IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC15-1086

HEATHER WORLEY,

Petitioner,

v.

L.T. Nos. 5D14-3895;
2012-CA-001009-O

CENTRAL FLORIDA YOUNG MEN'S CHRISTIAN, ETC.

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

Andrew Parker Felix
Florida Bar No. 0685607
AFelix@forthepeople.com
W. Clay Mitchell, Jr.
Florida Bar No. 0077488
cmitchell@forthepeople.com
MORGAN & MORGAN, P.A.
20 N. Orange Ave., 16th Floor
P.O. Box 4979
Orlando, FL 32802-4979
Telephone: (407) 420-1414

Attorneys for Petitioner

Celene H. Humphries
Florida Bar No. 884881
chumphries@bhappeals.com
Philip J. Padovano
Florida Bar No. 157473
ppadovano@bhappeals.com
Tracy S. Carlin
Florida Bar No. 797390
tcarlin@bhappeals.com
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, Florida 33602
Tel: (813) 223-4300
Fax: (813) 262-0604
Secondary Email:
eservice@bhappeals.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE AND OF THE FACTS

This Court has jurisdiction to hear this case because the Fifth District certified a direct conflict between this case and one from the Second District. This Court should exercise its jurisdiction here because the Fifth District's decision erodes the attorney-client privilege by creating a need/want exception where the privilege protects potential bias-related impeachment evidence and the requesting party cannot obtain the information any other way. Thus, this Court should resolve the conflict and protect the privilege from erosion in this manner.

Petitioner Heather Worley ("Plaintiff") sued Respondent ("Defendant") after she tripped and fell in Defendant's parking lot. (A.2.) Plaintiff went to the emergency room (the "Hospital") twice, where the staff advised her to see a specialist about her knee pain. (A.2.) Plaintiff did not see a specialist at first because she had no money or health insurance. After Plaintiff retained Morgan & Morgan, P.A. (the "Law Firm"), various doctors from Sea Spine Orthopedic Institute, Underwood Surgery Center, and Sanctuary Surgical & Anesthesia (collectively, the "Various Doctors") treated Plaintiff's injuries. (A.2.)

During Plaintiff's deposition, Defendant asked her why she chose the Various Doctors and whether the Law Firm had referred her to them. The Law Firm objected on attorney-client-privilege grounds. (A.2.) The trial court sustained Plaintiff's objection. (A.4.) At Plaintiff's subsequent deposition, however, Plaintiff

testified that she was not referred to the Various Doctors by another doctor, the Hospital, a friend, or a relative. (A.5.)

After Plaintiff's first deposition, Defendant propounded three sets of interrogatories and requests to produce to Plaintiff attempting to ascertain the extent of the relationship between the Law Firm and the Various Doctors. (A.2.) Defendant believed a "cozy agreement" existed between the Law Firm and the Various Doctors because Plaintiff's medical bills were unusually high. (A.3.) Plaintiff conceded below that Defendant had sufficient evidence to argue that the Various Doctors' bills are unreasonable. (A.3.)

In the interrogatories, Defendant sought the names of all cases where the Various Doctors had treated a Law Firm client, the total bills charged, the amount paid to any third-party company that purchased the client accounts, the names of all cases in which the Various Doctors testified on behalf of a Law Firm client, and the expert fees paid in those cases. (A.3.) Defendant's request to produce sought: 1) formal or informal agreements or understandings regarding referral or treatment of, billing for, protections of bills for, or any other matter pertaining in any way to the referral of and billing for patients between the Law Firm and the Various Doctors; and 2) documents reflecting the amounts received or adjusted for any bills rendered for medical treatment of the Law Firm's clients by the Various Doctors. (A.3-4.)

Plaintiff objected to Defendant's interrogatories and production requests as "overbroad, vague, unduly and financially burdensome, irrelevant, and in violation [of] allowable discovery...." (A.4.) Plaintiff explained that the Law Firm does not maintain that information for treating physicians and that Defendant could obtain the answers from the Various Doctors. At their depositions, however, the Various Doctors responded that they were unsure who referred Plaintiff to them, but some believed the Hospital had referred her. (A.4.)

Defendant filed a Motion to Compel. The trial court granted the motion in part and denied it in part. (A.5.) The court's written order sustained Plaintiff's objections to the requested financial information. (A.6.) The court said it would reconsider that ruling if a billing or referral agreement or understanding or past referrals are shown to exist between the Law Firm and the Various Doctors. The order required Plaintiff to produce: 1) documents reflecting formal or informal agreements related to patient billing or any direct or indirect referrals of Law Firm clients to the Various Doctors; and 2) the names of cases where a client was referred directly or indirectly by the Law Firm to any of the Various Doctors, and *vice versa*. (A.5-6.) The court orally announced that "[i]f the health care provider doesn't have it, then the law firm is to produce it." (A.6.) The written order does not indicate which party had to bear the discovery-related costs.

Plaintiff filed a motion for reconsideration arguing that the information sought was protected by the attorney-client privilege and that it would be overly burdensome, if not impossible, to comply with the court's order. (A.6.) Plaintiff provided affidavit testimony that the Law Firm did not maintain this information, Plaintiff's counsel had identified 238 non-party legal matters involving the Various Doctors,[1] and that it would cost approximately $94,010 to fully comply with the court's order. (A.7.) The court denied Plaintiff's motion and Plaintiff sought certiorari in the Fifth District. (A1-16.) In denying Plaintiff's Petition, the court certified a direct conflict with *Burt v. Government Employees Insurance Co.*, 603 So. 2d 125 (Fla. 2d DCA 1992). (A.16.)

In *Burt*, the Second District held that the question of whether a lawyer referred his client to a particular treating physician was protected by the attorney-client privilege. (A.11.) The Fifth District believed *Burt* had been called into doubt by subsequent decisions from two other courts which allowed financial discovery pertaining to the relationship, if any, between a plaintiff's physicians and her lawyers. (A.11 (citing *Brown v. Mittelman*, 152 So. 3d 602, 604 (Fla. 4th DCA 2014); *Lytal, Reiter, Smity, Ivey & Fronrath, L.L.P. v. Malay*, 133 So. 3d 1178, 1178 (Fla. 4th DCA 2014); *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins.*

[1] Although 238 seems like a large number, the Law Firm has 250 lawyers statewide and 75,000 clients nationwide. *See* www.forthepeople.com, last accessed June 8, 2015.

Co., 103 So. 3d 200, 204 (Fla. 4th DCA 2012); *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1064 (Fla. 4th DCA 2011); *Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1, 2 (Fla. 2d DCA 2001)). Because Defendant had exhausted all other possible sources of this information without success, the Fifth District found, contrary to *Burt* and notwithstanding the applicable privilege, that Defendant could ask Plaintiff if the Law Firm referred her to the Various Doctors. (A.11-12.) Plaintiff seeks review of the Fifth District's decision.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review this case because the Fifth District certified a conflict with *Burt*. This Court should exercise its jurisdiction in favor of reviewing this case because not only does the conflict require resolution, but also because this decision undermines the sanctity of the attorney-client privilege by creating a need/want exception to the privilege that should not stand. Therefore, this Court should hear this case on the merits and protect the privilege from untoward erosion.

ARGUMENT

This Court has jurisdiction to hear this certified-conflict case. *See* Art. 5, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(vi). As the Fifth District certified, this case directly conflicts with *Burt*, 603 So. 2d at 125. In *Burt*, the Second District held that the information Defendant is seeking in this case –

whether the Law Firm referred Plaintiff to the Various Doctors – is protected by the attorney-client privilege and therefore not discoverable. 603 So. 2d at 125-26. In this case, the Fifth District held that, despite the privilege, Defendant could ask Plaintiff if the Law Firm referred her to the Various Doctors because Defendant could not obtain the information any other way. (A.8-13.) Therefore, a direct conflict exists.

Although the Fifth District believed *Burt* had been called into doubt by subsequent cases, the court is incorrect. None of the cases the Fifth District relied upon discussed or referred to *Burt*. *See Brown*, 152 So. 3d at 602; *Malay*, 133 So. 3d at 1178; *Steinger*, 103 So. 3d at 204; *Katzman*, 76 So. 3d at 1060; *Pope*, 798 So. 2d at 1. Indeed, only two of those cases discussed privilege at all. In *Pope*, the court found that the trial court adequately protected the privilege by requiring the documents to be redacted. *See Pope*, 798 So. 2d at 3. Also, because *Pope* involved a retained expert, the issue of whether the lawyer referred the client to the doctor for treatment was not at issue in that case. *Id.* at 1-4. Thus, *Burt* was not a concern in *Pope*. Likewise, in *Steinger*, which did involve treating physicians, the defendant had already made a *prima facie* case (apparently without invading the privilege) establishing that the lawyers had referred the client to the doctor. 103 So. 3d at 204. Thus, the privilege was not at issue there, either. Therefore, none of these cases called *Burt* into doubt. Rather, as the Fifth District seems to have

acknowledged through its certified conflict, *Burt* remains good law that directly conflicts with this case. Thus, this Court has jurisdiction to hear this case on the merits if it chooses to do so. *See* Art. V, § 3(b)(4); 9.030(a)(2)(A)(vi).

The Court should choose to resolve the conflict because the lower court's decision erodes the sanctity of the attorney-client privilege and opens the door to other situations where the privilege will be superseded by the needs or wants of one party or the other. This is not, and should not be, Florida law. Rather, in the absence of waiver, the privilege should remain inviolate. Thus, this Court should accept jurisdiction and hear this case on the merits.

Parties may obtain discovery of any matter not privileged that is relevant to the claims or defenses presented in the lawsuit. *See* Fla. R. Civ. P. 1.280(b)(1). Because the attorney-client privilege is unique and important to our adversarial system of justice, privileged materials are not discoverable regardless of need or undue hardship. *See Genovese v. Provident Life & Accident Ins. Co.*, 74 So. 3d 1064, 1068 (Fla. 2011) (noting that, unlike work product, there is no exception to the attorney-client privilege based on need or undue hardship); *Tumelaire v. Naples Estates Homeowners Ass'n, Inc.*, 137 So. 3d 596, 599 (Fla. 2d DCA 2014) (same); *Nat'l Sec. Fire & Cas. Co. v. Dunn*, 705 So. 2d 605, 608 (Fla. 5th DCA 1997) ("Notwithstanding a litigant's entitlement to work-product material upon a showing of need and undue hardship, the attorney-client privilege is absolute."

(citation omitted)). The privilege is simply different and more protected than work product. *See* Fla. R. Civ. P. 1.280(b)(4) (describing work product and that it may be discoverable if the requesting party shows need and undue hardship).

This Court has stated:

> Various reasons have historically been cited for the existence of the attorney-client privilege. The modern view is that the privilege promotes the administration of justice by "encouraging clients to lay the facts fully before their counsel." By encouraging full disclosure, a client is able to receive fully informed legal advice without the fear that his statements may later be used against him.

Owen v. State, 773 So. 2d 510, 514 (Fla. 2000) (citing *Brookings v. State*, 495 So. 2d 135, 139 (Fla. 1986) (citation omitted)); *see also Lender Process'g Servs., Inc. v. Arch Ins. Co.*, --- So. 3d ---, 2015 WL 1809318, *5 (Fla. 1st DCA Apr. 22, 2015) (citation omitted)). Similarly, another court reasoned:

> As stated in the Comment to Rule 210 of the A.L.I. Model Code of Evidence: "In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce *clients* to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases." [Emphasis added] But the privilege should be strictly construed in accordance with its object.

Merlin v. Boca Raton Comm'y Hosp., Inc., 479 So. 2d 236, 239-40 (Fla. 4th DCA 1985) (citation omitted).

Thus, the privilege is an integral part of our adversary system of justice. *See Hagans v. Gatorland Kubota, LLC/Sentry Ins.*, 45 So. 3d 73, 76 (Fla. 1st DCA 2010) (citation omitted). If the purpose of the privilege is to be preserved, the attorney and client must be able to predict with some certainty whether particular discussions will be protected. *Id.* "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* Thus, "[t]he attorney-client privilege is inviolate as to matters within its scope, and waiver of the attorney-client privilege is not favored in Florida." *Markel Am. Ins. Co. v. Baker*, 152 So. 3d at 86, 90 (Fla. 5th DCA 2014) (citations and footnote omitted).

Even though the privilege may be waived, no such waiver occurred here. Plaintiff has consistently invoked the privilege throughout this case. And, a party must do much more than merely file suit to be held to have waived the attorney-client privilege. *See Long v. Murphy*, 663 So. 2d 1370, 1371 (Fla. 5th DCA 1995). This should be true even if the privilege thwarts potentially relevant, bias-related discovery. Indeed, this Court has held that the attorney-client privilege trumps the constitutional right to confrontation in certain cases. *See Mills v. State*, 476 So. 2d 172 (Fla. 1985). Thus, the mere fact that a witness' testimony may be impeached

by the confidential communications between a party and her attorney does not give the opposing party the right to have those confidential communications disclosed. *See Baker*, 152 So. 3d at 91 (citations omitted). Rather, waiver of the privilege occurs only when a party "'raises a claim that will *necessarily* require proof by way of a privileged communication.'" *Lender Process'g Servs., Inc.*, 2015 WL, at *6 (citations omitted). Plaintiff's simple negligence claim did no such thing.

In the end, the Fifth District has created an entirely new, heretofore unknown exception to the attorney-client privilege. It has ruled that if the defense really needs the information and it pertains to a witness' bias, the privilege should stand aside. This should not be Florida law. Such a ruling seriously erodes the sanctity of the privilege and potentially opens the door to additional need/want exceptions. No doubt, this new exception will be expanded and applied to the other privileges provided by the evidentiary rules. To allow this opinion to remain undisturbed would be to undermine the public's confidence in the judicial system and clients' trust in the privilege and their lawyers. Consequently, this Court should hear this case to determine when and how the privilege applies in this context.

CONCLUSION

For the foregoing reasons, this Court should exercise its discretion in favor of resolving this case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by email to Joseph Flood, Jr., Esquire, jflood@drml-law.com, judy@drml-law.com, and Jessica.Conner@DRML-Law.com, Dean, Ringers, Morgan, & Lawton, P.A., Post Office Box 2928, Orlando, Florida 32802-2928, this 16th day of June 2015.

Andrew Parker Felix
Florida Bar No. 0685607
AFelix@forthepeople.com
W. Clay Mitchell, Jr.
Florida Bar No. 0077488
cmitchell@forthepeople.com
MORGAN & MORGAN, P.A.
20 N. Orange Ave., 16th Floor
P.O. Box 4979
Orlando, FL 32802-4979
Telephone: (407) 420-1414

Attorneys for Petitioner

Celene H. Humphries
Florida Bar No. 884881
chumphries@bhappeals.com
Philip J. Padovano
Florida Bar No. 157473
ppadovano@bhappeals.com
Tracy S. Carlin
Florida Bar No. 797390
tcarlin@bhappeals.com
BRANNOCK & HUMPHRIES
100 South Ashley Drive, Suite 1130
Tampa, Florida 33602
Tel: (813) 223-4300
Fax: (813) 262-0604
Secondary Email:
eservice@bhappeals.com

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

TRACY S. CARLIN
Florida Bar: 797390