IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STEVEN YOUNKIN,

Petitioner

v.

NATHAN BLACKWELDER,

Respondent.
_____/

CASE NO.: SC19-385

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

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Mark A. Nation, Esquire
Florida Bar No.: 968560
Paul W. Pritchard, Esquire
Florida Bar No.: 133371
The Nation Law Firm
570 Crown Oak Centre Drive
Longwood, FL 32750
Phone: (407) 339-1104
Fax: (407) 339-1118
bhirt@nationlaw.com
mnation@nationlaw.com
ppritchard@nationlaw.com

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STATEMENT OF THE CASE AND FACTS

The question before this Court is whether the attorney-client privilege and public policy rationale applied to treating physicians in *Worley v. Cent. Fla. YMCA*, 228 So. 3d 18 (Fla. 2017) should be extended to experts who are retained solely for litigation. Petitioner favors expansion of *Worley* to retained experts. Respondent states the analysis and rationale in *Worley* do not apply to retained experts, and *Worley* should not be expanded to them.

Three members of this Court dissented in *Worley*, and only one member of the *Worley* majority still sits on this Court. Thus, it seems likely that *Worley* would have been decided differently had it been decided by the current Court. But whether *Worley* should have had a different outcome, or whether it should be overruled, is not before this Court. Instead, Petitioner invites this Court to *extend*—not overrule—*Worley's* rationale and apply it to a different set of circumstances. Given the current Justices' disagreement with *Worley's* rationale, this Court should decline this invitation. In a later case, this Court may decide to re-address *Worley*. But if this Court extends *Worley* as proposed by Petitioner, any door for reconsidering *Worley* will be slammed shut.

This case arises out of a motor vehicle collision [R. 36-38]. Petitioner disputes causation and the extent of Respondent's injuries, damages, and losses [R. 39-41]. The Trial Court set this case for trial on its December 10, 2018, docket [R.

42]. Respondent disclosed his treating physicians on his witness list [R. 54-58]. In response to the disclosure, Petitioner served numerous interrogatories upon Respondent in an attempt to discover the treating physicians' financial bias and referral relationship with Respondent's attorneys, law firm, and "predecessor law firms" [R. 64-85]. This discovery violated the scope of discovery which had already been established by this Court in *Worley*, and Respondent objected on those grounds [R. 91-98]. That objection was not set for a hearing or ruled upon, and those interrogatories are not at issue in this Petition.

Pursuant to Fla. R. Civ. P. 1.360, Petitioner asked that Respondent undergo a Compulsory Medical Examination ("CME") with Craig Jones, M.D. [R. 51-53]. Dr. Jones never treated Respondent for injuries related to the crash, and is not a fact witness. Dr. Jones was only hired by the defense after the trial was set. Dr. Jones was hired for this litigation, to perform a Rule 1.360 CME of Respondent and provide expert testimony to dispute the treating physicians' opinions as to causation and Respondent's injuries and damages.

Respondent's trial counsel served a notice of taking Dr. Jones's deposition *duces tecum*. The *duces tecum* schedule asked Dr. Jones to produce 31 things at his deposition [R. 86-90]. The *duces tecum* schedule included 14 requests related to

Dr. Jones's expert witness CME work in this case and others [R. 86-90].[1] However, just as Petitioner's discovery requests exceeded the allowable scope established by *Worley*, Respondent's subpoena did not comply with *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), and Fla. R. Civ. P. 1.280. The subpoena is not at issue in this case, because the Trial Court effectively quashed it upon Petitioner's objection.

Petitioner objected to the notice (including the subpoena) and moved for a protective order [R. 99-101]. The Trial Court heard Petitioner's motion and its Court Minutes note, in pertinent part:

> The Court orders the Defendant to provide updated numbers to Plaintiff's counsel prior to the deposition of Dr. Jones, for a three year period and the number of times he has been retained.

[R. 107]

The Trial Court entered a very narrow written order regarding the discovery at issue in this Petition (the "Order") [R. 109-10]. The Order effectively quashed the 31 item subpoena to Dr. Jones and <u>did not</u> require Dr. Jones to produce anything at his deposition, consistent with Rule 1.280 and *Elkins*. Instead, it only

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[1] Petitioner sent approximately 14 requests for similar information regarding Respondent's treating physician Daniel Spurrier, M.D., the same for similar information regarding treating physician David Scoppa, M.D., as well as 7 requests for similar information regarding Central Florida Medical & Chiropractic Center, and 7 requests for similar information regarding Sterling Medical Group.

required Petitioner to provide certain, very limited information about the financial relationship between Petitioner's agent (his law firm) and its hand-picked expert witness. The discovery ordered is completely consistent with this Court's opinion in *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999) and its progeny. The Order also directed Respondent to timely provide his impeachment materials of Dr. Jones in compliance with *Northrup v. Acken*, 865 So. 2d 1267 (Fla. 2004). The Order states, in pertinent part:

> 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.
>
> 3. If the Plaintiff intends to use impeachment depositions during the cross examination of Dr. Jones, the Plaintiff shall be required to comply with the precedent set forth in *Northrup v. Acken*, 865 So. 2d 1267 (Fla. 2004) and shall turn over all documents reasonably expected or intended to be used for impeachment purposes.

[R. 109]. Petitioner's underlying law firm, The Law Office of Robert J. Smith, is Allstate's staff counsel office, which is wholly owned by Allstate Insurance Company. [R. 346].

Petitioner filed his Petition for Writ of Certiorari seeking to overturn the Order. In part, Petitioner argued that *Worley* prevented financial bias discovery between a law firm and its hand-picked testifying expert witness. The Fifth District determined *Worley* did not prevent the limited financial bias discovery of Dr. Jones and denied the Petition [R. 392-96]. The Fifth District held "the instant order is consistent with, rather than a departure from, the essential requirements of law" [R. 394]. Nonetheless, the Fifth District certified the following question to this Court as one of great public 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].

This Court granted jurisdiction.

SUMMARY OF THE ARGUMENT

As a preliminary matter, Respondent believes the Court improvidently granted jurisdiction, and should dismiss its jurisdiction over this case. The certified question asks whether the analysis and decision in *Worley* should be applied to expert witnesses who are retained for the purposes of litigation. The *Worley* analysis and decision cannot be applied to retained experts. The very rationale

which Petitioner seeks to "extend" was explicitly based on the differences between treating physicians and retained experts. With regard to allowable financial bias discovery and impeachment, *Worley* set a bright-line distinction between treating doctors and retained experts. *Worley* disapproved those cases that treated them the same. Therefore, extending the analysis in *Worley* to retained experts is not logically possible as the analysis and decision in *Worley* do not apply to retained litigation experts. Further, to do so would overturn decades of cases which specifically allow the discovery ordered in this case.

In the event this Court retains jurisdiction, it should answer the certified question in the negative. There is no disparate treatment of the parties. It is the witnesses who are treated differently, because—as this Court and the District Courts have recognized in *Worley* and several other cases both before and after *Worley*—treating doctors and retained experts are indeed different. This Court has repeatedly emphasized the distinction between (1) physicians who gain their factual knowledge about the case solely from treating the patient for his injuries; and (2) retained experts who intentionally inject themselves into the case to comment upon and criticize the factual findings of the treating physicians. Financial bias discovery and impeachment is tailored for each witness's particular role in the case. The Fifth District's certified question and Petitioner's argument fail to account for these well-recognized differences.

Worley was based on attorney client privileged communications and a balancing test regarding the chilling effect certain discovery would have on treating physicians. Public policy dictates that emergency room physicians, trauma surgeons, and other treaters who inevitably see accident injury victims must not be discouraged from treating patients. Compelling certain financial bias discovery from such treaters would have a chilling effect on doctors who may refuse to treat patients for fear of becoming embroiled in the litigation themselves. *Worley* at 26. Some on the Court may disagree with that conclusion. But, that disagreement should cause the Court to shrink from extending *Worley*, not seek to extend it to retained experts. There is clearly no chilling effect on retained experts. Retained experts aren't discouraged by potentially becoming embroiled in litigation, they have voluntarily injected themselves into litigation to critique the treating doctors.

This is obvious when one considers the discovery actually ordered in this case. Dr. Jones wasn't order to produce anything. The Trial Court simply, and consistent with well-established law, ordered Petitioner to disclose how much his law firm paid Dr. Jones over the preceding three years. None of the concerns listed by Petitioner or Amicus are implicated by the discrete discovery ordered in this case. There can simply be no chilling effect.

Because of the public policy concerns, *Worley* decided that treating physicians should not be subjected to the same financial bias impeachment as

retained expert witnesses. Instead, treating physicians may be specially impeached by showing the treater's direct financial interest in the outcome of the case, the treater's medical practice being based on such financial interest in litigation, and the treater's potentially inflated billing for medical treatment. *Worley* at 23-24.

The consequence of Petitioner's argument is that extending *Worley* to retained experts would effectively eliminate almost all meaningful financial bias impeachment of retained experts. Retained experts don't have LOPs and don't have outstanding medical bills to be paid. What Petitioner is requesting is that their retained experts also not be impeached with the cumulative amounts paid to them by the party's law firm over time. Such information is clearly relevant, and not protected from discovery by any rule or case.

Petitioner wants *Worley* to be expanded, arguing that the way it is being applied, the parties are treated differently. There is no disparate treatment of the parties. Witnesses are treated differently because they are different. However, applying *Worley*'s analysis and decision to retained experts would result in the disparate treatment Petitioner claims it is seeking to avoid, and would overturn decades of settled law that allows the discovery ordered in this case.

STANDARD OF REVIEW

The certified question does not involve a factual dispute, therefore the standard of review is de novo. *Andrews v. State*, 243 So. 3d 899, 901 at n.2 (Fla.

2018) ("Because the certified question is solely a legal issue, our review is de novo."); *Holmes Reg'l Med. Ctr., Inc. v. Allstate Ins. Co.*, 225 So. 3d 780, 783 (Fla. 2017), *as corrected* (Sept. 7, 2017) ("Because the certified question presents a pure issue of law, the standard of review is de novo.").

LAW AND ARGUMENT

Worley's analysis and decision are based on: 1) public policy concerning the chilling effect of discovery on treating doctors; and 2) attorney-client privilege. Neither of these considerations apply to retained expert witnesses.

Worley was clear: certain discovery would discourage treating physicians from treating patients, and would limit injured parties' access to the courts:

> We are concerned that this type of discovery would have a chilling effect on doctors who may refuse to treat patients who could end up in litigation out of fear of becoming embroiled in the litigation themselves. Moreover, we worry that discovery orders such as the one in this case will inflate the costs of litigation to the point that some plaintiffs will be denied access to the courts, as attorneys will no longer be willing to advance these types of costs.

Worley at 26. Retained expert witnesses do not refuse their services because of potential litigation and the fear of being embroiled in it themselves. Retained witnesses do exactly the opposite.

I. This Court's Distinction Between Treating Physicians and Hand-Chosen Expert Witnesses Who Intentionally Participate in Litigation.

Petitioner ignores the fundamental distinction between the two categories of witnesses. There is a stark difference between physicians who treat someone after

an injury "attempting to make [their] patient[s] well", and doctors who purposefully inject themselves into litigation for personal financial reasons to "opin[e] about the performance of another." *Worley* at 23, alterations in original.

Rather than a fear of being embroiled in potential litigation, some expert witnesses are so invested in the litigation process that they no longer participate in patients' treatment. Amicus Dr. Michael Foley is one such physician who only provides expert witness testimony in litigation. *See* "Amended Amicus Curiae Brief Submitted on Behalf of Drs. Michael Foley and John Shim in Support of Petitioner Steven Younkin" at page 1 ("Dr. Foley is now providing **only** expert testimony…." Emphasis added.).

In *Worley*, this Court distinguished between the roles of treating physicians and expert witnesses, because the distinction was critical to the type of financial bias impeachment allowed:

> …*Boecher* dealt with the discovery of experts who had been hired for the purposes of litigation. Treating physicians, however, "[do] not acquire [their] expert knowledge for the purpose of litigation, but rather simply in the course of attempting to make [their] patient[s] well." *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981). Moreover, they "typically testif[y] ... concerning [their] ... own medical performance on a particular occasion and [do] not opin [e] about the performance of another." *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 186 (Fla. 3d DCA 2005).

Worley at 23, alterations in original.

More recently, in *Gutierrez v. Vargas*, 239 So. 3d 615 (Fla. 2018), this Court reaffirmed and emphasized the distinction between experts and treaters:

> While an expert witness assists the jury to understand the facts, **a treating physician testifies as a fact witness "concerning his or her own medical performance on a particular occasion and is not opining about the medical performance of another**." *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 186 (Fla. 3d DCA 2005). This necessarily involves testifying with regard to the exercise of the treating physician's specialized medical knowledge as applied to other facts of the case, namely the plaintiff's symptoms. **A treating physician is a fact witness, and testifies to past facts based on personal knowledge**. Those facts involve a technical matter about which the jury lacks basic knowledge, *see Bowling*, 81 So. 3d at 540–41, but they are facts nonetheless. The treating physician's perception of the plaintiff's symptoms, their diagnostic opinion, and their recommendation of a particular treatment are all facts in issue. **An expert witness testifies with the benefit of hindsight, whereas a treating physician does not**. *See Ryder Truck Rental, Inc. v. Perez*, 715 So. 2d 289, 290–91 (Fla. 3d DCA 1998) ("**Treating physicians do not acquire their 'expert knowledge for the purpose of litigation but rather simply in the course of attempting to make [their] patient well**.' ") (alteration in original) (quoting *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981))).
>
> Treating physicians are limited to their medical opinions as they existed at the time they were treating the plaintiff, while **an expert may form new opinions in order to help the trier of fact decide the case**. *See Tetrault v. Fairchild*, 799 So. 2d 226, 227–28 (Fla. 5th DCA 2001) (ordering a new trial where treating physician gave opinion testimony based on MRIs he had not seen during treatment). Although a treating physician may possess the same qualifications as an expert witness, treating physicians form medical opinions in the course of rendering treatment and may therefore testify to the fact that they formed those opinions, and explain why they did so, provided such testimony is otherwise admissible. *See Ryder*, 715 So.2d at 290–91.

Gutierrez at 622-23,[2] emphasis added.

This Court also explained that it is the nature of the witness's testimony—not the party for whom the witness testifies—that determines whether the physician is a treater (fact witness) or expert for litigation. Based upon the witness's role, a fact witness can become an expert witness for litigation:

> If a treating physician testified to a medical opinion formed for the purpose of litigation rather than treatment, then the mere fact that the physician once treated the plaintiff would not prevent that doctor from being considered an expert witness. *See Fairchild*, 799 So. 2d at 228 (treating physician was expert witness because he "was called by the plaintiff not to testify to his 'care and treatment' of plaintiff but to render an opinion as a neuroradiologist based upon his review of MRIs supplied to him in plaintiff's counsel's office"). Again, **the determination turns on the role played by the witness: if the treating physician gives a medical opinion formed during the course and scope of treatment in fulfillment of their obligation as a physician, then the physician is a fact witness, albeit a highly qualified one. If, however, the treating physician gives an opinion formed based on later review of medical records for the purpose of assisting a jury to evaluate the facts in controversy, the physician acts as an expert witness, and should be considered as such**. *See Suarez*, 844 So. 2d at 771 (holding it is improper for a treating physician to "serve[ ] as a conduit to place specialist testimony before the jury, or offer[ ] medical opinions based on specialist reports" when testifying as a lay witness rather than an expert).

Guiterrez at 624, emphasis added.

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[2] *Gutierrez* was concerned with the cumulative nature of treating physician and expert witness testimony, and was not related to financial bias.

This fundamental difference between treating physicians and retained expert witnesses points out the flaw in Petitioner and the Fifth District's premise that "the law in this area is not being applied in an even-handed manner to all litigants" [R. 396]. As it stands after *Worley*, discovery regarding the bias of treating physicians and expert witnesses is being applied to the parties in an even-handed manner.

II. The Established, Permissible Financial Bias Discovery for Treating Physicians and Expert Witnesses.

Section 90.608(2), Fla. Stat. provides: "Any party, including the party calling the witness, may attack the credibility of a witness by… [s]howing the witness is biased." Florida law has long recognized that among the most fundamental ways a party can show a witness is biased is by disclosing a financial relationship between a party and a witness. *Pandula v. Fonseca*, 145 Fla. 395, 199 So. 358, 360 (Fla. 1940) ("The cross-examiner was permitted to bring out the fact that money had come to the witness, from which the jury might have inferred that it would likely have a biassing effect upon his testimony").

A. Financial Bias Discovery and Impeachment of Treating Physicians.

In *Worley*, this Court allowed certain financial bias discovery and impeachment of treating physicians which would not chill their involvement in litigation, nor violate the attorney-client privilege. The Court distinguished *Boecher*, because it applies to retained expert witnesses.

Worley set forth the parameters of financial bias discovery impeachment for treating physicians:

> We recognize that the evidence code allows a party to attack a witness's credibility based on bias. § 90.608(2), Fla. Stat. (2015). We also agree that "a treating physician, like any other witness, is subject to impeachment based on bias." *Steinger*, 103 So. 3d at 203. **However, bias on the part of the treating physician can be established by providing evidence of a letter of protection (LOP), which may demonstrate that the physician has an interest in the outcome of the litigation**. In the instant case, Worley was treated by all of her specialists pursuant to letters of protection. **Bias may also be established by providing evidence that the physician's practice was based entirely on patients treated pursuant to LOPs, as was found in the instant case**. Specifically, a Sea Spine employee testified during depositions that at the time of Worley's treatment, its entire practice was based on patients treated pursuant to LOPs. **Additionally, medical bills that are higher than normal can be presented to dispute the physician's testimony regarding the necessity of treatment and the appropriate amount of damages**.
>
> Allowing further discovery into a possible relationship between the physician and the plaintiff's law firm would only serve to uncover evidence that, even if relevant, would require the production of communications and materials that are protected by attorney-client privilege

Worley at 23-24, footnote omitted, emphasis added.

This financial bias discovery achieves the goal of demonstrating treating physicians' financial bias in litigated cases, just as *Boecher* discovery does for retained experts who have an extensive financial relationship with a party or the party's agents. For example, an emergency room doctor or trauma surgeon will not likely have an LOP, or practice built on LOPs, and there will be little financial bias

impeachment. The same goes for an expert witness who does not have an extensive financial relationship with a party's agents, there will be little financial bias impeachment. However, a clinic specializing in soft tissue motor vehicle injuries may treated exclusively on LOPs and will not get paid unless the plaintiff prevails in litigation. Potential bias would be readily apparent, just as it would for an expert who is frequently used and extensively paid by a party's agents. Current application of *Worley* and *Boecher* works to show each witness's potential bias.

Worley financial bias discovery and impeachment could never "apply to" a defendant's expert witness, as the Fifth District asked [R. 396]. So, extending *Worley* to retained experts makes no sense. The retained expert witness did not treat, did not treat under an LOP, would not have a financial interest in the outcome of the case, and would never have medical bills for treatment. The only meaningful financial bias discovery available for expert witnesses revolves around how much money the retaining party or its agents have paid the testifying expert in the past. Extending *Worley* to expert witnesses would eliminate the only type of meaningful financial bias discovery available.

The other rationale in *Worley* was attorney client privilege. Discovery into the relationship between a party's agents and an expert witness would never implicate attorney-client privilege. It is important to note, in the Initial Brief at page 17, Petitioner argues a defendant's law firm referral relationship to an expert

witness should be equally protected by an attorney-client privilege, quoting *Bellezza v. Menendez*, 273 So. 3d 11, 16 (Fla. 4th DCA 2019) ("Such evidence from the defendant law firm is similarly protected by attorney-client privilege."). *Bellezza* does not say that a defendant's law firm's relationship with its retained expert is protected. Petitioner presents the case and quote entirely out of context. In *Bellezza*, the court was discussing the defendant law firm's own referral relationship with *treating* physicians, not retained expert witnesses:

> The plaintiff next argues the trial court erred in excluding evidence that the **defendant law firm had made similar referrals and had similar financial relationships with the treating physicians**. We agree, but because we 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 is similarly protected by attorney-client privilege.
>
> The central theme of the defendants' case was the plaintiff's attorney's financial relationship with the treating physicians. It was raised in opening statements, throughout testimony, and in closing argument. Because we now hold *Worley* prohibits the discovery and admission of attorney-client privileged information concerning the relationship between the plaintiff's attorney and the treating physicians, and the financial information concerning that relationship, we reverse and remand the case for a new trial.

Bellezza at 16, emphasis added. *Bellezza* actually proves the parties are being treated equally after *Worley*, not differently.

B. Financial Bias Discovery and Impeachment of Expert Witnesses

In *Boecher*, this Court addressed discovery into retained expert witnesses, holding that a jury is entitled to know of the financial relationship because it is "directly relevant" and "indisputably relevant and meaningful." *Boecher* holds:

> The information sought here would reveal how often the expert testified on Allstate's behalf and **how much money the expert made from its relationship** with Allstate. The information sought in this case does not just lead to the discovery of admissible information. The information requested is **directly relevant** to a party's efforts to demonstrate to the jury the witness's bias.
>
> 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.
>
> **Any limitation on this inquiry has the potential for thwarting the truth-seeking function of the trial process**. As we observed in *Krawzak*, we take "a strong stand against charades in trials." 675 So. 2d at 118. **To limit this discovery would potentially leave the jury with a false impression concerning the extent of the relationship between the witness and the party by allowing a party to present a witness as an independent witness** when, in fact, there has been an extensive financial relationship between the party and the expert. **This limitation thus has the potential for undermining the truth-seeking function and fairness of the trial**. *See Dosdourian,* 624 So. 2d at 243. Thus, we conclude that the jury's right to assess the potential bias of the expert outweighs any of the competing interests expressed in *Elkins.*
>
> Although **Allstate may not want the plaintiff to discover information regarding the extent of the relationship between**

> **Biodynamics and Allstate, as Judge Farmer so aptly observed, that information would be "indisputably relevant and meaningful**." 705 So. 2d at 107. Unlike the circumstances discussed in *Elkins,* 672 So. 2d at 521–22, there are no compelling policy concerns to prevent discovery from the party who possesses the information. For all of these reasons, we conclude that *Elkins* should not be extended to limit the discovery sought from the party in this case.

Boecher at 997-98, emphasis added.

Immediately following *Boecher*, district courts began logically extending its rationale to encompass not only a "party" who retained the expert, but also the party's agents. Much of Petitioner's argument is devoted to the fact that his law firm is not a party to the litigation, and that *Boecher* refers to discovery from a "party." This is a distinction without a difference. The mere fact the law firm is the nexus for the witness's bias, rather than the litigant, is not a barrier to the discovery. If such were the case, parties would always have their agents or law firms retain the expert witnesses indirectly. This renders *Boecher* meaningless and leaves "the jury with a false impression concerning the extent of the relationship between the witness and the party by allowing a party to present a witness as an independent witness when, in fact, there has been an extensive financial relationship between the party and the expert" through the party's agent *Boecher* at 998. *Boecher* was not rendered meaningless in *Worley*, it was preserved intact.

Shortly after *Boecher* was released, *Boecher* was applied to a party's law firm. *Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1, 3 (Fla. 2nd DCA

2001) ("A witness's financial incentive to continue an advantageous association is no less applicable to an attorney who hires the witness than to a party who does the same thing and, in either instance, could indicate a degree of bias not immediately apparent to a jury."). The Second District recognized four factual similarities with *Boecher*:

> In *Boecher* the discovery order was directed to a named party, Allstate Insurance Company. In this case, however, the order is directed to the nonparty attorneys of the plaintiff. Nevertheless, the supreme court focused in *Boecher* on the jury's truth-seeking function and the corresponding fairness of a jury trial. That focus is no less applicable to this situation than it was in *Boecher*. Furthermore, there exist a number of significant factual similarities between *Boecher* and this matter:
>
> (1) Each respondent inquired into the extent of a financial relationship between an expert witness and a key actor in the pending litigation.
>
> (2) The sought-after information would reveal how much money the expert made from its relationship with the petitioner.
>
> (3) The information is directly relevant to the respondent's efforts to demonstrate a witness's bias. As the supreme court implied in *Boecher*, the more extensive and ongoing the financial relationship between the party and the expert witness, the greater the witness's interest in continuing that relationship. *Boecher*, 733 So.2d at 993 ("[W]hen the discovery sought is from the party who has employed the expert regarding the extent of that party's relationship with the expert and the financial remuneration paid by the party to the expert witness over a period of time[,] ... [t]he opposing party has no corresponding 'right' to prevent this discovery.") A witness's financial incentive to continue an advantageous association is no less applicable to an attorney who hires the witness than to a party who does the same thing and, in either instance, could indicate a degree of bias not immediately apparent to a jury.

> (4) Limiting discovery of this information would affect the truth-seeking function of a jury, for the failure to present any ultimately admissible information would diminish the jury's right to assess the potential bias of the witness. As the Third District recently explained in *Flores v. Miami-Dade County*, 787 So. 2d 955 (Fla. 3d DCA 2001), "As illustrated by *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996), and Florida Rule of Civil Procedure 1.280(b)(4)(A), there must be reasonable latitude for inquiry about the extent of a trial expert's alignment with one side, or another, of litigation practice."

MCG v. Pope at 2-3.

The rationale for applying *Boecher* to key actors in the litigation was well-explained in the Fifth District's *Vazquez v. Martinez*, 175 So. 3d 372, 373–74 (Fla. 5th DCA 2015):

> A party may attack the credibility of a witness by exposing a potential bias. § 90.608(2), Fla. Stat. (2013). "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." *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 997 (Fla. 1999). Therefore, Florida courts allow extensive discovery of financial information to assist counsel in impeaching examining physicians and other experts by demonstrating that the expert has economic ties to the insurance company or defense law firm. *See* Fla. R. Civ. P. 1.280(b)(5)(A)(iii); *Boecher*, 733 So.2 d at 997 ("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."). This furthers the "truth-seeking function and fairness of the trial." *Springer v. West*, 769 So. 2d 1068, 1069 (Fla. 5th DCA 2000); *see Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1, 3 (Fla. 2d DCA 2001) ("Limiting discovery of this information would affect the truth-seeking function of a jury, for the failure to present any ultimately admissible information would diminish the jury's right to assess the potential bias of the witness."). On the other hand, introducing the subject of insurance where insurance is not a proper issue constitutes prejudicial

error. *Herrera v. Moustafa*, 96 So. 3d 1020, 1021 (Fla. 4th DCA 2012); *Nicaise v. Gagnon*, 597 So. 2d 305, 306 (Fla. 4th DCA 1992).

> We find that the trial court did not abuse its discretion in permitting the challenged evidence. Whether the party has a direct relationship with any of the experts does not determine whether discovery of the doctor/law firm relationship or doctor/insurer relationship is allowed. The purpose of the rule is to expose any potential bias between a party and an expert. *See Boecher*, 733 So. 2d at 997. Evidence of bias may be found in the financial ties between all of the litigant's agents, including the litigant's law firm or insurer and the expert. *See Herrera*, 96 So. 3d at 1021 (holding party entitled to show financial ties between expert and litigant; admissible to show defense firm had paid expert $330,000); *Allstate Ins. Co. v. Hodges*, 855 So. 2d 636, 640 (Fla. 2d DCA 2003) (explaining that number of times expert testified on behalf of liability insurer and amount expert was paid as result is directly relevant to expert's bias); *Springer*, 769 So. 2d at 1069 (holding interrogatories sought discoverable information, even though insurer was not a party). Moreover, the trial judge adeptly permitted evidence of possible bias without disclosing the existence of insurance. We find no error.

Vazquez v. Martinez, 175 So. 3d at 373–74.

Similarly, in *Springer v. West*, 769 So. 2d 1068 (Fla. 5th DCA 2000) the Court held that to limit *Boecher* to a "party" alone would render it meaningless in all but a very few cases:

> Where an insurer provides a defense for its insured and is acting as the insured's agent, the insurer's relationship to an expert is discoverable from the insured. To hold otherwise would render *Boecher* meaningless in all but a small class of cases. Similarly, a defendant may question a plaintiff about any relationship between his or her attorney and the plaintiff's trial expert. In both cases, the information sought is relevant to the witness's bias and will enhance the truth-seeking function and fairness of the trial, as intended by *Boecher*.

Springer at 1069.

Extending *Worley* to experts retained by a key actor in the litigation would lead to absurd and unintended outcomes. If Allstate was Respondent's uninsured motorist carrier like in *Boecher*, and Allstate paid Dr. Jones one million dollars a year to testify in trial on its behalf, the jury could know of the financial bias. However, since Allstate is Petitioner's insurer and law firm, even if Allstate paid Dr. Jones five million dollars a year to testify in trial, the jury can never hear of such financial bias. Dr. Jones' financial bias does not disappear because Allstate paid him directly, or paid him indirectly through a "non-party" law firm it hired, or whether Allstate was a named party or not.

Similarly, if the financial bias between a party's law firm and specially retained expert witness were prohibited, a plaintiff's law firm could forego treating physician testimony, and only provide expert testimony through multi-million dollar retained experts, and the jury would never hear of such financial bias.

Applying *Worley* to retained expert witnesses would promote the very charade *Boecher* prevents.

III. Petitioner's Remaining Arguments Are Without Merit.

Petitioner's remaining arguments are similarly without merit, and do not require this Court to extend *Worley* to expert witnesses retained for litigation. As noted, the current application of *Worley* and *Boecher* works for the respective types of witnesses. It worked in this case. Unfortunately, both parties sent

discovery that was clearly prohibited by this Court's opinions: Petitioner initially sent interrogatories which exceeded the parameters of discovery and impeachment allowed in *Worley* [R. 64-85]; and Respondent initially sought information which exceeded the parameters of *Elkins* and Rule 1.280 [R. 86-90]. Petitioner would, upon proper *Worley* discovery, be entitled to financial bias impeachment of Respondent's treating physicians. Respondent, pursuant to the Order, will similarly be entitled to financial bias impeachment of Petitioner's litigation expert witness.

A. There Is No Increased Cost of Litigation.

Petitioner argues:

> 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.

Initial Brief at 14. This assertion is unfounded and unsupported by any evidence. If represented, discovery to a party is always served to the party's lawyer. Fla. R. Jud. Admin. 2.516(b). If the non-party law firm possesses information that the party does not have, it must still produce the information as the party's agent. The 1967 Author's Comment to Fla. R. Civ. P. 1.340 provides: "The fact that the information needed to answer an interrogatory is within the sole knowledge of the attorney for the party is not a valid objection."

Moreover, in this age of computers, such information should be readily available at the touch of a button and does not require anyone to "scour their files."

In the underlying Fourth District *Boecher* case, more than 20 years ago the court said:

> To be sure, we live in the age of computers not the bygone era of hooded clerics poring over ancient manuscripts seeking hidden truths. A labor that, just a few years ago, might have taken office clerks weeks or months now entails mere milliseconds of data processing time. It occurs to us that, in this pervasively computerized generation of doing business, any going concern would be sorely tried to establish burdensomeness in the mere retrieval of this kind of information. Surely Allstate has the power to pluck the data from its own cyberspace. The burden placed on this party should be presumed to be no more difficult than selecting the correct keys on a board or icons on a screen. Allstate has done nothing in this record to dispel such a presumption.

Allstate Ins. Co. v. Boecher, 705 So. 2d 106, 108 (Fla. 4th DCA 1998).[3] As the Second District again told Allstate more than 15 years ago:

> In this day of the computer age, and in light of the *Boecher* court's serious emphasis on the need for the very type of information requested, Allstate may want to reconsider adapting its computer system to provide easier access to the requested information.

Allstate Ins. Co. v. Hodges, 855 So. 2d 636, 641 (Fla. 2nd DCA 2003). Certainly now, so many years later, Allstate and its in-house counsel can easily provide such information by typing a few keys, without "spending substantial time" and "having to scour their files" and "increasing the cost of litigation."

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[3] While this Court approved the Fourth District's opinion, it did not address this argument about the ease of compiling information. *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 994 at n.1 (Fla. 1999).

B. There Is No Evidence that Post-*Worley* Discovery is "Artificially Inflating Verdicts" and "Inflaming the Emotions of Jurors."

Petitioner argues the present application of *Worley* to treating physicians and *Boecher* to expert witnesses "creates a lop-sided and skewed picture for the jury and artificially inflates verdicts" and further argues "This discovery, and ultimately the corresponding evidence, is artificially inflating verdicts and inflaming the emotions of jurors…." Initial Brief at 1 and 15, respectively. There is no evidence to support Petitioner's claims that the trial courts' applications of this Court's opinions in *Boecher* and *Worley* impact the verdict or inflame jurors' emotions. Instead, the finding from this Court is that the parameters of established discovery prevents charades at trial, protect the attorney-client privilege, and properly informs the jury of the witness's potential bias.

C. There Is No Evidence of a "Chilling Effect" on the Use of Experts at Trial, and the Discovery Does Not Defeat the Purpose of a Compulsory Medical Examiner.

Petitioner argues:

> 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.

Initial Brief at 15. This argument is rebutted by the information before this Court.

Petitioner's expert in this case, Dr. Jones is very well-known CME examiner in Central Florida, and has willingly injected his expert opinions in litigation for a

long, long time [R. 339]. For example, in *Gurney v. State Farm Mut. Auto. Ins. Co*., 889 So. 2d 97 (Fla. 5th DCA 2004), the court references an orthopedic CME performed by Dr. Craig Jones that occurred back in February, 1997, before *Boecher*. As a result of *Boecher* and its progeny, defendants have been required to disclose their financial ties (and their agents' financial ties) with Dr. Jones for many, many years. Yet, even with this allowable financial bias discovery, Dr. Jones continues to provide his services in litigation as an expert witness. There is no evidence of a chilling effect on Dr. Jones's willingness to continue performing CMEs for insurers and their law firms like this case.

Similarly, the alleged chilling effect hasn't stopped amicus Dr. Foley from providing expert testimony. By his own admission, Dr. Foley is no longer involved in patients' treatment, and currently only provides expert testimony for litigation. This is the antithesis of a chilling effect on expert witness services. This type of discovery and cross examination has been going on since at long before Boecher. There is no evidence these expert witnesses for litigation, or any others, "refuse to perform examinations in fear of subjecting themselves to this form of discovery and cross-examination on their finances." Initial Brief at 15.

Similarly, Petitioner's arguments that such discovery "has many consequences, including implications of insurance, financial wealth, and litigiousness" is also without any foundation. For all the record shows, Allstate and

its staff counsel may never have retained Dr. Jones before. There is no evidence of how many times Dr. Jones has been retained or how much, if anything, he has been paid by Petitioner's agents. If there is no bias, there is no such implication. If there is such bias, those considerations have always been inherently present in any financial bias discovery—that is why it is called "financial bias" and not just "bias."

Elkins and *Boecher* addressed the appropriate limitations to keep such "consequences" in check. As a result of the courts application of these limitations, financial bias evidence comes in without disclosing the existence of insurance, or a party's wealth, or alleged litigiousness. *See*, *e.g.*, *Vazquez v. Martinez*, 175 So. 3d at 373-74, where "the trial judge adeptly permitted evidence of possible bias without disclosing the existence of insurance."

D. Plaintiffs and Defendants Are Treated the Same.

Petitioner closes his Initial Brief by complaining that plaintiffs and defendants should be treated the same, and "what is good for the goose is good for the gander." Initial Brief at 16. Respondent agrees. That is the current state of the law surrounding financial bias discovery for treating physicians and experts.

- Plaintiffs can demonstrate financial bias of defendants' experts by showing the amount of payments from defendants or their agents to the hand-picked litigation witnesses. *Boecher* and its progeny.

- Defendants can demonstrate financial bias of plaintiffs' experts by showing the amount of payments from a plaintiffs or their agents to the hand-picked litigation witnesses. *Boecher* and its progeny.
- A defendant is not entitled to show the extent of the referral relationship between a plaintiff's agents and treating doctors. *Worley.*
- A plaintiff is not entitled to show the extent of the referral relationship between a defendant's agents and treating doctors. *Worley*, *Bellezza*.

Once again, the parties are not treated differently as a result of the application of *Worley*, the witnesses are treated differently based on their role in the case. To the extent the parties are treated differently, it is only because their witnesses are different.

CONCLUSION

For the foregoing reasons, this Court should dismiss jurisdiction as improvidently granted, or answer the Fifth District's certified question in the negative.

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 9th day of September, 2019.

Mark A. Nation, Esquire
Board Certified Civil Trial Attorney
Board Certified Business Litigation Attorney
The Nation Law Firm
Florida Bar No.: 968560
570 Crown Oak Centre Drive
Longwood, FL 32750
Phone: (407) 339-1104
Fax: (407) 339-1118
Email: bhirt@nationlaw.com (Primary)
mnation@nationlaw.com;
ppritchard@nationlaw.com (Secondary)
Attorney for Respondent

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 Response are Times New Roman 14 point.

Respectfully submitted,

Mark A. Nation, Esquire