IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-385

STEVEN YOUNKIN,

Petitioner,

v.

NATHAN BLACKWELDER,

Respondent

_____/

PETITIONER STEVEN YOUNKIN'S INITIAL BRIEF ON THE MERITS

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

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INTRODUCTION

This case concerns the effect and application of this Court's decision in Worley v. Cent. Fla. YMCA, 228 So. 3d 18 (Fla. 2017) on discovery served by a plaintiff upon a defendant seeking information concerning the financial relationship between the defense law firm and the compulsory medical examiner. The Fifth District Court of Appeal certified the following question:

> 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?

(R. 396).

This Court should answer the certified question in the affirmative. Florida law—including application of Worley—must be applied even-handedly to both civil plaintiffs and defendants. See generally Elkins v. Syken, 672 So. 2d 517, 519 (Fla. 1996) ("At the outset, it is important to recognize that the issues in this case affect plaintiffs and defendants equally."). Under the reasoning of the lower courts, the jury only hears of such financial bias on the defense side of the case, which creates a lop-sided and skewed picture for the jury and artificially inflates verdicts.

STATEMENT OF THE CASE AND FACTS

This case arises out of an automobile accident between Respondent Blackwelder and Petitioner Younkin. (R. 037). Blackwelder subsequently filed suit against Younkin alleging he sustained bodily injuries. (R. 036-038). Notably, the law firm retained to represent Younkin, the Law Firm of Robert J. Smith, and Younkin's insurance company, Allstate Insurance Company, are not parties to this action. (R. 036-038).

In the defense of the case, Younkin requested a compulsory medical examination of Respondent with Dr. Craig Jones, an orthopedic surgeon. (R. 051-053). Thereafter, the Respondent set Dr. Jones for deposition. (R. 086-087). The notice required Dr. Jones to bring thirty-one items, including the following:

> 1. Documents reflecting the total amount of money paid to Craig Jones, M.D. for medical reviews performed on plaintiffs' records, radiological studies or films (including MRI's) for 3 years prior to the date of accident in this case (September 13, 2016) through the present. Please list this by year.
>
> 2. Documents reflecting the total amount of money paid to Craig Jones, M.D. for medical reviews performed on plaintiffs' records, radiological studies or films (including MRI's) and on behalf of the Law Offices of Robert J. Smith for 3 years prior to the date of accident in this case (September 13, 2016) through the present. Please list this by year.
>
> 3. Documents reflecting the total amount of money paid to Craig Jones, M.D. for medical reviews performed on plaintiffs' records, radiological studies or films and on behalf of ALLSTATE INSURANCE COMPANY (and all related companies) for 3 years prior to the date of accident in this case

(September 13, 2016) through the present. Please list this by year.

4. The total number of medical reviews of radiological studies, films or records (including MRI's) performed on behalf of Defendants by Dr. Craig Jones, M. D. in the 3 years prior to the date of accident in this case (September 13, 2016) through the present. Please list this by year.

5. The total number of medical reviews of radiological studies, films or records (including MRI's) Craig Jones, M.D. performed on behalf of ALLSTATE INSURANCE COMPANY (and all related companies) in the 3 years prior to the date of accident in this case (September 13, 2016) through the present. Please list this by year.

6. The total amount of money billed by Dr. Craig Jones, M. D. for medical record, film and radiological study reviews (including MRI's) performed in the 3 years prior to the date of accident in this case through the present. Please list this by year.

7. The total number of times Craig Jones, M.D. was retained by the law firm representing the defendant(s) in this action, its agents, affiliates, employees or any person or entity acting on its behalf for 3 years prior to the date of accident in this case (September 13, 2016) through the present. Please list this by year.

8. The total number of times Craig Jones, M. D. was retained by the defense or defendant in a personal injury claim or lawsuit for 3 years prior to the date of accident in this case through the present. Please list this by year.

9. The total number of times Craig Jones, M. D. was retained by the Defendant's liability insurance company (and all related companies) or its agents, affiliates, employees or any person or entity acting on its behalf for 5 years prior to the date of accident in this case through the present. Please list this by year.

10. The total amount of money Craig Jones, M.D. was paid by the law firm representing the Defendant(s) in this case (or by the

person or entity paying said law firms litigation expenses) in the 3 years prior to the date of accident in this case through the present. Please list this by year.

11. The total amount of money Craig Jones, M. D. was paid by the Defendant(s) insurance company (and all related companies) or its agents, affiliates, employees or any person or entity acting on its behalf in the 3 years prior to the date of accident in this case through the present. Please list this by year.

12. The amount billed for services rendered in connection with any personal injury legal matter for 3 years prior to the date of accident in this case through the present. Please list this by year.

(R. 088-090). No discovery request was served directly on Younkin seeking this information.[1] (R. 33-111).

Younkin objected and filed a motion for protective order arguing it was improper to direct this discovery to Dr. Jones. (R. 099-106). Additionally, Younkin argued that, even if it were directed to the Petitioner, the trial court should preclude any discovery concerning the relationship between his attorney's law firm, his insurance company, and his compulsory medical examiner doctor because they are not parties to the action. (R. 99-106). Petitioner asserted any disclosure would be extremely prejudicial as it would imply insurance would be available, and any

[1] Petitioner Younkin served discovery upon Respondent seeking financial bias information as Respondent listed his treating physicians as expert witness. (R. 054-058; 064–085). However, Respondent, as a plaintiff in a personal injury action, refused to provide the information citing Worley. (R. 091–098).

disclosure would be unduly burdensome, prejudicial, and result in irreparable harm. (R. 99-106).

The trial court heard argument from the parties; nevertheless, it ordered the Petitioner Younkin to directly provide the information sought from Dr. Craig Jones before his deposition. (R. 107; 109-110). The order stated:

> 1. Defendant is to provide Plaintiff with the amount paid by Defendant's counsel and/or Defendant's counsel's law firm to Dr. Jones in the last three years. This information shall be disclosed to Plaintiff prior to the scheduled November 15, 2018 deposition of Dr. Jones.
>
> 2. Defendant is to provide Plaintiff with the total amount of times when Defendant's counsel and/or Defendant's counsel's law firm has retained Dr. Jones as an expert in the last three years. This information shall be disclosed to Plaintiff prior to the scheduled November 15, 2018 deposition of Dr. Jones.

(R. 109).

Younkin subsequently filed a petition for writ of certiorari in the Fifth District Court of Appeal. (R. 4-32). The Fifth District denied the petition. (R. 392-396). However, the Court found the Petitioner's argument that the law was not being applied even-handedly compelling and certified the following question of great importance:

> 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?

(R. 396). The Petitioner timely sought review in this Court.

SUMMARY OF ARGUMENT

This Court should answer the certified question in the affirmative. The reasoning in Worley should equally apply to both plaintiff and defense law firms. Those law firms are not parties to the litigation and their finances should not be the subject of cross-examination. In any event, both plaintiffs and defendants should be treated equally under the eyes of the law.

STANDARD OF REVIEW

Certified questions of great importance presenting a pure legal issue, such as this, are reviewed under a de novo standard. Haygood v. State, 109 So. 3d 735, 739 (Fla. 2013) ("The certified question presented by the district court is solely a legal question. Thus, this Court's review is de novo."); Macola v. Gov't Emples. Ins. Co., 953 So. 2d 451, 454 (Fla. 2006) (same).

ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE AND FIND THAT WORLEY APPLIES TO BOTH PLAINTIFFS AND DEFENDANTS.

A. History of Financial Bias Impeachment Discovery

In the 1990s, the Third District Court of Appeal issued an en banc decision in consolidated cases concerning the scope of discovery necessary to impeach an

opponent's expert witness. Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994). The cases involved subpoenas duces tecum issued to the compulsory medical examiner requesting all billing by the insurance company and defense law firm involved in the case and tax documentation from the expert showing his income. Id. at 541, 543. The Third District announced several guidelines limiting impeachment discovery:

1. The medical expert may be deposed either orally or by written deposition.

2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.

3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each?

4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.

5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.

6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.

7. The patient's privacy must be observed.

8. An expert may not be compelled to compile or produce non-existent documents.

Id. at 546.

This Court subsequently adopted these guidelines. Elkins v. Syken, 672 So. 2d 517, 518 (Fla. 1996). It explained:

> Pretrial discovery was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial. Discovery was never intended to be used as a tactical tool to harass an adversary in a manner that actually chills the availability of information by non-party witnesses; nor was it intended to make the discovery process so expensive that it could effectively deny access to information and witnesses or force parties to resolve their disputes unjustly. To allow discovery that is overly burdensome and that harasses, embarrasses, and annoys one's adversary would lead to a lack of public confidence in the credibility of the civil court process. The right to a jury trial in the constitution means nothing if the public has no faith in the process and if the cost and expense are so great that access is basically denied to all but the few who can afford it. 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.

Id. at 522. Notably, the Court emphasized on several occasions that its decision was not intended to favor either defendants or plaintiffs and was to protect both parties. Id. at 519, 522.

The above guidelines were swiftly incorporated into Florida Rule of Civil Procedure 1.280. In re Amendments to Fla. Rules of Civil Proc., 682 So. 2d 105, 114 (Fla. 1996). See also id. at 116, Committee Notes ("They are intended to avoid annoyance, embarrassment, and undue expense while still permitting the adverse party to obtain relevant information regarding the potential bias or interest of the expert witness.").

A few years later, this Court decided Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 994 (Fla. 1999), which analyzed "whether a party is prohibited from obtaining discovery from the opposing party regarding the extent of that party's relationship with an expert." Id. The Court found that this type of party-focused discovery was permissible. Id. at 997-99. The Court explained:

> The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing. A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship.

Id. The Court emphasized that this was information directly known by Allstate, a party to the litigation, and within its possession. Id. at 998-99.

Thereafter, courts across Florida drastically expanded this holding to apply to discovery directed to the financial relationship of non-parties to the litigation, such as law firms and insurance companies, related to experts and treating physicians on both sides. See, e.g., Vazquez v. Martinez, 175 So. 3d 372 (Fla. 5th DCA 2015) (defendant's attorneys and insurance company); Grabel v. Roura, 174 So. 3d 606; (Fla 3d 4th DCA 2015) (insurance company); Brown v. Mittelman, 152 So. 3d 602 (Fla. 4th DCA 2014) (plaintiff's attorneys); Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay, 133 So. 3d 1178 (Fla. 4th DCA 2014) (plaintiff's attorneys); Steinger Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co., 103 So. 3d 200 (Fla. 4th DCA 2012) (plaintiff's attorneys); Herrera v. Moustafa, 96 So. 3d 1020 (Fla 4th DCA 2012) (defendant's attorneys and insurance company); Morgan, Colling & Gilbert, P.A. v. Pope, 798 So. 2d 1, 3 (Fla. 2d DCA 2001) (plaintiff's attorneys); Springer v. West, 769 So 2d 1068 (Fla 5th DCA 2000) (defendant's attorneys and insurance company).

In 2017, this Court issued its decision in Worley v. Central Florida YMCA. 228 So. 3d 18 (Fla. 2017). The plaintiff slipped and fell in the parking lot of the local YMCA and filed suit. Id. at 20. The defendant made numerous attempts to discover information concerning the relationship between the plaintiff's law firm,

Morgan & Morgan, and the treating physicians. Id. at 20-21. The Court held that this type of discovery was impermissible and explained,

> In its decision approving the order, the Fifth District relied on district court decisions that have held that the financial relationship between a law firm and a plaintiff's treating physician is discoverable, pursuant to our decision in *Boecher*, if evidence of a referral relationship can be shown. *See Worley*, 163 So. 3d at 1246 (citing *Brown v. Mittelman*, 152 So. 3d 602 (Fla. 4th DCA 2014), and *Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200 (Fla. 4th DCA 2012)).
>
> We disagree that *Boecher* is applicable and, accordingly, disagree with the reasoning of these decisions. In *Boecher*, we considered whether a party could obtain discovery from the opposing party regarding the extent of that party's relationship with an expert. *Boecher*, 733 So. 2d at 994. In that case, the insured sought to discover from the insurance company the extent of its financial relationship with the expert witness that the insurance company intended to call at trial to dispute causation. *Id.* In concluding that the discovery was permissible, we recognized our earlier decision in *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). There, experts retained to provide compulsory medical examinations were ordered to produce expansive discovery of their private financial information, including tax returns. *Id.* at 520. We found such invasive and harassing discovery to be impermissible because it threatened to chill the willingness of experts to become involved in litigation. *Id.* at 522. In response to this concern, we adopted Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii) in order "to avoid annoyance, embarrassment, and undue expense" to experts. *Boecher*, 733 So. 2d at 998 (quoting Fla. R. Civ. P. 1.280 committee notes (1996)). However, because the discovery sought in *Boecher* was "directed to a party about the extent of that party's relationship with a particular expert," we found that the balance of interests shifted in favor of allowing the discovery. *Id.* at 997.
>
> Since then, district courts have extended *Boecher* to allow discovery of the financial relationship between law firms and treating physicians. *See Worley*, 163 So. 3d at 1246 ("In Florida, it is well established that the financial relationship between the law firm and the treating physician is not privileged and is relevant to show bias."); *Brown*, 152

> So. 3d at 604 ("The financial relationship between the treating doctor and the plaintiff's attorneys in present and past cases creates the potential for bias and discovery of such a relationship is permissible."); *Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay*, 133 So. 3d 1178 (Fla. 4th DCA 2014) ("A law firm's financial relationship with a doctor is discoverable on the issue of bias."); *Steinger*, 103 So. 3d at 205 ("[T]he defendant is entitled to discover information regarding the extent of the relationship between the law firm and the doctor."). However, contrary to these decisions, we find 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.
>
> 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. *Boecher*, 733 So. 2d at 994. In the instant case, YMCA is seeking discovery of the relationship between Morgan & Morgan, a non-party, and Worley's treating physicians.

Id. at 22-23 (emphasis added). 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."). The Court further analyzed whether such referral relationship is subject to the attorney-client privilege. Id. at 24-25.

B. Post-Worley Disparate Treatment

Judge James Edwards of the Fifth District Court of Appeal first questioned this disparate application in a footnote in State Farm Mut. Auto. Ins. Co. v. Knapp, 234 So. 3d 843, 845 n.1 (Fla. 5th DCA 2018). He wrote: "Worley seems, as a practical matter, to permit full Boecher discovery only when it is directed to personal injury defendants and their insurers, while shielding injured plaintiffs from having to disclose information about similar repetitious referral relationships that exist

between doctors and plaintiffs' counsel by invoking the attorney-client privilege." Id. While Judge Edwards observed this obvious disparity in the treatment of plaintiffs and defendants, the issue was not before the court. See id. at 843-50.

When the Fifth District had the issue before it, Judge Brian Lambert wrote:

> 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.

(R. 395).

Since that time, Florida's district courts have noted this disparate treatment and certified questions of great importance. See, e.g., Rosenthal v. Badillo, No. 4D19-1854 (Fla. 4th DCA July 3, 2019); Dodgen v. Grijalva, No. 4D19-1010, 2019 Fla. App. LEXIS 10060, at *5 (Fla. 4th DCA June 26, 2019) ("We agree that the discovery laws in this context have resulted in disparate and possibly unfair treatment of plaintiffs and defendants."); Salber v. Frye, 44 Fla. L. Weekly D1249 (Fla. 5th DCA May 10, 2019); Dhanraj v. Garcia, 44 Fla. L. Weekly D785 (Fla. 5th DCA March 22, 2019); Younkin v. Blackwelder, 44 Fla. L. Weekly D549 (Fla. 5th DCA February 22, 2019).

The disparate treatment is demonstrated by this very case. Younkin served

discovery attempting to learn the financial relationships at stake for the Respondent's disclosed expert witnesses; yet, the Respondent refused to produce the subject discovery citing Worley. (R. 054-058; 064–085; 091–098). Nevertheless, the trial court—without even a corresponding discovery request served upon Younkin—ordered him to provide financial information from the defense law firm. (R. 109).

Cases are steadily shifting their focus to collateral impeachment instead of focusing upon what should be at issue—a plaintiff's injury and damages. These discovery requests are becoming more frequent and more extensive with each case. Indeed, the subpoena duces tecum at issue requested thirty-one items from Dr. Jones. (R. 057-058).

Defense attorneys are spending substantial time addressing this discovery instead of defending the case. Defense attorneys are having to scour their files to obtain this information. This is increasing the cost of litigation. See generally Young v. Santos, 611 So. 2d 586, 587-88 (Fla. 4th DCA 1993) (Warner, J., concurring specially) ("Of late this court and other appellate courts have been bombarded with petitions for certiorari directed to similar issues of discovery of doctor's records regarding income from litigation sources. It appears that a great deal of time and expense is being directed towards such collateral issues during litigation. The trial bar needs to consider whether the expense is worth the

information gained. Overuse of the discovery process, increasing exponentially the cost of litigation, may end up destroying that process to the greater detriment of all litigants.").

This discovery, and ultimately the corresponding evidence, is artificially inflating verdicts and inflaming the emotions of jurors with ghost "financial referral relationships" as the defendants in these cases have no prior relationships with the compulsory medical examiners. That is the case here as Younkin has no relationship with Dr. Jones. Younkin's attorneys readily advised Respondent and the trial court of this fact.

This one-sided evidence creates a ruse or a legal fallacy. It has many consequences, including implications of insurance, financial wealth, and litigiousness. The result is neither fair nor just.

Furthermore, this extensive financial discovery unduly chills the use of compulsory medical examiners in the defense of cases. These doctors may refuse to perform examinations in fear of subjecting themselves to this form of discovery and cross-examination on their finances.

In any event, hearing impeachment testimony from only one side of the case destroys the credibility of that expert and completely undermines the defense of the case. It defeats the purpose of a compulsory medical examiner. GEICO Gen. Ins. Co. v. Berner, 971 So. 2d 929, 932 (Fla. 3d DCA 2007) ("The purpose of Rule 1.360

is to produce an even playing field at trial. In the usual personal injury case, one or more medical practitioners already will have examined and treated the claiming plaintiff."). The playing field is not level.

C. Plaintiffs and Defendants Should be Treated the Same

Fundamental fairness mandates that plaintiffs and defendants be treated equally with matters, such as discovery. It serves no rational basis to treat them differently. See generally Caldwell v. Mann, 26 So. 2d 788, 790 (Fla. 1946) ("The constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation."). What is good for the goose is good for gander. See Fridman v. Safeco Ins. Co., 185 So. 3d 1214, 1225 (Fla. 2016) ("Truly, this is an appropriate example of the classic adage 'what is good for the goose is good for the gander.'"); Sharp v. State, 221 So. 2d 217, 219 (Fla. 1st DCA 1969) ("Fair play and common sense dictates that what is sauce for the goose is sauce for the gander.").

Below, it was argued that Worley applies to protect only plaintiffs' law firms. Indeed, precedent should not operate to apply only to the party who makes the appellate challenge. Precedent cannot be used as both a shield and a sword. See generally Manor Care of Dunedin v. Keiser, 611 So. 2d 1305, 1307 (Fla. 2d DCA 1992); Stockham v. Stockham, 168 So. 2d 320, 322 (Fla. 1964). To allow precedent

to be used in this way would be absurd, would be impossible to apply, and would create ridiculous results.

For example, last year, this Court issued the decision, DeLisle v. Crane Co., 258 So. 3d 1219 (Fla. 2018), and held that Frye is the expert standard in Florida.[2] Under Respondent's and the lower court's reasoning, Courts would have to read that case in a limited manner so as to apply Frye to only the plaintiff's side of the case since the plaintiff's expert witness was at issue. This would mean Daubert was still the rule as to defense experts until it was challenged in court. Surely, this cannot be how precedent applies in Florida.

Again, the law must treat the plaintiff and defendant equally. So, if defendants are not entitled to this discovery, then plaintiffs are not either. Indeed, if a plaintiff's referral relationship truly is privileged, then wouldn't a defendant's referral relationship equally be? See Bellezza v. Menendez, 44 Fla. L. Weekly D1238, 2019 Fla. App. LEXIS 7152 at *11 (Fla. 4th DCA May 8, 2019) ("Such evidence from the defendant law firm is similarly protected by attorney client privilege"). Similarly, if plaintiffs are entitled to this discovery, then defendants must be as well. The law cannot exist as it currently is according to the lower courts.

[2] This Court recently addressed the Daubert amendment. In re Amendments to the Fla. Evidence Code, 44 Fla. L. Weekly S170 (Fla. May 23, 2019).

For this reason, Worley[3] implicitly overruled the defense-based cases which expanded the ruling of Boecher to non-parties, such as Vazquez, Grabel, Herrera, and Springer. See generally State v. DiGuilio, 491 So. 2d 1129, 1134 (Fla. 1986) ("Although we did not explicitly say so, it is also clear that *Rowe*, *Way*, *Trafficante* and *Gordon* were implicitly overruled by *State v. Marshall*, 476 So. 2d 150 (Fla. 1985), wherein we adopted the harmless error rule for comments on a defendant's failure to testify."); Gonzalez v. State, 392 So. 2d 334, 335 (Fla. 3d DCA 1981) ("The State relies on a severely eroded, if not implicitly overruled, line of cases, which it asks us to resurrect."); City of Miami v. Arostegui, 616 So. 2d 1117, 1118 (Fla. 1st DCA 1993) ("The City overlooks that *Payne* was implicitly overruled by the Florida Supreme Court in *State v. McKinnon*, 540 So. 2d 111 (Fla. 1989).").

What is clear is that the law has gone away from this Court's pronouncement in Elkins: that these issues are intended to protect both plaintiffs and defendants and not favor one party or the other. Elkins, 672 So. 2d at 519, 522. This Court should return to that intent and equal the playing field.

CONCLUSION

This Court should answer the certified question in the affirmative. The reasoning in Worley should equally apply to both plaintiffs and defendants.

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[3] Worley expressly overruled the plaintiff-based cases in the majority opinion. See, e.g., Brown, 152 So. 3d at 602; Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P., 133 So. 3d at 1178; Steinger Iscoe & Greene, P.A., 103 So. 3d at 200.

WHEREFORE, Petitioner STEVEN YOUNKIN respectfully requests this Court to answer the certified question in the affirmative, reverse the Fifth District's decision and remand with instructions for the Fifth District to issue a writ of certiorari quashing the subject order.

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 10th day of July, 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