IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-1118

BRENT A. DODGEN,

Petitioner,

v.

KAITLYN P. GRIJALVA,

Respondent

_____/

PETITIONER BRENT DODGEN'S REPLY BRIEF ON THE MERITS

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ARGUMENT IN RESPONSE AND REBUTTAL

I. THIS COURT SHOULD DISREGARD RESPONDENT'S STATEMENT OF THE FACTS AND THE CASE.

The Respondent's statement of the facts and case is unduly argumentative and contains inappropriate commentary throughout. Greenfield v. Westmoreland, 156 So. 3d 1, 1 (Fla. 3d DCA 2007); Sabawi v. Carpentier, 767 So. 2d 585, 586 (Fla. 5th DCA 2000) ("The purpose of providing a statement of the case and of the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute."); Williams v. Winn-Dixie Stores, Inc., 548 So. 2d 829, 830 (Fla. 1st DCA 1989). Accordingly, this Court should disregard it.

II. THIS COURT HAS JURISDICTION TO ADJUDICATE THIS MATTER.

A. Petitioner timely invoked jurisdiction within 30 days of the decision certifying a question of great importance.

The Fourth District issued its decision certifying a question of great importance on June 26, 2019. (R. 440-443). This is the decision under review by this Court. The Petitioner filed his notice of invoking jurisdiction on the basis of certified question on July 2, 2019. (R. 453-458). This was timely. See Fla. R. App. Pro. 9.120(b).

The ground for jurisdiction—certified question of great public importance—did not exist before the issuance of this decision. Respondent would have this Court focus on an earlier order, which states "opinion will follow." (R. 219). The absurdity of the Respondent's argument would have the Petitioner invoke the jurisdiction of this Court on the basis of certified question *before* that question is certified. It would further prevent any post-decision motion practice. Under any reading of the Constitution and the Rules, this would have been premature and dismissed by this Court.

Furthermore, this Court's jurisdiction is generally limited to final decisions from the district courts. The order stating "opinion will follow" was not a final decision as there was still judicial labor to be had. See generally Bennett's Leasing, Inc. v. First St. Mortg. Corp., 870 So. 2d 93, 96 (Fla. 1st DCA 2003); Fla. R. App. Pro. 9.120, Committee Notes, 1977 Amendment ("This rule replaces former rule 4.5(c) and governs all certiorari proceedings to review *final decisions* of the district courts.") (emphasis added).[1] The order is interlocutory. This is the reason motions directed to the opinion toll the time for seeking review in this Court.

In any event, Respondent did not file a motion to dismiss before the filing of the Answer Brief. It is only now almost a year into this appeal (and after the

[1] The notice to invoke jurisdiction cites Florida Rule of Appellate Procedure 9.120 as it addresses discretionary review of district court decisions. (R. 453-458).

Respondent's attempted intervention into the Younkin v. Blackwelder case as a purported amicus curiae) that it was asserted.

B. This Court has jurisdiction as the Fourth District passed upon the certified question.

Despite the Respondent's and FJA's claims otherwise, the Fourth District Court of Appeal passed upon the question presented. It addressed and ruled upon whether Worley applies to preclude discovery concerning the financial relationship between the compulsory medical examiner and a non-party insurance company. The Fourth District wrote,

> We address petitioner's argument that after Worley v. Cent. Fla. YMCA, 228 So. 3d 18 (Fla. 2017), the financial relationship between a defendant's law firm or insurance company and expert witnesses is no longer discoverable. We reject that contention because Worley was not broadly written to cover discovery sought from the defense side of a case.

Dodgen v. Grijalva, 281 So. 3d 490, 491 (Fla. 4th DCA 2019). This issue was determinative of the outcome of the appeal.

It appears the Respondent and FJA simply quibble over how the question was phrased. Nevertheless, it is irrelevant that the certified question includes the word "should" as the Fourth District is not asking for an advisory opinion. This Court has previously answered certified questions that contain similar phrasing. See, e.g., Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344, 346 (Fla. 2012); Keck v. Eminisor, 104 So. 3d 359, 360 (Fla. 2012); Am. Home Assurance Co. v.

Nat'l R.R. Passenger Corp., 908 So. 2d 459, 466 (Fla. 2005); Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 31 (Fla. 2000).

The FJA attempts to cloak its arguments with the language of originalism; however, wishing does not make it so. The FJA ignores all historical research that does not fit its desired narrative. Under the prior constitutions and the current constitution before 1995, district courts often did not submit an actual question to this Court when they certified a case of great public interest or importance. Instead, the analysis of the issue was set forth in the opinion. See, e.g., Finkelstein v. Dep't of Transp., 656 So. 2d 921, 922 (Fla. 1995); Radiation Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329, 331 (Fla. 1983); Rupp v. Jackson, 238 So. 2d 86, 89 (Fla. 1970) ("We do not view the language of Article V, Section 4(2) as requiring that a specific question be set out as certified because in any event we are privileged to review the entire decision and record."); State v. Cruz, 189 So. 2d 882, 882 (Fla. 1966). Thus, use of the word "should" is not dispositive here and there is no doubt that the Fourth District "passed upon" the issue presented by the text of the opinion.

This Court is not restricted by a district court's certified question. This Court regularly rephrases certified questions as it sees fit. See, e.g., Christensen v. Bowen, 140 So. 3d 498, 500 (Fla. 2014); Arsali v. Chase Home Fin. LLC, 121 So. 3d 511, 514 (Fla. 2013); Boatman v. State, 77 So. 3d 1242, 1244 (Fla. 2011); Hearndon v.

Graham, 767 So. 2d 1179, 1181 (Fla. 2000); Resha v. Tucker, 670 So. 2d 56, 57 (Fla. 1996).

III. RESPONDENT INAPPROPRIATELY TRIES TO REFRAME THE ISSUE ON APPEAL.

The Respondent and the FJA inappropriately try to reframe the issue before this Court from that of a certified question of great importance to a simple certiorari standard. Certified questions are pure legal issues for this Court and are reviewed de novo. Browning v. Poirier, 165 So. 3d 663, 664 n.2 (Fla. 2015); Rando v. Gov't Empls. Ins. Co., 39 So. 3d 244, 247 (Fla. 2010). The analysis is not pursuant to the certiorari standard—whether the trial court departed from the essential requirements of the law and whether irreparable harm results. See, e.g., Lafave v. State, 149 So. 3d 662, 665 (Fla. 2014).

The Respondent relies heavily upon two cases—Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344 (Fla. 2012) and Rodriguez v. Miami-Dade Cty., 117 So. 3d 400, 405 (Fla. 2013). However, neither of these cases stand for the proposition for which the Respondent advance them. For instance, in Citizens Prop. Ins. Corp., this Court addressed whether Citizens could seek review of denial of its claim of immunity via certiorari or prohibition and whether that was the proper appellate mechanism to do so. 104 So. 3d 344. It did not limit this Court's certified question jurisdiction in cases arising from petitions for writ of certiorari to a review of whether the trial court departed from the essential requirements of the law.

Similarly, in Rodriguez, this Court analyzed whether certiorari was the proper vehicle for the issue presented below. 117 So. 3d 400, 404. The case was not before this Court on a certified question. Id. at 402. Again, it did not limit this Court's certified question jurisdiction in cases arising from petitions for writ of certiorari to a review of whether the trial court departed from the essential requirements of the law.

IV. SINCE THIS COURT ACCEPTED JURISDICTION, IT CAN ADDRESS THIS CASE AND THE WORLEY DECISION.

Respondent and the FJA contend this Court cannot address, revisit, or recede from Worley. However, that simply is not true. Because this Court accepted jurisdiction, it can address the Worley decision and its continued application in Florida jurisprudence. Accord Trushin v. State, 425 So. 2d 1126, 1130 (Fla. 1982) ("Once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case."); Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982) (explaining that once the Court accepts jurisdiction it may address all issues before it); Miami Gardens, Inc. v. Conway, 102 So. 2d 622, 626 (Fla. 1958); accord Robertson v. Robertson, 593 So. 2d 491, 493 (Fla. 1991) ("Notwithstanding the fact that there is no longer a conflict of decisions in the district courts of appeal, having accepted jurisdiction when there was a conflict, we have agreed to render a decision in this case because of the important issue involved."). The Court is empowered to rule on the case as it deems appropriate.

This Court's decision in Worley further undercuts this argument. Indeed, in Worley, the Court overturned several cases allowing such discovery directed to plaintiff's law firms. See, e.g., Brown v. Mittelman, 152 So. 3d 602 (Fla. 4th DCA 2014); Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay, 133 So. 3d 1178 (Fla. 4th DCA 2014); Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co., 103 So. 3d 200 (Fla. 4th DCA 2012).

And, this Court should revisit and address Worley because of the disparate treatment it has caused. The Respondent and the FJA simply do not want this Court to address Worley because it allows a plaintiff's law firm's referral relationship to remain hidden from the eyes of the jury and the opposing party. (R. 063-072; 089-091; 093; 096-097). They want plaintiffs to maintain this advantage. Judge Brian Lambert explained how this situation unfolds at trial:

> 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, *4-5 (Fla. 5th DCA Feb. 22, 2019).

The Worley decision is unsound in principle and creates an uneven playing field for plaintiffs and defendants. It protects non-parties on the plaintiff's side from bias impeachment, whereas non-parties on the defense side of the case are subjected to abusive discovery. Simply put, the discovery obligations and accusations of bias at trial are lop-sided.

Thus, the Worley opinion is "clearly erroneous." State v. Poole, 45 Fla. L. Weekly S41 (Fla. Jan. 23, 2020). Accord Gamble v. United States, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring). This is laid out in the well-written dissent by Justice Polston.[2] Worley, 228 So. 3d at 26-31. Importantly, he wrote that the Court "should treat the plaintiff's law firm the same as an insurance company for purposes of discovering and disclosing potential bias." Id. at 30. This is what the Petitioner seeks. The parties must be treated the same to ensure fairness in the legal system.

"Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court." Smith v. Dep't of Ins., 507 So. 2d 1080, 1096 (Fla. 1987).

[2] Respondent appears to advocate that Worley should be overruled. *Answer Brief, Page 28.* She cites the dissent for the proposition that referral relationships are not protected by attorney-client privilege. Respondent cannot have her cake and eat it to.

V. PETITIONER HAS NEVER ASSERTED BOECHER SHOULD BE OVERRULED.

Respondent claims that Petitioner is seeking to overturn Allstate Ins. Co. v. Boecher, 733 So. 2d 993 (Fla. 1999) and that overturning Boecher is the only way for this Court to recede from Worley. This argument is illogical and circular, at best.

The Petitioner has never advocated during any of the proceedings that Boecher should be overturned. This is because Boecher addressed whether ***a party*** had to disclose financial bias with his or her own expert. That is not the fact pattern at issue here. Indeed, Mr. Dodgen has readily given that information to the Respondent as he has no relationship with the compulsory medical examiner.

The Boecher decision is not the problem—the problem is the Worley decision. Its rule should either be applied equally to plaintiffs and defendants or it should be overturned. Like in Worley, the Respondent sought information from a non-party to this litigation.

VI. BRENT DODGEN IS THE PETITIONER AND REAL PARTY IN INTEREST.

It is unclear whether the Respondent is playing fast and loose with the parties' names, is trying to confuse the Court, or is simply confused herself. Respondent refers to the Petitioner as "Allstate." Nevertheless, Allstate is not a party to this action. The Petitioner is Brent Dodgen.

Likewise, the Respondent claims Mr. Dodgen is not the real party of interest. This is incorrect. Mr. Dodgen's interest in this case is real and demonstrable. Not only has Respondent sued Mr. Dodgen alleging that he negligently caused damages, but Respondent also seeks punitive damages from him. (R. 59-62). No matter how much Respondent and the plaintiffs' bar wish to conflate defendants and their insurers before juries—and, in this case, before the Florida Supreme Court—there is an unambiguous limit to the identity of interest between Mr. Dodgen and his insurer. As a matter of public policy, punitive damages are not covered by liability insurance. See United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983) ("Florida public policy prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct. The Florida policy of allowing punitive damages to punish and deter those guilty of aggravated misconduct would be frustrated if such damages were covered by liability insurance.").

Brent Dodgen would be personally liable for any such damages and has an absolute right to protect himself from these damages. None of the cases the Respondent cites involve punitive damages.

If experienced practitioners cannot get this straight, how can an average juror? Conflation of Allstate and Mr. Dodgen has numerous consequences, including

implications of insurance, financial wealth, and litigiousness. (R. 030-035). And here, it involves something even more serious—punitive damages.

VII. RESPONDENT IGNORES THE WORDING OF WORLEY.

Respondent is simply wrong that Worley has no application to Springer v. West, 769 So. 2d 1068 (Fla. 5th DCA 2000). The Respondent ignores the plain wording of the Worley where the Court distinguished the plaintiff's law firm from Boecher on the grounds that the law firm was not a party to the case. Worley, 228 So. 3d at 22-23; 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."). Again, that is the situation of this case. The insurance company is not a party to the litigation.

VIII. THERE IS NO NEED TO AMEND THE RULES OF CIVIL PROCEDURE OR REFER THIS MATTER TO THE RULES COMMITTEE

There is no need to send this issue to the rules committee or to amend the rules. This discovery issue has developed through case law—not the rules process. It is judicially created and part of this state's common law. See, e.g., Worley, 228 So. 3d 18; Vazquez v. Martinez, 175 So. 3d 372 (Fla. 5th DCA 2015); Springer, 769 So 2d 1068; Boecher, 733 So. 2d 993. The Respondent and FJA seem to be shopping for a non-judicial forum.

This Court has the opportunity to strike the balance it strived hard to achieve in Elkins v. Syken, 672 So. 2d 517 (Fla. 1996).

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. In the alterative, this Court should overturn or recede from Worley.

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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.

/s/ Kansas R. Gooden
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