IN THE FLORIDA SUPREME COURT

Case No.: SC19-385

STEVEN YOUNKIN,

Petitioner,

v.

NATHAN BLACKWELDER,

Respondent

_____/

AMICUS BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER STEVEN YOUNKIN

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association (FDLA) in support of Petitioner Steven Younkin.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of defense attorneys formed in 1967, and it has over 1,000 members. The goal of the FDLA is to "support and work for the improvement of the adversary system of jurisprudence in our courts." The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort and insurance issues.

An issue on appeal is a certified question of great public importance from the Fifth District Court of Appeal:

> 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?

Younkin v. Blackwelder, No. 5D18-3548, 2019 Fla. App. LEXIS 2612 *1, 44 Fla. L.

Weekly D 549 (Fla. 5th DCA Feb. 22, 2019). In certifying the question, the Fifth District opined that Mr. Younkin raised a "compelling argument that the law in this area is not being applied in an even-handed manner to all litigants," particularly defendants, where defense law firms that are not a party to the litigation are being required to disclose certain financial information that plaintiff law firms are not. *Id* at *5. Many FDLA members represent defendants and insurance companies in personal injury cases. The FDLA is uniquely situated to provide this Court with input on the time and expense of this one-sided form of discovery, as well as its impact on litigation and the insurance industry.

SUMMARY OF ARGUMENT

The courts of this state have interpreted this Court's decision in *Worley v. Central Florida YMCA*, 228 So. 3d 18 (Fla. 2017), to place a discovery burden on defendants that has not been commensurately placed upon plaintiffs. The time and expense of the potentially burdensome discovery that is only being required of defendants changes the landscape of the litigation in a myriad of ways. Because justice demands a level playing field between parties in legal proceedings whenever practicable, the Court should not permit this dichotomy to continue.

ARGUMENT

I. INTENDED OR NOT, LOWER COURTS' INTERPRETATION OF *WORLEY*, *BOECHER* AND THEIR PRODGINEY HAS CREATED AN UNEVEN PLAYING FIELD IN FAVOR OF PLAINTIFFS AND AGAINST DEFENDANTS WITH AN ONEROUS BURDER PLACED

ON DEFENSE ATTORNEYS, THEIR CLIENTS, AND THEIR CLIENTS' INSURERS.

As the Third District Court of Appeal has stated, "[t]he 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 Rule simply allows the defense the opportunity to respond with its own experts if it so desires." *GEICO Gen. Ins. Co. v. Berne*r, 971 So. 2d 929, 934 (Fla. 3d DCA 2007). That level playing field, however, has recently been made lopsided by the courts of this state, as noted by the Fifth District in *Younkin*. 2019 Fla. App. LEXIS 2612 at *5. The impacts of the related expenditures of time, monetary expense, and the overall disparity between the parties must be considered by the Court in addressing how expert discovery should be handled in the trial courts.

With its pronouncement in *Worley v. Central Florida YMCA*, 228 So. 3d 18 (Fla. 2017), that producing information related to the financial or business relationship between a witness and plaintiff's attorney was too burdensome and invasive, this Court—inadvertently or not—created a fundamental unfairness in the way opposing parties are forced to respond to discovery regarding witnesses they will tender at risk. It presumably overlooked equally burdensome and intrusive discovery asked of defense witnesses, creating a prohibition on requesting bias evidence from Plaintiffs while compelling it against Defendants. Known as "Boecher" discovery from the *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993

(Fla. 1999), case, experts tendered by defendants are routinely asked to produce information regarding the number of times he or she has testified on behalf of defendants in general, if he or she has ever testified for another defendant represented by the defense attorney and how much money the expert has earned testifying in cases as an expert.

Members of the Florida Defense Lawyers Association were asked to participate in a survey centered on discovery of the financial relationship between the defense firm and the defense's expert(s). 78% of survey responders submitted that they have been required to produce information concerning the financial relationship between a defendant's compulsory medical examiner (or other expert) and their law firm. Similarly, 60% (61.5%) of survey responders confirm that the defense expert has been required to identify all cases in which he or she testified by deposition as an expert for the law firm or insurer, and was further required to include copies of deposition transcripts, names and contact information for attorneys in attendance, and names of court reporters.

The Court's analysis, however, overlooks a defense's burden to provide Boecher discovery related to any potential relationship between the defense firm and defense experts.

Compiling and producing this information that is typically requested by plaintiffs through Boecher discovery adds both a financial and time burden on the

defense. Nonetheless, the defense is expected to produce this type of information routinely, while inquiry into plaintiffs' relationships with their expert physicians is limited. These requests create a layer of expense that may force parties to settle or create additional discovery burdens that increase costs and severity of claims. In some instances, completing this discovery was reported to cost in excess of $100,000.00.

The Court in *Worley* goes further to comment that allowing discovery into the possible relationship between a plaintiff's law firm and plaintiff's treating physician would create a "chilling effect" such that doctors may refuse to treat patients out of fear of future litigation and the costs associated with litigation. *Worley*, 228 So. 3d at 26. The same concerns must apply to experts testifying on behalf of defendants. If physicians who choose to interject themselves in tort cases by accepting letters of protection and taking referrals from Plaintiffs' lawyers may be discouraged from participating in a vital function in litigation, the same must be assumed about highly qualified and trained professionals who are asked to provide their opinions and expert perspective on behalf of defendants. To suggest that experts who give opinion and testimony on behalf of Plaintiffs regarding causation and damages should be treated differently than experts hired by defendants to testify as to those same matters, flies in the face of fundamental principles of fair and impartial treatment of parties in litigation and right to equal protection in our Federal Constitution. For

example, 81% (80.7%) of survey responders said that their experts have been required to state the amount of money he or she had been paid by the defense law firm or insurer for a specified period of years. Likewise, 83% (82.6%) of responders said that they themselves have been required to provide the amount of times their firm or insurer has used the expert in a certain time period.

The unequal and indeed unfair treatment between the witnesses tendered by opposite parties significantly impacts the presentation of evidence at trial. While *Worley* masks the financial interest of Plaintiff's witnesses as to causation and damages possess, the defendants' witnesses are subject to rigorous cross examination on the relationship or financial interest they purportedly have for being asked by a defendant to provide their candid assessment of the case. This dichotomy of discovery requirements creates an unjust imbalance of positions between the plaintiff and defendant at trial and presents the defense's experts as biased and financially motivated. Defendants are precluded by *Worley* from showing the depths of the financial relationship between the plaintiff's doctors and the plaintiff and his or her attorneys, while the plaintiff is able to present specific and exhaustive evidence on the relationship between the defendants and their experts.

"Even if Life isn't fair, judges should endeavor, when the opportunity presents itself and it is legitimately within [their] means to do so, to assure that law is. This means that all parties to any litigation should compete on a level playing field unless

inclines are placed on the field based on some recognized legal theory and even then the incline should be only as steep as justified by the legal theory authorizing it." *Torres v. Matsushita Elec. Corp.*, 762 So. 2d 1014, 1018 (Fla. 5th DCA 2000), Harris, J. concurring. Here, there is no stated legal theory—other than a court's truth-seeking function and fairness of the trial—being applied to permit the discovery at issue. *Younkin*, 2019 Fla. App. LEXIS 2612 at *5. If truth-seeking and fairness of the trial are the ultimate concerns, then courts should endeavor to permit the same discovery from plaintiffs or decline to permit the invasive discovery at all.

Just as the Court was concerned in 2001 that the shift in certain litigation expenses that were not taxed as costs to ones that should or may be taxed would "simply make the playing field much more expensive for all involved," so too it should have a similar concern here. *Amendments to Uniform Guidelines for Taxation of Costs*, 794 So. 2d 1247, 1247-48 (Fla. 2001). Here, however, the concern is one more insidious: the playing field, at a courts' discretion, is now more expensive and burdensome for only one party. That should not be so.

Where a court permits such an obvious advantage to one party over another, particularly in such a critical area as expert opinions, the results can be devastating where experts may self-select out of providing opinions for defendants because they find the burdens placed on them by the courts too onerous. Although the case of *Bryant v. Buerman*, 739 So. 2d 710, 713 (Fla. 4th DCA 1999), does not deal with

discovery, it does show the importance of expert opinions. In *Bryant*, the Fourth District Court of Appeal held that the trial court erred in excluding an expert's testimony on the issue of speed where it "could have aided the jury in its search for the truth, particularly under the circumstances of this case, where such testimony was not merely cumulative but critical in resolving the factual issues and 'leveling the playing field' imbalanced by admission of appellee's testimony that his speed estimate was based upon his 'expertise' and thirty years of experience as a 'professional' body shop mechanic." 739 So. 2d at 713. Courts therefore noted the impact of perceived expert opinions and the weight that juries give them. That weight is unduly undermined for defendants with the current state of case law interpreting *Boecher* and its progeny, where plaintiffs can conceivably bury defendants and their experts, insurers, and lawyers in discovery to which plaintiffs, their experts, insurers, and lawyers are not subjected. Importantly, that discovery will only be used to impeach the defendants' experts—a tool that is denied to the defense.

The discovery being granted to plaintiffs is not, like some legislation or other legal premise, to level the playing field. *See, e.g., Ivey v. Allstate Ins. Co*., 774 So. 2d 679, 684 (Fla. 2000) (Section 627.428, Florida Statutes, fee shifting provision was designed to "level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people

will not have the necessary means to seek redress in the courts;" in that circumstance, "[i]t is the incorrect denial of benefits, not the presence of some sinister concept of 'wrongfulness,' that generates the basic entitlement to the fees if such denial is incorrect"); *Bell v. U.S.B. Acquisition Co.*, 734 So. 2d 403, 411 (Fla. 1999) (stating the primary rationale for allowing a contingency risk multiplier as to provide access to competent counsel for persons otherwise unable to afford it—the availability of a multiplier levels the playing field between the parties with unequal abilities to secure legal representation); *Anderson v. City of St. Pete Beach*, 161 So. 3d 548, 552 (Fla. 2d DCA 2014) (Stating section 286.011(8), Florida Statutes, created an exemption to the Sunshine Law for meetings between a public body and its attorney for the "purpose of leveling the playing field in litigation between public bodies and their private adversaries. The exemption addressed a long-standing complaint by public bodies that discussing settlement negotiations in public meetings would divulge to the adversary the position or 'bottom line' of the public body and thus give the adversary an unfair advantage that could be used to secure unmerited or excessive judgments or settlements against the public"). Rather, the opposite occurs in each and every case where discovery is ordered from the defendant with regard to an expert's relationship to the defendant's lawyers and insurer but not from the plaintiff with regard to the same relationships.

CONCLUSION

For the foregoing reasons, with a focus on evening the current disparate playing field between Plaintiffs and Defendants, the Court should answer the certified question in the affirmative, reverse the Fifth District Court of Appeal's decision, and remand with instructions for that court to issue a writ of certiorari quashing the trial court's discovery order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief was served by ePortal and/or e-mail on July 22, 2019 to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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