IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-1118

BRENT A. DODGEN,

Petitioner,

v.

KAITLYN P. GRIJALVA,

Respondent

_____/

PETITIONER BRENT DODGEN'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This case concerns the effect and application of this Court's decision in Worley v. Cent. Fla. YMCA, 228 So. 3d 18 (Fla. 2017), on discovery served by a plaintiff upon a defendant seeking information concerning the financial relationship between the defendant's insurance company and the compulsory medical examiner. The Fourth District Court of Appeal certified the following question as being of great public importance:

> WHETHER THE DECISION IN WORLEY V. CENTRAL FLORIDA YOUNG MEN'S CHRISTIAN ASS'N., 228 SO. 3D 18 (FLA. 2017), SHOULD BE APPLIED TO PROTECT A DEFENDANT'S INSURER THAT IS NOT A PARTY TO THE LITIGATION FROM HAVING TO DISCLOSE ITS FINANCIAL RELATIONSHIP WITH EXPERTS RETAINED FOR PURPOSES OF LITIGATION, INCLUDING THOSE THAT PERFORM COMPREHENSIVE MEDICAL EXAMINATIONS UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.360?

(R. 442-443).

This Court should answer the certified question in the affirmative. Florida law—including application of Worley—must be applied even-handedly to both civil plaintiffs and defendants. See generally Elkins v. Syken, 672 So. 2d 517, 519 (Fla. 1996) ("At the outset, it is important to recognize that the issues in this case affect plaintiffs and defendants equally."). Under the present reasoning of the lower courts, the jury only hears of such financial bias on the defense side of the case, which creates a lop-sided and skewed picture for the jury and artificially inflates verdicts.

The jury either needs to hear the information from both sides or from neither side. Parties must be treated equally.

STATEMENT OF THE CASE AND FACTS

This case arises out of an automobile accident between Petitioner Brent Dodgen and Respondent Kaitlyn Grijalva. (R. 046-048). Respondent Grijalva filed suit against Petitioner Dodgen for negligence and alleged that she sustained bodily injuries as a result of the accident. (R. 046-048). Petitioner Dodgen denied these allegations. (R. 049-053).

In his defense and in accordance with Florida Rule of Civil Procedure 1.360, Petitioner Dodgen requested the Respondent undergo an orthopedic medical examination with Dr. Stephen Jacobs, a podiatric examination with Dr. Marisel Medina, and a neurological examination with Dr. Richard Kishner. (R. 055-058; 100-101; 125-126). These doctors were also listed as expert witnesses by the Petitioner. (R. 073-079; 102-103).

In response, Respondent Grijalva served extensive discovery seeking information as to the financial relationships between the compulsory medical examiners and non-parties to the litigation—the Petitioner's attorney's law firm, Robinson Pecaro & Mier, PA, and the Petitioner's insurance company. (R. 080-082; 083-088). Specifically, the request for production sought:

> 6. Any documents sufficient to identify how many times you, your lawyers, or the defense representative have used these experts in

the past five years.

* * *

14. Pursuant to *Allstate Insurance Co. v. Boecher*, 733 So.2d (Fla. 1999) and *Morgan, Colling & Gilbert v. Pope,* 798 So.2d 1 (Fla. 2d DCA 2001, please provide the following copies of all billing invoices submitted by your expert to the defendant's law firm for the last three years, for any client, including those submitted for work performed on this case.

(R. 081-082). Similarly, the interrogatories sought:

5. Please identify each and every case in which each said expert has testified as an expert witness by deposition during the preceding three (3) years for those representing the defense in this case, including the name of the case and case number, the names and address of the attorneys, the current location of the copies of the deposition transcripts, and the name, address and telephone number of the court reporter who attended each deposition.

6. Please identify each and every case in which each said expert has testified as an expert witness in trial during the preceding three (3) years for those representing the defense in this case, including the name of the case and the case number and the names and addresses of the attorneys, also include whether the expert testified for the defense or the plaintiff.

* * *

9. Please state the amount of money paid to each said expert by those representing the defense in this case for his/her expert services during the preceding three (3) years as follows:

Year	Total Amount Paid
2018	
2017	

2016

(R. 086-087).

Petitioner Dodgen objected and filed a motion for protective order, requesting that the trial court preclude the instant discovery concerning his compulsory medical examiners' relationships with his insurance company and his attorney's law firm. (R. 104-124). The Petitioner argued that such discovery requests were improper because neither his insurance company nor his attorney's law firm were parties to the action. (R. 104-124). Relying on Worley v. Central Florida Young Men's Christian Association, Inc., 228 So. 3d 18 (Fla. 2017), he maintained that Boecher discovery cannot be sought from non-parties, such as his insurance company and his attorney's law firm. (R. 104-124). Dodgen also argued that the requested discovery was not in his possession, was not reasonably calculated to lead to admissible evidence, and was outside the scope of discovery. (R. 104-124). He further asserted that any disclosure would be extremely prejudicial as it would imply to the jury either that insurance is available or that he is independently wealthy. (R. 104-124). According to Petitioner Dodgen, any disclosure would be unduly burdensome, prejudicial, and result in irreparable harm. (R. 104-124).

During the course of litigation, the Petitioner served similar discovery upon the Respondent seeking information concerning the financial relationship between the plaintiff's law firm and her listed expert witnesses. (R. 063-072). The

Respondent listed all of the treating physicians as expert witnesses. (R. 089-091). However, Respondent objected, and refused to provide the financial bias information citing Worley. (R. 093; 096-097).

The trial court heard argument from the parties. (R. 128-145). Dodgen, citing Worley, argued that he is not required to produce the requested information because the defense law firm and the insurance company are not parties to this litigation. (R. 135-136). Dodgen asserted as an additional objection that the requested-information was protected by the attorney-client privilege based on a recent Fourth District case, Bellezza v. Menendez. (R. 138-138). Dodgen also stressed the disparate treatment under the law of plaintiffs and defendants. (R. 138). Despite the Respondent's listing of all the treating physicians as expert witness, Respondent maintained that treating physicians are treated differently than experts and are protected from this discovery. (R. 139-140). The trial court overruled all of Dodgen's objections. (R. 141; 143).

On March 28, 2019, the trial court entered an order denying the motion for protective order. (R. 127). The court ordered Petitioner Dodgen to provide information on his insurance company's and law firm's payments to the doctors and the number of times they were retained by both. (R. 127).

Petitioner Dodgen timely filed a petition for writ of certiorari in the Fourth District Court of Appeal. (R. 004-042). Along with other arguments, Petitioner

maintained that this Court made clear in Worley that Boecher discovery does not apply to non-parties and that such information is protected by attorney-client privilege. (R. 013-025).

In response to the show cause order and without conceding any error, Respondent withdrew her discovery requests directed towards the defense law firm.[1] (R. 176). Respondent argued that Worley only applies to treating physicians and their relationship to plaintiff's law firms. (R. 181-185). She further argued that the defense information is not protected by attorney-client privilege. (R. 186).

The Fourth District initially issued a short order stating:

> ORDERED that Brent Dodgen's April 9, 2019 petition for writ of certiorari is denied. *See Dhanraj v. Garcia*, 44 Fla. L. Weekly D785 (Fla. 5th DCA March 22, 2019); *Younkin v. Blackwelder*, 44 Fla. L. Weekly D549 (Fla. 5th DCA Feb. 22, 2019), rev. granted, No. SC19-385, 2019 WL 2180625 (Fla. May 21, 2019).
>
> An opinion will follow.

(R. 219). The Fourth District subsequently issued its opinion. (R. 440-443). The opinion "explain[ed] the basis for that denial and suggest[ed] the need for further consideration of the disparate treatment of plaintiffs and defendants in the discovery arena." (R. 440). The Court held that Worley was not written to apply to the

[1] Respondent subsequently served a subpoena duces tecum seeking this information directly from Dr. Kishner. (R. 207-211). Petitioner moved for a protective order. (R. 212-213). The Fourth District struck this from its consideration since the subpoena was served after the petition was filed. (R. 217).

defense. (R. 441). It certified the following question as one of great public importance:

> WHETHER THE DECISION IN WORLEY V. CENTRAL FLORIDA YOUNG MEN'S CHRISTIAN ASS'N., 228 SO. 3D 18 (FLA. 2017), SHOULD BE APPLIED TO PROTECT A DEFENDANT'S INSURER THAT IS NOT A PARTY TO THE LITIGATION FROM HAVING TO DISCLOSE ITS FINANCIAL RELATIONSHIP WITH EXPERTS RETAINED FOR PURPOSES OF LITIGATION, INCLUDING THOSE THAT PERFORM COMPREHENSIVE MEDICAL EXAMINATIONS UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.360?

(R. 442-443). Petitioner timely sought review in this Court. (R. 453-458).

SUMMARY OF ARGUMENT

This Court should answer the certified question in the affirmative. The reasoning in Worley should equally apply to both plaintiff and defendants. Like the plaintiff's law firm in Worley, the insurance company is not a party to this litigation and its finances should not be the subject of cross-examination. The Petitioner is not privy to, and is not a part of, any financial relationship between the insurance company and a compulsory medical examiner. Like in Worley, such relationships and communications are protected by attorney-client privilege. In any event, both plaintiffs and defendants should be treated equally under the eyes of the law.

STANDARD OF REVIEW

Certified questions of great public importance presenting a pure legal issue, such as this, are reviewed under a de novo standard. Haygood v. State, 109 So. 3d 735, 739 (Fla. 2013) ("The certified question presented by the district court is solely a legal question. Thus, this Court's review is de novo."); Macola v. Gov't Emples. Ins. Co., 953 So. 2d 451, 454 (Fla. 2006) (same).

ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE AND FIND THAT WORLEY APPLIES TO BOTH PLAINTIFFS AND DEFENDANTS.

A. History of Financial Bias Impeachment Discovery

In the 1990s, the Third District Court of Appeal issued an en banc decision in consolidated cases concerning the scope of discovery necessary to impeach an opponent's expert witness. Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994). The cases involved subpoenas duces tecum issued to compulsory medical examiners requesting all billing by the insurance companies and defense law firms involved in the case and tax documentation from the experts showing their income. Id. at 541, 543. The Third District announced several guidelines limiting impeachment discovery:

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 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 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 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 or compelling circumstance.

7. The patient's privacy must be observed.

8. An expert may not be compelled to compile or produce non-existent documents.

Id. at 546 (footnotes omitted).

This Court subsequently adopted these guidelines. Elkins v. Syken, 672 So. 2d 517, 518 (Fla. 1996). The Court noted that these limitations were necessary to prevent intrusive discovery which "serves only to emphasize in unnecessary detail

that which would be apparent to the jury on the simplest cross-examination: that certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf." Id. at 521 (quoting Syken, 644 So. 2d at 545).

The Court explained:

> Pretrial discovery was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial. 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. 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 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 basis, 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.

Id. at 522 (internal citations omitted). Notably, the Court emphasized on several occasions that its decision was not intended to favor either defendants or plaintiffs and was to protect both parties. Id. at 519, 522.

The above guidelines were swiftly incorporated into Florida Rule of Civil Procedure 1.280. In re Amendments to Fla. Rules of Civil Proc., 682 So. 2d 105, 114 (Fla. 1996). See also id. at 116, Committee Notes ("They are intended to avoid annoyance, embarrassment, and undue expense while still permitting the adverse party to obtain relevant information regarding the potential bias or interest of the expert witness.").

A few years later, this Court decided Allstate Ins. Co. v. Boecher, which analyzed "whether a party is prohibited from obtaining discovery from the opposing party regarding the extent of that party's relationship with an expert." 733 So. 2d 993, 994 (Fla. 1999), The Court found that this type of party-focused discovery was permissible. Id. at 997-99. The Court explained:

> The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing. A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship.

Id. The Court emphasized that this was information directly known by Allstate, a party to the litigation, and within its possession. Id. at 998-99.

Thereafter, courts across Florida drastically expanded this holding to apply to discovery directed to the financial relationship of non-parties to the litigation, such

as law firms and insurance companies, related to experts and treating physicians on both sides. See, e.g., Vazquez v. Martinez, 175 So. 3d 372 (Fla. 5th DCA 2015) (defendant's attorneys and insurance company); Grabel v. Roura, 174 So. 3d 606 (Fla. 4th DCA 2015) (insurance company); Brown v. Mittelman, 152 So. 3d 602 (Fla. 4th DCA 2014) (plaintiff's attorneys); Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay, 133 So. 3d 1178 (Fla. 4th DCA 2014) (plaintiff's attorneys); Steinger Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co., 103 So. 3d 200 (Fla. 4th DCA 2012) (plaintiff's attorneys); Herrera v. Moustafa, 96 So. 3d 1020 (Fla 4th DCA 2012) (defendant's attorneys and insurance company); Morgan, Colling & Gilbert, P.A. v. Pope, 798 So. 2d 1 (Fla. 2d DCA 2001) (plaintiff's attorneys); Springer v. West, 769 So 2d 1068 (Fla 5th DCA 2000) (defendant's attorneys and insurance company).

The Fourth District has observed,

> In an effort to discredit medical witnesses for the other side, attorneys for both plaintiffs and defendants are exceeding the bounds of the rules of civil procedure, confidentiality laws, and professionalism by engaging in irrelevant, immaterial, burdensome, and harassing discovery. Parameters have already been expanded to allow both sides to explore financial interests of medical witnesses and the volume of referrals to those witnesses. See Elkins v. Syken, 672 So. 2d 517 (Fla. 1996). And now, attempts to expand the scope of that discovery to treating physicians as well as retained experts are usurping the limited resources of our trial courts. This not only creates unnecessary burdens on our over-strained justice system, it further taints the public's view of our profession.

Coopersmith v. Perrine, 91 So. 3d 246, 248 (Fla. 4th DCA 2012) (May, C.J.,

specially concurring).

B. The Worley Decision

In 2017, this Court issued its decision in Worley v. Central Florida YMCA, 228 So. 3d 18 (Fla. 2017). The plaintiff slipped and fell in the parking lot of the local YMCA and filed suit. Id. at 20. The defendant made numerous attempts to discover information concerning the relationship between the plaintiff's law firm, Morgan & Morgan, and the treating physicians. Id. at 20-21. The Court held that this type of discovery was impermissible and explained,

> In its decision approving the order, the Fifth District relied on district court decisions that have held that the financial relationship between a law firm and a plaintiff's treating physician is discoverable, pursuant to our decision in *Boecher*, if evidence of a referral relationship can be shown. *See Worley*, 163 So. 3d at 1246 (citing *Brown v. Mittelman*, 152 So. 3d 602 (Fla. 4th DCA 2014), and *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200 (Fla. 4th DCA 2012)).
>
> We disagree that *Boecher* is applicable and, accordingly, disagree with the reasoning of these decisions. In *Boecher*, we considered whether a party could obtain discovery from the opposing party regarding the extent of that party's relationship with an expert. *Boecher*, 733 So. 2d at 994. In that case, the insured sought to discover from the insurance company the extent of its financial relationship with the expert witness that the insurance company intended to call at trial to dispute causation. *Id.* In concluding that the discovery was permissible, we recognized our earlier decision in *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). There, experts retained to provide compulsory medical examinations were ordered to produce expansive discovery of their private financial information, including tax returns. *Id.* at 520. We found such invasive and harassing discovery to be impermissible because it threatened to chill the willingness of experts to become involved in litigation. *Id.* at 522. In response to this concern, we adopted Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii) in order "to avoid annoyance,

> embarrassment, and undue expense" to experts. *Boecher*, 733 So. 2d at 998 (quoting Fla. R. Civ. P. 1.280 committee notes (1996)). However, because the discovery sought in *Boecher* was "directed to a party about the extent of that party's relationship with a particular expert," we found that the balance of interests shifted in favor of allowing the discovery. *Id.* at 997.
>
> Since then, district courts have extended *Boecher* to allow discovery of the financial relationship between law firms and treating physicians. *See Worley*, 163 So. 3d at 1246 ("In Florida, it is well established that the financial relationship between the law firm and the treating physician is not privileged and is relevant to show bias."); *Brown*, 152 So. 3d at 604 ("The financial relationship between the treating doctor and the plaintiff's attorneys in present and past cases creates the potential for bias and discovery of such a relationship is permissible."); *Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay*, 133 So. 3d 1178 (Fla. 4th DCA 2014) ("A law firm's financial relationship with a doctor is discoverable on the issue of bias."); *Steinger*, 103 So. 3d at 205 ("[T]he defendant is entitled to discover information regarding the extent of the relationship between the law firm and the doctor."). However, contrary to these decisions, we find that the relationship between a law firm and a plaintiff's treating physician is not analogous to the relationship between a party and its retained expert.
>
> First, and most obviously, the law firm is not a party to the litigation. In *Boecher*, the insured sought discovery from the other party, in that case Allstate Insurance, regarding the financial relationship Allstate had with its hired expert. *Boecher*, 733 So. 2d at 994. In the instant case, YMCA is seeking discovery of the relationship between Morgan & Morgan, a non-party, and Worley's treating physicians.

Id. at 22-23 (emphasis added). See also id. at 30 (Polston, J., dissenting) ("The majority distinguishes *Boecher* on the basis that the law firm is not a party to the litigation."). The Court further analyzed whether such referral relationship is subject to the attorney-client privilege. Id. at 24-25.

C. Post-Worley Disparate Treatment

Judge James Edwards of the Fifth District Court of Appeal first questioned this disparate application in a footnote in State Farm Mut. Auto. Ins. Co. v. Knapp, 234 So. 3d 843, 845 n.1 (Fla. 5th DCA 2018). He wrote: "Worley seems, as a practical matter, to permit full Boecher discovery only when it is directed to personal injury defendants and their insurers, while shielding injured plaintiffs from having to disclose information about similar repetitious referral relationships that exist between doctors and plaintiffs' counsel by invoking the attorney-client privilege." Id. While Judge Edwards observed this obvious disparity in the treatment of plaintiffs and defendants, the issue was not before the court. See id. at 843-50.

When the issue arose before the Fifth District, Judge Brian Lambert wrote:

> For example, under *Worley*, a plaintiff law firm can refer 100 of its clients to the same treating physician, who may later testify as an expert witness at trial, without that referral arrangement being either discoverable or disclosed to the jury, yet if a defense firm sends each one of these 100 plaintiffs to its own expert to perform a CME under Florida Rule of Civil Procedure 1.360, and then later to testify at trial, the extent of the defense law firm's financial relationship with the CME doctor is readily discoverable and can be used by the plaintiff law firm at trial to attack the doctor's credibility based on bias.

Younkin v. Blackwelder, 44 Fla. L. Weekly D549 (Fla. 5th DCA February 22, 2019), rev. granted, No. SC19-385, 2019 Fla. LEXIS 800 (Fla. May 21, 2019).

Since that time, Florida's district courts have noted this disparate treatment and certified questions of great public importance. See, e.g., Balle v. Hernandez,

No. 4D19-1921 (Fla. 4th DCA Sept. 12, 2019), appeal filed, No. SC19-1577; Levitan v. Razuri, No. 4D19-2200 (Fla. 4th DCA July 22, 2019), appeal filed, No. SC19-1279; Rosenthal v. Badillo, No. 4D19-1854 (Fla. 4th DCA July 3, 2019), appeal filed, No. SC19-1241; Dodgen v. Grijalva, No. 4D19-1010, 2019 Fla. App. LEXIS 10060, at *5 (Fla. 4th DCA June 26, 2019) ("We agree that the discovery laws in this context have resulted in disparate and possibly unfair treatment of plaintiffs and defendants."); Salber v. Frye, 44 Fla. L. Weekly D1249 (Fla. 5th DCA May 10, 2019), appeal filed, No. SC19-982; Dhanraj v. Garcia, 44 Fla. L. Weekly D785 (Fla. 5th DCA March 22, 2019), appeal filed, No. SC19-610; Younkin v. Blackwelder, 44 Fla. L. Weekly D549 (Fla. 5th DCA February 22, 2019), review granted, No. SC19-385.

The disparate treatment is demonstrated by this very case. Dodgen served discovery attempting to learn the financial relationships at stake for the Respondent's disclosed expert witnesses; yet, the Respondent refused to produce the subject discovery citing Worley. (R. 063-072; 089-091; 093; 096-097). Nevertheless, the trial court ordered Dodgen to provide financial information from his insurance company and attorney's law firm. (R. 127).

Cases are steadily shifting their focus to collateral impeachment instead of focusing upon what should be at issue—a plaintiff's injury and damages. These discovery requests are becoming more frequent and more extensive with each case.

Defendants, and their counsel, are spending substantial time addressing this discovery instead of defending the case. Again, this is not information that a defendant has within his or her own knowledge. The defendant must obtain this information from his or her insurance company, and the defendant must in turn produce the information in the form requested by the plaintiff. This is increasing the cost of litigation. See generally Young v. Santos, 611 So. 2d 586, 587-88 (Fla. 4th DCA 1993) (Warner, J., concurring specially) ("Of late this court and other appellate courts have been bombarded with petitions for certiorari directed to similar issues of discovery of doctor's records regarding income from litigation sources. It appears that a great deal of time and expense is being directed towards such collateral issues during litigation. The trial bar needs to consider whether the expense is worth the information gained. Overuse of the discovery process, increasing exponentially the cost of litigation, may end up destroying that process to the greater detriment of all litigants.").

This discovery, and ultimately the corresponding evidence, is artificially inflating verdicts and inflaming the emotions of jurors with ghost "financial referral relationships" when the defendants in these cases have no prior relationships with the compulsory medical examiners. That is the case here as Dodgen has no prior relationship with the compulsory medical examiners retained for his defense. The Petitioner readily advised the Respondent, the trial court, and the Fourth District of

this fact.

This one-sided evidence creates a ruse or a legal fallacy. It has many consequences, including implications of insurance, financial wealth, and litigiousness. (R. 030-035). The discovery is an end-run around several well-established principles of law, including Florida Rule of Civil Procedure 1.280(b)(5)(A). See, e.g., § 627.4136, Fla. Stat. (nonjoinder statute); Carls Mkts., Inc. v. Meyer, 69 So. 2d 789, 793 (Fla. 1953) (prohibiting evidence of insurance of defendant); Zabner v. Howard Johnson's, Inc., 227 So. 2d 543, 546 (Fla. 4th DCA 1969) ("To determine litigiousness to be the proper subject of cross examination for impeachment purposes would be tantamount to stating that one creates a legal wrong by enforcing one's rights when they are violated. Such would be a gross infringement upon the basic rights granted to us by the Constitution of the State of Florida . . . ."); Sossa ex rel. Sossa v. Newman, 647 So. 2d 1018, 1019-20 (Fla. 4th DCA 1994) ("In Florida, the general rule is that during trial no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's. The reason the courts are so adamant about this rule is that jurors have a tendency to favor the poor as against the rich and, if provoked by such inflammatory evidence, the jury is likely to apply the deep pocket theory of liability." (internal citations omitted)). The result is neither fair nor just.

Furthermore, this extensive financial discovery unduly chills the use of

compulsory medical examiners in the defense of cases. The number of doctors willing to perform these examinations is already limited. These doctors may refuse to perform examinations in fear of subjecting themselves to this form of discovery and cross-examination on their finances. It also implicates the doctor's own rights to privacy.

In any event, hearing impeachment testimony from only one side of the case destroys the credibility of that expert and completely undermines the defense of the case. It defeats the purpose of a compulsory medical examiner. GEICO Gen. Ins. Co. v. Berner, 971 So. 2d 929, 932 (Fla. 3d DCA 2007) ("The purpose of Rule 1.360 is to produce an even playing field at trial. In the usual personal injury case, one or more medical practitioners already will have examined and treated the claiming plaintiff."). The playing field is not level.

D. Springer v. West in Light of Worley

Worley washed away the foundation upon which the district courts' rationale for expanding Boecher to non-parties rested. A review of the caselaw noted above shows Springer v. West, 769 So 2d 1068 (Fla 5th DCA 2000), was the first case expanding Boecher discovery to non-parties. The subsequent cases cite this case favorably. See, e.g., Vazquez, 175 So. 3d at 374; Grabel, 174 So. 3d at 607 n.1; Herrera, 96 So. 3d at 1021.

In Springer, the defendant filed a petition for writ of certiorari seeking review of an order compelling him to answer interrogatories concerning the financial relationship between his compulsory medical examiner and his insurance company. Id. at 1069. The Fifth District denied the petition and wrote:

> Where an insurer provides a defense for its insured and is acting as the insured's agent, the insurer's relationship to an expert is discoverable from the insured. To hold otherwise would render *Boecher* meaningless in all but a small class of cases. Similarly, a defendant may question a plaintiff about any relationship between his or her attorney and the plaintiff's trial expert. In both cases, the information sought is relevant to the witness's bias and will enhance the truth-seeking function and fairness of the trial, as intended by *Boecher*. 733 So. 2d at 998.

Id.

This reasoning is fundamentally flawed and no longer valid in light of the Worley decision. Indeed, the Fifth District reasoned that this discovery should be allowed because a defendant is entitled to similar discovery from the plaintiff's side—a proposition which Worley quashed.

Moreover, the statement in Springer that an insurance company is the agent of the insured was done without citation to any legal authority and is wholly contrary to basic agency law. For instance, the element of control is wholly lacking. Indeed, the insured does not control the insurance company. Amstar Ins. Co. v. Cadet, 862 So. 2d 736, 741 (Fla. 5th DCA 2003) ("The essential elements necessary to establish an actual agency relationship are (1) acknowledgment by the principal that the agent will act for him, (2) acceptance by the agent of the undertaking, and (3) control by

the principal over the agent's actions.").

Further, a principal cannot be held liable for the actions of the agent that are wholly unrelated to the principal or those that were not done on the principal's behalf. See generally Palm Garden of Healthcare Holdings, LLC v. Haydu, 209 So. 3d 636, 640 (Fla. 5th DCA 2017) ("When there has been no representation of authority by the principal, no apparent or implied agency arises, and the acts of the agent, standing alone, are insufficient to establish that the agent is authorized to act for the principal.") (internal citations, alterations, and emphasis omitted); Stalley v. Transitional Hosps. Corp. of Tampa, Inc., 44 So. 3d 627, 630 (Fla. 2d DCA 2010); Ruotal Corp., N. W. v. Ottati, 391 So. 2d 308, 309 (Fla. 4th DCA 1980) ("It is axiomatic that knowledge of the agent constitutes knowledge of the principal as long as the agent received such knowledge *while acting within the scope of his authority*." (emphasis added)). Therefore, actions of an "agent" in retaining a compulsory medical examiner in unrelated cases should not be binding upon the "principal" or used against him. They are not actions within the scope of any agency.

Likewise, under basic agency law, a principal is vicariously liable for the actions of its agent. Amstar Ins. Co., 862 So. 2d at 741. This would create a preposterous result here. For example, it would be absurd to hold the insured liable for insurance bad faith claims handling due to the actions or inactions of an insurance company. In any event, the insured cannot be held vicariously liable for the actions

of the insurance company.

Lastly, whether an agency relationship exists is a question of fact for the jury—not dicta from a court opinion. Roman v. Bogle, 113 So. 3d 1011, 1016 (Fla. 5th DCA 2013) ("Whether an agency relationship exists is generally a question for the jury to resolve and the party alleging the relationship has the burden of proving its existence."). Thus, the insurance company is not the agent of the Petitioner here. There is no evidence demonstrating otherwise.

The dissent in Springer v. West is in line with several of the arguments made in this case and below. Id. at 1070 (dissenting, Griffin, J.). A defendant is being asked to swear under oath concerning the extent of the financial relationship between his or her insurance company and a compulsory medical examiner. This is not a relationship that the party-defendant has first-hand knowledge of. (R. 027-028). Further, "there is the pesky problem that this information is utterly inadmissible." Id. The sought information is not relevant to the issues being tried, implicates the existence of insurance, implies that the Petitioner is litigious in nature or independently wealthy. (R. 030-035).

E. The Information is Subject to Attorney-Client Privilege

"The attorney-client privilege is the oldest confidential communications privilege known in the common law. 'It is therefore not only an interest long recognized by society but also one traditionally deemed worthy of maximum legal

protection.' " Am. Tobacco Co. v. State, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997) (citations omitted) (quoting Haines v. Liggett Group Inc., 975 F.2d 81, 90 (3d Cir. 1992)). It is "the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997); see also Union Nat'l Bank v. Turney, 824 So. 2d 172, 185 (Fla. 1st DCA 2001) ("The ability of client and attorney to communicate with one another in confidence is central to our system of administering justice.").

"The purpose of the privilege is to encourage clients to make full disclosure to their attorneys." Fisher v. United States, 425 U.S. 391, 403 (1976).

> The attorney-client privilege exists to protect not only the giving of professional advice, but also the giving of information to the lawyer to enable him to render sound and informed advice. If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. 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.

Hagans v. Gatorland Kubota, LLC/Sentry Ins., 45 So. 3d 73, 76 (Fla. 1st DCA 2010). The privilege is codified in section 90.502, Florida Statutes, which provides: "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." § 90.502(2), Fla. Stat. (2019). "Any communication to which

the privilege attaches is absolutely immune from disclosure." United Servs. Auto. Ass'n v. Roth, 859 So. 2d 1270, 1271 (Fla. 4th DCA 2003); cf. Fla. R. Civ. P. 1.280(b)(1) (stating that parties are only entitled to relevant, *nonprivileged* information in discovery).

It is only when there are extraordinary circumstances that privileged information is discoverable. R.L.R. v. State, 116 So. 3d 570, 573 n.4 (Fla. 3d DCA 2013). The privilege is not subject to any balancing test and privileged information cannot be discovered simply on a showing of need. Hagans, 45 So. 3d at 76; see also Worley, 228 So. 3d at 25 (explaining that the attorney-client privilege "is not concerned with the litigation needs of the other party").

The discovery order requires Petitioner Dodgen to produce privileged information because it necessarily requires the disclosure of confidential communications made in rendition of legal services to Mr. Dodgen, to his law firm's other clients, and to his insurance company's other insureds. See § 90.502(2), Fla. Stat.

The attorney-client privilege covers the tripartite relationship between Petitioner Dodgen, the insurance company, and the defense law firm. See, e.g., Progressive Express Ins. Co. v. Scoma, 975 So. 2d 461, 467 (Fla. 2d DCA 2007) ("[T]he confidential communications between the insured, the insurer, and any counsel representing them regarding the matter of common interest are protected by

the attorney-client privilege from discovery by third parties."). United Servs. Auto. Ass'n v. Law Offices of Herssein & Herssein, P.A., 233 So. 3d 1224, 1230-31 (Fla. 3d DCA 2017) ("While the insured is the attorney's client when an attorney is hired by an insurance company to represent an insured in a liability case, it is well settled that communications between an insurer and the lawyer hired by the insurer to protect the insured's interests are protected by the attorney-client privilege because the insurer and insured share a common interest in the outcome of the case."); Maharaj v. Geico Cas. Co., 289 F.R.D. 666, 671 (S.D. Fla. 2013) ("Therefore, as explained in Scoma, any attorney-client privileged communications between GEICO and the insured's counsel should continue to be protected.").

As established in Worley, the connection between a plaintiff's lawyer and the client's referral to a particular doctor is protected by the attorney-client privilege. Worley, 228 So. 3d at 25. This is because the connection does not elicit the underlying fact of whether the client saw a certain physician; rather it asks whether he saw the physician at his attorney's request. Id. at 25 ("[W]hether the plaintiff's attorney requested that the client see a certain doctor requires the plaintiff to disclose a part of a communication that was held between the plaintiff and attorney, and we resist any attempts to separate the contents of communications to distinguish 'facts' from privileged information."). This same information regarding an insurance company or a defense law firm making similar referrals and having similar

relationships is similarly protected by attorney-client privilege. Bellezza v. Menendez, 273 So. 3d 11, 16 (Fla. 4th DCA 2019).[2]

It is facially apparent from the trial court's order and the discovery requests in this case that this information is protected. "When a privilege is facially apparent, the burden is on the party seeking disclosure to show that the privilege does not apply." Haskell Co. v. Georgia Pac. Corp., 684 So. 2d 297, 298 (Fla. 5th DCA 1996); see also Shell Oil Co. v. Par Four P'ship, 638 So. 2d 1050, 1050 (Fla. 5th DCA 1994); W. Peninsular Title Co. v. Palm Beach Cty., 132 F.R.D. 301, 303 (S.D. Fla. 1990) (explaining party seeking attorney's deposition must show that the information sought does not fall within the attorney-client privilege). The Respondent failed to carry this burden and show that the attorney-client privilege absolutely did not apply to the discovery sought in this case.

When it ordered discovery of extensive communications between Dodgen, the insurance company, the defense law firm, and the compulsory medical examiners, the trial court departed from the essential requirements of the law. The trial court failed to give full effect to section 90.502 and denied, in part, the request for a protective order without due consideration of Dodgen's attorney-client privilege and the tripartite relationship. This error was compounded by the Fourth District not

[2] Notably, this Court recently stayed proceedings in its review of Bellezza pending its resolution of Younkin and Dodgen. See Menendez v. Bellezza, No. SC19-944 (Fla. Oct. 16, 2019) (order staying proceedings).

recognizing that a defendant would have the same attorney-client privilege that a plaintiff would have.

Importantly, permitting disclosure of the attorney-client privileged information in this case will have a far-reaching implications. "Once third parties view [or hear] the information, the privileged nature of the information is destroyed." Ford Motor Co. v. Hall-Edwards, 997 So. 2d 1148, 1153–54 (Fla. 3d DCA 2008); see also Estate of Stephens v. Galen Health Care, Inc., 911 So. 2d 277, 279 (Fla. 2d DCA 2005) ("[O]nce privileged information is disclosed, there is no remedy for the destruction of the privilege available on direct appeal."). Once the information is disclosed, the Respondent would be free to share the information with anyone; the trial court placed no limitations on sharing the contents of the disclosed discovery. The proverbial bell cannot be un-rung and irreparable harm will result. All of this "cat-out-of-the-bag" material could be used to harm or embarrass the nonparties outside the context of this litigation. It could also be used to harm or embarrass the doctors outside the context of this litigation and unduly chill their participation in the defense of such claims.

F. The Subject Discovery is Beyond the Scope of Florida Rule of Civil Procedure 1.280

The subject discovery exceeds the permissible scope of Florida Rule of Civil Procedure 1.280(b)(5)(A). Under the rule, parties are permitted to obtain the following expert discovery: (1) scope of employment in pending case and payment,

(2) general litigation experience and percentage of work performed for plaintiffs and defendants, (3) identity of other cases in a reasonable timeframe the expert has testified in, and (4) approximate portion of the expert's work that involves being an expert witness. Fla. R. Civ. Pro. 1.280(b)(5)(A). The rule expressly limits financial discovery from experts to "the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness" and prohibits disclosure of the expert's "earnings as an expert witness or income derived from other services." Id. Any discovery beyond that requires a showing of "unusual or compelling circumstances." Id.

In any event, the permissible discovery listed in rule does not include extensive financial information concerning the relationship between non-parties and the expert. Cf. Boecher, 733 So. 2d at 999 ("We find no indication from either the language of rule 1.280(b)(4) or our opinion in Elkins that the rule was intended to shield a party from revealing the extent of its relationship with an expert witness."). Respondents have not identified any "unusual or compelling circumstances" that would justify compelling production in this case. See generally Orthopedic Ctr. of S. Fla. v. Sode, 274 So. 3d 1127, 1134 (Fla. 4th DCA 2019) ("We reject Respondent's argument that proof that the defense law firm hired Petitioner, a business entity with nine doctors, for 120 cases in three years supports an 'unusual or compelling circumstance' for the requested information.").

G. Plaintiffs and Defendants Should be Treated the Same

Fundamental fairness mandates that plaintiffs and defendants be treated equally with matters, such as discovery. It serves no rational basis to treat them differently. See generally Caldwell v. Mann, 26 So. 2d 788, 790 (Fla. 1946) ("The constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation."). What is good for the goose is good for gander. See Fridman v. Safeco Ins. Co., 185 So. 3d 1214, 1225 (Fla. 2016) ("Truly, this is an appropriate example of the classic adage 'what is good for the goose is good for the gander.'"); Sharp v. State, 221 So. 2d 217, 219 (Fla. 1st DCA 1969) ("Fair play and common sense dictates that what is sauce for the goose is sauce for the gander.").

Below, the Respondent argued that Worley applies to protect only plaintiffs' treating physicians. Indeed, precedent should not operate to apply only to the party who makes the appellate challenge. Precedent cannot be used as both a shield and a sword. See generally Manor Care of Dunedin v. Keiser, 611 So. 2d 1305, 1307 (Fla. 2d DCA 1992); Stockham v. Stockham, 168 So. 2d 320, 322 (Fla. 1964). To allow precedent to be used in this way would be absurd, would be impossible to apply, and would create ridiculous results.

For example, last year, this Court issued the decision DeLisle v. Crane Co., 258 So. 3d 1219 (Fla. 2018), and held that Frye is the expert standard in Florida.[3] Under Respondent's and the lower court's reasoning, Courts would have to read that case in a limited manner so as to apply Frye to only the plaintiff's side of the case since the plaintiff's expert witness was at issue. This would mean Daubert was still the rule as to defense experts until it was challenged in court. Surely, this cannot be how precedent applies in Florida.

Again, the law must treat the plaintiff and defendant equally. So, if defendants are not entitled to this discovery, then plaintiffs are not either. Indeed, if a plaintiff's referral relationship truly is privileged, then would a defendant's referral relationship not equally be protected? See Bellezza, 273 So. 3d at 16 ("Such evidence from the defendant law firm is similarly protected by attorney client privilege"). Similarly, if plaintiffs are entitled to this discovery, then defendants must be as well. The law cannot exist as it currently is according to the lower courts.

For this reason, Worley[4] implicitly overruled the defense-based cases which expanded the ruling of Boecher to non-parties, such as Vazquez, Grabel, Herrera, and Springer. See generally State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986)

[3] This Court recently addressed the Daubert amendment. In re Amendments to the Fla. Evidence Code, 44 Fla. L. Weekly S170 (Fla. May 23, 2019).

[4] Worley expressly overruled the plaintiff-based cases in the majority opinion. See, e.g., Brown, 152 So. 3d at 602; Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P., 133 So. 3d at 1178; Steinger Iscoe & Greene, P.A., 103 So. 3d at 200.

("Although we did not explicitly say so, it is also clear that *Rowe*, *Way*, *Trafficante* and *Gordon* were implicitly overruled by *State v. Marshall*, 476 So. 2d 150 (Fla. 1985), wherein we adopted the harmless error rule for comments on a defendant's failure to testify."); Gonzalez v. State, 392 So. 2d 334, 335 (Fla. 3d DCA 1981) ("The State relies on a severely eroded, if not implicitly overruled, line of cases, which it asks us to resurrect."); City of Miami v. Arostegui, 616 So. 2d 1117, 1118 (Fla. 1st DCA 1993) ("The City overlooks that *Payne* was implicitly overruled by the Florida Supreme Court in *State v. McKinnon*, 540 So. 2d 111 (Fla. 1989).").

What is clear is that the law has gone away from this Court's pronouncement in Elkins: that these issues are intended to protect both plaintiffs and defendants and not favor one party or the other. Elkins, 672 So. 2d at 519, 522. This Court should return to that intent and once again equal the playing field.

CONCLUSION

This Court should answer the certified question in the affirmative and quash the Fourth District's opinion. The reasoning in Worley should equally apply to both plaintiffs and defendants.

WHEREFORE, Petitioner BRENT DODGEN respectfully requests this Court to answer the certified question in the affirmative, quash the Fourth District's decision and remand with instructions for the Fourth District to issue a writ of certiorari quashing the subject order.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), the undersigned counsel hereby certifies that this Brief complies with the font requirements of the Rule: Times New Roman 14-point font.

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