IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,649

MAX ELKINS, et al,

Petitioners,

v.
ELISA SYKEN, et al,

Respondents.
_____/

PETITION FOR DISCRETIONARY REVIEW
ON CERTIFICATION OF CONFLICT
FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

AMICUS CURIAE BRIEF
OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION

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STATEMENT OF THE CASE AND FACTS

The Florida Defense Lawyers Association ("FDLA") hereby incorporates the Statements of the Case and Facts contained in the briefs filed by the respondents in this case.

Suffice it to say, for the purposes of this amicus brief, each case involved a situation in which the defendant obtained the appointment of a doctor pursuant to Rule 1.360 of the Florida Rules of Civil Procedure to examine the plaintiff in a personal injury action. Following that appointment, each of the plaintiffs in the court below (petitioners here) instituted broad based discovery addressed to the doctor in question. The discovery asked for an extensive variety of financial and documentary information concerning the doctor's previous relationships with insurance companies and/or defense law firms who had previously utilized the doctor's services to perform medical examinations pursuant to Rule 1.360. In each case, the trial court ordered the physician retained by the defendant to produce, create or retrieve significant data including 1099 forms and financial documents related to previous examinations performed by the doctors in question on behalf of other defendants (or other insurance carriers in other cases). In each case below, the affected doctor submitted an affidavit attesting to the difficulty (if not impossibility) in compiling or reconstruction of the information and records requested by the plaintiffs below.

SUMMARY OF ARGUMENT

The Florida Defense Lawyers' Association's interest in this case centers on the importance, independence and reasonable availability of the medical examination procedure spelled out in Rule 1.360 of the Florida Rules of Civil Procedure, separate and apart from the peculiar eccentricities of the cases before this Court. That medical examination process, already peopled frequently with court reporters, plaintiffs' doctors, plaintiffs' attorneys, plaintiffs' nurses, videographers or other representatives being present, and video tape or audio tape recorders being involved, now appears challenged by probing and widespread inquiries into the physician's own personal and financial records.

The FDLA does not suggest that information that bears upon a potential repetitive financial relationship between a doctor and the party requesting the examination is always irrelevant; the arguable relevance in some cases, however, in no way mandates that a third party doctor be required to produce extensive financial information to the limits of potential relevance when it is at best material only to a collateral impeachment issue. It appears to the FDLA that in the area of "independent" medical examinations under Rule 1.360, the pendulum has swung about as far away from independence as it can, and the system desperately needs an adjustment which preserves the availability of competent practicing physicians willing to perform such examinations.

The Third District, in its en banc decision, more reasonably and prudently addressed the issues of possible relevance versus abusive discovery by creating a carefully crafted accommodation of the legitimate interests of litigants in pretrial discovery. To avoid ever widening "trials within trials" concerning the painstaking and trivial details of an expert's financial life, the court's opinion below reasonably protected the examined party's interest in obtaining evidence concerning bias of the examiner, while creating (or preserving) a system which allows a climate in which competent examiners may be willing to provide their services as examining physicians under Rule 1.360.

The FDLA will decline the opportunity to take a position on the issues raised that have no significant policy considerations, but would note that, in the Syken case, the defendant had full and complete authority under the Florida Rules of Civil Procedure and proper practice to raise the issue of the breadth of the subpoena addressed to the independent medical examiner that had been retained by that party. To require the examining physician to retain his or her own attorney to fight the ever-widening disputes on discovery is yet another subtle, if not insidious, attempt to destroy the availability of independent examiners, and to require a party's attorney to appear in the name of the examiner in response to a plaintiff's subpoena, only to create further avenues of cross-examination by the party's attorney being deemed the "examiner's own" attorney, is bad practice and bad policy.

The decision of the Third District en banc should be affirmed.

ARGUMENT

POINTS ON DISCRETIONARY REVIEW (RESTATED)

POINT I

THE DISTRICT COURT'S UNANIMOUS EN BANC DECISION PROPERLY DESCRIBES THE APPROPRIATE SCOPE OF AND PROCEDURE FOR DISCOVERY THAT WILL BE ALLOWED FROM A DOCTOR WHO IS APPOINTED PURSUANT TO RULE 1.360 TO PERFORM AN INDEPENDENT MEDICAL EXAMINATION ON AN INJURED PARTY.

A. The basis of the FDLA's interest in these consolidated cases.

The interest of the FDLA in this case relating to discovery addressed to court appointed or independent medical examiners is simple. The procedures provided in Rule 1.360, Florida Rules of Civil Procedure, constitute a vital means by which a defendant can test the bonafides of a plaintiff's claim, as well as challenge it in court in the event the independent examiner disagrees with the plaintiff's physician. (The history and the purpose of the Rule is set forth in greater detail in the subsequent section of this brief.)

In recent years, the procedures in using an "independent" or "court-appointed" physical examination have changed considerably. In addition to the process now providing more or less explicitly

that the examining physician is the "defendant's" physician[1], the process itself has been subjected to a number of conditions which have significantly changed the "independence" of the examination process. These changes include requests, frequently successful, to have the plaintiff's lawyer present, to have the plaintiff's personal physician present, to have a court reporter present, to have the examination recorded on audio tape and/or to have the examination reported on video tape. See Bartell v. McCarrick, 498 So.2d 1378 (Fla. 4th DCA 1986) (attorney or physician present); High v. Burrell, 509 So.2d 385 (Fla. 5th DCA 1987) (counsel and court reporter present); Stakley v. Allstate Insurance Company, 547 So.2d 275 (Fla. 2d DCA 1989) (court reporter present); Collins v. Skinner, 576 So.2d 1377 (Fla. 2d DCA 1991) (court reporter present); Doucet v. Big Ben Moving & Storage, Inc., 581 So.2d 952 (Fla. 1st DCA 1991) (attorney present); Medrano v. BEC Construction Corp., 588 So.2d 1056 (Fla. 3d DCA 1991) (audio tape); F.M. and L.M. v. Old Cutler Presbyterian Church, Inc., 595 So.2d 201 (Fla. 3d DCA 1992) (video tape); Stressman v. Lefler, 597 So.2d 308 (Fla. 2d DCA 1992); Wilkens v. Palumbo, 617 So.2d 850 (Fla. 2d DCA 1993). See also Cline v. Firestone Tire & Rubber Co., 118 F.R.D. 588 (S.D.W.Va. 1988) (attorney present); Wheat v. Bieseker, 125 F.R.D. 479 (N.D.Ind. 1989) (attorney present); Di Bari v. Incaica Cia Armadora, F.A., 126 F.R.D. 12 (E.D.N.Y. 1989) (attorney and court reporter present); Tomlin v. Holecek, 150 F.R.D. 628 (D. Minn.

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[1] From time to time in this brief, the requesting party is referred to as the defendant and the examined party is referred to as the plaintiff. Under Rule 1.360 the parties can just as easily be reversed.

1993) (attorney or tape recorder); Sanden v. Mayo Clinic, 495 F.2d 221 (8th Cir. 1974) (plaintiff's own doctor present).

Faced with a legal climate in which plaintiffs' attorneys seek to condition the "independent" examination by their opponents with the presence of observers or recording devices, and faced with increased reluctance by physicians to subject themselves to such "presences" during examinations, the FDLA is sensitive to any other conditions which are sought to be imposed upon the process of obtaining independent medical examinations, especially those which are particularly likely to cause further reluctance and hesitance on the part of qualified practicing physicians to participate in the process.

B. Importance of Independent Medical Examination.

Rule 1.360 of the Florida Rules of Civil Procedure, in its earlier form, was based upon Rule 35 of the Federal Rules of Civil Procedure and provided for the examination of persons whose physical or mental condition was in controversy. As originally crafted, the rule provided for a court-appointed physician, presumably named by the court in its order. The reasons for the court-ordered intrusion into a claimant's privacy were (1) that it allowed both parties equal access to medical evidence usually in the exclusive control of a single party, (2) that it exposed malingering, and (3) that it allowed the court and the parties access to the true facts of the physical condition of the examined party, thereby insuring the just, speedy, and inexpensive determination of the case. See Barnet, Compulsory Medical Examinations Under the Federal Rules, 41 Va.L.Rev. 1059, 1060-61

(1955); Wright & Miller, Federal Practice & Procedure Civil, § 2231 at p. 664; 23 Am.Jur.2d Depositions and Discovery, § 282 at p. 590; Hardy v. Riser, 309 F. Supp. 1234 (N.D.Miss. 1970).

In 1988, the Florida rule on compulsory physical examinations was amended and the procedure was changed to spell out that the selection of the doctor, at least initially, was specifically to be made by the party requesting the examination. Presumably, the thought was that the defendant, having had no say in the determination of which physician a plaintiff chooses, should be allowed in the ordinary course to select his or her own physician so as to provide for a level playing field between the parties. See Looney v. National Railroad Passenger Corp., 142 F.R.D. 264 (D.Mass. 1992). In short, the previously "neutral" doctor selected by the court was transformed in 1988, to some extent, into a retained expert.

Courts no longer being able, or willing, to select physicians for compulsory physical examinations, the issue before this Court has now devolved into to what extent can the examined party influence the selection of or the effectiveness of the examining physician through the utilization of wide, sweeping financial discovery aimed at particularizing, detailing and itemizing the relationship between the examining physician and either the insurance industry or the defense bar or both. It is respectfully suggested to this Court that the pendulum has swung too far in favor of the plaintiff (examined party), threatening both the independence of any medical examination, as well as the availability of competent physicians to perform such examinations.

It is urged that this Court approve the carefully modulated unanimous en banc decision of the Third District, center the pendulum, and return the playing field to a somewhat more level condition.

As this Court is painfully aware, the last several years in Florida have yielded a spate of appellate decisions which have wrestled with a host of issues concerning the extent to which the examined party may seek detailed financial, personal, and medical record discovery from the physicians selected by the defendant. See, e.g., State Farm Mutual Automobile Insurance Co. v. Gray, 546 So.2d 36 (Fla. 3d DCA 1989); McAdoo v. Ogden, 573 So.2d 1084 (Fla. 4th DCA 1991); Dollar General, Inc. v. DeAngelis, 590 So.2d 555 (Fla. 3d DCA 1991); Wood v. Tallahassee Memorial Regional Medical Center, Inc., 593 So.2d 1140 (Fla. 1st DCA 1992); Lambe v. DeWalt, 600 So.2d 1201 (Fla. 4th DCA 1992); Crandall v. Michaud, 602 So.2d 637 (Fla. 4th DCA 1992); Young v. Santos, 611 So.2d 586 (Fla. 4th DCA 1993); Bissell Bros., Inc. v. Fares, 611 So.2d 621 (Fla. 2d DCA 1993); Gold, Vann & White, P.A. v. DeBerry, 639 So.2d 47 (Fla. 4th DCA 1994). See also Bliss v. Brodsky, 604 So.2d 923 (Fla. 2d DCA 1992) (Financial discovery appropriate to ascertain financial arrangement between plaintiff, plaintiff's expert and intermediary arranging for the expert); Winn-Dixie Stores, Inc. v. Miles, 616 So.2d 1108 (Fla. 5th DCA 1993) (Defendant precluded from obtaining financial discovery from plaintiff's treating physician).

Prior to the en banc decision below, certain members of the Third District questioned the wisdom of the body of law allowing broad and at times almost unlimited discovery into the financial

documents and records of supposedly independent medical examiners appointed under Rule 1.360. See Trend South, Inc. v. Antomarchy, 623 So.2d 815 (Fla. 3d DCA 1993); (Jorgensen, J. dissenting); LeJeune v. Aikin, 624 So.2d 788 (Fla. 3d DCA 1993) (Schwartz, C.J. specially concurring).

The FPLA's overriding interest in these issues is that there be an adequate supply of competent and experienced physicians who are willing, for a fee, to conduct "independent" medical examinations pursuant to Rule 1.360. This group of physicians is necessary to insure that defendants in litigation can have equal access to medical information, to insure that baseless claims are resisted and meritorious ones resolved, and to promote the "just, speedy and inexpensive determination of every action." Rule 1.010, Florida Rules of Civil Procedure.

While the undersigned is aware of no comprehensive body of scientific data sufficient to support the creation of a "Brandeis Brief" on this issue, it is respectfully suggested to this Court that anecdotal evidence and the concentration of independent examinations into a relatively small number of physicians is more than adequate to support the proposition that the seemingly coordinated actions of the plaintiffs' bar on the issues of how independent examinations are conducted and what information may be obtained from the examining physician are having the effect they desire of severely restricting the number of doctors who will perform such examinations. It is suggested to this Court that that result in no way furthers the ends of justice and should be undone if at all possible.

At Page 5 of the panel opinion in the Syken case, the court noted that the parties agreed that financial information concerning the examining physicians' IMEs performed for insurance companies was both "relevant and discoverable". While the FDLA acknowledges that a witness' financial relationship to one of the parties can be a basis for arguing bias, that possibility should not lead to an immutable rule requiring the discovery of every possible shred of such information.

It must be remembered here that the potentially exhaustive information requested by the plaintiffs below is not directed to a party in a lawsuit so as to test that party's claim for damages. Rather, it is an attempt to force disclosure of significant personal and financial information on what is at best a collateral issue - the potential bias of a court-appointed physician who is examining an injured party in an attempt to ascertain the extent, if any, of injury.

While some courts struggle to keep the increasingly adversary tone out of the independent medical examination arena (and the FDLA thinks properly so, see, e.g., McDaniel v. Toledo, Peoria & Western Railroad Co., 97 F.R.D. 525 (C.D. Ill. 1983)), the judicial construct in place before the en banc decision below with respect to the forced disclosure of personal and financial information from independent medical examiners put the physicians on the front lines of the litigation. Indeed, as evidenced by the many cases generated of late in this field, this area of the law is spawning significant lawsuits within lawsuits.

It is believed that Florida courts support the creation and

maintenance of a system which allows parties to obtain competent physicians to examine opposing parties when appropriate, and are committed to the establishment of a system that promotes the fair and just resolution of disputes. In that light it is respectfully suggested to this Court that the marginal benefit which may be obtained by the forced documentary production of specific dollar and cents information from 1099s or income tax returns[2] is outweighed by the damage to the system of court-ordered examinations under Rule 1.360, as well as by the distress that it causes to the personal financial privacy interests of the physicians involved. Although modern discovery at times favors the production of routine documentation as a prelude to the more expensive practice of taking depositions, it appears that in the context of the issue before this Court, the guidelines created below will, in virtually all cases, establish for the examined party a sufficient basis to put before the jury the relationship with the insurance industry[3] or the defense bar which would allow

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[2] With respect to the issue in the Plaza case of the production of income tax returns containing potentially sensitive and personal information unrelated to income generated from independent medical examinations, the FDLA incorporates the argument of the respondent's counsel in the Plaza case.

[3] Although perhaps not directly raised by the issue of the discoverability of the extent of an examining physician's relationship with the insurance industry, the use of such information at trial could also be a vehicle or device to avoid the proscription of Florida Statute § 627.4136 and the exclusion of evidence concerning liability insurance from most personal injury lawsuits. Hence its discovery does not necessarily lead to admissible evidence.

the inference of a biased examiner[4].

C. Guidelines in the Decision Below are Proper and Reasonable.

It is the belief of the FDLA that the guidelines established by the unanimous en banc decision of the Third District are a carefully measured response to the clamor for unlimited and sometimes oppressive discovery on the one hand and complete financial privacy on the other. The guidelines allow the deposition of the medical expert, and the discovery of the details of the agreement for any compensation, the nature of the expert work that the expert does, the percentages of such work performed for plaintiffs versus defendants, the approximation of the portion of time or work spent in such expert services, and the cases in which the expert has actually testified. These guidelines do not constitute some irrational limitation on the trial court's discretion, but instead seek to channel it in the best interests of the entire judicial system. The trial court is also allowed, under the most unusual or compelling circumstances, to permit

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[4] Other courts, when considering the question of the balancing of these adversarial interests, have come to the conclusion that the utilization of the less intrusive device of discovery deposition is preferable, at the outset, to the broad sweep of an intrusive inquiry into personal and financial records. See Allen v. Superior Court of Contra Costa County, 198 Cal. Rptr. 737, 151 Cal. App. 3d 447 (1st DCA 1984). Should the doctor so deposed avoid answering questions which establish the qualitative nature of his or her relationship to the insurance industry or the defense bar, then, upon request to the court, more intrusive discovery could easily be ordered. The substantive interests of the examined parties in trying to establish bias would be reasonably preserved while the legitimate sensitivities of the physician would be protected in the vast majority of cases.

discovery to go into additional business records and may, at the trial court's discretion, apply such sanctions as may be necessary to control a recalcitrant witness.

As importantly, the guidelines are even-handed. They apply not only to plaintiffs' efforts to discover information from defendants' experts, but also to defendants' attempts to discover financial information from plaintiffs' experts. No reason exists to make such discovery one way only because the issues of potential bias, in the real world, may be as troublesome, regardless of the source of the original retention of the expert.

Again, although sensitive to and supportive of the concerns of individual physicians with respect to the forced disclosure of massive financial information on collateral issues, the primary motivation of the FDLA is the establishment of a system that insures the continued availability of competent independent medical examiners. When the McAdoo case first opened the flood gates of requests for the sorts of information seen in the two cases consolidated before this Court, the Florida Bar Journal published an article addressing the future effect of such discovery. Snowden, Discovery of Medical Experts' Records In Connection With Compulsory Medical Examinations, Florida Bar Journal, January, 1992 at 50. That article concluded that plaintiffs had been given a new and powerful tool, but cautioned that there existed the potential for overreaching. The final sentences of that article presaged the FDLA concern:

> Without proper controls, the effect of the law on defense-appointed medical examiners can severely burden them in their personal and

> professional lives. A result of this could be the refusal of defense experts to conduct medical exams, thereby leaving the defense and the plaintiff lacking the necessary information to develop and resolve issues essential to disposition of claims. Id. at 52.

For the reasons set forth in this Amicus Brief, as well as those advanced in the various briefs submitted by the respondents in this case, it is respectfully urged by the FDLA that this Court affirm the decision below and ratify the procedures and guidelines carefully crafted by the unanimous en banc decision of the Third District in this case.

POINT II

THE OVERBREADTH OF DISCOVERY ADDRESSED TO A COURT-APPOINTED PHYSICIAN CAN PROPERLY BE RAISED BY THE ATTORNEY FOR THE PARTY WHO OBTAINED THE PHYSICIAN'S APPOINTMENT.

As noted above, and unlike the Academy's Amicus Brief, the FDLA declines to argue each point which may, on the facts of either case, support a conclusion that would justify the issuance of the writ of certiorari in the lower court. The FDLA feels that, as an Amicus, its appearance before this and other courts in Florida is not to "win" cases for "defendants", but rather to assert its legitimate interest on matters of statewide concern and let the "wins" or "losses" abide the result.

In the Academy's brief, however, it raises one other point which could have broader significance, and that is its Point III dealing with whether Syken, the party, had standing to question the breadth of the subpoena addressed to her independent medical examiner. While it is not believed that this issue has been properly preserved for Supreme Court consideration (see Syken's brief at 14), in the event this Court does consider the issue, there appear to be several policy questions that should be addressed.

At its most basic, it is the position of the FDLA that no procedural or practical purpose is furthered by forcing a court-appointed, independent or retained medical expert to hire his or her own counsel to resist the blunderbuss type of discovery which was asserted against the retained expert or independent medical examiner in each of these two cases.

In each case, the argument concerning the overbreadth of the discovery was asserted by the attorney for the party who obtained the appointment of the expert in question. In one, the examiner's name was included on the motion for protective order, and in the other it was not. The distinction is one without any significant difference and is not and should not be required under Florida law.

At its simplest, Rule 1.410(b) of the Florida Rules of Civil Procedure does not limit or restrict the parties (or non-parties) that can make a motion with respect to the breadth of a subpoena. Similarly, Rule 1.280(c), formerly Rule 1.310(b), provides:

> Upon motion by a party, or by the person from whom discovery is sought, and for good cause shown, the court in which the action is

> pending may make an order to protect a party or person....

These rules could not be clearer and, under Florida law, have been so construed.

In the case of Sunrise Shopping Center, Inc. v. Allied Stores Corp., 270 So.2d (Fla. 4th DCA 1972), the Fourth District carefully considered a motion filed by the party, but directed to a subpoena to a non-party witness. Although the Academy would wish to construe this case as having dealt with a motion filed on behalf of a non-party witness, the court clearly, on page 33 and twice on page 34, acknowledged that it was dealing with the question of a party's standing to seek an order addressed to a third party and expressly held and concluded that the defendants (parties) had standing to seek such an order. A similar result, dealing with a parallel statute, was reached by the First District in State of Florida, Department of Highway Safety and Motor Vehicles v. State of Florida, Career Service Commission, 322 So.2d 64 (Fla. 1st DCA 1975).

Not only is this result clearly mandated by the express terms of the Rules of Civil Procedure, as noted by the Fourth District, it:

> ...accommodates a practical approach to the not unusual situation where a witness, served with a subpoena duces tecum which he feels to be unreasonable and oppressive, will simply complain to the other party of the hardship, and that party in turn will more likely than not present the issue to the court without the necessity of the witness being put to the trouble and expense of presenting a motion on his own behalf. (270 So.2d at 34)

See also "Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas", 1987 Duke L.J. 140, 146.

It is respectfully suggested to this Court that the legitimate interests of a court system in having interested parties appear before it on matters raised in legal proceedings is amply protected by the party who obtains the appointment of a court-appointed physician being allowed to question the overbreadth of discovery addressed to that expert. If such an approach is not allowed, in the face of the Rules of Civil Procedures and the foregoing authorities, it would again add a significant impediment to a party's ability to obtain qualified physicians willing to perform this service and could easily be construed as another effort to restrict defendants from learning the nature of their opponents' cases through the free and unfettered use of a Rule 1.360 examination.

For the reasons set forth in this section of this Amicus Brief, it is respectfully urged to this Court that it expressly approve the practice of parties being allowed to question the breadth of discovery addressed to a court-appointed or other retained expert without the requirement that that expert appear specially, through his or her own counsel, and without the attorney for the party having to appear for the retained expert[5].

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[5] Although the proceeding before this Court does not deal with the trial in either of the two cases, it appears that the Academy's position is designed either to require the retained expert or independent medical examiner to expend personal funds to attack overbroad discovery, or to attempt to create, through the plaintiffs' own efforts, an appearance of bias between the party

CONCLUSION

For all of the foregoing reasons, the unanimous en banc decision of the Third District should be affirmed.

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obtaining the appointment of the expert and the expert by the forced establishment of an attorney-client privilege. Either result is inappropriate in our system of justice.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 1st day of March, 1995, to all counsel on the attached service list.

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