IN THE SUPREME COURT OF FLORIDA

CASE NOS. 85,053 & 85,117

DINA R. CHUNG, M.D., et al,

Petitioners,

-vs.-

MALKA FINK, etc., 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

As established by the Petitioner Chung's Initial Brief on the Merits at iv, Lawrence Forman "is a certified rehabilitation administrator." Although less than clear from the parties' briefs and appendix materials filed to date, it is the Academy's belief that Mr. Forman, as a certified rehabilitation administrator, practices his profession of providing patients whom he sees with plans of vocational rehabilitation and lifestyle changes to accommodate the limitations imposed by injuries they have suffered and to maximize their potential as wage earners and their enjoyment of life.[1]

Consistent with the Academy's understanding that Mr. Forman performs services for injured persons, other than as an expert witness retained for litigation, his testimony by affidavit is that no more than one-third of his time is spent on litigation support services, including civil cases on behalf of Plaintiffs and Defendants, Workers Compensation matters, guardianship and social security matters. Chung App. F at 4, ¶ 11.

The Academy otherwise adopts and incorporates the Statement of the Case and of the Facts set forth in the brief of the Respondent, Lawrence Forman.

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[1]While the basis for that belief is not wholly contained in the portions of the record supplied to amicus by the parties to date, the statement is made in good faith and with the expectation that the complete record in this case will better support the proposition.

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SUMMARY OF THE ARGUMENT

This brief is offered in support of the position of the Respondent, Lawrence Forman, that the order compelling discovery from him was properly quashed, for a reason altogether different than that which was the basis of the Third District's holding, which cited Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994). The Academy submits that Syken was erroneously decided and, if it should be quashed, such a holding does not compel the quashing of the decision of the Third District in the case at bar, because the discovery sought from Mr. Forman was properly disallowed under other existing authorities.

There are two reasons why defense examining physicians should be subject to greater discovery than other witnesses and other experts. One is that there is an erroneous perception by jurors that examining physicians are probably telling the truth, which does not accompany experts in other settings. That misperception results from the status of those witnesses as doctors, combined with the erroneous belief that such doctors have been appointed by the court or are otherwise truly independent. Second, defense examining physicians have no role and provide no service apart from their role as advocates. Thus, unlike the case of a doctor or other professional consulted by a patient or client for rendition of treatment, which expert later finds himself called as a witness, an I.M.E. doctor should expect his or her bias to be investigated and revealed from the moment he or she becomes involved in a

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matter, and it is not an unfair intrusion to do so.

It is the Academy's understanding that Mr. Forman is more than an expert hired to render opinions in the course of litigation, but that he practices his profession of providing patients whom he sees with plans of vocational rehabilitation and lifestyle changes to accommodate the limitations of the injuries they have suffered and to maximize their potential as wage earners and their enjoyment of life. Unlike the so-called "I.M.E." physicians whose only job is to examine an Plaintiff on behalf of the adverse party for use at trial, Mr. Forman is like a treating physician whose work exists independently of the litigation process and benefits the patients he sees.

The Academy has appeared as amicus in other cases involving the similar issue of the scope of discovery from defense examining physicians, arguing that a narrow exception to the usual limitations upon discovery from non-party witnesses was justified in the case of such witnesses by virtue of the misperception of credibility which applies to them and by their unique status as the only voluntary participants in the litigation process.

Unlike physicians who examine a patient for the sake of treatment (and who are expected by the jury to be sympathetic to their patients and not erroneously thought to be court-appointed), defense examining physicians have no role and provide no service apart from their role as professional witnesses. Thus, from the moment they become involved in a matter, an I.M.E. doctor should expect his or her bias to be investigated and revealed, and it is

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not an unfair intrusion to do so. Treating physicians, on the other hand, perform a necessary service for patients apart from the litigation process and they appear as witnesses as a mere incident to that service, not as the sole reason for that service.

Mr. Forman's role (as that is understood by the Academy) is more like that of a treating physician rendering a service to the patient which is useful whether litigation ensues or not. It would not be fair to subject him to the same type of scrutiny as that to which an I.M.E. doctor subjects himself or herself by agreeing to act as an advocate. Therefore, although the Academy believes that the en banc Third District incorrectly decided Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994), the result in the present case is correct under existing law and should not be quashed.

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ARGUMENT

ALTHOUGH BASED UPON THE THIRD DCA'S INCORRECT DECISION IN SYKEN v. ELKINS, THE DCA'S DECISION QUASHING THE DISCOVERY ORDER IS SUPPORTED BY OTHER EXISTING LAW AND SHOULD NOT BE QUASHED BY THIS COURT

The Academy of Florida Trial Lawyers appears as a friend of the Court and submits that the decision quashing the discovery order should be allowed to stand. This appearance follows the Academy's appearance as amicus in Syken v. Elkins and other cases[2] in which the Academy has argued that full discovery of similar information from so-called "Independent Medical Examiners[3]" (I.M.E.'s) was correctly ordered. There is no contradiction in those two positions because there are two distinct characteristics of doctors hired by insurance companies to perform defense examinations for use in litigation which render them susceptible to such discovery, and those distinguishing qualities do not exist in the present case. Thus, although the Academy maintains that the en banc Third District incorrectly decided Syken v. Elkins, already-

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[2]The Academy appeared through undersigned counsel as amicus before the Third District in Syken v. Elkins, in the continuation of that case now pending before this Court in case no. 84,649, and in Dollar General, Inc. v. DeAngelis, 590 So. 2d 555 (Fla. 3d DCA 1991). The Academy has appeared through other counsel in other similar cases.

[3]Although such witnesses are no longer appointed by the court and are far from "independent," the "I.M.E." label sticks, even being used during trial to create an untrue aura of neutral credibility.

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existing law[4] which limits discovery from non-I.M.E. experts applies to the situation of discovery from a rehabilitation administrator, such as Lawrence Forman, and the decision of the Third District quashing the discovery order should be permitted to stand even if Syken is quashed.

The two distinguishing characteristics which warrant broader discovery from I.M.E. doctors are: 1) that I.M.E. doctors are cloaked with an untrue aura of neutral credibility greater than that which surrounds other experts, and 2) a defense examining physician is the only truly voluntary participant in the litigation process, and therefore should expect deeper intrusion into his or her other affairs than should a witness who learns facts about a matter useful for some purpose other than testimony at trial.

The Academy submits that there is an erroneous perception by jurors that examining physicians are probably telling the truth, which does not accompany other experts into the courtroom. That perception is perpetrated by 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, and by the public misconception that so-called I.M.E. 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

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[4]Respondent Forman cites several such cases on page 11 of his brief on the merits.

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"court-appointed." They are not even "independent" as the current label mischaracterizes them, much less appointees of the judiciary. An expert such as Mr. Forman does not come into court wearing the title of doctor, nor is he cloaked with the untrue status of having been court-appointed. Thus, he does have the untrue aura of neutral credibility, so the first distinguishing characteristic which warrants greater discovery from I.M.E. doctors than from other experts is absent here and the decision under review should be approved as consistent with longstanding precedent in cases other than the I.M.E. cases.

Second, defense-selected examining physicians are not like other witnesses, in that they are in the only category of witnesses whose participation in litigation is wholly volitional and expected from the first moment they become familiar with any information which later provides the basis for their testimony. They furnish no service to the patient during which they incidentally learn facts which may later prove to be material in a lawsuit; their whole reason for seeing the patient is to marshal evidence for use at trial.

It is the Academy's understanding that Mr. Forman provides a service to his injured clients and is more than an expert hired to render opinions in the course of litigation. He is believed to practice his profession by providing the patients whom he sees with plans of vocational rehabilitation and lifestyle changes to accommodate the limitations of the injuries they have suffered and to maximize their potential as wage earners and their enjoyment of

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life. Unlike the so-called I.M.E. physicians whose only job is to examine an Plaintiff on behalf of the adverse party for use at trial, Mr. Forman is like a treating physician whose work exists independently of the litigation process and which benefits the patients he sees in ways other than through his testimony.

The Academy appeared as amicus in Syken v. Elkins, and in the continuation of that case now pending before this Court, arguing that a narrow exception to the usual limitations upon discovery from non-party witnesses was justified in the case of I.M.E. physicians by virtue of their unique status as medical doctors who conduct examinations of injured Plaintiffs solely for the sake of litigation testimony of the opposing party. Other than the untrue aura of neutral credibility discussed above, the characteristic of I.M.E. doctors warranting discovery of financial matters which otherwise would be unacceptably intrusive is their status as the only voluntary participants in the litigation process.

Defendants are brought into lawsuits involuntarily, and their appearances as witnesses on their own behalf can hardly be said to be voluntary. 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 expose their frailties before the trier of fact, at least not nearly as voluntary as that decision made by the expert earning a livelihood as a witness.

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Lay witnesses served with subpoenas cannot be said to have voluntarily subjected themselves to intrusive discovery. There are also those non-expert witnesses who observe material facts and agree 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.

Unlike I.M.E. doctors, many experts who ultimately testify do not commence their familiarity with the facts of a case or with the condition of a litigant solely for the purpose of helping a party at trial. Experts who are able to render opinions because of their expertise in a field--such as treating physicians who observe medical conditions as they are being treated and not solely for the sake of testifying, and persons like Mr. Forman whose job it is to help the people he sees improve their lives after handicapping injury--are not in the same category of wholly volitional participants as Dr. Glatzer and other "examining" experts as are involved in the Syken v. Elkins line of cases.

In contrast to the role of physicians who examine patients for the sake of treatment, defense examining physicians have no role and provide no service apart from their role as witnesses. Thus, I.M.E. doctors should expect their bias to be investigated and revealed and it is not an unfair intrusion to do so. Treating physicians, on the other hand, perform a necessary service for patients apart from the litigation process and they appear as witnesses as a mere incident to that service, not as the sole

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reason for that service. Mr. Forman's role (as that is understood by the Academy) is more like that of a treating physician rendering a service to the patient which is useful whether litigation ensues or not. It would not be fair to subject him to the same type of scrutiny as that to which an I.M.E. doctor subjects himself or herself by agreeing to act only as a professional witness.

Only a retained expert such as an I.M.E. doctor who performs no service for the party apart from preparing for litigation can expect to be haled into court at the time the facts which bring him there are first learned. And only such an expert has the opportunity to say "no" and to avoid the virtual certainty of testifying and the likelihood of extensive discovery calculated to reveal bias. Unlike the other witnesses in a case, 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).

Thus, there are more compelling reasons to uphold disclosure of the true financial involvement of defense-retained physicians examining injured Plaintiffs under Fla. R. Civ. P. 1.360 than exist with regard to other experts in other cases, and the exception to the normal limitations on discovery applicable to the present case do not apply and the decision of the Third District quashing the discovery order should be approved on grounds other than this Court's approval of the en banc decision in Syken v. Elkins.

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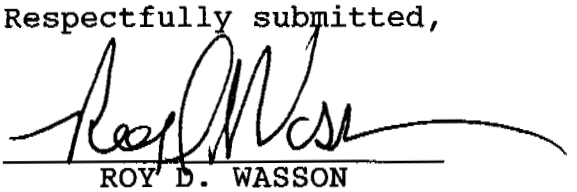
CONCLUSION

WHEREFORE, although based upon the en banc Third Districts's erroneous decision in Syken v. Elkins, the decision of the court below quashing the discovery order was correctly based upon other existing law and should not be quashed.

Respectfully submitted,



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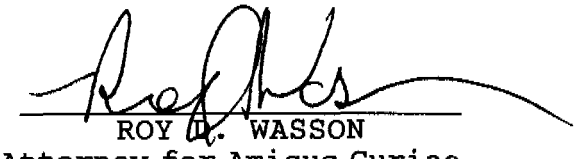
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by mail, upon Steven E. Stark, Esq., FOWLER, WHITE, et al, Attorneys for Petitioners University, Lai, and Quetel, Seventeenth Floor International Place, 100 Southeast Second Street, Miami, FL 33131; Esther E. Galicia, Esq., GEORGE, HARTZ, LUNDEEN, et al, Attorneys for Petitioners Chung, 4800 LeJeune Road, Coral Gables, Fl 33146; Frederick E. Hasty II, Esq., WICKER, SMITH, et al, 2900 Middle Street, Fifth Floor, Miami, FL 33133; Susan Rosenblatt, Esq., STANLEY M. ROSENBLATT, P.A., Attorneys for Respondents Fink, Twelfth Floor Concord Building, 66 West Flagler Street, Miami, FL 33130; and Stuart H. Sobel, Esq., SOBEL & SOBEL, Attorneys for Respondent Forman, 155 South Miami Avenue, Penthouse, Miami, FL 33130, on this, the 7th day of August, 1995.



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