IN THE SUPREME COURT OF FLORIDA

CASE NO: 84,649

MAX ELKINS, et al.,
Petitioners,

vs.

ELISA SYKEN, et al.,
Respondents.
_____/

ON CERTIFICATION FROM THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF OF ELISA SYKEN ON THE MERITS

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INTRODUCTION

The plaintiffs' initial brief will be cited as (IB).

The academy's initial brief will be cited as (AB).

The defendant's Appendix will be cited as (Syken App.), and the hearing transcript will be cited as (Syken App. at 40 Tr.).

The plaintiff's Appendix will be cited as (Elkins App.).

The slip opinion below will be cited by page 1-21.

STATEMENT OF THE CASE AND FACTS

Plaintiffs' statement that Dr. Glatzer submitted a third affidavit is incorrect (IB p.2). The affidavit referred to by the petitioner was an affidavit presented by the plaintiffs' attorney at the court ordered, evidentiary hearing below. The affidavit was ostensibly provided courtesy of Attorney Ellenberg, who was not counsel of the record, but who appeared with another plaintiff attorney, Attorney Hibnick, to "assist" the cross-examination of Dr. Glatzer (Syken App. at 40, Tr. 18, 42, 2).

The same is true with the affidavit cited by the petitioners on page one of the initial brief.

Respondent disagrees with plaintiffs' statement that Dr. Glatzer acknowledged that his record keeping was a persistent concern of the circuit court (IB at 3). There is no citation provided for this statement, and the review of the evidentiary hearing transcript does not support the same.

SUMMARY OF ARGUMENT

At the evidentiary hearing below, the plaintiffs presented no evidence to rebut the defense doctor's affidavit and live testimony. As such, the plaintiffs did not meet their burden as set forth in *Dollar General v. DeAngelis*, 590 So.2d 555 (Fla.3dDCA 1991). The trial court's failure to follow *Dollar General* constituted departure from the essential requirements of law. Plaintiffs have failed to address the trial court's failure to follow *Dollar General*. The academy does address this issue, and attempts to justify the trial court's departure by relying on *Republic National Bank v. Roca*, 534 So.2d 736 (Fla.3dDCA 1988), and *Laragione v. Hagan*, 195 So.2d 246 (Fla.2dDCA 1967). These cases, however, are favorable to the defense because in both cases the trial court was reversed for failing to follow unrebutted evidence.

The en banc opinion was unanimous, and this is significant. It is a harmonious attempt to curb the $19.50 discovery approach that is too time consuming and intrusive when seeking information on a collateral issue, witness bias.

That the en banc opinion is unanimous illustrates a consensus as to this discovery problem. The opinion is well reasoned and permits judicial discretion. It safeguards against unscrupulous experts and cautions trial attorneys who engage them.

The standing argument was not argued to the trial court, and has not properly been preserved for appellate review. It is, however, an additional attack on defense experts by attempting to

require them to retain attorneys to fight such frequent discovery intrusions at the doctor's expense.

The $19.50 discovery approach began in 1989, and is now in its sixth year. The unanimous decision below has been long awaited. It should be upheld in order to prevent a chilling effect on the availability of doctors who will continue to perform such exams. It is likewise important that the opinion below be upheld to encourage more doctors to participate as defense examiners, and to keep the cost of such exams and court testimony from inflating.

ARGUMENT

I. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN FAILING TO FOLLOW *DOLLAR GENERAL V. DEANGELIS*.

Two years ago on January 13, 1993, at an estimated cost of $19.50, the plaintiffs issued a subpoena and initiated this discovery dispute that has found its way to the Florida Supreme Court (Syken App. at 1).[1] After the affidavit of Dr. Glatzer was filed pursuant to the trial court's order of February 4, 1993 (Syken App. at 6), the plaintiffs made absolutely no attempt to initiate any discovery to rebut the affidavit.

The only activity in response to the affidavit was the plaintiffs' filing of a Motion to Require Dr. Glatzer's Records Custodian and/or Bookkeeper to Comply with Subpoena (Syken App. at 10). A separate document, Plaintiff's Response to Affidavit of Dr. Glatzer, was filed along with the motion. This response generally editorialized plaintiffs' counsel's incredulity as to the content of the affidavit. The response was unverified and was based on no fact (Syken App. at 12). In fact, it was probably a sham pleading pursuant to Fla.R.Civ.P. 1.150.

Sham or not, the motion and the response to the affidavit were clever and had the calculated effect. When the trial judge learned that the doctor's affidavit exceeded her predetermined, reasonable

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[1] The witness fee is estimated at $6.50, the issuance fee from the court clerk $1.00, and the process server $12.00.

figure of $35,000.00, the judge hit the roof and ordered the doctor to appear at an evidentiary hearing without pay (Elkins App. at 44-45, 62).

At the evidentiary hearing, May 6, 1993, the plaintiffs submitted no evidence to rebut the affidavit of the doctor. Plaintiffs did, however, contact two colleagues, and obtained an additional affidavit of Dr. Glatzer in another case (Syken App. at 26). The colleagues attended the hearing (Syken App. at 40 Tr. 42).

Because the plaintiffs failed to provide rebuttal evidence to the doctor's affidavit, the trial court was bound to follow the guidelines in *Dollar General, Inc. v. DeAngelis*, 590 So.2d 555, (Fla.3dDCA 1991). The Third District's directive in *Dollar General* is plain:

> Given the fact that Dr. Glatzer's affidavit went uncontradicted below, we can conclude that a prima facie case of oppressiveness was established in this case, so the order under review must necessarily be quashed...(p.556).

The trial court clearly ignored this holding and thus departured from the essential requirements of law.

II. THE EN BANC OPINION BELOW SHOULD BE AFFIRMED.

A. Plaintiffs' Initial Brief.

The trial court's failure to follow *Dollar General* is blatant, yet the plaintiffs have failed to address such in the initial brief. This is because no credible argument can be advanced given the plain language of the court's directive in *Dollar General* and the patent failure of the trial court below to follow such.

Instead plaintiffs advance three arguments that are without substance. Plaintiffs' first contention is that it is important to investigate and cross-examine an expert for bias (IB 7). The plaintiffs were able to procure from colleagues a separate affidavit from the doctor that could be used to show bias (Syken App. at 26). The *Kelsey* affidavit established that the doctor makes a minimum of $144,000.00 per year for defense exams, an additional $12,000.00 for court testimony (assuming two hours of portal to portal), an additional $4,500.00 for depositions. This totals $160,500.00, a sum that exceeds substantially the average juror's pay. Plaintiffs, however, ignore this. Plaintiffs have failed to explain in the initial brief why this affidavit is not sufficient to show bias, a collateral issue. In other words, "that certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf" *LeJeune v. Aiken*, 624 So.2d 788, 789-790 (Fla.3dDCA 1993).

The Third District relied on *Allen v. Superior Court*, 151 Cal.App.3d. 447, 198 Cal.Rptr. 737 (1984). The *Allen* court noted:

> To show bias or prejudice, each party need not learn the <u>details</u> of his billing and accounting or the <u>specifics</u> of his prior testimony and depositions...<u>exact</u> information as to the number of cases and amounts of compensation paid to medical experts is unnecessary for the purposes of showing a bias (p.741 emphasis added).

This quotation puts in perspective the scope of discovery on a collateral issue, as opposed to the main issues: negligence and damages. The Third District's <u>en banc</u> opinion is a long awaited attempt to temper this cutthroat discovery onslaught by the

plaintiff bar by setting forth a less intrusive means approach.[2] The opinion was unanimous, and should be affirmed.

Plaintiffs cite *Tennant v. Charlton*, 377 So.2d 1169 (Fla. 1979), *Donahue v. Hubert*, 355 So.2d 1264 (Fla.4thDCA 1978), and *Lay v. Kremer*, 411 So.2d 1347 (Fla.1stDCA 1982) for the apparent proposition that discovery should be permitted beyond the doctor's affidavit or sworn testimony. These cases, however, are inapplicable because they deal with discovery into the finances of a party to the litigation, not a non-party. Again, a distinction between main issues and collateral issues needs to be recognized.

Plaintiffs' urge that a defense expert voluntarily injects himself into litigation. This deserves scrutiny. Does a defense doctor who agrees to examine a plaintiff at the request of a defense attorney differ from a plaintiff oriented doctor who agrees to examine and treat a plaintiff at the referral of the plaintiff attorney? Doesn't a plaintiff doctor, who can bill for the initial office visit, subsequent office visits, physical therapy, massage and modality, thermograms, magnetic resonance, final evaluation report, deposition testimony, and court testimony, have more potential to gain monetarily from litigation and have more "interest in the outcome of the case" than a one, shot defense doctor (Fla.Std.Jury. Instr.(Civ.) 2.2)?

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[2] It is easy to see why the $19.50 subpoena approach is so popular. It is cheap, and its effect is annoying and time consuming to the defense and experts alike.

On the other hand, if the defense doctor is treated as a party, wouldn't the defense at trial be entitled to present the doctor's accountant and an economist to compare profits versus overhead? In turn, wouldn't the defense be entitled to invasive discovery into the finances of the plaintiff's doctors and chiropractors to show bias? *Tennant*, *Donahue*, and *Lay*, would suggest such if the doctor is treated as a party. The result would be a two day trial on liability and damages followed by two more days on a collateral issue, bias. Inevitably, this is the future for personal injury litigation if the opinion below is reversed.

The plaintiffs' second point suggests that the Third District has stripped the trial court of discretion in discovery disputes (IB 13). This contention is not supported by a fair reading of the Third District's opinion. The court specifically allowed for trial court discretion, urged trial judges to cull bad doctors, and warned trial lawyers on choice of experts.

At the risk of awakening a sleeping dragon, guideline 5 of the opinion deserves consideration. It provides:

> 5. The expert maybe required to identify <u>specifically</u> each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time of which is normally three years. (p.14, emphasis added).

Can't this provision be reasonably interpreted by trial courts to require specific testimony and not a guesstimate? Isn't this guideline a more sober dose of the trial judge's order of May 13, 1993 (Syken App. at 20)? Clearly this guideline provides meat for the

plaintiff bar's frenzy, and should be of considerable concern for experts and defense lawyers.

Further, guideline 6 permits inquiry into the expert's business records, the medical files and even the 1099 forms under compelling circumstances.[3] Unequivocally, the trial court has discretion to choose circumstances that would permit inquiry into such records, and to permit such invasive discovery if warranted.

Moreover, the opinion cautions trial judges to be on the lookout for false testimony from "miscreant" experts (p.15). It warns trial counsel to avoid unreputable medical experts, and forewarns that striking an expert maybe proper when compliance with the eight guidelines has been thwarted. Most importantly, the Third District specifically permits departure from the guidelines. The opinion provides:

> Trial judges have discretion to vary the guidelines where appropriate and impose less severe sanctions where warranted (p.15, emphasis added).

Plaintiffs' argument on this point is meritless. Decidedly, the unanimous opinion below is well reasoned and safeguards against plaintiffs' concerns. It need not be disturbed.

Plaintiffs' third point is similar to the second (IB 17). Plaintiffs suggest that the Third District's opinion deprives all plaintiffs of their right to challenge expert bias. In light of

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[3] The Third District continues to overlook the fact that 1099 forms show the total amount of income from a single provider, and do not breakdown litigation income (Syken App. at 40, Tr. 61). They simply should not be discoverable.

guidelines 5 and 6, and the explicit statement that the trial judge may vary the guidelines, this argument is without substance.

The plaintiffs complain that the expert's veracity must now be unilaterally accepted, that the district court did not define the circumstances in which business records may be sought, and that a quandary exists as to the method of obtaining contradictory evidence because the district court did not tell the plaintiffs how to do it.

This is a specious argument that illustrates perfectly the plaintiff bar's purpose in pursuing the $19.50 discovery tactic: harassment of defense experts. Plaintiffs' did not want to pay for the doctor's deposition. They attempted to circumvent *Dollar General*. They did nothing, absolutely nothing, to gather evidence to rebut the doctor's affidavit. The bookkeeper's deposition was never taken, without production of records, to explore the accuracy of the affidavit.

In addition, Dr. Glatzer identified the name of his accountant at the evidentiary hearing. Does the opinion below prevent taking the deposition of the bookkeeper or accountant on remand?

If plaintiffs are still in a quandary after these two suggestions, the plaintiff attorney in *Secada v. Weinstein*, 563 So.2d 172 (Fla.3dDCA 1990) should be contacted. There was no quandary for this attorney. The plaintiff attorney in *Secada* cleverly assembled a stack of cases in which the defense expert "consistently and repeatedly testified to the same effect in previous cases" (p.173). This method, arguably, was successful in showing witness bias

because the jury returned a plaintiff's verdict. The appellate court approved this approach, but reversed on other grounds.

In summary, plaintiffs have failed to demonstrate any credible argument to support departure from the opinion below.

B. Academy Brief.

The first point raised in the academy brief suggests that broad discovery should be permitted into defense expert's finances simply because the public adores doctors (AB 4). It is urged that the media and film industry support this as evidenced by "Marcus Welby, M.D." This argument is mere speculation and is not supported by the record below.

Notwithstanding, the basis for this argument is unsound. Numerous films come to mind that portray doctors unfavorably. "The Verdict" starred Paul Newman and dealt with a medical malpractice lawsuit. "Malice" starred Alec Baldwin and dealt with the deity syndrome. "Coma" starred Michael Douglas and dealt with the selling of organs on the black-market. "Dr. Giggles" starred Larry Drake and dealt with the psychotic mutilation of patients. "Boys from Brazil" starred Gregory Peck and dealt with Hitler clones. "Dead Ringers" starred Jeremy Irons and dealt with the gynecological mutilation of patients. "Silence of the Lambs" starred Anthony Hopkins and dealt with a cannibalistic doctor.

The television movie regarding Dr. Sam Shepard, the military doctor who allegedly murdered his wife, comes to mind. Episodes of

"Melrose Place" have dealt with the misappropriation of research loans by Dr. Peter Burns. In another episode Dr. Peter Burns gave Heather Locklear adulterated, cold medication which ruined her work place, drug test. Decidedly the academy's contention is inaccurate. Moreover, it is simply not logical.

The academy brief also suggests that jurors believe that defense experts are actually court appointed experts. Nothing could be further from the truth! No defense attorney would dare suggest to the jury that their experts are court appointed or even independent because such would be met immediately by objection, which in turn would be sustained by the court. Such an attempt by a defense attorney would be foolish and would be akin to a plaintiff attorney's asking a defendant if he carried liability insurance.

The second point in the academy brief deals with the misconception that defense experts inject themselves into litigation (AB 6). This is without merit and was discussed under the first section of the answer brief (p.5-6). The academy cites *Winn Dixie Stores, Inc. v. Miles*, 616 So.2d 1108 (Fla.5thDCA 1993), for the proposition that plaintiff doctors have a different financial interest than defense doctors. This has merit if one considers a "genuine" treating doctor, such as an emergency room doctor. There is no distinction, however, between a doctor who regularly receives referrals from plaintiff attorneys and the defense doctor. In fact, *Winn Dixie* implies this and suggests that inquiry into the

treating doctor's finances might be permissible upon a threshold showing of bias toward plaintiffs.

The third point in the academy brief deals with standing (AB 9). Standing was never argued to the trial court, and need not be considered by this court. *Abrams v. Paul*, 453 So.2d 826 (Fla.1stDCA 1984).[4]

Notwithstanding, the academy's reliance on *Engel v. Rigot*, 434 So.2d 954 (Fla.3dDCA 1983) is misplaced. The thrust of that case dealt with whether an expert witness fee should be paid prior to the taking of an expert's deposition. The language cited appears in the concurring opinion and is of questionable import to the case at bar. The more reasonable rule is expressed in *Sunrise Shopping Center, Inc. v. Allied Stores Corp.*, 270 So.2d 32 (Fla.4thDCA 1972). *Sunrise* is directly on point with the case at bar. Moreover, Elisa Syken has an interest in the subpoena directed to the doctor based on the trial court's order that would strike Glatzer as a witness (Syken App. at 23).

The standing argument is another good example of the true purpose behind the plaintiffs' purported quest for impeachment evidence. Are the plaintiffs prejudiced if Elisa Syken takes the writ instead of the doctor himself? What difference does it really make as to whose name appears on the caption of the briefs? Positively, the purpose behind the standing argument is to force

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[4] Plaintiffs' counsel mentioned the fact that the protective order was filed by the defendant and not by the doctor at the first hearing (Elkins App. at 42) and plaintiffs' response to the affidavit states such (Syken App. at 13). However, standing was never argued to the trial judge.

defense experts to retain attorneys to repeatedly fight the $19.50 subpoena approach through the trial court level and into the appellate arena. In the instant case, there were two separate hearings at the trial court level followed by the evidentiary hearing which eventually killed an entire afternoon. In addition to the petition for writ of certiorari and the reply brief, an initial oral argument was followed by a supplemental brief for the en banc panel, and a second oral argument. The motive behind the standing argument is blatant.

The academy's final point addresses the trial court's failure to follow *Dollar General*, an argument which was omitted from the plaintiffs' brief (AB 11). The academy's argument is commendable, yet faulty. The academy cites *Republic National Bank v. Roca*, 534 So.2d 736 (Fla.3dDCA 1988), and *Laragione v. Hagan*, 195 So.2d 246 (Fla.2dDCA 1967) for the proposition that a trial court may disregard unrebutted testimony. Both cases, however, are actually helpful to the defendant. The trial court was reversed in *Republic National Bank* for rejecting uncontroverted evidence. This is exactly what the trial judge did below.

Laragione dealt with a probate matter, and the language cited by the academy concerned the testimony of a live witness which was not contradicted. The appellate court noted that the witness' testimony was material and consisted of facts instead of opinions, and that the trial court erred in rejecting the testimony. Below, both the affidavit and the doctor's live testimony were material and were based on facts. In contrast, the point made by the

academy would more properly be directed to the unverified response to the affidavit that the plaintiff attorney filed (Syken App. at 12).

C. Chilling Effect.

Conspicuously absent from both the plaintiffs' brief and the academy's brief is any discussion as to the chilling effect of the $19.50 discovery approach. Indeed, it is appropriate that plaintiffs allude to the Suffolk witch trials. Unquestionably, the plaintiff bar is on a witch hunt and has been since 1989 beginning with *State Farm v. Gray*, 546 So.2d 36 (Fla.3dDCA 1989). Dr. Glatzer is by far the most despised witch. Nothing would please the plaintiff bar more than to drive him out of medicine in Dade County.

Dr. Glatzer is not the only one. The list includes: Dr. Al Petti, orthopedic surgeon, *McAdoo v. Ogden*, 573 So.2d 1084 (Fla.4thDCA 1991); Dr. Abdel-Fattah, TMJ specialist, *Abdel-Fattah v. Taub*, 617 So.2d 429 (Fla.4thDCA 1993); Dr. Jack Barrett, orthopedic surgeon, *Crandall v. Michaud*, 603 So.2d 637 (Fla.4thDCA 1992); Dr. Frederick McFall, dentist, and Dr. Michael Slomka, orthopedic surgeon, *Bissell Brothers, Inc. v. Fares*, 611 So.2d 620 (Fla.2dDCA 1993); Dr. Melvin Young, orthopedic surgeon, *Young v. Santos*, 611 So.2d 586 (Fla.4thDCA 1993); Dr. Donn Fuller, orthopedic surgeon, *Wilkins v. Palumbo*, 617 So.2d 850 (Fla.2dDCA 1993); Dr. Sal Ramirez, orthopedic surgeon, *LeJeune v. Aiken*, 624 So.2d 788 (Fla.3dDCA 1993) and Dr. Ledford Gregory, orthopedic surgeon, in the present case.

The *Kelsey* affidavit below is sufficient to cross-examine the doctor. The *Secada* approach will lend further impeachment material if necessary. Plaintiffs' motive is clearly to harass defense doctors and force them from performing defense examinations under the artifice that the cross-examination will be totally ineffective without details and specifics. Certainly, this is the reason that the two plaintiffs' attorneys from separate law firms on separate cases took time out from their busy schedules to attend the evidentiary hearing below.

This onslaught is going into its sixth year, and the continued pressure of the $19.50 discovery approach is taking its toll on defense doctors. The availability of examining doctors is sparse compared to the number of orthopedists and chiropractors who are willing to treat the potential plaintiffs. This is especially true in automobile cases where personal injury protection insurance is available to finance the first $10,000.00 worth of treatment.

It is difficult to locate objective practitioners who are willing to endure the annoyance that is concomitant with performing defense exams. Time must be arranged for last minute depositions. Lawyers, court reporters and videographers loiter in the waiting room with patients. Private patient appointments must be cancelled to travel to the courthouse. Vacation and leisure time is constantly limited by trials. Attorneys must be called when intrusive financial materials are subpoenaed. Plaintiff attorneys, paralegals, court reporters, and now videographers watch the exam. What young, up and coming, orthopedist or neurologist will step-up

to serve as a defense examiner if his personal finances will be subject to discovery? How much will the defense doctor be required to increase his fee for the exam and portal to portal trial time to cover the cost of hiring a lawyer to fight the $19.50 subpoena?

The fact that the en banc opinion below was unanimous illustrates the consensus to the problem created by this discovery attack by the plaintiff bar. It is reasonable to contend that the Third District in its entirety is concerned about the availability of defense examiners now and for the future.

CONCLUSION

The trial court clearly departed from the essential requirements of law in failing to follow *Dollar General*. The time has come for a less intrusive means approach to limit the intrusive discovery onslaught into the financial matters of defense doctors. The unanimous opinion below is directed toward that goal, and at the same time allows for judicial discretion to cull miscreant experts. It is important to all Floridians to have objective doctors available to perform defense exams, and certainly more are needed. The opinion below should not be disturbed in order to prevent a chilling effect on the availability of new and present doctors, and to curb the increasing cost of defense examinations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 30th day of January, 1995, to: BARBARA GREEN, Esquire, 2964 Aviation Avenue, Third Floor, Miami, Florida 33133; JOEL S. PERWIN, Esquire, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flager Street, Suite 800, Miami, Florida 33130; ROBERT A. ROBBINS, Esquire, Robbins & Reynolds, P.A., 9200 South Dadeland Boulevard, Dadeland Towers, Suite 400, Miami, Florida 33156; RICHARD A. FRIEND, Esquire, and RICHARD A. WARREN, Esquire, 5975 Sunset Drive, Penthouse 802, South Miami, Florida 33143; RAOUL G. CANTERO, III, Esquire, Adorno & Zeder, P.A., 2601 South Bayshore Drive, Suite 1600, Miami, Florida 33133; PAUL R. REGENSDORF, Esquire, Fleming, O'Bryan & Fleming, P.A., P.O. Drawer 7028, Fort Lauderdale, Florida 33338-7028; and ROY D. WASSON, Esquire, 44 West Flager Street, Suite 402, Miami, Florida 33130.

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