IN THE SUPREME COURT OF FLORIDA

STEVEN YOUNKIN,

Petitioner

CASE NO.: SC19-385
L.T. CASE NO.: 5D18-3548

v.

NATHAN BLACKWELDER,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent, Nathan Blackwelder, accepts the statement of the case and facts as presented by Petitioner, Steven Younkin, with the following additions:

In its opinion in this case, the Fifth District distinguished this case from *Worley v. Central Florida Young Men's Christian Association*, 228 So. 3d 18 (Fla. 2017), because this case involves a retained expert who injected himself into the litigation for pay; whereas *Worley* dealt with a treating physician who acquired his knowledge from treating the plaintiff and not just for purposes of litigation. (A.004-06.) In doing so, the Fifth District stated:

> In *Vasquez v. Martinez*, 175 So. 3d 372, 373-74 (Fla. 5th DCA 2015), we acknowledged that the discovery of this type of financial information requested in this case is permissible "to assist counsel in impeaching examining physicians and other [retained] experts by demonstrating that the expert has economic ties to the insurance company or defense law firm." Thus, the instant order is consistent with, rather than a departure from, the essential requirements of law. Petitioner raised other arguments for certiorari relief, which we deny without further discussion.

(A.005). Nevertheless, because the Court believed defendants were receiving disparate treatment under *Worley*, the Court certified the question set forth in Petitioner's Jurisdictional Brief as one of great public importance. (*See* Petitioner's Jurisdictional Brief ("PJB"), p. 2.)

SUMMARY OF THE ARGUMENT

The Court should not exercise its discretionary jurisdiction in this case on either the ground of a certified question or conflict jurisdiction. The underlying premise of the Fifth District's certified question—that there is disparate treatment between plaintiffs and defendants in personal injury litigation—is incorrect. As demonstrated by *Worley* and *Bellezza v. Menendez*, ___ So. 3d ___, 44 Fla. L. Weekly D630 (Fla. 4th DCA Mar. 6, 2019), the applicable distinction here is between retained experts for pay and treating physicians, not plaintiffs versus defendants. Both sides, plaintiffs and defendants, are treated equally with respect to each distinct category of witness. More bias-related discovery is permitted about retained experts because they gain their knowledge solely for the purpose of the litigation; whereas treating physicians gain their knowledge from treating the patient, whether it be a plaintiff or a defendant. But each party is subject to the same rules of disclosure depending on the nature of the witness involved. Thus, jurisdiction on the certified question should be denied.

Jurisdiction should also be denied because no conflict exists between this case and *Worley* or *Bellezza.* Rather, the ruling in this case is entirely consistent with longstanding Florida law regarding bias-related discovery related to retained experts who are paid a fee for their testimony. Both *Worley* and *Bellezza*, however, dealt with the proper scope of discovery or admissible evidence pertaining to

treating physicians. Indeed, *Bellezza* demonstrates that both sides must be treated the same when it comes to treating physicians, which were at issue in that case. The same is true for retained experts, which are at issue here. Therefore, the Court should decline to hear this case on the merits.

ARGUMENT

Because There Is No Disparate Treatment Between the Parties, There Is No Question of Great Public Importance

Plaintiffs and defendants in litigation are treated equally with respect to the scope of bias-related discovery about retained experts for pay on the one hand and treating physicians on the other. The focus in *Worley* dealt with the category of the witness, not which side of the "v." the party seeking discovery is on. As this Court noted in *Worley*, a significant distinction exists between retained experts who inject themselves into the case for pay and physicians who gain their knowledge about the case solely from treating the patient for his injuries. *Worley*, 228 So. 3d at 23. Here, as a CME doctor, Dr. Jones is a retained expert who injected himself into the litigation for pay. Therefore, *Worley* is inapplicable here, where the only issue is the scope of bias-related discovery permitted from a retained expert under Rule 1.280(b)(5) of the Florida Rules of Civil Procedure, a matter that has been settled since 1996. *See Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996); *see also Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999).

In *Worley*, this Court explained the reasons supporting its decision to limit the scope of bias-related discovery from treating physicians. Those reasons included: 1) the possible chilling effect on doctors willing to treat patients involved in litigation; 2) the inflation of the costs of litigation over the collateral issue of the physician's bias; 3) the potential negative impact to access to courts; and 4) the need to protect privileged attorney-client communications. *Worley*, 228 So. 3d at 26. These concerns do not exist with respect to hand-picked, retained experts like Dr. Jones who voluntarily inject themselves into litigation for pay. They expect to participate more fully in the litigation because that is precisely what they are paid to do. Retained experts and treating physicians are not in the same category.

To be sure, the critical distinction between retained medical experts and treating physicians was at the very heart of the *Worley* decision. That distinction is evident by the Court's discussion of *Boecher*, where the Court stated:

> *Boecher* dealt with discovery of *experts who had been hired for the purposes of litigation*. *Treating physicians, however, "[d]o not acquire [their] expert knowledge for the purpose of litigation, but rather simply in the course of attempting to make [their] patient's well.* Moreover, they "typically testify… concerning [their]… own medical performance on a particular occasion and [do] not opin[e] about the performance of another.

Worley, 228 So. 3d at 23 (internal citations omitted, alterations in original, emphasis added). The two categories are treated differently because they are not in the same species of witness.

Both species of witnesses—retained experts and treating physicians—are subject to bias-related discovery, but that discovery is constrained when it comes to treating physicians who are thrust into the case by their patient's litigation and expanded when it involves retained experts who volunteer to participate in the case for pay. This Court concluded that there are other ways to impeach a treating physician than to allow an expensive fishing expedition into whether there was some "cozy agreement" between the treating physician and a party's lawyers. *Worley*, 228 So. 2d at 26. Thus, in *Worley*, the questions the Court faced turned on the nature of the witness, not whether it was the plaintiff or defendant seeking the bias-related discovery or whether the discovery was sought from the party or from the party's lawyers. As a result, there is no disparate treatment between plaintiffs and defendants when it comes to treating physicians—both are subject to the same rules. The same is true for discovery about retained experts; the same rules apply to plaintiffs and defendants alike.

For example, assume a plaintiff and a defendant are involved in an automobile accident where both suffered some injury and each party claims the other was negligent. Both the plaintiff and defendant will have treating physicians. And, those treating physicians will be treated equally with respect to bias-related discovery in the sense that neither party may discover from the other whether there is a financial or referral relationship between the treating physician and their

opponent's law firm. Likewise, both parties retain paid experts to testify at trial. Again, both parties will be treated equally with respect to the scope of bias-related discovery into the financial or referral relationship between that party's lawyer or insurance carrier and that party's hand-picked, retained expert under Fla. R. Civ. P. 1.280(b)(5) and *Boecher*. Therefore, the Fifth District's rationale for the certified question is incorrect—no disparate treatment between the parties exists. But the two categories of witness, retained experts and treating physicians, are treated differently for bias-related discovery purposes because they simply are not the same nor do they present the same concerns. A retained expert fully expects to have his relationship with the hiring party explored and has had this expectation since at least 1996. Also, this kind of discovery related to retained experts will not create any chilling effect on the ability of persons involved in litigation to obtain treatment. Consequently, there is no goose versus gander problem here.

Contrary to Petitioner's assertions below, *Worley* did not implicitly overrule *Vasquez* or otherwise modify *Boecher* to limit one party's ability to discover the relationship between the other party's lawyers or insurance carrier and retained experts. The *Worley* decision did not turn on the question of whether the discovery was sought from the party or the party's law firm; rather, it was based solely on the category of the witness involved, *i.e.*, a treating physician who gets sucked into the litigation through no choice of his own. Thus, no question of great public

importance exists here because there is no disparate treatment between plaintiffs and defendants in personal injury litigation with respect to either retained experts or treating physicians.

Petitioner's reliance on other circuit court orders that appear to agree with Petitioner's misguided interpretation of *Worley* is misplaced. Those erroneous rulings do not provide a basis for jurisdiction under the Florida Constitution. Also, trial courts make mistakes, which is why we have appellate courts. Every mistake does not create a question of great importance. Moreover, future rulings by those same trial courts will now be bound by the Fifth District's decision in this case. *See Pardo v. State*, 596 So. 2d 665 (Fla. 1992). Thus, Petitioner's erroneously decided circuit court cases are irrelevant and do not provide any basis for this Court to exercise jurisdiction over this case. Accordingly, the Court should decline to exercise its discretionary jurisdiction in this matter.

No Express and Direct Conflict Exists

The Court should also decline to accept jurisdiction in this case because no express and direct conflict exists between the decision below and the decisions in *Worley* or *Bellezza*. The Court therefore lacks jurisdiction to review this case on that ground. As a result, jurisdiction should be denied.

The fact that no conflict exists between this case and *Worley* or *Bellezza* is obvious. For there to be jurisdiction for express and direct conflict, the conflict

between the decisions must be express and direct and must appear within the four corners of the majority decision. *See Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). In other words, for there to be conflict jurisdiction, there would have to have been an "'application of a rule of law to produce a different result in a case which involves substantially the same [controlling] facts as a prior case' or 'the announcement of a rule of law which conflicts with a rule previously announced by this court or another district[.]'" *Valladares v. Bank of Am. Corp*., 197 So. 3d 1, 14 (Fla. 2016), *quoting Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). Those requirements are not met here.

In both *Worley* and *Bellezza*, the courts were concerned with the scope of bias-related discovery permitted about a treating physician. The decision in this case, however, deals with materially different facts. This case involves the scope of bias-related discovery permitted about a retained expert, an entirely distinct class of witness. In short, treating physicians are apples whereas retained experts are oranges. They are not a goose and a gander of the same species as a defendant and a plaintiff. Rather, they are completely different types of witnesses who are treated differently for the reasons explained in *Worley.* Therefore, on the face of the relevant decisions, no express and direct conflict exists.

Petitioner's claim of conflict is based on Petitioner's misunderstanding of *Bellezza*. (*See* PJB, p. 8.) Petitioner claims *Bellezza* stands for the proposition that

the relationship between a defendant's lawyers and a *retained expert* is protected by the attorney-client privilege just as the plaintiff's counsel's relationship with a *treating physician* is protected by the attorney-client privilege. (*Id*.) However, *Bellezza* held no such thing. Rather, if the Court looks at the statement in context, it will see that the Fourth District was saying that the plaintiff and the defendants should have been treated the exact same way with respect to their lawyers' separate relationships with the plaintiff's treating physicians. The court stated:

> [W]e hold that the evidence of the plaintiff's attorney's referral of the plaintiff to *his treating physicians* and other payments to those physicians is protected by attorney-client privilege, it is unnecessary for us to address this issue further. *Such evidence from the defendant law firm [related to the relationship with the plaintiff's treating physicians] is similarly protected by the attorney-client privilege*.

Id. at *3, alterations and emphasis added. Thus, the *Bellezza* court decided that the evidence as to the relationship between the lawyers and treating physicians was off limits regardless of whether it was the plaintiff or defendants who were seeking to discover or admit it into evidence. Therefore, no express and direct conflict exists between this case involving retained experts and *Bellezza*, which dealt with treating physicians. Consequently, the Court lacks jurisdiction to hear this case on the ground of express and direct conflict.

This Court Should Not Accede to Petitioner's Desire to Reverse *Worley*

Finally, the Court should decline to exercise its discretionary jurisdiction in this case because Petitioner appears to hope that a change in the constitution of the

Court will result in a reversal of *Worley*, which was decided barely two years ago in a four to three opinion. Petitioner wishes that with the Court's new constitution, defendants will return to a time where defendants could engage in extensive and expensive bias-related discovery about treating physicians in virtually every personal injury case. It was a great weapon in the defense bar's arsenal—make the litigation so expensive that the plaintiff or his lawyer could not afford to continue. Indeed, that is, in part, precisely what this Court sought to prevent when it issued *Worley*.

This Court adheres to the doctrine of *stare decisis*. *Puryear v. State*, 810 So. 2d 901 (Fla. 2002). *Stare decisis* fosters stability in the law by not allowing the law to change every time there is a shift in the constitution of a particular court. And, in the past two years, no significant change in circumstances has occurred that would support a departure from the established doctrine of *stare decisis* to reverse. Therefore, the Court should not accept jurisdiction over this case or be tempted to overrule a barely two-year-old decision.

CONCLUSION

For the foregoing reasons, the Court should not exercise its discretionary jurisdiction to review this case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail 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; Kansas R. Gooden, Esq. (kgooden@boydjen.com), Boyd & Jenerette, P.A., 201 North Hogan Street, Suite 400 Jacksonville, Florida 32202; and Amanda E. Wright, Esq. (OrlandoLegal@Allstate.com), Law Offices of Robert J. Smith, 390 North Orange Avenue, Suite 895, Orlando, FL 32801-1635, this 11th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

In compliance with the Florida Rules of Appellate Procedure, counsel for Respondent certifies that the size and style of typefont used in this Answer are Times New Roman 14 point.

Respectfully submitted,

Mark A. Nation, Esquire