

>> THE NEXT CASE UP IS JOERG
VERSUS STATE FARM.
>> MAY IT PLEASE THE COURT, GOOD
MORNING, YOUR HONOR.
MY NAME IS TRACY GUNN.
I'M HERE FOR THE PETITIONER,
MR. JOERG, AND MY TRIAL COUNSEL
IS WITH ME AS WELL.
I HAVE RESERVED FIVE MINUTES FOR
REBUTTAL.
THIS CASE IS ON REVIEW FROM
DECISION OF THE SECOND DISTRICT
REGARDING THE ADMISSIBILITY OF
POTENTIAL MEDICARE BENEFITS IN
REGARD TO FUTURE MEDICAL DAMAGES
IN A PERSONAL INJURY CASE.
WE'RE ASKING THIS COURT TO
REJECT THE ANALYSIS OF THE
SECOND DCA AND THAT REQUIRES
THIS COURT TO ANALYZE TWO LEGAL
PRINCIPLES.
THIS COURT'S FAMILY DECISION AND
THE COLLATERAL SOURCE RULE IN
STATUTE.
WE'D START WITH STANLEY, BECAUSE
THAT WAS THE BASIS FOR STATE
FARM'S ARGUMENT THAT THE
EVIDENCE IN THIS CASE SHOULD BE
ADMISSIBLE.
AS STATE FARM NOW ADMITS, THE
STANLEY CASE IS VERY LIMITED.
IT APPLIES ONLY TO ALLOW
EVIDENCE OF SERVICES AVAILABLE
TO ALL CITIZENS REGARDLESS OF
WEALTH OR STATUS AND FOR WHICH
THE PLAINTIFF HAS INCURRED NO
EXPENSE, OBLIGATION OR
LIABILITY.
THE FACTS OF STANLEY ARE
IMPORTANT.
THERE WAS A BABY THAT WAS BORN
DISABLED BECAUSE OF MEDICAL
NEGLIGENCE AND THE ISSUE WAS NOT
REALLY FUTURE MEDICAL TREATMENT
PER SE IN THE CASE, BUT THE
FUTURE NEED FOR SPECIAL
EDUCATION AND THERAPIES AND THE
DEFENSE ARGUED THESE WERE
AVAILABLE TO ANYONE WHOSE CHILD
GOES TO PUBLIC SCHOOL.

>> YOU'RE TALKING ABOUT EASTER SEALS AND THINGS LIKE THAT.

>> CORRECT, YOUR HONOR, CHARITABLE ORGANIZATIONS THAT ARE AVAILABLE LITERALLY, AS THIS COURT SAID IN STANLEY, TO ALL CITIZENS REGARDLESS OF WEALTH OR STATUS.

>> IT'S NOT WELL-ARTICULATED IN STANLEY.

IT'S LITIGATED THAT WAY THROUGHOUT THE STATE, WHERE, I MEAN, THAT'S WHAT IT'S UNDERSTOOD TO MEAN, DIVISION OF BLIND SERVICES, THOSE KINDS OF BENEFITS, NOT ONES THAT HAVE A RIGHT OF SUBROGATION OR REIMBURSEMENT AND ARE IN THE NATURE OF MEDICAL BENEFITS.

>> EXACTLY, YOUR HONOR. AND THERE'S REALLY A COUPLE DISTINCTIONS IN THE STATEMENT THAT YOU JUST MADE BETWEEN THE STANLEY CASE AND THIS CASE. WE'RE TALKING ABOUT A REDUCTION IN EXPENSES BY PRIVATE PROVIDERS IN OUR CASE AS OPPOSED TO THE AVAILABILITY OF SERVICES THROUGH A GOVERNMENT OR CHARITABLE ORGANIZATION IN THE STANLEY CASE, AND IN STANLEY, "AVAILABLE TO ALL CITIZENS" MEANT LITERALLY ANYONE.

>> I THINK THAT'S ALREADY BEEN ACKNOWLEDGED, STANLEY SAYS SOME OTHER THINGS, TOO.

IT SAYS WE BELIEVE THE COMMON LAW COLLATERAL SOURCE RULE SHOULD BE LIMITED TO THOSE BENEFITS EARNED IN SOME WAY BY THE PLAINTIFF.

NOW, AND THAT ESSENTIALLY IS THE LANGUAGE THAT WAS RELIED ON BY THE SECOND DISTRICT IN THEIR ANALYSIS TO A LARGE EXTENT.

>> YES.

>> BUT THAT'S NOT THE ONLY TIME THE STANLEY COURT SAYS THAT. THEY SAY -- THEY REFER TO THE COLLATERAL SOURCE RULE NOT BEING

APPLICABLE IN A SITUATION IN WHICH THE INJURED PARTY INCURS NO EXPENSE, OBLIGATION OR LIABILITY.

WE SEE NO JUSTIFICATION FOR APPLYING THE RULE.

SO IT SEEMS LIKE THE REASONING HERE IS FOCUSED ON WHETHER THE DEFENDANT HAS ACTUALLY EARNED THE BENEFITS IN SOME WAY.

>> THE PLAINTIFF.

>> I'M SORRY.

I'M SORRY.

>> YEAH.

>> THE PLAINTIFF.

THAT SEEMS TO BE IS CENTRAL PART OF THE REASONING HERE.

AND TELL ME WHY THAT'S NOT THE CASE AND WHY THAT DOESN'T SUPPORT STATE FARM'S POSITION HERE IN THE DECISION OF THE SECOND DISTRICT.

>> THANK YOU, YOUR HONOR.

THAT'S EXACTLY WHAT JUDGE MAKAR READ, TOO, FROM THE STANLEY CASE.

IT'S THE DIFFERENCE BETWEEN EARNED AND UNEARNED BENEFITS. ALTHOUGH STANLEY SAYS THAT, THAT'S NOT THE FOCUS OF THE CASE.

THE FOCUS OF THE CASE IS THAT THESE ARE BENEFITS AVAILABLE TO ALL CITIZENS.

IF YOU PUT YOUR KID IN PUBLIC SCHOOL, HE'S GOING TO GET THESE THERAPIES AND THESE SERVICES.

AND WE HAVE, IN ADDITION TO THE STANLEY CASE, AFTER THE STANLEY CASE, WE WOULD ASK THE COURT TO LOOK AT ITS OWN DECISION IN GORMLEY, WHAT DOES THE TERM COLLATERAL SOURCE MEAN FOR THE COMMON MEANING OF EVIDENCE.

IT DOESN'T SAY ANYTHING ABOUT WHETHER THE PLAINTIFF DID OR DID NOT PAY FOR IT.

IT'S JUST ARE YOU GETTING A BENEFIT FROM SOMEWHERE ELSE THAT IS INDEPENDENT OF THE TORT

FEASOR.

SO WE WOULD ASK THE COURT TO VALIDATE WHAT THE FOURTH DISTRICT SAID IN THE CASE WHICH PART OF STANLEY IS DICTA. THE TERM COLLATERAL SOURCE HAS NEVER BEEN APPLIED TO BE LIMITED TO THOSE BENEFITS THAT A PLAINTIFF HAS ACTUALLY EARNED OR PAID FOR.

THE ISSUE IN STANLEY WAS NOT SOMETHING THAT THEY HAD PAID FOR.

IT WAS SOMETHING THAT WAS AVAILABLE TO EVERYONE.

IN ADDITION, YOUR HONOR, IF THE ISSUE IS, AS STATE FARM ARGUES AND AS THE SECOND DISTRICT ANALYZED, IF THE ISSUE IS WHETHER THEY WERE EARNED OR PAID FOR THAT DOESN'T APPLY TO EVERY MEDICARE AVAILABILITY IN EVERY CASE.

>> DO YOU DISPUTE THAT IT WOULD APPLY HERE?

>> YES, YOUR HONOR, WE DO.

>> HOW WERE THESE BENEFITS EARNED?

>> A COUPLE DIFFERENT WAYS. THE LANGUAGE IN STANLEY, IF WE'RE LOOKING AT STANLEY, IS EARNED -- FOR WHICH HE HAS NOT INCURRED AN OBLIGATION, LIABILITY OR EXPENSE, RIGHT? SO TWO THINGS.

NUMBER ONE IS THE RECORD ADMITTEDLY IS NOT CLEAR ON WHETHER LUKE DID PAY OR DID NOT PAY.

THE EVIDENCE FROM OUR TRIAL COUNSEL, THE ARGUMENT WAS, PAGE 17 OF THE MOTION IN LIMINE HEARING, HE GETS SOCIAL SECURITY DISABILITY CHECKS EVERY MONTH AND THEY TAKE MONEY OUT OF HIS CHECKS FOR THAT.

IT'S SOME SMALL AMOUNT.

WE KNOW FROM THE WINSTON TOWERS CASE, THAT'S HOW MEDICARE GETS PAID FOR.

DOES IT MAKE A DIFFERENCE THAT
IN THIS CASE HE WAS ENTITLED TO
THAT SOCIAL SECURITY CHECK
BECAUSE OF A DISABILITY INSTEAD
OF EARNING IT IN A JOB?

NO.

IF IT SHOULD HAVE BEEN \$500, BUT
IT'S \$475 BECAUSE OF MEDICARE,
HE STILL PAID \$25.

ADMITTEDLY THE EVIDENCE IN THE
RECORD IS NOT FIRM ON THAT.

>> WHAT ABOUT THE LIABILITY?

I UNDERSTAND MEDICARE IS THAT
IT'S NOT A FREE BENEFIT.

>> EXACTLY.

>> A STRETCH OF THE IMAGINATION.
BUT THEY ARE FAIRLY AGGRESSIVE
IN THEIR REQUEST FOR
REIMBURSEMENT.

SO I THINK THE PROBLEM FOR ME --
AND I DON'T KNOW WHETHER IT'S
STANLEY THAT CREATES THE PROBLEM
-- IS THAT YOU HAVE -- IF THE
WHOLE PURPOSE OF TRYING TO LIMIT
WHAT GOES INTO EVIDENCE FOR THE
FUTURE --

>> CORRECT.

>> TO SAY THAT SOMEONE'S GOING
TO TALK ABOUT WHAT FUTURE
MEDICARE BENEFITS HE'S GOING TO
BE ENTITLED TO, WHICH IS
SPECULATIVE, AND THEN ON TOP OF
IT THAT THEY'RE GOING TO REALLY
GET REIMBURSEMENT, SO THE JURY
WOULD HAVE TO HEAR ALL THAT --

>> RIGHT.

>> -- I WOULD ASSUME, IN ORDER
TO BE FULLY INFORMED ABOUT THE
SIGNIFICANCE OF THE MEDICARE
BENEFITS.

>> CORRECT, YOUR HONOR.

>> IT'S SORT OF A BIGGER PROBLEM
WITH STANLEY, IS THAT -- AND I
SEE IT NOT -- YOU KNOW, HAVE
EASIER SEAL FOR THESE KINDS OF
PROGRAMS TO KNOW THAT SOMEONE'S
GOING TO GET THAT.

BUT NOT MEDICARE.

>> RIGHT.

AND YOU BRING UP A COUPLE

DIFFERENT POINTS IN YOUR
COMMENT, YOUR HONOR.

>> LIABILITY.

SO I GUESS MY QUESTION IS ISN'T
THAT A LIABILITY.

>> THE REIMBURSEMENT IS A
LIABILITY OR OBLIGATION.

EVEN IF WE GO BACK TO WHAT
STANLEY SAYS, IT SAYS EXPENSE,
LIABILITY OR OBLIGATION.

SO YOU CAN PAY FOR IT EITHER BY
PAYING FOR IT IN THE BEGINNING,
LIKE PRIVATE INSURANCE OR LIKE A
WITHDRAWAL FROM YOUR SOCIAL
SECURITY.

AND, AGAIN, WE DON'T KNOW
WHETHER LUKE'S PARENTS PAYING
INTO THE SYSTEM IS HOW HE WAS
ELIGIBLE FOR MEDICARE IN THE
FIRST INSTANCE.

IT WAS STATE FARM'S BURDEN TO
PROVE THAT HE DID NOT PAY.

BUT THE REIMBURSEMENT
SEPARATELY, SEPARATE FROM
WHETHER ANYBODY PAID ANYTHING
FOR HIM TO GET MEDICARE
BENEFITS, THE RIGHT OF
REIMBURSEMENT IS AN OBLIGATION.

THIS COURT DOES NOT HAVE TO
RECEDE FROM STANLEY FOR US TO
PREVAIL IN THIS CASE.

I THINK THERE ARE THINGS IN
STANLEY THAT COULD BE CLARIFIED.
WE SUGGEST THE COURT SHOULD
REJECT THE SECOND DISTRICT'S
EXPANSION OF STANLEY.

>> (INAUDIBLE)

>> THE CONFLICT, YOUR HONOR, IS
WITH THIS COURT'S DECISIONS IN
GORMLEY AND SHEFFIELD AND ALSO
WITH THE FOURTH DCA DECISION IN
PARKER AND VELILLA AND THE
WINSTON TOWERS CASE.

THERE THE ISSUE WAS MEDICARE AND
THE COURT SAID MEDICARE IS
SOMETHING YOU PAY FOR OUT OF
YOUR TAXES.

THAT WOULD DISTINGUISH IT FROM
THE STANLEY CASE.

>> LOOKING AT THIS, SURELY YOUR

LEGAL ARGUMENTS ARE SOUND, BUT
IN LOOKING AT -- WE KNOW FOR
CERTAIN THAT IF THERE IS SOME
TYPE OF MEDICAL CARE THAT HAS
BEEN PAID FOR IN THE PAST --
>> YES.

YES.

>> -- BY MEDICARE, THERE IS
ABSOLUTELY NO DISPUTE THAT THAT
CANNOT COME IN.

I MEAN, ISN'T THAT -- OR IS
STATE FARM SAYING EVEN THAT'S
GOT TO COME IN?

>> YOUR HONOR, WHAT HAPPENS IN
THE PAST CASES, LET'S BE
CLEAR --

>> I WANT TO GO ONE STEP
FURTHER, THOUGH.

I MEAN, IT WOULD SEEM TO ME IF
IT'S THAT IN THE PAST, WHAT
WOULD CHANGE IT IN THE FUTURE?

>> A COUPLE THINGS, YOUR HONOR.
FIRST OF ALL, THE SPECULATIVE
NATURE ABOUT THE FUTURE
BENEFITS.

>> WELL, THAT'S A FRIENDLY
QUESTION.

>> NO.

WE DON'T KNOW WHETHER LUKE IS
GOING TO CONTINUE TO BE
ELIGIBLE.

>> EVEN IF HE IS, SEEMS TO ME
YOU CAN LOOK TO THE WAY THINGS
HAPPEN WITH REGARD TO WHAT IS
AND IS NOT ADMISSIBLE.

>> RIGHT.

>> AND WHEN YOU'RE SAYING FOR
FUTURE, I MEAN, THE SAME RULES
OUGHT TO APPLY AS TO WHAT CAN BE
RECOVERED AND CAN'T BE RECOVERED
AND WHAT COMES INTO EVIDENCE AND
WHAT DOES NOT.

>> RIGHT.

YOUR HONOR, AND THERE'S NO CASE
IN WHICH ANYONE IS ALLOWED TO
TELL THE JURY THAT THE PLAINTIFF
IS GETTING MEDICARE.

>> IT'S THE WELFARE PROBLEM,
IT'S THE PROBLEM YOU HAVE WITH
THE STIGMA--

>> AND MEDICARE MAYBE FOR ME,
BECAUSE I'M ELIGIBLE FOR
MEDICARE--
[LAUGHTER]
DOESN'T HAVE THE SAME STIGMA--
>> [INAUDIBLE]
[LAUGHTER]
>> BUT HERE LET ME GO BACK TO
JUSTICE LEWIS' QUESTION AND MAKE
SURE, FIRST OF ALL, STANLEY--
AND THERE'S BEEN SOME-- STANLEY
RELIED ON THE CASE FROM
ILLINOIS--
>> CORRECT.
>> THAT CASE IN ILLINOIS HAD TO
DO WITH PAST BENEFITS.
>> PAST.
UH-HUH.
>> OF COURSE, STANLEY RELIED ON
A CASE THAT WAS RECEDED FROM, IN
2008, BY THE--
>> ILLINOIS.
>>-- ILLINOIS SUPREME COURT.
IT SEEMS THAT STANLEY HAS
CREATED CONFUSION AND IS REALLY
AN OUTLIER WHEN IT PROBABLY WAS
MEANT TO HAVE A VERY NARROW
APPLICATION.
BUT ON THE ISSUE THAT MEDICARE
AND WE OUGHT TO BE TREATING IT
SIMILAR IN THE PAST AND IN THE
FUTURE--
>> RIGHT.
>> IF YOU, SAY, HAVE A HOSPITAL
BILL FOR THE PAST THAT WAS
\$100,000 BUT BECAUSE-- AND THIS
COULD BE THE SAME WITH
INSURANCE, WHATEVER-- YOU ONLY
HAD A, THE PAYMENT WAS 20,000.
>> RIGHT.
>> YOU CAN'T CLAIM THE
100,000--
>> CORRECT.
>> IS THAT CORRECT?
OKAY.
SO NOW GOING FORWARD--
>> UH-HUH.
>> AND THAT'S NOT, THAT'S JUST
BECAUSE--
>> IT'S YOUR ACTUAL DAMAGE.

>> OKAY.

SO NOW GOING FORWARD IF YOU WERE TO SAY, WELL, ON THE OPEN MARKET I'M GOING TO HAVE TO PAY X AMOUNT FOR THIS TYPE OF CARE BUT THERE IS EVIDENCE THAT UNDER THE MEDICARE-APPROVED RATES IT'S, YOU KNOW, THAT'S NEGOTIATED, IT'S 20% OF THAT.

>> RIGHT.

>> HOW DOES THAT FIGURE IN? BECAUSE THAT, IT SEEMS TO ME, IS FAIRNESS ABOUT-- YOU CAN'T GO AND OVERREACH FOR THE FUTURE IF IT'S REASONABLE TO THINK THAT IT'S GOING TO BE WHETHER IT'S UNDER A NEGOTIATED INSURANCE CONTRACT OR SOMETHING TO SAY IT'S SPECULATIVE, WELL, IT'S SPECULATIVE THAT YOU'RE GOING TO HAVE TO PAY THAT MUCH.

HOW DOES THAT WORK IN THE REAL WORLD?

>> I THINK THIS COURSE EXPLAINED IT IN THE SHEFFIELD CASE.

THE WAY IT WORKS IN THE REAL WORLD AS TO PAST DAMAGES THE NUMBER CHARGED WHICH WAS NEVER PAID BECOMES ILLUSORY.

IT'S IRRELEVANT.

THE DOCTOR SAID HE WANTED A THOUSAND DOLLARS, HE TOOK \$100. WHETHER THE REDUCTION IS FROM AN HMO OR MEDICARE DISCOUNT OR WHATEVER IT'S FOR.

AS TO FUTURE DAMAGES, IT'S EXACTLY WHAT COURT HELD IN THE SHEFFIELD CASE.

WE'RE NOT GOING TO ALLOW EVIDENCE OF COLLATERAL SOURCES, MEANING PAYMENTS BY SOMEONE OTHER THAN THE TORTFEASOR, TO BE INJECTED INTO THE PROCESS.

WE'RE NOT GOING TO TELL THE JURY ABOUT THAT.

IT'S EVEN MORE SPECULATIVE AS TO MEDICARE BECAUSE MEDICARE HAS A POLICY OF NOT PAYING AT ALL IF THERE'S BEEN A TORT RECOVERY. SO WE DON'T KNOW THAT LUKE IS

GOING TO OBTAIN THESE TREATMENTS
AT A MEDICARE-DISCOUNTED RATE.
HE'S ONLY GETTING THAT RATE IF
HE QUALIFIES FOR MEDICARE
COVERAGE FOR THE SERVICE, AND IT
WOULD BE SPECULATION TO SAY--
AND AS A PRACTICAL MATTER, HOW
DO YOU TRY THIS CASE?

>> SO HOW DOES-- IT SEEMS TO ME
IF THE JURY WOULD HEAR IT,
THEY'D HAVE TO HEAR THAT--

>> RIGHT.

>> WHAT THE MEDICARE POLICIES
ARE.

>> BUT WHAT THE COURTS HAVE HELD
IS THAT HAVING THE PLAINTIFF
COME IN AND SAY I MIGHT NOT
QUALIFY FOR IT, WE DON'T-- THAT
STILL IS TOO MUCH DAMAGE,
INHERENT DAMAGE TO THE PLAINTIFF
TO HAVE TO COME IN AND SAY THAT.
THE--

>> [INAUDIBLE]

>> IT'S STILL A COLLATERAL
ISSUE.

[INAUDIBLE]

TO TALK ABOUT A FUTURE MEDICAL
THAN IT DOES THE LIABILITY--

[INAUDIBLE]

>> RIGHT, YOUR HONOR.

YES.

AND SO WE WOULD SUGGEST THAT
THIS COURT SHOULD CONFIRM THAT
ALL THE FUTURE BENEFITS ARE
GOING TO BE TREATED THE SAME
WAY, THAT MEDICARE IS NO
DIFFERENT, A MEDICARE DISCOUNT
IS NO DIFFERENT THAN A PRIVATE
INSURANCE DISCOUNT AS TO THE
PAST AND THEN AGAIN TO THE
FUTURE.

>> BUT YOU SEE THE DIFFERENCE,
MAYBE THIS IS THE QUESTION, THE
MISAPPLICATION OF STANLEY.
IF YOU TAKE STANLEY, EVEN THOUGH
THERE'S BROADER LANGUAGE, AS
BEING THE TYPE OF IT'S AVAILABLE
TO EVERYBODY--

>> YES.

>>-- NO MATTER YOUR WEALTH OR

YOUR STATUS--

>> RIGHT.

AND, YOUR HONOR, I THINK THE COURT SHOULD LIMIT STANLEY. AND I THINK STATE FARM, OR THEIR ARGUMENT IS THE SECOND DCA DECISION ISN'T WRONG BECAUSE IT'S VERY LIMITED, THESE UNIQUE FACTS.

SO IF THIS COURT WERE TO SAY STANLEY IS LIMITED TO--

>> YOU'RE SAYING THE UNIQUE FACTS BEING THAT THERE'S NO EVIDENCE THAT HE PAID INTO MEDICARE, THAT'S THE UNIQUE FACT?

>> YOUR HONOR, THERE WAS A PROFFER THAT HE DID PAY--

>> BUT ON--

[INAUDIBLE]

>> YES.

THEIR ARGUMENT IS THAT'S THE UNIQUE FACT.

AND IN MOST CASES, THOUGH, SOMEONE DOES PAY FOR MEDICARE.

WE CAN'T HAVE THIS OPINION REQUIRING TRIAL LAWYERS AND JUDGES IN EVERY CASE ON FUTURE DAMAGES TO SAY WHAT ARE THE DAMAGES GOING TO BE, WHAT'S MEDICARE GOING TO PAY--

>> IF YOU'RE NOT MEDICARE ELIGIBLE, YOU WOULD GO UNDER MEDICAID, ISN'T THAT CORRECT? I DON'T KNOW-- I MEAN, I'M ASSUMING THAT.

>> MY UNDERSTANDING, YOUR HONOR, IS THAT MEDICAID IS ONLY FOR INDIGENT PEOPLE WHO ALSO QUALIFY.

AND STANLEY APPLIES ONLY TO BENEFITS FOR WHICH NO ONE HAS TO QUALIFY.

AND, AGAIN, IT APPLIES TO A SERVICE.

YOU DON'T HAVE TO PAY FOR SPEECH THERAPY, YOU DON'T HAVE TO PAY FOR SPECIAL EDUCATION IN A PRIVATE SCHOOL BECAUSE YOU CAN SEND YOUR KID TO A PUBLIC

SCHOOL.

THAT'S ALL THE ARGUMENT WAS.
ANYBODY CAN SEND THEIR KID TO
PRIVATE SCHOOL.

WE CAN'T ALL WALK INTO THE
DOCTOR AND GET OUR MEDICAL
TREATMENT AT MEDICARE RATES.
THAT'S THE DIFFERENCE IN THIS
CASE, YOUR HONOR.

SO WHAT WE'RE ASKING THIS COURT
TO DO, THE SECOND DCA BEGAN ITS
ANALYSIS WITH A QUESTION HAS
STANLEY BEEN OVERRULED, AND WE
WOULD TELL THIS COURT THAT
STANLEY PROBABLY NEEDS SOME
CLARIFICATION.

HOWEVER, OUR ARGUMENT DOES NOT
FEND ON THIS-- DEPEND ON THIS
COURT OVERRULING STANLEY.

THE SECOND DCA, IN OUR POSITION,
IMPROPERLY EXPANDED STANLEY, SO
WE'RE ASKING THIS COURT TO
AFFIRM THE LIMITED SCOPE AND TO
HOLD THAT ED OF FUTURE--

EVIDENCE OF FUTURE POSSIBLE
MEDICARE BENEFITS IS
INADMISSIBLE BECAUSE IT'S NOT A
SOURCE AVAILABLE TO ALL CITIZENS
REGARDLESS OF WEALTH OR STATUS
BECAUSE THE PLAINTIFF DOESN'T
INCUR AN EXPENSE OR LIABILITY
BECAUSE IT'S PREJUDICIAL TO
WITHHOLD THAT THE PLAINTIFF HAS
THIS AND BECAUSE IT'S
SPECULATIVE.

RESERVING THE REST OF MY TIME
FOR REBUTTAL UNLESS THE COURT
HAS FURTHER QUESTIONS, THANK
YOU.

>> MAY IT PLEASE THE COURT, MARK
TINKER ON BEHALF OF STATE FARM.
I'D LIKE TO START WITH THE
DISCUSSION OF WHAT'S BEEN ASKED
IN THIS CASE AND WHAT WAS
DISCUSSED IN THE CASE BEFORE
WITH JURISDICTION--

>> YOU DO AGREE STANLEY IS
TALKING ABOUT-- THE CASE OF
STANLEY, ABOUT EASTER SEALS
AND--

[INAUDIBLE]

DID NOT INVOLVE MEDICARE.

>> CORRECT, BUT I DON'T BELIEVE THAT THERE'S A DIFFERENCE THERE BECAUSE I KNOW SOME OF THE DISCUSSION HAS BEEN, WELL, HOW DO WE KNOW WHAT'S GOING TO HAPPEN IN THE FUTURE, IS IT SPECULATIVE, YOU COULD SAY THAT ABOUT ANY BENEFIT.

YOU COULD SAY THAT ABOUT EASTER SEALS.

HOW DO WE KNOW EASTER SEALS IS GOING TO BE THERE TEN YEARS FROM NOW?

>> AND THAT'S WHY THE CASE UPON WHICH STANLEY RELIED WAS QUASHED OR OVERTURNED.

THAT REALLY IS A--

>> I THINK THE BIG PICTURE HERE--

>> YOU AGREE--

[INAUDIBLE]

HAS BEEN OVERRULED--

[INAUDIBLE]

>> CORRECT.

BUT I THINK THE BIG PICTURE HERE, AND I THINK WHAT STANLEY SAYS-- I MEAN, WHAT I VIEW AS THE OVERALL BIG PICTURE IS THIS CASE, THE SECOND DISTRICT'S OPINION IS ABOUT LET'S TELL THE JURY THE TRUTH.

IF WE KNOW-- I MEAN, I'LL SAY THIS IN MORE GENERAL TERMS, WE SEE IT ALL THE TIME AS CIVIL PRACTITIONERS.

YOU HAVE A DOCTOR WHO TREATS SOMEBODY UNDER A LETTER OF PROTECTION AND SAYS THIS SURGERY IS GOING TO COST \$200,000, BUT WE ALL KNOW THAT DAY IN AND DAY OUT WHETHER IT'S DUE TO INSURANCE RATES, MEDICARE, WORKER'S COMP, WHATEVER, THEY DO THAT SURGERY FOR \$50,000 EVERY DAY.

THAT'S THE MARKET RATE.

THEY'VE DECIDED IT'S WORTH MY TIME TO DO THIS SURGERY FOR

\$50,000.

THE JURY SHOULD GET TO KNOW THAT WHEN THEY'RE DECIDING WHAT'S THE REASONABLE VALUE OF SERVICES, WHAT IS THIS DOCTOR WILLING TO DO TO ACCEPT.

IS IT BECAUSE I SAY THIS IS A MILLION DOLLARS?

OR WHAT ARE THEY WILLING TO ACCEPT, TO DO THIS PROCEDURE FOR.

WHEN YOU GET DOWN TO THIS CASE, IT'S THE SIMILAR SITUATION.

I BELIEVE THE EVIDENCE WAS, OKAY, HIS FUTURE'S GOING TO BE 460 SOME ODD THOUSAND DOLLARS, BUT EVERYBODY IN THE COURTROOM EXCEPT FOR THE JURY KNEW THAT HE'S ELIGIBLE FOR MEDICARE, HE WILL BE FOR LIFE BECAUSE HE WAS BORN DISABLED, THAT HIS TREATMENT IS NOT GOING TO COST THAT.

AND I THINK THAT'S--

>> YOU'RE NOT GOING TO KNOW EITHER WAY BECAUSE WE SEE LIKE MY DOCTOR'S GETTING READY TO THROW ME OUT BECAUSE I'M GOING TO GO UNDER MEDICARE, AND THEY'RE NOT GOING TO ACCEPT THESE REIMBURSEMENTS.

HOW DO WE, HOW DO WE DEAL WITH THAT--

>> THAT'S--

>> GET DOWN TO FIVE CENTS.

BY THE TIME YOU'RE READY TO TAKE ADVANTAGE OF MEDICARE, THEY MAY PAY A NICKEL FOR A HEART REPLACEMENT.

I MEAN, HOW DO WE DEAL WITH THAT IN A COURTROOM?

>> I THINK THAT'S THE KEY TO THE SECOND DISTRICT'S OPINION, IS THEY SAID THIS IS JUST EVIDENCE FOR THE JURY TO CONSIDER.

THIS ISN'T A SETOFF, THIS ISN'T A LIMITATION ON DAMAGES, IT'S EVIDENCE.

AND I THINK THE JUDGE'S CONCURRENCE WAS SPECIFIC IN THAT

REGARD TO SAY THE JURY CAN REJECT THAT.

YOU KNOW, MY 200,000 VERSUS 50,000 SURGERY EXAMPLE, THE JURY CAN SAY, OKAY, YOU'RE ELIGIBLE FOR MEDICARE--

>> [INAUDIBLE]

I DIDN'T SEE THAT IN THIS RECORD, THAT STATE FARM PUT ON THE EVIDENCE THAT YOU'RE NOW--

>> THAT'S A HYPOTHETICAL EXAMPLE.

>> WELL, WHAT ELSE DID YOU PUT ON AT TRIAL OR PROFFER TO THIS POINT?

>> THIS WAS RESOLVED AS MOTION IN LIMINE BEFORE TRIAL, SO THERE WAS NEVER--

>> THERE WAS NEVER A PROFFER--

>> THE PROFFER WAS WE HAVE A DOCTOR WHO WAS GOING TO TESTIFY AS TO WHAT THE MEDICARE RATES WERE GOING TO BE, AND ALSO PART OF THE PROFFER WHEN YOU LOOK AT WHAT HIS PAST MEDICAL BILLS WERE VERSUS WHAT WAS REIMBURSED, MEDICARE PAID I THINK IT WAS IN THE 0-25%-- 20-25% RANGE OF IT, SO WE KNOW WHAT'S ACTUALLY BEING PAID IS LESS THAN WHAT'S WRITTEN ON THESE BILLS.

>> SEE, THAT'S A DIFFERENT ISSUE TO ME BUT, OBVIOUSLY, NOT TO STATE FARM, AND THAT'S WHY I WAS ASKING ABOUT THAT YOU CAN'T CLAIM FOR THE PAST A INFLATED AMOUNT IF WHAT YOU'RE GETTING IS A LESSER AMOUNT BECAUSE IT WAS NEGOTIATED.

BUT IT SEEMS THAT THE PART WHERE WE GET FOR THE FUTURE THE DIFFICULTY IF WE WERE JUST LOOKING AT WHAT'S GOOD POLICY IS THAT THE IDEA THAT YOU'RE ELIGIBLE FOR MEDICARE-- AND, THEREFORE, STATE FARM DOESN'T HAVE TO PAY THIS BECAUSE MEDICARE'S GOING TO PAY-- SO YOU AGREE THAT WOULDN'T BE HOW THAT, WHY THAT EVIDENCE SHOULD

COME IN, RIGHT?

BECAUSE THERE IS THE LIABILITY OF MEDICARE IF MEDICARE PAYS OR THEY MAY NOT PAY FOR WHAT THEY'RE SAYING IS THEY MAY NOT PAY IF YOU GET A TORT RECOVERY. SO HOW DO YOU WORK WITH THE DIFFERENCE BETWEEN WHETHER IT'S A REASONABLE AMOUNT FOR THE FUTURE WHICH IS A LEGITIMATE AREA TO ME OF EXAMINATION OR CROSS-EXAMINATION IF IT CAN BE DONE VERSUS THAT THE JURY GETS THE IMPRESSION THAT THESE ARE BENEFITS THAT ARE FREE-- IT'S WHAT STANLEY WAS ABOUT-- IT'S FREE TO THE PLAINTIFFS.

SO JUST LIKE IF YOU COULD GET SPECIAL EDUCATION SERVICES IN SCHOOL AND YOU WERE, SAID I WANT A PRIVATE ONE, YOU'D BE ABLE TO SAY, LOOK, THEY WANT PRIVATE, BUT IT'S AVAILABLE IN PUBLIC SCHOOLS.

SO HOW DOES THAT-- AREN'T THOSE TWO DIFFERENT THINGS, AND SHOULDN'T WE LOOK AT THOSE? STANLEY WAS REALLY TALKING ABOUT FREE SERVICES.

NOW YOU'RE SAYING THAT THE AMOUNT THEY'RE CLAIMING IS, WAS TOO HIGH BECAUSE THEY COULD HAVE GOTTEN A LOWER RATE.

ISN'T THAT TWO DIFFERENT THINGS?
>> I DON'T BELIEVE SO, AND I THINK THAT'S WHERE, I MEAN, PART OF WHAT I WAS SAYING, I STARTED BY SAYING THERE'S A JURISDICTIONAL ISSUE HERE, I THINK.

BUT THIS IS SOMETHING THAT THE SECOND DISTRICT SAID IS A VERY UNIQUE SITUATION BECAUSE AS TO MR. JOERG, PRONOUNCE IT WRONG, THIS IS A FREE SERVICE.

>> SEE, THAT'S NOT WHAT YOU WERE ARGUING THOUGH.

WHETHER IT'S FREE OR NOT, LIKE, SAY IT'S MY HEALTH INSURANCE, IF MY HEALTH INSURANCE IN THE PAST

IS, YOU KNOW, BLUE CROSS BLUE SHIELD NEGOTIATES RATES OF 50% OF WHAT A DOCTOR OR HOSPITAL'S GOING TO CHARGE-- WHICH THEY DO, I MEAN, THEY NEGOTIATE THOSE ALL THE TIME, AN \$80,000 HOSPITAL BILL, YOU KNOW, THEY PAY \$15,000, YOU KNOW? THE IT'S ONE OF THE-- IT'S CRAZY.

BUT, AND THEY MAY DO THAT IN THE FUTURE.

SO COULD I, IF I NEEDED SURGERY IN THE FUTURE AND IT'S MY PAYMENT OF HEALTH INSURANCE BUT WE KNOW THAT IN THE PAST THEY NEGOTIATED A LOWER RATE, DOES THE INSURANCE COMPANY YET TO PUT-- GET TO PUT ON THAT BLUE CROSS BLUE SHIELD ALWAYS NEGOTIATES A LOWER RATE, THEREFORE, CLAIMING THE ACTUAL MARKET VALUE IS TOO MUCH? ISN'T THAT WHAT IT-- SEE, THAT'S, AND MAYBE THAT'S A GOOD ARGUMENT, BUT THAT'S WHAT IT OPENS THE DOOR TO.

>> THAT'S WHERE THERE'S A DIFFERENCE BECAUSE INSURANCE-- AND THAT'S PART OF THE POINT OF STANLEY-- INSURANCE IS SOMETHING THAT YOU PAID FOR. IT'S AN EARNED BENEFIT, AND STANLEY SAID--

>> I KNOW.

IN MY SITUATION IT'S PAID THROUGH MY EMPLOYMENT.

[INAUDIBLE]

>> IT'S A SMALL AMOUNT COMPARED TO WHAT YOU GET FOR A REDUCED RATE, RIGHT?

>> WELL, STANLEY, THE POINT OF IT IS WHEN YOU'RE TALKING ABOUT EARNED VERSUS UNEARNED BENEFITS IS WE DON'T WANT TO DISCOURAGE PEOPLE FROM GOING OUT AND PURCHASING AGAINST HEALTH ISSUES.

WE DON'T WANT TO SAY, YOU KNOW WHAT?

DON'T EVEN BOTHER CARRYING
INSURANCE BECAUSE THE
TORTFEASOR'S GOING TO HAVE TO
PAY FOR EVERYTHING.

>> BUT WHAT YOU WERE SAYING WAS
IT'S NOT FAIR BECAUSE THEY COULD
PROBABLY GET THESE SERVICES
THROUGH MEDICARE AT A REDUCED
RATE, AND I'M SAYING WHY IS THAT
ANY DIFFERENT FROM THE FACT THAT
IF YOU CONTINUE TO HAVE
INSURANCE, YOU'RE GOING TO GET
IT AT A REDUCED RATE SO THAT THE
RULES OF EVIDENCE MAYBE SHOULD
BE THAT THE WAY YOU KEEP IT OUT
OF EVIDENCE IS YOU DON'T ASK FOR
MORE THAN WHAT YOU THINK IS THE
REASONABLE VALUE OF WHAT THE
FUTURE BENEFITS WOULD BE THROUGH
YOUR, WHETHER IT'S YOUR
INSURANCE OR MEDICARE.

I MEAN, THAT'S, THAT'S A POLICY
ARGUMENT.

>> UNDER THE SECOND DISTRICT'S
OPINION, THAT'S THE DIFFERENCE
HERE, IS THAT THIS IS A FREE
BENEFIT AS TO MR. JOERG.
HE DID NOT PAY FOR THIS.
THIS ISN'T INSURANCE, THIS ISN'T
SOMETHING WHERE HE HAD SOMETHING
TAKEN OUT OF HIS PAYCHECK.
HE'S NEVER WORKED A DAY IN HIS
LIFE.

HE'S NEVER HAD ANYTHING TAKEN
OUT OF HIS PAYCHECK.

>> SO THE FACT THAT AT LEAST
YOUR OPPONENT SAYS THAT OUT OF
HIS SOCIAL SECURITY CHECK
WHETHER IT'S SSI OR OTHER KIND
OF-- THERE'S SOME KIND OF
PAYMENT TAKEN OUT FOR MEDICARE.
AND IF THAT IS THE CASE, HOW IS
THAT DIFFERENT?

I MEAN, ALL OF US PAY, YOU KNOW,
REDUCED PREMIUMS, BASICALLY, FOR
OUR OWN HEALTH CARE.

SO HOW IS THAT ANY DIFFERENT?

>> THAT'S, ACTUALLY, A MATTER
OF-- IT'S AN EVIDENTIARY ISSUE
THAT WOULD BE HASHED OUT AT THE

RETRIAL ON THIS, BECAUSE THERE'S BEEN A LOT OF DEBATE IN THE BRIEFS ABOUT IT.

THERE'S MEDICARE PART A, PART D, SSI, SSDI, SOME OF IT IS PAID FOR, SOME OF IT IS COMPLETELY FREE TO MR. JOERG.

IT'S UNEARNED, HE HAS NOT HAD OBEY FOR IT.

>> IT'S FREE TO EVERYONE, I MEAN, WHICH IS WHAT STANLEY WAS TALKING ABOUT, A BENEFIT THAT IS FREE TO ANYBODY IN THE PUBLIC. CORRECT?

>> TO ANYBODY WITH A SPECIFIC DISABILITY OR WITH AN ISSUE, AND THAT'S WHAT MR. JOERG HAS. HE WAS BORN WITH A DISABILITY. AS TO HIM, THIS IS EASTER OR SEALS.

THIS IS--

>> NO, IT'S NOT.

>> IT'S A FREE BENEFIT.

>> I'M SORRY.

THAT IS THE DISTINCTION.

YOU'RE TRYING TO PUT IT IN A CATEGORY OF SOMETHING THAT IS A CHARITABLE KIND OF SERVICE.

AND IT'S NOT-- I'M SORRY, MEDICARE AND EASTER SEALS ARE NOT THE SAME.

>> WELL, UNDER--

>> YOU SUGGESTING THAT MEDICARE HAS NO LIEN OR REIMBURSEMENT RIGHTS TO THIS MONEY?

>> I THINK THE REIMBURSEMENT RIGHT ISSUE IS A RED HERRING. BY SAYING THEY HAVE A RIGHT OF REIMBURSEMENT, THAT MEANS HE'S ACTUALLY GOING TO HAVE TO PAY FOR THE TREATMENT HE RECEIVES. SO TO GO OUT AND SAY HE'S GOING TO--

>> AND YOU'RE SAYING HE CAN'T RECOVER THAT?

>> NO, WE'RE SAYING HE CAN RECOVER THAT AT THE RATE HE'S GOING TO HAVE TO PAY FOR IT.

>> THAT'S NOT WHAT YOUR ARGUMENT IS--

>> NO, THAT'S ABSOLUTELY--
>>-- HE CANNOT RECOVER THAT
AMOUNT OF MONEY.

>> NO.

AND THAT'S NOT WHAT THE SECOND
DISTRICT'S OPINION SAYS EITHER.
IT SAYS THIS IS A MATTER OF
EVIDENCE WHERE THE JURY GETS TO
HEAR WHAT THE REASONABLE RATES
ARE GOING TO BE.

IF HE GOES AND GETS A SURGERY,
THE BILL SAYS \$200 TO ,000,
MEDICARE'S GOING TO PAY IT AT 50
AND HE HAS TO REIMBURSE MEDICARE
AT 50, THEN WHY DO WE HAVE TO
GIVE HIM THE 200 JUST BECAUSE WE
KNOW HE'S GOING TO HAVE TO
REIMBURSE MEDICARE THE 50?

>> WHY DOES HE NOT GET THE 50?

>> HE SHOULD.

HE ABSOLUTELY SHOULD.

THAT'S THE POINT, IS TELL THE
JURY WHAT THE REAL NUMBERS ARE,
LET THEM AWARD-- AND AS I SAID,
THE JUDGE'S CONCURRENCE SAYS IF
THE JURY DECIDED TO REJECT THAT
AND SAY, YOU KNOW WHAT?

WE WANT TO GIVE HIM THE 200
INSTEAD OF THE 50, THEY CAN DO
THAT, BUT WE HAVE TO SHOW THEM
THE EVIDENCE, SHOW THEM THE
TRUTH AND LET THEM MAKE A
DECISION BASED UPON ALL OF THE
EVIDENCE AS FAR AS HERE'S WHAT
THE REALITY OF THE SITUATION IS.
THIS GENTLEMAN WAS BORN
DISABLED, HE'S ELIGIBLE FOR
MEDICARE, HE'S GOING TO GET
MEDICARE COVERAGE IN THE FUTURE.
IF YOU DECIDE THAT YOU DON'T
THINK-- IF YOU THINK IT'S
SPECULATIVE AND YOU DON'T THINK
IT'S GOING TO BE THERE FOREVER
OR THAT MEDICARE'S NOT GOING TO
REIMBURSE HIM, YOU DON'T HAVE TO
GIVE HIM THE MEDICARE RATES.
BUT TELL THE JURY ALL OF THE
INFORMATION SO THEY CAN MAKE AN
INFORMED DECISION.

THAT'S ALL THE SECOND DISTRICT

SAID IN THIS CASE.

>> LET ME-- THE EVIDENCE NEVER GOT PRESENTED HERE, RIGHT?

>> NO, IT DID NOT.

>> LET ME FAST FORWARD.

HAD IT GOTTEN PRESENTED AND IN CASES IN WHICH YOU ARGUE IT SHOULD COME IN, HOW DOES THAT GET ARGUED TO THE JURY?

WHAT ARGUMENTS TO THE JURY TAKE PLACE, AND WHAT JURY INSTRUCTIONS REGARDING THESE PARTICULAR PAYMENTS ARE REQUESTED?

>> I THINK WHAT WAS PROPOSED HERE IS THERE WAS GOING TO BE A DOCTOR, AN EXPERT TO COME IN AND SAY, YOU KNOW, THE JURY IS INFORMED, HE'S BORN AS A DISABLED ADULT-- HE'S A DISABLED ADULT, WASN'T BORN AS ONE, OBVIOUSLY-- HE'S ELIGIBLE FOR MEDICARE, HERE'S WHAT MEDICARE PAYS FOR THE SERVICES. SO THEY HAVE, HIS DOCTORS, OF COURSE, HIS EXPERTS ARE GOING TO COME IN AND SAY IN THE FUTURE HE'S GOING TO NEED THIS TREATMENT, THAT TREATMENT, THIS SURGERY, YOU KNOW, THESE OFFICE VISITS.

THE DOCTOR CAN SAY, OKAY, HE'S ELIGIBLE FOR MEDICARE, HERE'S WHAT THEY REIMBURSE AT EVEN THOUGH WHAT THEIR DOCTOR SAYS IS GOING TO BE WRITTEN ON THE BILL IS ONE AMOUNT, MEDICARE PAYS THIS, AND THEN THE JURY CAN--

>> SO YOU'RE NOT ASKING FOR A REDUCED DAMAGES AWARD BASED UPON THE AMOUNTING COMING IN?

>> WELL, THAT WOULD BE A MATTER OF ARGUMENT, BUT THAT'S-- AGAIN, THAT'S NOT WHAT THE SECOND DISTRICT--

>> WELL, I'M ASKING YOU, WHAT WOULD YOU BE ARGUING BEFORE THE JURY?

ARE YOU ASKING FOR REDUCED DAMAGES DOLLAR FOR DOLLAR, OR ARE YOU ASKING FOR MORE OF YOU

SHOULD ONLY BE AWARDING AN ACTUAL PAYMENT AMOUNT? THOSE ARE TWO VERY DIFFERENT THINGS, AS JUSTICE PARIENTE-- >> VERY MUCH.

AND I THINK WHAT THE-- I MEAN, THE LAW IS HE SHOULD BE AWARDED THE REASONABLE VALUE OF MEDICAL TREATMENT.

OR AND THAT'S WHAT WOULD BE A MATTER OF ARGUMENT TO SAY, YES, WE KNOW THAT THEIR DOCTORS SAY WHAT WE'RE GOING TO WRITE ON THE BILL IS THIS, BUT BECAUSE THIS GENTLEMAN'S ELIGIBLE FOR MEDICARE, WHAT HE'S ACTUALLY DOWNING TO HAVE TO REIMBURSE MEDICARE FOR THAT TREATMENT IS THIS.

WE THINK THE REASONABLE VALUE SHOULD BE THERE.

THEY WOULD, OBVIOUSLY, ARGUE FOR THE HIGHER ONE.

THE JURY CAN FIGURE IT OUT.

>> BUT YOU'RE ASKING JURY TO AWARD AN AMOUNT IF THEY'RE GETTING \$25 OF PAYMENT ON THIS RATHER THAN 100 THAT THE DOC CLAIMS, THEN YOU WOULD ASK THE JURY TO REDUCE THE DAMAGE AWARD BY THE 25?

>> THAT WOULD BE A MATTER OF ARGUMENT BEFORE THE JURY.

>> NOT, NO THE ARGUMENT-- NOT THE ARGUMENT THAT YOU SHOULD NOT AWARD THE PLAINTIFF THE FULL 100, BUT INSTEAD REDUCE IT BY THAT \$75 DIFFERENCE?

>> THE ARGUMENT IS THE REASONABLE VALUE OF WHAT THIS MEDICAL CARE IS ACTUALLY GOING TO COST GOING FORWARD.

>> HERE'S THE PROBLEM--

>> NOW, WOULD YOU ASK FOR ANY ADDITIONAL JURY INSTRUCTIONS ON THAT PARTICULAR PIECE?

>> I DON'T BELIEVE ANY WOULD BE NEEDED.

I THINK THIS IS NO DIFFERENT THAN IF YOU HAVE, YOU KNOW, IN A

NORMAL SITUATION LIKE I STARTED SAYING WHERE YOU HAVE, LIKE, LETTER OF PROTECTION DOCTORS. THEY'LL COME IN AND SAY THE SURGERY IS GOING TO BE X AMOUNT, ANOTHER EXPERT COULD COME IN AND SAY, WELL, I THINK THE REASONABLE VALUE IS X AMOUNT, AND IN CLOSING ARGUMENT COUNSEL SAYS THIS IS WHAT WE THINK THE VALUE IS GOING TO BE, AND THE JURY FIGURES IT OUT.

>> WHAT JURY INSTRUCTION WOULD GUIDE THE JURY BASED UPON THE EVIDENCE THEY HEARD ON THAT AMOUNT THIS.

>> JUST THE STANDARD INSTRUCTIONS ON WHAT MEDICAL REIMBURSEMENT IS SUPPOSED TO BE, THAT IT'S THE REASONABLE VALUE OF SERVICES.

THERE ARE PLENTY OF CASES FROM THIS COURT SAYING IT'S NOT WHAT'S WRITTEN ON THE BILL, NOT, YOU KNOW, JUST WHAT ANY DOCTOR CLAIMS I'M GOING TO CHARGE FOR IT, WHAT'S THE REASONABLE VALUE, WHAT'S THE MARKET RATE IN A FREE MARKET ECONOMY, HOW MUCH ARE THEY WILLING TO ACCEPT TO DO THIS.

AND THAT'S WHAT THIS OPINION SAYS AS TO THESE PARTICULAR DAMAGES, AS TO, YOU KNOW, MEDICARE DAMAGES, THAT'S WHAT HIS ACTUAL COST IS GOING TO BE.

>> WELL, BUT THAT'S-- CAN I JUST GO BACK TO THIS AND FOLLOWING UP JUSTICE POLSTON, \$100,000 IS WHAT, HE NEEDS THE SURGERY FOR \$100,000.

AND THE-- BUT IF MEDICARE ENDS UP COVERING IT IN THE FUTURE, HE'LL-- IT WILL ONLY COST \$25,000.

BUT THERE'S EVIDENCE THAT MEDICARE, IF HE GETS A TORT RECOVERY BASED ON 25,000 BUT HE GETS PAIN AND SUFFERING AND OTHERS, SO HE GETS SAY A TOTAL

OF 100,000, THAT-- AND HE,
FIRST THING HE NEEDS TO DO IS
HAVE THIS SURGERY, AND IF
MEDICARE DOESN'T COVER THAT
SURGERY, THEN HE'S PAYING
\$100,000, HIS WHOLE TORT
RECOVERY IS WIPED OUT BECAUSE IF
MEDICARE HAS A POLICY THAT
THEY'RE NOT GOING TO START
PAYMENT IF IT'S A TORT RECOVERY.
SO WE, IS A JURY GOING TO HEAR
THAT?

IN OTHER WORDS, THAT IT'S, YOU
REALLY, NO, NOT UNTIL YOUR TORT
RECOVERY IS WIPED OUT DO YOU GET
TO START TO GET THE ADVANTAGE OF
THIS MEDICARE OR THAT--
MEDICARE THAT THIS DISABLED
PERSON IS ENTITLED TO?

WHAT ABOUT THAT?

DO THEY HAVE THE RIGHT TO
EXPLAIN HOW MEDICARE WORKS SO
THAT IT ISN'T AS SIMPLE AS STATE
FARM IS SAYING?

>> WELL, I THINK THERE'S TWO
PARTS TO THAT.

FIRST, AGAIN, THE SECOND
DISTRICT'S OPINION SAYS THIS IS
JUST EVIDENCE FOR THE JURY TO
CONSIDER.

THEY CAN REJECT IT--

>> I'M ASKING YOU A SPECIFIC
QUESTION.

DOES THE PLAINTIFF THEN WHEN
THEY'RE CONSIDERING IT GET TO
CALL A MEDICARE EXPERT TO TALK
ABOUT HOW MEDICARE LOOKS AT TORT
RECOVERIES?

AND HOW THEY-- BOTH THE TOTAL
AMOUNT, WHAT THEY REIMBURSED?
AND PART OF THAT REALLY WOULD BE
WHAT THEY'RE GOING TO GET FOR
THE PAST BECAUSE HOW DO YOU EVEN
START TO DISTINGUISH THE PAST
AND THE FUTURE?

>> IF THAT IS THE CASE AND,
AGAIN, I THINK THIS IS WHERE I
DON'T KNOW WHY THERE SHOULD BE A
LINE DRAWN BETWEEN, YOU KNOW,
THE EASTER SEALS EXAMPLE AND

MEDICARE AS FAR AS THIS IS A
FREE BENEFIT TO MR. JOERG--
>> YEAH, BUT HERE'S-- DO WE
HAVE A STATUTE THAT SAYS, AGAIN,
GOING BACK TO WHAT HAPPENED IN
THE PAST, THAT THE JURY DID NOT
HEAR THAT THE PAYMENTS WERE MADE
BY MEDICARE?

>> CORRECT.

>> AND THAT'S BECAUSE THE
LEGISLATURE HAS SAID THAT THEY
HAVE DISTINGUISHED MEDICARE FROM
FREE BENEFITS.

SO YOU'VE GOT THIS ANOMALY THAT
THE JURY WOULDN'T HEAR ANYTHING
ABOUT WHAT HAPPENED IN THE PAST
BECAUSE OF WHAT YOU CONCEDED IS
THE LAW, BUT NOW WE'RE GOING TO
HAVE THIS SPECULATION ABOUT THE
FUTURE.

BUT ONLY BECAUSE THIS PARTICULAR
PERSON HAD THE MISFORTUNE OF
BEING BORN DISABLED.

>> WELL, I THINK THAT'S WHAT
PUTS THIS CASE-- AND I STARTED
OUT BY SAYING THAT WAS WHAT PUTS
THIS CASE AS BEING DIFFERENT
FROM ANY OTHER.

AND THE SECOND DISTRICT EVEN
SAID IN ITS OPINION THERE IS NO
PRECEDENT THAT GOVERNS THIS
PARTICULAR SITUATION THAT WE CAN
FIND IN FLORIDA LAW.

WHICH, I THINK, I DON'T-- I
WANTED TO SAY AT THE OUTSET IS
WHY I DON'T BELIEVE THERE'S ANY
EXPRESS AND DIRECT CONFLICT
HERE.

THERE CAN'T BE ON THE OPINION--

>> THE MISAPPLICATION OF
STANLEY.

>> WELL--

>> MISAPPLICATION AS WELL BEING
ASSERTED AND IN ADDITION TO ALL
THOSE OTHER CASES FROM THE LOWER
COURTS.

>> AND THAT'S--

>> THERE'S ANOTHER MEDICARE
CASE, ISN'T THERE, IN THE
DISTRICT COURT?

>> MEDICARE THAT WAS PAID FOR BY THE PLAINTIFF.

THAT'S WHAT DISTINGUISHES THIS ONE, IS THIS IS A PARTICULAR SITUATION--

>> I DON'T SEE WHERE STATE FARM HAS PROVED IN THIS RECORD THAT THIS WAS NOT PAID FOR IN SOME WAY, I'M SORRY.

YOU MAY KEEP SAYING THAT.

I'D LIKE TO KNOW WHERE IT IS IN THE RECORD, AND WE'LL TAKE A LOOK AT IT.

BUT WE LOOKED FOR IT AND COULDN'T FIND IT.

>> WELL, AGAIN, THAT WAS SOMETHING THAT WAS A MATTER-- I'LL AGREE WITH YOU THAT THERE IS NO ACTUAL PROOF THERE.

THAT WAS A MATTER OF ARGUMENT THAT WAS CONCEDED DURING THE MOTION IN LIMINE HEARING THAT THIS IS A FREE BENEFIT TO HIM. AND, AGAIN--

>> I DON'T SEE WHERE ANYTHING WAS CONCEDED BY THE PLAINTIFF THAT HE DIDN'T HAVE TO, THAT THIS WAS, THAT HE DIDN'T HAVE TO PAY FOR IT IN SOME WAY.

>> HIS ARGUMENT WAS HE'S ELIGIBLE SIMPLY BECAUSE HE WAS BORN AS A DISABLED PERSON.

>> YOU AND I READ THAT TRANSCRIPT TOTALLY DIFFERENTLY THEN.

I READ IN THERE THE ARGUMENT ABOUT HIS FAMILY AND THIS IS MEDICAID AND THAT MONEY IS DEDUCTED FROM SSI.

THAT'S WHAT I READ IN THAT TRANSCRIPT.

>> AS TO, AGAIN--

>> [INAUDIBLE]

>> THERE ARE DIFFERENT TYPES OF--

>> WASN'T THAT THE POSITION OF THE PLAINTIFF?

THAT'S ALL I'M ASKING.

>> AS TO PART OF MEDICARE.

THERE'S, LIKE I SAID, THERE'S

PART A, PART B, SSI, SSDI.
THE SSDI, THERE ARE NO PREMIUMS
EVER PAID FOR THAT.

SO, I MEAN, THERE ARE PARTS,
THAT WOULD BE A MATTER OF
EVIDENCE.

>> I DON'T SEE PROOF OF THAT IN
THE RECORD.

>> THAT'S BY STATUTE.

>> WHAT STATUTE NUMBER IS THAT?
I DON'T SEE THAT IN THE BRIEF
EITHER.

[INAUDIBLE CONVERSATIONS]

>> I DON'T HAVE THE STATUTE
NUMBER FOR YOU, BUT IT'S FROM
THE GOVERNMENT'S SSA WEB SITE,
IT IS SSA.GOV/SSI TEXT
ELIGIBILITY.

AND IT SAYS "UNLIKE SSDI, SSI,
THERE'S ABSOLUTELY NO WORKING
REQUIREMENT, NO PREMIUMS ARE
PAID.

SO YOU DON'T HAVE TO WORK A
CERTAIN NUMBER OF QUARTERS, YOU
DON'T HAVE TO HAVE A RELATIVE
WHO'S WORKED, IT IS AN
ABSOLUTELY FREE BENEFIT.

SO, AGAIN, I THINK THAT'S A
MATTER OF EVIDENCE MOVING
FORWARD, WE CAN SAY THAT STUFF
DOESN'T GET TO COME IN BECAUSE
HE'S PAID FOR OUT OF HIS SOCIAL
SECURITY.

THIS TOUGH DOES.

IT'S ALWAYS ABOUT PUTTING THE
EVIDENCE BEFORE THE JURY.

THAT'S ALL THIS COURT-- AND I
SEE I'M DOWN TO JUST A FEW
SECONDS TO SEE IF THE COURT HAS
ANY FURTHER QUESTIONS.

>> I HAVE A QUESTION.

>> YES, SIR.

>> IS IT TRUE THAT THE TORT
RECOVERY, MEDICARE WILL NOT PAY
GOING FORWARD, FUTURE PAYMENTS?
TO MEDICAL?

>> THEY WILL DEMAND
REIMBURSEMENT OUT OF THE
RECOVERY.

YOU HAVE A MEDICARE SET-ASIDE

ACCOUNT--

>> I UNDERSTAND THERE'S REIMBURSEMENT UP TO THAT POINT, BUT WE'RE TALKING THE FUTURE.

>> I'M SORRY, I DON'T UNDERSTAND.

>> WELL, IS IT TRUE THAT MEDICAID-- MEDICARE WOULD NOT COVER FUTURE MEDICAL COSTS ONCE THERE'S A TORT RECOVERY?

>> IT WILL COVER IT, BUT IT REQUIRES REIMBURSEMENT OUT OF THE TORT RECOVERY.

THAT'S WHY THERE'S A--

>> IS THAT A DOLLAR-FOR-DOLLAR REIMBURSEMENT?

>> YES.

>> OKAY.

>> WHICH IS NOTHING MORE THAN, AGAIN, NOTHING MORE THAN SAYING, OKAY, HE'S ACTUALLY GOING TO HAVE TO PAY FOR HIS MEDICAL CARE, SO LET'S DECIDE HOW MUCH TO GIVE HIM TO PAY FOR HIS MEDICAL CARE, WHAT'S THE REASONABLE VALUE FOR THAT? IF IT'S THE MEDICARE RATES, THE FULL RACK RATES OF WHAT'S BILLED, THAT'S FOR THE JURY TO DECIDE.

>> OKAY, THANK YOU.

>> THANK YOU.

>> REBUTTAL?

>> THANK YOU, YOUR HONORS. JUSTICE PERRY, I'D LIKE TO ANSWER YOUR QUESTION FIRST, IF I CAN.

BY REFERENCE TO THE U.S. V. BAXTER CASE AND THE EARLY V. CARNIVAL CASE, BOTH OF THOSE CASES WHICH ARE CITED AT PAGE 13 OF OUR INITIAL BRIEF EXPLAIN THAT MEDICARE DOES NOT PAY IF THERE IS A TORT RECOVERY IN THE CASE.

THEY CALL IT A SETTLEMENT, BUT IT REFERS TO A JUDGMENT OR A VERDICT OR A SETTLEMENT.

AND THEN WHAT THEY FURTHER SAY IS WE CAN MAKE CONDITIONAL

PAYMENT BE YOU DON'T HAVE THE MONEY YET, OR IF WE ACCIDENTALLY PAY, WE'RE GOING TO COME GET IT BACK.

THAT'S EXACTLY WHAT THEY SAY, AND WE EXPLAIN THAT.

>> BUT IS THERE SOMETHING, IS THERE A TENSION THOUGH BETWEEN THAT ISSUE WHICH IS THE RIGHT OF REIMBURSEMENT WHICH WOULD POTENTIALLY OCCUR IN ANY PRIVATE INSURANCE WHERE THERE IS SUBROGATION--

>> YES.

>>-- AND THE IDEA THAT THE PLAINTIFF IS ASKING FOR \$100,000 WHEN REALLY-- AND, TO ME, IT COULD OCCUR, SEE, I SEE IT THE SAME WITH PRIVATE INSURANCE FOR THE FUTURE--

>> IT IS.

>>-- THAT YOU'RE REALLY NEVER GOING TO HAVE TO PAY \$100,000. YOU'RE GOING TO PAY A NEGOTIATED RATE.

SO WOULDN'T IT TO BE, IF WE'RE REALLY GOING TO CHANGE THE LAW ON THIS, WE SORT OF HAVE TO GO AND JUST SAY IF YOU IN THE PAST GOT THESE BENEFITS AT LOWER RATES, IT'S LIKELY YOU'RE GOING TO GET THEM IN THE FUTURE.

YOU SHOULDN'T ASK FOR THE HIGHER AMOUNT, AND I THINK THIS WOULD OPEN THIS CAN OF WORMS--

>> EXACTLY, YOUR HONOR.

THERE'S NO DIFFERENCE AS TO FUTURE BENEFITS AT A DISCOUNT. THIS REALLY IS A DISCOUNT.

IT'S JUST LIKE A PRIVATE INSURANCE HMO DISCOUNTS, AND THIS COURT HAS ALREADY HELD IN THE SHEFFIELD CASE THAT WE'RE NOT GOING TO ALLOW THE JURY TO HEAR EVIDENCE AS TO FUTURE DAMAGES IF THE PLAINTIFF IS GOING TO BE ENTITLED TO A DISCOUNT ON THOSE SERVICES.

SO ARE WE GOING TO TREAT MEDICARE DIFFERENTLY?

AND THE ANSWER SHOULD BE, NO,
WE'RE NOT, WAS IT IS EARNED--
BECAUSE IT IS EARNED, IT'S PAID
FOR, THERE'S A RIGHT OF
REIMBURSEMENT, THERE'S AN
OBLIGATION OR A LIABILITY.
BECAUSE, LET'S GO BACK TO THE
BASIC PRINCIPLE HERE, THE
COLLATERAL SOURCE RULE.
THIS IS, UNDER THE COMMON LAW
DEFINITION, THE BROAD DEFINITION
OF COLLATERAL SORTS, A PAYMENT
FROM SOMEONE OTHER THAN THE
TORTFEASOR.

WE DO NOT TELL THE JURY ABOUT
THOSE THINGS.

>> ARE WE REALLY TALKING THOUGH
ABOUT THE SETOFF OF THE-- IS
STATE FARM TRYING TO SET IT OFF
DOLLAR FOR DOLLAR IN MY
HYPOTHETICAL, THE 25, AND SAYING
REDUCE THE DAMAGES BY THAT
AMOUNT, OR ARE WE ARGUING ABOUT
WHAT SHOULD BE THE REASONABLE
AMOUNT OF DAMAGES, THE 25 NOT
THE 100?

>> WELL, YOUR HONOR, THE SETOFF
WE KNOW FROM CASE LAW FROM THIS
COURT AND FROM OTHER COURTS, THE
SETOFF IS UNDER THE STATUTE.
IT APPLIES TO ONLY CERTAIN
ENUMERATED BENEFITS AND APPLIES
ONLY IN THE PAST.

THE SETOFF ONLY WORKS IF YOU
KNOW WHAT THE NUMBER IS.
AND MEDICARE IS ACCEPTED FROM
THE STATUTE.

SO AS TO THE FUTURE, THERE'S
GOING TO BE THIS SPECULATION
THAT IT'S NOT GOING TO BE A
SETOFF.

WE DON'T KNOW WHAT THE NUMBER IS
YET.

WE DON'T KNOW WHETHER LUKE IS
GOING TO CONTINUE TO QUALIFY.
COUNSEL ARGUED WE KNOW FOR SURE
HE'S GOING TO QUALIFY FOR LIFE.
WE DON'T KNOW THAT.

IT'S THE SAME PROBLEM THAT--

>> I'M TRYING TO FIND OUT WHAT

THE ISSUE IS, WHAT THE ARGUMENT REALLY IS ABOUT.

IS IT ABOUT THE DECREASED COSTS, OR IS IT ABOUT THE DEFENSE TRYING TO SEEK THE WHOLE THING BEING REDUCED?

>> WHAT THEY ARGUED, YOUR HONOR, THEIR PROFFER-- WHICH WAS VERY GENERIC-- WAS DR. LOAN STEEN, WHO'S THEIR EXPERT, CAN SAY MR. JOERG HAS MEDICARE BENEFITS, HE CAN GO TO THE DOCTOR IF HE NEEDS THE DOCTOR, IF HE NEEDS THERAPY, THAT WOULD BE COVERED, AND IT WOULD BE AT THE REDUCED COSTS.

MEDICARE'S GOING TO COVER MOST OF THE COSTS.

THEY WANTED TO COME IN AND SAY HERE'S WHAT MEDICARE'S GOING TO PAY FOR THAT.

NOBODY KNOWS WHETHER ANY FUTURE BENEFIT IS GOING TO BE AVAILABLE.

NO COURT HAS ALLOWED A DEFENSE ATTORNEY TO TELL THE JURY THE PLAINTIFF'S GOING TO HAVE THESE OTHER BENEFITS IN THE FUTURE TO REDUCE THIS--

>> [INAUDIBLE]

SEEKING A TOTAL AMOUNT OF DAMAGES, AND THEY'RE PUTTING NUMBERS ON THE BOARD THROUGH AN EXPERT WITNESS, THESE ARE MY DAMAGES.

>> YES.

>> IS THE DEFENSE ALLOWED TO COME IN AND SAY THOSE ARE NOT THE TOTAL AMOUNT OF DAMAGES, THOSE ARE INFLATED DAMAGES--

>> ABSOLUTELY.

>>-- AND ONLY GET PAID AT A REDUCED COST?

>> WELL, THEY'RE NOT ALLOWED TO SAY WHY THE REDUCTION IS THERE, WHETHER IT'S BECAUSE OF PRIVATE INSURANCE OR MEDICARE.

HOWEVER, A DEFENDANT WOULD BE ALLOWED TO SAY THESE DAMAGES ARE EXCESSIVE.

STATE FARM DID NOT SAY THAT IN THIS CASE.

STATE FARM NEVER APPEALED THE DENIAL OF ITS REMITTER--

>> SO BUT FOR THE USE OF EVIDENTIARY STANDARDS, THEY'RE ARGUING-- THEY'RE NOT ALLOWED TO SAY IT'S AT A REDUCED COST BECAUSE OF THIS PROGRAM IN.

>> CORRECT, YOUR HONOR.

AND THE DIFFERENCE HERE OR IS TO SAY THIS IS AN EVIDENTIARY ISSUE.

AND IF WE REMAND FOR A I NEW TRIAL, YOU'RE GIVING STATE FARM THE OPPORTUNITY TO PUT IN THIS EVIDENCE THAT THEY SHOULD HAVE DONE THE FIRST TIME THAT THEY FAILED TO DO, AT BEST.

>> THEY COULD ARGUE BECAUSE YOU'RE NOT ALLOWED TO CLAIM MORE THAN WHAT WAS PAID, DOCTOR SO AND SO, YOU'RE SAYING THIS HOSPITALIZATION IS GOING TO COST \$100,000.

DIDN'T YOU TWO YEARS AGO DO A SIMILAR HOSPITALIZATION, AND IT WAS ONLY 20,000?

>> ABSOLUTELY.

BECAUSE ALL WE'RE ALLOWED TO PUT IN, ALL ANY PLAINTIFF IS ALLOWED TO PUT IN IS THE ACTUAL COST OF THE PAST DAMAGES--

>> SO THEY CAN ARGUE THE REASONABLE VALUE OF THE FUTURE IS AT LEAST INDICATED IN PART BY WHAT--

>> IN RELATIONSHIP TO WHAT IT WAS IN THE PAST.

YES, YOUR HONOR, ABSOLUTELY.

>> OKAY.

YOU'RE WAY OVER.

>> THANK YOU, YOUR HONOR.

>> WE HELPED YOU WITH THAT THOUGH.

>> THANK YOU.

>> WE'RE IN RECESS FOR TEN MINUTES.

>> ALL RISE.

