

RECEIVED, 9/9/2013 12:23:39, Thomas D. Hall, Clerk, Supreme Court

**IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

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

Plaintiffs/Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant/Respondent

CASE NO.: Pending

2d DCA case numbers:

2D11-6229

2D12-1246

Consolidated

Trial Court case number:

2009-CA-12996 NC

PETITIONERS' BRIEF ON JURISDICTION

On Review from the Second District Court of Appeal
Express and Direct Conflict

Tracy Raffles Gunn, Esq.
Florida Bar Number: 984371
GUNN APPELLATE PRACTICE P.A.
400 North Ashley Drive suite 2055
Tampa FL 33602
(813) 254-3183 telephone
tgunn@gunnappeals.com
Appellate counsel for Plaintiffs

TABLE OF CONTENTS

Table of Contents	i
Table of Citations	ii
Statement of The Case and Facts	1
Summary of the Argument	1
Argument on Jurisdiction	2
I. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL	2
II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REVIEW THE CASE ON THE MERITS	9
Conclusion	10
Certificate of Compliance	i
Certificate of Service	ii

TABLE OF CITATIONS

Cases

<i>Allstate Insurance Co. v. Rudnick</i> , 761 So.2d 289, 293 (Fla.2000)	7,8,9
<i>Aravena v. Miami-Dade County</i> , 928 So.2d 1163 (Fla. 2006).....	5
<i>Bedenbaugh v. Adams</i> , 88 So.2d 765, 768 (Fla. 1956.....	3
<i>Benefield v. State</i> , 160 So.2d 706 (Fla. 1964)	6
<i>Benton v. CSX Transp.</i> , 898 So.2d 243, 245 (Fla. 4th DCA 2005)	7
<i>Bravo v. United States</i> , 403 F.Supp.2d 1182, 1199 n.13 (SD Fla. 2005).....	9
<i>Engle v. Liggett</i> , 945 So.2d 1246 (Fla. 2006);.....	3
<i>Florida Physicians Insurance Reciprocal v. Stanley</i> , 452 So.2d 514 (Fla. 1984).....	1, 2,3,passim
<i>Goble v. Frohman</i> , 901 So.2d 830, 833 (Fla.2005).....	8
<i>Gormley v. GTE Products Corporation</i> , 587 So.2d 455, 457 (Fla.1991)	7
<i>Grell v. Bank of America</i> , 2007 WL 1362728 (MD Fla. 2007).....	9
<i>Measom v. Rainbow Connection Preschool</i> , 568 So.2d 123 (Fla. 5 th DCA 1990) ...	6
<i>Nationwide Mutual Fire Ins. Co. v. Harrell</i> , 53 So.3d 1084 (Fla. 1 st DCA 2010)....	7
<i>Parker v. Hoppock</i> , 695 So.2d 424 (Fla. 4th DCA 1997)	4,5,6
<i>Sheffield v. Superior Insurance Company</i> , 800 So.2d 197, 203 (Fla. 2001).....	6, 7
<i>United States v. Baxter Int'l, Inc.</i> , 345 F.3d 866, 875 (11th Cir.2003);.....	3
<i>Velilla v. VIP Care Pavilion, Ltd.</i> , 861 So.2d 69 (Fla. 4th DCA 2003).....	4,5,6
<i>Wale v. Barnes</i> , 278 So.2d 601 (Fla. 1973).....	3
<i>White v. Westlund</i> , 624 So.2d 1148, 1153 (Fla. 4 th DCA 1993);.....	6

<i>Winston Towers 100 Ass'n, Inc. v. De Carlo</i> , 481 So.2d 1261 (Fla. 3d DCA 1986)	5,6
--	-----

Florida Statutes

Florida Statutes 768.76	7
Florida Statutes 768.76(1).....	8
Florida Statutes 768.76(2)(a)(1).....	8
Florida Statutes 90.201.....	3

United States Code Provisions

42 USC Section 2651.....	3
42 USC Section 1395y(b)(2)(A)(ii).....	3
42 USC Section 1395-1395kkk	8

Rules of Civil Procedure

Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv).....	2
--	---

Florida Constitution

Art. V, s. 3(b)(3), Florida Constitution	2
--	---

STATEMENT OF THE CASE AND FACTS

This is an appeal from a jury trial in a personal injury case. Plaintiff Luke Joerg, a disabled adult, was a bicyclist who was struck by a motor vehicle. Luke and his father/guardian sued their uninsured motorists (“UM”) insurance carrier, State Farm. Plaintiffs prevailed in the trial, and State Farm appealed to the Second District Court of Appeal. State Farm raised numerous evidentiary issues. The Second District affirmed all but the last point raised by State Farm. The court, through visiting First DCA Judge Scott Makar, held that it was error to exclude evidence of Luke’s potential future Medicare benefits, and accepted State Farm’s argument that those benefits could reduce the cost of future medical damages awarded by the jury. The Second District granted a new trial on this issue.

SUMMARY OF THE ARGUMENT

The Second DCA held that Medicare benefits are admissible under this Court’s decision in *Florida Physicians Insurance Reciprocal v. Stanley*, 452 So.2d 514 (Fla. 1984). This is a misapplication of this Court’s decision in *Stanley* because Medicare benefits are not free or unearned. The decision below is also in express and direct conflict with several other decisions of this Court and other district courts of appeal. This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a

decision of this Court or another district court of appeal on the same point of law.

Art. V, s. 3(b)(3), Fla. Const; Fla.R.App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

I. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL.

The Second District held that the key issue in determining admissibility under this Court's decision in *Florida Physicians Insurance Reciprocal v. Stanley*, 452 So.2d 514 (Fla. 1984), is "earned versus unearned collateral sources." Opinion, P.11. The Second District then stated that Medicare benefits are "free" and "unearned," and concluded that *Stanley* required the trial court to allow evidence of Luke's potential future Medicare benefits. This is a misapplication of *Stanley* in two separate ways, because Medicare is not free and is not unearned.

First, while Part A Medicare is called "premium-free," the patient or someone on his behalf has already paid for it. Luke Joerg qualified for Medicare as a disabled adult, but Medicare eligibility depends in the first instance on the insured or his or her spouse or parent having paid quarterly payroll taxes under the Federal Insurance Contributions Act (FICA). <http://cms.gov/Medicare/Eligibility-and-Enrollment/OrigMedicarePartABEligEnrol/index.html> This is true even if the beneficiary is disabled. This is no different than a spouse or parent paying private insurance premiums for private health insurance.

Second, Medicare is not “free” because if a Medicare insured obtains future medical care coverage from Medicare after a tort damages recovery, the federal government has a right of reimbursement. *United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 875 (11th Cir.2003); 42 U.S.C. § 1395y(b)(2)(A)(ii); 42 U.S.C. § 2651; <https://www.federalregister.gov/articles/2012/06/15/2012-14678/medicare-program-medicare-secondary-payer-and-future-medicals>. Therefore, unlike the charitable benefits discussed in *Stanley*, Luke Joerg will have to pay back Medicare.¹

When a district court of appeal applies a decision of this Court as controlling, even though the factual situation is materially distinguishable, that constitutes a “misapplication of law” vesting conflict jurisdiction in this Court. *Engle v. Liggett*, 945 So.2d 1246 (Fla. 2006); *Wale v. Barnes*, 278 So.2d 601 (Fla. 1973). The fact that people pay payroll taxes to qualify for Medicare, and the fact that Medicare has a right of reimbursement against the tort recovery, means that Medicare is not free or unearned. Because Medicare is not free or unearned, the facts are materially distinguishable, and the Second DCA misapplied this Court’s decision in *Stanley*, creating an express and direct conflict.

¹ This Court will follow controlling federal statutes even if not discussed in the decision below. See *Bedenbaugh v. Adams*, 88 So.2d 765, 768 (Fla. 1956); Florida Statutes section 90.201 (mandatory judicial notice of federal statutes).

The decision below is also in express and direct conflict with *Parker v. Hoppock*, 695 So.2d 424 (Fla. 4th DCA 1997) and *Velilla v. VIP Care Pavilion, Ltd.*, 861 So.2d 69 (Fla. 4th DCA 2003), both of which refused to construe *Stanley* as allowing evidence of collateral sources if the benefits are unearned. The decision below construed *Stanley* to mandate that “the common-law collateral source rule should be limited to those benefits earned in some way by the plaintiff.” Opinion, P. 4-5. The court in *Parker* held exactly the opposite, rejecting the argument that government benefits are excluded only if they were not paid for or earned by the plaintiff, and stating:

[W]hile there is dicta in *Stanley* that the common-law collateral source rule excluding testimony about benefits received by a plaintiff should be limited to those benefits earned in some way by the plaintiff, the term “collateral sources” has never been limited to those benefits that a plaintiff has earned or paid for.

695 So.2d at 428. The 4th DCA reaffirmed this holding in *Veililla*, 861 So2d at 71. Thus, the decision below relies for its central premise on the same part of *Stanley* that the Fourth DCA has twice rejected as dicta. In fact, the Second District expressly “disagree[d] with the panel of the Fourth District that characterized this holding of *Stanley* as ‘dicta’.” Opinion, footnote 2. This is express and direct conflict with both cases.

Additionally, the decision below is in express and direct conflict with the holding of the Fourth District that *Stanley* must be strictly construed. *Velilla*, 861

So.2d 69; *Parker*, 695 So.2d 424. *Stanley* did not involve the issues of Medicare or Medicaid. *Stanley* was a medical malpractice claim involving a child who suffered oxygen deprivation during childbirth. This Court held that the defense was properly allowed to introduce evidence of therapy and education services available to children in the community at no or reduced cost. This Court's specific holding was that evidence of "governmental or charitable benefits *available to all citizens regardless of wealth or status* should be admissible for the jury to consider in determining the reasonable cost of necessary future care." 452 So.2d at 515 (es). Medicare benefits are not available to all citizens regardless of wealth or status. Under *Veililla* and *Parker*, *Stanley* is strictly construed, and is limited by its terms to benefits available to all citizens. The decision below is irreconcilable with these cases, creating express and direct conflict. *See Aravena v. Miami-Dade County*, 928 So.2d 1163 (Fla. 2006).

The decision below is also in express and direct conflict with *Winston Towers 100 Ass'n, Inc. v. De Carlo*, 481 So.2d 1261 (Fla. 3d DCA 1986), which held that it was proper to preclude any reference to Medicare benefits paid to the plaintiff. While the Second DCA distinguished *Winston Towers* on basis that Joerg "has not contributed to or paid for the Medicare benefits at issue," the *Winston Towers* court actually explained that Medicare is "paid for" by prior social

security withholding.² Because the two cases involve substantially the same controlling facts, and apply the same rules of law, but reach opposite results, there is an express and direct conflict triggering this Court's jurisdiction. *See Benefield v. State*, 160 So.2d 706 (Fla. 1964).

The decision below is also in express and direct conflict with numerous cases holding that it is reversible error to allow the jury to hear evidence of available collateral sources. *See, e.g. Sheffield v. Superior Insurance Company*, 800 So.2d 197, 203 (Fla. 2001); *Velilla*, 861 So.2d 69; *Parker*, 695 So.2d 424 (Fla. 4th DCA 1997) ("the very image of a Plaintiff as one who accepts governmental handouts carries a substantial likelihood of prejudice that outweighs any marginal probative value").

The holding below is also in express and direct conflict with cases from the 4th and 5th DCA holding that future benefits for which the plaintiff must qualify cannot be deducted from a future medical expense award as a collateral source, because the plaintiff's future entitlement to those benefits is speculative. *See White v. Westlund*, 624 So.2d 1148, 1153 (Fla. 4th DCA 1993); *Measom v. Rainbow Connection Preschool*, 568 So.2d 123 (Fla. 5th DCA 1990).

² Furthermore, the concurrence in *Winston Towers* confirms that a defendant seeking admissibility of benefits available to the plaintiff has the burden of proving that the plaintiff did not earn or pay for those benefits, which is directly contrary to the holding below.

Next, the decision below relies on the collateral source statute, Florida Statutes section 768.76, to determine admissibility of evidence. As such, the decision below is in express and direct conflict with numerous cases holding that the collateral source statute is a simply rule of damages or set off, and the statute does not impact whether collateral sources available to the plaintiff are admissible in evidence. The collateral source rule “functions as both a rule of damages and a rule of evidence.” *Gormley v. GTE Products Corporation*, 587 So.2d 455, 457 (Fla.1991). Under the common-law rule, both the introduction of evidence of collateral benefits and the set off of any collateral source benefits were prohibited. The damages portion of the rule has been superseded in part by the statute. *Sheffield v. Superior Ins. Co.*, 800 So.2d 197, 200 n. 3 (Fla.2001). “However, the evidentiary portion of the rule remains alive and well in Florida.” *Nationwide Mutual Fire Ins. Co. v. Harrell*, 53 So.3d 1084 (Fla. 1st DCA 2010); citing *Sheffield*, 800 So.2d at 200; *Benton v. CSX Transp.*, 898 So.2d 243, 245 (Fla. 4th DCA 2005). The decision below is in express and direct conflict with these cases establishing that whether the statute applies or not does not affect the rule of evidence.

Likewise, the Second District’s decision is in express and direct conflict with the principle established by this Court in *Allstate Ins. Co. v. Rudnick*, 761 So.2d 289, 293 (Fla.2000), that section 768.76 must be narrowly construed because

it alters the common law. The Second District broadly applied the statute in several ways. First, the statute defines the term “collateral sources” in section 768.76(2)(a)(1), and specifically “except[s]” Title XVIII of the Social Security Act. The Second District did not address this definition or exception, but Title XVIII is Medicare. See 42 USC ch 7 subch XVIII, §§1395-1395kkk. Second, section 768.76(1) expressly states “there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists.” A “subrogation or reimbursement right exists” for Medicare benefits. Finally, the statute by its terms is merely a set off statute which applies after a verdict, stating that “the court” “shall reduce” the amount of the award by the applicable collateral sources. §768.76(1). It does not permit the jury to hear any evidence of the availability of collateral sources. The decision below does not narrowly construe the statute, which conflicts with this Court’s decision in *Rudnick*.

The decision below also conflicts with *Goble v. Frohman*, 901 So.2d 830, 833 (Fla.2005), in which this Court held that “discounts” negotiated by a plaintiff’s private health insurer with health-care providers constitute a collateral source which is set off against an award of compensatory damages following trial, unless a right of reimbursement or subrogation exists. In *Goble*, therefore, this Court established that the proper way to deal with a discount, which is what State Farm argued that Medicare creates in this case, is by set off, not by allowing the jury to

weigh the speculative possibility of future discounts. The cases are irreconcilable, creating express and direct conflict.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REVIEW THE CASE ON THE MERITS.

This Court should exercise its discretion to review this case on the merits.

The decision below is exhaustive and seems intended to become a seminal opinion on collateral sources, cataloging years of case law and statutory law on numerous issues. It is the type of decision that will likely be cited often. The issue of admissibility of future benefits will arise in virtually every serious personal injury case involving future medical damages.

The decision below creates confusion in the law on all the issues outlined above, and this Court should exercise its jurisdiction to eliminate that confusion. The Second District expressly acknowledged “possible analytical tensions” between this Court’s decision in *Stanley* and its later decision in *Allstate Insurance Co. v. Rudnick*, 761 So. 2d 289 (Fla. 2000), which supports the proposition that “future damages may not be reduced for collateral sources, including Medicare.” Opinion, P.8. Furthermore, at least two federal courts applying Florida law have also interpreted *Stanley* differently than the court below. See *Grell v. Bank of America*, 2007 WL 1362728 (MD Fla. 2007) (denying new trial because Florida law does not allow evidence of future medical payments from private insurance or Medicare); *Bravo v. United States*, 403 F.Supp.2d 1182, 1199 n.13 (SD Fla. 2005)

(no set off for future Medicaid payments under Florida law, citing collateral source statute).³ These cases further demonstrate the need for this Court to accept jurisdiction and eliminate the confusion in the law.

CONCLUSION

This Court has discretionary jurisdiction to review the decision of the Second District Court of Appeal, and should exercise that discretion to consider the merits of Petitioners' argument.

Respectfully submitted,



Tracy Raffles Gunn, Esq.
Florida Bar Number: 984371
GUNN APPELLATE PRACTICE, P.A.
400 N. Ashley Drive Suite 2055
Tampa, FL 33602
(813) 254-3183 Telephone
tgunn@gunnappeals.com
tbishoff@gunnappeals.com
Appellate Counsel for Plaintiffs

³ Discretionary review is further warranted because, as the Second DCA noted, two important factors underlying *Stanley* have since changed. First, *Stanley* interpreted a version of the statute that “applied only to collateral source payments already paid; it did not apply to future damages.” Opinion, P. 4. Second, *Stanley* was based on an Illinois case that has since been overruled. Opinion, P. 5. This further creates uncertainty and confusion, which this Court should address.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and is formatted using Times New Roman 14-point font.


Tracy Raffles Gunn, Esq.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished electronically on September 9, 2013, to:

Charles Hall, Esq.
Mark Tinker, Esq.
BANKER LOPEZ GASSLER P.A.
501 1st Avenue North, suite 900
St. Petersburg, FL 33701
Appellate Counsel for Appellant, State Farm
Service-mtinker@bankerlopez.com

James H. Burgess, Jr., Esq.
BURGESS, HARRELL, MANCUSO, OLSON & COLTON, P.A.
1776 Ringling Blvd.
Sarasota, Florida 34236
Trial Counsel for Appellant, State Farm
jburgess@burgessharrell.com

Damian Mallard, Esq.
MALLARD LAW FIRM
3431 Magic Oak Lane
Sarasota, Florida 34232
Trial Counsel for Appellees
damian@mallardlawfirm.com

Lee D. Gunn, IV, Esq.
GUNN LAW GROUP, P.A.
400 North Ashley Drive, Suite 2050
Tampa, FL 33602
Co-Counsel for Appellees
lgunn@gunnlawgroup.com


Tracy Raffles Gunn, Esq.