IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,436
DCA Case No.: 97-2644

Florida Bar No. 184170

ALLSTATE INSURANCE COMPANY,

Appellant/Petitioner,

vs.

ROBERT BOECHER,

Appellee/Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS
ALLSTATE INSURANCE COMPANY

(With Appendix)

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TABLE OF CITATIONS

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POINT ON APPEAL

I. THE FOURTH DISTRICT'S OPINION IN BOECHER IS IN DIRECT AND EXPRESS CONFLICT WITH THE LAW OF THIS COURT IN ELKINS, THE THIRD DISTRICT'S DECISION IN CARRERA AND BECAUSE IT COMPLETELY ABROGATES RULE 1.280, THE OPINION MUST BE QUASHED AND THE THIRD DISTRICT'S OPINION IN CARRERA APPROVED.

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STATEMENT OF THE FACTS AND CASE

In direct and express conflict with this Court's decision in Elkins, infra, and the Third District's Court's decision in Carrera, infra, the Fourth District has abrogated the new Rule of Civil Procedure 1.280 and ordered Allstate to create and provide discovery that is admittedly not obtainable under Rule 1.280. Allstate Insurance Company v. Boecher, 23 Fla. L. Weekly D268 (Fla. 4th DCA January 21, 1998) (A 1-2).

All the proper discovery has already been produced by Allstate's expert and in a blanket Decision, the Fourth District Court of Appeal has now held that there is a presumption (without evidentiary basis) that insurance carriers in Florida can provide unlimited discovery by simply clicking on some computer icon. Not only is there no basis in the Record for such a presumption, but the trial court has actually ordered Allstate, if this Court affirms the Fourth District's opinion, to produce all the required information within 5 days (A 3-4).

It is respectfully submitted that Allstate should be given the opportunity to establish that it does not have the cyberspace capability the Fourth District has assumed it possesses and it should be give a reasonable opportunity to establish the burdensome task of manually producing the discovery ordered. In other words, the Fourth District has decided that this information is not privileged, nor protected and is easily obtainable in a millisecond on some type of megacomputer. At the very least, Allstate should be given the opportunity to file an

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Affidavit with this Court, establishing that such a computer system is not in Allstate's possession, and the burdensome nature of the discovery ordered should be considered when this Court announces its rule of law in resolving the inter-District conflict. This is especially necessary when this "icon" issue was ruled upon without notice to Allstate (A 36).

The Plaintiff, Boecher, was involved in a rear end accident, when struck from behind by an uninsured motorist (A 31). Boecher sued his UM carrier, Allstate (A 32).

As part of his discovery, the Plaintiff sent Supplemental Interrogatories to the Defendant, Allstate, asking Allstate to identify every person who worked for a company called Bio-Dynamic Research Corporation, who has testified as an expert in the past three years for Allstate in the entire country, either at trial or by deposition and:

> 3. For the preceding three years, how many litigation cases has Bio Dynamics performed analysis and rendered opinions for Allstate Insurance Company?
>
> 4. Please identify the amount of money members, employees, or experts of Bio Dynamics have been paid during the preceding three years from Allstate Insurance Company?
>
> (A 1-2).

At the same time, the Plaintiff sent to Bio-Dynamics itself, a subpoena for telephonic deposition, attaching written questions regarding the expert, who would testify in the pending case; the percentage of work done on behalf of plaintiffs and defendants, arguing what portion of work was devoted to litigation expertise;

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how many cases in the past three years the expert had rendered opinions or analyzed (A 7). Among the questions to the expert himself, were two questions asking the expert to identify every case the company had ever been involved with on a nationwide basis for Allstate and the amount of money it made in the past three years on a nationwide basis working for Allstate:

> 9. PLEASE IDENTIFY EACH CASE IN WHICH MEMBERS, EMPLOYEES, OR EXPERTS OF YOUR COMPANY HAVE BEEN RETAINED BY ALLSTATE INSURANCE COMPANY ON A NATION WIDE BASIS.
>
> 10. PLEASE IDENTIFY THE AMOUNT OF MONEY MEMBERS, EMPLOYEES, OR EXPERTS OF YOUR COMPANY HAVE BEEN PAID DURING THE PRECEDING THREE YEARS FROM ALLSTATE INSURANCE COMPANY ON A NATION WIDE BASIS; (the same exact questions sent to Allstate itself).
>
> (A 7).

The Plaintiff also sent a subpoena to Bio-Dynamics asking for video tapes, films, etc. regarding studies as to the kinematics involved in rear end low velocity impacts and resulting whiplash injuries (A 8-9).

Allstate answered the Plaintiff's interrogatories by stating that it had never previously used Bio-Dynamics to provide expert testimony in the preceding three years and objected to questions 3 and 4, regarding how many cases Bio-Dynamics analyzed for Allstate and the amount total money paid to Bio-Dynamics for the past three years (A 11). Allstate noted that to identify every case that Bio-Dynamics was involved in nationwide was overbroad and burdensome; Allstate did not keep statistics on the utilization of experts from city to city and it would be

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impossible to ascertain this information without great financial hardship to the Defendant (A-11).

Regarding the total amount of money paid to anybody connected with Bio-Dynamics over the past three years by Allstate nationwide, Allstate objected and stated that that amount of money was unknown; that documentation was not kept; and the only way such information could be determined would be to open each and every file Allstate had nationwide for the past three years to see if in fact Bio-Dynamics had been used in that particular case (A 11). Obviously, this would cause great financial hardship to generate this kind of information, which was not documented by Allstate (A-11)

Meanwhile, the corporate representative of Bio-Dynamics answered the Plaintiff's interrogatories, supplying information regarding the expert to testify in the case, Dr. McNish; listing all the cases he had testified in around the country over the past three years; provided the fee schedule used by Bio-Dynamics; and it objected to any other information, on the basis that either it was not maintained by the corporation, or was not available in a readily retrieval form (A 13-21).

Bio-Dynamics also raised attorney/client and work product privileges; objected to questions 9 and 10, regarding each case the company ever worked in when retained by Allstate; the total amount of money paid to the company; and again reasserted that the information was either not maintained or not maintained in a regularly retrievable form (A 15).

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The Vice President of Bio-Dynamics filed an Affidavit, explaining the hardship and difficulty involved in obtaining the information sought in interrogatories 9 and 10, including having to review over 3,000 files, which material was work product, attorney/client privileged, or protected or confidential information; that it would take over 16 man-weeks to complete a review of the files to get the necessary information and an additional 12 weeks at an estimated cost of over $25,000 and just to answer questions 9 and 10 would require a cost over $12,000 and a period of more than 6 weeks to respond (A 23-29).

The hearing noticed for July, 1997, was on Bio-Dynamics Objections to Interrogatories 9 and 10, regarding the financial information and nationwide list the Plaintiff sought from Bio-Dynamics; to which Bio-Dynamics had appropriately responded with supporting Affidavits (A 30-40). The Plaintiff began arguing Allstate's Objections to Interrogatories instead and the court allowed this unnoticed issue to go forward over Allstate's objection (A 36). The Plaintiff told the judge that there were no cases requiring Allstate to provide the type of information he was seeking in questions 3 and 4; but that another trial judge in the area and a trial judge in Arizona had required Bio-Dynamics to produce the information and, therefore, Allstate should have to do it as well (A 32-34).

Allstate pointed out that the local trial court's order the Plaintiff was relying on, was issued before the Supreme Court's decision in Elkins, infra; and it did not require the expert, nor

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the company he worked for, to reveal financial information which did not exist, nor to compile such records (A 34-36). There were eight criteria that had to be met before the Plaintiff could even get this information from the expert, who was the only one required to provide it; and then the judge announced that he just wanted to hear the part regarding Allstate and not the Objections and Affidavits filed by the expert and his company, Bio-Dynamics (A 34-36).

Allstate noted that the issue was no different than the cases involving the discovery of 1099s from corporations, as opposed to experts; this discovery was burdensome; there was no basis to require it to be produced on a nationwide level; and it would require an enormous amount of time to search all of Allstate's files across the United States to answer questions 3 and 4 (A 36-37).

The judge then summarily announced that he was going to grant the Motions to Compel Allstate to answer the questions regarding how many litigation cases Bio-Dynamics had rendered opinions in, or analyzed, for Allstate nationwide for the past three years and the amount of money paid to Bio-Dynamics for any services rendered by that company to Allstate nationwide for the past three years (A 37).

The judge decided that answering those two questions was not invasive as they were not directed to the expert; they were not asking for the expert's entire income from all sources, but just what Allstate had paid the expert over the past three years

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nationwide (A 37-38). The judge made no mention of the fact that Bio-Dynamics had already responded and objected to these exact questions and had filed supporting Affidavits containing some of the information and proper objections to the remaining portions (A 37-38). However, the judge did ask if the Plaintiff wanted to withdraw his Motion to Compel Bio-Dynamics to provide the exact same information and the Plaintiff said no (A 38-39).

The judge then entered an Order requiring Allstate to provide the information within 30 days (A 40).

Bio-Dynamics in the meantime filed a second Affidavit outlining its response and objections to having to produce all of the information sought regarding video tapes and research on rear end collisions, etc. (A 42-48).

Allstate filed a timely Motion for Reconsideration of the Discovery Order, pointing out to the court that to supply the information regarding every case in which Bio-Dynamics was involved, on a national level, to either analyze or render opinions for Allstate, was clearly overbroad; as it sought information in 52 separate and distinct states, involving numerous different Allstate offices, making it difficult and burdensome to obtain this information (A 49-52).

It was overly burdensome, as Allstate did not maintain any statistically readily available retrievable manner to assimilate and collate this kind of information; and to compile such information would cause a severe financial burden on Allstate; again since it was being asked to review every litigation case

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involving Bio-Dynamics over the past three years nationwide; and the financial hardship was incalculable (A 50).

In addition, such documentation was not kept in a retrievable form and would require Allstate, nationwide, to look at every single file it had, to compile the information requested; which would require the Allstate offices in every individual county and state across the nation to shut down to review every open file; and all files in storage over the past three years; to obtain such information (A 50-51). Furthermore, the requests sought information that was privileged work product, since Bio-Dynamics may have been retained just to analyze cases, in preparation of litigation and the information was thus privileged (A 51).

Allstate pointed out to the court that in the recent decision of the Third District in Carrera v. Casas, 695 So. 2d 763 (Fla. 3d DCA 1997) based on the Supreme Court's decision in Elkins v. Syken, 672 So. 2d 517 (Fla. 1996), the information sought by the Plaintiff had to be directed only to the expert and not the parties or their attorneys (A 51). Without question, the discovery ordered deviated from established law as it sought protected financial information; the criteria in Elkins had not been met; and the discovery had been directed to the wrong party (A 51). The judge denied the Motion for Reconsideration (A 53).

On appeal, the Fourth District recognized that Allstate had argued that the interrogatories propounded both to itself and Bio-Dynamics, the expert witness, were overbroad and burdensome;

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that Allstate did not keep such records and would have to compile such information; and that the discovery requested would be impossible to ascertain without great financial hardship. Boecher, D268. The Fourth District noted that the trial court had found that the discovery, while not obtainable from the expert under the new Rule of Civil Procedure 1.280, was not invasive when sent to the party, instead of directly to the expert. Boecher, D268. The Fourth District noted that criteria approved by this Court in Elkins, became an amendment to Rule 1.280; but the Fourth District found that this discovery was expressly limited to the expert witness, while recognizing that the Plaintiff could not discover this information directly from the expert witness under this rule. Boecher, D268-269.

The Fourth District also acknowledged that the Third District had refused to allow this tactic to circumvent Rule 1.280 in Carrera, supra, but the Fourth District disagreed with the Third District's ruling and certified conflict to this Court. Boecher, D269.

In addition to deciding that there was nothing in the Rules that prevented the discovery prohibited in Rule 1.280, to be obtained from parties as opposed to expert witnesses, the Fourth District determined that the judge's discovery Order also was a rejection of Allstate's contention that to produce the discovery would be an undue burden. Boecher, D269. The Fourth District went one step further and not only did it agree that the discovery was not invasive as to Allstate, but then made the

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following fact findings not based on any evidence in the Record whatsoever nor even argued to the trial court:

> ... Allstate knows -- or can readily lay its hands on records showing the data -- just how often and when it has used this expert witness. Although its motion for protective order contains boilerplate text about difficulties in locating the information sought -- in having to search numerous files -- there is nothing in the record furnished by Allstate suggesting that its burden in providing this information is any more difficult than the ordinary retrieval of common routine business records.
>
> To be sure, we live in the age of computers -- not the bygone era of hooded clerics poring over ancient manuscripts seeking hidden truths. A labor that, just a few years ago, might have taken office clerks weeks or months now entails mere milliseconds of data processing time. It occurs to us that, in this pervasively computerized generation of doing business, any going concern would be sorely tried to establish burdensomeness in the mere retrieval of this kind of information. Surely Allstate has the power to pluck the data from its own cyberspace. The burden placed on this party should be presumed to be no more difficult than selecting the correct keys on a board or icons on a screen. Allstate has done nothing in the record to dispel such a presumption.
>
> Boecher, D269.

Allstate sought review in this case based on the certified conflict between Boecher and Carrera and for this Court to address the irrebuttable presumption adopted by the Fourth District; that insurance carriers have easy access to computerized discovery that can be produced in milliseconds, especially where this irrebuttable presumption was not based on any evidence nor any argument made in the trial court below. The

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Fourth District claimed that Allstate had done nothing in the Record to dispel the Fourth District's sua sponte presumption of cyberspace technology and immediate access to all discovery, which in itself, conflicts with the very facts contained in Boecher, noting that this material was not in a retrievable form. At the very least, if such a presumption is going to be the new rule of law in Florida, then Allstate should be given an opportunity to file an Affidavit establishing, in detail, how this material would have to be created and obtained and the cost of doing so.

A month after the Fourth District issued its Opinion ordering the discovery and certifying conflict, the trial court entered an Order on a Motion to Stay Discovery, compelling Allstate to begin assembling all the information, so that if this Court affirms the decision from the Fourth District, all the discovery could be produced within 5 days (A 3-4). The trial court's Order is in conflict with the Fourth District's opinion, as it recognizes that it will take months to assemble this information, if this Court should affirm the Fourth District's opinion. Therefore, in resolving the conflict between Boecher and Carrera and interpreting this Court's New Rule 1.280, this Court should also address the fact that there is no presumptive high-tech megacomputer that can spew forth discovery for Plaintiffs in milliseconds.

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SUMMARY OF ARGUMENT

In the present case, not only did the Plaintiff seek improper financial information about the expert and income the expert derived directly from the Defendant, but the Plaintiff went a step further and sought information about cases and money paid to the firm the expert worked for, just to get an opinion in the case or analyze the case, and wanted the total amount of money paid to employees of Bio-Dynamics, regardless of what they were paid for.

Without question the blanket carte-blanche discovery ordered in this case was burdensome, harassing, overbroad and totally improper; and in direct and express conflict with the Supreme Court's decision in Elkins, the Third District's decision in Carrera; the applicable Rule of Civil Procedure and clearly and unquestionably deviated from the essential requirements of law and the Opinion and discovery Order must be quashed.

The Fourth District's opinion in Boecher does not explain how impeachment of an expert witness with material expressly forbidden to be produced under 1.280 is somehow magically available to a plaintiff because the information is coming from the party instead of the expert. As noted by Allstate below, Allstate is not being impeached with this information, but rather the expert witness is and should be protected under the provision of Elkins and Rule 1.280. There is absolutely nothing in this Court's decision in Elkins, nor the new Rule of Civil Procedure that states that the Rule and case law can be ignored if the

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appellate court decides, contrary to the Record, that the discovery information, otherwise protected, must be produced because it is easily accessible from cyberspace. If an expert cannot be impeached with the exact same information under this Court's decision in Elkins and Rule 1.280, there is simply no basis to circumvent this law by allowing impeachment because the interrogatories were sent to the Defendant, as opposed to the expert. The Fourth District has, once again, opened a Pandora's box of discovery abuse and, once again, it is up to this Court to shut the lid on this completely irrelevant, improper and unnecessary discovery.

The Fourth District's opinion in Boecher and discovery of expert witnesses must be limited to interrogatories sent to those experts, as required by Rule 1.280 and this Court's decision in Elkins and the Third District's decision in Carrera.

Allstate Should be Allowed to File an Affidavit

The Fourth District, without evidentiary basis, simply stated that Allstate can simply "click on an icon" and retrieve this information. As indicated, there was no evidence to support this. Allstate should be allowed to produce an Affidavit to show this is not accurate. Computers are rapidly changing, such that every five years or so they are vastly different, and just because something is presently technically possible, does not mean that existing computer systems have been programmed to do that. Just because it is possible when a program is first

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written to set up the program to do something, does not mean the program was written to do that. Nor does it mean that years later a program can be written to retrieve information that has been put into the computer over the years without appropriate codes or identifying data, etc.

Allstate realizes this is an unusual request, to file an Affidavit in the Supreme Court. However, it is necessary because the Fourth District made a "finding" without any evidentiary basis, that Allstate can simply "click on an icon" and retrieve this information. Therefore, Allstate should be allowed to file an Affidavit to show this is not accurate.

If this Honorable Court wishes to remand to allow depositions of the individuals who give the Affidavits so that the Plaintiff can cross-examine, this is agreeable with Allstate.

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ARGUMENT

I. THE FOURTH DISTRICT'S OPINION IN BOECHER IS IN DIRECT AND EXPRESS CONFLICT WITH THE LAW OF THIS COURT IN ELKINS, THE THIRD DISTRICT'S DECISION IN CARRERA AND BECAUSE IT COMPLETELY ABROGATES RULE 1.280, THE OPINION MUST BE QUASHED AND THE THIRD DISTRICT'S OPINION IN CARRERA APPROVED.

The Plaintiff admitted below that there was absolutely no Florida law that allowed the discovery ordered from Allstate; especially when the exact same discovery was propounded to and responded to by Allstate's expert witness. Rather Boecher argued to the trial court that it should adopt the law of Arizona, because Florida law was directly on point against him.

In response, the Fourth District determined that just because the discovery was totally barred by Rule 1.280, the Plaintiff was still entitled to the same privileged discovery from the Defendant. Not only did the Fourth District completely abrogate Rule 1.280; with a tactic expressly condemned by the Third District in Carrera; it went on to sua sponte make a fact finding that Florida's insurance carriers have access to immediate discovery by a quick click on a computer icon. There was no Record basis for the lower court to impose an irrebuttable presumption of "discovery owed due to easy access" through "Hal-type" computers; in fact, the Record was the opposite. To support the Court's decision that the banned discovery is okay, if sought from a "party;" the Fourth District decided the discovery was not "invasive;" using omnipotent cybertechnology,

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so it should be provided.

On its face, the Opinion in Boecher cannot stand, because it does not even address the prejudice to the expert, who still will provide the otherwise privileged information to the "party;" nor the prejudice to the expert from the otherwise banned material being used at trial, in violation of Rule 1.280; nor the fact that Boecher totally circumvents the Rule, rendering it meaningless. The Opinion in Boecher must be quashed; Carrera affirmed and Rule 1.280 upheld.

The Plaintiff admitted to the trial court that there was absolutely no case in Florida that allows the discovery the court ordered from Allstate, so the Fourth District just created it. The existing cases were totally the opposite, as established by this Court's decision in Elkins, followed by the Third District in Carrera and as reflected in the new Rule of Civil Procedure 1.280(b). In resolving the conflict created by Boecher, it must be quashed and the law of this Court followed.

The Plaintiff sought discovery regarding the total income of Bio-Dynamics and all the cases it has handled for Allstate nationwide for the last three years, from Bio-Dynamics. Bio-Dynamics responded and objected to the discovery requests and filed supporting Affidavits for those materials it asserted are privileged. That should be the end of the matter.

Instead, the Plaintiff went ahead and sought virtually the identical information from Allstate in direct and express conflict with Florida law; which holds that even an expert does

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not have to reveal how much money he makes as an expert, nor his total income:

> The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.
>
> Elkins, 521.

The Plaintiff got around this uniform prohibition by asking for the same discovery from Allstate instead and on a wider basis - the income of the whole company the expert works for. It was clear legal error for the Fourth District to approve this strategy to allow this financial discovery and the Opinion below must be quashed.

The Plaintiff admitted to the court there were no cases allowing the type of discovery he sought, but rather, he relied on a local trial judge order; and a trial judge from Arizona, in a case involving a different insurance carrier. The Fourth District went a step further in ordering the discovery, it sua sponte decided that the discovery protected by Rule 1.280 should be provided by a "party," because it was not invasive, since a computer click was all that was involved. Without Record support, nor with any rhyme or reason, the Fourth District, once again, has allowed the tail to wag the dog and turned a settled discovery Rule on its head, in violation of this Court's law.

This Court has held that the discovery sought, must be sought from experts, and not from the Defendant, his carrier or the Defendant's attorneys. Without question, the discovery Order in this case violated the express reason for the new Rule of

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Civil Procedure, since it not only deviated from the essential requirements of law, but also because it was overbroad, harassing, burdensome; and in direct and express conflict, with the stated purpose of the new Rule, which is to avoid annoyance, embarrassment and undue expense to an adverse "party."

The Plaintiff told the trial judge that he plans on proving at his personal injury trial, that Allstate has a connection to Bio-Dynamics nationwide and somehow is planning on using this to impeach Allstate, as opposed to impeaching the Defendant's expert, who works for Bio-Dynamics. It is clear that this material is completely irrelevant, because all the information simply goes to the expert testimony to be presented at trial. Furthermore, the total amount of money paid, even if discoverable, which it is not, still does nothing to impeach Allstate, since Bio-Dynamics works for other litigants, like plaintiffs. Therefore, the information sought is not relevant to Allstate, which is probably why the cases expressly require that only non-financial information be provided and only from the expert in question.

The first test to be applied is whether the discovery is relevant and can reasonably lead to admissible evidence. Allstate Insurance Company v. Langston, 655 So. 2d 91 (Fla. 1995)(litigants are not entitled to carte blanch discovery from their insurance carrier; discovery must be directed to relevant admissible evidence). Regarding Langston, the Fourth District recently observed that the Supreme Court in that case was

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obviously offended by the discovery abuse by the insured, in her attempt to obtain completely irrelevant and privileged material; and the Supreme Court took that opportunity to send a message to the trial court and litigants, that litigants are not entitled carte blanche to irrelevant discovery. Eberhardt v. Eberhardt, 666 So. 2d 1024 (Fla. 4th DCA 1966). However, trial judges continue to do this, and once again the Fourth District is permitting it.

Therefore, the right to discovery does not extend to matters which are not directly relevant and which cannot reasonable lead to relevant matters. Langston; Manatee v. Estech General Chemicals Corporation, 402 So. 2d 75 (Fla. 2d DCA 1981); City of Miami v. Fraternal Order of Police, 346 So. 2d 100 (Fla. 3d DCA 1977); Hoogland v. Dollar Land Corporation, Ltd., 330 So. 2d 509 (Fla. 4th DCA 1976); Travelers Indemnity Company v. Salido, 354 So. 2d 963 (Fla. 3d DCA 1978). Here none of the discovery requested is relevant as to Allstate and the proper discovery must go to the expert involved.

Furthermore, the Fourth District refused to accept or recognize that the documents which the Plaintiff requested, and which the trial court ordered produced, are not documents which are presently in existence. Instead it sua sponte decided the information could be plucked from cyberspace by Allstate. Boecher, supra. It is reversible error and a departure from the essential requirements of the law to order any party, or even an expert, to produce records which are not shown to be in

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existence. See, Bissell Brothers, Inc. v. Fares, 611 So. 2d 620 (Fla. 2d DCA 1993). Certainly, such an Order directed to the Defendant Allstate, after already being properly answered and objected to by the expert, seeking documents not in existence, must be quashed as well.

The Third District's decision in Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994) adopted by this Court, as the new Rule of Civil Procedure is directly on point and requires the Opinion below be quashed. In Syken, the plaintiff scheduled the deposition of the record custodian and bookkeeper of the defendants's orthopedic expert. The deposition sought required documentation of the income earned by the IME for a three year period, as well as the percentages of IMEs performed, the amount charged for IMEs, the amount charged for reviewing medical records, impairment ratings, court appearance, attorney conferences, etc. Syken, 541.

The Syken trial judge even went to the extent of having the IME appear at an evidentiary hearing, to substantiate his affidavit as to the cost of producing all the requested information. Syken, 541. Then the trial judge entered an omnibus order; requiring the IME to keep detailed records, including a list of every defense exam and the date, an accounting of every dollar billed for defense exams, including a breakdown of all charges with number of hours spent for medical review, trial testimony, travel, etc. Syken, 542. The judge also ordered the IME to start listing every party billed for

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defense exams and testimony, whether the charges were paid by the attorney, the insurance company, or some other entity; and that noncompliance would prevent the expert from ever testifying in that judge's courtroom. Syken, 542.

Not surprisingly, the Third District quashed all portions of the court's order requiring the IME to create all of these new records of billings, etc. Syken, 544-546. The court affirmed the doctor's assertion that requiring information presently contained in the doctor's files was over burdensome, and could not pass the test of relevancy versus burdensomeness set out in McAdoo, infra; Syken, supra.

Sitting en banc, the Third District adopted the following criteria for discovery from an opposing expert, and not the adverse party, for impeachment purposes:

> 1. The medical expert may be deposed either orally or by written deposition.
>
> 2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
>
> 3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each.
>
> 4. The expert may be asked as to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she performs in one year. The expert need not answer how much money he or she

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earns as an expert or how much the expert's total annual income is.

5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back to a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.

6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual of compelling circumstances.

7. The patient's privacy must be observed.

8. An expert may not be compelled to compile or produce nonexistent documents.

Syken, 546.

The Syken court ultimately held that it is sufficient for the doctor to estimate the number of IMEs that he or she performed in a single year, in order for the plaintiff to demonstrate bias. Syken, 545.

The discovery Order in this case is just another example of the continued harassment technique used in personal injury cases to virtually eliminate any real defense to the Plaintiff's claims. What started out as a simple discovery procedure, allegedly to impeach IME physicians by use of their 1099s, has mushroomed into voluminous requests for discovery of all types, of not only corporate information and financial information from doctors, but even requests for personal financial information. Furthermore, the requests to produce are being sent not only to the IME, but to any experts testifying for the defendants, as

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well as to the defendant's insurance companies. In response, judges in the Third District and even the Fourth District Courts of Appeal called for a re-evaluation and limitation on the discovery, that was spawned by the Fourth District's decision in McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991).

In McAdoo, the Fourth District opened a pandora's box to discovery from independent medical examiners, who testify for defendants as experts at trial, regarding the IMEs' 1099s, IRS forms, billing information, the identity of the various insurance companies an IME might worked for, attorneys who hire them, number of patients, etc. McAdoo, 1085. The court noted that resolution of the issue regarding this type of discovery was a balancing test between the competing interest of the relevancy of the discovery information sought, as information to impeach the medical expert opinion of the IME, against the burdensomeness of the production of the information, and whatever confidentiality interest of the doctor were involved. McAdoo, 1085; see also, North Miami General Hospital v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033 (Fla. 3d DCA 1981). McAdoo resulted in a plethora of appellate court opinions and even more petitions for certiorari, as parties attempted to "impeach" medical expert witnesses with all types of financial, business and personal information, or to prevent them from testifying at all. LeJeune v. Aikin, 624 So. 2d 788, 790 (Fla. 3d DCA 1993).

After opening the door, the Fourth District then attempted to shut it, by calling for a limitation on the types of discovery

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plaintiffs are entitled to seek from the defense.

In the same year as McAdoo, in Dollar General, Inc. v. Deangelis, 590 So. 2d 555 (Fla. 3d DCA 1991), the Third District held that a physician's past work as defense expert for any insurer or law firm was relevant on the issue of his credibility, as an expert witness for the defendant in a slip and fall; and that records of such work were discoverable, if not unduly burdensome to produce. Dollar General, 556. The Third District allowed the plaintiff to depose the doctor on remand, to inquire whether the records requested, particularly the 1099s, were in another form which would not be unduly burdensome to produce. Dollar General, 556. Therefore, on remand, if the IME physician could not show that it was burdensome to comply with the plaintiff's request, financial information would have to be produced, in order for the plaintiff to use this material as impeachment of the defendant's IME. Dollar General, 556.

The following year, four more cases addressed the McAdoo situation, where financial discovery was being sought of independent medical examiners, or the plaintiff's medical expert, who was going to testify at trial. In Wood v. Tallahassee Memorial Regional Medical Center, Inc., 593 So. 2d 1140 (Fla. 1st DCA), review denied, 599 So. 2d 1281 (Fla. 1992), the court held that the discovery order was appropriate and required all the plaintiff's non-treating medical expert witnesses, who would testify at trial, to produce for in-camera inspection their tax returns for five years; and all documents which reveals cases in

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which the expert has provided testimony in deposition, arbitration, mediation, or at trial, in five years. The court adopted the balancing test set out in McAdoo, and the Third District's decision in Dollar General. Wood, 1142. The First District agreed with the trial court that the past earnings and past testimony of non-treating medical experts were material matters subject to discovery; and were relevant issues for consideration, as to the credibility of the expert witness by the jury. Wood, 1142.

The Second District held that it is reversible error and a departure from the essential requirements of the law to order an expert doctor to produce 1099 records which are not show to be in existence. See, Bissell Brothers, supra. The court held that the lower court's order to produce 1099 forms, appointment calendars for three years, and time records departed from the essential requirements of the law by directing doctors to produce items that were not in existence. The court further noted that IRS 1099 forms for IMEs' were subject to discovery as reasonably calculated to lead to relevant evidence concerning bias of the defendant's expert. Bissell Brothers, 621.

In Young v. Santos, 611 So. 2d 586 (Fla. 4th DCA 1993) the court once again addressed the issue of how much and what type of discovery would have to be produced from the defendant's expert. In Young, the IME filed an uncontradicted affidavit that it cost nearly $10,000 to produce the financial payment records requested by the plaintiff. The trial court had ordered the payment of

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$400, which the appellate court held was insufficient. The doctor was 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 a three year period. The doctor's overall income was held not discoverable and the court observed that other less intrusive means of discovering information should be explored first. Young, 587. The court held that the production of the IME's personal tax returns was improper, because the IME had not relinquished his right of privacy entirely simply by becoming a potential witness in the litigation. Young, 587.

Judge Warner, in her specially concurring opinion, noted how the appellate courts, since the Fourth District's decision in McAdoo, had been bombarded with petitions for certiorari; directed to the discovery requests regarding income from litigation sources. Young, 587. Judge Warner advised that perhaps the trial bar needed to consider whether the expense was worth the information gained; and that overuse of the discovery process was increasing exponentially the cost of litigation, which could end up destroying the process to the greater detriment of all the litigants. Young, 587-588. The present case is a perfect example of what Judge Warner cautioned against.

With this backdrop of case law, this Court in Elkins, supra, affirmed the Third District's decision in Syken; adopted the eight part criteria the Third District suggested as appropriate discovery to be obtained from the expert, but not the defendant,

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nor defense counsel and disapproved the previous cases that allowed financial discovery. The court noted that discovery was never intended to be used as a tactical tool to harass an adversary in a manner that actually chilled the availability of information by non-party witnesses; nor was it intended to make the discovery process so expensive that it would deny access to information and witnesses and force parties to resolve their disputes unjustly, just as the Third District had suggested in LeJeune. Elkins, 521. Furthermore, the court affirmed the Third District's criteria in an effort to prevent annoyance, embarrassment, oppression, undue burden, or expense on behalf defense experts. Elkins, 521.

This Court was not swayed by the plaintiff's argument that professional witnesses used by the defense derived most of their income from testifying as experts and, therefore, the discovery of financial information and related document was necessary to attack the credibility of these witnesses. Elkins, 521. The court noted that the district court had struck a proper balance between disclosure of information concerning an expert witness' potential bias and the witness' right to be free from burdensome and intrusive production requests, especially on financial matters. Elkins, 521-522:

> .... To allow discovery that is overly burdensome and that harasses, embarrasses, and annoys one's adversary would lead to a lack of public confidence in the credibility of the civil court process. The right to a jury trial in the constitution means nothing if the public has no faith in the process and if the cost and expense are so great that

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> access is basically denied to all but the few who can afford it. In essence, an overly burdensome, expensive discovery process will cause many qualified experts, including those who testify only on an occasional bias, to refrain from participating in the process, particularly if they have the perception that the process could invade their personal privacy. To adopt petitioners' arguments could have a chilling effect on the ability to obtain doctors willing to testify and could cause future trials to consist of many days of questioning on the collateral issue of expert bias rather than on the true issues of liability and damages.
>
> Elkins, 522.

This Court then limited the type of evidence that could be obtained from the expert witnesses, especially related to financial matters, disapproving the holdings in Bissell Brothers, Young, and McAdoo to the extent they were inconsistent by requiring blanket production of financial information as a means of impeaching the defendant's experts. Elkins, 522.

Based on the decision in Elkins, and in order to insure that discovery abuses did not continue, like that predicted by Judge Warner in Young, the Court went a step further and amended Florida Rule of Civil Procedure 1.280(b)(4) as follows:

> ... (4) **Trial Preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, many be obtained only as follows:
>
> (A) (i) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to

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state the substance of the facts and opinions to which the expert is expected to testify and a summary of the ground for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with rule 1.390 without motion or order of court.

APPENDIX - continued

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.

2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.

3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.

4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent document. Upon motion, the court may order further discovery by other means, subject to such

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> restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate....
>
> In Re Amendments to Florida Rules of Civil Procedure, 682 So. 2d 105, 114 (Fla. 1996).

The Plaintiff in the present case propounded proper and improper discovery requests to the expert involved in the case; but completely ignored the new Rule when he tried to get the identical improper discovery from Allstate, itself; something that is clearly forbidden in Elkins and by the new Rule. In fact, Allstate properly relied on the decision in Carrera from the Third District, which found the exact same type of discovery order departed from the essential requirements of law, because the court had ordered discovery from the defendants that should have been directed to an expert, in conflict with Elkins and the new Rule. Carrera, 765. Just like in the present case, in Carrera the plaintiff sought document related to other cases in which the experts might have been involved on behalf of the defendant and discovery ordered was then quashed by the Third District:

> Defendants filed objections on multiple grounds, including that the requests were overbroad, asked for work product, and were burdensome and harassing. Defendants also objected on the grounds that they did not keep files in ways that would allow them to compile the information requested, and that compiling the information would require them to review all of their open files and all of the files that were in storage.
>
> Plaintiffs also propounded

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> interrogatories to defendants and their attorneys that sought additional information about the experts and the income that the experts derived from serving as expert witnesses.
>
> Defendants objected to these interrogatories as outside the scope of rule 1.280(b)(4)(A)(iii), and sought a protective order from the court. The court denied the motion for a protective order, and in doing so, departed from the essential requirements of law.
>
> Both rule 1.280(b)(4)(A)(iii) and *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), from which the rule was derived, allow limited discovery *from an opponent's expert witness* in order to determine that witness probability of bias. All eight of the criteria to be followed in seeking financial information from opposing medical experts, listed in *Elkins* and adopted by the supreme court in the commentary to rule 1.280, refer to matters directed to that expert witness, not to the parties or their attorneys. The information sought by the plaintiffs in this case does not fall within the limited parameters set forth in *Elkins*, and is directed to the parties, rather than the experts themselves.
>
> Petition for certiorari granted; order quashed; cause remanded for further proceedings consistent with this opinion.
>
> Carrera, 764-765.

In the present case, not only did the Plaintiff seek improper financial information about the expert and income the expert derived directly from the Defendant, but the Plaintiff went a step further and sought information about cases and money paid to the firm the expert worked for, just to get an opinion in the case or analyze the case and wanted the total amount of money paid to employees of Bio-Dynamics, regardless of what they were

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paid for.

Without question the blanket carte-blanche discovery ordered in this case was burdensome, harassing, overbroad and totally improper; and in direct and express conflict with the Supreme Court's decision in Elkins, the Third District's decision in Carrera; the applicable Rule of Civil Procedure and clearly and unquestionably deviated from the essential requirements of law and the Opinion and discovery Order must be quashed.

The Fourth District's opinion in Boecher does not explain how impeachment of an expert witness with material expressly forbidden to be produced under 1.280 is somehow magically available to a plaintiff because the information is coming from the party instead of the expert. As noted by Allstate below, Allstate is not being impeached with this information, but rather the expert witness is and should be protected under the provision of Elkins and Rule 1.280. There is absolutely nothing in this Court's decision in Elkins, nor the new Rule of Civil Procedure that states that the Rule and case law can be ignored if the appellate court decides, contrary to the Record, that the discovery information, otherwise protected, must be produced because it is easily accessible from cyberspace. If an expert cannot be impeached with the exact same information under this Court's decision in Elkins and Rule 1.280, there is simply no basis to circumvent this law by allowing impeachment because the interrogatories were sent to the Defendant, as opposed to the expert. The Fourth District has, once again, opened a Pandora's

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box of discovery abuse and, once again, it is up to this Court to shut the lid on this completely irrelevant, improper and unnecessary discovery.

Affidavit - Burdensome

In an abundance of appellate precaution, Allstate would be respectfully suggest that should this Court, for some reason, agree with the Fourth District, that a party can produce the discovery forbidden by Rule 1.280, then Allstate should be given the opportunity to show the burdensome nature of such discovery by Affidavit, as the burdensomeness of producing the privileged discovery was never challenged by the Plaintiff below. Rather, the Plaintiff simply cited to discovery produced in an Arizona trial court case by a different insurance company to argue that the information was available.

The Fourth District simply stated that Allstate can retrieve this information by simply "clicking on an icon," without any evidentiary basis, and Allstate should be allowed, in the Supreme Court, to produce an Affidavit that it cannot do so. Just because it is possible when a program is first written to set up the program to do something, does not mean the program was written to do that. Nor does it mean that years later a program can be written to retrieve information that has been put into the computer over the years without appropriate codes, etc.

It is clear that the Fourth District simply wants the information produced, because it failed to explain why a Rule limiting the discovery from experts would allow the same

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discovery from the party when the end is to impeach the expert witness. In other words, according to the Fourth District, Rule 1.280 is completely unnecessary, since all the Plaintiff has to do is obtain the discovery directly from a party. Certainly that is not what this Court had in mind when it decided Elkins and when it amended Rule 1.280. The bottom line is that the harassment techniques used to eliminate witnesses in personal injury cases continues from McAdoo forward in spite of the warnings in cases like Young and LeJeune, supra.

The Fourth District's opinion in Boecher and discovery of expert witnesses must be limited to interrogatories sent to those experts, as required by Rule 1.280 and this Court's decision in Elkins and the Third District's decision in Carrera.

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CONCLUSION

The discovery Order issued in this case deviates from the essential requirements of the law and must be quashed and the Fourth District's opinion in Boecher must be quashed as well, to resolve its direct and express conflict with the decision of this Court in Elkins and the Third District's decision in Carrera.

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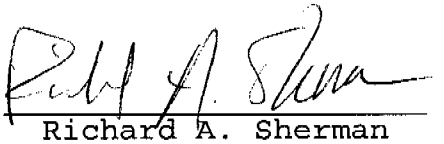
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of April, 1998 to:

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