IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-385

STEVEN YOUNKIN,

Petitioner,

v.

NATHAN BLACKWELDER,

Respondent

_____/

PETITIONER STEVEN YOUNKIN'S JURISDICTIONAL BRIEF

BOYD & JENERETTE, PA
KANSAS R. GOODEN
Florida Bar No.: 58707
kgooden@boydjen.com
GENEVA R. FOUNTAIN
Florida Bar No.: 117723
gfountain@boydjen.com
201 N. |Hogan Street, Suite 400
Jacksonville, Florida 32202
Tel: (904) 353-6241
Fax: (904) 493-5658
Attorneys for Petitioner Steven Younkin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Miscellaneous

STATEMENT OF THE CASE AND FACTS

Petitioner seeks review of Younkin v. Blackwelder, 44 Fla. L. Weekly D549b (Fla. 5th DCA Feb. 22, 2019). Respondent Blackwelder sued Petitioner Younkin for personal injuries stemming from a motor vehicle accident. (App. 004). Petitioner's insurer, Allstate Insurance Company, appointed counsel to defend him. (App. 004). Petitioner retained a physician to perform a Compulsory Medical Examination ("CME") on Respondent under Florida Rule of Civil Procedure 1.360. (App. 004). Respondent sought information concerning the frequency Petitioner's counsel's law firm used the physician and the amounts the law firm paid that doctor during the preceding three years. (App. 004).

Petitioner objected and sought a protective order, arguing that this Court's opinion in Worley v. Central Florida Young Men's Christian Ass'n, 228 So. 3d 18 (Fla. 2017), restricted the application of Boecher[1] discovery to only parties. (App. 004). The trial court denied the motion for protective order and Petitioner sought certiorari review in the Fifth District Court of Appeal. (App. 004).

Petitioner argued that the trial court departed from the essential requirements of the law, as expressed in Worley, by compelling him to disclose information related to the financial relationship between the CME physician and Petitioner's counsel's law firm and that this disclosure causes irreparable harm. (App.004). The

[1] Allstate Ins. Co. v. Boecher, 733 So. 2d 993 (Fla. 1999).

Fifth District denied the petition, concluding Worley did not implicitly overrule earlier cases compelling such discovery. (App. 005-06). However, the Court recognized the disparate treatment in personal injury litigation between plaintiffs and defendants, and it certified the following question of great public importance to this Court:

> WHETHER THE ANALYSIS AND DECISION IN *WORLEY* SHOULD ALSO APPLY TO PRECLUDE A DEFENSE LAW FIRM THAT IS NOT A PARTY TO THE LITIGATION FROM HAVING TO DISCLOSE ITS FINANCIAL RELATIONSHIP WITH EXPERTS THAT IT RETAINS FOR PURPOSES OF LITIGATION INCLUDING THOSE THAT PERFORM COMPULSORY MEDICAL EXAMINATIONS UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.360?

(App. 007).

Petitioner timely invoked this Court's discretionary jurisdiction, based on an express and direct conflict with other decisions and the Fifth District's certified question.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction on at least one of the bases asserted – certified question of great importance or express and direct conflict. This case qualifies as one of great importance as this issue is being litigated throughout the state. Worley is not being applied even-handedly and plaintiffs and defendants are being treated differently under the law. This disparate treatment denies defendants equal protection, due process, and access to courts.

This issue affects virtually every personal injury lawsuit as this type of discovery is sought from defendants and defense law firms. Trial courts are ruling inconsistently, and the district courts of appeal are being confronted with the issue. Both the public and the courts of this state will benefit from this Court's consideration and guidance.

The decision below misapplied this Court's Worley decision, and therefore, express and direct conflict exists. The decision below also conflicts with the Fourth District's decision of Bellezza v. Menendez, 44 Fla. L. Weekly D630a (Fla. 4th DCA Mar. 6, 2019), which noted that such information is protected by attorney-client privilege.

ARGUMENT

I. THE DECISION BELOW PASSES UPON A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE.

This case meets the requirements for a certified question of great importance and should be accepted by this Court. See Art. V, § 3(b)(4); Floridians for a Level Playing Field v. Floridians Against Expanded Gambling, 967 So. 2d 832, 833 (Fla. 2007).

This issue is of great importance because this discovery is served upon defendants in virtually every personal injury lawsuit. This Court's decision will affect every single one of those cases. A decision will go well-beyond the immediate parties. See Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958). Similarly, this

issue is not narrow and is not based on unique facts. Cf. State v. Brooks, 788 So. 2d 247 (Fla. 2001); Dade County Property Appraiser v. Lisboa, 737 So. 2d 1078 (Fla. 1999); State v. Sowell, 734 So. 2d 421 (Fla. 1999).

Since the issuance of Worley, plaintiffs, and their counsel, are immune from similar discovery; nevertheless, defendants and defense law firms are being forced to produce extensive financial information concerning the firm's relationship with CME physicians. In other words, the law is not being applied even-handedly and plaintiffs and defendants are being treated differently.

Both the Fifth District and the dissenters in Worley have provided excellent examples of this unequal and disparate treatment. Justice Polston explained,

> If a law firm routinely refers clients to the medical provider, and there is an "extensive [] financial relationship between a party [through its law firm] and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing." Boecher, 733 So. 2d at 997. The insurance company is a repeat player in the judicial system, and the witnesses it uses on a regular basis may have a financial, incentive that a jury is entitled to know about and evaluate for potential bias. Substitute the phrase "plaintiff's law firm" in place of "insurance company," and the same is true here: The "plaintiff's law firm" is a repeat player in the judicial system, and the witnesses it uses on a regular basis may have a financial incentive that a jury is entitled to know about and evaluate for potential bias.

Worley, 228 So. 3d at 30 (Polston, J., dissenting) (alterations in original). Similarly, the Fifth District observed,

> [U]nder 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 D549b (Fla. 5th DCA Feb. 22, 2019).

This issue has been raised in courts across the state and various judges have ruled differently on the issue. See, e.g., Stubbs v. Brizus, et. al., Case No. 50-2015-CA-9783 (Fla. 15th Jud. Cir. 2018) (granting protective order protecting information concerning law firm and insurance company); Alvarez v. Perez, Case No. 17-005362-CA-01(22) (Fla. 11th Jud. Cir. 2018) (granting protective order protecting information concerning law firm); Terrero v. Botero, 2017-17403-CA-04 (Fla. 11th Jud. Cir. 2018) (granting protective order protecting information concerning law firm); Farnell v. Barbarito, Case No. 2019-023606-CA-01 (Fla. 11th Jud. Cir. 2018) (granting protective order protecting information concerning law firm and insurance company); Swisher v. Wasserman, Case No. 2015-CA-009705 (Fla. 15th Jud. Cir. 2018) (granting protective order protecting information concerning law firm and insurance company); Kucinski v. Landrum-Hammock, Case No. 16-03623-CI (Fla. 6th Jud. Cir. 2018) (granting protective order protecting information concerning law firm and insurance company); Vilchez v. Frazer, Case No. 2017-14772-CA-01 (Fla. 11th Jud. Cir. 2018) (denying motion for protective order as to insurance company); Kissoon v. Richardson, Case No. 16-CA-009455 (Fla. 13th Jud. Cir. 2018) (granting

plaintiff's motion to compel); Kyzar v. Zarza, Case No. 2017-CA-011364 (Fla. 15th Jud. Cir. 2019) (denying motion for protective order).

District courts are now being confronted with this issue. See, e.g., Dhanraj v. Garcia, 2019 Fla. App. LEXIS 4315 (Fla. 5th DCA Mar. 22, 2019) (certified question issued); Berger v. Sexton, Case No. 4D18-3304 (Fla. 4th DCA Jan. 31, 2019) (dismissing petition); Litzenberger v. Bowers, Case No. 2D18-4531 (currently pending); Farnell v. Barbarito, 257 So. 3d 999 (Fla. 3d DCA Sept. 20, 2018) (dismissing petition for writ of certiorari seeking to quash order granting a defendant's motion for protective order prohibiting Boecher discovery in third-party case); Villalobos v. Martinez, Case No. 3D19-155 (currently pending).

These courts need guidance on how the Worley decision affects discovery targeted at defense law firms, and on whether a defense law firm must disclose the subject information even though it is not a party to the lawsuit and a plaintiff's law firm is not similarly required.

II. THE DECISION BELOW MISAPPLIES THE WORLEY DECISION TO ONLY PROTECT PLAINTIFFS AND CREATES DISPARATE TREATMENT OF DEFENDANTS UNDER THE LAW.

The Fifth District's misapplication of Worley created an express and direct conflict, and this Court should exercise its discretionary jurisdiction to resolve the conflict. Art. V, § 3(b)(3), Fla. Const.; Hayes v. State, 94 So. 3d 452, 455 (Fla. 2012); Jaimes v. State, 51 So. 3d 445, 446 (Fla. 2010); Wallace v. Dean, 3 So. 3d

1035, 1040 (Fla. 2009). See also Harry Lee Anstead, The Operation and Jurisdiction of the Supreme Court of Florida, 29 Nova L. Rev. 431, 520 (2005).[2]

In Worley, this Court determined that Allstate Ins. Co. v. Boecher, 733 So. 2d 933 (Fla. 1999), did not apply to allow discovery of the financial relationship between a plaintiff's law firm and the plaintiff's treating physician. 228 So. 3d at 22-24. This Court explained "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." Id. at 23 (emphasis added). This Court distinguished Boecher explaining,

> 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. In the instant case, YMCA is seeking discovery of the relationship between Morgan & Morgan, **a non-party**, and Worley's treating physicians.

Id. (citation omitted) (emphasis added).

Nevertheless, the decision below did not afford the defendant and the **non-party** law firm with those same protections. It required the **non-party** defense law firm to provide the subject financial information. While the Fifth District

[2] "For example, a scholarly opinion may make broad statements of law that are actually dicta, yet these statements express an opinion about some legal point. Later a district court could conceivably find the dicta persuasive but then misapply it. In such a situation, all the reasons justifying review of misapplication conflict also apply, and review would be warranted to the extent the misapplication may create confusion in the law or reach an incorrect or unfair result."

acknowledged and quoted this Court's reasoning in Worley, it declined to apply that reasoning even-handedly and equally to the defense. It even noted the disparate treatment.

A conflict similarly exists with Bellezza v. Menendez, 44 Fla. L. Weekly D630a (Fla. 4th DCA Mar. 6, 2019). Importantly to the issue and conflict here, in holding that "the evidence of a plaintiff's attorney's referral of the plaintiff to his treating physicians and other payments to those physicians is protected by attorney-client privilege," the Court also noted "[s]uch evidence from the defendant law firm is similarly protected by attorney-client privilege." Id. Thus, the Fourth District's opinion, in that it would have protected the defendant law firm from disclosing this same financial relationship information, conflicts with Younkin.

WHEREFORE, Petitioner STEVEN YOUNKIN respectfully requests this Court to accept jurisdiction of this matter.

BOYD & JENERETTE, P.A.
Attorneys for Petitioner
201 North Hogan Street, Suite 400
Jacksonville, Florida 32202
Tel: (904)353-6241
Fax: (904)493-5658

/s/ Kansas R. Gooden
KANSAS R. GOODEN
Florida Bar No. 58707
kgooden@boydjen.com
GENEVA R. FOUNTAIN
Florida Bar No. 117723
gfountain@boydjen.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing was uploaded and served in the eportal to: **George H. Anderson, III Esq.**, Dutch.Anderson@newlinlaw.com; Anderson.pleadings@newlinlaw.com; Dan Newlin & Partners, 7335 W Sand Lake Road, Orlando, FL 32819; **Mark A. Nation, Esq.**, and **Paul W. Pritchard, Esq.,** bhirt@nationlaw.com, mnation@nationalw.com, ppritchard@nationlaw.com, The Nation Law Firm, 570 Crown Oak Centre Drive, Longwood, FL 32750; **Amanda E. Wright, Esq.,** OrlandoLegal@Allstate.com, Law Offices of Robert J. Smith, 390 North Orange Avenue, Suite 895, Orlando, FL 32801-1635; this 25th day of March, 2019.

/s/ Kansas R. Gooden
KANSAS R. GOODEN

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
KANSAS R. GOODEN