IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,436

Florida Bar No. 184170

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

ROBERT BOECHER,

Respondent.

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

REPLY BRIEF OF PETITIONER ON THE MERITS
ALLSTATE INSURANCE COMPANY

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REPLY ARGUMENT

Boecher continues to switch horses in mid-stream to argue new and different theories; which substantiates that Boecher correctly admitted below that there is no law in Florida that allows the discovery ordered by the Fourth District Court of Appeal. In the trial court, Boecher argued that the judge should adopt the circuit court law of Arizona, because Florida law was directly on point against him. In the Fourth District, Boecher argued that a "party" is not subject to Florida Rule of Civil Procedure 1.280 because the rule only applies to experts. The latest theories being pushed by Boecher in this Court, is that Rule 1.280 does not apply because the discovery is not being sought from a "medical" expert; and "multi-million dollar corporate defendants" must produce any type of discovery the plaintiff wants, because they can afford it and, therefore, they should be treated differently from any other defendant in Florida. Even the Fourth District's decision in Allstate Insurance Company v. Boecher, 705 So. 2d 106 (Fla. 4th DCA 1998) does not hold this; because if it did, it certainly would be a violation of due process, at the very least.

Incredibly, Boecher actually admits, in the Supreme Court, that if this discovery had been directed to an expert, it would be completely improper (Brief of Respondent, page 9). In other words, the Plaintiff continues to make distinctions without differences and now actually wants the Florida Supreme Court to rule that corporate defendants in personal injury cases should be

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treated differently than other defendants; that the Rules of Civil Procedure do not apply to them; and that they must create discovery, in direct and express conflict with established Florida law. The Plaintiff justifies these mind boggling requests by claiming that "proverbial hired gun" experts, for defendants, should be treated differently than any other expert and do not deserve "the same protection as practicing physician who engage in litigation as only one part of their multi-faceted medical practices." (Brief of Respondent, page 8).

All of the rigmarole about the alleged difference between medical experts and any other experts and the difference between the status of rich corporate defendants and individual defendants, is simply to get this Court completely off track about what the legal issue is on appeal. The bottom line is that the Third District's decision in Carrera v. Casas, 695 So. 2d 763 (Fla. 3d DCA 1997) is directly on point, requiring reversal; with or without affidavits; Carrera correctly interprets and applies the Florida Rule of Civil Procedure and this Court's decision in Elkins v. Syken, 672 So. 2d 517 (Fla. 1996), to hold that under Rule 1.280(b)(4)(A)(iii) only limited discovery is permitted "from an opponent's expert witness" in order to determine that witness' probability of bias. Carrera, 765. Carrera is on all fours with the facts in Boecher and it is only the legal conclusions that are different between the Third District and the Fourth District. For Boecher to seriously suggest that Carrera does not apply, and there is no direct and express conflict

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because individuals were named as Defendants, as opposed to an insurance carrier, is not based on any law in Florida, whatsoever. That is understandable, because it certainly would be violative of the United States and Florida Constitutions and all defendants rights to be treated equally, under the law. Furthermore, there is nothing stopping the Plaintiff form getting the proper discovery from the expert, which is exactly what happened below when the same identical Interrogatories were sent to Bio-Dynamics.

Conspicuously absent from the Brief of Appellee, is any case law supporting his new theory that Allstate should be treated differently than other defendants in Florida; as well as no case that holds that medical experts are the only ones subject to Rule 1.280. There is also no case law cited to support the theory that only medical experts should be protected, as opposed to any other type of expert. Clearly when this Court adopted Rule 1.280, it was aware of the fact that numerous types of experts testified, day in and day out, across the State of Florida and nowhere in any opinion, nor in any discussion of Rule 1.280, has this Court ever suggested that the new Rule of Civil Procedure must only be applied to "medical experts."

Conspicuously absent from the Brief of Respondent is also any case that holds that a defendant, even a corporate Defendant, like Allstate, must create documents, in order to comply with a discovery Order. This issue is completely ignored by Boecher; just as it was by the Fourth District; even though from the trial

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court forward, Allstate has consistently objected to creating any documents which currently are not in existence and has throughout answered that most of discovery sought by the Plaintiff does not currently exist. Therefore, even if this Court should affirm Boecher, on the narrow ground that an affidavit should have been attached to Allstate's Motion, to show how burdensome and expensive gathering the ordered discovery would be, for the documents that currently exist, Boecher cannot be viewed, or used, as a decision requiring Allstate, or any other defendant in Florida, to create documents. The Boecher decision is being cited throughout the State of Florida for the principle that these documents must be created by defendants; which cannot be done, because Allstate, for example, cannot simply click on a computer icon. There is no Record basis for Judge Farmer's sua sponte fact in Boecher in computer capabilities. In fact, Affidavits were filed in the trial court on this issue, after the Fourth District made its incredible sua sponte finding that all the discovery requested was a millisecond away from production, by some main frame computer owned by Allstate. Once again, if this Court would affirm Boecher because some affidavit was not filed to establish the financial burdensomeness of producing what does not exist, Boecher still cannot be a holding that documents must be created; especially based on the Fourth District's unprecedented speculation that this discovery really requires a single mouse click.

As previously noted, Carrera is directly on point,

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factually, with the present case. The following objections were made to the interrogatories in Carrera, just as they were made below, and affidavit or not, the Third District's decision is the proper construction of this Court's intent in Elkins and the application of 1.280:

> 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 their files that were in storage.
>
> Plaintiffs also propounded 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.
>
> Carrera, 764.

Allstate similarly objected on the basis that it was a nationwide company which did not keep statistics on the utilization of experts from city to city; the information would be impossible to ascertain without great financial hardship rendering the discovery overbroad and burdensome; that such documentation was not kept as the Plaintiff requested; and the only way such information can be ascertain would be to open each and every file to make the determination the Plaintiff requested (A 11).

As can easily be seen, the facts in Carrera and the facts in Boecher regarding the objections are identical. The issue of

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affidavits was never raised below; there was no objection at any hearing, by the Plaintiff, that an affidavit was required; or that the objections were not sufficient. Rather the Plaintiff's position was simply that Allstate was a party and, therefore, Rule 1.280 did not prevent the discovery the Plaintiff was seeking. It was the Fourth District, on its own, that interpreted the court's Order, which simply read "Denied;" as some kind of substantive ruling rejecting Allstate's contention that the discovery was burdensome and the Fourth District, on its own, decided that was a correct finding because the discovery was not invasive, as it was directed to a party instead of the witness. Boecher, 107-108. It was at that point that the Fourth District went off on a tangent, finding, without any Record support whatsoever, that Allstate could readily lay its hands on the records showing the data that the plaintiffs were requesting and that Allstate had the power to pluck this data from its own cyberspace, again, without any record support whatsoever. Boecher, 108.

Affidavits were filed in the trial court refuting the Fourth District's presumptions, which are expressly stated as "presumptions" in Boecher. However, the effect of the Boecher decision is that now trial judges around the state are requiring all entities; whether they are an individual defendant, the defendant's attorney, the defendant's insurance carrier, or corporation, to do computerized searches, or to start maintaining computerized records, based on the Fourth District's decision in

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Boecher. Therefore, it is up to this Court, not only to resolve the conflict between Carrera and Boecher; but to make it very clear that there is no law in Florida, nor can the Boecher decision stand for the principle that, defendants or anyone else, must "create" discovery, which currently does not exist.

In Discovery, a Party Cannot be Required to "Create" Documents

It has long been the law that a party may not be required to produce documents which it does not have, and which are not known to exist. Fryd Construction Corporation v. Freeman, 191 So. 2d 487 (Fla. 3d DCA 1966)(in the absence of a showing that the discovery statement was in existence order to produce it was improper and quashed); Balzebre v. Anderson, 294 So. 2d 701 (Fla. 3d DCA 1974)(appellate court held that discovery order was too broad, as a party may not be required to produce documents which it does not have, and which are not shown to exist); Bissell Brothers, Inc. v. Fares, 611 So. 2d 620, 621 (Fla. 2d DCA 1993)(discovery order departed from the essential requirements of law and was quashed, where it directed two Miami doctors to produce documents which were not shown to be in existence; "a person may not be ordered to produce documents which he does not have").

In addition, no party can be ordered to create documents or records, or to maintain in futuro records or documents, in response to any court ordered discovery. LeJeune v. Aikin, 624 So. 2d 788 (Fla. 3d DCA 1993)(trial court discovery order

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requiring IME doctor to create detailed records in his office, from the date following the court's order to the date of trial, to determine the amount of fees paid to him for acting as an IME and/or expert witness quashed; as there is no authority requiring a party or witness to create in futuro records which he/she did not keep prior to the court's discovery order; the trial court clearly has no authority to order the discovery of non-existent records, such as to whom money is paid and for what year, by an insurance company for IME exams); Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994)("clearly, a trial court has no authority to order the discovery of non-existent records;" Third District Court of Appeal quashed orders requiring expert witness to maintain complete and accurate records commencing from the date of the court's discovery order, and to continue to maintain such information and have it available for the inspection or copying of any interested party or entity into the future, discovery order was a deviation from the essential requirements of law), affirmed, Elkins, supra, (discovery was never intended to be used as a tactical tool to harass an adversary in a manner that actually chills the availability of information by non-party witnesses; nor was it intended to make the discovery process so expensive that it could effectively deny access to information and witnesses, or force parties to resolve their disputes unjustly).

More important is the fact that the substantive issue in this case is that a party must produce discovery in order to

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impeach one of its witnesses, when the witness would not have to produce the discovery. Boecher makes some vague assertions that Allstate is capable of "bias" in the retention of experts, but then goes on to say that what is relevant is the impeaching of the "witness." As previously mentioned, all of this expert discovery has been sent to the experts in this case. Boecher does not explain how a jury would find the corporate Defendant/uninsured motorist carrier, Allstate, biased by how Allstate handles the retention of experts nationwide. Boecher admits that it is only how much a certain expert earns for one particular party that is extremely relevant to the credibility of the retaining party, as well as the expert. (Brief of Respondent, page 11). Elkins and Rule 1.280 expressly forbid total income discovery, discovery of income earned as an expert witness, and there are no provisions in Rule 1.280 for nationwide discovery. Furthermore, one of the Interrogatories at issue in the present case, asks Allstate to identify the amount of money members, employees, or experts of Bio-Dynamics have been paid and, again, there is no case law, rationale, Rule of Civil Procedure, or anything else, to support such a clearly irrelevant question (A 1-2). Therefore, the Respondent's claim that this annual income discovery is, somehow, allowable, is completely without merit, which is substantiated by the fact that all the cases cited are all pre-Elkins decisions. Wood v. Tallahassee Memorial Regional Medical Center, Inc. 593 So. 2d 1140 (Fla. 1st DCA 1992), rev. denied, 599 So. 2d 1281 (Fla. 1992); Dollar

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General, Inc. v. Deangelis, 590 So. 2d 555 (Fla. 3d DCA 1991).

If the Plaintiff is correct that the information sought is highly relevant to the witness' bias, Boecher has certainly has fallen short of explaining how this relevant information is not being obtained through the Interrogatories sent to the expert himself. That is because the information sought clearly is in violation of Elkins and Rule 1.280 and Boecher is simply trying to circumvent this law to obtain protected discovery.

The Plaintiff does not share his rationale or reasoning for the production from Allstate; and certainly has not made a sufficient showing for this Court to overrule its own precedent, directly on point, banning the ordered discovery. While the Plaintiff pays lip service to the underlying decision in Elkins, and Carrera from the Third District, he completely ignores the fact that there is no basis to permit burdensome inquiries into the financial affairs of a corporate Defendant to provide information, which would only emphasis the unnecessary detail which would be apparent to the jury on the simplest examination, that certain experts may be consistently chosen by a particular side in a personal injury case to testify on their behalf. Syken, supra. If the Opinion below is affirmed, the burdensome intrusion upon the corporate Defendant, will be crystal clear, when Boecher has to post the discovery cost bond required to create the ordered discovery.

How State Farm maintains its records and how or why it produced the discovery ordered by a trial judge in Arizona is

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completely irrelevant to the situation in the present case. Florida has adopted a very strict rule regarding the production of financial information, a rule which was necessary due to the burdensome, harassing and over-reaching discovery by plaintiffs throughout the state of Florida. If such discovery were really allowed from defendants, the Plaintiff would be able to cite to some precedential authority, besides an unpublished trial court judge in Arizona.

It is totally apparent that what the Plaintiff is trying to do in this case is intimidate the insurance company, such that it cannot hire any non-medical experts; just as the plaintiffs tried to intimidate defendants from hiring certain IMEs through the device of exploitative, immaterial, irrelevant, and harassing financial discovery requests. Syken, 545. Witnesses do not have to reveal how much money they earn as an expert, nor how much their total income is, under Florida law. The Plaintiff believes that he can circumvent these clear rules, by simply seeking the same prohibited financial information from the Defendant "party;" under the guise that this would not prejudice the corporate Defendant, because it is a big insurance company. Such prejudicial, disparate unconstitutional treatment is not supported by any law, anywhere.

It is important to remember that in Elkins this Court expressly addressed these exact same argument Boecher makes; where the petitioners had asserted that many "professional witnesses" derived most of their income from testifying as

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experts and therefore this financial information was necessary to attack the credibility of these witnesses. Elkins, 521. The Supreme Court expressly rejected this argument and pointed out that discovery was not to be used as a tactical tool to harass an adversary and actually chill the availability of information by non-party witnesses; the exact same result Boecher is seeking in the present case. He says this is somehow okay because the witness is not a practicing medical doctor. Whether the expert is a P.H.D, a retired M.D. or a practicing physician is of no importance. All experts and defendants must be treated alike under the law and no case, besides Boecher, holds differently. Boecher must be quashed and Carrera affirmed.

The Elkins Court pointed out that to allow the type of discovery which is overly burdensome, harassing, embarrassing, and annoying to the Defendant, would lead only to a lack of public confidence in the credibility of the civil court process. The cost of litigation would be so great that access to courts would be denied to all but a few who could afford it. Elkins, 522.

This Court expressly noted that to allow the type of discovery the Plaintiff is seeking in the present case, would cause many qualified experts, even those who only testify occasionally, to refrain from participating in the judicial process, especially if their personal privacy was to be invaded. Elkins, 522. Boecher and the Fourth District respond that the expert's privacy will not be invaded, if the information is

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supplied by Allstate, as opposed to Bio-Dynamics. An interesting argument, since the producible information has already been supplied by the Bio-Dynamics expert that is relevant and permitted by Florida law. Furthermore, the Fourth District justified its abrogation of Elkins and Rule 1.280 by "presuming" the information is readily available as ordinary business records. Boecher, supra. However, this conclusion was based on no Record evidence whatsoever. What was undisputedly in the Record, was that such documentation does not exist and Allstate does not keep such records. To justify its conclusion, the Fourth District ignored these undisputed facts and affirmed a discovery Order requiring the records to be created; in direct conflict with Elkins, supra.

As this Court pointed out, to allow the type of discovery Boecher seeks, would have a chilling effect on experts being able to testify and could cause future trials to consist of many days of questioning on the collateral issue of expert bias, rather on the true issues of liability and damages. Elkins, 522. This does not change simply because the expert is not a medical doctor, or because the Defendant is a corporate entity.

Where Florida has adopted an express set of "expert" discovery criteria, that must be met before the discovery can be ordered and this express law prohibits this discovery from a party; suffice it to say, that there is no question that the Order below departed from the essential requirements of law and should have been quashed. Boecher is in direct and express

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conflict with this Court's decision in Elkins, the Third District's decision in Carrera and Syken, and the new Rule of Civil Procedure 1.280(b). The Fourth District's opinion and the discovery Order must be quashed in their entirety.

In the alternative, should this Court decide to affirm the decision below, it must be on the narrow grounds that the Record did not support reversal of the Fourth District's presumption that production of the requested discovery was not burdensome. This Court should take the opportunity to make it very clear that the Boecher decision should not be interpreted, as it is currently being used; as a holding that insurance carriers can produce and create all types of discovery regarding their business at the mere click on a computer icon. Therefore, even if this Decision is affirmed, the Court should make it very clear to the Fourth District and trial judges, that Allstate cannot be required to produce any documents that currently do not exist, nor can it be required to create documents in order to comply with the Plaintiff's discovery requests.

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CONCLUSION

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

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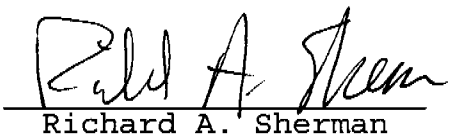
By: 
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