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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

RESPONSE BRIEF ON JURISDICTION

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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 that this was not a collateral source or setoff issue, and stated "we 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.

SUMMARY OF ARGUMENT

The Second District correctly followed this Court's precedent in Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984). That case established that "evidence of free or low cost services from governmental or charitable agencies available to anyone with specific disabilities is admissible on the issue of future damages." Id. at 515. In this case, JOERG was born disabled, has never worked, but nevertheless is entitled to reduced-cost medical care through the Medicare program as a result of his disability. For that reason, the Second District ruled that STATE FARM should have been permitted to inform the jury of his Medicare coverage so that it could consider that evidence when deciding his future damages.

JOERG nevertheless claims that the collateral source rule somehow applies, and that it creates a conflict with a host of other cases. It does not. As this Court explained in Stanley: "Such evidence violates neither the statutory nor the common-law collateral source rule . . . ." Id. Likewise, in the decision below, the Second District expressly stated: This case does not implicate the collateral source rule and does not involve a setoff." Joerg, 2013 WL 3107207 at *6(Khouzam, J., concurring). There accordingly are no conflicts and the Court should decline jurisdiction.

ARGUMENT

The Second District considered a case of first impression, and in its opinion directly stated: "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). In his brief, JOERG nevertheless contends that the opinion expressly and directly conflicts with no less than 12 other cases. For the reasons explained below, it does not.

I. There was no misapplication of the law.

JOERG's first argument is that the Second District misapplied this Court's decision in Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984). That case established that "evidence of free or low cost services from governmental or charitable agencies available to anyone with specific disabilities is admissible on the issue of future damages." Id. at 515. The Court explained: "Such evidence violates neither the statutory nor the common-law collateral source rule . . . ." Id. "We believe that the common-law collateral source rule should be limited to those benefits earned in some way by the plaintiff." Id. "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." Id. "Keeping such evidence from the jury may provide an undeserved and unnecessary windfall to the plaintiff." Id.

With respect to JOERG, the reduced-cost healthcare he is entitled to receive as a result of his disability is precisely that type of governmental benefit. He did not have to earn it or pay into the system in order to become eligible, but instead receives it simply because he was born disabled. That benefit will continue to be available to JOERG regardless of his wealth or status — it is available to all disabled United States citizens — so it governs the true cost of his future medical care.[1]

JOERG nevertheless claims that the Second District erred by applying the Stanley rule to Medicare because someone — although not JOERG himself — has in some fashion "paid" for those benefits by working and paying taxes. That claim fails to address the actual issue. Even if ***other people*** have paid into the Medicare system, that does not change the fact that JOERG has not. As to him, it is a 100%

[1] 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 fact. It noted that evidence of future Medicare benefits is generally inadmissible with respect to an individual who has worked his entire life and paid into the system. Id. That person could be said to have earned those retirement benefits. Id. But that is not true for individuals such as the plaintiff in Overton, or JOERG in this case. He has not worked or paid into the system, and is receiving the benefits simply because he was born a disabled citizen of the United States. In no uncertain terms, they are "low cost services from governmental . . . agencies available to anyone with specific disabilities." Stanley, 452 So. 2d at 515.

free benefit that is available simply due to his disability. It thus falls directly within the Stanley holding, because the Court explained that "the common-law collateral source rule should be limited to those benefits earned in some way ***by the plaintiff***." Stanley, 452 So. 2d at 515. JOERG has never worked or paid into the system, so the collateral source rule does not prevent STATE FARM from presenting evidence as to how his future medical costs will be reduced by those benefits. Id.("evidence of free or low cost services from governmental or charitable agencies available to anyone with specific disabilities is admissible on the issue of future damages").

Indeed, JOERG's argument that the result should be different any time that "someone" has paid would eviscerate that rule. Every service has to obtain its funding from somewhere. Whether it is from a philanthropist donating to a charity or other taxpayers subsidizing a governmental service, the funding has to occur. 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. He has never worked so, as to him, it is a free governmental benefit.

The 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 and 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 full "rack-rate" damages, pay 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 have to pay.

II The opinion does not conflict with Parker v. Hoppock, 695 So. 2d 424, 428 (Fla. 4th DCA 1997), Velilla v. VIP Care Pavilion Ltd., 861 So. 2d 69 (Fla. 4th DCA 2003), or Winston Towers 100 Ass'n v. De Carlo, 481 So. 2d 1261, 1262 (Fla. 3d DCA 1986).

JOERG's first claims of conflict relate to Parker v. Hoppock, 695 So. 2d 424, 428 (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, 1262 (Fla. 3d DCA 1986). He makes those claims despite the fact that the Second District's opinion in this case expressly distinguished all three 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.

When cases "are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). See also Gillis v. State, 959 So. 2d 194 (Fla. 2007)("Upon further consideration we conclude that jurisdiction was improvidently granted, because these cases are factually distinguishable."). Based upon the Second District's recognition of those controlling differences, there is no conflict.

III. The opinion does not conflict with the remaining collateral source cases.

JOERG's remaining claims of conflict — the other 8 cases he cites — all relate to the application of the collateral source rule, Florida Statute Section 768.76, and setoffs. But as the Second District made clear in its opinion, this is neither a matter of setoffs nor a mandatory reduction of damages. As in Stanley, it is simply evidence for the jury to consider when deciding the case. Joerg, 2013 WL 3107207 at *6("By requiring that the trial court allow State Farm to introduce evidence of potential Medicare benefits available to Joerg in the future, we in no way suggest that a jury must do more than consider that evidence in making its award of future damages.").

Indeed, Judge Khouzam wrote a short concurrence to emphasize that fact, stating: "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. at *6(Khouzam, J., concurring).

In that respect, it bears repeating that the Second District was following this Court's Stanley precedent, and in Stanley the Court explained: "Such evidence violates neither the statutory nor the common-law collateral source rule . . . ." Id. For all of those reasons, the Court should reject JOERG's persistent references to the rule and claims of conflict.

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; and James H. Burgess, Jr., Esquire., Co-Counsel for State Farm, at jburgess@burgessharrell.com on this.

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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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