

IN THE SUPREME COURT OF FLORIDA

SCOTT KATZMAN, M.D. and
ADVANCED ORTHOPAEDICS,
P.A.,

Petitioners,

v.

Case No. SC12-114
4th DCA Case No. 4D11-1290

REDIRON FABRICATION, INC.
GEORGE MARTIN and ALLISON
MINJARES,

Respondents.

PETITIONERS' JURISDICTIONAL BRIEF

On Review from the District Court of Appeal,
Fourth District
State of Florida

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STATEMENT OF CASE AND FACTS

The facts and posture of this matter are not complex, and they are set forth in the Opinion. Opinion, at 2-3. A lawyer referred two individuals involved in automobile accidents to Dr. Katzman. Dr. Katzman entered into a letter of protection (“LOP”) by which he agreed to be paid for his treatments with any funds recovered in a lawsuit. He performed a surgical procedure on the plaintiffs, and the defendant below sought discovery regarding how often he has ordered that particular surgical procedure, as well as what he has charged for that procedure in litigation and in non-litigation cases. Dr. Katzman moved for protective order, arguing that *Elkins v Syken*, 672 So. 2d 517 (Fla. 1996) mandated that he did not have to produce such discovery.

The trial court disagreed and ordered him to respond to two requests from the defendant. Dr. Katzman then filed a petition for writ of certiorari in the Fourth District Court of Appeal, and on August 10, 2011, the Court issued an opinion. Dr. Katzman filed a Motion for Rehearing, Rehearing En Banc, Clarification, and Certification of a Question of Great Public Importance. The Fourth District granted the Motion for Clarification, and on December 21, 2011, substituted a new opinion (the “Opinion”) for the one previously issued. Dr. Katzman timely served notice of seeking this Court’s discretionary review.

SUMMARY OF THE ARGUMENT

In *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), this Court imposed certain limits and protections on expert discovery designed to protect experts from harassment, embarrassment and annoyance. Those protections were then made part of Florida Rule of Civil Procedure 1.280(b)(4)(A). The parties below recognized that Dr. Katzman qualified as an expert, though the Opinion denied him the protections of *Elkins* and the Rule because he was also a treating physician. It is respectfully submitted that the Opinion expressly and directly conflicts with *Elkins*, and this Court should accept jurisdiction to consider the scope of expert discovery.

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *ELKINS V. SYKEN*, 672 SO. 2D 517 (FLA. 1996).

For 15 years, experts in the State of Florida have clearly and unambiguously enjoyed the discovery protections afforded by *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996) and Florida Rule of Civil Procedure 1.280(b)(4).¹ Treating physicians are not always deemed experts, though, in certain circumstances, they may be. *Clair v. Perry*, 66 So. 3d 1078, 1079 n.1 (Fla. 4th DCA 2011). Here, the Opinion correctly states that the “parties do not dispute that [Dr.] Katzman, who has been listed as an expert for trial, qualifies as an expert under the rule.” Opinion, at 6. Yet, despite qualifying as an expert, the Opinion removes the protections afforded to Dr. Katzman by *Elkins* and Rule 1.280.

The reason that the Opinion denies the protections of *Elkins* to Dr. Katzman is because he is not merely an expert witness, but also a fact witness in that he is a “treating physician who has provided treatment under a letter of protection agreement.” Opinion, at 6. Thus, the Opinion creates an exception, never previously recognized under Florida law, to the limitations placed on expert witness discovery under *Elkins*.

¹Florida Rule of Civil Procedure 1.280 was amended in 1996 to incorporate *Elkins*' holding. See Fla. R. Civ. P. 1.280 (Committee Notes).

The Opinion cites *Allstate Insurance Company v. Boecher*, 733 So. 2d 993 (Fla. 1999) where this Court considered the rationale behind *Elkins* in the context of discovery directed at a party, not an expert, and “found that the analysis changed and the balance of interests shifted in favor of allowing the discovery.” Opinion, at 5. However, this case does not involve discovery directed to a party, but rather to a third party expert/treating physician.

Elkins heralded a significant change in the law, and put in place protections that were carefully designed to allow for meaningful discovery while protecting the interests of testifying physicians. As *Elkins* noted, 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*, 672 So. 2d at 522. These concerns are as legitimate today as they were 15 years ago, and *Elkins* put limitations in place to protect a testifying physician such as Dr. Katzman. It is respectfully submitted that the Opinion expressly and directly conflicts with *Elkins*, and this Court should accept jurisdiction to address the scope of that opinion.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the Petitioners' argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent via U.S. regular Mail and/or facsimile to: I hereby certify that a true copy of the foregoing has been sent via U.S. regular Mail and/or facsimile to: **The Honorable Dwight L. Geiger**, Circuit Court Judge, St. Lucie County Courthouse, Post Office Box 700, Fort Pierce, Florida 34954; **Michael Celeste, Esquire**, Celeste & Associates, P.A., 580 Village Boulevard, Brandywine Center, West Palm Beach, Florida 33409; **Sharon Urbanek, Esquire** and **William Viergever, Esquire**, Sonneborn Rutter Cooney & Klingensmith, P.A., 1545 Centrepark Drive North, Post Office Box 024486, West Palm Beach, Florida 33402; **Glen E. Chaney, Esquire**, Hayworth Chaney & Thomas, P.A., 202 North Harbor City Boulevard, Suite 300, Melbourne, Florida 32935; **Celene H. Humphries, Esquire** and **Tracy S. Carlin, Esquire**, Brannock & Humphries, 100 South Ashley Drive, Suite 1130, Tampa, Florida 33602; and **Kimberly P. Simoes, Esquire**, 120 South Woodland Avenue, Suite 202, Deland, Florida 32720; this 30th day of January, 2012.

CHRISTOPHER V. CARLYLE, B.C.S.
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point type.

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