IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1245

ARTHUR GOBLE,
Petitioner,

v.

MARK E. FROHMAN,
Respondent.

AMICUS BRIEF OF THE FLORIDA DEFENSE LAWYERS' ASSOCIATION

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SUMMARY OF ARGUMENT

In enacting the Tort Reform and Insurance Act, the Florida Legislature sought to reduce escalating damage awards, curb increasing insurance costs, and end a crisis in the liability insurance industry. Among these reforms was Section 786.76, Florida Statutes, which largely abrogated the common law collateral source rule. At common law, defendants were not entitled to reductions for collateral source benefits provided to the injured party. The rule was problematic and resulted in unjustified awards and windfalls for plaintiffs, which led to increased liability insurance costs for the general public. In order to reduce these damage awards, while at the same time providing injured persons with reasonable and adequate damages for their injuries, the Legislature enacted Section 786.76, Florida Statutes. In interpreting the statute, this Court should afford it a liberal construction, giving effect to the expressed legislative intent to control tort damage awards and avert escalating insurance costs.

In this case, Plaintiff's healthcare providers accepted $145,970.76 as payment in full pursuant to their agreement with Plaintiff's HMO. Neither Plaintiff nor anyone else is obligated for any additional amount. Nevertheless, Plaintiff claims he is entitled to $574,554.31 as compensation for past medical expenses simply because this is what the doctors usually charge. Plaintiff never

faced even potential liability for anything in excess of $145,970.76 because the doctors had contractually agreed to limit their charge to that sum.

The district court properly concluded that the healthcare providers' "write-off," i.e., amount in excess of the contractually-agreed payment, is properly set-off from the jury's award for past medical expenses pursuant to Section 768.76. The "payment made" on Plaintiff's behalf, or the resulting benefit "otherwise available" to him, is not merely the contractually-agreed sum tendered by Aetna, but the full amount of the debt discharged by that sum. Because Aetna fully discharged any and all obligation to the physicians, the physicians' write-off is properly considered part of the "payment made" on Plaintiff's behalf, or a benefit "otherwise available" to him. Because nobody has a right to reimbursement or subrogation for the amount of the write-off, Section 768.76 requires a set-off in that amount.

Construing the statute in a manner that denies a set-off for amounts written-off by the healthcare providers will undermine the very purpose of the statute, i.e., to control damage awards in excess of actual damages and to address out-of-control liability insurance costs borne by the general public.

Alternatively, if Section 768.76 is inapplicable, the jury's verdict was still properly reduced to the contractually-agreed amount accepted by the healthcare

providers as payment in full because Plaintiff simply did not sustain any damages for past medical expenses in excess of that sum.

ARGUMENT

I. THE SECOND DISTRICT CORRECTLY DETERMINED THAT SECTION 768.76, FLORIDA STATUTES, REQUIRES THAT THE JURY'S AWARD FOR PAST MEDICAL EXPENSES BE REDUCED TO THE AMOUNT PAID AND ACCEPTED BY PLAINTIFF'S HEALTH CARE PROVIDERS AS PAYMENT IN FULL.

At common law, defendants were prohibited from obtaining a set-off for "collateral source" benefits, which is compensation from a source independent of the defendant tortfeasor. *See Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 457-489 (Fla. 1991); *Parker v. Hoppock*, 695 So. 2d 424 (Fla. 4th DCA 1997). "The [common law] collateral source rule permits an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of any element of those damages by a source independent of the tortfeasor . . . ." *Gormley*, 587 So. 2d at 457 (quoting Jerome H. Nates Et Al., Damages In Tort Actions § 17 (1988)). This principle, however, represented the common law before the Florida Legislature abandoned it.

In enacting Fla.Stat. § 768.76, the legislature largely abrogated the common law collateral source rule, and declared that all collateral sources must be set-off from jury awards unless a subrogation or reimbursement right exists. *See* Fla.Stat.

§768.76; *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 200 n.3 (Fla. 2001)(pursuant to Section 768.76, "the trial court is required to reduce the amount of damages by the amount of all collateral sources for which no right of subrogation exists.").

The common law collateral source rule was readily criticized as "anomalous, and illogical." *See* 25 C.J.S. Damages §99(1). Indeed, it permitted recovery even though there was no loss and even though it may constitute a double recovery. *See id.* §99(1) at 21 (*citing Feeley v. U.S.*, 337 F.2d 924 (3d Cir. 1964)). One of the stated purposes of the common law rule was that any windfall should be granted to the plaintiff rather than the defendant. *See Janes v. Baptist Hospital of Miami, Inc.*, 349 So. 2d 672 (Fla. 3d DCA 1977). To the extent this principle survives the enactment of Section 768.76, it is inapplicable in this case, as there is no windfall to allocate. Defendant was held liable for every penny incurred for Plaintiff's medical care. The only windfall would be in favor of the Plaintiff, if he were permitted to recover for damages he did not sustain.

Assuming *arguendo* that the common law collateral source rule is necessary to ensure that tortfeasors are not relieved of their wrongdoing, the present day reality is that most defendants in litigation are insured; thus, the insurer pays the additional amounts, not the tortfeasor. The increased cost of providing "compensation" for phantom damages is ultimately borne by Florida's citizens and

businesses through spiraling insurance costs.

These are precisely the concerns the Florida Legislature addressed in enacting the Tort Reform and Insurance Act and, more particularly, Section 768.76, Florida Statutes. *See* 1986, *Laws of Florida* ch. 86-160, preamble; *see also University of Miami v. Echarte*, 618 So. 2d 189, 192 (Fla. 1993).

Section 768.76 is remedial legislation, enacted in response to the financial crisis in the insurance industry; as such, the statute should be construed liberally to effectuate its purposes even though it is in derogation of the common law. As this Court has explained, "[w]hen a statute is both in derogation of the common law and remedial in nature, the rule of strict construction should not be applied so as to frustrate the legislative intent." *See Irven v. Dept. of Health and Rehabilitative Services*, 790 So. 2d 403, 406 (Fla. 2001). Rather, "[t]he statute should be construed liberally in order to give effect to the legislation." *See id.*

Section 2 of the Tort Reform and Insurance Act, of which Section 768.76 was a part, sets forth the Legislature's remedial purpose:

> The Legislature finds and declares that a solution to the current crisis in liability insurance has created an overpowering public necessity for a comprehensive combination of reforms to both the tort system and the insurance regulatory system. ***This act is a remedial measure and is intended to cure the current crisis and to prevent the recurrence of such a crisis.*** It is the purpose of this act to ensure the widest possible availability of liability insurance at reasonable rates, to

> ensure a stable market for liability insurers, to ensure that injured persons recover reasonable damages and to encourage the settlement of civil actions prior to trial.

1986 *Laws of Florida* ch. 86-160 (emphasis added). The legislature also made express findings of fact which included the following:

(1) At the time, there was an extreme financial crisis in the liability insurance industry; *see* 1986 *Laws of Florida* ch. 86-160, preamble;
(2) Liability insurance costs were spiraling, thus many people would soon be unable to purchase liability insurance due to the outrageous costs; *Id.*;
(3) Without liability insurance, injured victims would be prevented from recovery of damages*; Id.*; and
(4) The burden of compensating persons injured by the tortious acts of others, and the related costs, were borne by all citizens, not just the tortfeasor; *Id.*

The legislative intent to abrogate the common law collateral source rule is clearly reflected in the enactment of Fla.Stat. §768.76. It is difficult to envision much clearer legislative intent. Consequently, FDLA submits that the Court should grant a liberal construction to the statute to give effect to the expressed legislative intent. With the enactment of Section 768.76, there is no reason to think that the legislature intended to continue to permit plaintiffs to recover amounts for past medical expenses for which no one is liable and for which there is no subrogation or reimbursement right.

The Second District correctly concluded that both the language and purpose of Fla.Stat. § 768.76 mandate a set-off for sums in excess of what the physicians

agreed to accept as full payment. The statute provides in pertinent part as follows:

> **768.76. Collateral sources of indemnity**
> (1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for **losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources**; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists . . . .
>
> (2) For purposes of this section:
>
> (a) "Collateral sources" means **any payments made to the claimant, or made on the claimant's behalf**, by or pursuant to:
>
> . . . .
>
> 3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

Fla.Stat. § 768.76 (emphasis added).

As the Second District noted, common dictionary definitions of "payment" include "the discharge of a debt or obligation." *See Goble v. Frohman*, 848 So. 2d 406, 409 (Fla. 2d DCA 2003)(*quoting* Webster's Third New International Dictionary 1659 (1986)). Thus, the "payment made" on Plaintiff's behalf is not merely the contractually-agreed price, but the full amount of the debt discharged thereby. Aetna's payment entirely discharged any and all obligation to Plaintiff's

health care providers. The providers agreed prior to ever rendering services to the HMO patient that they would provide medical services at the contractually specified rates. Nobody will ever be liable to pay any additional amount for past medical care. Nor does anybody have a right to reimbursement or subrogation for the amount of the healthcare providers' write-off. Thus, Section 768.76 requires a set-off in that amount.

Moreover, by its express terms, the statute mandates a set-off for the "total of all amounts which have been paid for the benefit of the claimant, ***or which are otherwise available to the claimant***, from all collateral sources." *See id*. (emphasis added). Thus, even if the word "payment" is narrowly construed to mean only a tender of cash, the statute contemplates a set-off not only for the amount of such "payment," but also for amounts "otherwise available to the claimant." In this case, the amount of the debt discharged in excess of the "payment" is clearly a benefit "otherwise available." To permit a set-off only in the amount of the cash tender would improperly render the phrase "otherwise available" without any effect, a result which could not have been intended by the Legislature given its inclusion of this language in the statute.

As the Second District also recognized, the very purpose of Section 768.76 would be frustrated if there were no set-off for amounts written-off by the physicians:

> The allowance of a setoff for a contractual discount is also consistent with the legislature's express intent to fully compensate the injured party while simultaneously reducing the litigation costs that arise when insurers are required to pay damages beyond what the injured party actually incurred. *See* ch. 86-160, § 2. The injured party is fully compensated by an award that equals the amounts the injured party paid to the medical provider plus the amounts paid by his insurer, which will ultimately be subrogated by the insurer. *See* §§ 641.31(8), 768.76(4), Fla. Stat. (1999). Awarding an injured party damages that include a contractual discount, which in this case is in excess of $400,000, results in a windfall to the injured party for damages that have not been incurred. The allowance of such a windfall completely undermines the purpose of the Act by requiring insurers to pay damages based on a billing fiction, especially when the insurers will be sure to pass the cost for these phantom damages on to Floridians. Accordingly, we affirm the trial court's order granting a setoff in favor of Frohman.

Goble, 848 So. 2d at 410.

Plaintiff's argument to the contrary relies on an erroneous recitation of the statutory definition of "collateral source." Plaintiff argues that "'collateral sources' must be 'payments made' to the healthcare provider, not **by** the healthcare provider." (*See* Petitioner's Brief at 15). It should initially be noted that, by advancing this argument, Plaintiff implicitly acknowledges that the term "payment" is broader than the mere delivery of cash, as the healthcare providers did not actually tender cash to anyone – they simply wrote off a debt which never truly existed in the first place. Moreover, Section 768.76 does not define

"collateral source" in terms of the identity of the payor; instead, a "collateral source" is any payment [i.e., any discharge of a debt] . . . on the claimant's behalf." *See id*. § 768.76(2)(a). Plaintiff's argument also ignores that the healthcare providers' debt was entirely discharged ***only because of the payment of the contractually-mandated amount by Aetna.*** It was the collateral source – not the healthcare providers – that secured the complete discharge of Plaintiff's obligation for past medical expenses.

Ironically, while Plaintiff tries to avoid a set-off under Section 768.76 by arguing that the physicians' write-off is not a collateral source, he simultaneously argues that the write-off ***is*** a collateral source under the common law collateral source rule, which Section 768.76 was designed to abrogate. Plaintiff cannot have it both ways.

Although Plaintiff cites Connecticut cases which denied defendants a set-off for healthcare providers' write-offs, FDLA respectfully submits that more persuasive authority is found in *Mikulay v. The Dial Corp*, 1990 WL 57530 (Minn.Ct.App. 1990), which holds that a defendant is entitled to a statutory set-off in the amount of the write-off. The Minnesota collateral source statute, Minn.Stat. § 548.36, much more closely parallels Fla.Stat. § 768.76 than does the Connecticut statute. For instance, while the Connecticut statute permits a set-off only for amounts "paid for the benefit of the claimant," *see* Conn.Gen.Stat. § 52-225b(b),

the Minnesota statute (like the Florida statute) more broadly mandates a set-off for amounts "paid ***or otherwise available to the plaintiff,***" see Minn.Stat. § 548.36(1)(emphasis added). The narrower language of the Connecticut statute renders the analysis employed by the Connecticut courts inapplicable to the broader Florida statute. Furthermore, while the Connecticut cases employed no cogent reasoning, the *Mikulay* decision rests on a sound legal analysis:

> SPRMC [St. Paul Ramsey Medical Center] provided medical services to appellant and received reimbursement for a percentage of those services from Medicare. Medicare asserted a subrogation right for the amount paid and the trial court properly refused to deduct this amount from appellant's recovery. However, SPRMC had to write off the charges for the remaining amount, $68,097.40, in accordance with Medicare regulations. This write-off was made on appellant's behalf pursuant to a federal program providing medical care. *See* Minn.Stat. § 548.36, subd. 1(1). Appellant certainly received a benefit from the services provided by SPRMC. Allowing appellant to receive the medical services at no cost and recover the cost of the services from respondent would result in a double recovery and contravene the purpose of the statute. Additionally, if SPRMC did not have to write-off appellant's debt pursuant to Medicare regulations, SPRMC would have a subrogation claim against appellant for the cost of these services. Furthermore, appellant's claim that the $68,097.40 write-off should be treated as a donated service is not persuasive. Therefore, we hold that the trial court properly deducted the $68,097.40 debt write-off from appellant's medical expense award *as a collateral source payment.*

Id. at *3 (emphasis added).

Plaintiff's analogy to cases involving ***forgiven*** or ***waived*** subrogation rights is misplaced (*see* Petitioner's Brief at 25-27); *see, e.g., Bruner v. Caterpillar, Inc.*, 627 So. 2d 46 (Fla. 1st DCA 1993); *Centex-Rodgers Construction Company v. Herrera*, 816 So. 2d 1206 (Fla. 4th DCA 2002); *Sutton v. Ashcroft*, 671 So. 2d 301 (Fla. 5th DCA 1996). In this case, no subrogation rights ever existed or sprang into being on behalf of Aetna or the medical care providers for amounts in excess of the $145,970.76 payment in full. Aetna never had subrogation rights for monies in excess of the amount actually paid, and thus could not have relinquished or waived them. The same analysis applies to the medical care providers, who agreed prior to ever rendering medical services to Plaintiff that the services would be rendered at the contractual price.

Plaintiff also misplaces reliance on *Paradis v. Thomas*, 150 So. 2d 457 (Fla. 2d DCA 1963), and *Burke v. Byrd*, 188 F.Supp. 384 (N.D.Fla. 1960). Both cases applied the common law collateral source rule to hold that a serviceman who received "free" medical care from the government could collect from the tortfeasor the value of the medical services. *Paradis* and *Burke* are of no value in resolving the issue presented, as both cases pre-date the enactment of Section 768.76. The language and purpose of Section 768.76 render the viability of *Paradis* and *Burke* questionable at best. Moreover, this case does not involve free services. In this

case, an agreed-upon sum of money was exchanged in an arm's length transaction as full payment for the medical services. In this circumstance, there is no reason to create a fictional amount of damages. In *Aircraft Service International, Inc. v. Jackson*, 768 So. 2d 1094, 1096 (Fla. 3d DCA 1995), the Third District reversed the denial of the defendant's motion for remittitur where the jury awarded $150,000 in past medical expenses where the bills totaled only $143,000. The Court explained, "[a]wards exceeding such a definite and ascertainable amount are readily vacated and remanded." *Id.*

Finally, Plaintiff incorrectly argues that any statutory set-off should be reduced not only by the amount of premiums he paid, but also in an amount representing the loss of his freedom to select his own doctors (*see* Petitioner's Brief at 30-32). It is unnecessary to address the valuation of such an intangible right because Plaintiff's factual premise is incorrect. Plaintiff relinquished no such freedom of choice. Plaintiff was free to obtain treatment from any healthcare provider who agreed to treat him. If that provider was not on Plaintiff's HMO plan then Plaintiff would incur the provider's usual charge, and Defendant would face potential liability for that unreduced sum in accordance with normal tort principles.

II. ALTERNATIVELY, IF SECTION 768.76 DOES NOT APPLY THEN PLAINTIFF'S JUDGMENT WAS STILL PROPERLY REDUCED BECAUSE PLAINTIFF'S DAMAGES FOR PAST MEDICAL EXPENSES DO NOT EXCEED THE AMOUNT ACCEPTED AS FULL PAYMENT BY THE HEALTHCARE PROVIDERS.

Even without reliance on Fla.Stat. § 768.76, the Second District reached the correct conclusion that a plaintiff may not recover past medical expenses in an amount exceeding what anyone was obligated to pay for the medical care. Quite simply, Plaintiff did not sustain damages for past medical expenses in excess of that amount.

In *Hanna v. Martin*, 49 So. 2d 585, 587 (Fla. 1950), this Court described the "fundamental principle" of compensatory damages as follows:

> The fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which give rise to the action. In other words, the damages awarded should be equal to and precisely commensurate with the injury sustained . . . . the measure of damages to be awarded, in such cases, should be limited to the actual damages sustained by the aggrieved party.

(internal citations omitted).

Plaintiff's health care providers accepted $145,970.76 as payment in full. Neither Plaintiff nor anyone else was, is, or ever will be, liable for any more than that amount. Clearly, Plaintiff's damages do not exceed $145,970.76.

Nevertheless, Plaintiff claims he is entitled to $574,554.31 as compensation for past medical expenses simply because this is what the doctors might have charged other non-HMO patients. To permit Plaintiff to recover over $400,000 in phantom damages based on a billing fiction violates the penultimate principle of compensatory damages established by this Court in *Hanna*.

In *Hollins v. Perry*, 582 So. 2d 786 (Fla. 5th DCA 1991), the Fifth District held that a plaintiff's recovery for past medical expenses was limited to the amount accepted by the hospital as full payment ($35,000), even though this was less than what the hospital originally charged. The reason, as explained in Judge Diamantis' special concurring opinion, was as follows:

> [Orlando Regional Medical Center] reduced its bill to the plaintiff to $35,000 and agreed that $35,000 would constitute full payment for plaintiff's past hospitalization expenses. Florida has followed the rule that damages awarded to a plaintiff should be equal to and precisely commensurate with the loss sustained. *Hanna v. Martin*, 49 So.2d 585, 587 (Fla.1950); *The Wackenhut Corporation v. Lippert*, 16 F.L.W. D1559, D1661(Fla. 4th DCA June 12, 1991). [The plaintiff's] loss for past hospitalization expenses was the sum of $35,000 and not the original greater sum. Consequently, [he] was only entitled to recover $35,000 as actual damages for past hospitalization expenses.

Id. at 786-87 (Diamantis, J., specially concurring).

Similarly, in both *Horton v. Channing*, 698 So. 2d 865 (Fla. 1st DCA 1997), and *Dourado v. Ford Motor Co.*, 843 So. 2d 913 (Fla. 4th DCA 2003), it was held

that an award for past medical expenses in a wrongful death action is limited to the amount accepted by the doctors as full payment, and not any greater amount originally charged. The Academy of Florida Trial Lawyers ("AFTL") argues that wrongful death cases are different because they are purely statutory (*See* Amicus Brief of AFTL at 6 n.1). FDLA disagrees that *Horton* and *Dourado* are limited to wrongful death actions because there is no legitimate reason to distinguish between wrongful death actions and other tort actions in computing actual, compensatory damages. The reasoning of *Horton* and *Dourado* is in accord with well-entrenched common law principles of compensatory damages as set forth in *Hanna* and *Hollins*.

The argument that Plaintiff is entitled to recover the "reasonable value" of medical services is misplaced (Petitioner's Brief at 23; Amicus Brief of AFTL at 5-6). The "reasonable value" principle is one of ***limitation***, not ***enlargement*** of the damages recoverable. *See Hanif v. Housing Authority of Yolo County*, 200 Cal.App.3d 635 (Cal.Ct.App. 1988). Under the rule, a plaintiff's recovery is capped at the liability actually incurred regardless of what the "reasonable value" would otherwise be. As the Restatement (Second) of Torts explains:

> When the plaintiff seeks to recover for expenditures made or liability incurred to a third person for services rendered, normally the amount is the reasonable value of services rather than the amount paid or charged. ***If, however, the injured person paid less than the exchange***

> ***rate, he can recover no more than the amount paid,*** except when the low rate was intended as a gift to him.

Restatement (Second) of Torts § 911 cmt(h) (emphasis added). Another source similarly states:

> Where the amount paid for medical services is in accordance with a contractual schedule of rates, the recovery is limited to that amount although the reasonable value of services in the absence of the contract is higher.

25 C.J.S. *Damages* § 153.

Courts considering this issue have held that a plaintiff may not collect from the defendant the amount written-off by the healthcare providers because the write-off is not a damage sustained by the plaintiff. *See Hanif*; *Kastick v. U-Haul Co. of Western Michigan*, 292 A.D.2d 797, 798 (N.Y.App.Div. 2002); *Suhor v. Lagasse*, 770 So. 2d 422, 427 (La.Ct.App. 2000).

CONCLUSION

For the foregoing reasons, FDLA respectfully requests that this Court answer the certified question in the affirmative, or otherwise hold that a plaintiff is not entitled to recover past medical expenses in an amount exceeding what the healthcare providers agreed to accept as payment in full.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was served by United States Mail this date, November 17th, 2003 to: Amy S. Farrior, Raymond T. Elligett, Jr., and Charles P. Schropp of Schropp, Buell & Elligett, P.A., 3003 W. Azeele Street, Suite 100, Tampa, Florida 33609; Timothy F. Prugh of Prugh, Holliday & Deem, P. L., 1009 W. Platt Street, Tampa, Florida 33606; Rebecca O'Dell Townsend; Daniel P. Mitchell of Gray, Harris & Robinson, P.A., 201 North Franklin Street, Suite 2200, Tampa, Florida 33601; Jeremy S. Sloane, Rice Rose & Snell, P.O. Box 2599, Daytona Beach, Florida 32115; Tracy Raffles Gunn and Charles Hall of Fowler, White, Boggs & Banker, P.A., P.O. Box 1438, Tampa, Florida 33601 and Roy D. Wasson, 1320 South Dixie Highway, Suite 450, Gables One Tower, Miami, Florida 33146.

CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing was printed in Times New Roman 14-point font.

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