IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,649

MAX ELKINS, et al.,

Petitioners,

vs.

ELISA SYKEN, et al.,

Respondents.

_____/

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

REPLY BRIEF OF PETITIONERS MAX AND MARION ELKINS

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I
ARGUMENT

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW BY INSTRUCTING DR. GLATZER TO PRODUCE THE REQUESTED INFORMATION CONCERNING HIS IME PRACTICE, AND TO KEEP ADEQUATE RECORDS OF THAT PRACTICE IN THE FUTURE OR SUFFER DISQUALIFICATION.

Respondent Syken's primary argument for acceptance of the district court's guidelines is that they adequately empower litigants to investigate an opposing expert medical witness' bias. We will address that contention in discussing our third sub-point, concerning the draconian strictures imposed by the district court. Before doing so, we will revisit briefly the two preliminary sub-points to which Respondent Syken has offered only token opposition--that the litigants should have wide latitude to investigate an expert's bias, and that the trial courts should have wide discretion to supervise those investigations.

A. The Importance of Investigating and Cross-Examining Medical Experts for Bias (See Our Initial Brief at pp. 7-13). We established that juries tend to credit experts' testimony (brief at 7-8; *see also* Petitioner Roth's initial brief at 12-13); that cross-examination of experts therefore is particularly important, and is permitted to be wide-ranging (brief at 8-9); that such inquiry necessarily must include the right to demonstrate an expert witness' bias--a right which is codified in § 90.608(2), Fla. Stat. (1993) (brief at 9-10; *see* Petitioner Roth's initial brief at 14-15); that these considerations are equally applicable to expert medical witnesses, as all of the Florida courts have made clear (brief at 10-11; *see* Petitioner Roth's initial brief at 10, 17-18; AFTL amicus brief at 5); and that the need for such inquiry is not satisfied by forcing reliance upon the expert's veracity, as this Court has held in numerous other contexts (brief at 11-12; *see* Petitioner Roth's brief at 21-23). Respondent Syken has offered four responses.

First (Syken answer brief at 12-13), echoing the district court's intuitive approach to judicial decisionmaking, Respondent Syken has offered examples of movies and television

programs to illustrate her impression that jurors typically are skeptical of expert witnesses. We can only refer the Court to the authorities which we cited (brief at 8), to the arguments and authorities offered by Petitioner Roth (brief at 8-9, 11-12, 16-17), and to the common-sense observations of the AFTL (amicus brief at 2, 5-6). As we noted (brief at 9), the opportunity to show bias is an inherent aspect of a litigant's constitutionally-protected right of cross-examination; it is codified in § 90.608(2); it has been recognized and enforced in a wide variety of contexts; and these authorities necessarily are premised on the assumption that the investigation of bias is an inherent and vital aspect of the factfinding process. Respondent Syken's intuitions can hardly forestall the overwhelming weight of these authorities.

Second (answer brief at 8), Respondent Syken protests that the authorities which we cited counsel broad latitude in investigating and cross-examining parties--but not experts. We refer the Court to the authorities specifically addressing the investigation of bias in expert witnesses, and in medical expert witnesses, at pages 9-11 of our initial brief.

Third, Respondent Syken protests (answer brief at 8)--in response to our contention that an expert who voluntarily injects himself into a controversy for profit has no standing to invoke his own right of privacy (*see* initial brief at 11 n.4; *see also* Petitioner Roth's initial brief at 10-11; AFTL amicus brief at 7)--that any scrutiny permitted of a defendant's expert medical witness also should be permitted of the plaintiff's expert medical witness--and we agree entirely. Any medical expert retained by either side should be subject to the same general standard of inquiry, administered on a case-by-case basis in the trial court's discretion. In proper cases, a plaintiff's medical expert should be required to provide precisely the same information which we are requesting here from the defendants' experts.

Fourth (answer brief at 9), Respondent Syken protests that if the door is opened beyond requiring the litigants to rely upon opposing experts' self-serving testimony, the litigation of personal-injury cases will be dominated by collateral battles between accountants, economists

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and other witnesses offered to scrutinize the data provided. That prospect, of course, is entirely illusory, in light of the trial courts' broad discretion to limit the trial of collateral matters. It is one thing to permit the parties access to the primary data concerning an expert's background and practice, but quite another to permit secondary evaluations of that data. The trial courts are more than able to limit the inquiry, while still permitting the litigants access to the primary data.

We remind the Court that there is no other context in Florida in which a litigant is required to depend upon the veracity of the opposing side. It was precisely for that reason--that the moving party should not be "in the position of depending on the veracity of its adversary in furnishing the records"--that this Court upheld the production of out-of-state medical records, if necessary by compelling the opposing party's authorization, in *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855 (Fla. 1994). And *Rojas* echoed this Court's declaration in *Tennant v. Charlton,* 377 So. 2d 1169, 1170 (Fla. 1979) that the discovery of a defendant's financial records "should not be limited to a sworn statement of defendant's current assets and liabilities." Surely the trial courts are capable of satisfying these mandates--of permitting all litigants access to the primary data--without opening up their trials to extensive litigation on collateral matters. Respondent Syken has offered no serious disagreement that all litigants are entitled to extensive discovery, of the primary data, in probing the bias of expert medical witnesses.

B. The Trial Courts Must Have Discretion to Regulate Discovery and Cross-Examination on a Case-By-Case Basis (Initial Brief at 13-17). We established that the trial courts have broad discretion in matters of administration (brief at 13-14); that such discretion has always extended to the demonstration of bias at trial (brief at 14; *see* Petitioner Roth's initial brief at 19); that such discretion in the area of discovery is conferred upon the trial courts by Rule 1.280(c), Fla. R. Civ. P. (brief at 14; *see* Petitioner Roth's initial brief at 7, 20); that such discovery necessarily extends to the investigation of potential bias in an expert witness (brief at 14-15); and that the exercise of such discretion necessarily requires the trial courts to balance

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the burdens and benefits of discovery on a case-by-case basis (brief at 15-17). Notwithstanding her defense of the district court's guidelines, which presumably are meant to be applicable in most cases (or else they have no meaning at all), Respondent Syken has offered no disagreement that the trial courts should be able to exercise discretion in this area on a case-by-case basis. Respondent Syken has protested that the district court's guidelines do allow for the exercise of such discretion (answer brief at 9-10)--an assertion which we will take up in the next sub-section; but she has not denied the fundamental truth that each case is different, and that the scope of discovery which may be appropriate in one case may be entirely inappropriate in another. As we noted, in some cases it may be appropriate to require the deposition of a doctor before allowing broad-based production, in order to narrow the scope of subsequent production. In some cases the material available may obviate the necessity of examining tax returns, but in others the tax returns may be necessary in light of the expert's failure to comply with prior, less-restrictive orders. In some cases the trial court may find the witness' affidavit or testimony credible--in others not. The district court's guidelines, assuming that they are meant to be broadly applicable, necessarily are inconsistent with these possibilities.

Respondent Syken's sole response (answer brief at 5-6) is her observation that the trial courts' exercise of discretion necessarily should include their appreciation of the burdens which may be imposed upon expert witnesses in producing the information requested. Of course we agree entirely. We contend that the trial courts must balance the burdens and benefits of discovery on a case-by-case basis. The respondent's observation only reenforces our position that general guidelines are simply inappropriate in this context.

We do not agree, however, with Respondent Syken's contention (brief at 5-6) that the trial courts must accept an expert's subjective estimates of such burdens--such as Dr. Glatzer's fanciful estimations of the amount of time it would take him to provide the information requested--if those estimations are "uncontradicted." This Court has declared that a jury may

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reject even uncontradicted expert testimony, *see Easkold v. Rhodes,* 614 So. 2d 495 (Fla. 1993); and the trial courts certainly have the same authority, especially if they are familiar with the expert in question and his track record. As a general proposition, a factfinder is free to disbelieve even uncontradicted evidence which is "inherently improbable or unreasonable, contrary to natural laws, opposed to common knowledge, or contradictory within itself . . . ." *Vilas v. Vilas,* 153 Fla. 102, 13 So. 2d 807, 808 (1943). *See Chomont v. Ward,* 103 So. 2d 635, 637 (Fla. 1958). As we noted (brief at 3), the trial court in the instant case heard evidence that Dr. Glatzer has been the subject of three district-court decisions and three circuit-court orders concerning his recordkeeping and veracity, and in fact that he was in violation of one of those orders at the time of the hearing below. In the light of these facts, and of Dr. Glatzer's absurd protestation that it would take him three months to assemble the required data at a cost of $50,000.00 to $100,000.00, the trial court had ample discretion to disbelieve him. But we agree that the asserted burden upon the physician is a relevant factor for the trial court to consider, in the exercise of its broad discretion. That only reenforces our contention that every case is different, and that general guidelines are inappropriate in this context.

C. The District Court's Guidelines Impermissibly Deprive the Trial Courts of Discretion, and the Litigants of Their Right to Challenge Experts for Bias (Initial Brief at 17-20). We argued that the district court's guidelines--intended to be applicable in all cases, in the absence of an extraordinary showing of necessity--by definition are inconsistent with the trial courts' exercise of discretion on a case-by-case basis (brief at 17); that even if guidelines were appropriate, those adopted by the district court are far too draconian in their constriction of a litigant's ability to probe the bias of an opposing expert, because the opposing party must rely upon the accuracy of the expert's subjective recollections (brief at 17-18); that the expert's testimony may be excluded only if the opposing party can somehow come up with contradictory evidence--a task which is made impossible by the constrictions imposed upon discovery (brief

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at 18); that the information provided by the opposing expert is sufficient only on the assumption that the expert answers accurately--an assumption not recognized in any other area of Florida law (brief at 18); that the district court's guidelines foreclose entire areas of discovery, such as the amount of income which a physician yearly makes from IME's and testimony (brief at 18); that the one area of inquiry permitted--concerning cases in which the witness actually has testified in the preceding three years--is woefully inadequate to present an accurate picture (brief at 18 n.9); and that an expert like Dr. Glatzer, who purposefully avoids the creation of records, will be unable to provide even reliable approximations of the character of his practice--witness Dr. Glatzer's extrapolations from his subjective memory of the previous two weeks (brief at 19). Respondent Syken has offered three responses.

First (answer brief at 7), Respondent Syken insists that the information provided by Dr. Glatzer was sufficient to permit the plaintiffs to demonstrate his asserted bias. But that of course assumes the veracity of Dr. Glatzer's recollections--an assumption which is difficult to make in any case, and impossible in Dr. Glatzer's case. As we noted, Dr. Glatzer relied upon his unverified memory of appointments during the previous two weeks, and then extrapolated his yearly averages from those subjective recollections. The plaintiffs cannot possibly rely upon the accuracy of Dr. Glatzer's subjective recollections, and they should not be required to do so.

Second (answer brief at 9), Respondent Syken argues that sufficient verification is permitted by the district court's instruction that the witness must identify the cases in which he has testified during the past three years. As we noted (initial brief at 18 n.9), the plaintiff therefore is limited to cases in which the expert has actually testified, and in which a transcript of such testimony was prepared. That sub-set of a sub-set of the expert's practice will be woefully insufficient to provide an accurate picture of the extent of his involvement with the defense bar on the one hand, or the plaintiffs' bar on the other. And this is the only area in which the district court has permitted access to primary information.

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Third (answer brief at 9-10), Respondent Syken argues that the district court's order allows the trial courts to depart from its guidelines, and to punish expert witnesses who do not provide accurate responses. But Respondent Syken has proffered no reasonable likelihood that the opposing party will have the opportunity to discover any inaccuracy in the expert's representations, in the absence of adequate discovery. And the district court's decision allows deviation from the guidelines only for compelling reasons (*see* the opinion at 14)--a standard which the district court did not define. Presumably, these guidelines are meant to be broadly applicable in the vast majority of cases. If they are not--if the respondent will concede that they have no meaning, and if this Court will ratify that concession--then there is nothing here to argue about. But if the guidelines are intended to be a broadly applicable--which is the assumption of this proceeding, and the assumption upon which the respondent has defended them--then they will not afford the trial court sufficient discretion to permit litigants access to the primary documentation to which they are entitled in every other area of Florida law.

As conceived by the district court, the guidelines adopted purport to be controlling in the ordinary case. They are blanket restrictions which impermissibly deprive both plaintiffs and defendants of their right to investigate and to cross-examine experts, and deprive the trial courts of their appropriate discretion to administer the discovery process. They are inappropriate in an area which must be amenable to the exercise of discretion on a case-by-case basis.

II
CONCLUSION

It is respectfully submitted that this Court should disapprove the guidelines enacted by the Third District Court of Appeal, and affirm the orders of the trial court in the *Elkins* case.

III
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this

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Respectfully submitted,

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