IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-385

STEVEN YOUNKIN,

Petitioner,

v.

NATHAN BLACKWELDER,

Respondent

_____/

PETITIONER STEVEN YOUNKIN'S REPLY BRIEF ON THE MERITS

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ARGUMENT IN RESPONSE AND REBUTTAL

I. RESPONDENT IGNORES MUCH OF THE ANALYSIS OF THE WORLEY OPINION.

Respondent solely focuses on the portion of the Worley majority opinion concerning attorney-client privilege. Nevertheless, he disregards that the opinion was based on several grounds and ignores the analysis concerning Boecher discovery not applying to non-parties. Worley v. Central Florida YMCA, 228 So. 3d 18, 22-23 (Fla. 2017); 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."). Respondent cannot pick-and-choose what portions of the opinion he deems worthy. Instead, precedent must be applied even handedly and equally to both parties.

II. RESPONDENT IS ATTEMPTING TO SHIFT THE FOCUS OF THIS CASE TO TREATING PHYSICIANS VERSUS COMPULSORY MEDICAL EXAMINERS

This case is not about treating physicians versus compulsory medical examiners. Instead, it is about who the opposing party is seeking the information from and about. Both Worley and this case involve discovery served upon a party seeking financial information from the non-party law firm. The situation is virtually identical—just on the opposite side of the v.

It is this factual scenario that has led to the disparate treatment between plaintiffs and defendants. See, e.g., Younkin v. Blackwelder, 44 Fla. L. Weekly D549 (Fla. 5th DCA February 22, 2019); Salber v. Frye, 273 So. 3d 192, 193 (Fla.

5th DCA 2019); Dhanraj v. Garcia, 44 Fla. L. Weekly D785 (Fla. 5th DCA March 22, 2019). Indeed, Judge Brian Lambert of the Fifth District explained:

> 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).

The Petitioner is simply seeking for both plaintiffs and defendants to be treated the same under the law. It is within this Court's power to determine how that decision is framed.

III. RESPONDENT IGNORES REALITY AND THE NATURE OF PERSONAL INJURY LITIGATION.

By focusing on an arbitrary distinction between treating physicians versus compulsory medical examiners, Respondent would have this Court ignore reality. He claims that only defense compulsory medical examiners are "hand-picked" by counsel and "inject themselves into proceedings." This is simply not so. There are numerous doctors across the state who have continual referral and financial relationships with plaintiff's law firms. See, e.g., Katzman v. Rediron Fabrication, Inc., 76 So. 3d 1060, 1063-64 (Fla. 4th DCA 2011) ("The situation presented in this

case, which we have seen recurring, involves a physician who treats a patient who was involved in an auto accident and referred by a lawyer.").

This referral and financial relationship was highlighted by Justice Polston in his well-reasoned dissent in Worley,

> This letter of protection involves just the one case. Allowing the jury to consider just this limited financial interest of the one case completely ignores, and improperly limits, the ability to show bias of a provider that may arise from a potentially very significant amount of compensation, and percentage of total business, from other cases brought to the provider by the law firm.
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> * * *
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> If a law firm routinely refers clients to the medical provider, and there is an "extensive [] financial relationship between a party [through its law firm] and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing." Boecher, 733 So. 2d at 997. The insurance company is a repeat player in the judicial system, and the witnesses it uses on a regular basis may have a financial, incentive that a jury is entitled to know about and evaluate for potential bias. Substitute the phrase "plaintiff's law firm" in place of "insurance company," and the same is true here: The "plaintiff's law firm" is a repeat player in the judicial system, and the witnesses it uses on a regular basis may have a financial incentive that a jury is entitled to know about and evaluate for potential bias.

Worley, 228 So. 3d at 28, 30 (Polston, J., dissenting) (alterations in original).

The Respondent's arbitrary distinction and the lower courts' treatment of Worley have combined to thwart the truth-seeking function of the trial process. Now, the jury hears bias impeachment testimony about only the defense's

compulsory medical examiner. The playing field is uneven and the results are skewed.

Moreover, Respondent's arguments ignore the nature of personal injury litigation. There are no treating physicians on the defense side of the case. A compulsory medical examiner is the only way to defend a case.

The purpose of a compulsory medical examination is to enable the defendant to obtain a witness who can render an admissible opinion. Wilkins v. Palumbo, 617 So. 2d 850, 852 (Fla. 2d DCA 1993). "The defendant needs a witness who can testify as an expert concerning: 1) the plaintiff's present physical condition; 2) the plaintiff's predicted future condition and reasonably expected medical needs; and 3) the causation, if any, between these conditions and the accident that is the subject of the lawsuit." Id. In addition, the compulsory medical examiner is the defendant's source to challenge the credibility of the plaintiff. Id. For that reason,

> [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. Berner, 971 So. 2d 929, 932 (Fla. 3d DCA 2007).

In any event, treating physicians provide more than fact witness testimony. They provide expert opinions on causation, permanency, and future medical

treatment. But yet, plaintiffs are allowed to hide any bias by the mere citation to Worley. That is exactly what happened here. (R. 054-058; 064-085; 091-098).

IV. RESPONDENT RELIES UPON PRE-WORLEY CASE LAW

The Respondent relies heavily on case law that predates the Worley decision. See, e.g., Vazquez v. Martinez, 175 So. 3d 372 (Fla. 5th DCA 2015); Morgan, Colling & Gilbert, P.A. v. Pope, 798 So. 2d 1, 2 (Fla. 2d DCA 2001)[1]; Springer v. West, 769 So 2d 1068 (Fla 5th DCA 2000). These cases are called into question by this case and Dodgen v. Grijalva, SC19-1118, rev. granted, (Fla. Oct. 1, 2019). Indeed, if Worley is applied equally and even-handedly, these cases were implicitly overruled by Worley.

Both Vasquez and Morgan, Colling favorably cite the reasoning set forth in Springer. See Vazquez, 175 So. 3d at 371; Morgan, Colling & Gilbert, P.A., 798 So. 2d at 3. Notably, Springer reasoned that this non-party financial discovery should be allowed because a defendant is entitled to similar discovery from the plaintiff's side—a proposition which Worley overruled and quashed.

Moreover, Springer's analysis is fundamentally flawed. The statement in Springer concerning an insurance company as the agent of the insured was made without citation to any legal authority and is wholly contrary to black-letter agency

[1] While this case involves a plaintiff's witness, it was not cited in Worley in the majority opinion.

law. See Amstar Ins. Co. v. Cadet, 862 So. 2d 736, 741 (Fla. 5th DCA 2003); Restatement (Second) of Agency § 14.

Further, a principal cannot be held liable for the actions of the agent that are wholly unrelated to the principal or those that were not done on the principal's behalf. See generally Palm Garden of Healthcare Holdings, LLC v. Haydu, 209 So. 3d 636, 640 (Fla. 5th DCA 2017) ("When there has been no representation of authority by the principal, no apparent or implied agency arises, and the acts of the agent, standing alone, are insufficient to establish that the agent is authorized to act for the principal.") (internal citations omitted); Stalley v. Transitional Hosps. Corp. of Tampa, Inc., 44 So. 3d 627, 630 (Fla. 2d DCA 2010); Ruotal Corp., N. W. v. Ottati, 391 So. 2d 308, 309 (Fla. 4th DCA 1980) ("It is axiomatic that knowledge of the agent constitutes knowledge of the principal as long as the agent received such knowledge *while acting within the scope of his authority*."). Therefore, actions of an agent in retaining a compulsory medical examiner in unrelated cases should not be binding upon the principal or used against him. They are not actions within the scope of any agency. Accordingly, these cases are inapplicable and distinguishable.

V. THIS COURT SHOULD DISREGARD THE FJA'S AMICUS BRIEF AS IT VIOLATES WELL-ESTABLISHED RULES FOR AMICUS CURIAE.

The FJA's amicus brief violates many well-established rules that govern amicus briefs in Florida and should be rejected by this Court. Indeed, FJA

inappropriately raises issues that were not addressed by the parties. See Turner v. Tokai Fin. Servs., Inc., 767 So. 2d 494, 496 n.1 (Fla. 2d DCA 2000); Acton v. Ft. Lauderdale Hosp., 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982); Keating v. State, 157 So. 2d 567, 569 (Fla. 1st DCA 1963). For instance, FJA claims that the Fifth District never "passed upon" the certified question. This has *never* been argued by the Respondent—even in his jurisdictional brief. Nevertheless, the Fifth District did "pass upon" the certified question presented as demonstrated by the opinion it issued.

Petitioner is not seeking an advisory opinion from this Court. This issue and the irreparable harm which results is real and demonstratable to the Petitioner, as well as the other parties with cases pending before this Court. See, e.g., Dhanraj v. Garcia, Case No. SC19-610; Salber v. Frye, Case No. SC19-982; Dodgen v. Grijalva, Case No. SC19-1118; Rosenthal v. Badillo, Case No. SC19-1241; Levitan v. Razuri, Case No. SC19-1279; Balle v. Hernandez, Case No. SC19-1577; Angeles-Delgado v. Benitez, Case No. SC19-1600.

Additionally, under the guise of making a textualist argument, FJA injected an issue about this Court referring a case to the rules committee. There is no need to send this issue to the rules committee. This discovery issue has developed through case law—not the rules process. See, e.g., Worley v. Central Florida YMCA, 228 So. 3d 18 (Fla. 2017); Vazquez v. Martinez, 175 So. 3d 372 (Fla. 5th DCA 2015);

Springer v. West, 769 So 2d 1068 (Fla 5th DCA 2000); Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 994 (Fla. 1999). The FJA's argument is simply a red herring attempting to conflate issues. Indeed, if courts were to limit impeachment discovery *on both sides* to only those matters set forth in Rule 1.280(b)(5)(A)(iii), the parties would not be here. Instead, case law has gone far astray of those bounds and have resulted in this uneven playing field. Plaintiffs' attorneys have used this prior case law to circumvent the express language of Rule 1.280(b)(5)(A)(iii). Thus, the Court should resolve the disparate treatment which has resulted from these court decisions.

FJA further asserts that this Court cannot use this case to overturn or extend any case law. However, this Court's own jurisprudence of Worley undercuts this argument. Indeed, in Worley, the Court overturned several cases allowing such discovery. See, e.g., Brown v. Mittelman, 152 So. 3d 602 (Fla. 4th DCA 2014); Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay, 133 So. 3d 1178 (Fla. 4th DCA 2014); Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co., 103 So. 3d 200 (Fla. 4th DCA 2012).

Lastly, FJA inappropriately argues the facts. "Although 'by the nature of things an amicus is not normally impartial,' amicus briefs should not argue the facts in issue." Ciba-Geigy Ltd. v. Fish Peddler, 683 So. 2d 522, 523 (Fla. 4th DCA 1996) (citing Strasser v. Doorley, 432 F.2d 567 (1st Cir. 1970)).

In any event, FJA has inappropriately crossed the bounds of an amici. This Court should disregard its brief.

CONCLUSION

This Court should answer the certified question in the affirmative. The law must be applied equally and even-handedly to both plaintiffs and defendants.

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.

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CERTIFICATE OF SERVICE

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/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
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