

>> TURN TO THE SECOND CASE ON OUR DOCKET.

AND BEFORE WE DO THAT, I APOLOGIZE WITH FOR THE BRIEF DELAY WE'VE HAD IN THE PROCEEDINGS THIS MORNING. WE NOW DO MOVE ON TO THE SECOND CASE.

DODGEN V. GRIJALVA.

I APOLOGIZE IF I MISPRONOUNCED THAT.

COUNSEL, PLEASE PROCEED.

>> KANSAS GOODEN, MAY IT PLEASE THE COURT.

LIKE THE LAST CASE, WE ARE HERE AGAIN ASKING THIS COURT TO TREAT CIVIL PLAINTIFFS AND CIVIL DEFENDANTS EQUALLY IN THEIR DISCOVERY OBLIGATIONS AND OPPORTUNITIES.

AGAIN, WE BELIEVE THIS WILL FORCE OR A BALANCED SEARCH FOR TRUTH AND ENSURE A FAIR TRIAL FOR BOTH PARTIES.

SEVERAL YEARS AGO AGAIN THIS COURT DECIDES WORLEY V. YMCA, AND THAT COURT REALLY UPENDED THE LAW IN SEVERAL AREAS.

IT CHANGED THE LAW WITH REGARDS TO REFERRAL RELATIONSHIPS FOR PLAINTIFFS' LAW FIRMS.

BEFORE THAT THE DEFENSE WAS ABLE TO GET DISCOVERY OF THAT THE REFERRAL RELATIONSHIP AND IMPEACH THOSE DOCTORS IN FRONT OF THE JURY.

AFTER WORLEY THAT WAS NOT ALLOWED.

THE COURT ALSO FOUND THAT THAT REFERRAL RELATIONSHIP WAS PROTECTED BY ATTORNEY-CLIENT PRIVILEGE.

WHERE THE COURT'S MAJORITY OPINION IN THAT CASE, IT KIND OF WENT FARTHER THAN IT HAD BEFORE IN THE PAST, IT BECAUSE CLUE FOUND THAT THAT REFERRAL RELATIONSHIP, THAT TELLING OF A CLIENT TO GO TO A DOCTOR WAS MADE IN FURTHERANCE OF THE

REASON DECISION OF LEGAL SERVICES, NOT JUST FOR OBTAINING MEDICAL CARE.

IT ALSO EXTENDED ATTORNEY-CLIENT PRIVILEGE NOT ONLY TO THE COMMUNICATION, IT EXTENDED IT TO THE UNDERLYING FACT.

>> WHAT'S YOUR BEST CASE FOR THE PROPOSITION THAT, IN FACT, THAT INFORMATION, THAT EXCHANGE IS FOR THE PURPOSE, IS FOR SOME PURPOSE OTHER THAN IN ANTICIPATION TO LITIGATION? THAT IS, IT'S FOR MEDICAL CARE AND IT IS, IN FACT, SOUGHT FOR SOME ADVANCING OF THEORY OR MAKING SOME CLAIM.

>> I MEAN, BEST CASE I ACTUALLY THINK IS THE-- NOT A CASE, BUT IT'S ACTUALLY THE TEXT OF THE ATTORNEY-CLIENT PRIVILEGE STATUTE, 90.502.

THAT SPECIFICALLY STATES THAT IT'S IN FURTHERANCE OF RENDITION OF LEGAL SERVICES.

GOING TO A DOCTOR IS NOT LEGAL SERVICES.

AND THAT IS JUST BASED ON A PLAIN, ORDINARY READING OF THAT TEXT.

AND, AGAIN, EXTENDING TO THE UNDERLYING FACTS VERSUS JUST COMMUNICATIONS BETWEEN ATTORNEY AND A LAWYER, THERE'S A LOT OF CASE LAW ON THAT.

THERE'S CASES FROM THE U.S. SUPREME COURT.

OFF THE TOP OF MY HEAD, I THINK THE LEADING CASE IS CALLED UPJOHN ON THAT ISSUE.

SO THAT CASE, WORLEY REALLY UPENDED THIS FOR A LOT OF REASONS.

WE ARE HERE TODAY SPECIFICALLY THERE'S LANGUAGE IN THE MAJORITY OPINION THAT WE BELIEVE THAT COULD, SHOULD BE APPLIED EVENLY, OR THE WORLEY OPINION NEEDS TO BE OVERTURNED.

SPECIFICALLY THAT ALLSTATE V--

[INAUDIBLE]

DOES NOT APPLY TO A LAWSUIT, OR,
SORRY, DOES NOT APPLY WHEN IT'S
NOT A PARTY TO THE LAWSUIT.

THE INSURANCE COMPANY IN THIS
CASE IS NOT A PARTY. WE ALSO
BELIEVE THAT THE ATTORNEY-CLIENT
PRIVILEGE, IF IT'S PRIVILEGE,
THAT REFERRAL RELATIONSHIP IS
PRIVILEGE ON THE PLAINTIFF'S
SIDE, IT NEEDS TO BE PRIVILEGE
ON THE DEFENDANT'S SIDE.

>> CAN YOU IMAGINE A
CIRCUMSTANCE, LEAVING ASIDE THE
CATEGORICAL PROVISION, WOULD YOU
CONCEDE THAT SOME CONSULTATIONS
WITH A PHYSICIAN, SAY ON THE
PLAINTIFF'S SIDE, COULD BE
PRIVILEGED?

HERE'S A HYPOTHETICAL.

LET'S SAY A QUESTION IN DISPUTE,
A MATTER IN DISPUTE IN A CAR
ACCIDENT CASE IS THE SPEED AT
WHICH A PARTY WAS TRAVELING.

AND THE PLAINTIFF CONSULTED WITH
A PHYSICIAN TO ESTABLISH THAT
THE INJURIES TO THE VICTIM WERE
CONSISTENT WITH A SPEED THAT IS
A MATTER IN DISPUTE.

WOULD THAT CONSULTATION BE MORE
PRIVILEGED OR PRIVILEGED AT ALL
BECAUSE IT GOES TO ANTICIPATING
CLAIM OR DEFENSE IN THE
LITIGATION?

>> SO SPECIFICALLY UNDER THAT
HYPO, THAT TYPE OF DOCTOR WOULD
HAVE TO BE A BIOMECHANICAL
EXPERT.

AND SO ONCE YOU GET INTO THAT
EXPERT REALM, I DON'T THINK THAT
WOULD BE PRIVILEGED.

NUMBER ONE, THERE IS A THIRD
PARTY IN THAT CONVERSATION.
WHEN YOU HAVE A THIRD PARTY IN
THE MIX, THAT DESTROYS THE
PRIVILEGE, NUMBER ONE.

AND THERE IS MEDICAL RECORDS
DOCUMENTING WHAT IS GOING ON
THAT IS BEING DISCLOSED WHICH
WOULD ALSO DESTROY THE

PRIVILEGE.

SO I THINK THERE'S PROBLEMS WITH THE PRIVILEGE OF THESE REFERRAL RELATIONSHIPS GETTING DISCLOSED IN THE FIRST INSTANCE.

THE COMMUNICATION THAT I THINK WOULD BE JUST A LAWYER AND A CLIENT HAVING A CONVERSATION ABOUT LEGAL STRATEGY IN THE CASE AND IT'S JUST THEM, I THINK THAT'S PRIVILEGED.

BUT THE UNDERLYING FACTS OF THE REFERRAL RELATIONSHIP THAT FLOWS BETWEEN THE LAW FIRM AND THAT DOCTOR, THAT IS WHAT'S NOT PRIVILEGE.

AND IT'S THOSE UNDERLYING FACTS THAT WORLEY, TENDED THAT ATTORNEY-CLIENT PRIVILEGE IF TO THAT HAS REALLY CAUSED HAVOC IN THIS AREA OF LAW.

AND, AGAIN, WORLEY JUST REALLY UPENDED THINGS IN THIS AREA.

AND WORLEY HAS NOT BEEN APPLIED EVEN-HANDEDLY ON BOTH SIDES.

IT'S ESSENTIALLY BEEN USED AS A SWORD AND A SHIELD BY THE PLAINTIFFS.

THEY WILL REFUSE TO RESPOND TO DISCOVERY AND PROVIDE ANY ANSWERS TO EXPERTS, AND THAT'S THE CASE IN OUR RECORD HERE BELOW.

BUT THEN THEY SEEK A TON OF EXPERTS DISCOVERY FROM THE OTHER SIDE.

SO THE JURY'S ONLY LEFT WITH HEARING IMPEACHMENT ON ONE SIDE OF THE CASE.

AND AS I STATED EARLIER, THESE CASES ARE TRULY BATTLE OF THE EXPERT CASES.

IT COMES DOWN TO CREDIBILITY, WHO DOES THE JURY BELIEVE.

AND IF THE JURY IS ONLY HEARING THAT THE DEFENSE'S DOCTORS ARE THE ONES BEING PAID AND HAVE A FINANCIAL INTEREST, THAT ALWAYS STARTS THE DEFENSE BEHIND THE 8 BALL.

SO I THINK THIS COURT HAS SEVERAL OPTIONS TO REALLY ADDRESS THIS ISSUE HEAD ON. IN ALL THREE OF THESE OPTIONS, I THINK THE FOCUS IS MAKING THE DISCOVERY OBLIGATION OPPORTUNITIES EQUAL, AND YOU STRIVE FOR A FAIR BALANCE AT TRIAL.

AND I WILL SAY NONE OF THESE ARE PERFECT.

THERE'S DOWNSIDES TO ALL OF THEM.

BUT, AGAIN, IT'S JUST STRIVING FOR A FAIR AND BALANCED TRIAL. NUMBER ONE IS OVERTURNING WORLEY.

AND I DO THINK THIS IS THE AVENUE AND THE CASE TO DO IT. AND THIS WILL ALLOW BOTH SIDES TO GET THE INFORMATION.

NUMBER TWO, THIS COURT COULD HOLD THAT THE REASONING IN WORLEY APPLIES TO ALL NON-PARTIES, BOTH PLAINTIFFS AND DEFENDANTS.

THE DOWNSIDE OF THIS IS IN, FOR INSTANCE, IN UM CASES WHERE THE INSURANCE COMPANY IS THE PARTY, THAT IMPEACHMENT EVIDENCE IS GOING TO PLAY A HUGE PART IN THAT TRIAL.

AND THEN, NUMBER THREE IS LIMITING TO RULE 1.280 FOR EVERYONE, AND THAT'S WHAT THE DOCTORS ARGUED IN THEIR AMICUS BRIEF.

AND THAT, THEY ARGUE, FOCUSED AND WOULD PROTECT THEIR CONSTITUTIONAL RIGHT OF PRIVACY. IN, YOU KNOW, PREPARING FOR THESE ARGUMENTS, YOU KNOW, ONE THING I NOTICE ABOUT THE BOUCHER CASE, THE ACTUAL EXPERT IN BOUCHER WAS A NATIONAL CORPORATION, AND THE CONSTITUTIONAL RIGHT OF PRIVACY WITHIN OUR CONSTITUTION WASN'T CONSIDERED AND DID NOT APPLY BECAUSE IT WAS A CORPORATION.

WHEREAS THE DOCTORS IN THEIR AMICUS BRIEF, THEY ARE NATURAL PERSONS, AND SO UNTIL APPLY. AND THEN THE DOCTOR IN OUR CASE IS A NATURAL PERSON.

SO I JUST THINK THAT'S ONE, YOU KNOW, THING THAT THIS COURT SHOULD KIND OF TAKE INTO CONSIDERATION THAT I DON'T KNOW WAS UNDER CONSIDERATION DURING BOUCHER.

DOES THE COURT HAVE ANY QUESTIONS?

>> ALL RIGHT.

WE WILL MOVE TO OPPOSING COUNSEL.

>> THANK YOU.

>> MAY IT PLEASE THE COURT, GOOD MORNING, DOUGLAS EATON ON BEHALF OF THE RESPONDENT, KAITLYN GRIJALVA.

I WANT TO START KIND OF AT THE END HERE, SOMETHING THAT JUSTICE MUNIZ WROTE A COUPLE WEEKS AGO IN THE DeSANTIS V. THOMPSON CASE.

I WANT TO POINT OUT THAT THE PETITIONER HERE, ALLSTATE, HAS NOT, DID NOT ASK FOR REVERSAL OF WORLEY AS A REMEDY IN ITS INITIAL BRIEF.

THE ONLY TIME THEY ASKED FOR THIS IS IN THE REPLY BRIEF. THIS IS THE FIRST TIME THEY MADE THE ARGUMENT THAT WORLEY WAS WRONGLY DECIDED.

THAT'S TOO LATE.

YOU CAN'T ASK FOR, YOU CAN'T MAKE AN ARGUMENT FOR THE FIRST TIME IN A REPLY BRIEF BECAUSE--

>> MR. EATON--

>> YES.

>> EXCUSE ME.

I WANTED TO GIVE YOU MORE TIME TO SET THIS UP, BUT I KIND OF SEE WHERE YOU'RE GOING. YOU'VE HEARD MY QUESTIONS ALREADY, SO IT'D BE HELPFUL, TO ME AT LEAST, IF YOU SORT OF FOLLOWED THIS OUTLINE.

THE FIRST QUESTION IS DO WE HAVE JURISDICTION, OKAY?

CAN WE ANSWER A QUESTION AT ALL. THE SECOND IS SHOULD WE EXERCISE THIS JURISDICTION.

THE THIRD IS, WITH RESPECT TO WHAT I SEE IN THE VERNACULAR AS THE PRIMARY QUESTION IS DOT RULES OF DISCOVERY INCLUDING THE PROCEDURE RULES AND COMMON LAW RULES APPLY EQUAL, EQUALLY TO ALL EXPERTS.

AND SO WHAT IS THE ANSWER TO THAT QUESTION, OR HOW SHOULD WE ANSWER THAT QUESTION AND WHY.

AND THEN SECOND, DO WE ANSWER THE SECOND QUESTION IS WHAT ARE THOSE RULES, AND THAT IS DETERMINED BY DO WE LET WORLEY APPLY TO THE DEFENSE SIDE, OR DO WE REVISIT WORLEY?

AND THEN SHOULDN'T ANYTHING ELSE BE DETERMINED LATER IN RULEMAKING IN TERMS OF WHAT THE RULES SHOULD BE FOR DISCOVERY IN THIS AREA?

SO IF YOU COULD, OR IF YOU HAVE ALL THOSE, IF YOU COULD FOLLOW THAT OUTLINE, THAT'S SORT OF THE ORDER I THINK OUR QUESTIONING GOES IN, AND I'D APPRECIATE YOUR THOUGHTS ON THAT.

I THINK THEY MIGHT BE HELPFUL.

>> AND THAT'S SIMILAR TO THE OUTLINE I WAS GOING TO PROCEED ON ONCE I ADDRESSED THE QUOTE I WANTED TO RAISE FROM JUSTICE MUNIZ.

I JUST FINISHED THAT, AND I'LL TURN RIGHT TO THIS OUTLINE.

IN THOMPSON HE WROTE THAT IT IS NOT OUR ROLE TO IMPOSE A REMEDY THAT THE PETITIONERS HAS NOT REQUESTED AND THAT IT'S INCONSISTENT WITH THE PETITIONER'S STATED GOALS.

THE PETITIONER DID NOT REQUEST ANYTHING UNTIL THE REPLY BRIEF, AND THAT'S TOO LATE.

SO LET ME TURN TO JURISDICTION.

MY CASE IS A LITTLE DIFFERENT FROM THE FIRST CASE IN THAT WE HAVE A JURISDICTIONAL DEFECT IN THE FILING OF THE NOTICE OF APPEAL HERE.

IT WAS FILED AFTER 30 DAYS FROM THE ISSUANCE OF THE ORDER IN THIS CASE.

AND THE RULE WAS VERY CLEAR THAT YOU'VE GOT 30 DAYS, AND THAT'S JURISDICTIONAL, AND THEY DIDN'T FILE IT.

THEY ISSUED THE ORDER, THEN THEY ISSUED AN OPINION SUBSEQUENT TO IT.

THE OPINION WAS ISSUED WITHIN THE 30 DAYS, AND PETITIONER STILL HAD TIME WITHIN THAT 30 DAYS TO FILE THE NOTICE OF APPEAL.

THEY DIDN'T DO SO.

NOW, THEY KIND OF JUST WAVED THIS AWAY AND SAID, WELL, THEY FILED THE OPINION LATER AND, THEREFORE, WE WERE TIMELY.

BUT THAT'S NOT WHAT THE RULE SAYS.

THE RULE SAYS THE DECISION, THE DECISION IS THE ORDER THAT WAS ISSUED BY THE FOURTH DCA.

THIS COURT HAS REPEATEDLY MADE THE DISTINCTION BETWEEN AN ORDER AND AN OPINION, AND DECISION AND OPINION.

>> OKAY, SO--

>> SO RIGHT FROM THE OUTSET--

>> MR. EATON, I UNDERSTAND YOUR ARGUMENT REGARDING THAT ASPECT OF JURISDICTION.

ASSUMING THAT WE DISAGREE WITH YOU, DO YOU THINK THERE'S SOMETHING ABOUT THE POSTURE OF THE CASE BELOW OR THE NATURE OF THE QUESTION THAT DOESN'T GIVE US JURISDICTION UNDER ARTICLE V?

>> YES, YOUR HONOR.

AND THAT IS THAT THE DISTRICT COURT DID NOT PASS ON THE QUESTION WHICH IS SHOULD WORLEY BE EXTENDED TO FIT THIS FACT

PATTERN.

IT DID NOT ANSWER THAT QUESTION.
AND THIS COURT HAS REPEATEDLY
STATED THAT-- AND THERE ARE
NUMEROUS EXAMPLES THAT I
PROVIDED IN MY BRIEF, SAGAD V.
STATE WAS ONE WHICH WAS A
SIMILAR TYPE OF QUESTION.
IN EACH OF THE CASES THAT I'VE
CITED, THE QUESTION WAS DID A
CHANGE IN THE LAW APPLY TO THIS
NEW FACTUAL SITUATION.

IT'S VERY SIMILAR TO WHAT THE
COURT IS ASKING HERE.

DID WORLEY, WHEN IT WAS WRITTEN,
DID THAT CHANGE THE WAY WE
SHOULD TREAT THIS TYPE OF
DISCOVERY FROM AN INSURANCE
COMPANY.

AND IN CITIZENS PROPERTY V. SAN
BERNARDINO-- I'M SORRY, SAGAD
V. STATE-- AND I'M GOING TO GET
YOU THE OTHER CASES.

SPEEDWAY SUPER AMERICA AND
MERCURY EMOTERS EXPRESS V.
SMITH, ALL CASES FROM THIS
COURT, THE COURT DENIED REVIEW
BECAUSE THE DISTRICT COURT DID
NOT PASS UPON THE CERTIFIED
QUESTION.

AND WE BELIEVE IT DID NOT DO
THAT HERE.

NOW, I WILL NOTE THIS COURT DID
GO AHEAD AND USE THE RULEMAKING,
ITS RULEMAKING POWER TO ADDRESS
THE ISSUE WHICH THIS COURT
ALWAYS HAS THE ABILITY TO DO.
BUT IT DID NOT HAVE THE ABILITY
UNDER SECTION THREE THE ACTUALLY
ADDRESS THE QUESTION BECAUSE THE
LOWER COURT DID NOT PASS ON THE
QUESTION.

NOW, THE STANDARD OF REVIEW, IF
THE COURT--

>> MR. EATON, IF YOU COULD GO
BACK--

>> YES, SURE.

>> AND I APPRECIATE YOU LINKING
YOUR ARGUMENT TO THE LANGUAGE OF
THE APPROPRIATE PROVISION IN THE

CONSTITUTION WITH RESPECT TO THAT ISSUE.

BUT BACK TO THE FIRST ISSUE THAT YOU RAISED IN YOUR BRIEF, DO YOU RECOGNIZE THAT IF WE AGREED WITH YOU ON THAT POSITION, IT WOULD MEAN THAT SOME QUESTIONS COULD NEVER BE ANSWERED?

IN OTHER WORDS, IF THE TRIAL, IF THE LOWER COURT, THE DISTRICT COURT HAD THE JURISDICTION TO ENTER AN ORDER AND THEN RESERVE JURISDICTION TO ENTER AN OPINION LATER AND THERE'S NO 30-DAY DEADLINE ON THAT, JURISDICTIONAL DEADLINE, SO AS LONG AS THEY RESERVE, THEY CAN RESERVE FOR LONGER THAN 30 DAYS.

AND I THINK THAT'S THE LAW, THEY STILL HAVE JURISDICTION TO ISSUE THAT OPINION MORE THAN 30 DAYS AFTER THEY ISSUED THE ORDER. THEN THAT WOULD PUT US IN A POSTURE WHERE THERE ARE QUESTIONS THAT ARE NOT APPEALABLE.

THAT IS SORT OF THE END RESULT OF YOUR LEGAL ANALYSIS ON THAT MORE BASIC PROCEDURAL JURISDICTIONAL ARGUMENT, IS THAT CORRECT?

>> WELL, AGAIN, RULES-- IT'S A BRIGHT LINE RULE.

I DON'T KNOW WHY THE APPELLATE COURT CHOSE TO DO IT IN THE FASHION THEY DID.

MAYBE THE ANSWER IS THEY SHOULDN'T DO IT THAT WAY. ISSUE THE OPINION WITH THE ORDER.

THERE WASN'T ANY REASON, THERE WASN'T ANY RUSH WHY THEY HAD TO ISSUE AN ORDER.

WHICH I BELIEVE, BY THE WAY, HAD ENOUGH IN IT THAT SHE COULD HAVE SOUGHT CONFLICT REVIEW FROM THIS COURT BASED ON--

>> YEAH.

BUT WE'RE NOT TALKING ABOUT CONFLICT REVIEW, WE'RE TALKING

ABOUT OUR JURISDICTION UNDER THE PROVISION FOR A CERTIFIED QUESTION.

>> OKAY.

>> OKAY.

>> IF THE APPELLATE COURT ISSUES A CERTIFIED QUESTION 30 DAYS AFTER, THEN, YES, UNDER THE RULE THERE'S NO EXCEPTION FOR OPINIONS ISSUED LATER.

>> I THINK THE QUESTION IS DO THEY, DO THEY HAVE JURISDICTION TO RESERVE MORE THAN 30 DAYS AND THEN ISSUE AN OPINION.

BECAUSE IT WOULD BE NONSENSICAL TO SAY IF THEY DID HAVE JURISDICTION TO DO THAT, THAT THE PARTY'S REQUIRED TO FILE A NOTICE SEEKING OUR REVIEW OF A CERTIFIED QUESTION THAT HASN'T BEEN ISSUED YET.

I MEAN--

>> WELL, LOOK, I AGREE IT'S A VERY UNUSUAL SITUATION, BUT I CAN THINK OF CIRCUMSTANCES AT THE TRIAL LEVEL.

FOR EXAMPLE, IF I FILE AN UNAUTHORIZED MOTION FOR A HEARING ON AN ORDER THAT I CAN'T-- THAT I HAVE TO APPEAL WITHIN 30 DAYS AND THE TRIAL COURT HEARS IT AND DENIES MOTION, AFTER 30 DAYS I CAN'T THEN APPEAL THE MOTION.

IT'S TOO LATE.

EVEN THOUGH THE COURT FOUND JURISDICTION AND HEARD IT. SO THOSE CIRCUMSTANCES EXIST WHERE THE RULE AFFECTS WHAT SEEMS TO BE SOMETHING UNFAIR, BUT THE RULE NEVERTHELESS APPLIES.

>> I THINK A MORE APPROPRIATE ANALOGY THERE, WOULD IT BE A MORE APPROPRIATE ANALOGY TO SAY THAT I FILED A TIMELY MOTION FOR REHEARING, THE TRIAL JUDGE DIDN'T, LIKE, GRANT IT, ACTUALLY GRANTED OR CLARIFIED MORE THAN 30 DAYS LATER AND THEN YOU CAN'T APPEAL

THE ORDER ON THE MOTION FOR REHEARING.

AS LONG AS THE TRIAL JUDGE HAD JURISDICTION TO RULE ON THE MOTION FOR REHEARING, WOULDN'T YOU HAVE AN OPPORTUNITY TO APPEAL FROM?

IT WOULDN'T BE LINKED TO THE INITIAL ORDER OR ANALYSIS THAT YOU'RE WANTING TO APPEAL, RIGHT?

>> WELL, IF THE RULING IS GRANTED, THEN THERE IS NO BASIS FOR APPEAL BECAUSE YOU'RE STILL IN COURT.

SO I'M NOT SURE THAT'S NECESSARILY THE SAME THING HERE. I DON'T WANT TO GET TOO BOGGED DOWN ON THAT.

I'D LIKE TO GET TO THE REST OF THE COURT'S QUESTIONS.

I THINK IT'S A TECHNICAL ISSUE. I THINK IT'S ONE THAT THE COURT CAN DISMISS THIS PETITION ON SOLELY, BUT IF THE COURT WANTS TO HEAR IT, LET'S ADDRESS THE MERITS.

SO THE QUESTION OF WHAT STANDARD THIS COURT NEEDS TO APPLY TO THIS, I WANT TO GO BACK AND ADDRESS THAT BECAUSE MS. GOODEN WAS ARGUING THAT THE COURT'S DECISION IS DE NOVO, AND IT'S NOT APPROACHING FOR A CERTIORARI STANDARD.

THAT'S INCORRECT.

SHE ACTUALLY CITED A CASE IN WHICH JUSTICE CANADY DISSENTED, JUSTICE POLSTON CONCURRED, WHERE THE MAJORITY WROTE THAT THE DISTRICT COURT'S DECISION WAS ISSUED DE NOVO, BUT CHIEF JUSTICE CANADY WROTE THE QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE, THE RESULTS SHOULD BE APPROVED.

FAILING TO UPHOLD THE TRIAL COURT'S ERROR IN THIS CASE WAS A MISCARRIAGE OF JUSTICE.

THAT IS THE CERTIORARI STANDARD. SO THAT'S THE STANDARD THIS

COURT NEEDS TO APPLY TO THIS QUESTION.

WAS THERE A DEVIATION FROM THE LAW.

AND THE ANSWER IS, NO, THE COURT DID EXACTLY WHAT IT WAS SUPPOSE TO DO I OR THE TRIAL COURT DID AND THE DISTRICT COURT DID.

SO I DO NOT THINK THE COURT SHOULD EXERCISE JURISDICTION.

I THINK THERE SHOULD FIND THAT THERE WAS NO MISCARRIAGE OF JUSTICE, THERE WAS NO-- THE LAW WAS APPLIED PROPERLY.

NOW, LET ME MOVE ON TO THE BROADER QUESTION HERE, THE ISSUE OF FAIRNESS.

I THINK, I THINK WHERE THERE IS SOME CONFUSION HERE IS THE FACT THAT WE'RE DEALING WITH A VERY UNIQUE SET OF EXPERTS.

WE HAVE-- THE LAW OF BOUCHER IS BEING APPLIED EQUALLY TO BOTH SIDES, AND THAT'S UNDER THE MORGAN COLIN CASE WHICH SAYS YOU CAN COME TO A PLAINTIFF'S LAW FIRM, AND YOU CAN GET EVIDENCE OF THE FINANCIAL RELATIONSHIP BETWEEN IT AND ITS RETAINED EXPERTS DURING TRIAL.

AND IT IS APPLIED EQUALLY TO BOTH SIDES.

IF I RETAIN AN EXPERT FOR TRIAL, YOU CAN GET THAT INFORMATION FROM MY LAW FIRM AND USE THAT TO IMPEACH HIM ABOUT OUR FINANCIAL RELATIONSHIP.

THIS IS THE WAY WE CAN DO THAT FOR ALLSTATE.

SO THE LAW IS BEING APPLIED EQUALLY.

WE HAVE A UNIQUE SET OF EXPERTS CALLED HYBRID EXPERTS WHICH WERE FIRST DISCUSSED BACK IN 2009 LONG AFTER THE JURISPRUDENCE.

>> OKAY.

MR. EATON, LET ME GIVE YOU AN OPPORTUNITY TO ADDRESS THIS.

SO WE AGREE THAT WHAT'S DISCOVERABLE IS RELATED TO

WHAT'S ADMISSIBLE.

AND WHAT'S ADMISSIBLE IS DETERMINED BY THE FLORIDA EVIDENCE CODE AND RULES OF EVIDENCE.

AND THE RULES OF EVIDENCE, 90.702, IS TALKING ABOUT TESTIMONY OF EXPERTS.

AND IT DIDN'T DIFFERENTIATE BETWEEN, IT DOESN'T MAKE THE DIFFERENTIATION THAT YOU'RE MAKING.

SO WHY, WHY SHOULD WE BY CASE DECIDE THAT SOME EXPERTS ARE DIFFERENT THAN OTHER EXPERTS WHEN IT COMES TO SOMETHING AS BASIC AS FINANCIAL BIAS DISCOVERY SO THAT ONE EXPERT IS-- WHAT THE PARTY CAN'T FIND OUT WITH ONE EXPERT IN THE COURTROOM TESTIFYING AS TO THE EXACT SAME ISSUES, WHATEVER THOSE ISSUES ARE, YOUR EXPERT-- HOWEVER HE GOT THERE, RETAINED OR IS TESTIFYING TO THE EXACT SAME ISSUES.

BUT THE OTHER PARTY CAN'T GET THAT EXPERT'S FINANCIAL BIAS INFORMATION IN ORDER TO IMPEACH AND LET THE JURY KNOW ABOUT CREDIBILITY ISSUES.

ON THE OTHER-- SO WHY, WHERE ARE YOU GETTING THIS DISTINCTION FROM, AND WHY DOES IT MAKE SENSE?

>> WELL, I'M GETTING IT FROM THE OPINION IN GUTIERREZ V. VARGAS, SOUTHERN THIRD, 615.

THIS COURT MADE A DISTINCTION BETWEEN TREATING PHYSICIANS AND EXPERTS.

A TREATING PHYSICIAN IS FACT WITNESS AND TESTIFIES BASED ON PERSONAL KNOWLEDGE.

THE TREATING PHYSICIAN'S PERCEPTION OF THE PLAINTIFF'S SYMPTOMS, THEIR DIAGNOSTIC OPINION AND THEIR RECOMMENDATION ABOUT PARTICULAR TREATMENT ARE ALL FACTS IN ISSUE.

AN EXPERT WITNESS TESTIFIES WITH THE BENEFIT OF HINDSIGHT WHEREAS THE TREATING PHYSICIAN DOES NOT. THIS COURT HAS MADE THE DISTINCTION BETWEEN TREATING PHYSICIANS AND RETAINED EXPERTS. SO THAT IS THE BASIS---

>> WHY IS THAT A RELEVANT DISTINCTION WHEN IT COMES TO WHETHER THAT EXPERT IS BIASED BASED ON A FINANCIAL INCENTIVE TO TESTIFY IN FAVOR OF ONE PARTY OR ANOTHER?

>> WELL, YOU'RE ASKING WHETHER THE ISSUE OF BIAS IS RELATIVE, AND THE ANSWER IS, IT IS. WORLEY NEVER HELD THAT IT WAS NOT RELEVANT.

WORLEY SAID YOU CAN'T GET IT BECAUSE OF ATTORNEY-CLIENT PRIVILEGE.

THAT'S IT.

THAT'S THE DISTINCTION.

THEY NEVER SAID IT WAS NOT RELEVANT.

AND, IN FACT, IT DID SAY, IN FACT, THAT THE EXISTENCE OF LETTERS OF PROTECTION WAS BROUGHT OUT IN WORLEY, AND THAT GOES TO SHOW FINANCIAL BIAS AS WELL.

IT SHOWS THAT THE PHYSICIAN HAS AN INTEREST, A FINANCIAL INTEREST IN WINNING THIS CASE BECAUSE THAT'S THE ONLY WAY THEY GET PAID UNDER A LETTER OF PROTECTION.

SO THAT IS ONE WAY THAT YOU CAN SHOW FINANCIAL BIAS OF A TREATING PHYSICIAN.

BUT THEY'VE SIMPLY HELD THAT THE FACT THAT I REFERRED A PATIENT TO A DOCTOR IS AN

ATTORNEY-CLIENT COMMUNICATION. AND THAT'S THE ENTIRE HOLDING OF WORLEY.

IT WAS NOT BASED ON THE FACT THAT IT WAS A NON-PARTY.

THEY DID DISTINGUISH IT, BUT THAT WASN'T THE HOLDING.

THE HOLDING WAS THE
ATTORNEY-CLIENT PRIVILEGE
PROTECTS THIS INFORMATION.
AND SO IF THE COURT IS
INTERESTED IN ADDRESSING THAT
UNIQUE SITUATION BECAUSE,
AGAIN--

>> LET ME--

>> YES.

>> YOU WOULD AGREE THAT THE
IMPEACHMENT EVIDENCE IS
EQUALLY-- IT WOULD BE
ADMISSIBLE AGAINST THE--

>> YES.

>>-- EXPERT.

OKAY.

AND SO FAIRNESS WOULD DICTATE
THAT IT SHOULD BE DISCOVERABLE
UNLESS THERE'S A REASON NOT TO
DISCOVER IT.

>> YES.

I MEAN--

>> OKAY.

SO YOUR ONLY--

[INAUDIBLE CONVERSATIONS]

>> SO IF YOU AGREE WITH THE
GENERAL PRINCIPLE THAT THE
DISCOVERY RULES SHOULD APPLY
EVENLY TO ALL PARTIES, THEN THE
ONLY REASON WE WOULD EVER SAY
IT'S NOT DISCOVERABLE IS IF
WE'RE RIGHT THAT, THAT IT'S
PRIVILEGED.

>> THAT'S CORRECT.

RULE 1.280 SAYS, HAS TWO
PREREQUISITES; IS IT RELEVANT
AND IS IT PRIVILEGED.

THAT'S IT--

>> SO IF IT'S NOT, IF IT'S
REALLY NOT PRIVILEGED AND WE
MADE AN ERROR, DOES--

>> THEN IT'S DISCOVERABLE.

>>-- DOESN'T IT MEAN THAT WE
CORRECT THAT ERROR SO THAT THE
LAW AND THE RULES CAN APPLY
EVENLY TO ALL PARTIES WHEN IT
COMES TO IMPEACHMENT EVIDENCE
THAT'S INTRODUCED AT TRIAL?

>> WELL, YOU KNOW, THIS ISSUE OF
FAIRNESS, TO ME, THAT'S NOT A

TEXTURAL-BASED ARGUMENT.
IT'S NOT, THIS IS NO, THERE'S NO
LEGAL ARGUMENT.
THAT'S KIND OF, YOU KNOW, WHAT
JUSTICE SCALIA, WHEN HE--
>> YEAH, BUT THE TEXTUAL-BASED
ARGUMENT, ISN'T THE
TEXTUAL-BASED ARGUMENT THAT
SECTION 9.702 AND RULE
90.702 OF THE RULES OF EVIDENCE
TREATS ALL EXPERTS THE SAME?
I MEAN, THAT'S THE TEXTUAL--
>> BUT THIS COURT DOESN'T TREAT
ALL EXPERTS THE SAME.
I MEAN, YOU'D HAVE TO GO BACK TO
GUTIERREZ V. VARGAS AND SAY THAT
THEY'RE THE SAME, BECAUSE
THEY'RE NOT.
TREATING PHYSICIANS ARE NOT
RETAINED EXPERTS.
THAT DISTINCTION HAS BEEN MADE
VERY CLEAR BY THIS COURT.
SO YOU HAVE TO TREAT THOSE
SEPARATELY.
AND IF YOU WANT TO CRAFT A RULE
SPECIFIC TO THEM, THEN THAT'S
FINE.
BUT RIGHT NOW THE LAW DOES TREAT
RETAINED EXPERTS EQUALLY.
AND THAT'S, SO WE HAVE RETAINED
EXPERTS ON BOTH SIDES ARE EQUAL,
AND THEN YOU'VE GOT THIS SUBSET
THAT DOES NOT EXIST ON THE
DEFENSE SIDE.
IT ONLY EXISTS ON THE
PLAINTIFF'S SIDE.
SO IT'S NOT AN EQUAL PROTECTION
ISSUE BECAUSE THEY'RE NOT
SIMILARLY SITUATED.
AND THAT ARGUMENT WASN'T EVEN,
FRANKLY, MADE.
SO IF YOU WANT TO CARVE OUT AND
CREATE A RULE WITH RESPECT TO
THESE SPECIFIC EXPERTS THAT ARE,
HAVE ONLY BEEN DESIGNATED AS
SUCH SINCE 2009 AND WEREN'T EVEN
TAKEN INTO ACCOUNT IN BOUCHER
AND SPRINGER AND ITS PROGENY,
THEN THE COURT SHOULD DO THAT.
BUT IT SHOULD DO THAT THIS IN A

MANNER THAT TAKES IN EVIDENCE BECAUSE THERE'S NOT GOING TO BE A ONE-SIZE-FITS-ALL RULE HERE. AS MR. NATION NOTED, YOU KNOW, THERE ARE CIRCUMSTANCES WHERE THE REFERRAL WAS PART AND PARCEL OF MITIGATING DAMAGES IN THE CASE.

AND THERE MAY BE SITUATIONS WHERE A SECRETARY SAYS, HERE, HERE'S A LIST OF DOCTORS, GO TO ONE OF THESE.

AND MAYBE THAT'S NOT PROTECTED. BUT IF I HAVE A CONVERSATION WITH MY CLIENT AND YOU SHOULD GO TO THIS DOCTOR BECAUSE HE'S VERY GOOD AND HE'S GOING TO TREAT YOU, THEN THAT IS PROTECTED COMMUNICATION--

>> TELL US WHY.

>> IF YOU'RE GOING TO GO DOWN THIS ROAD --

>> WHAT PART OF THAT COMMUNICATION WAS IN ANTICIPATION OF LITIGATION? YOU SHOULD GO SEE THIS DOCTOR, HE'S GOOD, YOU SHOULD GO SEE HIM, WHAT PART OF THAT--

>> IT ONLY ARISES OUT OF MY RELATIONSHIP AS ME AS HIS ATTORNEY.

IT WOULDN'T-- THAT CONVERSATION WOULDN'T HAPPEN OTHERWISE.

I REPRESENT HIM--

>> THAT WE CAN AGREE PROVES TOO MUCH, RIGHT?

IF WE CAST THE BLANKET OF PRIVILEGE OVER EVERYTHING THAT WOULD NOT HAPPEN BUT FOR YOUR EXISTENCE AS COUNSEL, THEN THINGS LIKE YOUR INVOICES WOULD BE PRIVILEGED OR HOW MUCH YOUR HOURLY RATE IS WOULD BE PRIVILEGED OR ALL SORTS OF THINGS THAT AREN'T PRIVILEGED. I GUESS WHAT I'M TRYING TO-- IF WE AGREE THAT THE COMMUNICATION THAT YOU'RE SEEKING TO DEFEND OR PROTECT UNDER THE SHIELD OF PRIVILEGE IS DIAGNOSTIC IN

NATURE, RELATE TO MEDICAL TREATMENT, HELP ME UNDERSTAND HOW THAT'S IN ANTICIPATION OF LITIGATION.

>> WELL, LET ME JUST, LET ME JUST ADDRESS ONE THING, YOUR HONOR.

I'M NOT ASKING TO PROTECT ANYTHING LIKE THAT.

I'M HERE ON BEHALF OF MY CLIENT AND SAYING THIS COURT SHOULD ANSWER IN THE NEGATIVE AND DENY THIS PETITION.

YOU'RE ASKING ME TO ISSUE AN ADVISORY ON SOMETHING I'M NOT INVOLVED IN AND THERE'S NO RECORD IN THIS CASE.

THAT'S WHAT I'M SAYING, THIS CASE IS NOT THE MECHANISM TO DECIDE THIS ISSUE.

I THINK THAT IF YOU'RE ENTERED IN DEALING WITH THIS ISSUE IN WORLEY, THEN THE WAY TO DO IT IS THROUGH A RULEMAKING PROCESS IN WHICH EVIDENCE OF HOW THIS OCCURS IS DONE SO THAT YOU, YOUR HONOR, CAN MAKE A DETERMINATION AS TO WHERE TO DRAW THAT LINE. BECAUSE THIS IS NOT THE CASE. YOU CAN'T DRAW IT BASED ON NO RECORD, ON NO EVIDENCE, ON A CASE OR CONTROVERSY THAT HAS NOTHING TO DO WITH A RELATIONSHIP BETWEEN A LAW FIRM AND A TREATING PHYSICIAN.

THIS CASE IS ABOUT AN INSURANCE COMPANY HAS TO GIVE US HOW MUCH MONEY THEY PAY THEIR RETAINED EXPERTS.

THAT'S IT.

SO THIS IS NOT THE APPROPRIATE CASE TO ANSWER THE QUESTION OF HOW TO SOLVE THE WORLEY PROBLEM. THAT'S OUR POSITION.

MY TIME, I'M HAPPY TO ANSWER ANY FURTHER QUESTIONS, BUT--

>> ALL RIGHT.

WE THANK YOU, COUNSEL.

NOW FOR REBUTTAL.

>> THANK YOU.

>> OPPOSING COUNSEL HAS RELIED ON GUTIERREZ V. VARGAS FOR THE DISTINCTION OF TREATING PHYSICIANS VERSUS EXPERTS, BUT HE ACTUALLY IGNORES THE WORDING OF THAT OPINION. BECAUSE THIS COURT'S OPINION ACTUALLY SAYS THAT THE TREATING PHYSICIANS CAN BECOME EXPERTS ONCE THEY START GIVING EXPERT IF OPINIONS. AND SO JUST BECAUSE YOU'RE A TREATING EXPERT, YOU'RE NOT AUTOMATICALLY PROTECTED FOREVER, AND THAT'S EXACTLY WHAT'S GOING ON IN THIS CASE. THE TREATING PHYSICIANS IN THIS CASE WERE DISCLOSED AS EXPERT WITNESSES, AND THAT'S FOUND ON PAGE 89-91 OF THE RECORD. AND ALL OF THE TREATING PHYSICIANS WERE DISCLOSED. SO ALL OF THESE PHYSICIANS ARE GIVING CAUSATION, PERMANENCY, FUTURE MEDICAL CARE AND EXPERT OPINIONS. AND SO THIS IS, THIS GOES TO THE FUNDAMENTAL FAIRNESS OF THE CASE. WE HAVE TO LOOK TO FIRST PRINCIPLES, IS THIS FAIR? AND IT IS NOT. AND NO MATTER HOW MUCH LEGAL GYMNASTICS THEY TRY TO MAKE THIS BETWEEN A TREATING PHYSICIAN VERSUS A RETAINED EXPERT, IT IS STILL AN EXPERT WHO IS TESTIFYING IN FRONT OF THE JURY AND GIVING EXPERT OPINION. AND THAT JURY IS JUDGING THE CREDIBILITY OF THESE DOCTORS AND ONLY HEARING ONE SIDE'S IMPEACHMENT BIAS, IT REALLY DOES A DISSERVICE AND DENIES THE DEFENDANTS A FAIR TRIAL AND MAKES EVERYTHING LOPSIDED. THE STANDARD OF REVIEW WAS RAISED. WHEN YOU'RE DEALING WITH CERTIFIED QUESTIONS OF GREAT

IMPORTANCE ON LEGAL QUESTIONS,
THE STANDARD OF REVIEW IS DE
NOVO.

SO REGARDLESS OF HOW THE
UNDERLYING VEHICLE WAS CREATED,
WHETHER IT WAS A WRIT OR CERT,
ONCE YOU HAVE THAT CERTIFY
QUESTION ON A LEGAL ISSUE, THIS
COURT REVIEWS THAT DE NOVO, AND
THAT'S WHY WE ARE HERE.

>> COUNSEL, COULD WE HEAR YOUR
BEST RESPONSE TO OPPOSING
COUNSEL'S ARGUMENT THAT THIS
ISN'T THE RIGHT PLACE TO MAKE
THE MERITS ADJUSTMENTS THAT
YOU'RE SUGGESTING TO THE RULE,
BUT THAT INSTEAD WITH THE
BENEFIT OF COMMENT AND THE
RULEMAKING PROCESS, THAT IS?

>> WELL, AGAIN, ON-- SO I THINK
HIS ARGUMENT IS KIND OF TWOFOLD.
NUMBER ONE, GOING THROUGH--
[AUDIO DIFFICULTY]

THIS CASE LAW DID NOT DEVELOP
BECAUSE OF THE RULE.
BOUCHER SPECIFICALLY SAID RULE
1.280.

SO THIS ENTIRE LINE OF CASES
BEGINNING WITH BOUCHER,
SPRINGER, ALL OF THAT, IT
DEVELOPED OUTSIDE OF THE RULE
AND THROUGH THE COMMON LAW OF
THIS STATE.

AND SO I BELIEVE THAT THIS IS
THE APPROPRIATE VEHICLE BECAUSE
OF THAT.

AND THIS COURT CAN CORRECT THE
COMMON LAW OF THIS STATE.

AND, NUMBER TWO, IT SEEMS LIKE
THEY'RE MAKING THE ARGUMENT THAT
IT'S NOT THE APPROPRIATE VEHICLE
BECAUSE THE UNDERLYING CASE WAS
ON A WRIT OF CERT.

IT'S NOT NECESSARILY LIKE THE
PLAINTIFF BRINGING IT, BUT IF WE
WAIT FOR THAT CASE, THE
PLAINTIFF IS NOT GOING TO BE
FILING AN APPEAL ON WORLEY.
THIS IS THE CASE TO ADDRESS
WORLEY.

THIS IS THE CASE TO ADDRESS THE
FAIRNESS OF THE PARTIES.

THIS IS THE CASE TO ADDRESS ALL
WORLEY HAS CREATED THIS UNEVEN
TREATMENT BETWEEN EVERYBODY.
AND WE DID ADDRESS IT IN OUR
INITIAL BRIEF IN THE OPENING
INTRO.

IT STATES: THE JURY NEEDS TO
HEAR THE INFORMATION FROM BOTH
SIDES OR FROM NEITHER SIDE.

SO THIS IS THE CASE.

AND SO WE ARE ASKING THIS COURT
TO ADDRESS THIS ISSUE HEAD ON.
THE PARTIES HAVE TO BE TREATED
EQUALLY UNDER THE EYES OF THE
LAW.

AND FOR THAT REASON, WE ARE
ASKING FOR THIS COURT TO
BASICALLY FIX THE ISSUE AND TO
DO THAT AND STRIVE FOR THAT
BALANCE.

BALANCE TRUTH SEEKING FUNCTION
THAT ELKINS STRIVED SO HARD TO
ACHIEVE.

THANK YOU.

>> THANK YOU, COUNSEL.

WE THANK BOTH OF YOU FOR YOUR
ARGUMENTS.

THE COURT WILL NOW STAND IN
RECESS FOR ABOUT TEN MINUTES.