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IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-1118

BRENT A. DODGEN,

Petitioner,

v.

KAITLYN P. GRIJALVA,

Respondent
_____/

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PETITIONER'S MOTION FOR REHEARING

Petitioner BRENT DODGEN, by and through undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.300, moves for rehearing and states in support as follows:

1. This Court overlooked or misapprehended its own jurisdiction, its standard of review, and its prior precedent in deciding this case. As a result, this Court should rehear this case in accordance with the principles and precedent set forth herein.

2. This Court recently issued its opinion in this case. In doing so, it rephrased the certified question as follows:

> Whether it is a departure from the essential requirements of law to permit discovery regarding the financial relationship between a defendant's nonparty insurer and an expert witness retained by the defense?

3. The rephrased question mirrors the standard for common law certiorari and in essence reframed this as a certiorari proceeding. Respectfully, this reframing altered the Court's jurisdiction beyond what is prescribed by the Florida Constitution.

4. Moreover, this reframing did not address the gravamen of the original question: the disparity between plaintiffs and defendants Worley v. Cent. Fla. YMCA creates in their discovery obligations. See generally Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973) ("This is not to say that the District Courts of Appeal are powerless to seek change; they are free to certify questions of great public interest to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court."); Arthur J. England, Jr., et al., Constitutional Jurisdiction of the Florida Supreme Court: 1980 Reform, 32 Fla. L. Rev. 147, 190 (1980) ("After Hoffman v. Jones, it because impermissible for a district court to announce a decision in direct conflict with a previous decision of the supreme court. Rather, the court was obliged to follow the directive of the supreme court even if it chose to articulate reasons why the policy or justification for the supreme court's earlier decision should no longer be followed. The district court could, however, certify the legal question to the court as one suitable for reconsideration.").

5. In light of this rephrasing, the decision in Younkin v. Blackwelder, and the dismissals in Suzuki Motor Corp. v. Winckler, Case No. SC19-1998 and State Farm v. Sanders, Case No. SC20-596, it appears that this Court has narrowed its own jurisdiction with regard to certified questions which originate in cases involving petitions for writ of certiorari.

6. As set forth below in more detail, this narrowing is a drastic change from the Court's prior jurisprudence.

7. It will prevent this Court from addressing numerous discovery issues—especially those that are not appropriate for a change in the rules of procedure. It will also discourage parties from requesting a certified question on petitions for certiorari and district courts from issuing them.

8. This narrowing is unnecessary and does not align with the Constitution's text, its original meaning, this Court's standard of review on certified questions, and its prior precedent.

9. In 1956, the District Courts of Appeal were created through amendment to Article V of the Constitution. Through the amendment, the Constitution authorized review of certified questions via certiorari.[1] Art. V,

[1] Notably, it appears that this Court even reviewed these cases de novo and did not limit itself to a certiorari standard. See, e.g., Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 165 (Fla. 1970) (superseded by statute).

Fla. Const. (1956). See also Rupp v. Jackson, 238 So. 2d 86, 87 (Fla. 1970); State v. Cruz, 189 So. 2d 882, 883 (Fla. 1966).

10. This Court explained:

> The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958). See generally Thomas C. Marks, Jr., Perspectives: State Character, Traditions, and Peculiarities: Jurisdiction Creep and The Florida Supreme Court, 69 Alb. L. Rev. 543, 544 (2006) ("When the district courts of appeal set up shop in early 1957, the intent was that, with few exceptions, the Florida Supreme Court would be a 'law declaring' court only.").

11. This did not come to fruition in the manner envisioned by the framers.

12. In 1980, the Constitution was again amended and this Court's jurisdiction was narrowed. The references to "by certiorari" were removed. Art. V, § 3(b), Fla. Const. (1980) (approved by the electorate on March 11, 1980); Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980).

13. Justice Arthur England explained:

> Certiorari is essentially a common law writ issued by a superior court to an inferior court for the purpose of bringing up the record to determine whether the inferior court exceeded its jurisdiction or failed to proceed according to the essential requirements of law.
> . . .
> The deletion of 'by certiorari' from § 3(b)(3) was intended to eliminate the common law jurisdictional principles noted above.
> . . .
> Protracted written debates on the existence or nonexistence of a jurisdictional predicate will actually become unnecessary, since the Supreme Court's decisions will themselves deal with the legal issue or issues on which jurisdiction was predicated.
> . . .
> The clear import of the change has been to free the court from nonpolicy types of decisions, and direct its efforts to issues of statewide importance or jurisprudential significance.

Arthur England, Jr., et. al., Analysis of the 1980 Jurisdictional Amendment, 54 Fla. B. J. 406, 411-12 (1980).

14. Thus, the 1980 amendment transferred all certiorari review to the circuit and district courts. See generally Broward Cty. v. G.B.V. Int'l, 787 So. 2d 838, 842 (Fla. 2001) ("The writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists. The writ is discretionary and was intended to fill the interstices between direct appeal and the other prerogative writs.").

15. The Constitution currently states: "The supreme court . . . [m]ay review any decision of a district court of appeal that passes upon a question

certified by it to be of great public importance. . . ." Art. V, § 3(b)(4), Fla. Const.

16. The Constitution does not give this Court original certiorari jurisdiction. Art. V, § 3(b)(7), (8), (9), Fla. Const. See also 1-888-Traffic Sch. v. Chief Circ. Judge, Fourth Judicial Circ., 734 So. 2d 413, 417 (Fla. 1999); Trepal v. State, 754 So. 2d 702, 706 (Fla. 2000).

17. Indeed, this Court accepted jurisdiction of this case on certified question jurisdiction—not certiorari.

18. When this Court reviews a certified question, its standard of review is de novo. See, e.g., Browning v. Poirier, 165 So. 3d 663, 664 n.2 (Fla. 2015); Haygood v. State, 109 So. 3d 735, 739 (Fla. 2013); Rando v. Gov't Empls. Ins. Co., 39 So. 3d 244, 247 (Fla. 2010).

19. De novo means that this Court is free to decide the question of law—without deference to the district court or trial court and as if it had been deciding the question in the first instance. See Lee v. St. Johns Cty. Bd. of Cty. Comm'rs, 776 So. 2d 1110, 1113 (Fla. 5th DCA 2001) ("'De novo' means to try a matter anew, as though it had not been heard before and no decision

has been rendered."); Philip J. Padovano, Florida Appellate Practice § 19:4 (2015 ed.).[2]

20. This is true even where the underlying case arose from a petition for writ of certiorari; this Court is not limited to certiorari review of such cases.

21. The Court demonstrated this when addressing certified questions in appellate proceedings that began as petitions for writ of certiorari.

22. In these cases, this Court did not narrow its review to whether there had been a departure from the essential requirements of the law. Instead, this Court reviewed the case de novo and fully addressed the merits of the case.

23. The law is clear that, once this Court accepts jurisdiction, it can address all issues that may affect the case. See, e.g., Keck v. Eminisor, 104 So. 3d 359, 361 (Fla. 2012) (addressing merits of immunity claim after answering a certified question); 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

[2] This de novo standard of review comports with this Court's law declaring function.

So. 2d 308, 310 (Fla. 1982); Miami Gardens, Inc. v. Conway, 102 So. 2d 622, 626 (Fla. 1958).

24. For instance, in State v. Owen, 696 So. 2d 715 (Fla. 1997), the State requested the trial court to reconsider admissibility of a confession in light of a new United States Supreme Court case. After denial of the motion, the State filed a petition for writ of certiorari. The District Court denied the petition, but certified the following question:

> Do the principles announced by the United States Supreme Court in [Davis v. United States, 512 U.S. 452, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994)] apply to the admissibility of confessions in Florida, in light of [Traylor v. State, 596 So. 2d 957 (Fla. 1992)]?

This Court reviewed the matter de novo and analyzed its precedent. It chose not to reaffirm its own precedent and instead found the reasoning of Davis v. United States persuasive. The Court answered the certified question in the affirmative, quashed the decision below, and remanded with directions to grant the petition for certiorari. In other words, it declared new law in Florida. This Court did not rephrase the question so as to determine only whether there had been a departure from the essential requirements of the law. The Court also did not frame its analysis in that manner.

25. Likewise, in Gerry v. Dep't of Health & Rehab. Servs., 476 So. 2d 1279 (Fla. 1985), this Court answered the following certified question, which arose after a denial of a petition for writ of certiorari:

> Whether either a performance agreement or a performance plan as prescribed by section 409.168 is a prerequisite to permanent commitment proceedings pursuant to section 39.41(1)(f) 1.a.

Again, this Court reviewed the case de novo. It answered the question in the affirmative and quashed the decision in review. This Court did not rephrase the question so as to determine only whether there had been a departure from the essential requirements of the law. The Court also did not frame its analysis in that manner. See also Burk v. Dep't of Health & Rehab. Servs., 476 So. 2d 1275, 1279 (Fla. 1985) (same).

26. Similarly, in Genovese v. Provident Life & Accident Ins. Co., 74 So. 3d 1064 (Fla. 2011), an insurance company petitioned for writ of certiorari on a discovery issue. The Fourth District granted the petition, and certified the following question:

> Does the Florida Supreme Court's holding in Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005), relating to discovery of work product in first-party bad faith actions brought pursuant to Section 624.155, Florida Statutes, also apply to attorney-client privileged communications in the same circumstances?

The Court reviewed the issue de novo. It answered the question in the negative, held that attorney-client privilege applies in the first-party bad faith

context, and approved a portion of the District Court's opinion. This Court did not rephrase the question so as to determine only whether there had been a departure from the essential requirements of the law. The Court also did not frame its analysis in that manner.

27. In Henderson v. Florida, 745 So. 2d 319 (Fla. 1999), the First District Court of Appeal denied a petition for writ certiorari seeking to quash a protective order ruling that Henderson's public records request to the sheriff triggered reciprocal discovery obligations in a criminal case. The First District Court of Appeal certified the following question:

> Does section 119.07(8), Florida Statutes (Supp. 1996), limit a criminal defendant's pre-trial discovery of nonexempt public records regarding his or her pending prosecution, to the discovery provisions in Florida Rule of Criminal Procedure 3.220, such that receipt of such records triggers a reciprocal discovery obligation for that defendant?

This Court reviewed the case de novo. The Court analyzed its precedent and fully addressed the case before it. It answered the certified question in the affirmative and approved the decision below. It even sua sponte amended the Rules of Criminal Procedure to account for the issue raised in the case. This Court did not rephrase the question so as to determine only whether there had been a departure from the essential requirements of the law. It did not frame its analysis in that manner.

28. In Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994), Tucker, who was the executive director of the Florida Department of Revenue, moved for summary judgment alleging qualified immunity. Upon denial of the motion, Tucker filed a petition for writ of certiorari with the First District Court of Appeal. Her petition relied on the federal appellate mechanism for interlocutory review of qualified immunity matters. The First District denied the petition, but certified the following question:

> Is a public official asserting qualified immunity as a defense to a federal civil rights claim entitled in the Florida courts to the same standard of review of denial of her motion for summary judgment as is available in the federal courts?

This Court reviewed the issue de novo and answered the certified question in the affirmative. It declared new law. It ordered the rules committees to submit a proposed rule change consistent with the opinion. This Court did not rephrase the question so as to determine only whether there had been a departure of the essential requirements of the law. It did not frame its analysis in that manner.

29. In Miami Herald Pub. Co. v. Morejon, 561 So. 2d 577 (Fla. 1990), the newspaper filed a petition for writ of certiorari seeking to quash a subpoena to a reporter that witnessed a crime, which it claimed violated the reporter's privilege. The appellate court denied the petition, but certified the following certified question:

> [W]hether a news journalist has a qualified privilege under the First Amendment to the United States Constitution, as interpreted by the Florida Supreme Court in Morgan v. State, 337 So.2d 951 (Fla. 1976) and Tribune Co. v. Huffstetler, 489 So.2d 722 (Fla. 1986), to refuse to divulge information learned as a result of being an eyewitness to a relevant event in a criminal case -- i.e., the police arrest and search of the defendant -- when the journalist witnesses such an event in connection with a news gathering mission.

The Court reviewed the case de novo. It answered the question in the negative and approved the district court's decision. This Court did not rephrase the question so as to determine only whether there had been a departure of the essential requirements of the law. The Court did not frame its analysis in that manner.

30. Additionally, in State v. Hosty, 944 So. 2d 255 (Fla. 2006), the State filed a petition for certiorari in the Fourth District Court of Appeal, which was denied. The court certified the following question:

> As it applies to a disabled adult, is section 90.803(24), Florida Statutes (2001), violative of a criminal defendant's right to confront witnesses under the Florida and United States Constitutions?

This Court rephrased the certified question as:

> As it applies to a mentally disabled adult whose nontestimonial hearsay statement the trial court determines meets certain qualifications of reliability, is section 90.803(24), Florida Statutes (2001), violative of a criminal defendant's right to confront witnesses under the Florida and United States Constitutions?

The Court reviewed the case de novo. The Court answered the rephrased question in the negative and directed that the case be remanded back to the trial court for its consideration of the case consistent with the opinion. This Court did not rephrase the question so as to determine only whether there had been a departure from the essential requirements of the law. The Court did not frame its analysis in that manner.

31. In Fla. Dep't of High. Saf. & Motor Vehs. v. Hernandez, 74 So. 3d 1070 (Fla. 2011), this Court reviewed two certified questions which arose on second-tier certiorari review. The Court rephrased a single question and split into two:

> Can the DHSMV suspend a driver's license under section 322.2615, Florida Statutes, for refusal to submit to a breath test if the refusal is not incident to a lawful arrest?
>
> Is the issue of whether the refusal was incident to a lawful arrest within the allowable scope of review of a DHSMV hearing officer in a proceeding to determine if sufficient cause exists to sustain the suspension of a driver's license under section 322.2615, Florida Statutes, for refusal to submit to a breath test?

The Court reviewed the case de novo. The Court answered the first question in the negative and the second in the affirmative. This Court did not rephrase the questions so as to determine only whether there had been a departure from the essential requirements of the law. The Court did not frame its analysis in that manner.

32. In State v. Belvin, 986 So. 2d 516 (Fla. 2008), the defendant sought second-tier certiorari review of admission of a breath test affidavit and the resulting conviction. The Fourth District Court of Appeal found that admission of the affidavit violated the defendant's confrontation rights. It also certified the following question:

> Does admission of those portions of the breath test affidavit pertaining to the breath test operator's procedures and observations in administering the breath test constitute testimonial evidence and violate the Sixth Amendment's confrontation clause in light of the United States Supreme Court's holding in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)?

This Court addressed the certified question de novo and answered it in the affirmative. Notably, this Court did not rephrase the questions so as to determine only whether there had been a departure from the essential requirements of the law. The Court did not frame its analysis in that manner. In a separate section of the opinion, the Court went on to address the "other issue raised." The State argued that the district court erred in granting certiorari because the circuit court did not violate a clearly established principle of law. The Court rejected that argument and found no error with the district's court's resolution of the case.

33. In cases where this Court has analyzed a departure from the essential requirements in the certified question framework, the issue

concerned whether a petition for writ of certiorari was the correct appellate vehicle to bring the issue before the district court. See, e.g., Lafave v. State, 149 So. 3d 662, 663 (Fla. 2014) (questioning whether the State can seek certiorari to review an order terminating probation); Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344 (Fla. 2012) (questioning whether denial of a motion to dismiss based on sovereign immunity should be reviewable via certiorari or plenary appeal); Keck v. Eminisor, 104 So. 3d 359, 360-61 (Fla. 2012) (questioning whether a denial of summary judgment based on immunity under section 768.28 should be reviewable via certiorari or plenary appeal).

34. Nader v. Fla. Dep't of High. Saf. & Motor Vehs., 87 So. 3d 712 (Fla. 2012) is a prime example of how this Court analyzes both and performs a different analysis on each. The case involved two certified questions. One involving a pure legal question involving implied consent provisions of section 316.1932, Florida Statutes. This certified question was reviewed de novo and answered by the Court. Its analysis did not include any discussion about the essential requirements of the law or certiorari standard. The second certified question concerned whether certiorari could be used in that circumstance. It was under this framework that the Court analyzed departure from the essential requirements and certiorari jurisdiction.

35. Notably, the instant case does not involve whether a petition for writ of certiorari was the proper vehicle to bring the case before the district court. Instead, the instant case falls in the first bucket of cases—those addressing the certified question de novo and not analyzing the case under a certiorari standard.

36. Thus, the opinion in this case marks a significant deviation from well-settled principles and precedent. The Court used a form of jurisdiction that the current Constitution does not grant to it. Although consistent with this Court's jurisdiction prior to 1980, this is contrary the plain text and original meaning of the Constitution in its current form. See Arthur England, Jr., et. al., Analysis of the 1980 Jurisdictional Amendment, 54 Fla. B. J. 406, 411 (1980) ("The deletion of 'by certiorari' from § 3(b)(3) was intended to eliminate the common law jurisdictional principles noted above.").

37. The Younkin dissent's proposal would not be an "unwarranted use" of this Court's jurisdiction—it would have been wholly consistent with the Constitution, its original meaning, this Court's precedent, and the standard of review it historically applies to certified questions which arose from an underlying petition for writ of certiorari in the district court of appeal.

38. Accordingly, this Court overlooked or misapprehended its own jurisdiction, its standard of review, and its prior precedent in deciding this

case. As a result, this Court should rehear this case in accordance with the principles and precedent set forth above.

39. This issue is of statewide importance and affects virtually every personal injury case. Numerous courts have found that Worley causes disparate treatment of the parties. See, e.g., Younkin v. Blackwelder, 44 Fla. L. Weekly D549 (Fla. 5th DCA Feb. 22, 2019); Dhanraj v. Garcia, 44 Fla. L. Weekly D785 (Fla. 5th DCA Mar. 22, 2019); Salber v. Frye, 273 So. 3d 192 (Fla. 5th DCA 2019); Dodgen v. Grijalva, 281 So. 3d 490, 492 (Fla. 4th DCA 2019); Rosenthal v. Badillo, No. 4D19-1854, 2019 Fla. App. LEXIS 14733 (Fla. 4th DCA July 3, 2019); Levitan v. Razouri, No. 4D19-2200, 2019 Fla. App. LEXIS 14734 (Fla. 4th DCA July 22, 2019); Balle v. Hernandez, No. 4D19-1921 (Fla. 4th DCA Sept. 12, 2019); Steel v. Thomas, No. 4D19-3044 (Fla. 4th DCA Oct. 1, 2019); Barnes v. Sanabria, 45 Fla. L. Weekly D135 (Fla. 5th DCA Jan. 17, 2020); Dennison v. Graham, No. 4D20-0723 (Fla. 4th DCA March 20, 2020); Mariano v. Thornton, No. 4D20-934 (Fla. 4th DCA Apr. 14, 2020); Christiansen v. Pierre, No. 4D20-1002 (Fla. 4th DCA Apr. 28, 2020); Tahan v. Munoz, 45 Fla. L. Weekly D 1466 (Fla. 3d DCA June 17, 2020) (Miller, J., concurring); Yomtov v. Fink, No. 4D 20-1628 (Fla. 4th DCA Aug. 3, 2020); Shuldham v. Evans, No. 4D20-1802 (Fla. 4th DCA Aug. 21, 2020); Owens v. Perron, 45 Fla. L. Weekly D2003 (Fla. 5th DCA Aug. 21,

2020); Joffe v. Love, No. 4D20-2028 (Fla. 4th DCA Sept. 25, 2020); Routhier v. Barnes, 45 Fla. L. Weekly Fed. D2496 (Fla. 5th DCA Nov. 6, 2020); Walsh v. Diaz-Navedo, 5D20-1759, 2021 Fla. App. LEXIS 824 (Fla. 5th DCA Jan. 22, 2021); Hidalgo v. Citizens Prop. Ins. Corp., 323 So. 3d 338 (Fla. 3d DCA 2021) (Miller, J., specially concurring). This Court should exercise its law-declaring function to fix this disparity.

40. As the Younkin dissent notes, "it appears that Worley can only be readdressed on plenary review after a trial court and district court of appeal prohibit discovery from a plaintiff in the same manner as sought in Worley." This will waste scarce judicial and party resources as defendants would have to serve Worley discovery, move to compel the Worley discovery, and have a hearing in every instance in order to preserve the issue for appeal.

41. The Court's decision in this case makes review of Worley contingent upon a district court certifying a question or disregarding precedent to create conflict, and this Court accepting jurisdiction.

WHEREFORE, Petitioner BRENT DODGEN respectfully requests this Court to grant rehearing.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was uploaded and served in the E-PORTAL to: **Brett M. Rosen, Esq.,** Goldberg & Rosen, P.A., 1111 Brickell Avenue, Suite 2180, Miami, Florida 33131 (pleadings@goldbergandrosen.com; bmr@goldbergandrosen.com); Marc **Schechter, Esq.,** Robinson Pecaro & Mier, P.A., 501 Shotgun Road, Suite 404, Sunrise, FL 33326 (mschechter@lawdrive.com; kirsten@lawdrive.com); **Douglas Eaton, Esq.**, Eaton & Wolk, P.L., 2665 So. Bayshore Drive, Suite 609, Miami, FL 33133 (deaton@eatonwolk.com; cgarcia@eatonwolk.com); **Jason Gonzalez, Esq., Amber Stoner Nunnally, Esq**., Shutts & Bowen, LLP, 215 S. Monroe St. Suite 804, Tallahassee, FL 32301, jasongonzalez@shutts.com, anunnally@shutts.com; **William W. Large, Esq**., Florida Justice Reform Institute, 210 S. Monroe St., Tallahassee, FL 32301, william@fljustice.org; **Bryan S. Gowdy**, **Esq.,** Florida Justice Association, 865 May Street, Jacksonville, FL 32204, bgowdy@appellate-firm.com, filings@appellate-firm.com, **Patrick A. Brennan, Esq.**, HD Law Partners, P.A., P.O. Box 23567, Tampa, Florida, 33623, brennan@hdlawpartners.com, maizo@hdlawpartners.com, **John Hamilton, Esq.,** Law Office of John

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