IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-_____
DCA Case No.: 2D03-281

Florida Bar No. 184170

ALLSTATE INSURANCE COMPANY,)
)
Petitioner/Defendant,)
)
vs.)
)
CATHERINE M. HODGES,)
)
Respondent/Plaintiff,)
)
and)
)
GRIGORI OKRASHEVSKAJA, and)
LJUBOU OKRASHEVSKAJA,)
)
Respondents/Defendants.)
_____________________________)

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

BRIEF OF PETITIONER ON JURISDICTION
ALLSTATE INSURANCE COMPANY

(With Appendix)

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POINT ON APPEAL

THE DECISION IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH (A) ALLSTATE v. PINDER, SUPRA; OLIVAS v. BRAVO, SUPRA; AND ELKINS v. SYKEN, SUPRA; WHICH HOLD THAT DISCOVERY WHICH IS "UNDULY BURDENSOME" SHOULD NOT BE REQUIRED; (B) OLIVAS, SUPRA, WHICH HOLDS THAT WHAT A PARTY IS ENTITLED TO ARE 1099 FORMS AND "TIN" REPORTS; (C) ALLSTATE INSURANCE COMPANY v. PINDER, SUPRA; OLIVAS v. BRAVO, SUPRA; AND ELKINS v. SYKEN, SUPRA; BY REQUIRING THAT DOCUMENTS WHICH ARE NOT IN EXISTENCE, BE CREATED TO COMPLY WITH DISCOVERY; AND (D) KORNEFFEL v. SOUTH BROWARD HOSPITAL DISTRICT, SUPRA; AND SCHERING CORPORATION v. THORNTON, SUPRA, WHICH HOLD THAT A BOND SHOULD BE REQUIRED WHEN EXPENSIVE DISCOVERY IS REQUESTED.

STATEMENT OF THE FACTS AND CASE

The facts were described in the Opinion of the Second District (A 1-10). This is a suit resulting from an automobile accident where the plaintiff alleges soft-tissue injuries. The plaintiff, Hodges, propounded Interrogatories to Allstate requesting certain information concerning Florida Neurology Group and/or Neurology Specialists of Southwest Florida. Specifically, the Interrogatories asked that each case be identified in which a member of the medical group had testified as an expert witness by deposition during the past three years for Allstate; in which a member had testified as an expert witness at trial during the past three years for Allstate; and for the number of litigation cases in which a member had performed an analysis, examination or rendered opinions for Allstate; and lastly, the total amount of money all members had been paid by Allstate during the past three years. The Interrogatories also sought the same information concerning Neurology Associates of Lee County.

Allstate answered the Interrogatories and filed three Affidavits which are discussed in detail in the Opinion of the Second District. Allstate indicated that it had made a total of 845 payments, totalling $225,725.34, for the period of 1999 through 2001, to Neurology Specialist of Southwest Florida; and $22,253.07, during the same period, to Neurologist Associates of Lee County. The Affidavits also indicated that a manual review of the files would be necessary to compile the other information, and would require approximately 422 man hours, and the cost of the manual search was detailed as being $11,885.

The plaintiff moved to compel better interrogatory answers, and

the trial court so ordered, and a Petition for Writ of Common Law Certiorari was taken to the Second District Court of Appeal. The Second District affirmed the decision, and it is respectfully submitted that the Opinion is in express and direct conflict with Florida law in four different aspects.

SUMMARY OF ARGUMENT

There is express and direct conflict in the Opinion with four rules of law. First, the Second District held that an erroneous discovery order which is burdensome, but which will not destroy the defendant company, will not be reviewed by certiorari. The court relied on the Fourth District case of Topp Telecom, Inc. v. Atkins, 763 So. 2d 1197 (Fla. 4th DCA 2000) which held to this effect, in a 2/1 decision. The dissenting judge in Topp Telecom stated that this was not accurate law, that unless a certiorari order "puts the petitioner out of business," certiorari is never available. The holding in the present case, as well as the holding in Topp Telecom, are in express and direct conflict with all other Florida law, which holds that a discovery order which is "overly burdensome," or "unduly burdensome," is susceptible to certiorari review. Olivas, infra; Pinder, infra; Elkins, infra. See also, North Miami General Hospital v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033 (Fla. 3d DCA 1981); Jerry's South, Inc. v. Morran, 582 So. 2d 803 (Fla. 1st DCA 1991).

Second, there is conflict with Olivas v. Bravo, 795 So. 2d 103 (Fla. 3rd DCA 2001), in which the Third District quashed similar discovery that sought information relating to a frequently employed

medical examiner because it was overly burdensome and irrelevant. Instead, the Third District allowed production of taxpayer information number (TIN) reports and 1099 forms "which are all the plaintiffs are entitled to under the prevailing law." *Id.* at 104. However, the Second District has taken a conflicting view of the "prevailing law". Even though Allstate had already produced TIN reports and 1099 forms for its experts, the Second District ordered further discovery and required Allstate to compile and produce a lengthy, detailed list of information regard its experts. Therefore, there is express and direct conflict with this holding. This Court should grant review, and resolve this conflict so that trial courts can know the "prevailing law" to apply on these discovery issues.

This Court in Elkins v. Syken, 672 So. 2d 517, 521 (Fla. 1996), established specific parameters for the scope of discovery to experts regarding their relationships with parties. Those parameters are codified in Rule 1.280(b)(4). Similar parameters are needed in the instant situation in which the discovery regarding experts is directed to the party, not the expert. Without standards from this Court, there is no uniformity in the duties imposed on parties throughout the state. In Miami, for instance, the party may respond to the discovery by producing TIN and 1099 reports, while the party in Tampa would be required to expend weeks of time and thousands of dollars in compiling lists of information in order to respond to the same discovery.

Therefore, this Honorable Court should grant discretionary review.

Third, not only did the Second District order discovery beyond the TIN reports and 1099 forms, it ordered the defendant to create

documents which do not exist, in order to comply with this discovery. Numerous Florida cases hold that it is error to require a party to create documents to comply with discovery. Cases involving this identical type of discovery, which have been reviewed on Petition for Writ of Certiorari, are Olivas v. Bravo, 795 So. 2d 103 (Fla. 3d DCA 2001); Elkins v. Syken, 672 So. 2d 517 (Fla. 1996); Allstate Insurance Company v. Pinder, 746 So. 2d 1255 (Fla. 5th DCA 1999). See also, Balzebre v. Anderson, 294 So. 2d 701 (Fla. 3d DCA 1974); Fryd Construction Corporation v. Freeman, 191 So. 2d 487 (Fla. 3d DCA 1966). Therefore, the decision in the present case is in express and direct conflict with these cases, because the present case requires that a document be created to comply with discovery.

The Second District distinguished Pinder and Olivas on the basis that those cases involve requests for production, whereas the present case involves interrogatories. However, the cases do not make this distinction. Moreover, since the affidavits indicate that a lengthy, detailed list will need to be compiled, in order to transpose the list into the answer to the interrogatories, the same principle of law applies; it still requires 422 man hours to be expended to create a list, which will then be transposed into the interrogatory answer.

The decision further impliedly orders Allstate to modify its computer system without any information as to whether this is possible, or the cost. If it is error to order a document to be created for discovery, it would appear to be a corollary that it is error to impliedly order a massive, expensive change in a corporation's computer system.

Fourth, the court held that although the cost of creating the discovery was $11,885, it was not error for the trial court to deny a bond for costs. This is in express and direct conflict with Florida law, that a bond should be required if expensive discovery is ordered to be produced. Korneffel v. South Broward Hospital District, 431 So. 2d 742 (Fla. 4th DCA 1983); and Schering Corporation v. Thornton, 280 So. 2d 493 (Fla. 4th DCA 1973).

ARGUMENT

THE DECISION IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH (A) ALLSTATE v. PINDER, SUPRA; OLIVAS v. BRAVO, SUPRA; AND ELKINS v. SYKEN, SUPRA; WHICH HOLD THAT DISCOVERY WHICH IS "UNDULY BURDENSOME" SHOULD NOT BE REQUIRED; (B) OLIVAS, SUPRA, WHICH HOLDS THAT WHAT A PARTY IS ENTITLED TO ARE 1099 FORMS AND "TIN" REPORTS; (C) ALLSTATE INSURANCE COMPANY v. PINDER, SUPRA; OLIVAS v. BRAVO, SUPRA; AND ELKINS v. SYKEN, SUPRA; BY REQUIRING THAT DOCUMENTS WHICH ARE NOT IN EXISTENCE, BE CREATED TO COMPLY WITH DISCOVERY; AND (D) KORNEFFEL v. SOUTH BROWARD HOSPITAL DISTRICT, SUPRA; AND SCHERING CORPORATION v. THORNTON, SUPRA, WHICH HOLD THAT A BOND SHOULD BE REQUIRED WHEN EXPENSIVE DISCOVERY IS REQUESTED.

I. Unduly Burdensome. The holding of the Second District —— that a discovery order which is burdensome but will not destroy the defendant company is not sufficiently egregious for review by certiorari —— is clearly in express and direct conflict with Florida law. Countless Florida cases have reversed discovery orders on a writ of certiorari, applying the test of whether the order is "unduly burdensome," or "overly burdensome."

The Second District held:

> Furthermore, under Topp Telecom, Allstate's economic concerns would not rise to the level of an undue burden necessary to support a finding of a departure from the essential requirements of the law. *See*, 763 So.2d at 1200. That court has specifically stated that "[a]n erroneous order compelling discovery when the cost and effort to do so is burdensome but not destructive is simply not 'sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari.'"
>
> Topp Telecom, 1200.

Topp Telecom is apparently the only other Florida case which has held this, and these two cases are in express and direct conflict with dozens of Florida cases which hold that the test for whether a discovery order should be reversed, is whether it is "overly burdensome," or "unduly burdensome." See, Pinder, supra; Olivas, supra; Elkins, supra; North Miami, supra; and Jerry's South, supra. Pinder refers to the test of whether there is an "undue burden." Olivas refers to the test of whether the discovery is "overly burdensome." The Supreme Court in Elkins v. Syken, supra, repeatedly refers to a test of whether discovery is "burdensome," or "overly burdensome." Therefore, this holding is in express and direct conflict with Pinder; Olivas; and Elkins v. Syken, on this basis, as well as being in conflict with all other Florida law on point, that "overly burdensome" or "unduly burdensome" is the correct test for granting certiorari review from a burdensome discovery order.

Furthermore, this holding in the present case and in Topp Telecom would be contrary to Florida law, by encouraging frivolous lawsuits to be filed. In a lawsuit involving for instance $10,000 or less, the plaintiff could propound discovery which would cost

$50,000, $100,000 or $500,000 to produce. Since it would not destroy the defendant corporation, it would not be objectionable. The defendant would be placed in the financial situation that it would need to settle a non-meritorious case simply to avoid the much larger financial burden. This clearly is contrary to the public policy, and in express and direct conflict with the cases which apply the test of whether discovery is unduly or overly burdensome.

II. Requires Additional Discovery. Second, Olivas, supra, held that what is necessary to comply with the Supreme Court's decision in Allstate Insurance Company v. Boecher, 733 So. 2d 993 (Fla. 1999), is production of 1099 Forms and "TIN" reports. The Second District held that even though the 1099 Forms and "TIN" reports had been produced, this was not sufficient, and a lengthy, detailed list of information must be produced, to comply with Boecher, supra. Therefore, there is express and direct conflict with this holding.

III. Requires Creation of Documents. The decision of the Second District Court of Appeal in the present case, ordered the defendant to create documents which do not exist, in order to comply with discovery. The Second District distinguishes the line of cases as exemplified by Pinder, supra; Olivas, supra; and Elkins, supra; by holding that this rule of law only applies to a request for production, and not to interrogatories. However, since the affidavits clearly reveal that a lengthy, detailed list will need to be created in order to transpose this list to the interrogatory answers, this is not a valid distinction, and therefore there is

express and direct conflict with these cases.

The facts in Pinder were that the plaintiff filed a request to produce which was substantially similar to the information requested in the present case. The trial court ordered the production, and a Petition for Writ of Common Law Certiorari was taken to the Fifth District Court of Appeal. The Fifth District held that a party can not be required to create a non-existent document, and granted a writ of certiorari and reversed.

Similarly, in Olivas, supra, the Third District held that information requested from a frequently employed independent medical examiner was overly burdensome and also was erroneous, in that it requested records which did not exist and which the company was erroneously required to create:

> We quash the order under review, which improperly requires the defendants' liability insurance carrier and their attorneys to produce information relating to a frequently employed independent medical examiner which was not only overly burdensome and irrelevant but is reflected in records which do not exist and which the company was erroneously required to create.
>
> Bravo, 103-104.

The Florida Supreme Court in Elkins said:

> 8. An expert may not be compelled to compile or produce nonexistent documents.
>
> Elkins, 521.

The Affidavits in this case made clear that it would be necessary to expend approximately 422 man hours to manually search files, in order to compile a list of the information requested in the interrogatories. Therefore, the Order requiring the creation of a list, which would be transposed to an interrogatory answer, is in

express and direct conflict with the cases cited above.

IV. Not Require Bond. Fourth, the Second District held that, even though the cost of completing the interrogatories would be $11,885, that the trial court did not commit error by denying a Motion to Post a Cost Bond. Therefore, this Opinion is in direct and express conflict with Korneffel and Schering, which hold that, when the cost of discovery is unreasonable and unduly burdensome, a bond should be required.

The present case is in express and direct conflict with Schering, supra, where the Court of Appeal held that when expensive discovery is ordered to be produced, it is error reviewable on a Writ of Certiorari, to order it to be produced without requiring a cost bond. The discovery cost in Schering was $4,000, so it is expressly and directly in conflict with the present case in which discovery costing $11,885 was ordered to be produced without a cost bond.

It is also in express and direct conflict with Korneffel. The facts there were that the trial court entered an Order compelling extensive discovery. The Fourth District reversed, holding that since extensive discovery was ordered, the trial court must also order a cost bond to be filed:

> We grant the petition for writ of certiorari and quash the order compelling discovery without prejudice to the trial court's authority to enter an order compelling the same discovery, provided however that any order must be conditioned upon payment of costs by the party requesting such discovery.
>
> Korneffel, 743.

Accordingly, the decision of the Second District in the present case is in express and direct conflict with caselaw on four different

rules of law.

CONCLUSION

The decision is the present case is in express and direct conflict with the cases of Allstate Insurance Company v. Pinder, supra; Olivas v. Bravo, supra; Elkins v. Syken, supra; Korneffel v. South Broward Hospital District, supra; Schering Corporation v. Thornton, supra; Balzebre, supra; Fryd, supra; North Miami, supra; and Jerry's South, supra.

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