IN THE SUPREME COURT OF FLORIDA

ELAINE DIAL,

Petitioner,

Case No.: SC21-43
L.T. Case No.: 2D18-4339

vs.

CALUSA PALMS
MASTER ASSOCIATION, INC.,

Respondents.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE ISSUES

1. Does the holding in *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So. 3d 1247 (Fla. 2015), prohibiting the introduction of evidence of Medicare benefits in a personal injury case for purposes of a jury's consideration of future medical expenses also apply to past medical expenses.

STATEMENT OF THE CASE AND FACTS

Elaine Dial tripped and fell while on property owned by Calusa Palms Master Association, Inc. ("Calusa Palms"). (A. 5). The trial court granted a motion *in limine* that precluded Mrs. Dial from admitting into evidence the gross amount of her past medical expenses and limited her to admitting only what Medicare paid. (A. 6). The Second District affirmed. (A. 8).

The Second District interpreted *Joerg v. State Farm. Mut. Auto. Ins. Co.*, 176 So. 3d 1247 (Fla. 2015), which negated the collateral source rule exception created in *Fla. Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984), and to hold that the evidentiary collateral source rule precludes the admission of social legislation benefits, like Medicare, into evidence. (A. 2). The Second District concluded *Joerg* only applied to future medical expenses—rather than past and future medical expenses—despite *Joerg* stating the distinction between past and future medical expenses was irrelevant. (A. 6-7).

Recognizing that "the evidentiary issue M[r]s. Dial raises is one that frequently arises in negligence cases[,]" the Second District certified the following question of great public importance:

> Does the holding in *Joerg v. State Farm Mutual Automobile Insurance Co.*, 176 So. 3d 1247 (Fla. 2015), prohibiting the introduction of evidence of Medicare benefits in a personal injury case for purposes of a jury's consideration of future medical expenses also apply to past medical expenses.

(A. 8).

ARGUMENT

I. THE SECOND DISTRICT CERTIFIED A QUESTION OF GREAT PUBLIC IMPORTANCE, THUS ASKING FOR RESOLUTION OF A QUESTION THAT HAS STATEWIDE IMPACT.

This Court undoubtedly has jurisdiction. The Second District certified its decision passed on a question of great public importance. (A. 8). The certification grants this Court jurisdiction *per se*. *See State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007).

Data supports the Second District's certification. As of December 2020, between 4,556,611 and 4,638,573 Floridians are Medicare beneficiaries. *Medicare Enrollment Dashboard*, CENTERS FOR MEDICARE & MEDICAID SERVICES, www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMSProgramStatistics/Dashboard (last modified Dec. 18, 2020); *Total Number of Medicare Beneficiaries*, KAISER FAMILY FOUNDATION, https://www.kff.org/medicare/state-indicator/total-medicare-beneficiaries/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%2

2,%22sort%22:%22asc%22%7D (last visited January 19, 2021). That is approximately twenty-one percent (21%) of Florida's population. *Compare id. with Quick Facts - Florida*, U.S. CENSUS BUREAU, www.census.gov/quickfacts/FL (last visited January 19, 2021).

The certified question "is one that frequently arises in negligence cases." (A. 8). In fact, the certified question extends beyond negligence cases and impacts any case where damages consist of medical expenses. This includes products liability and uninsured motorist cases. *See Joerg*, 176 So. 3d at 1252. Couple the frequency that this issue arises with the high number of Floridians enrolled in Medicare and the statewide impact is clear.

This statewide impact is borne out at the trial court level. Since *Joerg*, trial courts have continually been presented with motions *in limine* concerning the certified question. *See Tintle v. Publix Supermarkets, Inc.*, 2016 WL 2771211 (Fla. Cir. Ct.); *Steinberg v. Winn-Dixie Stores, Inc.*, 2016 WL 7374398 (Fla. Cir. Ct.); *Springle v. Allstate Fire & Cas. Ins. Co.*, 2016 WL 11598620 (Fla. Cir. Ct.); *Ortiz v. Fla. Strawberry Festival, Inc.*, 2018 WL 7526813 (Fla. Cir. Ct.); *Judge v. Tamiami Memorial Post No. 818*, 2017 WL 1745771 (Fla. Cir. Ct.); *Cristobal v. BJ's Wholesale Club, Inc.*, 2017 WL 51917359 (Fla.

Cir. Ct.); *Molavi v. Higdon*, 2016 WL 11587442 (Fla. Cir. Ct.); *Storch v. Arnov*, 2019 WL 1468007 (Fla. Cir. Ct.); *Washington v. Gov't Employees Ins. Co.*, 2016 WL 7441316 (Fla. Cir. Ct.); *Bauduy v. Adventist Health Sys./Sunbelt, Inc.*, 2018 WL 10158568 (Fla. Cir. Ct.).

District courts are also presented with the certified question. *See Gulfstream Park Pacing Ass'n, Inc. v. Margaret Volin*, 4D19-3471; *SP Burlington Senior GP, Inc. v. Phillips*, 241 So. 3d 117 (Fla. 2d DCA 2017); *Initial Brief of SP Burlington Senior GP, Inc.*, 2017 WL 4022719 at *3-4, 27-36; *Answer Brief of Donald M. Phillips*, 2017 WL 4563349, *18-31.

Not only have trial courts addressed the certified question every year since *Joerg*, trial courts within the same judicial circuit have reached conflicting decisions. *Compare Springle*, 2016 WL 11598620 (Palm Beach County) *and Washington*, 2016 WL 7441316 (Orange County), *with Storch*, 2019 WL 1468007 (Palm Beach County); *Bauduy*, 2018 WL 10158568 (Orange County). That these cases do not coalesce around a single answer to the certified question illustrates its public importance. *See Star Cas. v. U.S.A Diagnostics, Inc.*, 855 So. 2d 251, 252-53 (Fla. 4th DCA 2003).

Judge Rothstein-Youakim's concurring opinion shows that the district courts also disagree on the answer to the certified question. Below, the Second District relied on *Cooperative Leasing v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA 2004). *Cooperative Leasing* relied on *Stanley*. *Id.* at 958. But *Joerg* receded from *Stanley's* exception because it "was never intended to apply to benefits from Medicare or Medicaid…." *Joerg*, 176 So. 3d at 1256; (A. 9).

Nothing in *Joerg* indicates *Stanley* still applies to past medical expenses paid by Medicare. *Joerg* deemed this distinction irrelevant:

> …[T]he Illinois Supreme Court in *Wills* also involved the admissibility of past Medicare benefits, not the future benefits at issue here. Given our agreement with the policy pronouncement in *Wills*, *we do not consider this factual distinction relevant*.

Id. at 1256 n. 7 (emphasis added). Thus, *Joerg's ratio decidendi* is that Medicare is a collateral source for purposes of the evidentiary collateral source rule.

This Court has consistently held the evidentiary collateral source rule prohibits the introduction of collateral source evidence. *Joerg*, 176 So. 3d at 1249-50 (citing *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 203 (Fla. 2001) (citing *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991)). That is why Judge Rothstein-Youakim

concluded "that the rationale in *Joerg* compels the conclusion that…*Cooperative Leasing* was incorrect." (A. 9).

A rule that does not treat Medicare payments of past medical expenses as a collateral source will confuse the jury. *Covington v. George*, 597 S.E. 2d 142, 144 (S.C. 2004). Plus, "any attempts on the part of the plaintiff to explain the compromised payments would necessarily lead to the existence of a collateral source." *Id. Joerg* and the evidentiary collateral source rule prohibits this. *Joerg*, 176 So. 3d at 1255-57.

CONCLUSION

For the reasons stated above, this Court should accept jurisdiction and answer the certified question.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in Bookman Old Style 14-point font, contains 1,037 words, and is therefore in compliance with Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(A).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the parties on below service list through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1) on January 19, 2021:

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