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SID J. WHITE

JAN 25 1995

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 85053

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

THIRD DCA CASE NOS.

93-02606

93-02613

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

L.T. CASE NO. 89-50670 CA (08)
Judge Gisela Cardonne

Defendants/Petitioners,

vs.

MALKA FINK, etc.,

Plaintiffs/Respondents.

**APPLICATION FOR DISCRETIONARY REVIEW OF THE DISTRICT
COURT OF APPEAL, THIRD DISTRICT OF FLORIDA**

BRIEF OF PETITIONERS ON JURISDICTION

✓
ESTHER E. GALICIA, ESQUIRE

Florida Bar No.: 510459

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioners, DINA CHUNG, M.D. and DINA R. CHUNG, M.D., P.A. (hereinafter "CHUNG"), seek review of a decision of the District Court of Appeal, Third District, filed on October 26, 1994, rehearing denied on January 4, 1995. [A. 1, A. 2].¹ The Petitioners were one of the several defendant healthcare providers in the trial court and one of the respondents before the district court. The Respondent, Lawrence Forman (hereinafter "Forman"), was the Plaintiffs' rehabilitation expert in the trial court and the petitioner before the district court.

At the trial level, Petitioners CHUNG sought discovery of all medical and legal evaluations Respondent Forman conducted from 1990 through 1993, and evidence of income received on matters in which he was retained by the an attorney during those years. The trial court entered an order compelling such discovery and Respondent Forman sought certiorari review. The Third District granted Respondent's petition and quashed the discovery order on the authority of Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994) (en banc). The Syken decision is currently pending before this Court. Syken v. Elkins, Florida Supreme Court Case No. 84, 649.

Petitioners' Notice to Invoke the Discretionary Jurisdiction of this Court was timely filed on January 13, 1995.

¹The letter "A." followed by a number refers to the particular item/document in the Appendix to the Brief of Petitioners on Jurisdiction.

QUESTION PRESENTED

WHETHER THIS COURT HAS JURISDICTION PURSUANT TO ARTICLE V, § 3(b)(3), FLA. CONST., WHERE THE THIRD DISTRICT COURT OF APPEAL ISSUED A PER CURIAM OPINION CITING A CASE WHICH IS PENDING REVIEW IN THIS COURT AND THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

SUMMARY OF THE ARGUMENT

This Court should entertain its discretionary jurisdiction to review the decision of the Third District Court of Appeal for two reasons. First, the Third District's decision is based on the authority of Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994) (en banc), a decision that is currently pending review in this Court. Syken v. Elkins, Florida Supreme Court Case No.: 84, 649. Second, the Third District's decision expressly and directly conflicts with the decisions in Abdel-Fattah v. Taub, 617 So. 2d 429 (Fla. 4th DCA 1993); Young v. Santos, 611 So. 2d 586 (Fla. 4th DCA 1993); Bissell Brothers, Inc. v. Fares, 611 So. 2d 620 (Fla. 2d DCA 1993); Wood v. Tallahassee Memorial Regional Medical Center, Inc., 593 So. 2d 1140 (Fla. 1st DCA), review denied, 599 So. 2d 1281 (Fla. 1992); and McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991).

ARGUMENT

THIS COURT HAS JURISDICTION PURSUANT TO ARTICLE V, § 3(b)(3), FLA. CONST., SINCE THE THIRD DISTRICT COURT OF APPEAL ISSUED A PER CURIAM OPINION CITING A CASE WHICH IS PENDING REVIEW IN THIS COURT AND THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

In order to allow Petitioners to delve into Respondent Forman's potential bias as Plaintiffs' rehabilitation expert, the trial court compelled Respondent to produce evidence of income received on matters in which he was retained by an attorney from 1990 through 1993, and all medical and legal evaluations Respondent conducted during those years. The Third District Court of Appeal quashed the trial court's discovery order on the authority of Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994) (en banc). The court in Syken held that, in order to demonstrate the probability of bias, medical experts should not be required to disclose the amounts of money earned from expert witness work. Syken is currently pending before this Court. Syken v. Elkins, Florida Supreme Court Case No.: 84, 649.

The fact that the Third District's decision in the instant case is based on the authority of Syken, supra, which this Court has under review, constitutes prima facie express conflict for purposes of jurisdiction. State v. Lofton, 534 So. 2d 1148, 1149 (Fla. 1988); Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). This Court accordingly

has jurisdiction pursuant to Article V, § 3(b)(3) of the Florida Constitution. Taylor v. State, 601 So. 2d 540, 541 (Fla. 1992); Lofton, supra; Jollie, supra.

This Court also has jurisdiction over this matter because the Third District's decision, as discussed above, expressly and directly conflicts with the following decisions of the other district courts of appeal: Abdel-Fattah v. Taub, 617 So. 2d 429 (Fla. 4th DCA 1993) (trial court ordered to determine reasonable costs for non-party medical expert to compile information regarding defense-requested examinations done by him during past year); Young v. Santos, 611 So. 2d 586 (Fla. 4th DCA 1993) (doctor ordered by trial court to produce copies of bills, checks and payment records regarding medical exams done at request of insurance companies and law firms, as well as tax returns, for three-year period); Bissell Brothers, Inc. v. Fares, 611 So. 2d 620 (Fla. 2d DCA 1993) (IRS 1099 forms of independent medical examiners subject to discovery as reasonably calculated to lead to relevant evidence concerning bias); Crandall v. Michaud, 603 So. 2d 637 (Fla. 4th DCA) (independent medical examiner's 1099 forms or records of payment from insurers or defense law firms relevant to issue of bias); Wood v. Tallahassee Memorial Regional Medical Center, Inc., 593 So. 2d 1140 (Fla. 1st DCA) (trial court properly ordered independent medical examiners to produce for in-camera inspection tax returns for previous five years to extent they reflected income from involvement in medical malpractice cases), review denied, 594 So. 2d 1281 (Fla. 1992); McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991) (bills to companies or persons for whom expert witness served as a defense expert examiner

relevant and discoverable in that they might serve to demonstrate the witness's potential bias).

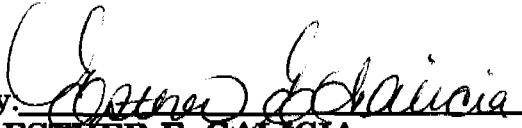
CONCLUSION

Based upon the foregoing, this Court has discretionary jurisdiction to review the Third District's decision below. This Court should accordingly exercise that discretion to consider the merits of the Petitioners' arguments.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above Brief of Petition on Jurisdiction was served by mail this 20th day of January, 1995 to: **Christopher E. Knight, Esq., Steven E. Stark, Esq.,** Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Courthouse Center, 11th Floor, 175 N.W. First Avenue, Miami, Florida 33128-1835; **Frederick E. Hasty, III, Esq.,** Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, P.A., 2900 Middle Street, 5th Floor, Miami, Florida 33133; **Henry A. Seiden, Esq.,** Henry A. Seiden, P.A., 7280 West Palmetto Park Road, Suite 304, Boca Raton, Florida 33433; **Mary Margaret Schneider, Esq., Susan Rosenblatt, Esq.,** Stanley M. Rosenblatt, P.A., Concord Building, 12th Floor, 66 West Flagler Street, Miami, Florida 33130, **Stuart H. Sobel, Esq.,** Sobel & Sobel, P.A., Penthouse, 155 South Miami Avenue, Miami, Florida 33130-1609, and **The Honorable Gisela Cardonne,** Dade County Courthouse, 73 West Flagler Street, Room 1500, Miami, Florida 33130.

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By: 
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Florida Bar No. 510459

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ITEM(S)


ITEM NO.

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Third District Court of Appeal's Order denying Motions for Rehearing, dated January 4, 1995	A. 2

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above Appendix to Brief of Petition on Jurisdiction was served by mail this 20th day of January, 1995 to: **Christopher E. Knight, Esq., Steven E. Stark, Esq.**, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., Courthouse Center, 11th Floor, 175 N.W. First Avenue, Miami, Florida 33128-1835; **Frederick E. Hasty, III, Esq.**, Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, P.A., 2900 Middle Street, 5th Floor, Miami, Florida 33133; **Henry A. Seiden, Esq.**, Henry A. Seiden, P.A., 7280 West Palmetto Park Road, Suite 304, Boca Raton, Florida 33433; **Mary Margaret Schneider, Esq., Susan Rosenblatt, Esq.**, Stanley M. Rosenblatt, P.A., Concord Building, 12th Floor, 66 West Flagler Street, Miami, Florida 33130, **Stuart H. Sobel, Esq.**, Sobel & Sobel, P.A., Penthouse, 155 South Miami Avenue, Miami, Florida 33130-1609, and **The Honorable Gisela Cardonne**, Dade County Courthouse, 73 West Flagler Street, Room 1500, Miami, Florida 33130.

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By: 
ESTHER E. GALICIA
Florida Bar No. 510459

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OCT 27 1994

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

GEORGE, HARTZ, LUNDEEN,
FLAGG & FULMER

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

LAWRENCE FORMAN,

**

Petitioner,

**

vs.

**

CASE NO. 93-2606

MALKA FINK, a minor, by and
through her parents and natural
guardians, DANIEL FINK and
MONIQUE FINK, DANIEL FINK
and MONIQUE FINK, individually,
UNIVERSITY OF MIAMI, INC.,
NORTH SHORE MEDICAL CENTER,
STUART GROSS, ANTHONY LAI,
THOMAS A. QUETEL, DINA CHUNG and
DINA CHUNG, M.D., P.A.,

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Respondents.

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

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**

Petitioners,

**

vs.

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CASE NO. 93-2613

UNIVERSITY OF MIAMI, INC. d/b/a
UNIVERSITY OF MIAMI HOSPITAL &
CLINICS a/k/a NATIONAL CHILDREN'S
CARDIAC HOSPITAL, NORTH SHORE
MEDICAL CENTER, ANTHONY LAI, M.D.,
THOMAS A. QUETEL, M.D., DINA
CHUNG, M.D., and DINA R. CHUNG,
M.D., P.A.,

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Respondents.

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Opinion filed October 26, 1994.

Writs of Certiorari to the Circuit Court for Dade County,
Gisela Cardonne, Judge.

Sobel & Sobel, and Stuart H. Sobel, for petitioner, Lawrence
Forman.

Stanley M. Rosenblatt, and Susan Rosenblatt, for petitioner,
Malka Fink.

George, Hartz, Lundeen, Flagg & Fulmer, and Esther E. Galicia,
for respondents, Dina Chung, M.D. and Dina R. Chung, M.D., P.A.

Wicker, Smith, Tutan, O'Hara, McCoy, Graham & Lane, and
Frederick E. Hasty, III for respondent, North Shore Medical Center.

Fowler, White, Burnett, Hurley, Banick & Strickroot, and
Christopher L. Kurzner, for respondent, University of Miami.

Before BASKIN, JORGENSON, and GERSTEN, JJ. ✓

PER CURIAM.

In this consolidated case, petitioner, Lawrence Forman, a
certified rehabilitation administrator, seeks review of that portion
of a trial court order compelling discovery of all medical and legal
evaluations petitioner conducted from 1990 through 1993, and
evidence of income received on matters in which he was retained by
an attorney during those years. We grant the petition and quash
this portion of the order on the authority of Syken v. Elkins, Nos.
93-1299 and 92-2317 (Fla. 3d DCA Oct. 5, 1994) (en banc).

Petitioner, Malka Fink, seeks review of another portion of the
order compelling "full and complete discovery from Plaintiffs'
former medical expert Joan Pehta, M.D.," an expert witness who had
been withdrawn by petitioner. Because no exceptional circumstances
were shown to compel discovery of an expert not expected to testify
at trial, we grant the petition and quash this part of the trial

court's order. See Fla. R. Civ. P. 1.280(b)(4)(B); Lift Systems, Inc. v. Costco Wholesale Corp., 636 So. 2d 569 (Fla. 3d DCA 1994); Morgan v. Tracy, 604 So. 2d 15 (Fla. 4th DCA 1992); Gilmor Trading Corp. v. Lind Elec., Inc., 555 So. 2d 1258 (Fla. 3d DCA 1989); Ruiz ex rel. Ruiz v. Brea, 489 So. 2d 1136 (Fla. 3d DCA 1986) (opinion on rehearing).

Petitions for writ of certiorari granted; order quashed in part.

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JAN 5 1994

GEORGE, HARTZ, LUNDEEN,
FLAGG & FULMER

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1994
WEDNESDAY, JANUARY 4, 1995

✓
[Handwritten signature]

LAWRENCE FORMAN,

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Petitioner,

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vs.

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DINA CHUNG, M.D., P.A.,

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

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Respondents.

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Upon consideration, Dina Chung, M.D. and Dina R. Chung,
M.D., P.A.; University of Miami; Anthony Lai and Thomas A.
Quetel's motions for certification and to stay issuance of mandate
pending discretionary review by the Supreme Court are hereby
denied. Baskin, Jorgenson and Gersten, JJ., concur.

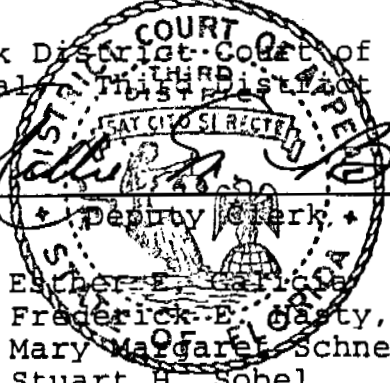
A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeals, Third District

By



Deputy Clerk
cc: Esther E. Garcia
Frederick E. Gasty, III
Mary Margaret Schneider
Stuart H. Sobel

Christopher E. Knight
Henry A. Seiden
Susan Rosenblatt
Steven E. Stark

/NB