

IN THE SUPREME COURT  
STATE OF FLORIDA

CASE NO. ~~85,063~~

85,053

DISTRICT COURT CASE NOS. 93-2606, 93-2613  
ELEVENTH JUDICIAL CIRCUIT CASE NO. 89-50670 CA 08

DINA CHUNG and DINA CHUNG, P.A.

Defendant/Petitioners,

vs.

MALKA FINK, etc.

Respondents.

**FILED**

SID J. WHITE

FEB 2 1995

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

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

BRIEF OF RESPONDENT, LAWRENCE FORMAN, ON JURISDICTION

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### SUMMARY OF ARGUMENT

The decision under review, insofar as it quashes an Order requiring Respondent, Lawrence Forman, to create and produce documents not shown to be in existence, does not conflict with any decisions of other District Courts of Appeal on the same point of law. While the Third District Opinion is expressly based upon the "authority of Syken v. Elkins," 644 So.2d 539 (Fla. 3DCA 1994) (en banc), there are no cases conflicting with the actual underlying proposition, that Respondent cannot be ordered to produce that which does not exist or which has not been sought by way of the challenged subpoena.

The holding in Syken, is far broader than necessary to sustain the Third District's disapproval of the Trial Court Order. Thus, should this Honorable Court reverse or modify the Third District's decision in Syken, the decision in this matter would likely remain undisturbed and there is no reason to entertain review of this matter.

## ARGUMENT

Respondent does not quarrel with Petitioner's analysis of Syken, or the claim that Syken may conflict with other cases on the same point of law. However, the discovery Order that was actually reviewed by the Third District required Petitioner to:

7...provide to the Defendants all information requested in the subpoena duces tecum. This Court will not excuse Dr. (sic)<sup>1</sup> Forman from the subpoena, **notwithstanding Dr. Forman's assertion<sup>2</sup> 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 is necessary to obtain that information.**

The Order emanated from a hearing at a Motion for Order to Show Cause, where Respondent's compliance with a particular subpoena was questioned. The subpoena required the production of

1. Any and all appointment books for 1990, 1991, 1992 and 1993 to date, which reflect any medical/legal evaluations, testimony or any other work at the request of attorneys representing the patient/client.

2. Any and all copies of reports and bills (individual names of patients/clients may be whited out) for each of the aforesaid examinations and/or reviews.

3. Any and all evidence of payments, including but not limited to IRS form 1099, form attorneys for examinations and/or reviews

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<sup>1</sup>Mr. Forman is not a doctor and has not held himself out as such.

<sup>2</sup>Respondent's "assertion" was not challenged and remains uncontroverted.

performed in the calendar years of 1990, 1991, 1992 and 1993 to date.

The October 12, 1993 Order on Discovery Motions, quashed by the Third District, required Forman to produce and compile non-existent documents and do the unspecified "whatever is necessary" beyond the scope of the subpoena to which Respondent was called to respond. In so doing, the Court did not need to rely on any doctrine which is in conflict. Rather, the opinion was soundly bottomed on the doctrine, in which Courts are quite uniform, that an expert witness cannot properly be ordered to produce records that are shown to be non-existent, Lejeune v. Aiken, 624 So.2d 788 (Fla. 3DCA 1993); Bissell Brothers, Inc. v. Fares, 611 So.2d 620 (Fla. 2DCA 1993); Balzebre v. Anderson, 294 So.2d 701 (Fla. 3DCA 1974). Likewise, it is indisputably error to order the production of unspecified documents not within the scope of a challenged subpoena. El Conquistador Condominium, Inc. v. Miller, 314 So.2d 641 (Fla. 3DCA 1975).

Petitioners can show no conflict on these points. Since this holding would be sufficient to sustain the Third District's Opinion, nothing is to be gained, or added to the jurisprudence of this State by subjecting this case to review.

CONCLUSION

The Petition for Discretionary Review should be denied. Ample, non-conflicting support for the decision of the Third District exists.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of January, 1995 to: Esther E. Galicia, Esq., George, Hartz, Lundeen, Flagg & Fulmer, P.A., 4800 LeJeune Road, Miami, Florida, 33145; Christopher E. Knight, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 175 N.W. 1st Avenue, 11th Floor, 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; Mary Margaret Schneider, Esq., Law Offices of Stanley M. Rosenblatt, P.A., 66 West Flagler Street, 12th Floor, Miami, Florida 33130; and to Henry A. Seiden, Esq., 7280 West Palmetto Park Road, Suite 304, Boca Raton, Florida, 33433.

Respectfully submitted,

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