

Third District Court of Appeal

State of Florida

Opinion filed June 17, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D20-497
Lower Tribunal No. 19-4984

Michael Tahan,
Petitioner,

vs.

Emma Munoz,
Respondent.

On Petition for Writ of Certiorari from the Circuit Court for Miami-Dade County, Maria de Jesus Santovenia, Judge.

Boyd & Jenerette, P.A., and Kansas R. Gooden and Ian E. Waldick (Jacksonville), for petitioner.

Florida Advocates, and Carlos D. Cabrera (Dania Beach), for respondent.

Before EMAS, C.J., and SCALES and MILLER, JJ.

PER CURIAM.

We deny the petition for writ of certiorari. See *Worley v. Cent. Fla. Young Men's Christian Ass'n*, 228 So. 3d 18 (Fla. 2017); *Villalobos v. Martinez*, 44 Fla. L.

Weekly D2458 (Fla. 3d DCA Oct. 2, 2019); Angeles-Delgado v. Benitez, 44 Fla. L. Weekly D2278 (Fla. 3d DCA Sept. 11, 2019). But see Younkin v. Blackwelder, 44 Fla. L. Weekly D549 (Fla. 5th DCA Feb. 22, 2019), review granted, No. SC19-385 (Fla. May 21, 2019); Dodgen v. Grijalva, 281 So. 3d 490 (Fla. 4th DCA 2019), review granted, No. SC19-1118 (Fla. Oct. 1, 2019).

EMAS, C.J., and SCALES, J., concur.

MILLER, J., concurring.

I agree with the majority that we are constrained by a body of binding precedent from finding a departure from the essential requirements of law. Nonetheless, I write separately to express the concern that we are again placing our imprimatur on the procedural mechanism engaged for obtaining the information sought here, and to further reiterate the apprehension that the decision by our high court in Worley¹ has given rise to “seemingly disparate treatment in personal injury litigation between plaintiffs and defendants.” Younkin v. Blackwelder, 44 Fla. L. Weekly D549, at D550 (Fla. 5th DCA Feb. 22, 2019), review granted No. SC19-385 (Fla. May 21, 2019) (citation omitted).

In this dispute, the insurer, a non-party to the underlying litigation, is subject to a discovery order requiring it to produce certain financial information regarding its relationship with a physician-expert.² The challenged discovery takes the form of interrogatories.

Although Boecher³ generally permits the discovery of this information, here, the order is directed toward a non-party. Accordingly, such “[d]iscovery . . . must be had by deposition or subpoena duces tecum.” Sjuts v. State, 754 So. 2d 781, 782

¹ Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc., 228 So. 3d 18 (Fla. 2017).

² Although the order ostensibly requires responses from the petitioner, the information sought is maintained by the insurer.

³ Allstate Ins. Co. v. Boecher, 733 So. 2d 993 (Fla. 1999).

(Fla. 2d DCA 2000) (citations omitted); see Fla. R. Civ. P. 1.340(a) (“Without leave of court, any party may serve on any other party written interrogatories to be answered.”); Fla. R. Civ. P. 1.310(a) (“[A]ny party may take the testimony of any person, including a party, by deposition upon oral examination.”). “[C]ompelling [a party’s] nonparty physicians to respond to interrogatories creates the potential for irreparable harm.” Parker v. James, 997 So. 2d 1225, 1226 (Fla. 2d DCA 2008) (citing Broward Cty. v. Kerr, 454 So. 2d 1068, 1069 (Fla. 4th DCA 1984) (“The challenged order clearly represents a departure from the essential requirements of law, as the trial court had no authority to order petitioner to respond to interrogatories directed to a non-party . . . Thus, the court had no authority to compel petitioner to obtain the desired information from its former employee.”)). Nonetheless, prior opinions of this court have effectively endorsed this use of interrogatories, in declining to grant certiorari under identical circumstances. See Villalobos v. Martinez, 44 Fla. L. Weekly D2458 (Fla. 3d DCA Oct. 2, 2019); Angeles-Delgado v. Benitez, 44 Fla. L. Weekly D2278 (Fla. 3d DCA Sept. 11, 2019).

Regardless of the inherent procedural infirmity, as was aptly declaimed by Justice Polston in his wholly prescient dissent, “[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.” Worley v. Cent. Fla. Young Men’s Christian Ass’n, Inc., 228 So. 3d 18, 29 (Fla. 2017) (Polston, J., dissenting). Further, “[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.

Today, our jurisprudential landscape is littered with decisions charting unsuccessful efforts by insurers to protect themselves from financial discovery of this ilk. See Barnes v. Sanabria, 45 Fla. L. Weekly D135 (Fla. 5th DCA Jan. 17, 2020); Tortorella-Andrews v. Delvecchio, 45 Fla. L. Weekly D65 (Fla. 2d DCA Jan. 3, 2020); Villalobos, 44 Fla. L. Weekly D2458; Dodgen v. Grijalva, 281 So. 3d 490 (Fla. 4th DCA 2019), review granted No. SC19-1118 (Oct. 1, 2019). Conversely, plaintiffs' counsel easily thwarts the same discovery, because the practical effect of Worley is “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.” State Farm Mut. Auto. Ins. Co. v. Knapp, 234 So. 3d 843, 845 n.1 (Fla. 5th DCA 2018).

Accordingly, Worley has served to obfuscate the transparency in financial bias arguably imputed to plaintiff-retained experts, but not defense-retained experts. As “the weight a jury gives to expert testimony is directly linked to the perceived credibility of the witness,” Julia A. Correll, Trower v. Jones: Expanding the Scope of Permissible Cross-Examination of Expert Witness, 20(4) Loy. U. Chi. L.J. 1071, 1073 (1989), this incongruity compromises “the truth-seeking function and fairness

of the trial process.” Allstate Ins. Co. v. Boechner, 733 So. 2d 993, 998 (Fla. 1999). “Fair play and common sense dictates that what is sauce for the goose is sauce for the gander,” thus, the continuing viability of Worley should give us pause for reflection. Sharp v. State, 221 So. 2d 217, 219 (Fla. 1st DCA 1969); see also Younkin v. Blackwelder, 44 Fla. L. Weekly at D549.