

047

**IN THE SUPREME COURT
STATE OF FLORIDA**



DINA R. CHUNG, M.D.; and,
DINA R. CHUNG, M.D., P.A.,

SUPREME COURT CASE NO.: 85,053
THIRD DISTRICT CASE NO.: 93-02606
CIRCUIT COURT CASE NO.: 89-50670

Petitioners,

vs.

MALKA FINK, a minor, by and through
her parents and natural guardians,
DANIEL FINK and MONIQUE FINK;
DANIEL FINK and MONIQUE FINK,
individually; and, LAWRENCE FORMAN,

FILED

SID J. WHITE

AUG 30 1995

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Respondents.

UNIVERSITY OF MIAMI; ANTHONY LAI,
M.D.; and, THOMAS A. QUETEL, M.D.,

SUPREME COURT CASE NO.: 85,117
THIRD DISTRICT CASE NOS.: 93-02613
CIRCUIT COURT CASE NO.: 89-50670

Petitioners,

vs.

MALKA FINK, a minor, by and through
her parents and natural guardians,
DANIEL FINK and MONIQUE FINK;
DANIEL FINK and MONIQUE FINK,
individually; and, LAWRENCE FORMAN,

Respondents.

**CONSOLIDATED ANSWER BRIEF ON THE MERITS
OF RESPONDENTS, MALKA FINK**



STANLEY M. ROSENBLATT, P.A.
Attorneys for Respondents - Malka Fink
66 West Flagler Street
12th Floor, Concord Building
Miami, FL 33130-1807
Telephone (305) 374-6131

Stanley M. Rosenblatt, Esquire
Florida Bar No.: 068445



David C. Rash, Esquire
Florida Bar No.: 0977764

STANLEY M. ROSENBLATT, P.A.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND OF THE FACTS 1

 A. STATEMENT OF THE CASE 1

 B. STATEMENT OF THE FACTS 2

POINT ON APPEAL 12

 WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL
 REQUIREMENTS OF THE LAW BY ORDERING THE RESPONDENT,
 LAWRENCE FORMAN - A CERTIFIED REHABILITATION
 ADMINISTRATOR - TO PRODUCE DOCUMENTS, ITEMS AND THINGS
 THAT WERE NONEXISTENT AND WOULD REQUIRE THE DIVULGING OF
 CONFIDENTIAL UNRELATED CLIENT INFORMATION 12

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

 I. THE TRIAL COURT CLEARLY DEPARTED FROM THE
 ESSENTIAL REQUIREMENTS OF THE LAW BY ORDERING
 THE RESPONDENT, LAWRENCE FORMAN - A CERTIFIED
 REHABILITATION ADMINISTRATOR - TO PRODUCE
 DOCUMENTS, ITEMS AND THINGS THAT WERE
 NONEXISTENT AND WOULD REQUIRE THE DIVULGING
 OF CONFIDENTIAL UNRELATED CLIENT INFORMATION. 13

CONCLUSION 15

CERTIFICATE OF SERVICE 15, 16

TABLE OF CITATIONS

Cases:	Page Number
<u>Abdel-Fattah v. Taub</u> , 617 So.2d 429 (Fla. 4th DCA 1993)	13
<u>Balzebre v. Fares</u> , 294 So.2d 701 (Fla. 3d DCA 1974)	13
<u>Bissell Bros., Inc. v. Fares</u> , 611 So.2d 620 (Fla. 2d DCA 1993)	13
<u>Crandall v. Mishaud</u> , 603 So.2d 637 (Fla. 4th DCA 1992)	13
<u>Forman v. Fink</u> , 646 So.2d 236 (Fla. 3d DCA 1994), <u>rehearing denied</u> January 4, 1995	1, 12
<u>LeJeune v. Aikin</u> , 624 So.2d 788 (Fla. 3d DCA 1993)	13
<u>McAdoo v. Ogden</u> , 573 So.2d 1084 (Fla. 4th DCA 1991)	13
<u>Syken v. Elkins</u> , 644 So.2d 539 (Fla. 3d DCA 1994)	1, 13
 <u>OTHER AUTHORITIES:</u>	
§445.241(2), Fla.Stat. (1993)	13

STATEMENT OF THE CASE AND OF THE FACTS

A. STATEMENT OF THE CASE

On November 9, 1989, the Respondents, MALKA FINK, a minor, by and through her parents and natural guardians, DANIEL FINK and MONIQUE FINK; and, DANIEL FINK and MONIQUE FINK, individually, [hereinafter referred to collectively as "Malka Fink" or "Fink Respondents"], filed a Complaint for Damages against UNIVERSITY OF MIAMI, ANTHONY LAI, M.D., THOMAS QUETEL, M.D., DINA R. CHUNG, M.D. and DINA R. CHUNG, M.D., P.A., [hereinafter referred to collectively as "Petitioners"].

The Fink Respondents allege in the Complaint for Damages that the minor child, Malka Fink, was severely brain damaged due to the medical negligence of the Petitioners.

The Petitioners now seek this Court's discretionary review of Forman v. Fink, 646 So.2d 236 (Fla. 3d DCA 1994), rehearing denied January 4, 1995, wherein the Third District Court of Appeal granted Lawrence Forman's, a certified rehabilitation administrator, [hereinafter referred to as "Mr. Forman" or "Forman Respondent"], Petition for Writ of Certiorari and quashed the trial court's discovery Order dated October 12, 1993, compelling Mr. Forman to produce certain documents, items and things.

Asserting conflict jurisdiction herein, the Petitioners seek to have that portion of the Forman Opinion quashing the trial court's discovery Order compelling Mr. Forman to produce certain documents, items and things vacated because they claim that it erroneously relies as authority on Syken v. Elkins, 644 So.2d 539 (Fla. 3d DCA 1994), en banc, which is presently before this Court on certification from the Third District Court of Appeal.¹

¹ Elkins v. Syken, Florida Supreme Court Case Number 84,649.

This Court accepted discretionary review jurisdiction in this case on May 18, 1995, and the Petitioners have filed their respective Briefs on the Merits. Mr. Forman has filed his Answer Brief on the Merits, and the Fink Respondents file this Consolidated Answer Brief on the Merits.²

B. STATEMENT OF THE FACTS

Each Petitioner has stated their respective renditions of the "facts." The Fink Respondents will state below those facts omitted by the Petitioners:

Mr. Forman has a Master of Education "with an emphasis on the mentally handicapped and a minor on the physically handicapped." Mr. Forman is also a Certified Rehabilitation Administrator, [C.R.A.], Certified Rehabilitation Counselor, [C.R.C.], and Certified Vocational Evaluator, [C.V.E.]. (App. Forman 2, p. 46).³

In addition to one third of his rehabilitation and vocational consulting practice involving litigation, Mr. Forman is involved in numerous other public and private activities, which were described by him in deposition, as follows:

A: We do vocational evaluations for the State of Florida Department of Labor.

We do job development for private industry. We do medical case management for private individuals, third-party payees at the request of

² The designation "App. Forman" followed by a tab number and page number refers to the corresponding tabs and pages in the Appendix to Petition for Writ of Certiorari filed by Mr. Forman in the Third District Court of Appeal. The designation "App." followed by a tab number and page number refers to the Appendix to this Consolidated Answer brief on the Merits of Respondents, Malka Fink. All emphasis is supplied by the undersigned counsel unless otherwise noted.

³ Mr. Forman is not a "Dr.", but has erroneously been referred to such throughout these proceedings.

the court and guardianship proceedings.

We do work in aspects of incompetency. We provide assistance in securing equipment and modifying homes and adapting vans and selecting camps and residential centers.

We help people who want to find specialty programs. We do a number of things.

(App. Forman 2, p. 38).

• * *

A: We helped them set up discharge planing programs. We helped them set up specialty programs. We've helped develop a group home for head injured adults.

We're working now on a project to help people who are employed by sheltered workshops sell the products they make. We help other rehab. centers.

(App. Forman 2, p. 69).⁴

The Petitioners not only sought from Mr. Forman information about his experience, education, and involvement in this case, but also sought via subpoena duces tecum, the following documents, items and things:

1. Any and all appointment books for 1990, 1991, 1992 and 1993 to date, which reflect any medical/legal evaluations, testimony or other work at the request of attorneys representing the patient/client.
2. Any and all copies of reports and bills (individual names and clients/patients can be whited out)

⁴ Mr. Forman was deposed by the Petitioners in this matter on two separate occasions: first, individually on March 29, 1993, (from which the above quotations are taken); and, then on April 29, 1993, as "records custodian."

for each of the aforesaid examinations and/or reviews.

3. Any and all evidence of payments, including but not limited to IRS Form 1099, from attorneys for examinations and/or reviews performed in the calendar years of 1990, 1991, 1992 and 1993 to date.

(App. Forman 1).

In his deposition, the Petitioners questioned Mr. Forman repeatedly and in detail about his records as requested by the subpoena, (App. Forman 2, pp. 3-87), and Mr. Forman answered the questions as quoted below:

Q: Okay. When you open a file because an attorney contacts you, how is that kept here in the office?

A: Same way. Just integrated into all our files. There is no special treatment.

Q: Are they on computer?

A: No, we don't keep that stuff on computer.

(App. Forman 2, p. 39).

* * *

Q: What percentage of the income of Comprehensive Rehabilitation Consultants, Inc. comes from litigation assistance?

A: I'm really not sure.

I guess it would have to be a third or less because we all bill at the same rate, and if a third of our work is litigation, then it must be a third or less.

We don't break our income down that way.

Q: Do you charge separately for work you do or does it all go through Comprehensive Rehabilitation Consultants?

A: Oh, no, it all goes through the company.

(App. Forman 2, pp. 43-44).

* * *

Q: One of the things asked for are appointment books for '90, '91, '92 and '93 which reflect medical evaluation testimony or other work. Where are those kept?

[Counsel objection]

Witness: We don't keep them.

Q: Do you presently keep an appointment book for 1993?

A: Yes, but I don't list it that way. I just list the client's name.

Q: Do you throw away your appointment books at the end of the year?

A: Yeah.

Q: You don't have any appointment books for 1992, '91 or '90?

A: No.

Q: How do you do your billing?

A: We use little time sheets and they go back to two people in the billing department who put it together.

(App. Forman 2, pp. 71-72).

* * *

Q: That would be billing records that would go back to '90, '91?

A: Oh, no. We don't keep them after they're paid.

Q: What about your tax records? Do you throw those away too?

A: No. We have tax returns.

Q: Where would we find your tax returns or IRS forms, 1099's, et cetera?

A: We don't have any 1099's. We don't have any 1099's and we keep the tax forms here.

Q: So you have no record whatsoever of what attorneys you have done work for in the last five years?

A: I just don't keep it. Don't maintain it.

Q: Do you even have a Rolodex?

A: No. It's of no value to me.

Q: You don't keep a computer program at all?

A: I think I've answered you three times. I don't keep it.

(App. Forman 2, pp. 72-73).

* * *

Q: How many cases are you presently serving this function on?

A: About twenty.

Q: What is your average case load for a given year in the last five years?

A: Litigation-related?

Q: Yes.

A: Somewhere between twenty and thirty.

Q: How many times did you testify in trial last year, 1992?

A: Probably an average of two times a month.

Q: Is that greater, lesser or about the same as in the past five years?

A: Oh, probably less.

Q: What year in the past was your greatest year?

A: Oh, it's been a long time ago. I don't know.

Q: In the last five years?

A: I don't know. I mean, it's leveled off. I just don't know.

(App. Forman 2, pp. 73-74).

* * *

Q: How many depositions did you give last year?

A: I would say an average of two to four a month.

(App. Forman 2, pp. 74-75).

* * *

Q: Are you scheduled to appear at trial in any time in the next two months?

A: Actually, I am going to do one video before I leave on vacation next week, but other than that, no.

(App. Forman, 2, p. 76).

* * *

Q: Have you ever done any work for the Wicker, Smith firm?

A: Sure.

Q: Have you ever done any work for the George, Hartz, Lundeen firm?

A: Oh, sure.

Where was Greg Gaebe before? Was he with Fowler, White? Then I did do work for Fowler, White.

(App. Forman, 2, p. 76).

Despite the clear and candid answers provided at his March 29, 1993, deposition, Mr. Forman was ordered thereafter by the trial court on April 20, 1993, to designate someone from his office who could best respond to the subpoena for deposition duces tecum. Mr. Forman designated himself and appeared for a second deposition on April 29, 1993, reiterating his answers before that he did not have the records the Petitioners sought, as follows:

Q: Sir, do you have any documents with you in response to that subpoena?

A: I have an appointment book here and I do have some bills.

Q: May I see them, please.

A: Absolutely not, because they don't contain the information that you have asked for in the form that you want it.

Q: Where are these documents in response to this subpoena that is now by Court order?

A: We don't have them, as I told you at the last meeting.

Number one, we have absolutely no 1099's.

Two, on the appointment book we do not list on some occasions whether there is or is not an attorney involved, but I have no idea from the appointment book other than an indication in some cases whether there is a plaintiff or a defense attorney involved.

I have absolutely no 1099's nor do we keep our bookkeeping or records based upon the name of anything other than the client.

I told you at the last deposition.

Q: Where are the documents kept physically?

A: Which ones now?

Q: The ones that you have mentioned and that you have said in this deposition, the appointment books.

A: I have it right here.

I have the bills that are right here.

Q: Could we see your appointment book, please, for 1990.

A: I don't have one. It is gone. Don't keep it.

The only one I have is 1993.

Q: Where is 1992?

A: It's gone. I don't keep it.

[Counsel objection]

Q: Where is 1991?

A: I don't have it.

Q: Let's look at the 1993 one.

A: What do you want to look at?

Do you want to look at the information relating to attorneys?

Is that correct?

Q: Yes.

A: I don't keep it in the format or in the way that you want it.

Q: You just testified, sir, that you can look and see if an attorney was involved in a certain case or in a certain review.

Ms. Schneider (counsel for Fink): Objection.

That is not what he said.

A: Let me give you an example. I don't want to spend extra time in this.

Q: When does your book start?

A: This book starts --- The first date is January 1, 1993.

As an example, the first page talks about New Year's Eve, a characterization, on the second page.

The third page begins with a meeting with a client. It does not have an attorney's name next to it.

The second also has a hearing, which has nothing to do with a medical legal matter. It was a guardianship case.

The third entry has nothing to do with legal.

The fourth entry has nothing to do with legal.

The bottom entry in that page happens to be a deposition.

It does have next to it plaintiff - and defense attorneys' names.

(App. Forman 3, pp. 17-20).

Thereafter, counsel for the Petitioners went through Mr. Forman's 1993 appointment book page by page asking questions about each entry. (App. Forman 3, pp. 17-73). Counsel for the Petitioners also marked the appointment book for identification and attached it as an exhibit to the deposition. (App. Forman 3, pp. 20-21).

Nevertheless, the Petitioners sought the trial court's assistance by filing a Motion for Order to Show Cause seeking to have Mr. Forman held in contempt for not appearing a third time for deposition and for allegedly not complying with the trial court's April 20, 1993, order. (App. Forman 4 and 5).

In response to the trial court's order on said motion to show cause on September 21, 1993, Mr. Forman filed an Affidavit of Compliance with Subpoena Duces Tecum detailing for the third time the facts that he did not have the documents, items and things being requested. (App. Forman 5 and 6).⁵

On October 12, 1993, the trial court ultimately entered the subject Discovery Order compelling, inter alia, the Respondent, Lawrence Forman, to produce documents, items and things, as follows:

Dr. Forman shall provide to the Defendants all information requested in the subpoena duces tecum. This Court will not excuse Dr. Forman from the subpoena, notwithstanding Dr. Forman's assertion that he does he does not have the

⁵ Mr Forman filed his Affidavit of Compliance not only in an effort to comply with the subpoena duces tecum, but also in an effort to avert being stricken as a plaintiffs' witness. The trial court had indicated at the hearing on September 21, 1993, that unless Mr. Forman fully complied with the subpoena duces tecum within 10 days, then she would strike him as a plaintiff's witness. (App. Forman 5, p. 8).

information requested, consisting of all medical and legal evaluations performed by Dr. Forman at the request of attorneys for the years 1990 through 1993. Dr. Forman shall provide evidence of income received on each matter where he was retained by an attorney, for the years 1990 through 1993, by producing 1099's, W-2 forms, or doing whatever necessary to obtain that information.

(App. Forman 7, ¶ 7).

Mr. Forman and the Fink Respondents filed separate Petitions for Writ of Certiorari regarding the trial court's Discovery Order dated October 12, 1993. The Third District Court of Appeal granted Mr. Forman's and the Fink Respondents' Writs of Certiorari and quashed, inter alia, the trial court's Discovery Order as related to compelling Mr. Forman to produce documents, items and things that he did not have and would have had to create in order to comply with the trial court's order. Fink, 646 So.2d at 237.

POINT ON APPEAL

WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY ORDERING THE RESPONDENT, LAWRENCE FORMAN - A CERTIFIED REHABILITATION ADMINISTRATOR - TO PRODUCE DOCUMENTS, ITEMS AND THINGS THAT WERE NONEXISTENT AND WOULD REQUIRE THE DIVULGING OF CONFIDENTIAL UNRELATED CLIENT INFORMATION.

SUMMARY OF ARGUMENT

Florida law clearly prohibits discovery orders requiring an expert to create nonexistent records, as well as prohibits discovery orders requiring an expert to divulge confidential unrelated patient information without notice to or consent of the patient.

In this case, the trial court's Discovery Order dated October 12, 1993, clearly departs from the essential requirements of the law by requiring the Respondent, Mr. Forman, a non-medical certified rehabilitation expert, to create nonexistent records and to

divulge confidential unrelated client information.

The Third District Court of Appeal properly quashed the trial court's Discovery Order not only based on Syken, but also based on well established case law not in conflict with Syken. Therefore, this Court should affirm the Third District Court of Appeal decision quashing the trial court's Discovery Order.

ARGUMENT

- I. THE TRIAL COURT CLEARLY DEPARTED FROM ESSENTIAL REQUIREMENTS OF THE LAW BY ORDERING THE RESPONDENT, LAWRENCE FORMAN - A CERTIFIED REHABILITATION ADMINISTRATOR - TO PRODUCE DOCUMENTS, ITEMS AND THINGS THAT WERE NONEXISTENT AND WOULD REQUIRE THE DIVULGING OF CONFIDENTIAL UNRELATED CLIENT INFORMATION.

Whether under Syken, or other well established case law, the trial court's Discovery Order compelling the Respondent, Mr. Forman, a non-medical certified rehabilitation administrator, to produce nonexistent documents, items and things, and all-encompassing client files clearly departs from the essential requirements of the law.

Well established Florida law prohibits discovery orders requiring an expert to nonexistent records, See Syken, supra; see also LeJeune v. Aikin, 624 So.2d 788 (Fla. 3d DCA 1993); Bissell Bros., Inc. v. Fares, 611 So.2d 620 (Fla. 2d DCA 1993); Balzebre v. Fares, 294 So.2d 701 (Fla. 3d DCA 1974); and, holds that divulging patient files without notice to or consent of the patient involved violates the confidentiality of said files. See §445.241(2), Fla.Stat. (1993); see also Syken, supra; Crandall v. Mishaud, 603 So.2d 637 (Fla. 4th DCA 1992); Abdel-Fattah v. Taub, 617 So.2d 429 (Fla. 4th DCA 1993); McAdoo v. Ogden, 573 So.2d 1084 (Fla. 4th DCA 1991).

In this case, the trial court's Discovery Order requires:

Dr. Forman shall provide to the Defendants all information requested in the subpoena duces tecum. This Court will not excuse Dr. Forman from the subpoena, notwithstanding Dr. Forman's assertion that he does not have the information requested, consisting of all medical and legal evaluations performed by Dr. Forman at the request of attorneys for the years 1990 through 1993. Dr. Forman shall provide evidence of income received on each matter where he was retained by an attorney, for the years 1990 through 1993, by producing 1099's, W-2 forms, or doing whatever necessary to obtain that information.

(App. Forman 7, ¶ 7).

Mr. Forman unequivocally testified under oath on three separate occasions (1) that he does not possess the client information and financial information requested by the Petitioners; (2) that he cannot identify from any of his records the specific sources of his income since he neither has any 1099 forms, nor does he receive any 1099 forms from his clients; (3) that the only appointment book he still had in his possession was for the current year, 1993, and that previous years appointment books were nonexistent; and, (4) that he did not maintain specific litigation records identifying or separating the attorneys and their clients for whom he was performing the consulting from his regular clients and patients.

Mr. Forman simply did not have or maintain the information requested, and would have to create nonexistent records and divulge confidential unrelated client information in order to comply with the trial court's Discovery Order.

No Florida district court has ever required that a medical expert, let alone a non-medical expert, such as a certified rehabilitation administrator like Mr. Forman, produce confidential patient/client evaluations, unrelated to the instant litigation, as was required by the trial court Order herein. Nor has any Florida district court required that an expert

create nonexistent information as to his litigation related income.

The trial court's Discovery Order clearly requires such of Mr. Forman, and whether The Third District Court of Appeal quashed the trial court's Discovery Order on the basis of Syken, or other well established case law not in conflict with Syken, the trial court's order clearly departs from the essential requirements of the law. Therefore, the Third District Court of Appeal's decision below should be affirmed and the trial court's Discovery Order quashed.

CONCLUSION

The Third District Court of Appeals properly quashed the trial court's Discovery Order dated October 12, 1993, which required the Respondent Forman to produce nonexistent records and divulge confidential unrelated client information. Therefore, the Fink Respondents most respectfully submits that this Court should affirm the Third District Court of Appeals decision below.

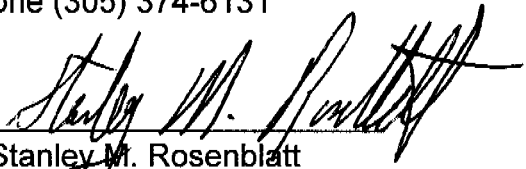
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. Mail upon Steven E. Stark, Esquire, Fowler, White, et al., Attorneys for Petitioners University, Lai and Quetel, 17th Floor, International Place, 100 S.E. 2nd Street, Miami, FL 33131; Esther E. Galicia, Esquire, George, Hartz, Lundeen, et al., Attorneys for Petitioners Chung, 4800 LeJeune Road, Coral Gables, FL 33146; Frederick E. Hasty, II, Esquire, Wicker, Smith, et al., 2900 Middle Street, 5th Floor, Miami, FL 33133; Stuart H. Sobel, Esquire, Sobel & Sobel, Attorneys for Respondent Forman, 155 South Miami Avenue, Penthouse, Miami, FL

33130; The Honorable Gisela Cardonne, Dade County Courthouse, 73 West Flagler Street,
Room 1500, Miami, FL 33130, on this 28th day of August, 1995.

STANLEY M. ROSENBLATT, P.A.
Attorneys for Plaintiffs/Fink Respondents
66 West Flagler Street
12th Floor, Concord Building
Miami, FL 33130-1807
Telephone (305) 374-6131

By: _____


Stanley M. Rosenblatt
Florida Bar No.: 068445

By: _____


David C. Rash, Esquire
Florida Bar No.: 0977764