SUPREME COURT OF FLORIDA

CASE NO.: SC12-479

TWYMAN E. BOWLING and TERRY BOWLING

Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

RESPONDENT'S BRIEF ON JURISDICTION

On Appeal from the Second District Court of Appeal
Case No. 2D10-1505, 05-7451

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STATEMENT OF THE CASE AND FACTS

Bowling sued State Farm for uninsured motorist (UM) benefits under his policy for injuries he received in an automobile accident. *State Farm Mut. Auto. Ins. Co. v. Bowling*, 37 Fla. L. Weekly D379, D380 (Fla. 2d DCA Feb. 10, 2012). Before trial, the trial court excluded Debra Pacha, who was State Farm's expert witness regarding the reasonableness of Bowling's medical charges. *Id.* Ms. Pacha would have opined at trial that four of Bowling's medical providers submitted bills that were not supported by their coding, billing, and medical record documentation. *Id.*

At trial, State Farm was precluded from presenting "Ms. Pacha's testimony that the bills did not correlate to the treatment in the medical records . . . ." *Id.* To prove the reasonableness and necessity of his medical expenses, Bowling relied on (1) a one-page summary of his medical bills, and (2) his own testimony that the charges were reasonable. *Id.* State Farm was barred from using Ms. Pacha's testimony to refute this evidence, despite the fact that "two of Mr. Bowling's medical providers admitted at trial that certain bills included items that should not have been billed." *Id.* at D380-D381. At the end of the trial, "the jury returned a verdict in favor of the Bowlings for $944,154.50."[1] *Id.* at D380.

[1] The Second District's opinion does not describe the jury verdict any further.

On appeal, the Second District reversed because Ms. Pacha was qualified to render an expert opinion and her testimony would have assisted the jury. *Id.* The Second District remanded for a new trial on damages. *Id.*

SUMMARY OF ARGUMENT

The Second District's decision does not conflict with *ITT Hartford Ins. Co. of the Southeast v. Owens*, 816 So. 2d 572 (Fla. 2002). The issue in this case, described by Bowling as an issue of first impression, concerned the exclusion of a medical billing and coding expert who would have testified that the Petitioner's medical bills were inaccurate and therefore unreasonable. By contrast, the issue in *Owens* (never addressed by the Second District)[2] concerned the availability of a new trial under section 768.043, Florida Statutes (1997), after the trial court grants a motion for an additur as to future medical expenses. Neither the issues nor the facts in the Second District's decision are in conflict with *Owens*. Thus, there is no express and direct conflict on the same question of law with *Owens* that would create conflict jurisdiction. And assuming such conflict exists (which it does not), the Court should not exercise its jurisdiction because the District Court's decision was correct.

[2] Bowling first raised *Owens* in his rule 9.330 motion, after the Second District's original decision. Bowling never argued in his brief or at oral argument that a new trial on all damages would be improper.

ARGUMENT

I

The decision of the District Court of Appeal in this case does not expressly and directly conflict with the decision of this Court in *ITT Hartford Ins. Co. of the Southeast v. Owens*, 816 So. 2d 572 (Fla. 2002).

Bowling incorrectly argues the existence of express and direct conflict, where there is none. The Second District's decision and *Owens* address different questions of law. Bowling improperly relies on facts beyond the four corners of the Second District's decision to make his argument. And Bowling takes the irreconcilable position that the Second District's decision rules on an issue of first impression and at the same time that it conflicts with *Owens*. Bowling has not shown any basis that would support this Court taking jurisdiction to review the Second District's decision.

The Second District's opinion does not address any question of law controlled by *Owens*. As Bowling concedes, "the main issue in this case was the admissibility of a coding expert at trial." (Pet'r's Am. Br. on Jxn. 9.) *Owens* did not address any issues regarding the admissibility of evidence in general or expert testimony in particular.

Owens was an additur case where this Court held that "in light of the mandate contained in section 768.043, Florida Statutes (1977), the trial court abused its discretion in denying ITT Hartford the alternative of a new trial on the

disputed element of damages issue under these circumstances." 816 So. 2d at 575. Here, the Second District did not address any question related to additur or § 768.043. Because the Second District's decision and *Owens* do not address the same questions of law, there is no express and direct conflict.

There is no conflict based on the four corners of the Second District's opinion. Bowling's claim of express and direct conflict is grounded upon a factual assertion outside the four corners of the Second District's decision: "a special verdict form was used in the instant case[.]" (Pet'r's Am. Br. on Jxn. 5.) The Second District's decision explains that "the jury returned a verdict in favor of the Bowlings for $944,154.50." *Bowling*, 37 Fla. L. Weekly at D380. However, neither the majority nor the dissent describes a special verdict form or an itemization of damages. Bowling ignores that any asserted conflict "must appear within the four corners of the majority decision [and] [n]either a dissenting opinion nor the record itself can be used to establish jurisdiction." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

Further, assuming the Second District had described a special verdict (which it did not), no conflict exists. Bowling complains that Ms. Pacha's testimony was only relevant to past medical expenses and any new trial should be limited to past medical expenses. (Pet'r's Am. Br. on Jxn. 4-5.) However, the Second District

did not limit the relevance of Ms. Pacha's testimony to past medical expenses when it explained that:

> The subject matter of Ms. Pacha's testimony would have assisted the jury in determining whether Mr. Bowling's medical bills, on which he based his **claim for damages**, accurately reflected the treatment he was documented to have received . . . .
>
> [Ms. Pacha] does have the requisite skill and training to render an opinion on whether the bills submitted by his medical providers accurately reflect the care documented in the medical records of those same providers. This was directly relevant to **the amount of damages** claimed by the Bowlings.

Bowling, 37 Fla. L. Weekly at D380 (emphasis added). Thus, Ms. Pacha's testimony was relevant to the issue of damages in general.

Bowling (and the dissent below) claims the Second District addressed "an issue of first impression." (Pet'r's Am. Br. on Jxn. 6, 9.) Bowling's claim of express and direct conflict contradicts his own assertion that this case addresses a question of first impression. If the question regarding the scope of retrial after a reversal premised on the erroneous exclusion of an expert is a question of first impression, then – a fortiori – there cannot be any conflict with *Owens*.

For these reasons, this Court should deny review of the Second District's decision.

II

This Court should not exercise its discretion to accept this case because the Second District reached the correct result.

Bowling complains about the Second District's directions on remand, but he is really trying to undo the ruling regarding the admissibility of Ms. Pacha's testimony. Expert testimony is appropriate where, as in this case, a plaintiff's medical bills use medical billing codes, which are "beyond the knowledge of an ordinary juror." *United States v. Diaz,* Case No. 07-20398-CR, 2008 WL 906725 at *6 (S.D. Fla. Mar. 28, 2008). The codes on the bills here were indecipherable to the untrained layperson. A coding expert was needed to explain what procedures were billed and thereby demonstrate the problems that existed in the bills.

State Farm should be able to challenge whether billed procedures were actually performed. Bowling bears the burden to show that his medical expenses were reasonable and necessary. *Albertson's Inc. v. Brady*, 475 So. 2d 986, 988 (Fla. 2d DCA 1985) (citing *Shaw v. Puleo*, 159 So. 2d 641 (Fla. 1964)). The trial court allowed him to prove up his medical bills based only on a one-page summary and his subjective self-serving testimony. The courts cannot apply an impossibly high evidentiary standard to defendants, and stop them from using an expert to address whether the medical bills being assessed against them reflect services documented in the medical records. Foisting an unduly high burden on State Farm, and easing Bowling's burden to virtually nothing, is patently unfair.

After all, a defendant is not "required to pay for medical expenses for which it is not responsible." *Id.* at 989. If the plaintiff's medical records do not show that the billed procedures were ever performed – as in this case – then the billed procedures cannot relate to the injuries caused by the accident. Any plaintiff allowed to recover for billed procedures unrelated to the accident, or for services that were not rendered, would receive a windfall at the expense of the defendant.

Further, a remand for a new trial on damages was appropriate. Based on the four corners of the Second District's decision, Ms. Pacha's testimony was relevant to the issue of damages in general. *Bowling*, 37 Fla. L. Weekly at D380. The credibility of Bowling's medical providers was also an issue at trial given their own admissions that they billed for items that should not have been billed. *Id.* at D381. Ms. Pacha's testimony of the use of codes for medical services that were not supported by the medical records, *id.* at D380, was proper impeachment of the credibility of Bowling's medical providers' testimony regarding all damages. The jury could have found these providers to be less credible and adjusted their findings on other categories of damages. Thus, the Second District properly remanded for a new trial on damages. *See Bucholc v. Kent*, 666 So. 2d 275, 275 (Fla. 4th DCA 1996) (remanding for a new trial on all damages where jury's perception of an expert's credibility could have been affected).

CONCLUSION

This Court lacks jurisdiction to review the decision below because there is no conflict with *Owens*. And assuming arguendo that this Court has discretionary jurisdiction (which it does not), the Court should not exercise that jurisdiction to consider the merits of the Petitoner's argument because the District Court's decision was correct.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the Jurisdictional Brief has been furnished by regular U.S. Mail to the following on April 11, 2012.

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