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IN THE SUPREME COURT OF FLORIDA

JOHN JOERG, JR., individually and as natural father and guardian of LUKE AUGUSTINE JOERG,

Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.
_____/

CASE NO.: SC13-1768

L.T. Nos.: 2D11-6229
2D12-1246
Consolidated

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

JOERG was born with mild retardation, and as a 45-year-old man he has an intelligence quotient of 70. He has never held employment, and he lives with his parents. At his mother's request, he was riding his bicycle to the grocery store one day when he was struck by a vehicle. This lawsuit involves his claim for uninsured motorist benefits against STATE FARM. State Farm Mut. Auto. Ins. Co. v. Joerg, __ So. 3d __, 2013 WL 3107207, *1 (Fla. 2d DCA June 21, 2013).

Although JOERG has never worked or paid taxes, he is eligible for reduced-cost health care through the Medicare program because he is a disabled adult. The trial judge, however, did not allow STATE FARM to introduce evidence that JOERG's future medical expenses would be at reduced rates as a result of Medicare. STATE FARM appealed that ruling, and the Second District held that pursuant to this Court's holding in Florida Physician's Insurance Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984), evidence of that benefit should have been provided to the jury.

The court specifically cautioned, however, that this was not a collateral source or setoff issue, stating: "[W]e in no way suggest that a jury must do more than consider that evidence in making its award of future damages. As the court in Stanley held, the availability of services under the program (including the risk of unavailability), as well as the cost and quality of such services, are relevant to the

determination of the amount of future damages." Joerg, 2013 WL 3107207 at *6. Indeed, Judge Khouzam wrote a short concurrence for the express purpose of making that clear by reiterating: "I concur with the majority but write separately to clarify that the issue in this case is the appropriate measure of damages for a plaintiff receiving reduced-rate care under the Medicare program. This case does not implicate the collateral source rule and does not involve a setoff." Id.[1]

[1] JOERG's initial brief repeatedly refers to there being a "majority" opinion below, and similarly claims that this was a decision made by "a majority of two judges" at the Second District. That is nothing more than an attempt to cast the decision as potentially-disputed through creative advocacy. There was no dissent in this case. All three judges fully agreed in the decision. Judge Khousam simply wrote a concurrence to emphasize that the panel did not decide this case based upon the collateral source rule, because it is not a collateral source issue. It was nevertheless a unanimous decision because the main opinion said nothing to the contrary.

SUMMARY OF ARGUMENT

JOERG sought this Court's jurisdiction over a purported conflict of decisions, but has now filed an initial brief which fails to even pay lip service to the Constitutional standard. He does not identify any conflicting decisions, and instead has done nothing more than ask this Court to legislate from the bench.

JOERG's argument is that the Second District reached the wrong result when deciding an issue of first impression. But that claim does not provide a valid basis for this Court's review, because the Constitution does not permit it to simply assume jurisdiction in a case to correct what it may perceive as district court error. There must be an actual conflict amongst decisions for the Court to resolve and, since there is none here, the Court should discharge its jurisdiction and dismiss this case.

On the merits, the Second District correctly found guidance in this Court's precedent in Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984), and none of the arguments raised in the initial brief change that fact. Specifically, JOERG first argues that unlike the benefits addressed in Stanley, Medicare is not a free benefit because it is paid for by either the beneficiary or his/her family. While that may be true in some cases, it is not for JOERG. He has not paid for it, and since he is Supplemental Security Income ("SSI") eligible, there

was no requirement that his family pay into the system, either. It truly is a free and unearned benefit for JOERG.

Second, the fact that Medicare would have a right of reimbursement for its future payments is irrelevant — and indeed, any argument based upon that fact is nonsensical. JOERG is essentially claiming that it would be wrong to tell the jury how much he will have to reimburse Medicare for his treatments as a result of the fact that he will, in fact, have to pay them. In other words, he will actually have to use the money he receives from this lawsuit for future medical expenses to pay for those future medical expenses.

The fact that he will have to pay for his care is irrelevant. The issue is whether the jury should be informed *how much* he will have to pay when deciding *how much* it should award him in compensatory damages so that he may do so.

Finally, all of the initial brief's arguments related to potential conflicts with the collateral source rule and the application of setoffs are again irrelevant. The Second District went out of its way to clarify that this is not a collateral source issue, because as to JOERG the free Medicare benefits are not a collateral source. Likewise, those benefits are not a setoff, but instead are simply evidence for the jury to consider when assessing damages. There accordingly is no conflict or confusion in that regard, so the Court should either decide that it has no conflict jurisdiction and dismiss this case, or in the alternative affirm.

ARGUMENT

I. The Court should discharge its jurisdiction and dismiss because there is no conflict of decisions — JOERG is simply seeking another merits-based appeal.

The issue raised in this case is exceedingly narrow and unique. Unlike the vast majority of the population, JOERG is eligible for Medicare without having ever worked a day in his life, paid into the system, or had a relative work or pay on his behalf. He is one of the few individuals who is eligible simply due to his birth.

As a result, the Second District expressly noted that it presented a case of first impression. The opinion states: "No precedent of this court or any other Florida appellate court directly and unequivocally answers this question." State Farm Mut. Auto. Ins. Co. v. Joerg, __ So. 3d __, 2013 WL 3107207, *1 (Fla. 2d DCA June 21, 2013). That fact should lead the Court to divest itself of any purported conflict jurisdiction.

Specifically, in State v. Barnum, 921 So. 2d 513, 523 (Fla. 2005), this Court explained: "It is beyond dispute that this Court is without power to simply assume jurisdiction in a case to correct what we perceive as error . . . ." Instead, "[t]he jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution." Gandy v. State, 846 So. 2d 1141, 1143 (Fla. 2003).

Subsequent to the 1980 amendment to the Constitution, the district courts of appeal are intended to be final appellate courts. In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d 1127, 1127 (Fla. 1982). As a result, the measure of the Court's conflict jurisdiction is not whether a litigant believes that this Court, or any other court, would necessarily have arrived at a different conclusion when deciding an issue. Kincaid v. World Ins. Co., 157 So. 2d 517, 517 (Fla. 1963). Instead, the Constitutional standard is whether the decision, on its face, collides with a prior decision of this Court or another district court on the same point of law so as to create a conflict among the precedents. Id.

Since this is a case of first impression, the Second District's opinion cannot possibly satisfy that standard. The issue is so narrow that it evidently has never before drawn the attention of an appellate court, and as a result there are no conflicting decisions concerning it. This Court should accordingly reject JOERG's invitation for it to legislate from the bench, discharge its jurisdiction, and dismiss this case.

II. This unique situation falls within the rule of Stanley because, contrary to the initial brief's statements, JOERG is eligible for 100% free Medicare coverage.

On the merits, JOERG's first argument hinges entirely upon his premise that Medicare is not a free or unearned benefit. He asserts that, in order to qualify,

either JOERG or a member of his family had to have worked a certain number of quarters, or paid a certain number of quarterly payments of FICA taxes.

That is not true. The initial brief limits its citations to the requirements for the Social Security Disability Insurance (SSDA") form of Medicare. But as an individual who was born with "a medically determinable physical or mental impairment . . . which results in the inability to do any substantial gainful activity," JOERG is eligible for Medicare through the Supplemental Security Income ("SSI") program. <http://www.ssa.gov/ssi/text-eligibility-ussi.htm>. Unlike SSDI, for SSI there is absolutely no working quarter requirement — whether for the beneficiary, relative, or otherwise — because it falls under Title 16 of the Social Security Act and is paid for out of the general treasury, not the Social Security trust fund. Id. In short, working quarters have nothing to do with JOERG's eligibility.

As described above, this case is accordingly unique. While JOERG's arguments may apply to other people in other cases who actually have earned their benefits, they do not apply to his particular case. His benefits are, in terms of this Court's decision in Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 515 (Fla. 1984), "free or low cost services from governmental or charitable agencies available to anyone with specific disabilities." Evidence of those benefits was thus "admissible on the issue of future damages." Id.

In a decision which has been widely cited throughout the nation, the Eighth Circuit in Overton v. U.S., 619 F. 2d 1299, 1308 (8th Cir. 1980) recognized that same distinction when it, too, came across this unique fact pattern. The court noted that evidence of future Medicare benefits is generally inadmissible with respect to an individual who has worked his or her entire life and paid into the system. Id. That person could be said to have earned those retirement benefits. Id.

But that was not true for the individual plaintiff in Overton, who qualified for Medicare despite never having paid into the system, and it likewise is not true for JOERG in this case. He has not worked or paid into the system. He is receiving the benefits simply because he was born a disabled citizen of the United States. In no uncertain terms, his benefits are "low cost services from governmental . . . agencies available to anyone with specific disabilities." Stanley, 452 So. 2d at 515.

Moreover, the initial brief's assertion that someone — although not JOERG himself — has in some fashion "paid" for his Medicare benefits by funding the system with their taxes still fails to address the actual issue. Even if ***other people*** have sent money to the government so that it can fund Medicare, that does not change the fact that JOERG has not. As to him, it is a 100% free benefit that is available simply due to his disability.

Indeed, JOERG's argument that the result should be different any time that "someone" has paid would completely eviscerate the Stanley rule. Every governmental or charitable service has to obtain its funding from somewhere. Whether it is from other taxpayers capitalizing the government, or a philanthropist donating to a private charity, some form of funding has to occur in order for such services to exist. Indeed, everyone who reads this brief is paying into the Medicare system on JOERG's behalf. But the fact remains that JOERG has not provided one cent of that funding so, as to him, it is a free benefit.

Finally, right up until the time that the Second District ruled against him, JOERG's counsel did not dispute the fact that he has absolutely free access to Medicare. At the start of trial, as the parties were arguing this issue before the circuit court, his counsel outright conceded that working quarters had nothing to do with the issue, stating: "My client is only on Medicare because he's mentally challenged. He's only 45 years old. He wouldn't be on Medicare but for that. He's on Medicaid for the same reasons and due to his indigency." (T.17).

Similarly, when the case then went on appeal, in the initial brief STATE FARM noted in its statement of facts section that JOERG's Medicare was free. (Initial Brief at 7). It then not only proceeded to argue the issue that way, but in fact specifically titled the issue on appeal as: "STATE FARM was entitled to present evidence that JOERG has available, ***at no cost to him***, governmental

benefits which will greatly reduce any future medical expenses." (Initial Brief at 29, 31, 33)(emphasis added).

In response, JOERG's answer brief contained a statement of facts which expressly stated that it was intended to correct STATE FARM's version, but then did not even mention Medicare at all. (Answer Brief at 1–8). Quite to the contrary, that brief proclaimed: "It is further ***undisputed*** that Luke qualifies for those benefits ***only*** because he is mentally disabled and indigent." (Initial Brief at 25)(emphasis added).

Accordingly, JOERG's current attempt to divert the Court's attention away from Medicare's SSI automatic entitlement that he unquestionably qualifies for, and instead to its SSDI working quarters requirement that has no application to this case, is nothing more than a red herring. For all of those reasons, the Court should reject the initial brief's primary argument and affirm.

III. The government's right of reimbursement is irrelevant, and in actuality represents nothing more than the common sense notion that JOERG will actually have to use his award of future medical expenses to pay for his future medical expenses.

JOERG's brief next attempts to make an issue out of Medicare having a "right of reimbursement" for its future medical payments. STATE FARM is unsure of how that common-sense notion affects this case.

Essentially, what JOERG is arguing is that because he will have to pay Medicare back for his medical care — at Medicare rates — he should be awarded

even more money than what he will have to pay. That is nonsensical. The entire point of this Court's Stanley opinion, as well as the Second District's decision below, is that since JOERG will receive his future care at the reduced-cost rates, the jury should be informed of that fact so that it can properly consider how much money he will need in order to pay for that care.

The purpose of compensatory damages is to make JOERG whole. It would make no sense to allow him to obtain phony damages, pay Medicare back for his future care at the reduced Medicare rates, and then pocket the remainder as a litigation windfall. Simply stated, the fact that JOERG will actually have to pay for his medical care does not entitle him to a windfall recovery of more than he will ever have to pay.

In reality, the situation is no different than JOERG's past medical expenses. Since he obtained that treatment through Medicare, JOERG fully agreed that it was proper for the trial judge to limit his evidence of past expenses to the amounts that Medicare actually paid. See Cooperative Leasing, Inc. v. Johnson, 872 So. 2d 956, 959 (Fla. 2d DCA 2004). The same should be true of his future care. It makes no sense to allow the jury to unwittingly award him phony damages, without hearing evidence that the true cost of his future reimbursements to Medicare for that treatment will be much less. Once again, the fact that JOERG will actually have to

pay for his medical care does not entitle him to a windfall recovery of more than he will ever have to pay. The Court should thus reject that argument as well.

IV. All of JOERG's arguments related to the collateral source rule are irrelevant, because the Second District's opinion expressly states that this is not a collateral source issue.

JOERG's final arguments — as well as the arguments presented by the Florida Justice Association in its amicus brief — relate to the application of the collateral source rule and setoffs. He claims that the Second District misapplied that rule, and that it furthermore erred by failing to apply it as a setoff rather than a rule of evidence.

But as expressly stated by the Second District, this case does not involve the collateral source rule or any question of setoffs at all. To the contrary, the Second District began by noting this Court's Stanley holding, where it explained that the collateral source rule is "limited to those benefits earned in some way by the plaintiff." Stanley, 452 So. 2d at 515. Finding that JOERG did not earn his benefits — as outlined above — the court then appropriately found the rule to be inapplicable to this unique situation.

Accordingly, all of JOERG's assertions about his perceived "misapplication" of the collateral source rule, and his arguments related to setoffs, are nothing more than red herrings. They have nothing to do with the Second District's decision.

Moreover, to the extent that JOERG does address the collateral source rule, he asserts that it must be applied differently now as a result of three decisions issues by the Third and Fourth Districts: Parker v. Hoppock, 695 So. 2d 424 (Fla. 4th DCA 1997), Velilla v. VIP Care Pavilion Ltd., 861 So. 2d 69 (Fla. 4th DCA 2003), and Winston Towers 100 Ass'n v. De Carlo, 481 So. 2d 1261 (Fla. 3d DCA 1986). First of all, those district courts do not have the authority to overrule this Court's precedent. Stanley still controls.

Second, JOERG fails to mention that the Second District's opinion in this case expressly distinguished all of those cases as factually inapposite — Parker because it involved nonmedical benefits, Velilla because it concerned past damages, and Winston Towers because the plaintiff actually paid for the benefits at issue. Joerg, 2013 WL 3107207 at *6, n.2. Once again, that is because this case presents a narrow and unique situation involving evidence of low cost medical care being available to JOERG as a completely free and unearned benefit. The Second District appropriately held that the jury should learn of that fact when calculating damages to award, and this Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should either discharge its jurisdiction and dismiss, or in the alternative affirm the Second District's well-reasoned decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Response Brief on Jurisdiction has been electronically filed through the **eFiling Portal**; and that one copy each has been served by e-mail to: **Tracy Raffles Gunn, Esquire**, Counsel for Joerg, at tgunn@gunnappeals.com and tbishoff@gunnappeals.com; **Damian B. Mallard, Esquire**, Co-Counsel for Joerg, at Damian@mallardlawfirm.com and Hannah@mallardlawfirm.com; **Lee D. Gunn, IV, Esquire**, Co-Counsel for Joerg, at lgunn@gunnlawgroup.com; **Nichole J. Segal, Esquire**, Counsel for Amicus Curiae Florida Justice Association, at njs@FLAppellateLaw.com and jew@FLAppellateLaw.com; **Mark K. Delegal, Esquire**, **Matthew H. Mears, Esquire**, and **William W. Large, Esquire**, Counsel for Amicus Curiae Florida Justice Reform Institute, at mark.delegal@hklaw.com, matthew.mears@hklaw.com, and william@fljustice.org; and **James H. Burgess,**

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CERTIFICATE OF TYPEFACE COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210, the undersigned counsel certifies that this Brief is printed in Times New Roman 14-point font.

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