintiff has not addressed in any manner this court's decisions in either Brooks or Kilgore, supra. In Brooks, this court recognized that if the order of the trial court was in violation of the essential requirements of controlling law, such as the Order in the present case, where the court is 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 and this year in Orange Lake.

Contrary to the Respondent's repeated claim that certiorari can only be granted when irreparable harm is proved, there is an entire body of case law where certiorari relief was granted and no showing of irreparable harm was required. Richter v. Bagala, 19 Fla. law Weekly, D1817 (Fla. 2d DCA, August 24, 1994) (protection, through certiorari relief, of privileged information does not require a showing of irreparable harm beyond threat of disclosure itself); Kirkland v. Middleton, 19 Fla. Law Weekly, D1213 (Fla. 5th DCA, June 3, 1994); Manor Care of Dunedin, Inc. v. Keiser, 611 So. 2d 1305 (Fla. 2d DCA 1992); Boucher v. Pure Oil Co., 101 So. 2d 408 (Fla. 1st DCA 1957)(the "matter" subject to discovery are those substantial facts which form the basis of the plaintiff's claim, facts material to the issue; wrongfully requiring disclosure of matter not subject to discovery requires certiorari relief as petitioner is beyond relief).

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Furthermore, the Plaintiff has not explained how Allstate would have any remedy on appeal from the production of the irrelevant material to perhaps be used in a different lawsuit. Allstate would only be able to appeal the personal injury case. Since the information being sought is not relevant to the personal injury case, there would be no appealable issue for the Fourth District to review. Therefore, once again, the standard for certiorari has been met because there is no adequate remedy by appeal. Brooks, supra; Boucher, 410 (we conceive of no means by which appeal could extract from the respondent the knowledge gained from the defendant, for "the moving finger having writ moves on nor any appeal shall lure it back to cancel half a line.").

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 clearly analogous to the doctors being afforded the same protections from the "overkill discovery" in Syken, supra. 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 personal injury lawsuit. Langston, 1179.

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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, or the new restatement of these same rules in Syken. 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 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

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to the plaintiff's claim for punitive damages. In the present case, the Fourth District found that all the materials required to be produced are irrelevant to the Plaintiff's claim. Even at this stage of the proceedings, the Respondent has come forward with no reason whatsoever why she needs the requested discovery, or even what it is relevant to in this lawsuit. 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.

This court has the opportunity now to pick up the ball from the Third District and for the whole State to stop the trend and misdirection of discovery in personal injury cases in Florida, which caused an unprecedented geometric increase in the judicial labor required to address the incredible discovery requests by plaintiffs, under the guise that McAdoo allows irrelevant information to be discovered from insurance carriers and its witnesses in any personal injury case. McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991). The needless expenses of litigating a standard automobile accident case have become vastly increased because of this discovery harassment 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 and Syken, 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

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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 entered in countless personal injury case in Florida. Fortunately, those parties in Syken were able to appeal and ultimately prevail on this issue. 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 business affairs of insurance companies and not even the 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 requiring the production of concededly irrelevant and immaterial documents be quashed.

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CONCLUSION

The Langston opinion must be quashed as it is in direct and express conflict with cases out of this court and the Florida Rules of Civil Procedure.

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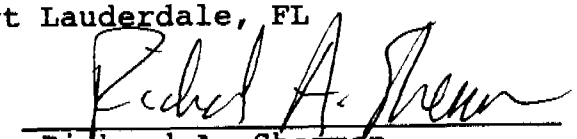
By: 
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APPENDIX

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 para-

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.

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.