IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,649

MAX ELKINS, et al,

Petitioners,

-vs.-

ELISA SYKEN, et al,

Respondents.

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

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND OF THE FACTS

This is one in a growing line of cases involving the refusal of defense examining physicians--in these two consolidated matters orthopedists Richard L. Glatzer, M.D. and Ledford Gregory, M.D.--to comply with subpoenas and discovery orders arising therefrom by which Plaintiffs are seeking information which establishes the amount of income these doctors generate from performing so-called IME[1] exams. See R-313. Attorneys representing injured persons seek such information, to impeach these doctors' credibility as witnesses when they testify that there is little or nothing wrong with the many, many patients they see at the insurers' behest.

The insurance companies which hire Drs. Glatzer and Gregory to examine injured claimants have taken the position that the doctors will have to virtually shut down their offices and cease practicing medicine for months and that it will cost hundreds of thousands of dollars to find out how much they make from that aspect of their practices. See Syken's App-8, 9. But trial judges have not been buying such arguments and orders compelling discovery were being entered, resulting in certiorari petitions in which the Defendants hiring the doctors (and sometimes nominally the doctors) have alleged undue burden, invasion of the doctors' and other patients' privacy, lack of duty to create documents, and other defenses.

The Amicus Curiae, the Academy of Florida Trial Lawyers,

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[1]The initials are supposed to stand for "Independent Medical Examination," but since the cessation of court-appointment of IME physicians, there is little if anything independent about them.

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otherwise adopts and incorporates the Statements of the Case and of the Facts contained in the Petitioners' briefs.

SUMMARY OF THE ARGUMENT

There is a valid reason to treat defense examining physicians somewhat differently than other experts. "IME" doctors are cloaked with an untrue aura of credibility and neutrality which is greater than that which surrounds other experts. There are two reasons why: One is the saintly image in which doctors have been painted (with the help of the media) as a profession of gentle helpers who operate solely for the benefit of society and not out of any motive for personal gain. The second is a misconception amongst the general public that so-called IME physicians are independent experts appointed by the judges. Therefore, there is a more compelling reason to uphold disclosure of the true financial involvement of defense-retained physicians examining injured Plaintiffs than exists with regard to other experts in other cases, and a remedy can be fashioned in these cases limited to this type of expert witness.

The trial court correctly ordered the creation of lists not already in existence to counter the doctors' lack of memory and lack of record-keeping. The cases which prohibit trial judges from ordering the production of documents not theretofore in existence should not be held to apply to retained experts such as the defense

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examining physicians involved here, because those physicians are the only truly volitional participants in the litigation process.

The petition filed below by Elisa Syken should have been denied by the Third District because Ms. Syken lacked standing to complain about the discovery order directed toward a non-party, Dr. Glatzer. Either Dr. Glatzer can retain counsel and oppose discovery he takes issue with, or the insurance company's lawyers can appear on his behalf so the jury can further understand the true relationship between the Defendants and their hired witnesses.

Dr. Glatzer's affidavit asserts that the cost of complying with the subpoena in question would be an amount of up to $100,000, and he suggests that his medical practice would grind to a halt while the files were reviewed in compliance. A court is able to reject unrebutted evidence which is inherently improbable or unreasonable, opposed to common knowledge, or inconsistent with other circumstances in evidence. The affidavit filed below was unreasonable and defied common sense. Therefore, the trial court correctly rejected Dr. Glatzer's affidavit and the discovery order was incorrectly quashed by the Third District.

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ARGUMENT

I.

DEFENSE EXAMINING PHYSICIANS SHOULD BE HELD SUSCEPTIBLE TO DISCLOSURE OF THEIR FINANCIAL RELATIONSHIPS WITH INSURANCE COMPANIES BECAUSE THEY ARE CLOAKED WITH AN UNTRUE AURA OF NEUTRAL CREDIBILITY GREATER THAN OTHER EXPERT WITNESSES

Petitioners' briefs do a good job of explaining why it is important to reveal to a jury the bias of an expert in general, but the Academy submits that there are even more compelling reasons to uphold disclosure of the true financial involvement of defense-retained physicians who examine injured Plaintiffs under Fla. R. Civ. P. 1.360 than exist with regard to other experts in other cases. The Academy begins this brief with this proposition in support of the suggestion that this Court can quash the incorrect decision of the Third District in these cases without unleashing the parade of horribles which Defendants might argue, such as the argument that every consulting engineer, economics professor, and other expert in every discipline will be exposed to such discovery as will dissuade her or him from participating in the judicial process.

A decision by this Court quashing the Third District's decision and approving the types of discovery orders rendered by the trial courts in these cases need not be a determination that every retained expert is subject to detailed discovery of financial data, because there is a valid reason to treat defense examining physicians somewhat differently than other experts. "IME" doctors

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are cloaked with an untrue aura of credibility and neutrality which is greater than that which surrounds other experts. This Court can correctly hold that there is a need for deeper inquiry into examining physicians' bias in accident cases than into the potential for an accountant's bias in a tax case or an engineer's bias in a patent case because of that misleading aura of credible neutrality which does not accompany experts in other situations.

There are two sets of circumstances which the Academy suggests create the erroneous perception by jurors that examining physicians are probably telling the truth, which do not accompany experts in other settings. One is the saintly image in which doctors have been painted (with the help of the media) as a profession of gentle helpers who operate solely for the benefit of society and not out of any motive for personal gain. Almost every doctor on television is like "Marcus Welby, M.D.," with a mission of mercy and selflessness. When is the last time a major television series has presented a physician as the real villain (as opposed to either a total hero or, if anything less, an innocent victim who has been falsely accused)?

The public's adoration of doctors and the unfair presumption of believability which that fosters is not present when other professions are thought of. Even the clergy has been sufficiently racked with scandal and corruption to remind the public of the human frailty of members of the cloth, and thereby preclude any such untrue presumption of greater believability, should one of that profession's members appear in court.

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The second circumstance which provides a basis for a need for greater access to the facts revealing their true bias is a misconception amongst the general public that so-called IME physicians are independent experts appointed by the judges. It has been a long time since that was the case, but even lawyers still mistakenly characterize defense examining doctors as "court-appointed." They are not even "independent" as the current label mischaracterizes them, much less appointees of the judiciary.

Merely asking a question whether the doctor was retained and paid by the defense in a given case cannot dissipate the untrue perception of independence and credibility which he or she brings into the courtroom. Defense-selected examining physicians in accident cases are not like any other witness in any other type of case, so there can well be means fashioned to correctly inform the juries of their potential for bias which otherwise are not needed. The Academy respectfully submits that perhaps a amendment to Florida Rule of Civil Procedure 1.360, the rule which already pertains to experts in such cases, could provide an appropriate vehicle to reflect that difference and to narrowly limit the effect of a decision quashing the Third District's decision under review.

II.

DEFENSE EXAMINING PHYSICIANS SHOULD BE HELD TO BE UNDER AN OBLIGATION TO PRODUCE NEW DOCUMENTS WHERE NECESSARY BECAUSE THEY ARE THE ONLY TRULY VOLUNTARY PARTICIPANTS IN THE TRIAL OF A PERSONAL INJURY CASE

The cases which prohibit trial judges from ordering the

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production of documents not theretofore in existence should not be held to apply to retained experts such as the defense examining physicians involved here, because those physicians are the only truly volitional participants in the litigation process. Unlike the other witnesses in a case, such as the parties, the treating physicians or lay witnesses whose testimony is a mere incident to the facts and opinions they came to know while living their normal lives, hired "experts inject themselves into litigation and, by so doing, impliedly waive any right to object to invasive discovery requests designed to reveal bias." Winn-Dixie Stores, Inc. v. Miles, 616 So. 2d 1108, 1111 (Fla. 5th DCA 1993).

Defendants are brought into lawsuits involuntarily. Even the Plaintiff who files suit is not doing so in the volitional pursuit of a profession, but because an unpleasant event has occurred that forces her or him to resort to the courts for relief. Therefore, on neither side of the litigation can the parties be said to have made a fully voluntary and conscious choice to participate in the judicial process, at least not nearly as voluntary as that decision made by the expert earning a livelihood as a witness.

Witnesses who happen to observe material facts may come to court without a subpoena, but even those witnesses who voluntarily appear do so to reveal what they learned by happenstance, and not as the result of a choice to become involved in the legal process. Likewise, even witnesses other than retained experts who are able to render opinions because of their expertise in a field--such as treating physicians and technical experts who observed material

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events as they occurred and not solely for the sake of testifying--are not in the same category of wholly volitional participants as Dr. Glatzer and other "examining" experts.

The Academy does not suggest that a civil engineer who happens upon an accident scene and views the wreckage should be subject to the duty to create documents about her income which do not already exist, and still that engineer might be summoned to testify and held qualified to render opinions about the case at trial. Nor should an expert whose usual work required examination of that wreckage or other material evidence be subject to produce items not in existence, even if that person should testify as an expert later. If, on the other hand, a litigant hires an expert whose livelihood is made--not by treating the patient who becomes the Plaintiff or by investigating an accident on behalf of the state--but as a professional witness, then that person goes into the situation with open eyes and can expect different treatment in the process.

It is not necessary that a retained expert be determined to be "venal" to subject her or him to greater scrutiny for bias than as to a non-retained expert or lay witness. See State Ex Rel Lichtor v. Clark, 845 S.W.2d 55, 61 (Mo. App. W.D. 1992)("A 'venal' expert is an expert whose opinions are available to the highest bidder--a mercenary"). The "venal" expert is so biased as to be disqualified from testifying altogether, while an expert with lesser bias may be competent but still subject to discovery such as that ordered below.

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The orders of the trial courts in the present cases cannot be compared to those issued against witnesses other than retained experts such as examining physicians, so the ruling that reasonable lists be made and kept was not a departure from the essential requirements of law and the Third District's decision to the contrary should be quashed.

III.

THE DECISION IN THE CASE INVOLVING DR. GLATZER SHOULD BE QUASHED BECAUSE SYKEN LACKED STANDING TO ASSERT OBJECTIONS TO PLAINTIFFS' REQUESTED DISCOVERY FROM DR. GLATZER, WHO IS NOT A PARTY

The petition filed below by Elisa Syken should have been denied by the Third District because Ms. Syken lacked standing to complain about the discovery order directed toward a non-party, Dr. Glatzer. "It is apodictic that one who is a party has no standing to object to a subpoena issued to a non-party witness unless that subpoena asks for documents in which the party claims some personal right or privilege or asks for documents in the party's possession." Engel v. Rigot, 434 So. 2d 954, 957 (Fla. 3d DCA 1983)(Pearson, J., concurring).

While very few Florida cases have squarely addressed the issue, it is the rule in the federal courts that "[a] party ordinarily has no standing to seek to quash a subpoena duces tecum directed to a nonparty, unless the party can claim some personal right or privilege with regard to the documents sought." Estey & Associates, Inc. v. McCulloch Corp., 39 Fed. R. Serv. 2d

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(Callaghan) 1074 (D. Ore. 1984) (citing 9 C. Wright & A. Miller, Federal Practice and Procedure § 2457 at 431 (1971). See also, e.g., Brown v. Braddick, 595 F.2d 961, 967 (5th Cir. 1979).

The lack of standing of a party to complain about discovery sought from non-party witnesses is so deeply-rooted in American jurisprudence that the United States Supreme Court has held a criminal defendant has no standing to challenge a subpoena duces tecum seeking production of records from a non-party. See United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). Surely the wishes of civil litigants in routine personal injury cases are no greater nor more deserving of protection than the rights of an accused facing the loss of liberty.

The Defendant/Petitioner Syken's Objection and Motion for Protective Order filed in the present case was not made on behalf of Dr. Glatzer, but on the Defendant's own behalf. Therefore, this Court should reject or distinguish the decision of the Fourth District addressing standing in Sunrise Shopping Center, Inc. v. Allied Stores Corp., 270 So. 2d 32 (Fla. 4th DCA 1972). That case is distinguishable because in Sunrise "the court held that an opposing party had standing on behalf of a non-party witness to move to quash a subpoena duces tecum as unreasonable and oppressive." Dade County Med. Assn. v. Hlis, 372 So. 2d 117, 121 n. 5 (Fla. 3d DCA 1979)(emphasis in original).

If Ms. Syken's attorneys had filed an appearance in the trial court and the Third District on behalf of Dr. Glatzer, then the jury would have been able to consider that fact on the bias

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question. If Dr. Glatzer himself took issue with the subpoena served upon him, he could have retained separate counsel to defend against it. But as the record stands there was no appearance by Dr. Glatzer separately or by Syken's attorneys on his behalf. Therefore, insofar as the Defendant Syken sought protective orders in the trial court (and sought certiorari from the Third District), the Defendant had no standing and her petition should have been denied.

IV.

CERTIORARI WAS ERRONEOUSLY GRANTED BECAUSE DR. GLATZER'S AFFIDAVIT AND TESTIMONY WERE PROPERLY REJECTED BY THE TRIAL COURT AS INHERENTLY IMPROBABLE, UNREASONABLE, AND INCONSISTENT WITH OTHER CIRCUMSTANCES

In the present case, Dr. Glatzer's affidavit asserts that the cost of complying with the subpoena in question would be an amount of up to $100,000, and he suggests that his medical practice would grind to a halt while the files were reviewed in compliance. Republic National Bank v. Roca, 534 So. 2d 736 (Fla. 3d DCA 1988) recognizes exceptions applicable here to the general rule that unrebutted[2] evidence must be accepted as being true.

As authority for the effect to be given to unrebutted proof, Roca cites Laragione v. Hagan, 195 So. 2d 246 (Fla. 2d DCA), rev'd on other grounds, 205 So. 2d 289 (Fla. 1967). The rule recognized

[2]It is difficult to understand how evidence can be rebutted in the usual sense of introducing contradictory evidence when the only source for contradictory evidence--discovery from the witness offering the "unrebutted" evidence--is not permitted.

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in Laragione is conditioned by language in the case which reveals that a court is able to reject unrebutted evidence which is "inherently improbable or unreasonable, opposed to common knowledge, or inconsistent with other circumstances in evidence." See 195 So. 2d at 248. That is just what we have here in the affidavit and testimony of Dr. Glatzer. The affidavit is inherently incredible on its face where it suggests that the doctor's practice would grind to a halt if he responded to the subpoena and estimates the cost at compliance with the subpoena at up to $100,000. The courts are far from being bound to accept such incredible representations, so the Third District should have held that the trial court did not abuse it discretion rejecting the improbable evidence and certiorari should have been denied.

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CONCLUSION

WHEREFORE, defense examining physicians being cloaked in an aura of untrue reliability which does not exist with other types of experts and which make it more necessary that their biases be exposed, such witnesses being properly subject to produce items not already in existence because those physicians are the only truly volitional participants in the litigation process, the Defendants having no standing to complain of discovery directed to a nonparty, and the trial court having correctly rejected inherently unreasonable evidence from Dr. Glatzer, the decision under review should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by mail, upon Barbara Green, Esq., Attorney for Petitioners Elkins, 999 Ponce de Leon Blvd., Suite 1000, Coral Gables, FL 33134; Joel S. Perwin, Esq., PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A., Attorneys for Petitioners Elkins, 25 West Flagler Street, Suite 800, Miami, FL 33130; Robert A. Robbins, Esq., trial counsel for Plaintiffs/Petitioners Elkins, Suite 400 Dadeland Towers, 9200 South Dadeland Blvd., Miami, FL 33156; Richard Allan Friend, Esq. and Richard A. Warren, Esq., Attorneys for Petitioners Roth, 5975 Sunset Drive, Penthouse 802, South Miami, FL 33143; James T. Sparkman, Esq., CLARK, SPARKMAN, ROBB & NELSON, Attorneys for Respondent Syken, 110 S.E. 6th Street, Suite 1800, Fort Lauderdale, FL 33301; Raoul G. Cantero, III, Esq., ADORNO & ZEDER, Attorneys for Defendant/Respondent Plaza of the Americas Part IV Condominium Association, Inc. and Respondent Gregory, 2601 South Bayshore Drive, Suite 1600, Miami, FL 33133; and upon Paul R. Regensdorf, Esq., FLEMING, O'BRYAN & FLEMING, Attorneys for Amicus Curiae, Florida Defense Lawyers Association, 500 East Broward Blvd., 17th Floor, P.O. Box 7028, Fort Lauderdale, FL 33338-7028, on this, the 5th day of January, 1995.

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