>> THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION, THE HONORABLE
CHARLES CANNADY PRESIDING.
>> WELCOME TO THE SESSION OF THE
FLORIDA SUPREME COURT.
FIRST CASE ON THE DOCKET TODAY
IS STEVEN YOUNKIN VERSUS NATHAN
BLACKWELDER.
COUNSEL FOR THE PETITIONER MAY
PROCEED.
>> GOOD MORNING.
KANSAS GOODEN ON BEHALF OF THE
PETITIONER'S.
I WOULD LIKE TO RESERVE A MINUTE
FOR REBUTTAL.
MAY IT PLEASE THE COURT.
WE ASK THIS COURT TO TREAT CIVIL
PLAINTIFFS AND DEFENDANTS
EQUALLY IN THEIR DISCOVERY
OBSERVATIONS AND OPPORTUNITIES.
THIS WILL FALL SHORT OF A
BALANCED SEARCH FOR THE TRUTH
AND ENSURE A FAIR TRIAL FOR BOTH
PARTIES.
SEVERAL YEARS AGO THIS COURT
ISSUED THE DECISION OF WORLEY
VERSUS YMCA CONSIDERING WHETHER
THE REFERRAL RELATIONSHIP
BETWEEN A PLAINTIFF'S LAW FIRM
IN THE PLAINTIFF'S TREATING
POSITION WAS DISCOVERABLE.
THE MAJORITY OPINION FOUND STAY
CLOSE TO DID NOT A CLIENT
ESTABLISHED ON THE GROUNDS THAT
THE LAW FIRM IS NOT A PARTY TO
THE LAWSUIT.
THE MAJORITY FURTHER FOUND THE
REFERRAL RELATIONSHIP WAS
PROTECTED BY ATTORNEY-CLIENT
PRIVILEGE.
THIS RULING HAS CREATED UNEQUAL
TREATMENT BETWEEN THE PARTIES.
THE JURY DOES NOT HEAR ABOUT THE
REFERRAL RELATIONSHIP ON THE
PLAINTIFF'S SIDE OF THE CASE.
THIS GIVES THE JURY THE FALSE
IMPRESSION THE PLAINTIFFS
WITNESSES HAVE NO FINANCIAL
INTEREST OR RELATIONSHIP IN THE
LAWSUIT.

>> I'M SORRY TO INTERRUPT.
COULD YOU ADDRESS THE PROCEDURAL JURISDICTIONAL ISSUE IN TERMS OF THE DECISION ON THE QUESTION FOR THE DISTRICT COURT WHETHER THERE WAS A DEPARTURE FROM ESSENTIAL REQUIREMENTS OF LAW AND WHAT EXACTLY ARE WE BEING ASKED TO DECIDE?
IN TERMS OF APPLYING EXISTING LAW IS THERE ANY QUESTION WHAT THE TRIAL COURT DID DEPARTED FROM REQUIREMENTS OF ESSENTIAL REQUIREMENTS OF LAW IN TERMS OF THAT HIGH STANDARD?
>> THERE IS A QUESTION.
PRECEDENT HAS TO BE READ EVEN HANDILY.
IF IT IS READ SOLELY TO APPLY TO THE PLAINTIFF SIDE OF THE CASE, THAT CREATES ISSUES IN FUNDAMENTAL FAIRNESS AND EQUAL PROTECTION IN THE LAW.
>> WHAT IS THE REQUIREMENT OF LAW, WHAT IS THE ESSENTIAL REQUIREMENT OF LAW THAT WAS DEPARTED FROM?
>> THE MAJORITY OF OPINION DISTINGUISHED THE ALL STATE VERSUS BOLSTERED DID NOT APPLY TO NON-PARTIES TO THE LAWSUIT AND THAT IS THE ESSENTIAL REQUIREMENT WE RELIED ON BELOW AND THAT IS THE DECISION FROM THIS COURT THAT ESTABLISHED THAT AND THAT IS THE FIRST CASE IN FLORIDA TO DECIDE THAT ON THAT BASIS.
BEFORE WORLEY, NONPARTIES WERE SUBJECT TO DISCOVERY ON BOTH SIDES AND THAT WENT BACK TO SPRINGER V WEST.
>> THE TRIAL COURT'S DECISION WAS CONSISTENT?
>> IT WAS CONSISTENT.
>> CONSISTENT WITH THAT, SO WHAT IS IT INCONSISTENT WITH?
>> THE FACT THAT IT ONLY APPLIES TO NONPARTIES OR PARTIES TO THE LAWSUIT.

AND IT IS NO DIFFERENT FROM THE
WORLEY DECISION.
>> AND WHAT THE WORLEY DECISION
DID.
THE JURY IS ONLY HEARING THE
DEFENSE'S IMPEACHMENT.
THIS IS TROUBLING BECAUSE THESE
PERSONAL INJURY - AND WHO DOES
THE JURY BELIEVE.
IN IMPEACHMENT OF THE TOOLING
DOCTORS CAN HAVE AN EFFECT ON
THESE TRIALS.
THE JURY IS NOT GIVING THE STORY
ON BOTH SIDES OF THE CASE.
I ANTICIPATE POSING COUNSEL, THE
DEFENSE SIDE HAS COMPULSORY
MEDICAL EXAMINERS LISTED AS
RETAINED EXPERTS.
THAT SHOULD NOT BE THE
DISTINCTION.
MOST OF THESE TYPES OF DOCTORS
ARGUE THE EXPERT OPINIONS, THEY
ARE APPLYING CAUSATION,
PERMANENCY, FUTURE MEDICAL CARE
AND OFTEN HAND-PICKED BY BOTH
SIDES AND IN THIS CASE THE
PLAINTIFF DID DISCLOSE THE
POSITION AS EXPERT AND FOCUSING
ON THE FAIRNESS THE DEFENDANT
DOESN'T HAVE POSITIONS ON THEIR
SIDE OF THE CASE, THEY CAN ONLY
DEFEND THE CASE BY USING A
COMPULSORY MEDICAL EXAMINER.
THE ENTIRE PURPOSE OF THAT
COMPULSORY MEDICAL EXAMINER AS
SET FORTH IN GEICO VERSUS BIRD
IS TO LEVEL THE PLAYING FIELD SO
IF THE FOCUS IS ON TREATING
PHYSICIAN VERSUS A RETAINED
EXPERT THE DEFENDANT ALWAYS
STARTS OUT BEHIND THE 8 BALL.
>> GO AHEAD.
>> IF THE PROBLEM IS WORLEY IS
WRONG HOW DO WE GET - HOW IS
THIS CASE THE PROPER VEHICLE TO
FIX THAT?
>> WE HAVE FROM DAY ONE ASKED TO
BE TREATED EQUALLY.
>> Reporter: TAKE A BAD DECISION
AND MAKE IT DOUBLY BAD BY

APPLYING IT IN THIS CONTEXT?
>> THIS COURT HAS DISCRETION TO STRUCTURE ITS DECISION HOW IT CAN TO MAKE THE PARTIES EQUAL AND ULTIMATELY THAT IS WHAT THE COURT'S GOAL SHOULD BE.
TAKING THE INTENT FOCUSED ON ELKINS, TALKS ABOUT HOW ELKINS, THE DISCOVERY WAS NOT INTENDED TO FOCUS ON ONE PARTY OR THE OTHER.
>> THE DISCOVERY ROLE IS APPLIED TO ALL PARTIES EQUALLY.
WHAT IS THE DISCOVERY RULE WE WERE TALKING ABOUT, WHAT IS THE ACTUAL?
>> THIS LINE OF CASE LAW DEVELOPED THROUGH COMMON-LAW.
A IS 1. 280 THAT DEALS WITH THE DISCOVERY FROM THE EXPERT, SURVEYING TO GET THAT INFORMATION FROM THE EXPERT.
IF THE PARTY - WE WOULDN'T BE HERE.
ONE.220 DOES NOT SAY YOU GET ALL THE PAYMENTS FOR THESE NONPARTIES, DOESN'T HAVE TO DISCLOSE EVERY COURT REPORTER, NAME AND ADDRESS AND EVERY DEPOSITION THE DOCTOR SET FORTH.
>> YOUR PROPOSITION IS RULES SHOULD APPLY EQUALLY, I ASK WHAT WILL SUPPLY TO GET TO THE POINT OF WHAT IS THE RULE.
AND HAND WHAT IS AVAILABLE UNDER THE RULE.
WHAT WAS DISCLOSED UNDER THE RULE.
>> UNDER RULE.ONE.280, THE CASE, THE EXPERTS GENERAL LITIGATION EXPERIENCE, THE PERCENTAGE OF PLAINTIFF VERSUS PERCENTAGES, THE IDENTITY OF OTHER CASES REFERRED TO THE ELKINS LIST AND THE EXPERT INVOLVEMENT AS AN EXPERT, NUMBER OF HOURS OR PERCENTAGE OF HOURS.
>> YOU ARE TAKING THE POSITION THAT YOUR EXPERTS SHOULD NOT HAVE ANSWERED THOSE QUESTIONS.

>> THAT IS NOT THE CASE.
BOTH PARTIES SHOULD BE ANSWERING
RULE.280.
IT IS QUESTIONS THAT ARE ABOVE
AND BEYOND TRYING TO GET TO THE
IMPEACHMENT AND THAT IS THE
ISSUE IN THIS.
HOW MUCH MONEY IS BEING PAID.
HOW MANY TIMES HAVE YOU BEEN
RETAINED, THAT IS BEYOND THE
ELKINS LIST.
THAT IS PRETENTIOUS ON THE SIDE
OF THE CASE.
THE DEFENSE CANNOT OBTAIN
INFORMATION ABOUT THAT.
>> PUTTING WHIRLY ASIDE FOR A
MOMENT, I HAVE A GREAT DEAL OF
DIFFICULTY UNDERSTANDING HOW
THAT INFORMATION IS NOT HIGHLY
RELEVANT TO THE ISSUE OF BIAS.
WE ARE TALKING ABOUT RULES OF
PROCEDURE BUT THAT IS A
SUBSTANTIVE RIGHT TO EVIDENCE
RELATED, RELEVANT EVIDENCE
RELATED TO BIAS, ISN'T THERE?
>> I WOULD ABSOLUTELY AGREE WITH
YOU.
I THINK THIS INFORMATION IS
HIGHLY RELEVANT BECAUSE IT DOES
GO TO IMPEACHMENT HOWEVER POST
WHIRLY, WHIRLY TURNED THIS AREA
OF LAW ON ITS HEAD, BECAUSE OF
HOW IT WAS WRITTEN IT CHANGED
THE LANDSCAPE.
BECAUSE THIS ENTIRE AREA OF LAW
IS PROTECTED IT HAS TO BE READ
EQUALLY.
BETWEEN PLAINTIFF AND
DEFENDANTS.
>> BACK TO THE JURISDICTIONAL
QUESTION.
FOR THE FIFTH DISTRICT TO ANSWER
THE QUESTION THEY HAD TO
DETERMINE WHAT THE LAW WAS AND
WHAT THE ESSENTIAL REQUIREMENTS
OF THE LAW ARE.
THAT IS WHAT WE ARE DEBATING.
ASSUMING WE DECIDE THAT EVERY
ONE, THE RULES APPLY EQUALLY TO
EVERY PARTY WHICH I THINK IS A

BASIC PROPOSITION THEN YOU HAVE TO ASK WHAT IS THE RULE IN THIS CONTEXT.
WHAT DISCOVERY IS PERMISSIBLE AND ONLY THEN CAN YOU DETERMINE IF THERE IS A DEPARTURE FROM ESSENTIAL REQUIREMENTS OF THE LAW, CORRECT?
>> CORRECT.
>> THERE IS A POSITION, WHAT POSITION, IS THERE A LIMITATION IN THE CONSTITUTIONAL PROVISION UNDER WHICH YOU APPEAL, A QUESTION OF GREAT PUBLIC IMPORTANCE, THAT WOULD LIMIT THE ABILITY TO HEAR THE CASE.
>> DON'T THINK THERE IS ANY LIMITATION.
THE COURT ACCEPTED JURISDICTION ON THE CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE.
IT IS A LEGAL ISSUE FOR THE COURT AND IT IS NOT CONFINED TO THAT REVIEW.
>> YOU DON'T THINK THE DISTRICT COURT NEEDED TO DISAGREE WITH THE LOWER COURT, QUESTION RELATED TO THE LAW AT ISSUE?
>> COULDN'T HAVE, BECAUSE IT IS REFERRING ON THE PLAINTIFF SIDE, DIDN'T APPLY TO THE DEFENSE AND IT APPLIED TO THAT CASE.
THAT'S WHERE WE END IT HERE.
THEY FOUND THIS ARGUMENT, PARTIES WERE NOT BEING TREATED FAIRLY COMPELLING, THAT PROMPTED THE QUESTION OF GREAT IMPORTANCE.
>> THIS IS A WEIRD -- IT DOESN'T SEEM LIKE IT WOULD MAKE SENSE TO EXTEND A DEEPLY FLAWED PRECEDENT TO ANOTHER AREA.
USING THIS CASE TO OVERTURN A PRECEDENT THAT DOESN'T APPLY TO THESE PARTIES SEEMS STRANGE TOO.
DO YOU HAVE ANY THOUGHTS ON THAT?
>> THIS COURT HAS OPTIONS WITH HOW TO GO ABOUT DOING THIS.
THE NEXT CASE WILL DEAL WITH

THESE SAME OPTIONS.
ESSENTIALLY HOW DO WE FIX THIS?
BECAUSE THIS COURT SHOULD STRIVE
TO MAKE DISCOVERY OBLIGATIONS
EQUAL ON BOTH SIDES AND STRIVE
ESSENTIALLY FOR A BALANCED
SEARCH FOR THE TRUTH.
ESSENTIALLY THREE AVENUES.
ONE IS OVERTURNED WHIRLY AND
ALLOWING EVERYBODY TO OBTAIN THE
INFORMATION GOING BACK TO WHERE
THIS WAS IN 2017 BEFORE WHIRLY
WAS ISSUED, THE REASONING
APPLIES TO ALL PARTIES AND THIS
WOULD ESSENTIALLY MAKE IT
LIMITED TO CASES LIMITED TO
PARTIES IMPEACHMENT AND THE
THIRD POOL, IN THE AMICUS BRIEF,
LIMIT ALL IMPEACHMENT TO ONE.28
284 EVERYONE.
THIS GOES TO WHAT JUDGE NESBITT
WROTE IN THE THIRD DCA OPINION
ABOUT THIS IMPEACHMENT COULD BE
DONE THROUGH A SIMPLE CROSS.
IT DOESN'T NEED TO BE VERY
EXTENSIVE.
YOU CAN GET ACROSS THAT SOMEONE
IS BEING PAID BY A CERTAIN PARTY
AND HAS THAT BIAS WITHOUT
SPENDING A LOT OF TIME.
THIS BIAS TAKING UP A LOT OF
TIME.
WE HAVE THE DEPOSITION OF THIS
DOCTOR.
THE MAJORITY OF THE TIME IS
SPENT ON IMPEACHMENT.
>> WOULD WHAT YOU ARE TALKING
ABOUT REQUIRE A RULE CHANGE TO
DETERMINE WHAT WAS DISCOVERABLE.
>> THIS LINE OF CASES OVER
COMMON-LAW.
>> IF THE RULES THAT WE PLAY BY
OUR LAID OUT CLEARLY.
IN TRYING TO FIGURE OUT AS IT
EVOLVES FROM COURTROOM TO
COURTROOM.
>> THAT RULE DIDN'T APPLY IN
THAT SITUATION, THAT GOT OUTSIDE
THE.
THAT DOESN'T COME INTO PLAY IN

THIS ANALYSIS.
>> IN OUR WILL MAKING ROLE COULDN'T WE COME UP WITH THAT SAYS WITH THIS TYPE OF DISCOVERY THIS IS WHAT YOU ARE ENTITLED TO?
FIGURE OUT WHAT MAKES SENSE AND WHAT BALANCE IS BEST, THE FINANCIAL BIAS INFORMATION ALONG WITH SEARCH FOR TRUTH ALONG WITH COST OF LITIGATION AND MAKING IT ACCESSIBLE, THAT IS THE SORT OF POLICY BALANCE YOU CAN HANDLE IN A RULEMAKING SITUATION, NOT THE KIND OF THING THAT IS APPROPRIATE FOR A CASE, THAT IS THE QUESTION.
>> I WOULD LIKE TO RESERVE THE REMAINDER.
>> YOU DON'T WANT TO ANSWER THE JUSTICE'S QUESTION.
>> SORRY ABOUT THAT.
I THINK THAT THE WILL IS SUFFICIENT THE WAY IT IS TO BE AMENDED.
WITHOUT HAVING TO GO THROUGH THE ENTIRE WAS COMMITTEE PROCESS, THIS COURT HAS TAKEN THAT AVENUE ON SEVERAL OCCASIONS BECAUSE IF WE GO THROUGH THE RULES PROCESS THIS PROBLEM IS GOING TO CONTINUE AND KEEP CONTINUING UNTIL IT IS SOLVED AND THAT WILL KEEP COMPOUNDING THE NUMBER OF TRIALS THAT WILL BE COMING DOWN THE PIPELINE ESPECIALLY ONCE JURY TRIAL STARTS.
>> THE PROCESS OVERLAID, CHIEF JUSTICE CANNAY MENTIONED THE ENTITLEMENT HERE.
HOW CAN WE DO THAT?
>> GOING BACK TO THE POOL, THIS LINE OF CASES DEVELOPED OUTSIDE THE, IT WOULD TAKE A SIGNIFICANT AMENDMENT TO PULL THIS LINE OF CASES BACK WHEREAS DOING IT IN AN OPINION FROM THIS COURT IS A SIMPLE WAY TO PULL IT BACK.
IT IS ESSENTIALLY GOING OVER A SPEED BUMP VERSUS CLIMBING A

MOUNTAIN.
>> FOR ALL OF US, TWO ADDITIONAL MINUTES, FOUR MINUTES FOR REBUTTAL.
>> MAY MEAN MORE TIME THAN THAT.
>> I HAVE MY LIMITATIONS.
>> GOOD MORNING, EVERYBODY.
THE QUESTIONING STARTED, LET ME FOLLOW UP ON THIS RULE.
GIVEN THE POSTURE OF THIS CASE OF THE COURT WAS INCLINED TO DEAL WITH THE ISSUE, THE PERCEIVED ISSUE, THE RULEMAKING AUTHORITY WOULD BE A PROPER WAY TO DO THAT OR REAL CASE DEALING WITH THAT ACTUAL POSITION.
I WOULD REMIND US ALL IN GOING THROUGH THE RULEMAKING PUBLIC COMMENT THINKING ABOUT THE COVER SHEET WITH THE CIVIL COVER SHEET, SOMETHING AS INNOCUOUS AS THAT.
A GOOD WAY TO DEAL WITH IT AND ALLOWS ALL SIDES TO AIR THE POTENTIAL ISSUES.
>> THAT, I AGREE WITH THAT POSITION, ONCE YOU FIGURE OUT WITH THE RULE IS YOU GO TO THE RULEMAKING PROCESS TO FIX IT.
THERE IS THAT ISSUE.
WHAT SHOULD THE RULE BE?
THAT IS RULEMAKING.
THERE IS, WHAT IS THE RULE WHICH IS AN ISSUE IN THIS CASE, EQUAL ALL TARTARS -- ALL PARTIES IN LITIGATION AND THAT IS THE BIG ISSUE THAT IS DEFINITELY AN ISSUE IN THIS CASE.
IT IS A PRECEDENT THAT SAID.
THEY DO NOT APPLY EQUALLY TO BOTH PARTIES IN THE STATE OF FLORIDA.
IS THAT A PROPER RULE.
>>
>> WHAT THE TRIAL COURT SETTLED, CLEAR AND UNAMBIGUOUS, SPRINGER VERSUS WEST AND EVEN, THEY MAKE CLEAR THE DISCOVERY OF FINANCIAL CONVICTION BETWEEN A LAW FIRM, SPECIALLY RETAINED EXPERT PER

TRIAL IS NOT PRIVILEGED.
THE TRIAL COURT DID NOT HAVE CENTRAL REQUIREMENTS OF LAW, WE SHOULDN'T HAVE A LOOSENING OF TERTIARY STANDARDS HERE.
>> IN THE REAL WORLD DOESN'T THAT LEAVE US IN A LEGAL POSTURE WHERE THE GOVERNING PRINCIPLE IS THE RULES OF CIVIL PROCEDURE AND DISCOVERY DO NOT APPLY EQUALLY TO BOTH PARTIES IN THE STATE OF FLORIDA?
>> THEY APPLY EQUALLY TO RETAINED EXPERTS, LOOKING AT THE ISSUE.
>> WHAT IS DISCOVERABLE IS RELATED TO WHAT CAN COME INTO EVIDENCE.
WHAT CAN COME INTO EVIDENCE DOES NOT MAKE A DECISION WHETHER A WITNESS IS A RETAINED EXPERT AND WHETHER A WITNESS IS SOMETHING, WHETHER OPINION EVIDENCE IS ALLOWED TO BE OFFERED THROUGH THE TESTIMONY OF ITS WITNESS WHETHER THE WITNESSES AND EXPERT.
EXPERT WITNESSES ARE EXPERT WITNESSES, THE QUESTION IS WHAT ARE THE RULES THAT APPLY TO EXPERT WITNESSES AND IF ONE SIDE GETS DIFFERENT RULES BECAUSE THEIR EXPERT IS RETAINED THERE IS NO WILL BASED OR LAW BASED, THERE IS A LAW BASED BECAUSE WHIRLY SAYS THAT IS THE LAW.
I WOULD SAY THAT IS A DISTINCTION IN THE LAW, IS IT APPROPRIATE TO APPLY DIFFERENTLY BASED ON DISTINCTION THAT IS NOT DRAWN, SOMEONE ALLOWED TO OFFER OPINION TESTIMONY IS RETAINED OR NOT.
>> CERTAINLY GET THE APPEARANCE OF WHAT APPLY DIFFERENTLY.
BUT SCRATCH THE SURFACE.
LOOK AT WHAT IS GOING ON.
THE ONLY WAY TO BRING IN EVIDENCE FROM OTHER CASES IF THERE IS A PAYMENT –

>> A DISTINCTION DRAWN IN RULES
OF DISCOVERY?
>> IT IS NOT MENTIONED.
>> WHAT WE ARE DEALING WITH,
THIS PERSON WHOEVER IT IS IN
THEIR ROLE AS A WITNESS WHO WILL
OFFER OPINION TESTIMONY AND CALL
THAT AN EXPERT, THAT IS THE ONLY
DISTINCTION THAT IS DRAWN SO
TELL ME HOW I CAN DRAW A
DISTINCTION AND SAY YOU CAN GET
FINANCIAL BIAS TESTIMONY FROM
ONE PARTY'S EXPERT BUT NOTHING
FROM ANOTHER PARTY'S EXPERT.
>> WE WERE THERE.
BUT YOU GOT TO SCRATCH - ONCE
YOU GET PAST THE SURFACE
ANALYSIS THE QUESTION BECOMES IS
THE LAW FIRM PAYING THE WITNESS?
THE LAW FIRM PAYING THE TREATING
DOCTOR?
THE ANSWER IS NO.
THE SECOND ISSUE --
>> I UNDERSTAND THAT BUT SAY THE
LAW FIRM REFERS THE PATIENT THAT
ALLOWS -- A BUSINESS
RELATIONSHIP THAT PUT $1 MILLION
INTO THE POCKET OF THAT
POTENTIAL EXPERT AND THE MONEY
WAS ONLY THERE BECAUSE THE
LAWYER EXAMINING THE EXPERT WHEN
HE'S ON THE STAND DIRECTED THAT
FINANCIAL GAIN TO THE EXPERT.
WOULD THAT BE A BASIS FOR BIAS?
>> IF IT CAN BE ABSOLUTELY SHOWN
BECAUSE SOMETIMES IT IS SHOWN ON
THE INTAKE FORMS, THAT IS FAIR
GAME FOR SURE.
IN THIS CASE THERE IS NO RECORD
EVIDENCE WHATSOEVER FOR
REFERRAL.
THAT IS NOT THIS CASE.
ALL THE MORE REASON TO HAVE IT
--
>> IS THERE A RELATIONSHIP
BETWEEN THE ATTORNEYS THEY
SHOULD IN THE CASE AND EXPERT
WITNESS?
>> LET'S TALK ABOUT THAT.
>> ISN'T THAT IRRELEVANT

QUESTION IF YOU'RE GOING TO
BRING OUT THE TRUTH AT TRIAL AND
CROSS-EXAMINE THE WITNESS?
IS THERE A REFERRAL
RELATIONSHIP?
>> THE QUESTION IS HOW THE
CLIENT GET TO THE DOCTOR, MANY
CLIENTS COME IN AND ARE TREATING
ALREADY BUT THE INSURANCE
COMPANIES WANT TO THROW IN A
NUMBER, THERE ARE 200 COMMON
SLIDES.
THAT DOESN'T MEAN THERE WAS A
REFERRAL SO IT CAN'T -- WE WOULD
NEVER JUST THROW IN THAT
EVIDENCE, 200 COMMON COINS.
WE WOULD HAVE TO LOOK AT THE
EVIDENCE.
>> IS THE BIAS ANY DIFFERENT IF
THE DOCTOR REFERRED TO THE
ATTORNEY OR THE ATTORNEY
REFERRED TO THE DOCTOR AS LONG
AS THE RELATIONSHIP WITH THE
ATTORNEY STANDING BEFORE THE
JURY QUESTIONING THE EXPERT WHO
IS GIVING TESTIMONY THEY HAVE A
SYMBIOTIC RELATIONSHIP IN WHICH
ONE SENDS BUSINESS ONE AND ONE
CENTS BUSINESS TO THE OTHER AND
THE POSITION IS THAT IS NOT
DISCOVERABLE BECAUSE IT IS NOT
GOING TO LEAD TO THE POSSIBILITY
OF EVIDENCE A FINANCIAL
RELATIONSHIP?
>> IF THERE IS AN INDEPENDENT
SOURCE THE DOCTOR REFERRED TO
THE LAWYER THAT COULD BE BROUGHT
OUT FOR SURE SAME AS IF THERE
WAS AN INDEPENDENT EVIDENCE THAT
THE LAWYER REFERRED THE PATIENT,
BUT --
>> WHAT YOU ARE SAYING IS THE
REFERRAL RELATIONSHIP IS THE
EVIDENT FINANCIAL -- IS EVIDENCE
OF FINANCIAL BIAS WHICH MEANS IT
WOULD BE DISCOVERABLE BETWEEN
THAT EXPERT AND THE ATTORNEYS,
CORRECT?
IF THE RULES APPLIED EQUALLY.
>> IF THAT EVIDENCE IS THERE.

IF IT IS IN THE INTAKE FORM,
FAIR GAME.
WHAT I WANT TO GET TO, THE
INSURANCE COMPANIES REALLY
WANTED TO DO, HOW THIS HAS TO BE
DEALT WITH, SAY THERE ARE 200
COMMON CLIENTS, WHAT THE
INSURANCE COMPANY WANTS TO DO IS
THROW THAT NUMBER 200 IN FRONT
OF THE JURY WHEN IN REALITY
THERE IS -- MANY PEOPLE MAY HAVE
COME, 50% WENT TO THE DOCTOR OR
LAWYER, NO REFERRAL WHATSOEVER.
THE QUESTION IS EVIDENTIARY
AREA.
HOW DO YOU GET THE EVIDENCE AND
I WANT TO ADDRESS ATTORNEY --
ATTORNEY-CLIENT PRIVILEGE.
WE HAVE BEEN LABORING WE HAD
WORLEY FOR THREE YEARS.
THE CONVERSATIONS THAT HAVE
OCCURRED BETWEEN LAWYERS AND
THEIR CLIENTS FOR THE PAST THREE
YEARS, THE SUPREME COURT OF
FLORIDA SAID THOSE ARE
CONFIDENTIAL, CAN'T BE OPENED UP
NOW.
>> IS YOUR POSITION THESE
CONVERSATIONS, PREPARING FOR
LITIGATION?
>> IT IS THE PURPOSE OF
ATTORNEY-CLIENT RELATIONS, WE
HAVE A DUTY TO MITIGATE DAMAGES
SO INJURED PERSON COMES IN TO A
PLAINTIFF'S LAWYER'S OFFICE, WE
HAVE TO EXPLAIN WE HAVE A DUTY
TO MITIGATE, THE CLIENT IS PART
OF THE CONVERSATION, HOW DO I DO
THAT?
OFTEN IT WOULD COME UP THAT --
>> YOUR POSITION IS SOMEONE
SEEKS TREATMENT FOR A HEAD
INJURY, THEY ARE MITIGATING
DAMAGES AS OPPOSED TO GETTING
TREATMENT FOR A HEAD INJURY.
>> IT IS MEDICAID DAMAGES BY
GETTING BETTER, A DUTY TO TRY TO
GET BETTER.
>> WHERE DOES THAT COME FROM?
>> ALMOST EVERY CASE, IF THERE

IS NO TREATMENT THEY DIDN'T GO
TO TREATMENT.
>> I WANT TO UNDERSTAND THE
POSITION, YOU ARE SAYING IF I
GET HIT IN THE HEAD IN A CAR
ACCIDENT, IF I HIT MYSELF IN THE
HEAD.
>> YOU ARE SEEKING RECOVERY FROM
SOMEBODY ELSE YOU HAVE A DUTY TO
MITIGATE THE DAMAGE.
YOU WOULD HAVE TO DO WHAT YOU
COULD TO GET BETTER IF YOU'RE
GOING TO HAVE SOMETHING ELSE TO
COMPENSATE YOU AND IF YOU DON'T,
AS PART OF THAT CONVERSATION IT
COULD COME UP.
HOW DO I DO THAT?
THAT IS PROTECTED BY THE
ATTORNEY-CLIENT PRIVILEGE.
>> IS THAT YOUR POSITION THAT A
SIMPLE REFERRAL, TO A MEDICAL
TREATING PHYSICIAN OR TREATMENT,
ATTORNEY PRICE CREW.
-- PRIVILEGE COMMUNICATION.
>> I READ YOUR DISTANT THE PAST
TWO DAYS SO YES.
IT IS BECAUSE I DON'T THINK THIS
ARGUMENT WAS MADE TO YOU, THIS
DUTY TO MITIGATE AND THEN IF
JUST THE FACT OF THE REFERRAL
COMES OUT THAT OCCURRED DURING
THE ATTORNEY-CLIENT
COMMUNICATION IF THE FACT COMES
OUT THEN IT MIGHT LOOK BAD, WE
HAVE TO OPEN UP THE CONVERSATION
AND PUT IN FRONT OF THE JURY
LISTEN, OUR CLIENTS HAVE A DUTY
TO MITIGATE WHICH IS CLEARLY
PROTECTED CONVERSATION.
A DUTY TO MITIGATE THROUGH
DAMAGES.
THIS IS PART OF THE ADVICE WE
GIVE, TO MITIGATE.
>> I QUESTION IF A SIMPLE
REFERRAL FOR MEDICAL TREATMENT
CONSTITUTES AN ATTORNEY-CLIENT
PRIVILEGE COMMUNICATION BUT
HAVING SAID THAT, THAT IS
PROBABLY A CASE FOR ANOTHER DAY.
IT DOES SEEM TO ME AS JUSTICE

LAWSON INDICATES, I THOUGHT THAT
IN MY DESCENT.
>> LOCAL MAKING.
>> THE CERTIFIED QUESTION FROM
THE DCA, I DON'T SEE THE
JURISDICTION TO ADDRESS THE
CERTIFIED QUESTION, WHY WE
SHOULD NOT DO SO.
>> TWO CASES AND WHEN YOU
CONCURRED WITH HIS RODRIGUEZ
VERSUS MIAMI-DADE, THE EMERGENCY
EXCEPTION, TO PROPERLY CONCLUDE
THE CIRCUIT COURT FOR
REQUIREMENTS OF THE LAW, AND -
>> THAT'S NOT THE CERTIFIED
QUESTION BEFORE US.
>> IT WAS NEVER PASSED THE
POINT.
THIS IS WHAT THE LAW IS IN THIS
WASN'T PAST LAW, THIS IS AN
ARGUMENT THAT IS RAISED.
>> WHAT TEXT IN THE CONSTITUTION
LIMITS OUR ABILITY TO PASS ON
THAT QUESTION NOW THAT IT HAS
BEEN CERTIFIED?
>> IT WASN'T PAST ON THE FIFTH
DCA.
>> IS THAT PART OF THE TEXT, IS
THAT A LIMITATION IN THE
CONSTITUTIONAL DOESN'T REQUIRE A
CERTIFIED QUESTION?
>> ARTICLE 5 SECTION BE 4.
THEY SAID IN THE OPINION WASN'T
PAST IT.
I WANT TO POINT OUT ONCE YOU
SCRATCH THE SURFACE WHICH IS
WHERE WARMAKING AUTHORITY WOULD
BE SO IMPORTANT WITH
CONTROVERSY.
TO GET PAST THE SURFACE, WHAT IS
ADMISSIBLE EVIDENCE IN A CASE,
NOT IN THIS CASE BECAUSE THERE
IS NO EVIDENCE.
WHAT IS ADMISSIBLE AND WHAT IS
NOT MISLEADING, WE CANNOT
MISLEAD THE JURY, WE HAVE 200
COMMON CLAIMS AND EXPECT THE
OTHER SIDE, THE MISLEADING
EVIDENCE.
THAT IS NOT WHAT RULES OF

EVIDENCE ARE FOR, YOU WILL NEVER
BE ABLE TO SIMPLY PUT IN A
NUMBER WITHOUT SOME FOUNDATION.
>> YOU SAID THAT WOULD BE EVIL
MAKING YOU ARE TALKING ABOUT
WHAT THE RULES SHOULD BE.
THE PRIMARY QUESTION IS WHATEVER
THE RULE IS SHOULD THEY APPLY
EVENLY?
AND THAT IS THE QUESTION THAT
CERTIFIED.
ASSUMING WE HAVE JURISDICTION TO
ANSWER ACIDIFY QUESTION WE CAN
ANSWER THAT QUESTION AND GET TO
DECIDE WITHIN OUR DISCRETION
WHETHER WE GET TO THE NEXT
QUESTION, WHAT -- WHETHER WORLEY
MAKES SENSE OR NOT IT IS THERE A
BETTER WILL LATER FORMAL MAKING?
ASSUMING WE DO DECIDE TO ANSWER
THE QUESTION, SHOULD THE RULES
OF CIVIL PROCEDURE AND DISCOVERY
REPLY EVENLY, YOU WOULD AGREE
THEY SHOULD APPLY EVENLY
ASSUMING WE DECIDE TO ANSWER THE
QUESTION CORRECTLY.
>> WITH THIS CAVEAT.
THERE ARE MANY RULES THAT APPLY
AND ARE JUST NOT EVEN.
AN INSURANCE COMPANY CAN FILE A
PROPOSAL, THEY DON'T HAVE TO
PICK A REAL NUMBER, NO
INCENTIVE, TO PICK AN ACTUAL
NUMBER 2 TRIGGER, THAT IS AN
EQUAL.
WHO HAD THE TICKET?
UNEQUAL.
THERE ARE THESE JUDGMENTS AND
AFTER HEARING EVERYTHING THAT
JUDGMENT WOULD BE MADE.
ON HIS FACE --
>> I THINK I UNDERSTAND THE
ARGUMENT, I UNDERSTAND YOU TO BE
SAYING WE SHOULD ANSWER THE
QUESTION AND WE SHOULD SAY OF
DISCOVERY SHOULD APPLY
DIFFERENTLY TO DIFFERENT
EXPERTS.
I'M HAVING A HARD TIME
UNDERSTANDING WHAT THE RATIONALE

WOULD BE FOR THAT.
>> ON ITS SURFACE EASY TO SAY THEY SHOULD BE EQUAL BUT IT HAS TO BE EVIDENCE.
CAN'T SIMPLY BE HOW MANY CLIENTS DO YOU HAVE.
THERE HAS TO BE AN EVIDENTIARY BASIS.
>> THAT GETS DOWN TO WHERE THE RULE IS OR WHAT IT SHOULD BE.
>> GENERALLY --
>> WHY SHOULD THE RULES APPLY DIFFERENTLY?
>> THEY ARE THE SAME WHEN WE TALK ABOUT RETAINED EXPERTS OF THE QUESTION BECOMES WITH AN EVIDENTIARY ISSUE THAT HAS TO BE ADDRESSED THAT IS NOT EVEN A QUESTION --
>> THE QUESTION IS WHETHER THE ANALYSIS OR DECISION SHOULD APPLY TO DEFENSE LAW FIRM, THE ANSWER TO THAT QUESTION IS NO BECAUSE IT WAS WRONGLY DECIDED WOULD THAT BE APPROPRIATE JUST PROCEDURALLY, NOT SAYING SUBSTANTIVELY YOU WOULD SAY THAT IS THE RIGHT A WRONG ANSWER BUT IN TERMS OF SQUARING THIS WITH JURISDICTION WOULD THAT BE UNAVAILABLE PATH?
>> THE BETTER PATH NOW, THEY DON'T APPLY BECAUSE THERE IS NO ATTORNEY-CLIENT PRIVILEGE.
>> IF WE ARE JUST TALKING ABOUT THE APPROPRIATENESS OF GETTING TO THE ISSUE, WHAT IS WRONG WITH THE PATH THAT SAYS IT SHOULD NOT APPLY BECAUSE WORLEY WAS WRONG?
>> BECAUSE WORLEY NEEDS TO BE ARGUED, THE FACTS IN A REAL CASE OR CONTROVERSY DEALING WITH THE ISSUES I RAISED TODAY THAT I DIDN'T KNOW WERE RAISED IN WORLEY.
THOSE NEED TO BE DEALT WITH.
IT WOULD BE INAPPROPRIATE TO GO OUTSIDE THE RECORD IN THIS CASE WHERE THE DECISION IN THIS CASE WHICH WAS THE TRIAL COURT DID

NOT MAKE A MISTAKE AND LEGAL
ERROR OR NOT AND TAKE THE NEXT
LEAP AND SAY BECAUSE WORLEY WAS
WRONGLY DECIDED.
IT IS A TRUE CONTROVERSY ISSUE
THAT WOULD BE FUNDAMENTALLY
UNFAIR, THE RULE THAT WORLEY WAS
WRONG IN THE CIRCUMSTANCES OF
THIS CASE, YOU DON'T HAVE A
RECORD AND THAT IS NOT THE ISSUE
EITHER SIDE HAS RAISED.
>> LET ME ASK YOU THIS.
WE WILL IN YOUR FAVOR ON GROUNDS
OTHER THAN THE DISTRICT COURT,
THIS IS A GENERAL PRINCIPLE OF
THE APPELLATE PROCESS.
>> THIS IS NOT AN APPEAL.
I DON'T KNOW IF I CAN GET THERE.
>> YOU ARE THE RESPONDENT HERE.
WE CAN RULE IN FAVOR OF THE
RESPONDENT ON GROUND OTHER THAN
THE GROUND THAT WAS THE BASIS
FOR THE DISTRICT COURT'S
DECISION.
ISN'T THAT CORRECT?
>> I DON'T THINK YOU CAN IN THIS
CASE.
>> IN GENERAL PRINCIPLE OF OUR
STRUCTURE OF THE APPELLATE
PROCESS.
>> YES, IT IS A GENERAL
PRINCIPLE.
>> THAT MY QUESTION.
I UNDERSTAND YOU DON'T THINK WE
ARE TO DO IT. I APPRECIATE THAT.
THAT IS A GENERAL PRINCIPLE.
>> IT IS THE GENERAL PRINCIPLE
BUT IN THIS CASE JUST BECAUSE
THERE IS NO MATERIAL INJURY,
THIS SAME INFORMATION WAS GIVEN
UP BY RETAINED EXPERTS IN 20
YEARS SO I DON'T KNOW THERE WAS
JURISDICTION.
THE DISCOVERY TO BE DEALT WITH.
THAT WAS THE BASIS.
THAT IS THE QUESTION I HAVE.
>> WE WILL GO TO REBUTTAL.
>> TWO CASES, RODRIGUEZ AND THE
OTHER IS SAN PARADISO.
THESE AROSE IN A DIFFERENT

CONTEXT.
THE CERTIFIED QUESTION HAD TO DO WITH THE APPROPRIATE VEHICLE TO REVIEW A CERTAIN ACTION.
COMPLETELY DIFFERENT AND DOES NOT LIMIT THE COURT'S ABILITY TO REVIEW A CERTIFIED QUESTION AND THE FIFTH DCA, IN THE OPINION, BASED SQUARELY REJECTED IT, IF WORLEY WAS NOT, MORE CONSISTENT IN THE CASES THAT CAME AFTERWARD.
THEY REJECTED IT.
THEY DECIDED IT THIS YEAR.
>> ON THE ONE HAND, IT SEEMS IF THE CONSTITUTION GIVES A FAIR AMOUNT OF LATITUDE TO ANSWER THESE QUESTIONS THIS IS AN ODDLY WORDED QUESTION.
WE SHOULDN'T -- IN DISTRICT COURT'S RACE THE QUESTION IN TERMS OF DOES SUCH AND SUCH CASE APPLY TO Q ASKING US TO SAY WHETHER THE ANALYSIS SHOULD APPLY IS ALMOST JUST LIKE TEEING UP FOR THE COURT, KIND OF ABSTRACT ADVISORY SORT OF QUESTION.
IT IS NOT ADVISORY IN THE SENSE THAT WE SAY NO BECAUSE IT COULD LEAD TO A CERTAIN OUTCOME IN THIS CASE OR YES BECAUSE XYZ, BUT IS THIS A PROPERLY PHRASED QUESTION?
>> THIS COURT HAS ANSWERED SOME OF THE QUESTIONS THAT WERE FRAMED IN A SIMILAR MANNER.
THIS COURT HAS WITHIN ITS POWER TO REPHRASE THIS QUESTION, HAS DONE THIS NUMEROUS TIMES OVER THE LAST 40 YEARS SINCE 1980 --
>> IF WE REPHRASE IT IN TERMS OF DOES THE ANALYSIS APPLY TO PRECLUDED DEFENSE LAW FIRM THE ANSWER TO THAT WOULD BE NO.
>> I WOULD DISAGREE.
IT DEPENDS WHAT THE COURT PLANS ON DOING WITH WORLEY.
>> TAKE WORLEY AS IT IS.
DOES THE DECISION APPLY TO

PRECLUDE THE DEFENSE LAW FIRM
THAT IS NOT ETC. ETC. THE ANSWER
WOULD BE NO.
>> THE ANSWER WOULD STILL BE YES
AND THIS WOULD BE BASED ON
EXPRESS WORDING OF WORLEY IT
SAYS ALLSTATE VERSUS BOWSHER
DOES NOT APPLY BECAUSE IT IS NOT
A PARTY TO THE LAWSUIT.
THE MAJORITY OPINION DID NOT
HAVE TO BE WORDED IN THAT MANNER
IT BECAUSE IT WAS IT NEEDS TO BE
APPLIED EVENLY ON BOTH SIDES.
ULTIMATELY I THINK THIS COURT'S
DECISION BOILS DOWN TO WHAT TO
DO WITH WORLEY BECAUSE WORLEY IS
THE ELEPHANT IN THE ROOM.
ALL OF US HAVE TO ADMIT THAT.
IT UP INTO THE LAW IN THIS AREA
AND CHANGED EVERYTHING.
TODAY WE ASK THIS COURT TO TURN
FOCUS BACK TO WHAT WE DID IN
ELKINS, THE DISCOVERY IS
INTENDED TO FAVOR NEITHER
DEFENDANT'S, BOTH PARTIES HAVE
TO BE TREATED EQUALLY, THANK
YOU.
>> THANK YOU BOTH FOR YOUR
ARGUMENTS IN THIS CASE TODAY.