

>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

PLEASE BE SEATED.

>> COURT WILL NOW TAKE UP THE
CASE OF DIAL V. CALUSA PALMS
MASTER ASSOCIATION.
COUNSEL.

>> MR. CHIEF JUSTICE AND MAY IT
PLEASE THE COURT, ALEX
BROCKMEYER ON BEHALF OF ELAINE
DIAL.

I WOULD LIKE TO RESERVE FIVE
MINUTES FOR REBUTTAL.

WE'RE ASKING THE COURT ANSWER
THE CERTIFIED QUESTION IN THE
AFFIRMATIVE BECAUSE THIS COURT
MADE CLEAR THAT MEDICARE IS A
COLLATERAL SOURCE AND THAT
STANLEY'S EXCEPTION TO THE
EVIDENTIARY COLLATERAL SOURCE
RULE DOES NOT APPLY TO MEDICARE.

AND IN DOING SO, THIS COURT SAID
THAT THERE WAS NO DISTINCTION
BETWEEN PAST OR FUTURE MEDICAL
EXPENSES PAID BY MEDICARE.

AND WITH STANLEY'S EXCEPTION
BEING SAID TO NO LONGER APPLY TO
MEDICARE PAYMENTS, THAT PACES US
AS THE JUDGE NOTED IN HER
CONCURRING OPINION BELOW BACK
SQUARELY WITHIN THE CONFINES OF
THE EVIDENTIARY COLLATERAL
SOURCE RULE.

AND THAT EVIDENTIARY COLLATERAL
SOURCE RULE, AS CALUSA PALMS
AGREES WITH ME IS, THAT IS A
RULE THAT A PER SE BARS ANY
EVIDENCE OF COLLATERAL SOURCE
PAYMENTS IN A LIABILITY TRIAL
FROM BEING ADMITTED INTO
EVIDENCE.

AND THEN POST-TRIAL HOW THIS HAS
WORKED IS THAT THE TRIAL COURT
OUTSIDE THE JURY'S PRESENCE
REDUCES ANY AWARD OF MEDICAL
EXPENSES PURSUANT TO SECTION
768.76.

AND THAT WAS ACTUALLY THE EXACT
APPROACH --

>> LET ME ASK YOU THIS SERIES OF
QUESTIONS MAYBE.

WHAT IS CONFUSING TO ME ABOUT
THE WAY THIS CASE IS PRESENTED

IS WE'RE REALLY TALKING ABOUT EVIDENCE, WHETHER SOMETHING SHOULD HAVE COME INTO EVIDENCE, CORRECT?

>> CORRECT, YOUR HONOR.

>> OKAY.

AND WE'RE DEALING WITH PAST MEDICAL EXPENSES AS IF THE EVIDENTIARY ANALYSIS OF RELEVANCE IS THE SAME WHETHER IT'S COMPENSATORY OR NON-ECONOMIC DAMAGES, CORRECT? I MEAN, WE'RE JUST LUMPING IT ALL TOGETHER.

>> I MEAN, I THINK IN GHORMLEY THIS COURT SAID THAT WE'RE NOT GOING TO HAVE ANY SORT OF RELEVANCY SORT OF ANALYSIS WITH COLLATERAL SOURCE RULES.

IT'S A PER SE --

>> BUT IT'S NOT A COLLATERAL SOURCE BY STATUTE, CORRECT?

>> WE'RE NOT GOING TO LET --

>> WE'RE ONLY TALKING ABOUT THE EVIDENTIARY COLLATERAL SOURCE RULE.

>> RIGHT.

768 IS COMPLETELY SEPARATE AND DISTINCT FROM OUR COMMON LAW EVIDENTIARY RULE.

>> SO WHAT IS THE RELEVANCE OF THAT EVIDENCE TO COMPENSATORY DAMAGE CLAIMS?

>> WELL, SO IT'S RELEVANT TO THE REASONABLE MEDICAL EXPENSES THAT A --

>> BUT THAT'S NOT RELEVANT TO COMPENSATORY DAMAGES, CORRECT? BECAUSE WITH COMPENSATORY DAMAGES, THE JURY HAS TO REIMBURSE YOUR CLIENT, ASSUMING LIABILITY OR WHAT THEY PAY. THAT'S COMPENSATORY DAMS.

>> WELL, SO I WOULD DIRECT THE COURT TO THE SECOND DISTRICT'S --

>> BUT WE'RE JUST TALKING ABOUT -- SO I'M, YOU'RE IN COURT, YOU SAY I WANT TO PUT THIS EVIDENCE IN.

THE AMOUNT OF THE REASONABLE -- OR WHAT WAS ACTUALLY WOULD HAVE BEEN BILLED IF IT WEREN'T FOR MEDICAID, WHAT WAS ORIGINALLY

BILLED IN ORDER TO PROVE
COMPENSATORY DAMAGES, OBJECTION,
RELEVANCE.

WHAT'S YOUR RESPONSE TO THE
TRIAL COURT?

>> ONE, THERE WAS NO RELEVANCE
OBJECTION MADE --

>> I KNOW, I KNOW.

>> SO WE WOULD SUBMIT THAT THAT
ARGUMENT HASN'T BEEN PRESENTED.
BUT I WOULD SAY, YOUR HONOR,
GHORMLEY SAYS THAT RELEVANCY IS
NOT AN INQUIRY.

WE'RE NOT ENGAGING IN ANY SORT
OF 403 RELEVANCY FIRST PROBATIVE
ANALYSIS --

>> STICK WITH ME.

ALL RELEVANCE HAVEN'T --
RELEVANT EVIDENCE IS ADMISSIBLE,
BUT IT HAS TO BE RELEVANT,
THAT'S SORT OF FOUNDATIONAL.
AND I CANNOT SEE THE RELEVANCE
GIVEN THAT IT'S, GIVEN THE
STATUTE TO THE ISSUE OF
COMPENSATORY DAMAGES.

>> WELL, SO WE WITH LOOK AT
CASES LIKE THE SECOND DISTRICT'S
DECISION IN NEGOTIABLE --

>> OKAY, JUST STICK WITH ME.

CAN YOU TELL ME WHAT THE
RELEVANCE IS.

>> WELL, I'M TRYING TO YOU, YOUR
HONOR.

I THINK --

>> HOW DOES IT TEND TO PROVE OR
DISPROVE A FACT?

>> IT GOES TO PROVE THE
REASONABLE VALUE OF THE MEDICAL
EXPENSES --

>> HOW IS THAT RELEVANT TO
COMPENSATORY OR DAMAGES?

>> BECAUSE A COMMON LAW -- THE
JURY INSTRUCTION SAYS YOU'RE
ENTITLED TO RECOVER THE
REASONABLE VALUE OF THE MEDICAL
EXPENSES AND A PLAINTIFF IS
ENTITLED TO RECOVER THE FULL
VALUE OF THE REASONABLE AND HE'S
IF MEDICAL EXPENSES CAUSED BY
THE TORTFEASOR'S TORTUOUS
CONDUCT WITHOUT REDUCTION FOR
COLLATERAL SOURCE.

>> YOU CAN SEE THAT THAT'S NOT
TRUE WITH RESPECT TO MEDICAID.

MEDICARE, RIGHT?

>> TO GET TO POST-TRIAL

REDUCTION, YES.

BECAUSE OF 768.176.

>> RIGHT.

>> FOR THE WRITEOFF AMOUNT.

AND THEN WE LOOK AT HOW OUR
COURTS HAVE ADDRESSED THIS IN
THE CONTEXT --

>> BUT TO BE LEGALLY RELEVANT, I
MEAN, GIVEN THE STATUTE AND WHAT
IS TRUE ABOUT HOW THE CASE IS
PROVEN, I'M HAVING A HARD TIME,
AS YOU CAN TELL BECAUSE OF MY
QUESTIONS, UNDERSTANDING THE
RELEVANCE TO COMPENSATORY
DAMAGES.

>> WELL, AND WE KEEP THAT
EVIDENCE OUT, YOUR HONOR,
BECAUSE OF WHAT THIS COURT HAS
CONSISTENTLY ACKNOWLEDGED AS THE
INHERENTLY PREJUDICIAL EFFECT
THAT THIS COLLATERAL SOURCE
EVIDENCE HAS ON A JURY'S
DETERMINATION OF BOTH LIABILITY
AS WELL AS DAMAGES.

SO IT'S NOT JUST -- IT'S AN
EXCLUSIONARY RULE, IS WHY WE
KEEP IT OUT.

BUT IT IS RELEVANT TO OTHER
ISSUES IN A CASE.

TAKE, FOR EXAMPLE --

>> NON-ECONOMIC DAMAGES --

>> OKAY.

AND BOTH SIDES SEEM TO
ACKNOWLEDGE THAT THERE WOULD BE
AN ARGUMENT THAT THE INFORMATION
IS RELEVANT TO NON-ECONOMIC
DAMAGES.

>> WELL, WHICH IS WHY IT WOULD
BE ADMISSIBLE.

>> BUT THAT ARGUMENT WAS NEVER
MADE BELOW.

IN OTHER WORDS, THERE WAS NEVER
A -- WAS THAT ARGUMENT MADE
BELOW, IT'S RELEVANT TO
NON-ECONOMIC DAMAGES?

>> YEAH, I ARGUED THAT IN THE
MOTION FOR CONSIDERATION BOTH
PRETRIAL AND DURING TRIAL, AND
WE RAISED IT AT THE SECOND
DISTRICT AS WELL, YOUR HONOR.
AND IT'S ALSO RELEVANT -- NOW,
THIS PART IS NOT RELEVANT TO OUR

CASE, BUT KEEPING IN MIND THAT THIS COURT IS MAKING A RULE FOR CASES AS A WHOLE, FUTURE MEDICAL EXPENSES, WHERE THERE IS NO -- THE PLAINTIFF IS ENTITLED TO RECOVER THE FULL VALUE AT PRIVATE MARKET RATES BECAUSE WHERE MEDICARE MAKES A TORT PAYMENT, THERE IS NO ABILITY FOR MEDICARE TO COME IN AND THEN PAY --

>> LET ME, IF YOU WERE GOING TO OFFER EVIDENCE AT TRIAL ON THE ISSUE OF NON-ECONOMIC DAMAGES, IT SEEMS TO ME THAT WHAT YOU WOULD NEED TO DO IS HAVE AN EXPERT AS TO THE REASONABLE VALUE OF THAT IN THE COMMUNITY. AND MAYBE IT WOULD BE ALSO ADMISSIBLE, THE PARTICULAR BUILD AMOUNT IN THIS CASE. BUT THAT SEEMS LIKE IF YOU'RE OFFERING EVIDENCE THAT'S RELEVANT TO THE ISSUE OF NON-ECONOMIC DAMAGES, YOU WOULD GO ABOUT IT IN A VERY DIFFERENT WAY.

YOU JUST COULDN'T STICK IN THIS IS HOW MUCH -- PERHAPS, I'M NOT SURE.

BUT THE WAY THE CASE IS ARGUED, IT'S NOT ARGUED THAT THIS IS ADMISSIBLE TO NON-ECONOMIC DAMAGES.

IT'S SORT OF JUST ARGUED THAT THE LAW EITHER ALLOWS IT BECAUSE IT'S PASSED OR DOESN'T ALLOW IT BECAUSE IT'S PASSED.

>> WELL, AGAIN, WE DID ARGUE AT THE TRIAL COURT LEVEL AND THE SECOND DISTRICT THAT THIS WAS RELEVANT BECAUSE, IN PART --

>> CAN YOU TELL US AGAIN HOW IS IT RELEVANT TO NON-ECONOMIC DAMAGES?

>> IT'S A QUALITATIVE ASSESSMENT OF THE SEVERITY OF THE INJURY CAUSED --

>> SO, BASICALLY, IT'S THE MAGNITUDE OF THE INJURY.

>> CORRECT, YOUR HONOR.

>> SO LET'S SAY THAT I'M WALKING DOWN THE STREET AND I HAVE THIS KIND OF CARVEOUT, OKAY?

A SIGN FALLS ON MY HEAD AND I'M RUSHED TO THE EMERGENCY ROOM. SURGERY.

AND THERE'S NO HEALTH INSURANCE, I'M JUST A GUY WITH NO JOB, NO MEDICARE, I'M TOO YOUNG FOR THAT, THERE'S NO WORKER'S COMP, THERE'S NOTHING.

SO I SUSPECT THAT THREE MONTHS LATER WHEN I'M RECOVERING, I'M GOING TO BE GETTING SOME BILLS FROM THE HOSPITAL.

LET'S SAY THEY ADD UP TO \$120,000.

AND I DON'T PAY 'EM.

I SUSPECT THAT I'M GOING TO BE PAID A VISIT BY BILL COLLECTORS FROM THE MEDICAL PROVIDERS.

WOULD THAT \$120,000 BE ADMISSIBLE, IF YOU WERE IN MY CASE?

>> I THINK IT WOULD --

>> NOBODY'S RECOVERING FROM -- THE JURY WOULD HAVE TO PAY ME \$120,000 IF THEY RULE IN MY FAVOR, AND THERE'S NO LIEN FROM MEDICARE, WORKER'S COMP OR ANYBODY ELSE, SO IS I WOULD BE RECEIVING \$120,000 TO REIMBURSE THE PROVIDERS.

>> CORRECT, YOUR HONOR.

>> IN THAT PARTICULAR CASE, THERE WOULD BE NO COLLATERAL SOURCE RULE.

WHAT DO YOU THINK IT INVOLVES?

>> CORRECT, IT WOULD JUST BE --

>> SO THE JURY WOULD GET TO HEAR THAT I HAD, BASICALLY, EXTENSIVE MEDICAL TREATMENT.

I MEAN, YOU JUST GO TO THE EMERGENCY ROOM, GOT A COUPLE STITCHES AND WENT HOME.

I HAVE TO HAVE SURGERY WITH AN ANESTHESIOLOGIST, A SURGEON, THE WHOLE WORKS AND THEN RECOVERY.

>> RIGHT.

>> RIGHT.

SO IT WOULD BE RELEVANT THAT THE REASON YOU AS A PLAINTIFF'S LAWYER WHO WANT TO INTRODUCE THAT IS TO SHOW THE JURY THAT THESE WERE SEVERE INJURIES, AND THAT'S HOW MUCH IT COST TO TREAT YOU.

>> ABSOLUTELY.

AND --

>> NOW --

>> -- THAT'S WHAT WE ARGUED TO THE TRIAL COURT.

>> NOW, LET'S SAY THAT I HAVE MEDICARE.

WALKING DOWN THE STREET, THE SIGN FALLS ON ME, TAKEN TO THE EMERGENCY ROOM AND THE BILL'S \$120,000.

TOLD BY MEDICARE USING THEIR STANDARDS, THEIR GUIDELINES THAT WE'RE GOING TO PAY YOU 25 CENTS ON THE DOLLAR, AND YOU'RE GOING TO TAKE THAT.

UNDER THOSE CIRCUMSTANCES, THE WAY THE CASE IS IN THIS CASE, THE JURY WILL ONLY HEAR THAT MEDICARE PAID \$25,000.

NOT MEDICARE, BUT \$25,000 WOULD BE THE ONES, THE AMOUNT THE JURY WOULD HEAR THAT WAS INCURRED. SO BECAUSE I HAVE MEDICARE, THAT MAGNITUDE ARGUMENT WON'T BE AVAILABLE.

>> ABSOLUTELY.

YOU'RE SEEN AS LESS INJURED BECAUSE A COLLATERAL SOURCE IS THERE TO COMPENSATE FOR THE MEDICAL EXPENSES.

AND WHAT THE CASES ALL SAY IS THAT WE SHOULDN'T BE LETTING A COLLATERAL SOURCE EFFECT HOW THE JURY IS ASSESSING THE DAMAGES.

>> BUT ONE ASPECT OF THE ARGUMENT OF RELEVANCY IS NOT JUST THE ECONOMIC MATTER, IT'S ALSO THE NON-ECONOMIC IF, BEING ABLE TO ARGUE TO THE JURY THAT INJURIES ARE EXTENSIVE.

AND THAT'S ONE WAY TO SHOW IT TO THE INJURY. -- JURY.

>> ABSOLUTELY, AND CALUSA PALMS ACKNOWLEDGE THAT THIS IS RELEVANT TOWARDS THE NON-ECONOMIC DAMAGES, AND WE'VE ARGUED THAT CONSISTENTLY THROUGHOUT THIS CASE.

AND THAT'S, IN FACT, WHAT CASES LIKE DURST V -- ACKNOWLEDGE, THAT IT IS RELEVANT TO SHOW THE NON-ECONOMIC DAMAGES.

>> I'M SORRY TO INTERRUPT YOU.

COULD YOU ADDRESS THE ANALYSIS
THE AMY KEY RAISED, THE DAMAGES
RULE IS GETTING AT IN THE SENSE
THAT A IF THE -- IF YOU CAN
INTRODUCE THE AMOUNT OF, YOU
KNOW, THE BILLS WITHOUT GETTING
INTO, YOU KNOW, HOW IT WOULD BE
DONE FOR, BY WHOM OR WHATEVER,
WHY DOESN'T THAT TAKE CARE OF
WHATEVER THE PREJUDICE THAT
MIGHT, YOU KNOW, THAT LED TO THE
CREATION OF THE RULE IN THE
FIRST PLACE?

>> CERTAINLY, JUSTICE MUNIZ.
AND THAT'S KIND OF WHAT THE
TRIAL COURT ATTEMPTED TO DO
HERE.

BUT WE CAN SEE FROM THE JURY'S
QUESTION, THE FIRST QUESTION WE
ASKED WHEN THEY RETIRED TO
DELIBERATE WAS, YOU KNOW, DID
INSURANCE PAY THE MEDICAL
EXPENSES.

THAT APPROACH INDIRECTLY DOES
WHAT THE COLLATERAL SOURCE RULE
DIRECTLY PROHIBITS, AND THAT'S
WHAT CASES LIKE WILLS OUT OF
ILLINOIS' SUPREME COURT,
LETTINGER OUT OF WISCONSIN, THE
HAPPY TIME CASE FROM ALASKA ALL
ACKNOWLEDGE WHICH IS IT'S STILL
GOING TO PUT QUESTIONS IN THE
JURY'S MIND AS TO WHY IS THIS
AMOUNT SO LOW AND WHY IS IT OUT
THERE.

AND IT'S GOING TO STILL AFFECT
THEIR ASSESSMENT ON LIABILITY
AND DAMAGES.

>> AND WHY -- I DON'T, AS FAR
AS, YOU KNOW, TO JUSTICE
LABARGA'S QUESTIONS, I MEAN, IF
THE GOAL WAS TO MAKE SURE THAT
THE JURY UNDERSTANDS, YOU KNOW,
THE SEVERITY OF THE INJURIES AND
THE CARE THAT WAS NECESSARY, I
MEAN, WHY COULDN'T YOU JUST
PRESENT EVIDENCE OF ALL THE
MEDICAL PROCEDURES THAT THE
PERSON WENT THROUGH AND WHO
CARES WHAT THE COST WAS?
I MEAN, IF -- YOU KNOW WHAT I'M
SAYING?

IF YOU'RE TRYING TO -- THERE'S
ONE, PART OF THE EVIDENCE IS TO

GET TO COMPENSATION, AND PART OF THE EVIDENCE IS TO GET TO HOW EXTENSIVE WERE THE INJURIES AND WHATEVER.

TO THE EXTENT THAT THERE'S THAT OTHER THING THAT'S SEPARATE FROM THE COMPENSATION ISSUE, WHY ISN'T IT ENOUGH THAT THE JURY JUST HEARS WHAT THE PERSON WENT THROUGH?

>> IT'S STILL RELEVANT EVIDENCE, AND IT'S SHOWING THE SEVERITY. I MEAN, THE AMOUNT OF THE TREATMENT CERTAINLY --

>> THE COST, I MEAN, IF I HAD FOUR SURGERIES AND THE JURY HEARS THAT, WHY DOES IT MATTER IF THEY HEAR, YOU KNOW, SOME PHANTOM AMOUNT THAT IS TECHNICALLY BILLED VERSUS WHAT'S PAID?

I DON'T UNDERSTAND THAT.

>> SORRY, JUSTICE.

FINISH AGAIN, I GO BACK TO WHY CASES LIKE WILLS, THE HAPPY TIME CASE, OUR CASE IN FLORIDA CONSISTENTLY OF SETTING UP -- IT'S GOING TO AFFECT HOW THE JURY'S LOOKING AT THIS, AND IT'S GOING TO CAUSE THEM TO THINK THAT THERE'S ALREADY BEEN EITHER SUFFICIENT COMPENSATION, THE SEVERITY OF THE INJURY IS DIFFERENT BASED ON WHAT THE COURT TALKS ABOUT IN ROBERTSON V. BATES.

PEOPLE ARE GOING TO BE SEEN DIFFERENTLY JUST BY THE NATURE OF THE SOURCE THAT'S PAYING THEIR MEDICAL BILLS.

AND WE SHOULDN'T LET THAT BE DRIVING THE HORSE HERE IN TERMS OF THE ADMISSIBILITY OF THE EVIDENCE.

>> I UNDERSTAND WHAT YOU'RE SAYING, BUT IT SEEMS LIKE TO ME IT'S KIND OF ASSUMED, THAT THERE'S SOME PROPORTION BETWEEN SOME AMOUNT THAT MIGHT BE EXORBITANT THAT IS BILLED AND THE PAIN RAIN SUFFERING.

I DON'T -- THAT SEEMS TO BE A

LOGICAL -- ONE DOES NOT NECESSARILY FOLLOW FROM THE

OTHER.

I THINK PEOPLE COULD VERY WELL UNDERSTAND THAT YOU MIGHT BE BILLED AN ENORMOUS AMOUNT OF MONEY FOR SOMETHING THAT WASN'T VERY PAINFUL AT ALL.

IT SEEMS LIKE YOU'RE TRYING TO -- THAT SORT OF INFORMATION MAY ACTUALLY EXAGGERATE IN THE MINDS OF THE JURY THE INJURY THAT WAS SUFFERED.

WHY ISN'T THAT LEGITIMATE?

>> I THINK IF A DEFENDANT WANTS TO TAKE ISSUE WITH THE AMOUNT OF THE MEDICAL EKH EXPENSE IF, WE LOOK TO WHAT PLACES LIKE GOBEL SAY WHICH IS YOU CAN CERTAINLY CROSS-EXAMINE THE TREATING PHYSICIAN AND SAY YOU CHARGED \$100 FOR THIS SHOULDER SURGERY. IT REALLY SHOULD HAVE COST \$50. OR YOU COULD CALL IN YOUR OWN EXPERT AND SAY, DR. SO AND SO, YOU DO A LOT OF SHOULDER SURGERIES HERE, IN OUR CASE, LEE COUNTY.

WHAT DO YOU ROUTINELY CHARGE FOR THAT?

IF YOU CAN GET INTO ALL THAT EVIDENCE, AND THAT IS AS THIS COURT HAS SAID, LESS PREJUDICIAL --

>> IT SEEMS LIKE THE FOCUS THERE IS ON THE ECONOMIC DAMAGES. AND WE KNOW WHAT THOSE WERE BECAUSE IT'S BEEN PAID.

>> WELL, BUT IT'S NOT --

>> AND, BUT SO THIS IS KIND OF MORPHING OVER INTO THE NON-ECONOMIC DAMAGES. AND SO I'M JUST TRYING TO UNDERSTAND WHY THAT SHOULD BE, WHY THAT NECESSARY IF -- NECESSARILY IS THE RIGHT WAY FOR THE JURY TO BE EVALUATING THE NON-ECONOMIC DAMAGE.

>> WELL, IT'S ALL RELEVANT EVIDENCE FOR THE JURY TO CONSIDER.

I MEAN, THERE IS NO EXACT MEASURE FOR EVALUATING NON-ECONOMIC DAMAGES. BUT THE WAY I LOOK AT IT, JUSTICE CANADY -- OR CHIEF

JUSTICE CANADY, APOLOGIES, I
DON'T MEAN TO GIVE YOU A
DEMOTION --
>> I'M NOT SENSITIVE ABOUT THAT.
>> IS TO JUST SAY THAT IT'S ALL
RELEVANT EVIDENCE.
BUT AT THE END OF THE DAY --
>> WELL, LET ME JUST QUESTION
THAT.

IN CHIEF JUSTICE CANADY'S
EXAMPLE WHERE YOU HAVE AN
EXORBITANT BILL FOR SOMETHING OR
A LOT OF MONEY SPENT FOR
SOMETHING THAT WASN'T VERY
PAINFUL AT ALL A, WHAT WOULD BE
THE RELEVANCE OF THAT FIGURE?
THE LEGAL RELEVANCE TO
NON-ECONOMIC DAMAGES?

>> I MEAN, I THINK WE GO BACK TO
WHAT'S ALREADY, MY OPPONENT'S
ALREADY CONCEDED, IS THAT IT
SHOWS THE SEVERITY OR LACK
THEREOF OF THE INJURY.
IF A DEFENDANT WANTS TO CONTEST
AND SAY I DON'T THINK THIS IS A
SEVERE INJURY, THE SURGERY
SHOULD NOT HAVE COST THAT
MUCH --

>> BUT WHY CONFUSE IT WITH THE
MONEY AS CHIEF JUSTICE CANADY
SAID?

WHY NOT JUST LOOK AT WHAT
ACTUALLY HAPPENED, THE
PROCEDURES AND -- WHICH THE JURY
DOES ANYWAY?

>> BECAUSE WHAT YOU'RE GOING TO
END UP DOING IS AFFECTING HOW
THE JURY IS COMPENSATING THE
PLAINTIFF FOR THEIR DAMAGES
WHICH THIS COURT HAS
CONSISTENTLY SAID WE'RE NOT
GOING TO LET A PLAINTIFF'S
RECOVERY BE REDUCED OR ADVERSELY
INFLUENCED BY COLLATERAL SOURCE
PAYMENTS.

THAT'S ESSENTIALLY WHAT THAT IS
DOING.

AND I GO BACK TO WHAT THIS COURT
IS SETTING NORMALLY, BUT IN
SHEFFIELD, OUR DISTRICT COURTS
HAVE CONSISTENTLY SAID SINCE
THIS COLLATERAL SOURCE RULE
EMERGED IN THE MID '50s --

>> WE HAVE TAKEN YOU INTO YOUR

REBUTTAL TIME.

I'M GOING TO GIVE YOU A LITTLE
EXTRA TIME, BUT YOU NEED TO --

>> CERTAINLY.

>> I'M SORRY, CAN I JUST ASK YOU
ONE QUICK QUESTION?

JUST TO FOCUS ON THE VERY, JUST
THE NARROW ISSUE OF WHAT THE
CERTIFIED QUESTION IS, IT SEEMS,
YOU KNOW, IN TERMS OF DOES THE
HOLDING OF -- IT SEEMS LIKE
WE'RE KIND OF TALKING MORE ABOUT
SHOULD THE HOLDING APPLY IN THIS
CONTEXT, IT SEEMS LIKE IT'S
CLEARLY TALKING ABOUT FUTURE
EXPENSES, AND IT GETS INTO THE
SPECULATIVENESS AND THE PROGRAMS
MAY NOT HAVE HAPPENED, YADA,
YADA.

IS YOUR WHOLE ARGUMENT JUST TIED
TO THAT ONE, THE FOOTNOTE AND
THE COMMENT ABOUT THE ILLINOIS
CASE?

>> IT'S NOT, YOUR HONOR.

I THINK, FIRST, MEDICARE IS A
COLLATERAL SOURCE, RIGHT?
SO IT'S COMPENSATION INDEPENDENT
OF THE TORTFEASOR WHICH IS HOW
THIS COURT DEFINED IT IN
GHORMLEY.

AND THE SECOND PART IS DOES
STANLEY REMOVE MEDICARE FROM THE
EVIDENTIARY COLLATERAL SOURCE
RULE.

AND WHAT A THIS COURT IN GEORGE
SAID WAS, NO, STANLEY DOES NOT
APPLY TO MEDICARE BECAUSE
THERE'S A RIGHT OF
REIMBURSEMENT.

THAT RIGHT'S GOING TO EXIST
REGARDLESS WHETHER IT'S A FUTURE
PAYMENT OR A PAST PAYMENT.

IT'S THERE STATUTORILY.

THAT MEANS STANLEY DOESN'T
APPLY.

I DO THINK THAT GOES TO SHOW THE
FOOTNOTE, THE IMMATERIALITY OF
THE DISTINCTION WHICH MAKES THE
BROADER RATIONALE APPLICABLE TO
BOTH PAST AND FUTURE EXPENSES
THOUGH.

AND WE CAN ALSO SEE THIS, I
THINK, ON 1255 OF GEORGE IT
TALKS ABOUT HOW WE HARMONIZE THE

DUAL PURPOSES OF THE COLLATERAL SOURCE IS RULE, THE EVIDENTIARY AND THE STATUTORY COMPONENT. THAT STATEMENT ABOUT HOW THAT HARMONIZATION IS TO WORK HAS TO HAVE BEEN IN THE CONTEXT OF PAST MEDICAL EXPENSES RATHER THAN FUTURE EXPENSES BECAUSE UNDER THIS COURT'S DECISION IN RUDD NICK, 768.76 DOESN'T APPLY TO FUTURE EXPENSES.

SO THAT HAS TO BE TALKING ABOUT THE PAST EXPENSE AT ISSUE HERE. BUT TO THE NARROW QUESTION, WE THINK THE ANSWER IS YES.

THANK YOU.

>> COUNSEL, I WILL GIVE YOU A TOTAL OF THREE MINUTES FOR REBUTTAL EVEN THOUGH YOU'VE GOT 37 SECONDS LEFT.

>> MAY IT PLEASE THE COURT, MR. CHIEF JUSTICE, JUSTICES, MY NAME IS MICHAEL DELUGO FROM THE LAW FIRM OF WICKER, SMITH IN ORLANDO.

THIS CASE PRESENTS AN INTERESTING ISSUE BECAUSE WE HAVE DIAMETRICALLY OPPOSED VIEWS OF WHETHER OR NOT MEDICARE IS A COLLATERAL SOURCE.

THE LEGISLATURE SAYS IT ISN'T. 768.762B SAYS BENEFITS RECEIVED UNDER MEDICARE SHALL NOT BE CONSIDERED A COLLATERAL SOURCE. MS. DIAL RELIES ON THE GEORGE DECISION.

GEORGE SAYS MEDICARE IS NOT A COLLATERAL SOURCE.

THE CIRCUIT COURT STATED IT, RELATING TO THE STANLEY EXCEPTION, WAS NEVER INTENDED TO APPLY FOR BENEFITS FROM MEDICARE OR MEDICAID OR TO COLLATERAL SOURCES.

WELL, IF THIS COURT CONSIDERED MEDICARE TO BE A COLLATERAL SOURCE, IT WOULD HAVE SAID IT DOES NOT APPLY TO MEDICARE, MEDICAID OR TO OTHER COLLATERAL SOURCES.

IT DOESN'T SAY THAT.

SO BOTH THE LEGISLATURE AND THIS COURT HAVE STATED THAT MEDICARE IS NOT A COLLATERAL SOURCE, AND

THAT'S WHY MS. DIAL'S ARGUMENT FAILS.

THE WHOLE ISSUE HERE IS SHOULD THE JURY BE ABLE TO CONSIDER DAMAGES FOR WHICH THE PLAINTIFF WILL NEVER, EVER BE HELD RESPONSIBLE.

MEDICARE PROVIDERS ACCEPT THE PREMISE THAT IF THEY'RE GOING TO PROVIDE SERVICES UNDER MEDICARE, THEY'RE GOING TO ACCEPT WHATEVER MEDICARE'S GOING TO PAY FOR THOSE SERVICES.

SO THEY CAN BILL WHATEVER THEY WANT, BUT THEY KNOW THAT IF THEY'RE PROVIDING THESE SERVICES, THAT'S THE AMOUNT THAT MEDICARE IS GOING TO PAY.

AND COMPENSATORY DAMAGES COMPENSATE.

IF THE PLAINTIFF IS NEVER GOING TO BE RESPONSIBLE FOR THOSE EXCESS CHARGES, THEN HOW COULD FLORIDA LAW EVEN RECOGNIZE THAT?

>> COUNSEL --

>> IF YOUR CLIENT IS GOING TO BE -- I'M SORRY.

>> GO AHEAD.

>> IF YOUR CLIENT IS GOING TO BE REIMBURSED PURSUANT TO STATUTE, LET'S SAY THE JURY CAME BACK WITH \$120,000 IN THIS CASE, YOU ARE GOING TO COME BACK TO THE COURT AFTERWARDS UNDER STATUTE, AND THE JUDGE IS GOING TO REDUCE THAT TO THE HEAD CARE AMOUNT.

>> IF IT'S A --

>> WHAT'S THE DOWNSIDE FOR YOU HERE?

>> JUSTICE LABARGA, THAT WOULD HAPPEN IF IT WERE A COLLATERAL SOURCE.

THAT'S HOW IT WORKS WITH INSURANCE, PRIVATE INSURANCE, FOR EXAMPLE.

THE TORTFEASOR SHOULD NOT BE ABLE TO DERIVE SOME SORT OF BENEFIT FROM, YOU KNOW, THE PLAINTIFF BEING WITH RESPONSIBLE AND HAVING HEALTH INSURANCE.

WITH THAT SAID, THE AMOUNTS THAT MEDICARE PAYS, IT'S ALL PREMISED ON THE FACT THAT THERE IS A RIGHT OF REIMBURSEMENT UNDER THE

MEDICARE, MEDICAID SECONDARY
PAYER ACT FROM 1980.

AND SO THERE IS ONLY A RIGHT OF
REIMBURSEMENT UP TO THE AMOUNT
THAT THE DOCTOR, THE MEDICARE
PROVIDER ACCEPTS IN FULL AND
FINAL PAYMENT FOR THE SERVICES
THAT WERE PROVIDED.

THAT'S THE DIFFERENCE BETWEEN
MEDICARE PAYMENT AND A PRIVATE
HEALTH INSURANCE PAYMENT IS THAT
CMS, THE FEDERAL AGENCY, THE
CENTER FOR MEDICARE AND MEDICAID
SERVICES HAS THE ABILITY TO COME
BACK AND GET THAT MONEY BACK
AFTER THE PRIMARY PAYER --
MEDICARE BEING THE SECONDARY
PAYER -- THE PRIMARY PAY PAYER
IS THE TORTFEASOR OR THE INSURER
FOR THE PAYER.

AND THAT'S WHY PRIVATE
INSURANCE, IT IS HANDLED
POST-TRIAL WITH A SETOFF FOR
REDUCTION.

BUT IN THE CASE OF ED MEDICARE,
BECAUSE IT'S NOT A COLLATERAL
SOURCE, IT IS ONLY THE AMOUNT
THAT THE MED CARE PROVIDER
ACCEPTED THAT THE COMPANY STORY
DAMAGES, AND THAT'S ALL THE
PLAINTIFF IS ABLE TO ARGUE.

>> THE KEY DIFFERENCE ISN'T THE
PRIVATE AMOUNT LIKE IN THE GOB
EVERYTHING L CASE, THEY TREATED
THE DISCOUNTED AMOUNT AS THE
COLLATERAL SOURCE PAYMENT.
BUT HERE IN MEDICARE THERE'S A
STATUTORY PROVISION THAT SAYS
YOU CAN'T DO THAT.

>> CORRECT.

>> SO IT'S THAT DISTINCTION
BETWEEN THE PRIVATE AND THE
MEDICARE THAT CAUSES THE
ARGUMENT, OH, PUT IN THE GROSS
AMOUNT.

BUT YOU DON'T HAVE THE
COLLATERAL SOURCE SETOFF BECAUSE
THERE'S A STATUTE THAT SAYS YOU
CAN'T DO IT.

>> THAT'S CORRECT.

AND THAT MAKES ALL THE
DIFFERENCE.

JUSTICE GROSS HASN'T?

>> THAT ACTUALLY ANSWERED MOST

OF MY QUESTIONS.

IS THE CALUSA PALMS' DECISION THAT THIS COURT SHOULD NARROWLY ANSWER THIS QUESTION THAT THE SECOND DCA HAD, OR IS IT CALUSA PALMS' POSITION THAT WE SHOULD CONSIDER WHAT EFFECT THIS MIGHT HAVE ON PRIVATE INSURANCE OR THE WHOLE COLLATERAL SOURCE RULE?

>> I DON'T THINK IT DOES HAVE ANY IMPACT ON THE COLLATERAL SOURCE.

I THINK WHAT CALUSA PALMS IS LOOKING FOR HERE IS AN AFFIRMANCE AND AN EXPLANATION THAT THE COOPERATIVE LEASING HOLDING IS STILL VIABLE AND STILL SHOULD BE APPLIED BY FLORIDA TRIAL COURTS.

AND THAT IS THAT THE JURY ONLY GETS TO HEAR IN THE CASE OF MEDICARE THE AMOUNT THAT WAS ACCEPTED AS FULL AND FINAL PAYMENT FOR THE MEDICAL SERVICES PROVIDED AND NOT THE AMOUNT THAT WAS ORIGINALLY BILLED WHEN THAT NUMBER IS MUCH, MUCH HIGHER THAN WHAT MEDICARE WOULD EVER PAY. THESE DAMAGES, THE DIFFERENCE BETWEEN WHAT IS BILLED AND WHAT IS PAID ARE FREQUENTLY REFERRED TO AS PHANTOM DAMAGES, AND I THINK THAT'S AN APPROPRIATE TRANSCRIPTION OF THEM BECAUSE THEY'RE NOT DAMAGES AT ALL. THE PLAINTIFF WILL NEVER HAVE THE OBLIGATION TO PAY ANY AMOUNT OVER AND ABOVE WHAT A HEALTH CARE PROVIDER ACCEPTED FOR MEDICARE --

>> SEEMS LIKE THAT SAME ARGUMENT REALLY SHOULD APPLY IN GOBEL, IN THE MAJORITY OPINION THERE. THEY'RE ARGUING FOR THE SAME TREATMENT FOR PRIVATE AND MEDICARE.

THAT SEEMS RIGHT TO ME THAT I DON'T SEE ANY REAL REASON WHY YOU SHOULD TREAT THEM DIFFERENTLY.

BUT IT SEEMS LIKE AT LEAST JUSTICE BELL IN HIS CONCURRENCE HAD IT RIGHT IN THE GOBEL CASE WHERE YOU SHOULD BE PUTTING IN

WHAT YOU'VE AGREED TO PAY IN THE DISCOUNTED AMOUNT INTO EVIDENCE.

>> WELL, THE DIFFERENCE IS THAT MEDICARE'S NOT A COLLATERAL SOURCE, SO THIS IS -- AND CMS HAS THE ABILITY TO SEEK REIMBURSEMENT FOR THE AMOUNTS THAT WERE PAID ONCE THERE IS A PAYMENT FROM A PRIMARY TORTFEASOR OR PRIMARY PAYER IN THIS CASE.

>> IT SEEMS A STRETCH TO TREAT A DISCOUNT AS A COLLATERAL SOURCE PAYMENT.

>> IT'S NOT.

THERE IS A LOT OF ARGUMENTS CONTAINED WITHIN MS. DIAL'S BRIEFS ABOUT THE FACT THAT THE GEORGE COURT RECEDED FROM THE STANLEY OPINION AND, CLEARLY, I DON'T DISPUTE THAT.

BUT WHAT I DO DISPUTE IS THE SORT OF IMPLICIT ARGUMENT THAT MERELY BECAUSE THE GEORGE COURT RECEDE FROM STANLEY, THAT EVERY SINGLE CASE CITED TO STANLEY FAVORABLY IS NECESSARILY GOING TO BE, YOU KNOW, WRONGLY DECIDED -- RETROACTIVELY WRONGLY DECIDED.

THAT IS NOT TRUE.

THE COOPERATIVE LEASING CASE IS STILL THE APPROPRIATE WAY TO APPROACH THIS.

THE ELEVATOR DECISION OUT OF THE FOURTH DISTRICT IS THE APPROPRIATE WAY TO ADDRESS THIS ISSUE.

THERE IS SIMPLY NO LOGICAL BASIS UNDER FLORIDA LAW TO TELL THE JURY ABOUT DAMAGES THAT AREN'T THE -- DAMAGES FOR WHICH THE PLAINTIFF WILL NEVER HAVE AN OBLIGATION TO PAY.

AND IT DOESN'T MAKE ANY SENSE TO ME THAT WE WOULD TRY TO AVOID CONFUSING THE JURY BY MISLEADING THE JURY.

OF FINISH OKAY?

-- OKAY?

THAT IS NOT HOW TRIALS SHOULD BE CONDUCTED.

IT SHOULD NOT BE UP TO THE DEFENSE TO CROSS-EXAMINE

PLAINTIFF'S EXPERTS OR HIRE THEIR OWN EXPERTS TO TRY TO COMBAT THE PROVIDING OF MISINFORMATION TO PLAINTIFFS. THIS IS SIMPLY NOT AN ACTUAL DAMAGE UNDER FLORIDA LAW, AND SO THERE'S -- IF THERE'S NOTHING TO COMPENSATE, IT CANNOT BE CONSIDERED COMPENSATORY DAMAGES. AND UNLESS THE COURT HAS ANY FURTHER QUESTIONS, I WILL RELY ON OUR BRIEF. THANK YOU.

>> REBUTTAL?

>> MAY IT PLEASE THE COURT, THE WESTEN CASE, I THINK, IS A VERY GOOD GUIDE POST FOR THIS COURT. ALASKA HAS A STATUTE JUST LIKE 768.76, THE PLAINTIFFS ARE ALLOWED TO RECOVER THE REASONABLE VALUE OF MEDICAL TREATMENT JUST LIKE HERE IN FLORIDA.

AND IN WESTEN THE COURT SAID THAT THE WRITEOFF AMOUNT CONSTITUTES A COLLATERAL SOURCE BECAUSE IT IS SOME SORT OF BENEFIT FROM THE CLAIMANT'S RECEIVING FROM A THIRD PARTY SOURCE.

AND IF THE COURT SAID THAT IN THE CONTEXT OF MEDICARE -- >> IT SEEMS LIKE IT WOULD MAKE MORE SENSE IF YOU PUT IN THE AMOUNT THAT YOU'RE ACTUALLY LIABLE FOR.

WHAT COMES INTO EVIDENCE IS THE AMOUNT THAT YOU'RE ACTUALLY LIABLE FOR BY WAY OF EXPENSES FROM A MEDICAL CARE PROVIDER, NOT SOME AMOUNT THAT'S -- WHATEVER IT MAY BE, BUT HAS NO REAL RELEVANCE TO WHAT'S GOING TO GET PAID.

>> AGAIN, IT'S BEEN CONCEDE BY IN THE BRIEFING THAT IT IS RELEVANT TOWARDS THE NON-ECONOMIC --

>> ISN'T THE PROBLEM HERE MEDICARE, UNLIKE A PRIVATE SITUATION WHERE IF YOU PUT IN THE GROSS AMOUNT, IN THIS CASE THE 120, BUT ONLY 34 IS ULTIMATELY GOING TO GET PAID,

THAT'S NOT GOING TO GET REDUCE
BECAUSE -- FROM THE JUDGMENT
BECAUSE OF THE SUBROGATION
RIGHTS MEDICARE HAS.
BUT YOU PUT IN THE GROSS AMOUNT,
THERE'S \$86,000 THAT A JURY'S
GOING TO HEAR AND ACTUALLY PUT
IN THE JURY VERDICT MOST LIKELY
FOR ECONOMIC DAMAGES, WOULD THEY
NOT?

SO ISN'T THAT THE REAL PROBLEM?
>> AND THAT WOULD BE REDUCED
POST-TRIAL.

>> HOW?

>> BECAUSE LIKE COOPERATIVE
LEASING EXPLAINS IN FOOTNOTE
ONE, THERE'S A DIFFERENCE
BETWEEN THE WRITEOFF AMOUNT AND
THE AMOUNT OF REIMBURSEMENT.
THE REIMBURSEMENT AMOUNT IS
ACCEPTED UNDER SUBSECTION 2B.
COOPERATIVE LEASING SAYS THAT
WRITEOFF AMOUNT IS STILL A
BENEFIT PAID FOR THE CLAIMANT
THAT SHOULD BE REDUCED --

>> WELL, IN GOBEL AS A PRIVATE
THAT GOT SET OFF, THEY TREATED
THE DISCOUNT AS PART OF THE
COLLATERAL SOURCE.

AND THAT THAT'S WHERE THAT
DISCOUNT GOT SET OFF.
BUT HERE YOUR ARGUMENT IS -- I
THINK PROPERLY -- THE STATUTE
SAYS OTHERWISE.

THE STATUTE SAYS THERE'S NO
COLLATERAL SOURCE, RIGHT?
ISN'T THAT WHAT IT SAYS?

>> TO THE EXTENT THERE'S A RIGHT
OF REIMBURSEMENT.

SO THE JURY -- THE TRIAL COURT
CANNOT SAY, JUST, FOR EXAMPLE,
LET'S SAY THERE'S \$100 BILL.

\$20 IS WHAT THE RIGHT OF
REIMBURSEMENT'S FOR, \$80 IS THE
WRITEOFF AMOUNT.

ONLY THE \$20 IS ACCEPTED FROM
THE DEFINITION OF COLLATERAL
SOURCE UNDER SUBSECTION THE B --
2B OF THE STATUTE.

THAT \$80 IS STILL SOMETHING PAID
FOR THE BENEFIT OF THE CLAIMANT
UNDER SUBSECTION 1 WHICH
CONSISTENT WITH GOBEL CAN BE SET
OFF FROM THE AWARD.

BUT, OF COURSE, ALL THIS IS
TALKING ABOUT 768.76 WHICH THIS
COURT HAS ALREADY SAID DOES NOT
AFFECT THE EVIDENTIARY RULE
BECAUSE AT COMMON LAW THE EARTH
SHARE AND DAMAGING --
EVIDENTIARY AND DAMAGES RULE
WERE SEPARATE AND DISTINCT.
AND OUR LEGISLATURE HAS ONLY
SEEN FIT TO ALTER THE DAMAGES
COLLATERAL SOURCE RULE.
THE EVIDENTIARY RULE IS ALIVE
AND WELL.

WE SHOULDN'T LET THE
LEGISLATURE'S ABROGATION OF
DAMAGES COMPONENT AFFECT OUR
EVIDENTIARY RULE ESPECIALLY WHEN
THIS COURT HAS SAID WE'RE NOT
GOING TO DO THAT ALREADY IN
GHORMLEY AND GEORGE --

>> LET ME JUST -- GO AHEAD,
FINISH.

>> NO, NO.

>> I WAS JUST GOING TO CLARIFY.
WHEN I WAS ASKING QUESTIONS
EARLIER, I MAY HAVE SAID THAT
YOU CONCEDED THAT IT WAS
RELEVANT TO NON-ECONOMIC
DAMAGES?

AND I THINK MORE PRECISELY YOU
PROBABLY AGREE WHAT THEY
SUGGESTED IN THE ARGUMENT IS
WHAT YOU SUGGESTED, IS THAT IT'S
A MATTER OF FACT THAT DAMAGES
TEND TO BE HIGHER, NON-ECONOMIC
DAMAGES TEND TO BE HIGHER IN
CASES WHERE THE MEDICAL EXPENSES
ARE HIGHER.

BUT THAT DOESN'T NECESSARILY
MEAN THAT THERE'S A LEGAL
RELEVANCE TO NON-ECONOMIC
DAMAGES, AND I DON'T THINK THAT
THEY EVER CONCEDED THAT, IS THAT
CORRECT?

>> I BELIEVE IN THEIR BRIEF THAT
WAS CONCEDED.

THE COLLATERAL SOURCE OR THE
GROSS AMOUNT IS RELEVANT TOWARDS
THE NON-ECONOMIC DAMAGES,
JUSTICE LAWSON.

AND MAY I BRIEFLY CONCLUDE,
CHIEF JUSTICE?

>> AND HOW COULD THAT BE MADE,
THAT DECISION AS A MATTER OF

EVIDENCE BE MADE ON ANYTHING BUT
A CASE-BY-CASE BASIS?

I MEAN, AS A MATTER OF LAW IT'S
ALWAYS RELEVANT?

IS THAT WHAT YOU'RE SUGGESTING?

>> WELL, I'M SUGGESTING TO THE
COURT THAT IT'S CERTAINLY
PROBATIVE TO THE SEVERITY OF THE
INJURY, AND THE CLASSICAL SOURCE
RULE SAYS THAT -- COLLATERAL
SOURCE RULE SAYS THAT WE
SHOULDN'T LET THE JURY'S DAMAGES
INTERPRETATION TO BE AFFECTED BY
COLLATERAL SOURCE OR PAYMENTS.

>> THANK YOU.

>> AND BECAUSE THE EVIDENTIARY
COLLATERAL SOURCE RULE'S ALIVE
AND WELL, MEDICARE FALLS WITHIN
THE SCOPE OF THAT RULE, WE'D IS
ASK THIS COURT TO ANSWER THE
CERTIFIED QUESTION, YES.

THANK YOU.

>> THANK YOU BOTH FOR YOUR
ARGUMENTS.