IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,649

MAX ELKINS, MARION ELKINS, and MICHAEL ROTH,

Petitioners,

vs.

ELISA SYKEN, PLAZA OF THE AMERICAS PART IV CONDOMINIUM ASSOCIATION, INC. and LEDFORD GREGORY, M.D.,

Respondents.

ON CERTIFICATION FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

REPLY BRIEF OF PETITIONER, MICHAEL ROTH

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ISSUE

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW BY ORDERING A "PROFESSIONAL" EXPERT WITNESS TO PRODUCE AUTHORIZATIONS FOR DISCARDED 1099 FORMS AND P.A. TAX RETURNS IN ORDER TO REVEAL THE ACTUAL INCOME DERIVED BY THE WITNESS FROM EXPERT TESTIMONY AND THE ATTENDANT BIAS.

In their efforts to paint the district court's decision as "reasonable" and "moderate," Respondents have glossed over an important issue: did the district court exceed its powers by failing to defer to the discretion of the trial court to deal with discovery matters? Both the district court's reversal of the trial court's order and the district court's "guidelines" make a mockery of both the "abuse of discretion" standard of review and the "departure from the essential requirements of law" threshold for certiorari jurisdiction. *See* Roth's Initial Brief at 4, 19-20.

Respondents also ignore the facts of this case. The trial court's response to Dr. Gregory's affidavits, in which he professed his total inability to estimate the examinations he performed for Plaza of the Americas' counsel or for any other law firm or insurance company for the past three years (*see* Roth's Initial Brief at 2-3), was proper *even under the guidelines adopted by the Third District*. Guideline 4 requires experts "to give an approximation of the portion of their professional time or work devoted to service as an expert." *Elkins v. Syken*, 644 So. 2d 539, 546 (Fla. 3d DCA 1994). Guideline 5 requires the expert "to identify specifically each case in which he

or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years." *Ibid.* Dr. Gregory's professed inability to do either is the sort of "unusual or compelling circumstance" which would permit, under Guideline 6, the production "of the expert's business records, files, and 1099's . . . ." *Ibid.*

Indeed, the intransigence of the venal experts involved in these cases and in *Wood v. Tallahassee Memorial Regional Medical Center, Inc.*, 593 So. 2d 1140 (Fla. 1st DCA 1992), *rev. denied*, 599 So. 2d 1281 (Fla. 1992), demonstrates that the Third District's guidelines are practically unworkable. Since these experts are deliberately refusing to keep records, discarding their 1009's, and professing their inability to estimate the portion of their work devoted to serving as expert witnesses, the deposition questions proposed by the Third District, while appearing reasonable in the abstract, will obviously be futile in the real world.

Should the Third District's approach be affirmed, examining physicians will be able to give their "honest estimates" of their financial dependence upon defense law firms and insurance companies which need not be "exact." Since the expert will know that his or her estimates cannot be challenged without a showing of unusual or compelling circumstances, the estimates will likely be inaccurate and untrustworthy. The plaintiff will, however, be stuck with these self-serving estimates. Affirming the Third District's decision will only reward these tactics while frustrating efforts to show the bias of such experts.

Respondents have ignored these issues. The issues which they do discuss fall short of justifying the Third District's drastic restrictions on discovery into the bias of these professional witnesses and the consequent impairment to full cross-examination at trial.

A. Relevance of P.A. tax returns and 1099 forms.

To adequately impeach Dr. Gregory for financial bias, Roth needs two pieces of information: the actual income received by Dr. Gregory for examinations performed and testimony given at the request of defense counsel and insurance companies; and the total income received by Dr. Gregory from his medical practice. This information will lead to evidence showing the jury that Dr. Gregory derives a substantial income, and a substantial portion of his overall professional income, from such work and can therefore be expected to tailor his testimony to ensure that he will continue to receive such employment in the future.

Dr. Gregory's P.A. tax returns will show his total income from the practice of medicine. Roth does not seek, contrary to Respondents' mischaracterizations, Dr. Gregory's *personal* tax return or any information pertaining to his *personal* finances. Indeed, Roth might only need to see one schedule or even one line of the P.A. tax returns. The trial court could order the rest redacted upon proper motion and after *in camera* inspection.

Dr. Gregory's 1099's will tend to show or will lead to evidence showing both his total income and what portion of his income is derived from defense law firms or

liability insurance companies. All of his 1099's are therefore relevant, not simply the ones pertaining to examinations or expert testimony for insurers.

The relevance of these documents has been increased by Dr. Gregory's professed inability to comply with Roth's efforts to procure more limited information, such as reports and bills for examinations conducted at the request of insurance companies or law firms. *See* Roth's Initial Brief at 1-3.

B. Privacy concerns of the professional witness.

An expert who injects himself into litigation by testifying for profit loses any claim of privacy which might otherwise protect relevant financial information. *See* Roth's Initial Brief at 10-11. Respondents' attempt to distinguish *Wood v. Tallahas-see Memorial Regional Medical Center, Inc., supra*, on the basis that there the experts gave evasive answers at deposition again ignores Dr. Gregory's equivalent affidavits professing total ignorance of his income from serving as a professional witness.

Roth does not seek Dr. Gregory's *personal* tax return, only his P.A.'s. Roth is not interested in personal details or information, only the income from Dr. Gregory's practice as a whole and the income received from work as a professional witness. Contrary to the assertions of Respondents and the FDLA, the information sought is neither personal, nor detailed, nor exhaustive. *See* FDLA brief at 10.

Furthermore, any concerns over the disclosure of personal information can be adequately protected by the trial court. The trial court can order irrelevant or sensitive portions of the tax returns redacted. The trial court can also limit disclosure through

a confidentiality order. Respondents never requested such protection in this case, choosing rather to argue that the information should not be discovered at all.

Respondents cite to federal cases which recognize a qualified privilege for income tax returns. *See* Respondents' Answer Brief at 13-14. This privilege was judicially created as a matter of general federal policy. *See Eastern Auto Distributors, Inc. v. Peugeot Motors of America, Inc.*, 96 F.R.D. 147, 148 (E.D. Va. 1982). Florida courts, however, are not empowered to judicially create any such privilege.

> Directly unlike the federal courts, which under Rule 501 of the Federal Rules of Evidence are granted "the flexibility to develop rules of privilege on a case-by-case basis . . . and to leave the door open to change," *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 910, 63 L. Ed. 2d 186 (1980), the courts of Florida are statutorily forbidden to do so. The Florida Evidence Code, Section 90.501, Florida Statutes (1981), didactically states:
>
> > 90.501 Privileges recognized only as provided
> >
> > Except as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to:
> >
> > (1) Refuse to be a witness.
> >
> > (2) Refuse to disclose any matter.
> >
> > (3) Refuse to produce any object or writing.
> >
> > (4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.

Marshall v. Anderson, 459 So. 2d 384, 386 (Fla. 3d DCA 1984) (refusing to consider judicial creation of federally-recognized academic testimonial privilege in Florida). Since no Florida statute recognizes a privilege against the disclosure of income tax returns, Respondents' citation to federal cases is unavailing.

Roth suggests, however, that it is not a concern for privacy which motivates Respondents' calculated resistance to disclosure. Respondents, and other defense doctors, have gone beyond merely objecting to disclosure -- they have simply refused to keep any records which would show their income from defense work. This fact suggests not a concern for privacy, but a realization that such disclosure will destroy the credibility of these doctors with juries, resulting in a loss of income for the doctors and imposing on defense counsel the task of seeking opinions from physicians with more integrity.

C. The expense of satellite litigation.

Respondents suggest that the Third District's guidelines will avoid the expense of satellite litigation over the professional witness' financial records. However, the Third District's guidelines will instead launch this satellite into even higher orbit.

Under the approach of every other district, the plaintiff subpoenas records showing the expert's income from IME's and professional testimony. The plaintiff then asks the expert at a deposition to confirm the amount of income earned from expert work in proportion to the expert's total professional income.

The only satellite litigation which occurs under this scenario occurs for two reasons: certain experts object to disclosing such information; and the experts seek to avoid scrutiny by refusing to keep records which would reveal such information. The first reason would vanish upon this Court's decision holding that such objections have no merit. The second problem could be remedied by a simple and inexpensive expedient -- the doctors should simply indicate on their computerized billing systems which exams and fees pertain to expert testimony, allowing the ready retrieval of such information. Doctors who do not comply should be prohibited from serving as experts. Since insurance companies and their experts could easily avoid the satellite litigation which now occurs, their complaints about the expense of such litigation are disingenuous.

The Third District's guidelines, however, only add another layer of litigation. If the expert is unable or unwilling to approximate his or her income at the initial deposition (a likely occurrence as this and other cases show), a mini-trial must be held at which the party deposing the expert must prove that unusual or compelling circumstances exist to justify the production of business and financial records. Since the Third District did not define "unusual or compelling circumstances," trial and appellate courts will be inundated with cases on this issue. If the plaintiff is successful at the mini-trial, then the plaintiff may begin the production and deposition process described above. If the plaintiff is unsuccessful, the plaintiff must then seek the information from collateral sources -- for instance, by subpoenaing and deposing

defense law firms and insurance companies for their records concerning payments to the expert.

The expense and burden of taking depositions and then proving unusual and compelling circumstances as preliminary steps to obtaining meaningful and reliable bias discovery is unfair and wasteful.

D. The chilling effect.

The "independent" medical examination is a misnomer. Since the amendment of Rule 1.360, Florida Rules of Civil Procedure, in 1988, examining physicians are no longer appointed by the court but are selected by the defense -- they are partisans, not independent arbiters. *See* FDLA's brief at 6-7. These physicians are hand-picked by defense law firms and insurance companies to give testimony negating the plaintiffs' claims. It is vital for plaintiffs to demonstrate this bias to the jury.

The FDLA warns that few doctors are now willing to serve as professional witnesses, and that an adverse decision will further chill doctors from participating in the process. *See* FDLA brief at 6, 11. The FDLA begs the question: is the small number of participating doctors due to the reluctance of doctors to undertake such employment out of fear of financial disclosure or is it due to the selection by defense law firms and insurance companies of those doctors who can be counted on to consistently testify in their favor?

The doctors' threat to refuse employment if they are required to disclose information revealing the financial rewards they garner from such work and their

concomitant bias is hollow. Physicians announced, through the defense bar, a similar collective unwillingness and threat not to perform examinations in the presence of a court reporter. *See Wilkins v. Palumbo*, 617 So. 2d 850, 853 (Fla. 2d DCA 1993). Yet there was, in fact, no lack of doctors to perform examinations when they lost on this issue.

The financial disclosure requested by Roth in this case will indeed expose those experts whose professional income is substantially enhanced by testifying for the defense. As a result, those witnesses may lose all credibility with juries and may no longer be employed by defense law firms and insurance companies. Perhaps, as a consequence, parties will be encouraged to seek opinions from a broader segment of the medical community, thus presenting to juries more reliable, less biased opinions. In the end, the interests of justice and the search for truth will be served.

CERTIFICATE OF SERVICE

WE CERTIFY that a copy hereof has been furnished to all counsel on the attached service list by mail this 31 day of March, 1995.

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