IN THE SUPREME COURT
STATE OF FLORIDA
CASE NO. ~~85,063~~ 85,053
consolidated with
CASE NO. 85,117

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

Petitioners,

vs.

MALKA FINK, etc., et. al.,

Respondents.

Supreme Court Case No. 85,063
Third District Case No. 93-2606
Circuit Court Case No. 89-50670

CONSOLIDATED WITH

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

Petitioners,

vs.

MALKA FINK, etc., et. al.,

Respondents.

Supreme Court Case No. 85,117
Third District Case No. 93-2613
Circuit Court Case No. 89-50670

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

RESPONDENT, LAWRENCE FORMAN'S CONSOLIDATED ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Petitioners, Dina R. Chung, M.D., Dina R. Chung, M.D., P.A. (jointly referred to as Chung), University of Miami, Anthony Lai, M.D., and Thomas Quetel, M.D. (jointly referred to as The University), were several Defendant health care providers in the trial court, and Respondents before the District Court of Appeal. The Respondent, Lawrence Forman (Forman) is a certified rehabilitation administrator retained by the Plaintiffs below and was the Petitioner before the District Court of Appeal, in a successful challenge to the Trial Court's October 12, 1993 Order on Discovery Motions.

This Answer Brief addresses the Briefs on the Merits filed by both Chung and The University. The designation "Forman Appendix" followed by a number refers to the correspondingly numbered item/document attached to the Appendix to Petition for Writ of Certiorari filed by Forman in the Third District. The designation "Chung Appendix" followed by a number refers to the correspondingly numbered item/document attached to the Appendix to the Response to the Petition for Writ of Certiorari filed by Petitioners, Chung, in the Third District.

All emphasis is supplied by counsel, unless otherwise indicated.

STATEMENT OF THE FACTS AND THE CASE

In June, 1992, Respondent, Lawrence Forman, a certified rehabilitation administrator, was retained to prepare a life care plan for Malka Fink (Forman Appendix, 2, page 37), who was involved in a personal injury lawsuit against the remaining Petitioners. During the course of the underlying litigation, on March 1, 1993, Petitioners subpoenaed Mr. Forman to testify duces tecum (Forman Appendix 1), and commanded to produce the following documents:

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

Respondent, Forman, appeared for deposition on March 29, 1993, from 5:45 P.M. to 8:00 P.M. (Forman Appendix 2) and again on April 29, 1993, from 2:30 P.M. to 5:30 P.M. (Forman Appendix 3). During the March deposition, Mr. Forman testified that he did not have appointment books for 1990, 1991 or 1992 (Forman Appendix 2, page 72). As for 1993, Petitioner testified that he had an 1993 appointment book, but it is not kept in a way "which reflect any medical/legal evaluations, testimony or any other work at the request of attorneys representing the patient/client," as requested in the subpoena (Forman Appendix 2, pages 71-72, Appendix 3, pages

18-22).

At page 3 of the University's brief, the University quotes a portion of the April 29, 1993 deposition of Respondent,

> Q. We can decipher that information from what you are telling us.
>
> A. How can you decipher that?
>
> Q. You told us you had a meeting with a client and the attorney.

Thereafter, the University claims that Mr. "Forman agreed." Petitioner misstates the record. Contrary to Petitioner's claim, in fact, Mr. Forman testified:

> No. I didn't say that." I said I had a meeting with a client. Underneath that (speaking of his calendar), I have an attorney in relation to a deposition.

Mr. Forman's calendar was not kept in a way that could provide any comprehensive list of attorneys with whom he had worked. He could only go through the calendar, day by day, on a hit or miss basis, to see if he could connect a particular attorney with a particular client. He did this for Petitioners (Forman Appendix C, pages 19-65).

Mr. Forman does not keep or maintain a record of attorneys for whom he has worked (Forman Appendix 2, page 73).

Respondent had no documents responsive to the second category, because the reports and bills are not categorized or sorted by medical legal evaluation or attorney request. Cases that are referred to Mr. Forman by attorneys are not afforded special treatment and the files, when open, are simply integrated with all of Petitioner's files (Forman Appendix 2, page 39 and Forman

Appendix 3, page 17).

As for IRS 1099 forms, Mr. Forman testified that he had none (Forman Appendix 2, page 73).

At the April continuation of Respondent's deposition, he went through his 1993 appointment book, and attempted to determine if any particular entry was "medicolegally" related. Page by page, day by day, Mr. Forman reviewed his 1993 appointment book and testified as to his recollection of whether a particular entry reflected work done at the request of a plaintiff's attorney (Forman Appendix 3, pages 19-65). The deposition was cut short because of a personal emergency to which Respondent had to attend.

Respondent later provided a letter, dated September 7, 1993, attesting to the fact that he had no information maintained in the manner sought by Dr. Chung (Forman Appendix 4, page 3).

Apparently dissatisfied and frustrated by the fact that Respondent did not keep records in a manner convenient for Petitioner Chung, Dr. Chung filed a Motion for Order to Show Cause why Respondent should not be held in contempt (Forman Appendix 4, pages 1-9). The Motion was heard by the Circuit Court on October 5, 1993 (Forman Appendix 5, pages 1-16), where the Court ruled (Forman Appendix 5, page 9):

> So, without playing semantics, since you do represent Mr. Forman, please explain to him that what I want is to be able to have discovery.
>
> **Whatever form that it happens in, I don't know, I don't care.**

Requests by Respondent's counsel for clarification (Forman

Appendix 5, pages 9-11) were unavailing. On October 8, 1993, Respondent filed his Affidavit of Compliance With Subpoena Duces Tecum (Forman Appendix 6, pages 1-5), which demonstrated Mr. Forman's attempts to comply with the subpoena and inability to comprehend or further comply with the trial court's September 21, 1993 oral directive. Without further argument, on October 12, 1993, the trial court entered its Order on Discovery Motions (Forman Appendix, 6, pages 1-4), which required Respondent to:

> 7...provide to the Defendants all information requested in the subpoena duces tecum. This Court will not excuse Dr. (sic)[1] Forman from the subpoena, **notwithstanding Dr. Forman's assertion[2] 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 19932. 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.**

Thereafter, Dr. Chung filed a Motion to Clarify. Respondent was never notified of Petitioners' Motion to Clarify the Order on Discovery Motions, did not receive Notice of the Hearing, and consequently, did not attend or participate in the hearing. At the hearing, however, Petitioners specifically requested that the Court vacate its Order on Discovery Motions. (Chung Appendix to Response to Petition for Certiorari, page 3. Petitioners argued that the

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[1]Mr. Forman is **not** a doctor and has not held himself out as such.

[2]Respondent's "assertion" was not challenged and remains uncontroverted.

Order "**is itself completely wrong. It's unfair. It's not proper**...It's just basically setting it up so that there is an easy appeal." (Chung Appendix to Response to Petition for Certiorari, page 3). Nevertheless, the Trial Court refused to correct the Order that Petitioners concede is erroneous:

> The Court: Well, the order is not inconsistent. First of all, if I sign something, I have to live with it, okay?...So my intent of this order was get it in whatever forms he does have it...So the record is clear, I'm going to leave that part of the order the same. (Chung Appendix to Response to Petition for Certiorari, page 5).

The District Court of Appeal corrected the Order, by vacating it. Forman v. Fink, 646 So.2d 236 (Fla. 3DCA 1994). Now, knowing that the Order on Discovery Motions was improper, that Petitioner's Certiorari Petition to the District Court was meritorious, and knowing that the District Court of Appeal was correct to grant certiorari and vacate the order, Petitioners seek, nonetheless, to have this Court re-instate the obviously erroneous trial court Order on Discovery Motions.

SUMMARY OF ARGUMENT

The decision under review, properly quashes the October 12, 1993 Trial Court Order On Discovery Motions (Forman Appendix, 7) requiring Respondent, Lawrence Forman, to create and produce documents not shown to be in existence and not specified in the subpoena to which Respondent was responding. The decision of the Third District need not be bottomed on Syken v. Elkins, 644 So.2d 538 (Fla. 3DCA 1994)(en banc), but, rather, is justified on the basis of other, well-established, settled rules of law.

ARGUMENT

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 Syken v. Elkins, 644 So.2d 538 (Fla. 3DCA 1994)(en banc), or any other doctrine which is in conflict. Rather, the opinion was soundly bottomed on the doctrine, in which the 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).

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 that 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.

A review of the opinion in Syken reveals that much of the holding is bottomed, not on any extension of law, but on application of the principals cited above. The Syken Court relied on Lejeune v. Aiken, 624 So.2d 788 (Fla. 3DCA 1993) to support the conclusion that there is no authority to support the creation of new records. In fact, Petitioner, Chung, filed Syken as supplemental authority (R/A 43-46), **supposedly to support the trial court order.** Presumably, Petitioners relied on Syken, as authority for requiring production of 1099. The Court, in Syken, ordered production of 1099s as relevant evidence of income from insurance companies. Here, however, since Respondent does not have 1099 forms, they cannot be produced. Thus, Syken, does not support Petitioners' position.

It should be made clear that Petitioners will not be permitted to jump from position to position, first arguing against the order, then supporting it, first urging the application of Syken, then challenging its applicability.

CONCLUSION

As recognized by Petitioners when they moved for clarification of the Order under review, that Order is not sustainable under any theory. Thus, the District Court of Appeal was correct to vacate the Order on Discovery Motions and, as such, the District Court of Appeal should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of June, 1995 to: Esther E. Galicia, Esq., George, Hartz, Lundeen, Flagg & Fulmer, P.A., 4800 LeJeune Road, Miami, Florida, 33145; Steven E. Stark, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 100 Southeast 2nd Street, 17th Floor, Miami, Florida, 33131-1101; 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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