

**IN THE SUPREME COURT
STATE OF FLORIDA**

**TWYMAN E. BOWLING and
TERRY BOWLING,**

Petitioners/Appellees,

v.

**Case No.: SC12-479
L.T.: 2D10-1505, 05-7451**

**STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,**

Respondent/Appellant.

_____ /

PETITIONER'S AMENDED BRIEF ON JURISDICTION

**ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION
OF THE SECOND DISTRICT COURT OF APPEAL**

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STATEMENT OF THE CASE AND FACTS

Petitioners/Appellees below, TWYMAN BOWLING and TERRY BOWLING, hereinafter “the BOWLINGS” seek this Court’s discretionary review of a February 10, 2012, opinion of the Second District Court of Appeal. (App. 1). The opinion reversed the final judgment entered by the trial court and remanded the case for a new trial on damages only. Specifically, the Second District Court of Appeal held that the trial court abused its discretion in excluding the testimony of Debra Pacha (medical coding and medical billing expert) and ordered a new trial on damages only. (App. 1).

This case is an uninsured / underinsured motorist (UM) claim brought by the BOWLINGS against State Farm Mutual Automobile Insurance Company (“STATE FARM”). On August 4, 2004, David Swan, the under-insured motorist, rearended Mr. Bowling’s vehicle at a high rate of speed. Shortly after the accident Mr. Bowling began having severe pain in his lower back; Mr. Bowling also began having memory loss. As such, Mr. Bowling went to see Dr. Daniel Stein who told Mr. Bowling that he had post-concussion syndrome and referred Mr. Bowling to Excel Rehab for physical therapy where he treated from October 24, 2004, to December 2, 2004. However, Mr. Bowling continued to have pain in his neck and lower back, so he began treating with several different physicians for his neck and

back. One of the physicians that Mr. Bowling saw was Dr. Thomas Sweeney, an orthopedic surgeon, who determined that Mr. Bowling was a surgical candidate. However, due to his financial situation and his wife's medical condition, Mr. Bowling was not able to have surgery on his neck and back.¹ Ultimately, on September 23, 2009, Mr. Bowling underwent neck surgery and on March 10, 2009, Mr. Bowling underwent back surgery. Both surgeries were performed by Dr. Robert Nucci with payment secured by a letter of protection. As stated above, Mr. Bowling also suffered a brain injury as a result of the accident and experts retained by the BOWLINGS offered testimony to support the brain injury. STATE FARM presented expert testimony to support its theory that Mr. Bowling did not have a brain injury but that his memory loss and other symptoms were caused by a sleep disorder.

After a six-day trial, the jury found for the BOWLINGS and awarded them \$1,093,504.00 as damages - comprised of \$314,763 for past medical expenses, \$157,361 for future medical expenses, \$131,835 for past pain and suffering, \$455,610 for future pain and suffering, \$ 7,616 for Mrs. Bowling's past loss of consortium, and \$26,320 for Mrs. Bowling's future loss of consortium. That verdict was offset by comparative negligence and then reduced by collateral sources to

¹ Mrs. Bowling has multiple sclerosis, fibromyalgia, and rheumatoid arthritis.

\$944,154.50.² A judgment was entered for the \$100,000.00 policy limits available under the BOWLINGS' underinsured motorist coverage with STATE FARM. After the trial, STATE FARM filed a motion for a new trial. One of the arguments asserted was that the trial court improperly struck STATE FARM's coding expert, Debra Pacha. The trial court denied the motion for a new trial and STATE FARM appealed the matter to the Second District Court of Appeal. The appellate court reversed the final judgment and remanded the case for a new trial. The BOWLINGS filed a motion for rehearing en banc, motion for clarification, and motion for rehearing. On February 10, 2012, the appellate court granted in part and denied in part the BOWLINGS's motion for clarification.³ (App. 1). In granting the motion for clarification, the appellate court remanded for a new trial on damages only. (App. 1). The only issue raised by STATE FARM that the appellate court relied on for its decision was the trial court's decision granting the BOWLINGS's motion to exclude STATE FARM's coding expert, Debra Pacha. (App. 1).

Debra Pacha reviews a healthcare provider's bills to determine if the services indicated by certain codes on those bills are substantiated by the

² The BOWLINGS will seek the difference between the net verdict and the final judgment in an action pursuant to section 624.155, Florida Statutes, and section 627.727(10), Florida Statutes.

³ In the motion for clarification, the Bowlings argued that the elements of negligence, i.e., duty, breach and causation, certainly should not be retried and that

procedures documented in the medical records. Ms. Pacha reviewed Mr. Bowling's medical bills from September 20, 2004, to August 10, 2009, totaling over \$278,000. She compared the codes in the account ledgers from providers who rendered treatment to Mr. Bowling to the procedures described in the associated medical records. Ms. Pacha took issue with the account ledgers from University Community Hospital Carrollwood, Nucci Spine Institute, and Robert C. Nucci, MD, PA. **From those account ledgers, Ms. Pacha only took issue with \$111,000.00 of Mr. Bowling's past medical expenses.**

As stated above, Debra Pacha's testimony was relevant to only \$111,000.00 of Mr. Bowling's past medical expenses. However, despite this fact, the appellate court awarded a new trial on **all damages** only. The appellate court's decision to remand the case for a new trial on all damages expressly and directly conflicts with a decision of the Florida Supreme Court on the same question of law.

SUMMARY OF THE ARGUMENT

Even though Ms. Pacha's testimony was relevant to only \$111,000.00 of the past medical expenses, the Second District Court of Appeal's opinion at issue reversed the final judgment and ordered a new trial on what appeared to be all elements of negligence, i.e., (1) duty, (2) breach of that duty, (3) causation, and (4)

the only damages that should be retried should be the past medical expenses.

damages. After the BOWLINGS filed a motion for clarification arguing that since the testimony only applied to past medical damages, there definitely should not be a new trial on duty, breach and causation, the Second District Court of Appeal clarified and stated that the new trial was only to be on damages. **The case at issue expressly and directly conflicts with this Court's ruling in *ITT Hartford Insurance Company of the Southeast v. Owens*, 816 So.2d 572 (Fla. 2002).**

In *Owens* this Court considered the issue of whether a new trial on all damages is permissible where the error is limited to an award of futures damages where that award is a discrete item of recovery and is separated from other damages. *Id.* at 577. The court stated that “because special verdict forms were used in this case, the record reflects that the jurors’ error occurred in that area of recovery alone.” Like in *Owens*, a special verdict form was used in the instant case, and as such, the error which is limited to only \$111,000.00 of the past medical expenses, should be corrected by holding a new trial on the contested past medical expenses only.

It follows that this Court should accept jurisdiction and resolve the conflict between the Second District Court of Appeal’s decision here and *Owens* because the Second District Court of Appeal’s decision creates substantial uncertainty regarding whether a new trial on all damages is permissible where the error is limited to only a

specific portion of damages, i.e., past medical expenses. Moreover, as an issue of first impression, the Second District Court of Appeal's opinion here opens the door all over Florida to the practice of employing coding experts to challenge a treating physician's medical bills leaving litigants free to argue that the Second District Court of Appeal's opinion allows such testimony. If this Court accepts jurisdiction for the reasons above, this Court will be permitted to not only correct the error by the appellate court ordering a new trial on all damages, but this Court may also take up the important issue of whether coding experts are permitted to testify regarding the reasonableness of medical bills in personal injury and related actions. *Russel v. State*, 982 So.2d 642 (Fla. 2008).

ARGUMENT

I. THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL THAT REVERSED THE FINAL JUDGMENT AND REMANDED THE CASE FOR A NEW TRIAL ON ALL DAMAGES EXPRESSLY AND DIRECTLY CONFLICTS WITH *ITT HARTFORD INSURANCE COMPANY OF THE SOUTHEAST V. OWENS*, 816 SO.2D 572 (FLA. 2002).

The Second District Court of Appeal's decision in the case at issue expressly and directly conflicts with *ITT Hartford Insurance Company of the Southeast v. Owens*, 816 So.2d 572 (Fla. 2002). In the instant case, the Second District Court of Appeal reversed the final judgment wherein the jury awarded the Plaintiffs

\$944,154.50 as damages and remanded the case for a new trial on all damages. That decision expressly and directly conflicts with *Owens*.

In *Owens* the insured brought an action to recover UM benefits. In the trial and after hearing the evidence, the jury returned a verdict for the insured. There, the special verdict form listed the present value of future medical costs to be \$72,000.00. However, the trial court opined that the award of \$72,000.00 must have been a mistake and stated that the jury must have intended to award the insured \$720,000.00. The insurance company disagreed and argued that \$72,000.00 was a “fair present value.” The trial court did not have the jury reconsider its verdict. After the trial, the insured filed a motion for rehearing and for additur or in the alternative for a new trial. The trial court granted the insured’s motion for additur and entered a supplemental order granting additur in the sum of \$819,214.00 plus interest. The trial court denied the motion for a new trial filed by the insurance company under section 768.043, Florida Statutes (1997) and the insurance company appealed. The Third District Court of Appeal affirmed the trial court’s decision and the insurance company filed an appeal with this Court.

The insurance company in *Owens* argued that it was entitled to a new trial on all damages pursuant to section 768.043, Florida Statutes. In discussing *Poole v. Veterans Auto Sales & Leasing Co. Inc.*, 668 So.2d 189 (Fla. 1996), this Court cited

and italicized the statement in *Poole* that “*we do not believe that [section 768.043, Florida Statutes] alters the longstanding principles applicable to the granting of new trials on damages.*” Further, this Court went on to hold that “section 768.043 in no way alters or conflicts with Rule 1.530.” *Owens*, 816 So.2d 572, 576. This Court went on to state that “the statute merely provides an alternative means of redress.” *Id.* In that section 768.043, Florida Statutes does not conflict with the generally accepted principles governing the procedures for granting a new trial, it cannot be argued that *Owens* is distinguishable because it involves analyzing section 768.043, Florida Statutes.

This Court agreed with the insured’s argument that the retrial should address only “*contested*” damages. *Id.* at 577. This Court went on to state that “[t]he organic right to a jury trial extends only to a determination of *contested issues* involving the facts of a litigated case.” *Owens*, 816 So.2d 572, 577 (citing *State v. Aetna Cas. & Sur. Co.*, 92 So. 871, 873 (1922)); *see also Astigarraga v. Green*, 712 So.2d 1183 (Fla. 2nd DCA 1998); *see also Altilo v. Gemperline*, 637 So.2d 299, 302 (Fla. 1st DCA 1994)(reversing a zero award for future medical expenses and remanding for a new trial on that issue and on future damages, if any, relating to the need for future surgery only). **Ultimately, this Court directed the appellate court to remand the case for a new trial on future medical damages only.** *Id.* at 579.

This Court should accept jurisdiction and consider this issue because the decision by the Second District Court of Appeal fails to follow *Owens* and creates confusion regarding the scope on remand of a new trial on damages where only a portion of the damages on remand are contested. Here, the appellate court has invaded the province of the jury when it rendered its decision to remand for a new trial on all damages rather than on contested damages only. In sum, the appellate court has substituted its judgment for that of the jury's judgment. As such, the decision is manifestly unjust and expressly and direct conflicts with this Court's decision in *Owens*.

Additionally, the main issue in this case was the admissibility of a coding expert at trial. As stated in the appellate court's opinion, **this is a matter of first impression**. It is important to point out that Judge Crenshaw wrote a well analyzed dissent in this case stating that the trial court's decision to strike Ms. Pacha should be affirmed. Moreover, the decision by the Second District Court of Appeal will have serious implications on all personal injury litigants in Florida. Without direction by the Florida Supreme Court, the practice of employing coding experts to challenge a treating physician's medical bills can be employed all over the state. The practical effect of this decision is that parties can present the Second District Court of Appeal's decision to trial courts in support of an argument that coding

experts are permitted to testify regarding the reasonableness of medical bills in personal injury and related cases. If this Court accepts jurisdiction for the reasons discussed above, this Court will be permitted to not only correct the error by the appellate court ordering a new trial on all damages, but this Court may also take up the important issue of whether coding experts are permitted to testify at trial regarding the reasonableness of medical bills in personal injury and related matters. *Russel v. State*, 982 So.2d 642 (Fla. 2008).

CONCLUSION

The Second District Court of Appeal's opinion expressly and directly conflicts with this Court's decision in *Owens* regarding the scope of a new trial on damages where only a portion of the damages are contested. *Owens* makes clear that when an error affects only one item of damages, a new trial should be limited to only the item of damages affected by the error. Moreover, if this Court accepts jurisdiction it will be free to consider the important issue as to whether a coding expert is permitted to testify regarding the reasonableness of medical bills in personal injury and related actions.

For the foregoing reasons, this Court should exercise discretionary jurisdiction to resolve the conflicts stated herein.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been served by U.S. Mail to Mark S. Ramey, Esquire, Ramey & Kampf, P.A., Rivergate Tower – Suite 1625, 400 North Ashley Drive, Tampa, FL 33602, and Anthony J. Russo, Esquire, Butler Pappas Weihmuller Katz Craig LLP, 777 S. Harbour Island Boulevard, Suite 500, Tampa, FL 33602, this 23rd day of March, 2012.

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the applicable *Florida Rules of Appellate Procedure*,
Petitioner certifies the use of 14 point Times New Roman throughout this Brief.

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