SUPREME COURT OF FLORIDA
CASE NO: SC15-1086

HEATHER WORLEY,

Petitioner,

L.T. Case Nos.: 5D14-3895, 482012CA001009A001OX

vs.

CENTRAL FLORIDA YOUNG MEN'S CHRISTIAN ASSOCIATION, INC.,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JOSEPH R. FLOOD, JR., ESQ.
Florida Bar No. 0361593
JFlood@drml-law.com
JESSICA C. CONNER, ESQ.
Florida Bar No. 0085145
Jessica.Conner@drml-law.com
LAMAR D. OXFORD, ESQ.
Florida Bar No. 0230871
LOxford@drml-law.com
Dean, Ringers, Morgan & Lawton, P.A.
Post Office Box 2928
Orlando, Florida 32802-2928
Tel: 407-422-4310
Fax: 407-648-0233
Attorneys for Respondent

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PRELIMINARY STATEMENT

References to the Petitioner Heather Worley shall be to the Plaintiff. References to the Honorable Circuit Judge John M. Kest shall be to Judge Kest. References to the Record shall be by (R. p.#). References to the Initial Brief of the Plaintiff shall be by (IB. p.#).

STATEMENT OF THE CASE AND FACTS

This cause of action arises as a result of Plaintiff's trip and fall accident occurring on June 28, 2010. (R. 353-54.) Plaintiff alleges she was walking in the parking lot of the Central Florida Young Men's Christian Association, Inc. at its Blanchard Park Family Center [hereinafter the "Defendant" or "YMCA"] when she tripped on a parking stopper. (R. 354.) Plaintiff sought treatment two days after her accident at Florida Hospital East. (R. 409.) Other than a follow-up there a week later, she sought no other treatment until *after* obtaining counsel. (R. 411, 414.) Significantly, Florida Hospital East referred the Plaintiff to Dr. Ramiro Zurita, but instead, the Plaintiff presented to Sea Spine Orthopedic Institute ["Sea Spine"] three months after the subject incident and was treated by Dr. Joshua Appel. (R. 496, 492, 466.) Plaintiff signed a letter of protection authorizing her attorney to pay Sea Spine out of any proceeds from this case. (R. 692-693.) Dr. Appel referred Plaintiff to another Sea Spine surgeon, Dr. Krishna Parchuri. (R. 421.)

On June 10, 2011, Dr. Parchuri performed a routine, minor meniscectomy on the Plaintiff at the Underwood Surgery Center. (R. 421; R. 424.) Plaintiff also signed letters of protection in favor of the Underwood Surgery Center, Sanctuary Surgical & Anesthesia, and Physician's Surgical Group, which are a few of the numerous providers who generated bills for the Plaintiff's surgery. (R. 692-693.) Plaintiff has disclosed that her treating physicians will be rendering expert opinions on matters such as permanency of the injury as well as the reasonableness and necessity of her care and treatment. (R. 523.)

Plaintiff now claims, among other damages, over $66,000.00 solely for her simple meniscectomy. (R. 358.) While her surgery was performed by Dr. Parchuri at the Underwood Surgery Center, there are inexplicably three separate bills from Underwood Surgery Center, Physician's Surgical Group and Sea Spine triple billing for the same single surgery with different CPT codes. (R. 518-519.) Defendant's knee specialist, Dr. Bryan Reuss of the Orlando Orthopaedic Center, stated that Plaintiff's surgery including the anesthesiology bill, surgical bill and the facility fees would be less than $6,000.00 at his surgery center. (R. 507.) As such, the YMCA has maintained throughout this litigation that Plaintiff's bills are grossly inflated, and do not reflect usual and customary billing practices within this medical community. (R. 600; R. 465-473.) In order to dispute these bills and discover how a $6,000 surgery ended up being billed at over $64,000, the YMCA

has been forced to engage in protracted discovery, which has been vehemently opposed by Plaintiff, her physicians and attorneys.

Compounding the problem, Plaintiff was generally questioned how she came to see Dr. Appel, but was instructed by her counsel not to answer pursuant to the attorney-client privilege. (R. 414.) Plaintiff's counsel further instructed her not to answer other questions clearly not covered by the privilege, including whether another doctor referred her to Sea Spine. (R. 415-416.) Following the deposition, the YMCA propounded to Plaintiff three sets of *Boecher*[1] Interrogatories and a Supplemental Request to Produce attempting to discover the referral relationship between Plaintiff's law firm and the treating physicians. (R. 537-555; R. 207-208.)

Plaintiff and her counsel opposed this discovery on the grounds that, *inter alia*, the YMCA could "attempt to obtain said information, if any, from the treating physicians at their depositions." (R. 557, 562.) Notwithstanding this contention, Plaintiff vehemently opposed any such discovery and filed a motion for protective order to prevent the YMCA from obtaining this information from the billing custodians for Plaintiff's treating physicians. (R. 366.) Moreover, when the treating physicians and their billing custodians were eventually deposed over objection from the Plaintiff, they all claimed ignorance of the source of the Plaintiff's referral. Some testified they believed she was referred by Florida

[1] *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999).

Hospital East even though Plaintiff testified she was not. (R. 624-627; R. 631-632, R. 634.)

On April 10, 2014, a hearing was held before Judge Kest regarding Plaintiff's assertion of the attorney-client privilege. (R. 455-456.) Judge Kest ordered that the Plaintiff must answer all general questions regarding the referral except the direct question of whether Plaintiff was referred by her attorney. (R. 455-456.) The court specifically overruled Plaintiff's objection to the question of how was it that she came to treat at Sea Spine, because this question did not ask whether Plaintiff's attorney referred her. (R. 456.) During her second court ordered deposition, Plaintiff was again asked how she was referred to Sea Spine. (R. 535.) She began to answer, but was once again instructed not to answer this question based on the attorney-client privilege. (R. 535-536.) However, Plaintiff did testify she was *not* referred to Sea Spine by any other doctor, by any friend or relative, or by Florida Hospital East where she was treated at the emergency room for this alleged injury. (R. 536.)

Based on the foregoing as well as Plaintiff's unusually high medical bills,[2] the YMCA reasonably suspected a referral relationship between Plaintiff's law

[2] Indeed, Plaintiff concedes that there is sufficient evidence to argue that the medical bills are unreasonable. (R. 758.) However, until Plaintiff stipulates that the bills are unreasonable, the YMCA is entitled to use the tools of discovery to dispute these outrageous bills with evidence of any referral or billing agreements between Plaintiff's law firm and doctors.

firm and doctors. The YMCA attempted to discover the existence of the referral relationship and basis for the exorbitant bills from Plaintiff's treating physicians, but their testimony was nebulous to say the least, as follows:

A. <u>2/21/14 Deposition of Sea Spine Billing Manager Rhonda Patterson</u>

MS. CONNER: So Raul would have been the administrator to come up with how much Sea Spine charges for its procedures?

MS. PATTERSON: Prior to July 1, 2011, yes.

MS. CONNER: And you don't know whether he came up with the fee schedule based on the formula that you currently use?

MS. PATTERSON: Correct. I have no idea how he came up with the fee schedule.

. . .

MS. CONNER: Are you aware of whether Morgan & Morgan has referred its clients to Sea Spine in the past?

MR. MITCHELL: Form.

MS. PATTERSON: We have received other patients from Morgan & Morgan, yes.

MS. CONNER: Are you aware of whether or not Morgan & Morgan has referred its clients to Sea Spine?

MR. MITCHELL: Form.

MS. PATTERSON: I wouldn't know. It is my understanding that all of the patients come from a referring doctor, whoever they are

treating with…The attorney has no bearing on it. It always comes from a doctor.[3]

(R.620-621.)

B. 2/26/14 Depo. Dr. Andrew J. Appel, Sea Spine doctor and owner

MR. FLOOD: How did Ms. Worley come to be referred to you or Sea Spine?

DR. APPEL: I don't know. It says Florida Hospital East. I assume she came from the hospital or she called herself.

. . .

MR. FLOOD: [I]f assuming as you say that that's Sea Spine's bill just for the Sea Spine services that were provided for this meniscectomy, do you know where that number comes from, the $18,235.72?

DR. APPEL: Again, I think it's better left for the people that do the business aspect of things.

(R. 624-627.)

C. 6/05/14 Deposition of Sea Spine CEO Mark Seda

MS. CONNER: Okay. And so there were multiple times in the past where you have seen a letter from an attorney from Morgan & Morgan, and then you got on the phone with them and negotiated a settlement; correct?

MR. SEDA: I couldn't tell you how many were Morgan & Morgan, how many were of any attorney.

MS. CONNER: But more than one?

MR. SEDA: I don't have that information. What I have is this case is ready to settle. I contact the attorney.

. . .

[3] The contention that Sea Spine's patient referrals *always* come from a doctor is belied by the fact that Plaintiff testified she was *not* referred to Sea Spine by a doctor. (R. 536.)

MS. CONNER: Do you know how Heather Worley came to be a patient of Sea Spine?

MR. SEDA: Other than Florida Hospital, no.

. . .

MS. CONNER: Is it your testimony today that there is no Sea Spine representative, employee, officer, or doctor or anybody from Sea Spine who can testify as to how Sea Spine came up with the charges that it charged Heather Worley?

MR. SEDA: Yes. There is nobody. Raul was the one who came up with the fee schedule. Keep in mind he was terminated for insubordination. So I'm not so sure he's going to want to talk.

(R.631-632, R. 634.) Mr. Seda also testified that at the time of Plaintiff's surgery, Sea Spine *only* treated patients pursuant to letters of protection and did not accept payment from any insurance carrier. (R. 631.)

D. <u>6/24/14 Deposition of Dr. Kris Parchuri, Sea Spine surgeon</u>

MR. FLOOD: Okay. Do you know how Ms. Worley was referred to Sea Spine?

DR. PARCHURI: No idea.

(R. 636.)

Thus, even after deposing Sea Spine's CEO, owner, Billing Manager, and Plaintiff's surgeon, the YMCA still has no answers regarding how Sea Spine came up with its charges or whether Sea Spine had a referral relationship with Plaintiff's lawyers. Conveniently, all have recited the same canned response that the Plaintiff was referred to Sea Spine by Florida Hospital East, even though the Hospital's

records and the Plaintiff herself clearly refute that. Physicians Surgical Group [hereinafter "PSG"] has also inexplicably stonewalled all attempts of discovery into their involvement in this case. It is unclear what services, if any, PSG has rendered to the Plaintiff as her medical records show that PSG did *not* supply the surgery center or the surgeon. (R. 515.) Nevertheless, Plaintiff signed a letter of protection in favor of PSG and PSG then generated a $38,078.00 bill for these phantom services. (R. 358.; R. 692) The YMCA subpoenaed to depositions the corporate representatives of PSG with the most knowledge of, among other things, the Plaintiff's bills, the relationship between Plaintiff's attorneys and PSG, and how Plaintiff came to be a "patient" of PSG. (R. 604.) Incredibly, PSG produced a "corporate representative" who was nothing more than a materials manager, unable to answer any relevant questions, as follows:

MS. CONNER: You don't know anything about these bills that are contained in the folder you brought today?

MR. MATOS: No. I just brought the folder over because they told me that was the patient that we were - - I was being deposed for, I guess, that's how you say it? Or the company was being deposed for. And that could be before my time. It all depends on when that patient had surgery.

MS. CONNER: But do you ever have to deal with patient ledgers in your job?

MR. MATOS: No. I handle the materials. I don't do billing.

(R. 643.)

Additionally, the YMCA subpoenaed PSG's bookkeeper of seven years, Mark Fritz. As PSG's authorized agent, Mr. Fritz signed several contracts regarding the sale of the Plaintiff's account to a referral service and medical financing company called National Health Finance.[4] (R. 648-649.) However, Mr. Fritz provided utterly evasive answers to basic questions, in order to conceal PSG's questionable billing practices:

MS. CONNER: Okay, so what service is it that Physicians Surgical Group provides to the patient?

MR. FRITZ: I don't know.

MS. CONNER: What is the purpose of Physicians Surgical Group's business?

MR. MITCHELL: Form.

MR. FRITZ: They do many different things. I'm just the bookkeeper so I'm not involved in their business.

. . .

MS. CONNER: You have no idea what they do?

MR. FRITZ: I have no idea…I know we do medical stuff, but that's about it. I'm a bookkeeper. I handle all the books.

[4] National Health Finance advertises itself on its website as a "medical finance company that facilitates patient referrals to medical providers on a lien basis" and has "working relationships with medical providers and attorneys across the United States." (R. 519) It's website claims to help attorneys "maximize your case." (R. 519).

(R. 647-648.) Most incredible of all, Mr. Fritz would only admit that he did in fact sign several documents regarding the Plaintiff's account, but denied knowing anything at all about the purpose of the documents.

MS. CONNER: Are you involved with the sale of the accounts to National Health Finance in any way?

MR. FRITZ: I don't remember.

MS. CONNER: So you no longer do that?

MR. FRITZ: I'm sorry?

MS. CONNER: You no longer, currently in your - -

MR. FRITZ: Well, I see my signature right there on this - -

MS. CONNER: Yes.

MR. FRITZ: - - form, so I know you're trying to lead up to something. Just so - - yeah, this particular form I signed, but I don't know anything about it.

(R. 649.)

Next, the YMCA sought to discover the referral relationship from the Plaintiff pursuant to its Motion to Compel Better Answers to *Boecher* Interrogatories and Supplemental Request for Production. (R. 525.) A hearing was held on the Motion to Compel on September 18, 2014 before Judge Kest. (R. 650-668.) On September 29, 2014, Judge Kest entered his written Order [hereinafter the "Discovery Order"] granting in part and denying in part the Motion to Compel. (R. 669-671.) Judge Kest limited the YMCA's discovery for a three

and a half year period to: (1) any and all documents reflecting referral and/or billing agreements between Morgan & Morgan and the treating physicians; and (2) the names of cases where a Morgan & Morgan client was referred to the treating physicians. (R. 669-670.) However, the court denied the YMCA's request for financial information regarding the amount of money exchanged between Morgan & Morgan and the physicians, without prejudice to seek this information if Plaintiff's responses to the YMCA's discovery show a referral relationship exists. (R. 670.)

On October 9, 2014, Plaintiff filed for reconsideration, for the first time submitting three affidavits and an e-discovery cost proposal purporting to establish undue burden. (R.672-699.) The affidavit of Plaintiff's counsel disclosed that there are 238 prior Morgan & Morgan clients over a three-year period who have treated with Plaintiff's providers. (R. 683.)[5] On October 28, 2014, the trial court denied Plaintiff's Motion for Reconsideration. (R. 726-727.) Thereafter, Plaintiff filed her Petition for Writ of Certiorari with the Fifth District to review Judge Kest's Discovery Order. (R. 3.)

On May 15, 2015, the Fifth District issued its Opinion denying Plaintiff's Petition. (R. 769-784.) The Fifth District found that the Discovery Order did not

[5] The fact that 238 clients of Plaintiff's law firm have also treated with Plaintiff's doctors certainly casts considerable doubt on Plaintiff's oft-repeated claim that no referral relationship exists.

depart from the essential requirements of the law and rejected the broad holding in *Burt v. GEICO*, 603 So. 2d 152 (Fla. 2d DCA 1992) that a client's referral by her attorney to her treating physician is always an attorney-client privileged communication. (R. 779.) Further, the Fifth District held the Discovery Order was proper because defendants, their counsel and insurers have been required to produce this same information for years. (R. 780.) The court saw "no meaningful difference between requiring defense counsel or insurers to disclose this information and requiring Worley or her counsel to disclose the clients that have been referred by Morgan & Morgan to the healthcare providers in this case." (R. 780.) The court also found that the YMCA demonstrated a good-faith basis for suspecting that a referral relationship exists. (R. 780.)

Regarding production of referral and billing agreements between Plaintiff's law firm and doctors, the court distinguished this type of discovery from the detailed *financial* discovery that is prohibited absent a preliminary showing of a referral relationship. (R. 780.) Significantly, the Fifth District found that "the limited type of discovery presently at issue here concerns only the *existence* of a referral relationship between Morgan & Morgan and the treating physicians in this case." (R. 781.) The court noted that whether the YMCA was permitted to obtain discovery concerning the *financial* relationship between Plaintiff's law firm and doctors if a referral relationship is shown to exist was not before the court because

Judge Kest sustained without prejudice the Plaintiff's objection to all other *financial* discovery information. (R. 781.)

The court rejected Plaintiff's undue burden arguments, stating "[t]o hold otherwise would essentially thwart the truth-seeking function highlighted in *Boecher* because it would allow a party to prevent disclosure of relevant information by arguing that it is too costly to provide, even though the greater the extent of the relationship between the party's law firm and the treating physicians, the more likely the opposing party could successfully argue bias or the unreasonableness of the medical bills charged by the treating physicians." (R. 783)

Finally, the Fifth District held that the Discovery Order did not improperly expand the scope of bias-related discovery beyond that permitted by *Boecher* and its progeny. (R. 783-784.) Thus the court denied the Petition and certified conflict with *Burt.* (R. 784.)

SUMMARY OF ARGUMENT

The Discovery Order correctly requires production of the very type of bias-related discovery which defendants and their law firms have been required to produce for years pursuant to *Boecher.* In fact, the Discovery Order is narrower than the order approved in *Boecher* because the Discovery Order does not require disclosure of the amount of money exchanged between Plaintiff's law firm and treating physicians or any other financial records. Instead, the Discovery Order

requires production of the most basic and preliminary discovery allowing the YMCA to learn of the mere *existence* of any referral relationship between Plaintiff's law firm and treating physicians. Plaintiff is asking this Court to determine which types of referral relationships will allow a defendant to explore financial records, but that issue was not before the courts below or here.

Thus the issue here is whether the Fifth District correctly found that the Discovery Order appropriately allows mere discovery of non-privileged, relevant facts in this case, to wit, the existence of a referral relationship or agreement. Clearly, the Fifth District's holding is consistent with the precedent of this Court regarding bias-related discovery. Further the Discovery Order does not require production of attorney-client privileged communications because the mere providing of a name of a treating physician to a client is not the rendition of legal advice.

The Discovery Order is directed to the Plaintiff and therefore does not burden any treating physician. Thus Plaintiff's argument that the Discovery Order will have a "chilling effect" on treating physicians should be rejected as a classic red herring. This Court should approve the Fifth District's decision because it supports the truth-seeking function of our court system. On the other hand, the holding in *Burt* that a plaintiff's referral by her attorney to her doctor is a

privileged communication, has been misused solely to prevent damaging bias-related evidence from exposure to the jury.

Plaintiff's arguments, if accepted, will allow biased treating physicians to be fraudulently presented to the jury as neutral, disinterested fact witnesses. In cases where plaintiffs fight tooth and nail to prevent discovery of the referral relationship, it is clear that these physicians are not neutral or disinterested. This case presents the Court with an opportunity to reassert its "strong stand against charades in trials." *Boecher*, 733 So. 2d at 998. The time has come to disrobe these wolves in sheep's clothing so that juries can fairly assess the credibility, motives and incentives of potentially highly biased treating physicians.

ARGUMENT

Standard of Review: "Appellate courts do not have automatic certiorari jurisdiction to review every discovery order, even if erroneous." *Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1, 2 (Fla. 2d DCA 2001). "In short, there are two indispensable ingredients to common law certiorari when sought to review pretrial orders of the circuit courts: (1) irreparable injury to the petitioner that cannot be corrected on final appeal (2) caused by a departure from the essential requirements of law." *Bared & Co., Inc. v. McGuire*, 670 So. 2d 153, 156 (Fla. 4th DCA 1996).

I. THE FIFTH DISTRICT'S DECISION SHOULD BE APPROVED AND THE *BURT* OPINION DISAPPROVED ON THE ISSUE OF ATTORNEY-CLIENT PRIVILEGE.

A. An Attorney's Referral of a Client to a Treating Physician is Not an Attorney-Client Privileged Communication.

The Fifth District below has held that the Plaintiff made a prima facie showing of irreparable harm based on the assertion of the attorney-client privilege and thus accepted jurisdiction to consider the issue on the merits. However, the court found that the Discovery Order did not depart from the essential requirements of the law by requiring Plaintiff to answer interrogatories regarding her law firm's current and past referrals of clients to her treating physicians. The Fifth District properly rejected the holding in *Burt*, the conflict case, that a referral of a client by an attorney to a healthcare provider is always protected by the attorney-client privilege.

Indeed, in the two short paragraphs comprising the *Burt* opinion, the Second District sets forth very little reasoning for its holding that a plaintiff's referral to her doctor by her attorney is an attorney-client privileged communication. The Second District found that the referral constituted an "attorney's advice regarding this lawsuit" because the question regarding whether plaintiff was referred to her doctor by her attorney somehow elicited "whether she saw the physician at her attorney's *request*." *Burt*, 603 So. 2d at 125-26 (emphasis supplied).

While the Second District's reasoning may be superficially persuasive, upon deeper analysis of the "communication" allegedly protected, it is clear that the attorney's mere provision of a name of a doctor to the client does not constitute legal advice, or advice of any kind. In rejecting the analysis in *Burt*, the Fifth District did not create a "need-based exception" to the attorney-client privilege as argued by the Plaintiff. Instead, it correctly held that the referral is simply *not* an attorney-client privileged communication to begin with. *Cf. Crawford v. McColister's Transp. Sys., Inc.*, 13-60402-CIV, 2013 WL 5687861, at *2 (S.D. Fla. 2013) ("[W]hether a Plaintiff was referred to a physician by her attorney is discoverable."). Aside from reliance on the questionable and conclusory holding in *Burt*, the Plaintiff simply failed to demonstrate that the act of referral meets the definition of an attorney-client privileged communication.

It is axiomatic that "the burden of establishing the attorney-client privilege rests on the party claiming it." *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) (citing *Fisher v. United States*, 425 U.S. 391 (1976)). Further, "[t]he privilege does not extend to every statement made to a lawyer" or by a lawyer. *Hoch v. Rissman, Weisberg, Barrett*, 742 So. 2d 451, 458 (Fla. 5th DCA 1999) (internal citations omitted). Instead, as explained in *Cunningham v. Appel*:

> Section 90.502(2), Florida Statutes, provides that a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when that other person learned of the communication created during rendition of **legal**

> **services** to a client….Statements about **matters unconnected with the legal services are not privileged**, but communications relating to the acquisition or rendition of **professional legal services** which have a **confidential** character are privileged.

831 So. 2d 214, 215-16 (Fla. 5th DCA 2002) (internal citations omitted). Significantly, the "attorney/client privilege is only available when *all* of these elements are present." *Hoch,*742 So. 2d at 458.

The *Burt* opinion gives short shrift to these indispensable elements and does not explain how the disclosure of the *fact* of the referral by the attorney reveals any *legal* advice. Importantly, "[t]here is general agreement that the protection of the privilege applies only if the primary or predominate purpose of the attorney-client consultations is to seek legal advice or assistance." *In re Seroquel Products Liab. Litig.*, 2008 WL 1995058, at *4 (M.D. Fla. 2008) (quoting 1 Paul R. Rice, Attorney–Client Privilege in the United States§ 7:5); *Anderson Columbia v. Brown*, 902 So. 2d 838, 841 (Fla. 1st DCA 2005) ("[O]ne of the chief purposes of the attorney-client privilege is to encourage 'clients to disclose their circumstances fully to lawyers whose assistance they seek in ascertaining their legal rights and obligations.'") (internal citations omitted)); *see also Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 689 (S.D. Fla. 2009) ("The burden of proof rests squarely on the party claiming the attorney-client privilege to show that the primary purpose of the communication in question was for the purpose of obtaining legal advice, not business advice.").

Here, it cannot be said that the primary purpose of providing a client with the name of a treating physician is for the client to obtain *legal* advice about her *legal* rights or obligations. Anyone can provide the name of a doctor to another person without rendering advice of any kind, let alone legal advice. A referral can come from a friend, neighbor, relative or co-worker without the referral being deemed the unlicensed practice of law. Being told the name of a doctor tells a person absolutely nothing about the person's *legal* rights and obligations any more than an attorney's recommendation of a restaurant, dry cleaner or hair stylist advises the client of a legal right. Instead, the primary or predominate purpose of providing any person with the name of a treating physician is so that the person can obtain medical treatment – not legal advice.

If an attorney's primary purpose in recommending a physician to his client is for legal or strategic reasons, then the attorney is indisputably violating his ethical obligations to his client. The predominate, if not only, reason an attorney should ever recommend a particular treating physician to a client should be so that the client can obtain necessary medical care from a reputable and competent doctor, not so the client can make a strategic legal decision affecting the outcome of her case.

The fact that there may be some legal strategy in recommending a *particular* doctor does not change the fact that the referral is primarily for the purpose of

obtaining medical treatment and is thus not protected from disclosure. *See Preferred Care Partners Holding Corp.,* 258 F.R.D. at 689 ("[T]he business aspects of [a corporate] decision are not protected simply because legal considerations are also involved…"). Here, the overriding medical aspect of Plaintiff's referral to a particular treating physician is not protected from disclosure merely because there may be *some* legal considerations involved in the referral.

It is clear that disclosure of an attorney's communications or advice to a client can under some circumstances "effectively reveal the substance of the client's confidential communication." *Cunningham*, 831 So. 2d at 215-16. However, the attorney's act of providing a name of a doctor to her client does not reveal what the plaintiff stated to the attorney whatsoever. Here, it is completely unknown what the Plaintiff said to her attorney, *if anything at all*, to prompt the provision of the doctor's name. A client's confidential communications with her attorney are only revealed if by disclosure the opposing party becomes aware of what was said by the client. Here, the words exchanged between attorney and client are unknown because the providing of a name of a doctor could consist of absolutely no communications whatsoever, but the mere handing over of a business card to the client. Such act does not reveal whether the client asked for a recommendation, nor does it reveal that the attorney "requested" that the client see the doctor as stated by the *Burt* court. One can only speculate as to the actual

communications exchanged, if any, during the attorney's provision of the doctor's name. Because the disclosure of the referral does not require anyone to divulge the substance of any statements, the privilege is not implicated.

Plaintiff argues that the act of referral should be protected as confidential so long as the Plaintiff has not waived the privilege by disclosing the referral to anyone outside the attorney-client relationship. This would mean that even if an attorney sends millions of dollars worth of business to a treating physician pursuant to letters of protection each year,[6] and the treating physician testifies that he had no idea that millions of dollars of his income came from a particular attorney, the referral relationship may be kept hidden from the jury. This would serve to perpetrate an incredible fraud on the court. *Burden v. Church of Scientology of California,* 526 F. Supp. 44, 45 (M.D. Fla. 1981) (the "attorney-client privilege, like any privilege, is not absolute. It may not, for example, be

[6] At the time of the Plaintiff's treatment in this case, Sea Spine revolved its entire business around litigation patients. (R. 631.) Such healthcare providers stand to gain enormous profit from a steady stream of referrals from personal injury lawyers and vice versa. In fact, the amount of profit a treating physician may gain from treating referred patients pursuant to letters of protections may dwarf the amount of money exchanged between a defendant and a retained expert in a year. *See Brown v. Mittelman*, 152 So. 3d 602, 604 (Fla. 4th DCA 2014) ("A physician may derive substantial income from treating patients involved in litigation beyond the provision of services as a retained expert."). Where doctors have a business model centered around treating personal injury patients, as was the case here, it is simply incredible to believe that the doctors do not know exactly which patients were referred by which attorneys, and thus the referral can hardly be deemed "confidential."

invoked to perpetrate a fraud upon the Court.") (citing *Anderson v. State*, 297 So. 2d 871, 875 (Fla. 2d DCA 1974)).

The Fifth District below disagreed with *Burt* in order to prevent any such fraud on the court or derailment of its truth-seeking function. It is clear that the act of referral is a material fact in this case, not a privileged communication. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("[T]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.").

Accordingly, this Court should approve the decision in *Worley* and disapprove the decision in *Burt* because disclosure of an attorney's referral of a client to a particular treating physician: (1) does not amount to "legal advice" by the attorney; (2) does not reveal the substance of the client's communications, if any, to the attorney; and (3) there is no legitimate reason to keep the referral "confidential" nor is it plausible that the referral is actually kept "confidential" or hidden from the treating physician. Therefore, this Court should approve the Fifth District's holding that an attorney's referral of a client to a treating physician is not an attorney-client privileged communication.

B. Even if the Referral is an Attorney-Client Privileged Communication, the Privilege May Not Be Used as Both a Shield and a Sword.

Here, through her assertion of the privilege, it is clear that Plaintiff was in fact referred to her doctor by her attorney and yet she unfairly wields the privilege like a sword to prevent the YMCA's ability to demonstrate bias based on that referral. *See Coates v. Akerman, Senterfitt & Eidson, P.A.*, 940 So. 2d 504, 511 (Fla. 2d DCA 2006) ("[T]he privilege was intended as a shield, not a sword."); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("[T]he attorney-client privilege cannot at once be used as a shield and a sword."); *see also Clark v. United States*, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused."). Indeed, a party "may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *Bilzerian*, 926 F.2d at 1292.

If the Plaintiff's attorney did not refer her to her treating physician, then her attorney could not have asserted the privilege in good faith when Plaintiff was generally asked how she was referred to her doctor. If Plaintiff was referred by anyone *but* her attorney, then there would be absolutely no reason to assert the privilege because no attorney-client communication would have occurred if she was referred by a non-attorney. Being asked generally how one comes to be referred is qualitatively different from asking if the attorney made the referral

because the former question only elicits an attorney-client communication if an attorney-client communication occurred.

Indeed, through the assertion of the privilege, the Plaintiff reveals a damaging fact, to wit, the referral. Notwithstanding, she is able to simultaneously use the privilege as a sword to prevent disclosure of the damaging referral and thereby falsely present her treating physician/expert as a neutral witness. As such, Plaintiff's use of the privilege as both a shield and a sword would serve to perpetrate an enormous fraud on the court if the YMCA is barred from conducting its bias-related discovery.

Plaintiff is incorrect that this type of bias discovery regarding treating physicians is being conducted in every single personal injury case. In most cases, the plaintiff simply reveals a non-attorney source of her referral, which is usually another doctor. Likewise in those cases: the medical bills are usually indisputably reasonable and paid by insurance; no letters of protection are involved; and the plaintiff does not treat at notorious personal injury centered clinics. In those cases, a defendant has no reason to suspect any bias of the treating physicians who truly have not inserted themselves into the litigation other than to treat a patient who later sued a defendant. Those doctors have no connection to the plaintiff's attorney and usually treat the plaintiff prior to the plaintiff ever obtaining representation or deciding to file a lawsuit.

On the other hand, the attorney-client privilege is being unfairly wielded like a sword *only* in those cases where an attorney referral did in fact occur. In those cases, as was the case here, the plaintiffs almost always treat pursuant to letters of protection with personal injury centered healthcare providers who generate inflated and unreasonable bills *after* the plaintiff obtains an attorney. Accordingly, *Burt* has been misused to allow the very relationships which *should* be exposed to the jury to remain hidden behind the attorney-client privilege. Indeed, material facts in these cases are going uncovered based on the fallacy that the *act* of referral is a privileged communication. This type of deception cannot be permitted in a court system founded on truth and fairness. Indeed, Plaintiff has never once stated that she was *not* referred by her attorney in order to avoid the discovery at issue and yet she continues to claim that the YMCA has failed to prove with "tangible evidence" that a referral relationship exists.

Even though it is the assertion of the privilege that makes clear that the Plaintiff was referred by her attorney, Plaintiff spuriously argues that the YMCA should be required to "first establish, without breaching the attorney-client privilege" that a referral relationship exists, before the YMCA can discover whether a referral relationship exists. This circular and self-serving reasoning places the YMCA in the impossible position of having to prove the existence of the very facts it is seeking to discover before those facts are discovered. Plaintiff is

thereby able to enjoy an impenetrable fortress that is created around the attorney/doctor financial relationship through assertion of the privilege. Plaintiff's argument carried out to its logical conclusion is that if she can succeed in hiding her referral, then she should be permitted to mislead the jury about material facts in this case, to wit, the biases of her treating physicians.

The Plaintiff should not be permitted to use the privilege as both a shield and sword to prevent highly probative evidence from being discovered in this case. Given the fundamentally unfair nature of the argument presented by the Plaintiff, this Court should approve the Fifth District's decision so that its holding is applicable throughout the State of Florida. To hold otherwise, would allow the Plaintiff to perpetrate an incredible fraud on the court.[7]

II. THE DISCOVERY ORDER CONFORMS TO THE ESSENTIAL REQUIREMENTS OF THE LAW SET FORTH IN *BOECHER* AND ITS PROGENY.

Here, the Discovery Order properly requires the Plaintiff to produce information regarding the referral relationship between her attorneys and treating physicians because such information is directly relevant to the potential bias of the

[7] Should this Honorable Court find that identification of the case names would somehow reveal a privileged communication, the YMCA respectfully requests that this Court remand with instructions to order redaction of the case names only while allowing the prior cases to be identified by a number. However, it is clear that the assertion of the privilege is just a tactic to prevent discovery of highly damaging bias information because Plaintiff has never once requested mere redaction of the case names.

physicians pursuant to *Allstate Ins. Co. v. Boecher* and its progeny. 733 So. 2d 993 (Fla. 1999). Although *Boecher* dealt with discovery of the financial relationship between a party and a witness rather than between the party's *attorney* and a witness, its reasoning is no less applicable here. *See Morgan, Colling & Gilbert, P.A. v. Pope*, 798 So. 2d 1, 3 (Fla. 2d 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.").

While treating the referral as an attorney-client privileged communication has many negative consequences, requiring disclosure of the referral serves the truth-seeking function of our court system. Disclosure will appropriately apprise the jury of a material underlying fact in the case: that this treating physician was selected by the attorney and is not randomly or independently involved in the lawsuit.

Plaintiff argues that it is "unclear how evidence that the lawyer referred the party to a specific doctor could open the door to this type of overbroad fishing expedition in the hopes of establishing that some broader, more nefarious type of relationship exists." (IB. 48.) However, the answer to this question is quite clear and has already been answered by this Court in *Boecher*. The reason the referral opens the door to allow a defendant to explore bias is because the referral results in

business for the physician which could provide the physician with "a vested interest in that financially beneficial relationship continuing." *Boecher*, 733 So. 2d at 997.

Of course, "[t]he more extensive the financial relationship between a party and a witness, the more it is likely that the witness" will be biased. *Id.* However, whether or not the witness is in fact biased, the point is that a party is permitted to *discover* any potential bias and the *extent* of any bias creating relationship. *Id.* ("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."); *see also State Farm Mut. Auto. Ins. Co. v. German*, 12 So. 3d 1286, 1287-88 (Fla. 5th DCA 2009) (Judge Torpy, concurring) (because a party may attack a witness's credibility with evidence of bias, "[i]t logically follows that pretrial discovery is permissible to uncover evidence of bias for all the same reasons that discovery on any trial issue is permitted.").

If it turns out that the "extent" of the financial connection between lawyer and doctor is minimal, then the jury is entitled to reject claims of bias. However, the fact that the connection is in fact minimal does not operate to prevent the *discovery* of the relationship because 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." *Boecher*, 733 So. 2d at 997-98. And "[a]ny limitation on this inquiry has the potential for thwarting the truth-seeking function of the trial process….we take 'a strong stand against charades in trials.'" *Id.* (internal citations omitted). As such, this Court does not have to take a "cynical" view as argued by the Plaintiff to reach the fair conclusion that a treating physician who accepts referrals from a lawyer has the potential to be biased.

Plaintiff argues that there are a myriad of reasons why the attorney may have referred his client to a particular doctor, some benign or altruistic while others strategic and self-interested. But just because the *attorney* may have altruistic reasons for a referral is completely irrelevant to whether the defendant gets to explore the bias of the *doctor* who receives the financial benefit of those "altruistic" referrals. To be sure, a defense attorney may recommend an expert to her client for the very first time for no other reason than that the expert is professional, credible, and perhaps one of very few experts who work in a particular field. However, none of these "good faith" reasons for choosing an expert or minimal contact with an expert has ever operated to prevent a plaintiff from merely discovering the potential bias of the expert pursuant to *Boecher* and *Pope.*

Notwithstanding, the Plaintiff advocates for some sort of bright-line test from this Court dictating the number of referrals required before a defendant can

conduct any further discovery on the issue of bias. Plaintiff incorrectly states that "no court has attempted to answer the question of what type of a 'referral relationship' would permit a party to delve into the financial dealings between a law firm and a physician." First, that issue is not before this Court. The Discovery Order merely requires disclosure of the existence of any referrals or referral agreements – not detailed financial records demonstrating the money exchanged. Second, even if the issue of "how many referrals does it take to get financial discovery" was on review, this Court has already held in *Boecher* that the mere fact that a party has retained the expert in the current case, even if it is the very first time, provides the opposing party with the opportunity to delve into the financial dealings between the party and expert.

Boecher does not set a threshold requirement of retentions or dictate the *extent* of the relationship required before discovery of the relationship is allowed. *Boecher* specifically allows every party to discover with regard to the opposing party's expert, the names of prior cases where the expert was retained by the party or attorney and the amount of money exchanged in those prior retentions. 733 So. 2d at 994, 997. This Court did not hold that if the current case was only the first, second or third time the expert was ever retained by a party then the opposing party did not have to answer interrogatories requesting the names of past cases and money exchanged. Instead, the fact that the expert was retained in the current case

was sufficient to allow discovery of the *extent* of the relationship. Thus the same should apply to treating physicians, that is, even one referral is sufficient to allow the defendant an opportunity to further explore the extent of the financial relationship. *See Steinger, Iscoe & Greene, P.A. v. GEICO*, 103 So. 3d 200, 206 (Fla. 4th DCA 2012) ("At the very least, the health care providers must provide…any history of referrals between the health care providers and the law firm.").

Next, Plaintiff argues that in approving the Discovery Order, the Fifth District misconstrued the ruling in *Boecher* because *Boecher* pertained to retained experts, not treating physician/experts. However, *Boecher* has been logically and properly extended to allow a defendant to discover the potential bias of treating physicians. As aptly stated by Judge Torpy:

> A treating physician, just as any other witness, may be questioned at trial concerning any bias he or she might have for or against a party….Under most circumstances, it would seem that the correct balance is the same balance contained in the rule for all other experts because there is no logical distinction between treating physicians and retained experts for purposes of uncovering this type of information. The information is similarly relevant, and the burdens of producing the information are the same for all of these professionals.

State Farm Mut. Auto. Ins. Co. v. German, 12 So. 3d 1286, 1287-88 (Fla. 5th DCA 2009) (Judge Torpy, concurring). Subsequent to *German*, the Fourth District expressly adopted the reasoning in Judge Torpy's concurring opinion holding, "[f]or purposes of uncovering bias, we see no meaningful distinction between a

treating physician witness, who also provides an expert opinion (the so-called 'hybrid witness'), and retained experts." *See Steinger Iscoe*, 103 So. 3d at 203.

The truth-seeking principles espoused in *Boecher* ring even truer in the case of a biased treating physician than a retained expert because " '[u]nder our adversary system a jury can usually assume that the parties and their counsel are motivated by the obvious interests each has in the litigation,' but, when the alignment of interests is unclear, '[t]he fairness of the system is undermined.' " *Boecher,* 733 So. 2d at 995 (internal citations omitted). Nowhere is the "alignment of interests" more unclear than in the case of a treating physician who is presented as a neutral fact witness, but actually has a multi-million dollar referral relationship with the plaintiff's counsel.

Because of this reality, *Boecher* has been routinely extended to allow discovery of the potential bias of treating physicians. *See Brown v. Mittelman,* 152 So. 3d 602, 604 (Fla. 4th DCA 2014) ("A jury is entitled to know the extent of the relationship between the treating doctor and referring law firm….[because] a physician's continued financial interest in treating other patients referred by a particular law firm could conceivably be a source of bias 'not immediately apparent to a jury.'"); *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."); *Flores v. Miami–Dade Cnty.*, 787 So.

2d 955, 958–59 (Fla. 3d DCA 2001) (holding that trial court properly allowed defendant to cross examine plaintiff's treating physician regarding referrals in that case, as well as in other cases); *Steinger Iscoe*, 103 So. 3d at 203 ("[D]iscovery aimed at producing evidence of a treating physician's bias is permissible."); *Norfolk v. Comparato*, 2012 WL 3055675, at *3 (S.D. Fla. 2012) (ordering plaintiff to answer an interrogatory regarding the referral relationship between his attorneys and doctors because "[d]espite the factual distinction between the instant case and *Boecher,* the same interests are present here as they are in *Boecher* and its progeny…").

Significantly, the Fourth District has held, "[w]hether the law firm directly referred the plaintiff to the treating physician does not determine whether discovery of the doctor/law firm relationship is allowed." *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." *Id.* Accordingly, the YMCA does not have to first *prove* that the Plaintiff was referred by her attorney before it is entitled to discover *if* she was referred by her attorney. The Fourth District has properly done away with any such impossible requirement of proving the plaintiff's referral, even though plaintiff has asserted the privilege to block proof of the referral, before being able to discover the referral. *Id.* (stating that in its prior decision in *Katzman*,

the court "recognized a 'direct referral by the lawyer to the doctor' as one circumstance that creates a potential for bias. However, contrary to Dr. Brown's assertion, we did not intend to limit discovery to that narrow situation.") (referring to *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1064 (Fla. 4th DCA 2011)).

Even if the YMCA is required to establish some sort of predicate before it is permitted to discover the existence of the referral relationship, there is ample support in the record for such predicate as noted by the Fifth District.

First, as demonstrated above, the Plaintiff's assertion of the privilege when generally asked how she was referred to her treating physician shows she was in fact referred by her attorney or else her attorney did not assert the privilege in good faith.

Second, the fact that the Plaintiff's treatment with her providers was pursuant to letters of protection provides a basis to suspect that she was referred to them by her attorney. A doctor is not going to treat a patient pursuant to a letter of protection unless she has an attorney who has or will file suit – there is no payment of the bill without a settlement or judgment. Accordingly, a plaintiff is usually referred to an LOP-accepting doctor by either her attorney or a doctor/lawyer referral service. Significantly, at the time of Plaintiff's surgery, Sea Spine *only* treated patients pursuant to letters of protection and did not accept payment from

any insurance carrier. (R. 631.) As such, 100% of Sea Spine's income derived from money it could get from defendants sued by its patients' lawyers. Thus there is a reasonable basis to suspect that when 100% of a doctor's income derives from finding and treating patients pursuant to letters of protection, the doctor has a clear incentive to develop a referral relationship with the attorneys who represent those patients.

Indeed, Plaintiff's counsel has already disclosed that there are 238 prior Morgan & Morgan clients over a three-year period who have treated with Plaintiff's providers. (R. 683.) It is either an unbelievable coincidence that these 238 clients independently found their way to Plaintiff's physicians or a clear referral relationship exists. Either way, the fact that 238 prior Morgan & Morgan clients also treated with Plaintiff's physicians provides a clear predicate for the YMCA's discovery of any referral relationship.

Third, Plaintiff's ridiculously inflated bills have provided the YMCA with a well-founded suspicion that an agreement to inflate the bills may exist. Contrary to Plaintiff's contention that defendants always dispute the medical bills, defendants often stipulate to the reasonableness of the medical bills because most non-LOP doctors charge what is in fact reasonable, usual and customary in the community.

Fourth, the evasive testimony of Plaintiff's providers is undeniably suspicious and verges on the fraudulent. The fact that not a single one of the

Plaintiff's physicians could justify the billing in this case is reflective of a business practice of overbilling and a potential agreement with Plaintiff's law firm to inflate the bills, but accept less post-verdict. The purpose of discovery is for the parties to obtain evidence in support of their claims or defenses. Discovery requests need only be reasonably calculated to lead to the discovery of admissible evidence. Here, "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." *Boecher*, 733 So. 2d at 997.

Thus the Fifth District properly found that the Discovery Order did not depart from the essential requirements of the law where such a significant predicate for bias-related discovery exists. If the circumstances of this case do not demonstrate a sufficient basis for discovery of the referral relationship, it is hard to imagine under what circumstances such discovery would ever be allowed.

Next, Plaintiff complains that the Discovery Order has improperly expanded *Boecher* because it requires the Plaintiff to produce information in the custody of her attorney. However, *Boecher* has been appropriately extended to allow this practice for years. Defendants are *routinely* required to answer interrogatories calculated to reveal the relationship between their experts and attorneys or insurers. As stated in *Springer v. West*, "[a]lthough petitioner argues that *Boecher* does not apply, because the interrogatories in this case seek information regarding the

relationship between his insurer, a nonparty, and the expert, whereas in *Boecher*, the insurer was a party, we reject that argument." 769 So. 2d 1068, 1069 (Fla. 5th DCA 2000). Importantly:

> 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*.

Id.; see also Pope, 798 So. 2d at 3 (trial court order requiring plaintiff's law firm to produce invoices between itself and plaintiff's experts conformed "to the trend insuring fairness in the jury trial process by permitting discovery of a financial relationship between a **witness** and a party or **representative**.") (emphasis supplied); *Norfolk v. Comparato*, 2012 WL 3055675, at *3 (S.D. Fla. 2012) (even though the defendant's *Boecher* interrogatory to the plaintiff did "not seek discovery from a party…[but] Rather, Defendant seeks discovery from Plaintiff's lawyers about their relationship with Plaintiff's medical providers" defendant's discovery was held proper). Additionally, the bias-related information is clearly available to the Plaintiff and in her control since the information is in her law firm's custody. *See Crawford*, 2013 WL 5687861, at *2 (stating that a party may not avoid answering an interrogatory question "if the information is available to her, or under her control").

In fact, the Plaintiff here has propounded interrogatories pursuant to *Springer* and *Pope* demanding that the YMCA produce information regarding the relationship between its retained experts and its insurance carrier and law firm. (R. 728-736.) The YMCA has fully complied, disclosing the relationship between its experts, law firm and insurer. Thus, it is unclear why Plaintiff believes she is entitled to this information in the custody of the YMCA's law firm, but her law firm is not required to produce the same.[8] Plaintiff would have this Court disapprove of *Springer* and *Pope* to avoid having to answer the YMCA's discovery, despite her reliance on these very cases in support of her expert interrogatories to the YMCA.

The reason the bias of the seemingly neutral treating physician must be exposed is the same reason a defense attorney is no longer allowed to present a CME (compulsory medical examination) expert to the jury as an IME (*independent* medical examination) expert. *Boecher,* 733 So. 2d at 996, fn. 4 ("Although still referred to as an IME…the rules of civil procedure recognize that the expert is no longer considered 'independent,' but rather an expert hired by the party requesting the compulsory court-ordered examination….[which] specifically provides that the witness 'shall not be identified as appointed by the court.'").

[8] The old adage, "what's good for the goose is good for the gander" expresses a universal truth which demands the result reached by the Fifth District in approving the discovery at issue in this case.

The potential for deception is the same or worse with regard to a treating physician because the treating physician may not only have an enormous incentive to render biased expert *opinions* for the plaintiff in hopes of future referrals from plaintiff's counsel, but also has the ability to manipulate the very *facts* at issue in the case: the necessity for and the cost of treatment. The physician decides whether surgery is necessary and sets the charges, but may have a referral or billing agreement with counsel to accept less post-verdict. These hidden biases and relationships are rarely apparent to a jury as they are with a defendant's retained expert. Thus the testimony of the purported "neutral" treating physician has a unique and insidious ability to mislead the jury.

In cases across the state, the incredible bias of certain treating physicians will be completely concealed from the jury *unless* this Court permits the very type of discovery at issue here. The harm caused by doctor/lawyer referral relationships is recognized in a very recent opinion of this Court wherein it noted an influx of Bar complaints regarding doctor/lawyer referral services. *See In re Amendments to Rule Regulating The Florida Bar 4-7.22--Lawyer Referral Services*, 175 So. 3d 779 (Fla. 2015) [hereinafter the "*Referral Services Opinion*"].

The *Referral Services Opinion* focuses on the harm that doctor-owned lawyer referral services can have on the public. *Id.* at 779. This Court found that these services have a tendency to foster relationships between doctors and lawyers

that cause lawyers to act contrary to their client's interests. *Id.* at 780. The lawyers develop incentives to refer their clients to the clinics owned by the referral service thereby inducing their clients to undergo potentially unnecessary or harmful procedures. *Id.* This is just one of the numerous evils that can arise from doctor/lawyer referral relationships. *See id.* (describing how unsophisticated accident victims referred by a referral service to doctors for unexplained treatment incurred "[t]housands of dollars in medical bills" which they were ultimately responsible to pay).

The anecdote that most concerned this Court was about a woman whose lawyer referred her to a doctor who also owned a referral service. *Id.* The lawyer referred his client to this doctor for unnecessary treatment because of his pre-existing relationship with the doctor's referral service. *Id.* The flip side of the *lawyer's* undisclosed financial motive for referring his client to a particular doctor is the *doctor's* undisclosed financial motive for providing biased testimony at trial in favor of the referring attorney's client. The doctor clearly has a desire to continue receiving referrals in the future because his personal injury/litigation oriented medical practice depends upon it. These doctors do not treat just any patient. They treat patients involved in litigation and thus their livelihood is intimately entwined with the legal profession and referral relationships with lawyers.

The fact remains that when attorneys get into the business of directing their client's medical care through repeated referrals to particular personal injury centered doctors, all sorts of abuses can occur. The YMCA and perhaps the Plaintiff are victims of just such abuse and that is the reason this case is before the Court right now. In many cases involving plaintiffs who treat at personal injury centered clinics, reasonable and early settlement becomes impossible where the defendant is unwilling to pay medical bills inflated pursuant to letters of protection. Ultimately, the defendant is harmed no matter what it does because it must choose between either paying the ridiculously inflated bills or expending exorbitant amounts on the discovery necessary to expose the referral relationship and the unreasonableness of the bills.

To the extent the YMCA is liable for the injuries to the Plaintiff, the YMCA should only be required to pay actual damages, not imaginary, inflated damages which have been foisted on the court time and time again pursuant to these hidden referral relationships. Here, unlike so many other defendants who simply surrender, the YMCA has taken a stand and has chosen to use the tools of discovery to defend itself. The resultant "sideshow" referenced in the Plaintiff's Initial Brief has been necessitated solely by the Plaintiff's vehement opposition to this discovery at every stage of this case. As stated by the Fifth District in *Worley*, where no referrals or billing agreements exist, the Plaintiff can simply answer

"none." It is as simple as that. The fact that she will not simply answer "none," but instead has fought this discovery tooth and nail is telling to say the least.

If the Court allows the privilege to be used to hide referral relationships from the jury, then the privilege could similarly be used to hide these relationships from the Florida Bar whose job it is to regulate this very conduct. The privilege could also be used to hide the referral relationship from the client even though the attorney is required to disclose his or her conflict of interest to the client before referring her to a particular doctor. These issues were of great concern to this Court in its *Referral Services Opinion.*

Based on the foregoing significant case law, the Fifth District's decision should be approved as consistent with *Boecher* and its progeny. To hold otherwise, all of the truth-seeking principals routinely applied and upheld over the last two decades would have to be rejected all so that a plaintiff may hide the bias of her doctors pursuant to the attorney-client privilege. The time has come for the Court to put an end to this charade in the State of Florida.

III. CLAIMS OF UNDUE BUT NON-RUINOUS BURDEN ARE INSUFFICIENT FOR CERTIORARI RELIEF.

First, it goes almost without saying that referral and billing agreements between the lawyer and *doctor* are not attorney-client privileged communications and thus no irreparable harm is caused by their disclosure based on the privilege. Second, Plaintiff argues that irreparable harm results from production of these

agreements because production is financially burdensome, but she and/or her law firm will not be able to recover these expenses on plenary appeal. Plaintiff argues that pursuant to the Uniform Guidelines for Taxation of Costs, these costs are not recoverable. However, this argument was never presented to the Fifth District for review and thus should be rejected here.

Moreover, the Uniform Guidelines clearly state that they are "advisory only" and taxation of costs is "within the broad discretion of the trial court." As such, the Uniform Guidelines do not act as an automatic bar to Plaintiff's recovery of costs. *See Allstate Ins. Co. v. Hodges*, 855 So. 2d 636, 641 (Fla. 2d DCA 2003) (allegedly burdensome discovery order allowing *Boecher* interrogatories did not result in irreparable harm because "the party imposed upon may later seek reallocation of the costs incurred for the discovery as the prevailing party."); *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1200 fn. 5 (Fla. 4th DCA 2000) ("[T]he mere fact that a trial judge has allowed burdensome discovery to proceed does not forestall later reallocation of the costs incurred when the prevailing party seeks to tax costs at the end of the case.").

However, even assuming the Plaintiff does not prevail, the costs are deemed unrecoverable and she has established irreparable harm, Plaintiff still must demonstrate the second indispensable element that the Discovery Order departs from the essential requirements of the law. *See McGuire*, 670 So. 2d at 156. Just

because a trial court order results in unrecoverable expense does not mean that the trial court is barred from entering the order. If the trial court order is proper, *i.e.*, does not depart from the essential requirements of the law, then a party is required to comply regardless of the fact that she will not be compensated for compliance. Responding to discovery costs money. But that does not mean that discovery is necessarily unwarranted or can be curtailed.

Here, the Discovery Order complies with the essential requirements of the law because it is not overbroad or unduly burdensome, but rather is quite narrow and tailored to reveal highly probative information. The Discovery Order only requires disclosure of the mere existence of a relationship, *if* it exists. The Fifth District clearly stated that it interpreted the Discovery Order to mean that *if* 'any' documents exist, then Plaintiff must produce them. If they do not exist, Plaintiff may state as much. Thus Plaintiff is not required to produce non-existent documents or create any lists. Importantly, the Fifth District noted that the Discovery Order does not compel production of financial information.

Even if production of the discovery is unduly burdensome, "discovery orders rejecting claims of undue but non-ruinous burden…do not involve the *essential requirements* of law." *Topp Telecom*, 763 So. 2d at 1200. Indeed:

> The fact that a party may be forced to furnish discovery when the cost to do so is deemed inordinate does not involve a failure "to afford procedural due process" and "whether the circuit court applied the correct law."…An erroneous order compelling discovery when the cost

> and effort to do so is burdensome but not destructive is simply not "sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari." *Haines City,* 658 So. 2d at 531.

Id.; see also Hodges, 855 So. 2d at 641 (holding that Allstate's economic concerns regarding production of *Boecher* discovery did not rise to the level of undue burden necessary to support a finding of a departure from the essential requirements of law where there was no showing that the discovery would be destructive). The courts distinguish "burdensome and unduly onerous" discovery from discovery, which "would effectually ruin the objector's business." *See Topp Telecom*, 763 So. 2d at 1200 ("It seems clear to us that the mere fact of unwarranted effort and expense is not, by itself, synonymous with a 'departure from the *essential* requirements of law' [e.s.] for which immediate review is necessary.").

In *Boecher,* this Court affirmed that its opinion in *Martin–Johnson, Inc. v. Savage,* 509 So. 2d 1097 (Fla.1987),[9] "properly sets forth the parameters for certiorari relief in pretrial discovery." This Court explained:

> Litigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case. The authorities are clear that this type of harm is not sufficient to permit

[9] "Although courts have since retreated from the specific holding of *Martin–Johnson, Inc.*…the foundation of the case—that common law certiorari may be invoked only when a party will suffer irreparable harm that cannot be remedied on direct appeal—remains sound law." *Bd. of Trustees of Internal Improvement Trust Fund v. Am. Educ. Enterprises, LLC*, 99 So. 3d 450, 455 (Fla. 2012**).**

> certiorari review. [c.o.]... Even when the order departs from the essential requirements of the law, there are strong reasons militating against certiorari review. For example, the party injured by the erroneous interlocutory order may eventually win the case, mooting the issue, or the order may appear less erroneous or less harmful in light of the development of the case after the order.

Martin–Johnson, 509 So. 2d at 1100.[10]

Significantly, this is not the first time that Morgan & Morgan has been ordered to identify the amount of past referrals of its clients to treating physicians. In *Crable v. State Farm*, the court noted that the plaintiffs, who were Morgan & Morgan clients, "disclosed, pursuant to court order, that within the last four years, Morgan & Morgan has referred approximately 176 clients to Deuk Spine for independent medical examinations and that during the past three years, Morgan & Morgan has paid Deuk Spine approximately $2,955,786.74." 2011 WL 5525361, at *1 (M.D. Fla. 2011). Therefore, it is clear that Morgan & Morgan has known for years that its referral relationships with treating physicians are discoverable.

[10] Likewise,"[w]hile certiorari may be used to review pre-trial orders compelling discovery, it is generally not appropriate simply based on an argument that the discovery request is overbroad, irrelevant, or burdensome." *Killinger v. Guardianship of Grable*, 983 So. 2d 30, 32 (Fla. 5th DCA 2008). Instead, certiorari review is appropriate when a discovery order "permits discovery even when it has been affirmatively established that such discovery is neither relevant *nor will lead to the discovery of relevant information*." *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995) (emphasis supplied). Here, as demonstrated above, any referral or billing agreements between Plaintiff's law firm and Plaintiff's treating physicians is directly relevant to demonstrate both bias and the unreasonableness of the medical bills.

More importantly, it is clear that Morgan & Morgan can keep track of and determine which of its clients were referred to treating physicians by its attorneys. Notwithstanding, Morgan & Morgan's CFO, Deborah Parrott, attests:

> To the best of my knowledge, the Firm does not collect or compile statistical information on whether any clients received any formal and informal arrangements…regarding their bills….I do not believe that I will be able to accurately arrive at attempting to locate any documentation of existence of a referral relationship… because we do not track or compile this kind of information.

(R. 691.) However, whether "statistical information" exists or whether Morgan & Morgan has a separate folder labeled "referral information" does not determine whether the discovery is unduly burdensome to produce. A law firm should not be permitted to obstruct this very important discovery by intentionally failing to maintain in an easily accessible form, information which is routinely requested in litigation. Defense law firms have been required to adapt their record keeping policies to keep track of this information for years.

Indeed, in *Hodges*, the court rejected Allstate's affidavit that it had "no central file…or database currently in existence" containing the requested information. 855 So. 2d at 641. The court held:

> [I]n the three years following the issuance of *Boecher,* Allstate still has not implemented a computer program or system for keeping track of the information….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.

Id.; *see Steinger Iscoe*, 103 So. 3d at 206, fn. 4 ("Defense counsel and defense experts have long been required to maintain financial records of their business dealings. We see no reason why law firms and doctors who engage in referral activities should not be required to maintain records of their dealings.").

Here, Plaintiff's law firm is the largest and arguably the most sophisticated personal injury law firm in Orlando, if not Florida or even the country. At this stage, the failure to maintain records, which have been known to be discoverable for years, can only be intentionally calculated to deter the very discovery requests to which they apply. Accordingly, the Fifth District properly found that the Discovery Order did not depart from the essential requirements of the law.

Moreover, this Court should hold that defendants are not required to first seek this discovery from treating physicians before requesting it from the plaintiff pursuant to interrogatories. Just as defendants are required to answer *Boecher* interrogatories disclosing the relationships between their lawyers and experts without the plaintiff first seeking this information from the expert, defendants should be allowed to seek this information as a matter of course from plaintiffs.

In the instant case, the YMCA was forced to incur significant expense on a wild goose chase to obtain this information from Plaintiff's healthcare providers, who all provided nebulous testimony at best. The YMCA deposed CEOs, billing custodians, bookkeepers and the treating physicians and not a single one could

testify about the relationship or the basis of the exorbitant bills. Defendants should not be required to go on such a fruitless and expensive discovery mission to obtain information from uncooperative doctors when plaintiffs are allowed to obtain the exact same type of discovery directly from defendants pursuant to simple interrogatories as a matter of course in every single case where a defense expert is retained.

Although serving this exact type of bias-related discovery on the YMCA, Plaintiff argues that the YMCA's service of bias-related discovery on her has resulted in a "sideshow" or "circus." But the only party who has been forced to jump through any circus hoops is the YMCA when trying to obtain the simplest discovery regarding the mere *existence* of the referral relationship between Plaintiff's doctors and lawyers. Plaintiff was not required to track down and depose the CEOs, bookkeepers, billing custodians and other employees of the YMCA's experts before she was allowed to discover, pursuant to interrogatories, the relationship between the YMCA's lawyers and experts.

Moreover, the only "chilling effect," if any, caused by the Discovery Order would be on the attorney's decision to direct his client's medical treatment and develop referral relationships with treating physicians. Based on the undeniable harm caused by such referral relationships to plaintiffs, defendants, and our court system, any such "chilling effect" should be welcomed by this Court. Likewise,

this Court should reject any claims of a "chilling effect" on a treating physician's willingness to treat patients referred by attorneys because the Discovery Order is not directed at Plaintiff's treating physicians and requires nothing from them.

Accordingly, the Fifth District has properly held that the Discovery Order is not unduly burdensome, but rather adheres to the truth-seeking principles espoused in *Boecher*. To hold otherwise would require a complete reversal of not just *Worley*, but *Boecher* and its progeny, which for decades has effectively operated to prevent the very types of charades at play in this case. Fairness demands the result reached by both the Fifth District and the trial court in this case.

CONCLUSION

For the foregoing reasons, this Court should approve the Fifth District's decision in *Worley* and disapprove of the decision in *Burt.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 16, 2015, the foregoing was electronically filed through the Florida Courts E-Filing Portal which will send a notice of electronic filing to:

Celene H. Humphries, Esq.
Philip J. Padovano, Esq.
Tracy S. Carlin, Esq.
Brannock & Humphries
100 South Ashley Dr., Ste. 1130
Tampa, FL 33602
(813)223-4300
chumphries@bhappeals.com
ppadovano@bhappeals.com
tcarlin@bhappeals.com
eservice@bhappeals.com
Attorneys for Petitioner

Andrew Parker Felix, Esq.
W. Clay Mitchell, Jr., Esq.
Morgan & Morgan, P.A.
Post Office Box 4979
Orlando, FL 32802
(407) 420-1414
Afelix@forthepeople.com
CMitchell@forthepeople.com
KDiMeglio@forthepeople.com
lbland@forthepeople.com
dramsey@forthepeople.com
Attorneys for Petitioner

Andrew A. Harris, Esq.
Burlington & Rockenbach, P.A.
Courthouse Commons/Suite 350
444 West Railroad Avenue
West Palm Beach, FL 33401
(561) 721-0400
aah@FLAppellateLaw.com
jew@FLAppellateLaw.com
flappellatelaw@gmail.com
Attorneys for Amicus Curiae, FJA

Katherine E. Giddings, BCS
Diane G. Dewolf, Esq.
Akerman LLP
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
(850) 224-9634
katherine.giddings@akerman.com
diane.dewolf@akerman.com
elisa.miller@akerman.com
michele.rowe@akerman.com
Attorneys for Amicus Curiae, Florida Justice Reform Institute

David I. Spector, Esq.
Akerman LLP
777 So. Flagler Dr., Suite 1100 West
West Palm Beach, Florida 33401
(561) 671-3616
david.spector@akerman.com

William W. Large, Esq.
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, FL 32301-1824
(850) 222-0170
william@fljustice.org

barbara.dormand@akerman.com
deborah.peterson@akerman.com
Attorneys for Amicus Curiae, Florida Justice Reform Institute

Attorneys for Amicus Curiae, Florida Justice Reform Institute

Sharon C. Degnan, Esq.
Caryn L. Bellus, Esq.
Kubicki Draper
One East Broward Blvd. Suite 1600
Fort Lauderdale, Florida 33301
(305) 982-6634
cb-kd@kubickidraper.com
Attorneys for Amicus Curiae, FDLA

/s/ JESSICA C. CONNER
JOSEPH R. FLOOD, JR., ESQ.
Florida Bar No. 0361593
JFlood@drml-law.com
JESSICA C. CONNER, ESQ.
Florida Bar No. 0085145
Jessica.Conner@drml-law.com
LAMAR D. OXFORD, ESQ.
Florida Bar No. 0230871
LOxford@drml-law.com
Dean, Ringers, Morgan & Lawton, P.A.
Post Office Box 2928
Orlando, Florida 32802-2928
Tel: 407-422-4310
Fax: 407-648-0233
Attorneys for Respondent

CERTIFICATE OF TYPESTYLE COMPLIANCE

I HEREBY CERTIFY that the typeface used for Respondent's Answer Brief on the Merits is Times New Roman, 14 point.

/s/ JESSICA C. CONNER
JOSEPH R. FLOOD, JR., ESQ.
Florida Bar No. 0361593
JFlood@drml-law.com
JESSICA C. CONNER, ESQ.
Florida Bar No. 0085145
Jessica.Conner@drml-law.com
LAMAR D. OXFORD, ESQ.
Florida Bar No. 0230871
LOxford@drml-law.com
Dean, Ringers, Morgan & Lawton, P.A.
Post Office Box 2928
Orlando, Florida 32802-2928
Tel: 407-422-4310
Fax: 407-648-0233
Attorneys for Respondent