

IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-1118
L.T. Case No.: 4D19-1010

BRENT A. DODGEN,

Petitioner,

v.

KAITLYN P. GRIJALVA,

Respondent.

**AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF DRS. MICHAEL
FOLEY AND JOHN SHIM IN SUPPORT OF PETITIONER**

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by Michael J. Foley, M.D. F.A.C.R. a board-certified radiologist and John Shim, M.D. F.A.C.S. a board-certified Orthopedic surgeon specializing in surgery of the spine. Dr. Shim has a private clinical practice and is also retained to provide opinions based on compulsory medical examinations conducted pursuant to Fla. R. Civ. P. 1.360. Dr. Foley is now providing only expert testimony and testifying approximately 55% of the time on behalf of Defendants and 45% of the time on behalf of Plaintiffs.

STATEMENT OF IDENTITY AND INTEREST

Each of these physicians' interests fall squarely within the Fourth District's certified question of great public importance. The answer to the certified question will potentially affect the fundamental privacy rights of all expert witnesses, including Dr. Shim and Dr. Foley. While the Petitioner's brief focuses primarily on the unfair and unequal application and effect of the *Worley* decision on Defendants, [*Worley v. Cent. Fla. YMCA*, 228 So. 3d 18 (Fla. 2017)], Drs. Shim and Foley will address the effect of the discovery on non-party witnesses' fundamental rights to privacy under Art I § 23 of the Florida constitution. Drs. Shim and Foley have had to retain the services of the attorneys filing this brief because of attempts to invade their fundamental constitutional right to privacy under Article I section 23 of the Florida Constitution due in part to what they

believe is a misunderstanding of this Court's decisions in *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996) and *Allstate Ins. Co. v. Boecher* 733 So. 2d 993 (Fla. 1999). Intrusive, burdensome and harassing discovery concerning financial relationships with experts continues despite this Court's and other appellate decisions. These physicians are filing this brief to express the concerns of all non-parties, including experts, regarding the over-reaching and intrusive discovery that parties to litigation are being forced to respond to that intrudes upon their constitutional right to privacy. On behalf of all non-parties, these physicians have an interest in maintaining the integrity of the court system, conserving scarce judicial resources, and protecting the fundamental constitutional privacy and due process rights of non-parties who become involved in the litigation process.

SUMMARY OF ARGUMENT

In this case the Defendant in the trial court below was ordered to provide the amount of money the non-party defendant's insurance carrier, as well as the defendant's non-party law firm, had paid the experts and the number of times they had retained the expert. The Defendant was ordered to provide copies of all billing invoices submitted to the defendant's law firm and insurance company from the experts for all cases where they had been retained, not just the case at issue. The Defendant objected and the court overruled all the Defendant's objections. As is typical in these matters, no notice was served on the expert that this issue was

going to be heard or decided. The breadth of the Plaintiff's request would require information identifying cases where the experts had not been identified as a testifying expert contrary to the limitations of Fla. R. Civ. P. 1.280(b)(5) as well as income information and information regarding the nature of the services provided from the expert's retention in cases unrelated to the case at issue. Simply put, the Plaintiff's discovery request was a back-door attempt to circumvent the expert's constitutional right of privacy and due process.

In 1995, this Court held that the right to privacy provided by Art I Sec 23 is a fundamental constitutional right of privacy that protected every person in Florida from intrusion into their financial affairs. *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985). In *Winfield*, the Department of Business Regulation and the Division of Pari-Mutuel Wagering issued subpoenas to obtain the banking records of Nigel and Malcolm Winfield without notice to them. Although this Court found that there was a compelling state interest in obtaining the records of the individuals that were being investigated, and that it was done in the least intrusive way in furtherance of the state's interest in conducting effective investigations in the pari-mutual industry, it also found that Art I sec 23 of the Florida constitution created a strong right of privacy for individuals that was much broader in scope than that of the Federal Constitution. Dr. Shim and Dr. Foley assert that the lower courts have essentially

ignored the non-parties strong fundamental constitutional right to privacy in the struggle to achieve a balance between a party's "need" for information regarding a witness's potential bias and the witness's right to be free from burdensome and intrusive discovery which infringes on their fundamental constitutional privacy rights. Judge Nesbitt was correct when he stated twenty five (25) years ago in *Syken v. Elkins*, 644 So. 2d 539 (Fla. 3d DCA 1994), that the courts had gone too far in permitting burdensome discovery into non-party affairs which served "only to emphasize in unnecessary detail that which would be apparent to the jury on the simplest cross-examination". Too many litigants are still today, "draining the pond" rather than "using rod and reel, or even a reasonably sized net to collect the fish from the bottom." *In Re IBM Peripheral EDP Devices Antitrust Litigation*, 77 F.R.D. 39, 42 (N.D.Cal. 1977). It is the amici's position that when rendering a decision on the issues raised by this appeal, this Court should continue to protect the due process rights of the non-parties, and protect them from over-burdensome, harassing, and improper intrusions into their fundamental constitutional privacy rights regarding their finances that is granted to them by Art 1 section 23 of the Florida Constitution.

As previously stated, most of the time, non-parties like Dr. Foley and Dr. Shim are not even being served with notice that their financial and business information is being requested. Only when the request is specifically directed to

the expert using a subpoena do the experts have notice and the opportunity to retain counsel to fend off these discovery onslaughts. This results in the expenditure of significant sums of money by these non-parties as well as imposing a burden on the courts with hearings on motions for protective orders. This is exactly the kind of discovery that that this Court tried to prevent over twenty-three years ago in *Elkins* which led to the adoption of Fla. R. Civ. P. 1.280(5). It should be remembered that discovery is limited to **non-privileged information** that is calculated to lead to admissible evidence. Both fairness to the parties and protection of the privacy interests of the non-party expert should limit the appropriate inquiry to:

1. The compensation of the expert that has or will be paid *in the pending case*.
2. The percentage of litigation work relative to the percentage of professional time devoted to other work of the expert.
3. The number of times the expert has worked for the party and/or the law firm who retained the expert.
4. The percentage of total earned income earned from performing expert work for litigation matters.
5. The identity of each case in which the expert has testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years.

The parties should be prohibited from seeking information relating to the expert's earned income from expert work, other than what is being paid in the

pending case. Fla. R. Civ. P. 1.280 (b)(5)(A)(iii)(1) specifically limits what the expert must answer regarding his compensation to “[t]he scope of employment in the pending case and the compensation for such service” as well as prohibits inquiry into earnings as an expert witness. *See* Fla. R. Civ. P. 1.280(b)(5)(A)(iii)(4). “Nor should information that has the effect of disclosing the expert’s business information and income be compelled except under extraordinary circumstances.” *Lynd v. District Board of Trustees of Broward Community College, Florida*, 696 So.2d 953 (Fla. 4th DCA 1997) (quashing order requiring expert to disclose the number of hours expert witness had performed private expert work in one year or expert's hourly rate information, had effect of requiring expert to disclose his earnings as an expert witness); *Gramman v. Stachkunas*, 750 So. 2d 688, 690 (Fla. 5th DCA 1999). In all cases, production of that information should only be allowed under the most extraordinarily unusual or compelling circumstances and with proper notice to the non-party whose privacy rights are being affected. The courts should protect the non-party expert’s fundamental constitutional right to privacy and their due process right to be heard regarding their financial affairs. The proposed limitations allow for sufficient discovery of potential bias information without substantially invading the privacy rights of the non-party witness. Although not completely equal in its effect, it does level the playing field somewhat.

ARGUMENT

Drs. Shim and Foley will not repeat the arguments of Petitioner Dodgen regarding the unequal and prejudicial application of the *Worley* decision on Defendants. Instead, they will focus on the impact of this discovery on the expert's due process rights and fundamental constitutional privacy rights regarding their financial information.

I. THE PARTY SEEKING THE CONSTITUTIONALLY PROTECTED INFORMATION CARRIES THE EXTRAORDINARY BURDEN OF DEMONSTRATING A COMPELLING INTEREST WHICH OUTWEIGHS THE NON-PARTY'S RIGHT TO PRIVACY, IF ORDERED, THE COURT MUST DO SO IN THE LEAST INTRUSIVE MANNER

At issue is the jury's "right to know" information about the potential bias of a non-party witness and the extent of the right, especially when it conflicts with the constitutional privacy rights of that witness. A jury's "right to know" information which *may* demonstrate the potential bias of a non-party expert witness, (which this Court has repeatedly stated is an important but clearly *collateral* issue), must be viewed with strict scrutiny, and it is presumptively unconstitutional when it infringes on the privacy rights of that witness. A compelling state interest must be shown, and any invasion of the right must be done through the least restrictive means. *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1256 (Fla. 2017)(finding "[a]ny law that implicates the right to privacy is presumptively

unconstitutional, and the burden falls on the State to prove both the existence of a compelling state interest and that the law serves that compelling state interest through the least restrictive means.”). As this Court has repeatedly explained:

The United States Supreme Court has explained that the United States Constitution does not mention the right to privacy, but that it is a pervasive right touching on many aspects of life and the right of privacy finds its roots throughout the Bill of Rights and in the Fourteenth Amendment:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education.

Roe v. Wade, 410 U.S. 113, 152–53, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), holding modified by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (internal citations omitted).

While the federal right to privacy is pervasive and is revealed by judicial interpretation, we need not rely on federal law but look only to the Florida Constitution, which explicitly provides a right to privacy:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.

Art. I, § 23, Fla. Const. (1980). This provision was added by Florida voters in 1980 and remains unchanged.

We have explained that the right to privacy in the Florida Constitution is broader, more fundamental, and more highly guarded than any federal counterpart:

This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Winfield v. Div. of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985) ; see N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So.2d 612, 634-35 (Fla. 2003). The right of privacy "ensures that individuals are able 'to determine for themselves when, how and to what extent information about them is communicated to others.' " Shaktman v. State, 553 So.2d 148, 150 (Fla. 1989) (quoting A. Westin, Privacy and Freedom 7 (1967))

Weaver v. Myers, 229 So. 3d 1118, 1125-1126 (Fla. 2017).

It is the **burden** of the party seeking to invade the constitutional right to privacy of a non-party to show a compelling need that outweighs the extremely strong constitutional privacy right of the non-party. Courts must engage in a

balancing test, weighing the need for the information against the privacy interests of the witness from whom the information is sought. If the witness establishes the existence of a legitimate expectation of privacy, the party seeking to obtain the private information has the burden of establishing a need sufficient to outweigh the privacy interest. *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015); *see also, Rouso v. Hannon*, 146 So.3d 66 (Fla. 3d DCA 2014); *Rowe v. Rodriguez-Schmidt*, 89 So. 3d 1101 (Fla. 2d DCA 2012)(finding the right of privacy under “the Florida Constitution protects the financial information of persons *if there is no compelling reason to compel disclosure*. . . . [t]his is because personal finances are among those private matters kept secret by most people.”)(internal citation omitted). It is also a departure from the essential requirements of law for a court to fail to conduct a balancing of interests test in an *evidentiary* hearing before it orders disclosure of protected financial information:

*When confidential information is sought from a non-party, the trial court **must** determine whether the requesting party **establishes a need for the information that outweighs the privacy rights of the non-party**. See *Berkeley v. Eisen*, 699 So.2d 789 (Fla. 4th DCA 1997). “[T]he party seeking discovery of confidential information **must** make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information.” *Higgs v. Kampgrounds of Am.*, 526 So.2d 980, 981 (Fla. 3d DCA 1988).*

Westco, Inc. v. Scott Lewis’ Gardening & Trimming, Inc., 26 So.3d 620 (Fla. 4th DCA 2009); *see also Rowe*, 89 So. 3d at 1103-1104.

II. THE RULINGS IN *ELKINS* AND *BOECHER* DO NOT PERMIT A WHOLESALE VIOLATION OF A NON-PARTY EXPERT WITNESS'S RIGHT TO PRIVACY UNDER THE FLORIDA CONSTITUTION.

Parties are ignoring the admonition of this Court over 23 years ago:

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.

Elkins, 672 So. 2d at 522. Three (3) years after deciding *Elkins*, this Court was presented with the question as to whether its' decision in *Elkins* and the changes to Florida Rule of Civil Procedure 1.280 prevented either the Plaintiff or the Defendant in a lawsuit, from sending discovery to each other inquiring about their relationship with the experts they disclosed they would be using as witnesses at trial. *Boecher* was a suit filed against Allstate Insurance, the automobile accident victim's uninsured motorist carrier. *Boecher*, 733 So. 2d at 994. Allstate revealed that it would call as a trial expert witness, an expert from Biodynamics Research Corporation, an accident reconstruction and injury causation firm. *Id.* The Plaintiff propounded interrogatories to Allstate asking about its relationship with Biodynamics including the identity of cases where Allstate had used Biodynamics experts and the amount of fees Allstate had paid Biodynamics nationally. *Id.*

Allstate objected, and the trial court overruled the objection. *Id.* The issue presented for review in *Boecher* was whether a party was prohibited from obtaining information, during discovery, **from the opposing party** regarding the extent of **that party's relationship** with their expert. *Id.* This Court pointed out the significant differences between *Elkins* and *Boecher* which led to its' decision in *Boecher*:

1. In *Elkins* the financial information was sought directly from the non-party expert witness, *compared to Boecher*, where the financial information was sought from the opposing party who was an insurance company.

2. **In *Elkins* the prohibited information requested directly from the expert included the expert's income and relationships, not only with the party who retained him in the case, but with others, *compared to Boecher*, where the information requested from the party was limited only to that party's ongoing relationship with their expert in that case. *Boecher*, 733 So. 2d at 997.**

3. In *Elkins* this Court was concerned about the fundamental privacy rights of the expert, *compared to Boecher*, where this Court found that the party [Allstate] had no privacy rights in that same information.¹

¹ This leads to another problem concerning the expert's fundamental constitutional privacy right in his financial information. Typically the expert is not informed of a Plaintiff's attempt to obtain *Boecher* information from the Defendant regarding the amount of money the non-party insurance carrier in that case has paid the retained expert, therefore the expert has no opportunity to object and indeed, his or her [440210/1]

The Court concluded that the analysis of the competing interests when a party seeks financial information directly from the expert as in *Elkins*, and the party seeking the information directly from the opposing party as was the case in *Boecher*, were qualitatively different:

On one side of the scale, we focused in *Elkins* on protecting the rights of the expert against unduly intrusive requests. ***We expressed concern for the expert having to divulge matters regarding personal financial privacy and further expressed concern for the burden imposed on the expert of compiling the requested information.***

A reading of rule 1.280(b)(4) in its entirety reveals an intent to restrict the information that can be discovered from the expert, even though the discovery is answered by the party. For example, the rule states: “[T]he expert shall not be required to disclose his or her earnings,” and “[a]n expert may be required to produce financial and business records only under the most unusual and compelling circumstances.” Fla. R. Civ. P. 1.280(b)(4)(A)(iii). The opposing party has no corresponding “right” to prevent this discovery.

Boecher, 733 So. 2d at 998–99. Both *Elkins* and *Boecher* prohibited questions and discovery directly to the expert regarding income received other than what he or she had been paid in the pending case.

What is unfortunate, is that many attorneys in their zeal to obtain “impeaching evidence” either do not understand, or choose to ignore, the concerns

objection would most likely be denied based on the appellate Courts interpretation of *Boecher*. This occurs in multiple cases with multiple different non-party insurance carriers so that the expert’s income from expert work is ultimately revealed to a large extent over time. This is an invasion that this Court stated in *Elkins*, *Boecher*, and in Rule 1.280 should not be done because of the expert’s privacy rights. Furthermore, once the expert witness’s financial information is disseminated, said information is improperly used against the experts in other cases at their depositions/trial.

expressed by this Court in *Elkins* and thus trample on the non-party's rights.² Questions designed to elicit the expert's income from other non-related cases and parties are frequently asked via discovery, and in deposition and at trial. Burdensome and harassing requests for business and financial records are frequently included in subpoenas served on the expert or the expert's "records custodian" in discovery depositions.³ Thus, the non-party expert is forced to retain an attorney to protect those rights resulting in many unnecessary evidentiary hearings which burdens the experts, the parties, and the courts.⁴ In many cases, the non-party experts do not even know what their rights are and are unwilling to incur the expense of hiring personal counsel. They simply provide the protected

² Professional Rule of Conduct 4-4.4 "In representing a client, **a lawyer may not** use means that have no substantial purpose other than to embarrass, delay, or burden a third person **or knowingly use methods of obtaining evidence that violate the legal rights of such a person**". Professional Rule of Conduct 4-3.4 (e) in trial, allude to any matter that the **lawyer** does not reasonably believe is relevant **or that will not be supported by admissible evidence**, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

³ This is despite the limitations of Florida Rule of Civil Procedure 1.280(b) (5) and the decision in *Smith v. Eldred*, 96 So. 3d 1102 (Fla. 4th DCA 2012) which held that a subpoena that demanded business records from the expert is not a discovery method that is condoned by the Rule.

⁴ This Court should expressly provide a mechanism for the non-party expert witness, who is exposed to such inappropriate burdensome and harassing requests for disclosure of their private financial information, to recover/mitigate their costs in having to defend against same.

information in response to the subpoena or respond to the improper questions in deposition or at trial, thus having their privacy rights ignored and their due process rights violated.

The invasion of a fundamental constitutional privacy right of a witness is not allowed by simply demonstrating the potential relevance of the financial information sought.⁵ It is the burden of the party seeking to invade the constitutional right to privacy to show a compelling need that outweighs the extremely strong constitutional privacy right of the non-party. It is hard to imagine a compelling need for information on the collateral issue of bias that can outweigh the fundamental privacy right of a Florida citizen. When a non-party asserts a right to privacy under the State Constitution, our courts ***must*** engage in a balancing test, weighing the need for the information against the privacy interests of the witness from whom the information is sought. If the witness establishes the existence of a legitimate expectation of privacy, the party seeking to obtain the private information has the burden of establishing a need sufficient to outweigh the privacy interest. *Nucci*, 162 So. 3d 146 (Fla. 4th DCA 2015); *see also Rousso*, 146 So.3d 66 (Fla. 3d DCA 2014); *Rowe v. Rodriguez-Schmidt*, 89 So. 3d 1101 (Fla. 2d DCA 2012). It is a departure from the essential requirements of law to fail to conduct a balancing of interests test in an evidentiary hearing before a court orders

⁵ Even relevant information is not necessarily admissible. Florida Statute §90.403. [440210/1]

disclosure of protected financial information. *See Berkeley*, 699 So.2d 789 (Fla. 4th DCA 1997); *Higgs*, 526 So.2d 980, 981 (Fla. 3d DCA 1988); *Westco, Inc.*, 26 So.3d 620 (Fla. 4th DCA 2009); *see also Josifov v. Kamal-Hashmat*, 217 So. 3d 1085, 1087 (Fla. 2d DCA 2017); *Gulfcoast Surgery Center, Inc. v. Fisher*, 107 So.3d 493 (Fla. 2d DCA 2013). Additionally, “the means to carry out any such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.” *In Re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990).

CONCLUSION

The expansion of bias discovery from defendants has created both an inequity in the treatment of defendants as opposed to plaintiffs, but more importantly, has, in many cases, deprived the expert of his or her due process rights and fundamental constitutional right to privacy. This Court is being presented with a problem that requires a decision that (1) insures both parties are treated equally regarding their right to bias information, (2) protects the integrity of the litigation process and reduces the burden placed on the parties, witnesses and the courts, while at the same time (3) insures that the non-party witnesses due process rights and especially their constitutional right to privacy is protected to the greatest extent possible. Any resolution of this issue that does not protect the rights of the non-party witness will ultimately chill the willingness of experts to become involved in

litigation out of fear of becoming embroiled in the litigation themselves and of being stripped of their privacy rights, affect treating physicians who may refuse to treat patients because of the potential that they themselves could become involved in litigation, and potentially inflate the costs of litigation and burden the courts leading to a lack of public confidence in the credibility of the civil court process. *Elkins*, 672 So. 2d at 522. Drs. Foley and Shim request this Court to render a decision that will not diminish, or worst yet, eviscerate a non-party's fundamental privacy rights granted to them by Art. I section 23 of the Florida Constitution. They feel the courts have failed to limit the discovery to the least intrusive means and that there is no justification for allowing disclosure of the amounts of money they are paid by non-party insurance companies on unrelated matters. Sufficient bias information can be obtained by adhering to the principles enunciated in *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996) and the limitations of Fla. R.Civ.P. 1.280.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 16th day of December, 2019, a copy of the foregoing was uploaded and served in the e-portal to:

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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 his Brief complies with the font requirements of the Rule: Times New Roman 14-point font.

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