IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-_____

LOWER TRIBUNAL CASE NO.: 2D02-1505

IRMA JOHNSON,
Petitioner.

v.

COOPERATIVE LEASING, INC.,
A Florida corporation and TRUMAN
ROOSEVELT DOMER, individually,
Respondents,

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

JAMES T. BUTLER
220 E. Madison Street, Suite 930
Tampa, Florida 33602
Telephone: (813) 229-3232
Fla. Bar No. 154948

DYLAN M. SNYDER
220 E. Madison Street, Suite 930
Tampa, Florida 33602
Telephone: (813) 277-9505
Fla. Bar No. 0050334

Co-counsel for Appellee/Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

OTHER AUTHORITIES PAGE

STATEMENT OF THE CASE AND FACTS

The following recitation of the facts is copied verbatim from the opinion issued by the Second District Court of Appeal and contained in the appendix hereto:

> The appellants, Cooperative Leasing, Inc. and Truman Roosevelt Domer (the defendants in the trial court), challenge the final judgment entered in favor of the appellee, Irma Johnson, in an action for personal injuries. The appellants contend that the trial court erred in allowing Johnson to admit into evidence bills for medical expenses for which she never incurred liability and in allowing her to recover an amount in excess of benefits paid by Medicare as an element of compensatory damages. We agree and reverse.
>
> Johnson was injured when she was hit by an automobile driven by Domer and owned by Cooperative Leasing. Johnson's medical providers billed her a total of $56,950.70. Johnson's personal injury protection carrier paid $15,000 of her medical expenses and her medical providers accepted $13,461 from Medicare as payment in full for their services. Johnson's medical providers cannot collect the balance of $28,489 because federal law prohibits them from attempting to recover any further amounts from Johnson or any other source. *See* 42 U.S.C. §1395cc(a)(1). Thus, Johnson never was and never will be legally obligated to pay more than $13,461 for medical services.
>
> Before trial, the appellants moved in limine to prevent Johnson from introducing into evidence the full amount of her medical bills. They contended that the amount representing the difference between the amount charged and the amount paid by Medicare should not be included in Johnson's compensatory damages because she never became liable for those charges. The trial court denied the appellants' motion and allowed Johnson to present all her medical bills to the jury. The jury returned a verdict in Johnson's favor, awarding her the full amount of her medical bills. After trial, the appellants sought to have that amount reduced to the amount that Medicare had actually paid on Johnson's behalf. The trial court denied this motion as well, finding that Johnson was entitled to recover the full amount

charged.

After the opinion by the Second District Court of Appeal, the Appellee filed a motion for certification and clarification. Both motions were denied. The Appellee has since filed a Notice to Invoke Discretionary Jurisdiction to the Supreme Court of Florida on June 10, 2004 and this brief has followed.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review the decision below under the jurisdictional grant of Fla. Const. Art. V, § 3 (b)(3) because this decision expressly and directly conflicts with decisions of the Supreme Court of Florida as well as decisions of other district courts of appeal on the same point of law, to wit: whether the original bills for medical services rendered which are later reduced pursuant to contracts with Medicare should be admissible during the liability phase of a trial in order to determine past and future economic damages and whether insurance type benefits received by an injured party should reduce damages. Public policy will be thwarted unless this Court resolves conflict.

ARGUMENT

I. THIS COURT HAS CONFLICT JURISDICTION TO REVIEW THIS DECISION

This Court has jurisdiction to review the Second District's decision in that it

expressly and directly conflicts with decisions of the Florida Supreme Court and decisions of other district courts of appeal on the same question of law. *See* Art. V, § 3 (b)(3), Fla. Const. as implemented by Fla. R. App. P. 9.030(a)(2)(A)(iv). The present case expressly and directly conflicts with Gormley v. GTE Products Corporation, 587 So.2d 455 (Fla. 1991), Respes v. Carter, 585 So.2d 987 (Fla. 5th DCA 1991), Florida Physician's Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984) and Goble v. Frohman, 848 So.2d 406 (Fla. 2d DCA 2003).

In the instant case, the Second District held that the appropriate measure of compensatory damages for past medical expenses when a plaintiff has received Medicare benefits does not include the difference between the amount that Medicare providers agreed to accept pursuant to their contracts with Medicare and the total amount of the plaintiff's medical bills. The Second District went further to rule that the trial court in the instant case should have granted the appellant's motion in limine and prohibited Johnson from introducing the full amount of her medical bills into evidence.

In Gormley, this Court recognized that:

> a tortfeasor should not benefit ... from an injured party's foresight in contracting for protection against injury....*Id.* at 17-5, 17-8. If the rule were other than what it is, some of the incentive for obtaining insurance might be destroyed. In that case, the losses occurring to plaintiffs who would not protect themselves with adequate insurance would, in many instances, have

> to be absorbed by society as a whole. In a real sense, the collateral source rule does not result in a double recovery in this situation because the plaintiff may have paid substantial premiums over a long span of time without ever having received benefits. The costs of premiums may, in fact, far exceed the benefits received.

Id. at 457. The Court further goes on to find:

> We draw the logical conclusion that the legislature intended neither the admission of privately-obtained insurance benefits into the liability trial, nor the reduction of damages based on these insurance benefits. Here the petitioners paid for insurance against the very loss which occurred. To permit respondent to benefit from this prudent act would result in an unearned windfall to respondent.

Id. at 459.

Although the Gormley discussion involves the collateral source rule and insurance benefits, the reasoning in that case logically applies to Medicare benefits as they apply in the instant. In the instant case, the Second District ignored that reasoning. The Second District failed to take into consideration the fact that the Petitioner paid substantial amounts of her own money over a period of time in order to be eligible for Medicare benefits. These payments may far exceed any benefits received. To allow the Respondent to benefits from the Petitioner's prudent act of meeting the requirements to obtain Medicare would result in an unearned windfall to the Respondent. The reasoning in Gormley directly conflicts with the reasoning and holding of the instant case.

In Florida Physician's Insurance Reciprocal, this Court reasoned:

> It is a well-settled rule of damages that the amount recoverable for tortious personal injuries is not decreased by the fact that the injured party has been wholly or partly indemnified for the loss by proceeds from accident insurance where the tortfeasor did not contribute to the payment of the premiums of such insurance. This rule is usually justified on the basis that the wrongdoer should not benefit from the expenditures made by the injured party in procuring the insurance coverage.(Emphasis added.) (22 Am.Jur.2d Damages sec. 210, at 293-94 (1965).)

Id. at 515, 516. The Florida Physician's Insurance Reciprocal opinion went on to state that:

> Evidence of availability, cost, and quality of such care is relevant to assist the jury in determining the reasonable cost of the plaintiff's future care.

Id. at 516.

The opinion of the Second District appears to be in direct conflict with this reasoning. Florida Physician's Insurance Reciprocal dealt with free or charitable services provided to an injured party. The Second District has equated free and charitable medical benefits with contractual write-offs associated with Medicare contracts. In the instant case, the Second District has once again overlooked the fact that the Petitioner paid substantial amounts of her own money over a period of time in order to be eligible for Medicare benefits. That while allowing an injured party to recover for the value of free or charitable medical services may in fact constitute a windfall, the instant decision clearly allows the tortfeasor a windfall

since the Petitioner made expenditures in order to procure the Medicare benefits.

Further, the instant court does not recognize the fact that the original cost of the medical services in the instant case is essential as evidence to determine the cost of past and future economic damages. The instant court has ruled that only the contractual amount allowed by Medicare is allowed at trial. There is no evidence that the Petitioner will continue to receive Medicare benefits and these contractual rates in the future. A jury will not be able to properly determine the potential cost of future medical care unless the original amounts of the medical bills are admissible into evidence. Florida Jury Instruction 6.2(c) states that:

> The reasonable value or expense of hospitalization and medical and nursing care and treatment necessarily or reasonably obtained by claimant in the past or to be so obtained in the future.

It is clear that the instruction does not limit the damages to only the amounts paid to health care providers. Therefore, the reasoning in the instant case directly conflicts with Florida Physician's Insurance Reciprocal.

In Respes v. Carter, 585 So.2d 987 (Fla. 5th DCA 1991), the district court not only noted that uninsured motorist benefits are not a collateral source, but that the collateral source doctrine allows an injured party to collect full damages, irrespective of coverage or payment from any element of the damages by any source other than the tortfeasor. The District court went on to find:

> The result reached in the instant decision exemplifies the extent to which the intricacies of modern law place the courts in the discomfiting position of making a correct decision that somehow seems wrong. It may seem unfair that, by virtue of a contractual arrangement with the insurance carrier, the survivors received substantially more than their stipulated damages and that the defendants are required to pay the full amount of damages even though part of those damages had been paid. On the other hand, plaintiffs' counsel was ingenious in inducing Allstate, in return for a $95,000 discount on the face amount of the UM coverage, to surrender its subrogation rights and the opportunity to pursue and settle a claim of speculative value. There is no reason that ingenuity should accrue to the benefit of the tortfeasors. Walker v. Hilliard, 329 So.2d 44 (Fla. 1st DCA 1976). The principle behind the collateral source rule is that it is better for the wronged plaintiff to receive a potential windfall than for a tortfeasor to be relieved of responsibility for the wrong.

Id. at 990.

In the instant case, the Second District once again failed to follow the reasoning that it is better for a plaintiff to receive a potential windfall than for a tortfeasor to be relieved of responsibility for the wrong. The Petitioners procurement of Medicare benefits should not accrue to the benefit of the tortfeasor. Therefore, the instant opinion is in conflict with Respes.

In Goble, the Second District Court Of Appeal dealt with medical bills written off by a HMO. The Court found that the full amount of the bills would be admitted into evidence. Id. at 410. The Court found that the value of or need for medical treatment could be challenged during the trial. Id. After trial, the medical bills would then be set-off by the contractual discount. Id. The Goble ruling

conflicts with the instant opinion which was decided by another panel of judges within the same district. This Court has already accepted certification of the Goble decision.

The Fourth District has already certified conflict between their decision in Thyssenkrupp Elevator Corp. v. Lasky, 868 So.2d 547 (Fla. 4th DCA 2004) and the Goble case in Didonato v. Youth Investments, 870 So.2d 206 (Fla. 4th DCA 206). The Thyssenkrupp opinion is very similar to the opinion rendered in the instant case. Hopefully, this Court will accept jurisdiction of the instant case, Johnson v. Cooperative Leasing, and resolve the conflicting opinions along with Thyssenkrupp and Didonato.

II. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO ADDRESS THE PUBLIC POLICY CONCERNS RAISED BY THE DECISION UNDER REVIEW

If a plaintiff with Medicare is not allowed to at least introduce the full amount of the medical bills, then a jury would not be able to consider these amounts when deciding the full extent of injuries, pain and suffering and overall damages, thus unduly effecting the class of people with Medicare. Plaintiffs with Medicare would be in a weaker position then those plaintiffs with health insurance or no insurance at all, since those groups are allowed to introduce the full amount of their medical payments.

Further, if the amount of damages awarded to an injured party is reduced to the contractual amount allowed by Medicare, then a tortfeasor would gain an unearned windfall. Tortfeasors would benefit from an injured party's prudent act of securing benefits for premiums paid. We ask this Court to accept jurisdiction to resolve these public policy concerns.

CONCLUSION

This Court has jurisdiction to review the Second District's decision in that it expressly and directly conflicts with decisions of the Florida Supreme Court and decisions from other district courts of appeal. The Second District's decision raises serious public policy concerns that will effect a large number of Florida residents that receive medical benefits through Medicare. The Florida Supreme Court should accept jurisdiction to resolve these issues.

Respectfully submitted,

JAMES T. BUTLER
220 E. Madison Street, Suite 930
Tampa, Florida 33602
Telephone: (813) 229-3232
Fla. Bar No. 154948

DYLAN M. SNYDER
220 E. Madison Street, Suite 930
Tampa, Florida 33602
Telephone: (813) 277-9505
Fla. Bar No. 0050334

Co-counsel for Appellee/Petitioner

By _____
Dylan M. Snyder

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MIKE SNOWDEN, Neale Dealmeida & Snowden, 221 West Oakland Park Boulevard, Fort Lauderdale, Florida 33311 and NANCY HOFFMANN, Nancy Hoffmann, P.A. 440 East Sample Road, Suite 200, Pompano Beach, Florida 33064 this 17th day of June, 2004.

By _____

Dylan M. Snyder
FL Bar No. 0050334

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing was prepared using Times New Roman 14, in compliance with the font requirements set forth in rule 9.210(a)(2).

By _____

Dylan M. Snyder
FL Bar No. 0050334