IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 85,053

THIRD DCA CASE NOS. 93-02606
93-02613

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

Petitioners,

vs.

MALKA FINK, etc.,

Respondents.
_____/

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

REPLY BRIEF OF PETITIONERS ON THE MERITS

ESTHER E. GALICIA, ESQUIRE
Florida Bar No.: 510459
GEORGE, HARTZ, LUNDEEN, FLAGG & FULMER
Attorneys for Petitioners, DINA R. CHUNG, M.D., and DINA R. CHUNG, M.D., P.A.
524 S. Andrews Avenue
333 Justice Building East
Fort Lauderdale, Florida 33301
Telephone No.: (305) 462-1620 (Broward)
(305) 940-1562 (Dade)

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INTRODUCTION

The Petitioners, DINA R. CHUNG, M.D., and DINA R. CHUNG, M.D., P.A. (hereinafter collectively referred to as "DR. CHUNG"), were one of the several defendant health care providers in the trial court and one of the respondents before the district court. The Respondent, LAWRENCE FORMAN (hereinafter "Respondent Forman"), is a "certified rehabilitation administrator" and was the petitioner before the district court. 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 collectively referred to as "Respondent Fink"), were the Plaintiffs in the trial court and petitioners before the district court. The parties will be referred to by the position they hold in this Court and, in the alternative, by proper name.

The designation "App. Forman" followed by a number refers to the correspondingly numbered item/document attached to the Appendix to Petition for Writ of Certiorari filed by Respondent Forman in the district court. The designation "App. Chung" followed by a number refers to the correspondingly numbered item/document attached to the Appendix to the Response to Petition for Writ of Certiorari filed by Petitioners, DR. CHUNG, in the district court. The letter "A." followed by a number refers to the particular item/document attached to the Appendix to the Brief of Petitioners (DR. CHUNG) on the Merits. The letter "R." followed by a number or numbers refers to the particular page(s) in the Record on

Appeal transmitted to this Court by the Third District Court of Appeal. The letters "App." followed by a letter refer to the particular item/document attached to the Appendix to this Reply Brief of Petitioners on the Merits.

All emphasis is supplied by undersigned counsel unless otherwise noted.

SUMMARY OF THE ARGUMENT

Respondents implicitly concede that the Third District's *en banc* decision in Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994), creates an unconstitutional restraint upon a party's right to discovery concerning an expert's sources of income and personal affiliations with litigants to show that expert's bias and partiality. In order to avoid inconsistent positions, Respondents argue that the Third District's decision below can be upheld for reasons other than the court's express and unequivocal reliance upon Syken, supra. Specifically, Respondents contend that the trial court improperly ordered Respondent Forman to create or otherwise produce non-existent records. The fact of the matter is, however, that the trial court never ordered Respondent Forman to create or otherwise produce non-existent records and actually unequivocally rejected any suggestion to the contrary. [App. A, pgs. 5-6]. Moreover, Respondent Fink's reliance on Fla. Stat. § 455.241(2) to support the decision below is misplaced because Respondent Forman is not a doctor/physician and his clients are not "patients."

Finally, the facts of this case fall within the circumstances which the Academy of Florida Trial Lawyers urges warrant an exception to Syken. Full discovery of Respondent Forman's bias is therefore justified. Respondent Forman is Respondent Fink's voluntary, hired-gun expert. Respondent Forman is **not** a witness appearing as a mere incident of a service independent of the litigation. Instead, he is a professional witness who assumed the status of voluntary participant in the litigation

for monetary compensation. Respondent Forman thus possesses the same characteristics and qualities which the Academy urges justify unfettered discovery into the bias of examining physicians. Respondent Forman relinquished his privacy rights when he voluntarily injected himself into this litigation for financial gain. As a result (and based on the Academy's own analysis), Syken cannot be applied *sub judice*.

ARGUMENT

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW BY REQUIRING RESPONDENT FORMAN TO PRODUCE EVIDENCE OF INCOME RECEIVED FROM MEDICAL/LEGAL EVALUATIONS HE PERFORMED AND COPIES OF THOSE EVALUATIONS DURING A THREE-YEAR PERIOD.

I. Reply to Respondents' Answer Briefs on the Merits

The Respondents have failed to challenge or rebut Petitioners' arguments against and attack of the Third District's decision in Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994) (en banc). Respondents thus implicitly concede that Syken creates an unconstitutional constraint upon a party's right to discovery concerning an expert's sources of income and personal affiliations with plaintiffs or defendants to show that expert's bias and partiality. Syken and the Third District's application of Syken to the instant case should be reversed.

The Third District's decision below is expressly and unequivocally grounded upon "the authority of Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994) (en banc)." Forman v. Fink, 646 So. 2d 236 (Fla. 3d DCA 1994). However, Respondents urge this Court to ignore the Third District's unequivocal statement and instead uphold the refusal to permit the discovery sought by Petitioners on grounds which Respondents argued below and the Third District tacitly rejected. Specifically, Respondents reassert the argument that the trial court improperly ordered Respondent Forman

to create or otherwise produce non-existent records. If the Third District had agreed with Respondents, it would have so stated in its opinion. In fact, the Third District would have cited the cases which Respondents relied on, then and now, for the proposition that a witness cannot be ordered to produce or create non-existent records.[1] [R. 1-8, 85-106]. The Third District obviously rejected that proposition as a basis for overturning the trial court's discovery order and this Court should similarly reject the principle as the basis for upholding the Third District's decision.

The trial court never ordered Respondent Forman to create or otherwise produce non-existent records. In fact, the trial court unequivocally rejected any suggestions to the contrary during the hearing wherein Petitioners sought clarification of the subject discovery order.[2] [App. A]. Specifically, the trial court stated:

> . . .I am not requiring him -- I know that after this hearing there is another Third District case with a very strong

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[1] LeJeune v. Aiken, 624 So. 2d 788 (Fla. 3d DCA 1993); Bissell Brothers, Inc. v. Fares, 611 So. 2d 620 (Fla. 2d DCA 1993); Balzebre v. Anderson, 294 So. 2d 701 (Fla. 3d DCA 1974).

[2] Read in context, the transcript of the hearing on Petitioners' Motion to Clarify reveals that Petitioners only objected to that portion of the discovery order - unilaterally prepared by Respondent Fink - suggesting that Respondent Forman had to create or produce non-existent records, a requirement that the trial court never enunciated. [App. A, pgs. 2-6]. Petitioners objected to the self-serving language chosen by Respondent Fink to set up an appealable and easily reversible order. [App. A, pgs. 2-6]. Petitioners did **not**, contrary to Respondent Forman's insinuations, object to the order to the extent that it requires Respondent Forman to produce evidence of income received from medical/legal evaluations and copies of those evaluations during a three year period. Petitioners have always and consistently argued the propriety of that court-ordered discovery.

> statement by Judge Schwartz and it says you cannot make a doctor create records. I am not requiring him to create records.
>
> At the hearing, the lawyer for this witness came in and said he doesn't have it in the form they are seeking it, so my intent for this order was to get it in whatever form he does have it. I can't believe that he doesn't keep some sort of income record.
>
> . . . .
>
> I think my statement on the record this morning is clear as far as intent. I don't know what format this witness has the information in. Therefore, I am not compelling him to create anything that he does not now have. (emphasis added)

[App. A., pgs. 5-6].

As the above-underscored language indicates, the trial court did **not** intend and did **not** require Respondent Forman to "create records." The trial court instead simply tried to put an end to Respondent Forman's word games while permitting Petitioners to secure information, unanimously deemed discoverable prior to Syken, to establish Respondent Forman's bias.[3]

Incidentally, it must be noted that the Respondents continue to use Respondent

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[3]Contrary to Respondent Forman's contention, Petitioners never urged the application of the Third District's en banc decision in Syken, a decision which Petitioners vehemently oppose. The Notice of Supplemental Authority Petitioners filed with the Third District cited to the December 7, 1993, Syken v. Elkins decision which held that information regarding income generated by experts in the performance of expert services is relevant to prove potential bias. Syken v. Elkins, 18 F.L.W. D2581 (Fla. 3d DCA December 7, 1993). That December of 1993 decision was, however, superseded ten months later by the en banc decision which is at the heart of this dispute.

Forman's semantics ploy, but now to uphold the decision which reverses the discovery order Respondent Forman attempted to circumvent via the same ploy. For example, the fact that Respondent Forman may not have 1099 forms does not establish the absence of evidence documenting the income in question. Respondent Forman has never proven that he does not have the requested financial information. Similarly, the fact that Respondent Forman's files are all integrated together and are not categorized into attorney-requested and not attorney-requested evaluations does **not** establish the absence of the requested medical/legal evaluations and bills. In fact, Respondent Forman acknowledges their existence but simply indicates that retrieval may not be easy due to Respondent Forman's particular filing system. The trial court refused to be caught up in Respondents' semantic games and it dispensed with form over substance. This Court should follow the trial court's footsteps.

For the first time since the subject discovery order was entered, Respondent Fink now argues that the evaluations that Respondent Forman has been ordered to produce are immune from discovery as confidential and cites Fla. Stat. § 455.241(2) in support thereof. However, as Respondent Forman himself stressed, Respondent Forman is "**not** a doctor and has not held himself out as such." [Respondent Forman's Answer Brief on the Merits, p. 8, n. 1 (emphasis added)]. Accordingly, Respondent Forman's clients are **not** patients. The confidentiality and privilege conferred by § 455.241(2) to the physician-patient relationship and a patient's medical records and information therefore does **not** apply to Respondent Forman's

evaluations.[4] Moreover, the privacy rights of Respondent Forman's clients' have been protected in that the evaluations to be produced can be produced with the clients' names "whited out." [App. Forman 1]. See Abdel-Fattah v. Taub, 617 So. 2d 429 (Fla. 4th DCA 1993) (protection of non-party patients' confidentiality provided by "whiting out" their names and addresses); McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991) (same).

II. Reply to Amicus Curiae Brief of Academy of Florida Trial Lawyers

The gist of the Academy of Florida Trial Lawyers' ("Academy") argument in support of the Third District's decision is that the Academy's proposed exception to Syken does not apply *sub judice* and that the "existing law" cited by Respondent Forman does apply. As discussed in the preceding section, the "existing law" cited by both Respondents is factually distinguishable and **not** applicable. In this section, Petitioners will show that the Academy's proposed exception to Syken extends and actually applies to the facts presented at bar.

The Academy submits, as do Petitioners, that Syken was "erroneously decided." In an effort to avoid an inconsistent position in this case while at the same time supporting the Respondents, the Academy, without any record support, assumes that Respondent Forman performed services other than as an expert witness retained for

[4]Similarly inapplicable are the cases cited by Respondent Fink in support of her confidentiality proposition. Those cases are distinguishable because they all involved the production of a physician's non-party patients' files.

litigation in this case.[5] However, Respondent Forman himself concedes that he was retained to provide expert services in connection with Respondent Fink's medical malpractice action against Petitioners. [Forman's Answer Brief on the Merits, p. 5]. Respondent Forman is Respondent Fink's voluntary hired gun expert. The facts of this case thus fall within the circumstances which the Academy urges warrant an exception to Syken and therefore justify full discovery of Respondent Forman's bias.

The Academy's rationale for why Syken should not apply to a party's expert examining physician applies with equal force and weight to Respondent Forman.[6] According to the Academy, an examining physician "is the only truly voluntary participant in the litigation." [Forman's Answer Brief on the Merits, p. 6]. The Academy argues that said distinguishing characteristic warrants "discovery of financial matters which otherwise would be unacceptably intrusive." [Forman's Answer Brief on the Merits, p. 8]. Petitioners submit that Respondent Forman, (who is no different than, for example, Dr. Glatzer), should have expected his bias to be investigated and revealed the moment he became involved in this matter.

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[5]Whatever other services Respondent Forman may perform in general are irrelevant to the issue of whether he is subject to the discovery order under review. The services he rendered in this case, which concededly are litigation-related services, are the only services that dictate the scope of discovery herein.

[6]The second reason set forth by the Academy is flawed. The perception that examining physicians are more truthful because they are "court-appointed" or "independent" was eliminated effective January 1, 1989, when Fla. R. Civ. P. 1.360 was amended to destroy that misconception. The Florida Supreme Court, via the 1989 amendment, deleted all references to "court-ordered" examinations. Thus, for the last six and one half years, juries have not longer been advised that an examiner is "court-appointed" or "independent".

Respondent Forman is nothing more than an expert hired to render opinions in the course of this litigation. He is **not**, as the Academy suggests, like a treating physician. Respondent Forman did **not** provide a service independent of the litigation. In other words, Respondent Forman is **not** a witness appearing as a mere incident of his service. Instead, Respondent Forman is a professional witness who assumed the status of voluntary participant in the litigation process for remuneration and who agreed to be an advocate for Respondent Fink. Respondent Forman thus possesses the same characteristics and qualities which the Academy urges justify unfettered discovery into the bias of examining physicians. Accordingly, Syken cannot apply to experts such as Respondent Forman.

Experts like Respondent Forman are assumed to have relinquished their privacy rights by agreeing "to testify for remuneration." Wood v. Tallahassee Memorial Regional Medical Center, 593 So. 2d 1140, 1142 (Fla. 1st DCA), rev. den'd., 594 So. 2d 1281 (Fla. 1992). Stated differently, Respondent Forman waived his privacy rights concerning his income and professional services when he voluntarily injected himself into this litigation for financial gain. As the Academy stated with respect to examining physicians:

> Only a retained expert such as [Respondent Forman] 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).

[Forman's Answer Brief on the Merits, p. 10].

CONCLUSION

WHEREFORE, the Petitioners, DINA R. CHUNG, M.D., and DINA R. CHUNG, M.D., P.A., respectfully submit that this Court should reverse the Third District's Opinion below, overrule the decision in Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994) (en banc), and affirm the trial court's order. Moreover, this Court should adopt the decisions which permit the discovery at issue here and otherwise permit trial courts to exercise their broad discretion to determine, on a case-by-case basis, what discovery is appropriate.

Respectfully submitted,

GEORGE, HARTZ, LUNDEEN, FLAGG & FULMER
Attorneys for Petitioners, DINA R.
CHUNG, M.D., and DINA R. CHUNG, M.D., P.A.
524 S. Andrews Avenue
333 Justice Building East
Fort Lauderdale, Florida 33301
Tel: (305) 462-1620 (Broward)
(305) 940-1562 (Dade)

By: _____
ESTHER E. GALICIA
Florida Bar No.: 510459

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above Reply Brief of Petitioners on the Merits was served by mail this 30th day of October, 1995 to: **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; **Roy D. Wasson, Esquire**, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; and **The Honorable Gisela Cardonne**, Dade County Courthouse, 73 West Flagler Street, Room 1500, Miami, Florida 33130.

GEORGE, HARTZ, LUNDEEN, FLAGG & FULMER
Attorneys for Petitioners, DINA R.
CHUNG, M.D., and DINA R. CHUNG, M.D., P.A.
524 S. Andrews Avenue
333 Justice Building East
Fort Lauderdale, Florida 33301
Tel: (305) 462-1620 (Broward)
(305) 940-1562 (Dade)

By: _____
ESTHER E. GALICIA
Florida Bar No.: 510459

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

APPENDIX TO REPLY BRIEF OF PETITIONERS ON THE MERITS

ESTHER E. GALICIA, ESQUIRE
Florida Bar No.: 510459
GEORGE, HARTZ, LUNDEEN, FLAGG & FULMER
Attorneys for Petitioners, DINA R. CHUNG, M.D., and DINA R. CHUNG, M.D., P.A.
524 S. Andrews Avenue
333 Justice Building East
Fort Lauderdale, Florida 33301
Telephone No.: (305) 462-1620 (Broward)
(305) 940-1562 (Dade)

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