IN THE DISTRICT COURT OF APPEAL IN AND FOR
THE STATE OF FLORIDA
FIFTH DISTRICT

CASE NO. 5D10-3188
(Lower Court) No. 2006-CA-002655-15-G

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, a foreign corporation,

Appellant,

vs.

MARK W. DARRAGH,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE 18TH
JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

JEFFREY M. BYRD, ESQ.
Fla. Bar. No.: 0959596
JEFFREY M. BYRD, P.A.
2620 E. Robinson Street
Orlando, FL 32803
Telephone: (407) 423-1313
Fax: (407) 422-5297
Attorney for Appellee

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PRELIMINARY STATEMENT

The Appellee, MARK W. DARRAGH, will be referred to throughout as "Appellee" OR "DARRAGH". The Appellant, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, will be referred to throughout as "Appellant" or "NATIONWIDE". The following citation references will be used: "R.__" for the record, and "T.__" for the trial transcripts contained within the Record.

STATEMENT OF THE CASE AND OF THE FACTS

For purposes of this Answer brief, Appellee will not restate all of those matters asserted by the Appellant, but rather re-incorporates those matters herein except where Appellant has omitted certain other material matters from the initial brief.

Accordingly, the parties stipulated in a Joint Pre-trial Statement, the following: on or about April 12, 2004, the Plaintiff, Mark W. Darragh was driving a motor vehicle on State Road 17-92 in Seminole County, Florida. It was admitted by the parties that at that time and place, another motorist named Ms. Beulah Michael negligently operated her motor vehicle when she made a left turn from the center lane. As a result, the vehicle of Plaintiff Mark W. Darragh was sideswiped, and his vehicle was pushed over a concrete median. For the purposes of this litigation, Beulah Michael is an underinsured motorist, and Nationwide, as the Plaintiff's Uninsured Motorist carrier, was liable for the damages that the jury determined were caused by Ms. Michael's negligence. It was also admitted by the parties that the Plaintiff, Mark W. Darragh, was injured on April 12, 2004, and it was further admitted that those injuries caused the Plaintiff the expense of medical care and treatment that through the date of trial was reasonable, related and necessary. It was also agreed that the injuries caused by the accident were permanent in nature. The

Plaintiff contended he would continue to suffer injuries in the future. The Defendant disputed the extent of Plaintiff's damages as a result of the motor vehicle accident. Therefore, the issue for the jury's determination was calculating the amount of such damages, both past and future (R.310-312).

Appellee filed suit on December 22, 2006, when the Appellee was unable to obtain a resolution of his Underinsured Motorist claim with his own insurance company, NATIONWIDE (R. 1-5). After an initial continuance at the Defendant's request (R. 202-204), the case proceeded to trial on July 20, 2009. The matter of the amount of damages was submitted to the jury, which resulted in a fully favorable jury verdict on July 24, 2009. The jury awarded DARRAGH the total amount of $3,994,461.63. (R. 487-488). Despite Appellant's trial tactics designed to minimize the damages, the jury determined by its verdict that the Plaintiff sustained a variety of significant damages caused by the subject crash, and the jury included compensation for past medical expenses and lost wages, compensation for future medical expenses and lost wages, and compensation for past and future pain and suffering. (R. 487-488).

Prior to trial, the parties filed competing Motions in Limine relating to important aspects of the damages issues. On July 14, 2009, the Trial Court heard argument on the issue of whether to introduce the full amount of medical bills at

trial, with supporting memorandum of law, and also the issue of whether to take Judicial Notice of the Military benefits that Darragh alleged he lost due to the crash. One of the significant elements of the Plaintiff's damages was the value of his lost military benefits following his involuntary medical discharge after 15 years of service from the Air Force. It was undisputed that prior to the subject crash, the Plaintiff had been enlisted in the Air Force and remained a member of the United States Air Force and Air National Guard for a total period of 15-16 years. It was also undisputed that in 2005, the Plaintiff was involuntarily medically discharged from the military due to medical reasons solely related to his permanent back injuries. (R. 400-413) DARRAGH valued those lost wages benefits at over 1 million dollars based upon easily verifiable formulas enacted by Congress to calculate the pay of all service members. No evidence to the contrary was ever presented at trial, but rather NATIONWIDE argued against the admission of the value of such losses on the basis of hearsay.

After hearing the facts and matters of law, the Trial Court over-ruled NATIONWIDE'S hearsay objections and determined the evidence attached to Plaintiff's Motion for Judicial Notice was admissible as an exception to the hearsay rule. (R. 930-931). Evidence (including both documents and testimony) was presented at length at trial to substantiate the length of DARRAGH's service in the

military, the ranking, his involuntary medical discharge, the modifications made to his military service due to his injuries before the involuntary discharge from service, his desire to continue in the military beyond the minimum of 20 years, and the losses he attributes to failing to reach 20 years due to the crash injuries and the method by which those figures were calculated. (see trial transcript, Volume III, pages 431-443, and Volume IV, pages 562-606). As is clearly shown in the trial transcript, all the calculations done by DARRAGH were done with precision, and in doing the calculations, DARRAGH erred on the side of being too low rather than too high (see page 602, line 25, and page 605, line 8). Based upon the accurate calculations which are the product of the United States Congress's formulas to pay retired enlisted members of the service, the precise loss through the age the Government Life Tables showed to be DARRAGH'S life expectancy was $718,775.38 (see page 605, line 17), which is to the penny what the jury awarded for future lost wages (R. 487), clearly indicating that the Jury found the testimony to be credible and accurate.

During the cross-exam of DARRAGH, NATIONWIDE'S counsel claims he sought to "impeach" the Plaintiff with evidence outside the record, and with his prior deposition testimony. What was the intended impeachment was quite unclear from the trial record, even in the face of a proffer. (T. 617-636).

Essentially, NATIONWIDE wanted to apparently impeach the Plaintiff with figures that showed his lost wages were 1.8 million, instead of $718,000. Apparently NATIONWIDE wanted to refer to documents that were never marked for Identification purposes, nor ever moved into evidence, and DARRAGH's counsel requested that any such impeachment be based upon actual record evidence. NATIONWIDE decided to not mark any such evidence for appellate review, nor are the documents identified adequately in the Trial transcript. At this point it would be speculation as to what NATIONWIDE had intended, other than it was not permitted by the Trial Court as it related to matters outside the record evidence, so the objection of Plaintiff was sustained. (T. 625, lines 10-15 and 626, lines 7-12). Indeed, the Plaintiff was concerned that NATIONWIDE intentionally interjected the irrelevant issue into evidence and that a Motion for Mistrial was necessary if an adequate curative instruction was not given. (T. 625, lines 16-22). It was also clear to the trial Court that part of NATIONWIDE's questions were designed to invade attorney/client privilege (T. 620-621, 628). Furthermore, after NATIONWIDE presented its proffer, it did not ask the trial Court to revisit its ruling based upon any presentation of evidence during the proffer. (T. 632, line, 13). NATIONWIDE argues that it was improperly prevented by the trial Court

from impeaching the Plaintiff, yet no reading of the transcript at trial even makes it clear what NATIONWIDE was precluded from doing?

Furthermore, on the topic of the medical bills, the Trial Court reviewed the Florida Supreme Court case of Goble vs. Frohman, 901 So. 2d 830 (Fla. 2005), and Florida Statute 768.76 (1), and based upon the Florida Supreme Court decision in Goble and based upon the clear language found in Florida Statute 768.76, the Court allowed DARRAGH to publish to the jury the full billed medical charges over Defendant's objection, and the Court preserved the Defendant's right to have a post-trial reduction of such damages. The Court also ruled that the matter of health insurance was not to be presented to the jury; as such evidence would violate the collateral source rule. (R-928-929)

Prior to closing arguments, the Court conducted a Jury Instructions charge conference. (T. 520). The only Jury Instruction in dispute was whether the Court would give Jury Instruction 6.10 on the reduction of economic future damages to present day value. NATIONWIDE argued that it should be given "just because" it was a Standard Instruction, while DARRAGH opposed it on the basis that the statute upon which it was based, Florida Statute 768.77, had been completely changed. (T 520-543). The trial Court initially took the matter under advisement after hearing the arguments of both sides (T. 542). The next morning, July 23, 2009,

additional documents were supplied to the trial Court, including the legislative history from the Senate Committee on the Judiciary, and those committee notes with respect to the changed legislation passed in the 1999 regular session. That legislative intent explained that 768.77 repealed the requirement that juries calculate future economic damages after a reduction to present value, and that the change was intended to simplify the verdict form and to cause a reduction in some of the confusion for jurors. The only legal authority that NATIONWIDE presented the trial Court in support of its position that the Present Value Reduction was still required in 2009, were very old cases that predated the 1999 change to 768.77; therefore, they were of little consequence to the trial Court which was entrusted with the duty to charge the jury with the **current** state of the law. Additionally, the trial Court recognized that no evidence was presented to the jury in any form by an economist to allow them to understand how to reduce the future economic damages to present day value. (T. 538, lines 10-16). Based upon a review of the legislative history, and a clear change in 768.77, upon which the Jury Instruction was previously predicated, the Court denied the requested Jury Instruction 6.10, which was consistent with DARRAGH's argument that the reduction to present value was no longer required by statute. (T.551-552)

Closing arguments began on the morning of July 24, 2009. DARRAGH sought damages, based upon the evidence presented during trial, totaling in excess of $7,000,000. (T. 715–734). NATIONWIDE argued the total damages of the Plaintiff caused by the crash were $584,000 (T. 749). The jury awarded DARRAGH a total amount close to the middle of what each party proposed, $3,994,461.63. (R. 487-488).

After the jury's verdict of July 24, 2009, NATIONWIDE filed rather boiler-plate post-trial motions seeking a New Trial (R. 874-876), and also Remittitur (R. 872-873). NATIONWIDE did not set their motions for hearing. Both Motions were denied by the Trial Court on August 7, 2009, without a hearing. (R-877-878). Thereafter, NATIONWIDE filed a Motion to reduce the Verdict to the UM policy limits of $200,000.00 (R. 879-927).

After a year of delays, a hearing was held on September 14, 2010, which resulted in a Judgment being entered for the policy limits of $200,000 but the Judgment also expressly stated that the parties agreed that, but for the limitations imposed by the subject insurance policy, the Plaintiff would have been able to recover a judgment in the amount of $3,922,047.20 (which is the verdict minus various set-offs due to health insurance write-offs plus credits for premiums paid). (R. 932-933). Further, the Judgment expressly provided that if DARRAGH should

ultimately prevail in his action for bad faith damages against NATIONWIDE, then DARRAGH would be entitled to a judgment, in accordance with the jury's verdict, for his damages in the stipulated verdict/net judgment amount of $3,922,047.20 plus interest, plus any other damages permitted by law as a product of bad faith litigation.

This appeal follows. Until this appeal is concluded on its merits, the "bad faith" litigation expressly reserved in the Judgment cannot proceed.

SUMMARY OF THE ARGUMENT

The trial Court correctly declined to give Florida Standard Jury Instruction 6.10 based upon a finding that it was not the current state of the law, after the legislature repealed portions of Florida Statute 768.77. The Legislative intent shows that the Legislature repealed that requirement in order to make the jury process much less confusing.

Further, the trial Court correctly followed the law permitting the entire incurred medical expenses to be submitted to the jury based upon the Florida Supreme Court decision in Gobel, and Florida Statute 768.76(1). Also, the trial Court did not abuse its discretion in its handling and ruling upon the evidence related to DARRAGH's future lost military benefits, as NATIONWIDE's hearsay objections were not proper, for which multiple exceptions to hearsay applied.

Finally, the jury verdict in this case was not excessive in as much as it was much less than what the Appellee himself sought, and was based upon the evidence presented at trial. Therefore, the trial Court did not abuse its discretion in failing to reduce such verdict, especially when the Appellee's boilerplate Motion set for no basis for the Court to conduct such calculations.

ARGUMENT

The Trial Court did not commit error, nor abuse its discretion in any respects throughout the lengthy trial of this case. Appellee will respond to the alleged errors in the order presented by the Appellant in its initial brief.

I. THE TRIAL COURT DID NOT COMMIT ERROR IN DECLINING TO GIVE DEFENDANT'S REQUESTED JURY INSTRUCTION 6.10 AND VERDICT FORM 8.1, REGARDING REDUCTION TO PRESENT VALUE BECAUSE THE STATUTE UPON WHICH IT WAS BASED WANT CLEARLY CHANGED BY 2009.

The Appellant cites numerous cases for the proposition that "there are numerous Florida cases which hold that the failure to give Jury Instruction 6.10, when properly preserved, is reversible error", and then NATIONWIDE cites to numerous old cases that specifically interpret a statute that no longer exists as it did previously. Yet, rather conveniently (or perhaps intentionally) NATIONWIDE does not cite the very statute upon which the Standard Jury Instruction is based! That which was previously Standard Jury Instruction 6.10, entitled "Reduction to Present Value" is properly cited by NATIONWIDE, but "Notes on use and comment" were omitted. The Standard Jury instruction note #1 specifically refers to the **1989 version** of Florida Statute 768.77.

The 1989 version of Florida Statute 768.77(2) reads as follows: "Each category of damages, other than punitive damages, shall be further itemized into

amounts intended to compensate for losses which have been incurred prior to the verdict and into amounts intended to compensate for losses to be incurred in the future. **Future damages itemized** under paragraph (1)(a) **shall be computed before and after reduction to present value**. Damages itemized under paragraph (1)(b) or paragraph (1)(c) shall not be reduced to present value. In itemizing amounts intended to compensate for future losses, the trier of fact shall set forth the period of years over which such amounts are intended to provide compensation." (emphasis supplied).

Based upon that **older** version of the statute, all of the case law cited by NATIONWIDE that relies upon and interprets the prior versions of the statute (pre-1999) would be correct. All of the cases cited in the footnotes to Standard Jury Instruction 6.10 would support the granting of the instruction, if one were to ignore the fact that the statute upon which it was based had completely changed. Nowhere in its Initial Brief does NATIONWIDE **even acknowledge the statutory basis for the Jury Instruction**! By not even citing to the relevant statute, or put the changes to such statute into proper context, NATIONWIDE conveniently ignores the current state of the law in Florida.

The remainder of the "Notes on use and comment" state as follows: "The Supreme Court opinion approving publication of basic itemized forms for personal

injury and wrongful death cases states: 'The committee may wish to prepare an additional instruction advising a jury on how to reduce future damages to present value.' Designing a standard instruction is complicated by the fact that there are several different methods used by economists and courts to arrive at a present value determination. [string cites enumerating the various calculation methods are omitted] Until the Supreme Court **or the legislature** adopts one approach to the exclusion of other methods of calculating present money value, the committee **assumes** that the present value of future economic damages is a finding to be made by the jury on the evidence; or, if the parties offer no evidence to control that finding, that the jury properly resorts to its own common knowledge as guided by SJI 6.10 and by argument." (emphasis added)

Respectfully, the committee never changed the Standard Instruction 6.10 when the **legislature** decided to repeal and delete the previous requirement from the statute! Therefore, this case should not be based upon the Jury Instruction Committees "assumptions" that are contrary to the statutory law. In 1999, in response to aggressive lobbying efforts by the insurance industry, the legislature enacted sweeping tort reform changes as part of the Tort-Reform act of 1999. The Legislature **entirely deleted** subsection (2) of 767.77 in 1999. The Legislative history clearly explains the reason for the deletion: "Itemized Jury Verdicts.

Section 7 amends 768.77, F.S., relating to itemized verdicts, to **repeal** the requirements that the trier of fact itemize and calculate on the verdict form economic damages before and after reduction to present value and to specify the period of time for which future damages are intended to provide compensation. This section may have the effect of simplifying the verdict form and reducing some of the confusion for jurors" (emphasis added). *Senate Committee on Judiciary*, published legislative history on HB 775—Civil Litigation Reform. When Governor Jeb Bush signed this sweeping legislation into law, no longer were juries required to reduce their verdicts on future economic damages to present money value. The legislature approved the approach that the Jury Instructions Committee was waiting for. The Jury Instruction Committee just did not get the memo, apparently and respectfully, so it's "assumption" was no longer a valid one after 1999.

NATIONWIDE's citing of old cases as a basis for still giving the Instruction also makes no sense as the instructions are supposed to reflect the **current state of the law at the time of trial.** Indeed, the Preamble to the Standard Jury Instructions book provides that the Standard Instructions may **not reflect the current state of the law**: "Because of changes in the law, these instructions may become outdated or in need of revision or supplementation.

Although the committee expends substantial effort in preparing standard instructions, the Florida Supreme Court does not express an opinion as to their correctness. For these reasons, parties remain free to contest a standard instruction's legal correctness or to request additional or alternative instructions." What good what this Preamble be if the sole basis for why an instruction should be given is because it is in the book? That is essentially all NATIONWIDE argued at trial. Plus they presented outdated law that interpreted the older version of 768.77. That does not reflect the status of the law in 2009, when this case was tried.

Not to complicate matters further, but 768.77 was changed again, effective September 15, 2003. The change has no bearing on the correctness of giving SJI 6.10, but it shows that at no time did the legislature decide to revert back to the old statute requiring reduction to present value.

> 767.77(2) In any action for damages based on personal injury or wrongful death arising out of medical malpractice, whether in tort or contract, **to which this part applies** in which the trier of fact determines that liability exists on the part of the defendant, the trier of fact shall, as a part of the verdict, itemize the amounts to be awarded to the claimant into the following categories of damages:
>
> (a) Amounts intended to compensate the claimant for:
>
> 1. Past economic losses; and
>
> 2. Future economic losses, **not reduced to present value**, **and the number of years or part thereof which the award is intended to cover**;

(emphasis added)

NATIONWIDE argued at trial that the legislature, by only limiting the "not reduced" to medical malpractice cases, intended to leave it for everything else. Where does it say that? Further, NATIONWIDE argued that the Court had to engage in statutory construction to interpret the intent of the statute. "The **legislature obviously knew** that it couldn't make that limitation, and it didn't do it in 2003. **There's a reason this thing is still in the standard jury instructions. I can't tell you for sure why**, but **I am guessing** it's because of this. It is still in the standard jury instructions" (T. 535, lines 12-18, emphasis added) That is a weak argument, and now NATIONWIDE says the Court committed error when the best that NATIONWIDE could do at trial was "guess" because it could not "tell you [the trial Court] why for sure"??? **Is this claim of error by the trial Court a joke**? Talk about an invitation to commit error! The Appellant could not say "why" it was error, just that it was, and when the Court was given the actual changed statutory language, and the actual legislative history to explain the statory change, the best NATIONWIDE can say is "I can't tell you why...I am guessing...[but] it is still in the standard jury instructions".

Respectfully, the law has changed, and the Jury Instructions do not reflect the change in the law. There was no common law right to a reduction of future

economic damages to present day value. It was purely a creature of statute, and when the legislature decided to delete that requirement by repealing that portion of the statute due to the unnecessary confusion it caused in jury trials, the trial Court **followed** the current state of the law by not giving the instruction.

The only (apparently) current case that NATIONWIDE cites in support of its position is Milton v. Reyes, 22 So. 3d 624 (Fla 3d DCA 1999). Respectfully, that decision is not binding on this District Court nor is it of any precedence value. That decision was not decided until December 9, 2009, many months after this trial concluded, so the trial Court obviously could not have had the benefit of the decision. How could the trial Court commit error in not following a decision that had not even been published? That is impossible! Further, the point NATIONWIDE relies upon in Milton was one that was **conceded** on appeal, **for unknown reasons**, and therefore the appeals Court in Milton reversed the verdict solely for the purpose of retrial of the jury's award of damages for future medical expenses. From the cited facts in Milton, it is not clear if that accident occurred before the changes made in 1999, or after. It is not clear why the concession was made. Indeed, that decision relied upon the **1983** decision of Seaboard Coast Line R.R. Co. v. Burdi, 427 So. 2d 1048, 1050 (Fla. 3d DCA 1983), the same case that NATIONWIDE relies upon herein. In contrast, there is no concession made in

this pending case, as the Appellee still stands by the position expressed at trial, as confirmed by the changed statute, 768.77, and by the legislative history explaining the reasons and purposes of the changes to avoid jury confusion.

Therefore, the Trial Court could **not** have committed error when the best explanation NATIONWIDE could offer at the time of trial was based on a "guess" without stating "why" the Instruction needed to be given any longer in light of the clearly changed statute upon which the instruction was based.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE FULL MEDICAL BILLS INTO EVIDENCE AS THAT IS THE REQUIREMENTS UNDER THE LAW

The trial Court correctly ruled that the full medical bills go into evidence, and are thereafter reduced at a post trial hearing by the amount of collateral sources paid or written off. That is exactly what the Court did in this case at the post-trial hearing held a year after the trial. Such is the recognized procedure set forth by the Supreme Court in Goble v. Frohman, 901 So2d 830 (Fla. 2005), and the longstanding common law collateral source rule **excluding** evidence of collateral sources **during trial.** The plain language of the Collateral Source Statute, F.S. 768.76(1), which provides in part,

> "In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, ***the court*** shall reduce the amount of such award by the total of all amounts which have been paid for

> the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists." (Emphasis Supplied)

Therefore, when F.S. 768.76(1) of the collateral source statute applies, the proper procedure to be followed is to allow admission of the **full amount of medical bills into evidence with a post trial set-off by the court** for any contractual collateral source adjustments.

DARRAGH has undergone years of medical treatment, including multiple medical procedures and surgeries. Appellee's medical, hospital and rehabilitative care were paid for, in part, by Appellee's PIP auto insurance (the Appellant herein), Appellee's private health insurance, and/or cash. In addition, many of Appellee's bills are still outstanding and not paid by any insurer or collateral source. NATIONWIDE wanted to limit the evidence that Appellee presented to the jury regarding the medical bills actually incurred.

As support, NATIONWIDE cited Thyssenkrupp Elevator Corp. v. Lasky, 868 So.2d 547 (4th DCA 2003). Thyssenkrup was not relied upon by the trial court to preclude admission into evidence of the full bills considered, adjusted and paid by Medicare (which frankly does not apply under the facts of this case). Simply put, that decision stands for the same proposition that the Appellee is

stating herein. ***There shall be no double recovery by the Plaintiff for damages that have been written off or adjusted by Medicare.*** In this case, Appellee did NOT REQUEST a windfall or double recovery but rather wanted to present evidence of the actual past medical bills for 5 distinct purposes:

1. To prevent the jury from hearing any evidence of a collateral source covering some or part of the bills;
2. To present evidence of the extent and seriousness of Appellee's injuries;
3. To present to the jury evidence of what future medical bills may look like;
4. To present to the jury evidence of non-economic damages; and
5. To avoid jury confusion.

The Fourth district in Thyssenkrup also expressly acknowledged that the sole issue in front of the Court was to prevent the jury from awarding Plaintiff a windfall. The Court made no mention of other reasons why a jury may hear evidence of the actual medical bills incurred thus the trial Court did not read into Thyssenkrup more than what the opinion expressly states, which is that the Plaintiff shall not get a windfall for adjustments or reductions of medical bills. In this case, the Appellee was not asking for such a windfall but rather sought to

present to the jury evidence of the actual medical bills incurred for other very specific purposes as discussed above.

In Goble v. Frohman, 848 So.2d 406 (Fla. 2nd DCA 2003) (hereinafter "Goble I"), the **trial court denied defendant's Motion in Limine** which sought to limit evidence of past medical bills to only those amounts actually paid by the HMO provider. **Instead, the court followed the collateral source statute, admitted the full amount of the bills and reduced or set-off the verdict post trial by the amount of the contractual reductions.** The plaintiff appealed the reduction arguing a contractual reduction or adjustment was not a "benefit paid or available" subject to a set-off. The defendant filed a cross appeal arguing the court erred by excluding evidence of the contractual discounts, which is the functional equivalent of only allowing the amounts of the reduced bills into evidence. The second district disagreed with both positions holding that contractual discounts or reductions should be set-off and **affirmed** the trial court's decision to exclude evidence at trial regarding collateral source benefits.

In affirming the court's decision, the Goble I court analyzed the purpose and function of the collateral source rule. It recognized that the collateral source rule "functions as both a rule of damages and a rule of evidence." Id at 410. "The evidentiary rule prohibits the admission of evidence regarding collateral sources in

the liability trial because it misleads the jury on the issue of liability. Id. (quoting Gormley v. GTE Prods. Corp., 587 So.2d 455 (Fla. 1991). "There generally will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance type benefits." Id. (quoting Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975)). Most importantly "evidence of contractual discounts received by managed care providers is insufficient, standing alone, to prove that non-discounted medical bills were unreasonable." Id. (quoting Hillsborough County Hosp. Auth. v. Fernandez, 664 So.2d 1071 (Fla. 2d DCA 1995).

Under this reasoning, it was clear to the trial court that limiting a plaintiff to admitting into evidence only the amounts of contractually adjusted or reduced medical bills, which was the functional equivalent of admitting evidence of collateral sources, violated the purpose and intent of the common law and statutory collateral source rules. Instead, the trial Court decided to follow the clear procedure outlined in Goble I and affirmed by our Supreme Court in Goble v. Frohman, 901 So.2d 830 (Fla. 2005) (hereinafter "Goble II"), which was to admit the full amount of Plaintiffs' medical bills, and set-off post trial any contractual adjustments or reductions made by the collateral source provider. **To follow any other procedure would have been clear error in light of the express language**

of the collateral source statute and the unequivocal holdings of the second district court of appeals and our Supreme Court. That was the purpose of the extensive Memo of Law filed by the Appellee with the trial Court on this vary topic! (R. 414-426). The trial Court reviewed the Memo of law, and made the correct ruling in denying NATIONWIDE's Motion in Limine on this topic.

Strangely and conveniently omitted from NATIONWIDE's Initial Brief is a case that NATIONWIDE should be quite familiar with, which is **directly on point**, but yet not referenced as the current state of the law in Florida. Nationwide Mutual Fire Insurance Company v. Harrell, 53 So. 3d 1084 (Fla. 1st DCA 2010), considered **all of the very same arguments advanced by NATIONWIDE in this case**, and ruled "the trial court correctly applied the collateral source rule when it overruled Defendant's objection and permitted Plaintiff to introduce into evidence the full medical bills (and to request from the jury the full bills). Harrell went on to further state:

> Appellant's first contention on appeal is that the trial court abused its discretion when, notwithstanding a timely objection, it permitted appellee to introduce into evidence (and to request from the jury) the **gross** amount of her **medical bills**, rather than the lesser amount paid by appellee's private health insurer in full settlement of the **medical bills**, because it misled the jury as to the true amount of appellee's damages. In support of this position, appellant cites a number of cases, all of which appellant contends hold that it is reversible error to permit evidence of the gross amount of medical bills, rather than the amount actually paid in full settlement of those

> bills. However, as appellee correctly points out, all of those cases involved payments made on the injured plaintiff's behalf by Medicare, rather than by a private insurance provider. We conclude that, as a result, all of those cases are distinguishable from this case because, here, the payments were made by appellee's private health insurer. the gross amount of her medical bills."

How convenient that NATIONWIDE advances the same exact argument that was rejected in Harrell, without even acknowledging in this current appeal that Harrell even exists. For the same exact reasons expressed in the Harrell decision, the Trial Court did not commit error in deciding to follow the exact wording of both the Supreme Court decision in Goble v. Frohman, 901 So2d 830 (Fla. 2005), and the plain language of the Collateral Source Statute, F.S. 768.76(1), by conducting a post-trial hearing on these issues.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE APPELLEE'S TESTIMONY REGARDING CALCULATIONS OF LOST MILITARY BENEFITS DESPITE NATIONWIDE'S CLAIMS OF HEARSAY

The Appellee testified at trial that but for his injuries, it was his desire to remain in the military at least until his military retirement benefits vested at 20 years, and more than likely he would have continued thereafter. The Appellee also testified that he did everything in his power to remain enlisted in the military, but for medical reasons beyond his control, the military deemed him "not fit for service".

As a result, the Appellee has lost out on continued military pay up to the point of retirement, and more significantly, his military retirement pension benefits after the point of retirement. He precisely calculated those benefits, and thoroughly explained those calculations to the jury.

NATIONWIDE continually objected to such damages testimony by claiming that data found on military websites (that is relied upon by military members) is inadmissible due to hearsay. This argument fails in many respects. 1) the "data" or information is all the product of acts of the U.S. Congress, 2) the "formula" upon which the Appellee relied is found in the U.S. Code, and 3) the Plaintiff did not let the website "calculate" the information for the jury, but rather he explained, step by step, how he calculated the precise figures with an excel spreadsheet that he simply created after applying the factors and formula that were all set forth by the U.S. Government to apply to all service member, active and reserve. As the trial transcript bears out, the Appellee was intimately familiar with the data, and methodology necessary to properly calculate his own losses. Just because the formula is contained on a military website does not mean that the formula is inadmissible, when the formula is derived from Acts of Congress, which the trial Court was required to take judicial notice of.

Florida Statutes §90.201 provides that the Court **must** take judicial notice of "Decisional, constitutional, and public statutory law and resolutions of the...Congress of the United States". Similarly, Florida Statutes §90.202 provides that the Court **may** take judicial notice of: (1) Special, local, and private acts and resolutions of the **Congress of the United States**...", (5) "**Official actions of the legislative, executive, and judicial departments of the United States**...", (12) "**Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned**.", and (13) **Official Seals of governmental agencies and departments of the United States...**". Pursuant to Florida Statutes §90.201 and §90.202, the Appellee had requested the Court take judicial notice of the following: Pursuant to the Acts of Congress, the U.S. Air Force has a formula that is used to calculate the Retirement Pay Benefits of Regular, Guard and Reserve Retired, which is found at the Air Force's website: www.arpc.afrc.af.mil/library/factsheets/factsheet_print.

At the bottom of the Air Force's website is a link that takes you to the mathematical formula that is effective pursuant to the various United States Codes. According to this formula, a corresponding website created by the Office of the Secretary of the Defense generates a Military Pay and Benefits 40-year projection table. This

information is available for review and determination at the United State government's website:

http://www.defenselink.mil/militarypay/mpcalcs/Calculators/FinalPayHigh3.aspx?calcType=final.

The Defense Finance and Accounting Service (DFAS), is the accounting firm of the U.S. Department of Defense. Under the guidance of the Department of Defense, the Defense Finance and Accounting Service (DFAS) is the agency responsible for paying America's service members. The information relating to entitlement to military retirement/pension benefits also appears at 10 U.S.C.S. §1406 and §6333.

Accordingly, all the proper predicate was laid out by the Appellee to cite all Congressional references to formulas, rankings, and pay scales. The Appellee explained those issues at length at trial, and he created an Excel spreadsheet that shows, to the penny, all of the losses he would incur in the future. This was all placed in evidence for the jury to review in their deliberations.

The 1st DCA in DeLoach v. DeLoach, 590 So.2d 956 (Fla. 1st DCA 1992), affirmed the lower court's taking judicial notice of 10 U.S.C.S. §1406 and §6333, which establishes a service member's retirement benefits and the method for

computing retired or retainer pay according to such base pay, in determining the non-member spouse's entitlement to member spouse's pension/retirement benefits.

In the instant case, the calculation of the amount of the Appellee's future retirement/benefits was not subject to dispute because they were based on figures that appear in the U.S.C.S. and which are calculated and disbursed by the Defense Finance and Accounting Service (DFAS), the accounting firm of the U.S. Department of Defense, and were capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.

Accordingly, the Plaintiff requested that the Court take judicial notice of the foregoing formulas and projection tables as applied to DARRAGH and permit such information be published to the jury under appropriate charges in accordance with Florida Standard Jury Instructions. The trial Court did just that after considering all the evidence presented for the jury's consideration. NATIONWIDE keeps arguing that the websites are not admissible, but they miss the point that the data and formulas referenced in the websites are the product of acts of Congress and other Governmental Agencies regulations, so therefore, it is not the website, but rather the formula that was relevant to the Appellee's calculations. (See T. page 393-399, 411-412) The Court ruled that the websites of the military were "public record" exceptions to the hearsay rule (T. 400-401), but those websites do nothing more that

explain in layman's terms those things that were already codified in the U.S. Code, and which the trial Court already took judicial notice of (T. 388 to 409). The Court specifically ruled that "the Court did not need expert testimony or testimony from the people who created the Website. It's a Government website. It's a public record. The information that's coming from these Government websites, at this point, I am going to let in." (T. 409 - 410). The Court also did not find credible NATIONWIDE's objections on hearsay, and compared the information in the military websites to being no different than going to the Florida Statutes online "and printing the stuff off of that? It's the same statutes that's in the books. It's just printed from the website. I mean, is there a difference between that and what this is?" (T. 410, lines 13-21). Finally the Court ruled: "If it makes everyone's life easier, I can certainly take -- and have taken – judicial notice of the Federal Code, and , you know, the formulas contained therein. So, instead of introducing pieces of paper talking about it, you could practically read it to the jury and just plug in your figures with the chalk board." (T. 412, lines 12-19).

Finally, the Court also entertained the same claims of error presented by NATIONWIDE herein, that the excel spreadsheet created by DARRAGH was either "hearsay" or that DARRAGH lacked the expertise to create it. DARRAGH referred the Court to the Rule of Evidence that allows for the use of summaries of data

compilations. For example, the parties agreed to use of a medical record summary so that the jury did not have to calculate the data regarding the incurred medical bills. The Lost Retirement Benefits calculations were no different. All the Excel Spreadsheet chart represented was mathematical calculations with the amount of benefits that you would receive for pay, based on a set formula by the Government. While DARRAGH could have done it year by year with a calculator in front of the jury, the Rules of Evidence allow for "summaries" in these circumstances. (T. 413-422).

Florida Statute § 90.956, entitled "Summaries" provides:

> When it is not convenient to examine in court the contents of voluminous writings, recordings, or photographs, a party may present them in the form of a **chart**, **summary**, or **calculation** by calling a qualified witness. The party intending to use such a summary must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place. A judge may order that they be produced in court.

After hearing the argument presented, and the explanations for the Excel spreadsheet chart, the Court in its discretion ruled that the chart would be permitted to come into evidence if the proper foundation were laid, and the Court

overruled NATIONWIDE's hearsay objections to the document. (T. 422). Indeed, that proper foundation was laid during the trial (T. 597-606)

NATIONWIDE also claims that DARRAGH was somehow unqualified to calculate his own losses by inputting into the Government's formula certain known data (constants), times has pay rate, times the standard cost of living increases, and then producing a spreadsheet to show the jury the precise calculations. NATIONWIDE claims he needs to be either an accountant or some sort of economist to do this. That is pure silliness. How is that any different than creating a "times table" in math class? DARRAGH testified at length that he was "very well versed in Excel", that he was an adjunct professor at a community college in Kentucky, and part of his instruction as a professor was in teaching college students how to create Excel spreadsheets. He pulled the formula used to create the Excel spreadsheet straight from the Government's Air Force Regulation Instruction 36-3209. (T. 650-651)

This required no "expert" testimony, but even still, DARRAGH's qualifications show that he is an "expert" at creating Excel Spreadsheets. NATIONWIDE has presented no legal authority that compelled an "expert" to perform such mathematical calculations. Nevertheless, DARRAGH has sufficient enough understanding to be an "expert" at creating Excel Spreadsheets as

someone who is a college professor and teaches other students how to create such documents. Pursuant to Florida Statute § 90.702, "If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial." DARRAGH does not contend that "expert" testimony was needed as NATIONWIDE does, but even if, for sake an argument, an "expert" were needed to present an Excel Spreadsheet, then the Appellee satisfied that requirement based upon his own skill, knowledge, experience training and education.

Lastly, as it relates to this section, NATIONWIDE contends it was error for the Court to prevent NATIONWIDE from impeaching the Plaintiff with his prior inconsistencies. During the cross-exam of DARRAGH, NATIONWIDE'S counsel claims he sought to "impeach" the Plaintiff with evidence outside the record, and with his prior deposition testimony. What was the intended impeachment was quite unclear from the trial record, even in the face of a proffer. (T. 617-636). Essentially, NATIONWIDE wanted to apparently impeach the Plaintiff with figures presented by his attorney at the hearing held a week before trial that showed his lost wages were 1.8 million, instead of $718,000. But at trial, it was

explained that the prior printout was done in error, as it related to an "active" military member, and not a "reservist". (T. 396-397). Reservists do not start getting retirement benefits until nearly 60 years old, whereas active members get such benefits upon their retirement after 20 years of service. The differences were large. Whereas before it appeared DARRAGH's benefit was 1.8 million, in following the formula that applies to reservists, it reduced the amount to a low of $718,000. Apparently NATIONWIDE wanted to refer to documents that were never marked for Identification purposes, nor ever moved into evidence, and DARRAGH's counsel requested that any such impeachment be based upon actual record evidence. NATIONWIDE decided to not mark any such evidence for appellate review, nor are the documents identified adequately in the Trial transcript. At this point it would be speculation as to what NATIONWIDE had intended, other than it was not permitted by the Trial Court as it related to matters outside the record evidence, so the objection of Plaintiff was sustained. (T. 625, lines 10-15 and 626, lines 7-12).

The Plaintiff was concerned that NATIONWIDE intentionally interjected the irrelevant issue into evidence and that a Motion for Mistrial was necessary if an adequate curative instruction was not given. (T. 625, lines 16-22). It was also clear to the trial Court that part of NATIONWIDE's questions were designed to

invade attorney/client privilege (T. 620-621, 628), by asking the Plaintiff what arguments his attorney made on his behalf in Court a week earlier.

The Court would not allow impeachment on matters outside the record evidence, and NATIONWIDE never made the documents part of the record for purposes of impeachment. When the Court sustained the objections, NATIONWIDE made a proffer that still was inadequate to demonstrate any form of "impeachment by a prior inconsistent statement". Furthermore, after NATIONWIDE presented its proffer, it did not ask the trial Court to revisit its ruling based upon any presentation of evidence during the proffer. (T. 632, line, 13). NATIONWIDE argues that it was improperly prevented by the trial Court from impeaching the Plaintiff, yet no reading of the transcript at trial even makes it clear what NATIONWIDE was precluded from doing?

NATIONWIDE's claims of error on this issue were not preserved. It is ironic that NATIONWIDE discovered an error, brought it to DARRAGH's attention before trial, and then when the error was corrected, NATIONWIDE wanted to impeach DARRAGH not based upon an error made at trial, but rather based upon an error made pre-trial. (see NATIONWIDE's Brief at pages 42-43). It is axiomatic that matters outside the record at not admissible at trial, unless and until they are made part of the record at trial. So the Defendant wanted to impeach

someone on fixing a problem and presenting accurate testimony at trial, with evidence of mistakes made before trial? There was never an argument made that the math at the time of trial was wrong, so referring to errors outside the record would have served no beneficial purpose!

If NATIONWIDE contends that the trial Court committed errors in excluding evidence, where is the evidence proffered to the trial clerk? To preserve such claimed error, you must proffer the excluded evidence at trial. §90.104, Florida Statutes; Fla. R. Civ. P. 1.450(b). The clerk must keep a record of the evidence excluded (mark exhibits, etc.). "[T]he substance of the evidence [must be] made known to the court by offer of proof or [must be] apparent from the context within which the questions were asked". §90.104, Florida Statutes. In this case, NATIONWIDE did not present a full proffer. Indeed, it is debatable what NATIONWIDE had even intended to ask from review of its proffer. (T. 627-632)

Excluded documents should be marked for identification with a number and described fully in the record. These documents become part of the record on appeal even if they have been excluded. Brantley v. Snapper Power Equipment, 665 So.2d 241 (Fla. 3d DCA 1996). NATIONWIDE did not mark any such documents in the record. The "prior inconsistent deposition testimony" was not even made part of the record, other than select questions that were not the

Plaintiff's own answers, but rather were questions directed to a document used at trial that was never made part of the record during trial itself. Therefore, this claimed "error" was not even preserved by NATIONWIDE (not that DARRAGH agrees an error occurred anyway), even if it can be said that the trial Court committed error.

IV. THE JURY VERDICT WAS NOT EXCESSIVE IN AS MUCH AS IT WAS MUCH LESS THAN WHAT THE APPELLEE HIMSELF SOUGHT, AND WAS BASED UPON THE EVIDENCE PRESENTED AT TRIAL.

During the closing arguments, DARRAGH sought damages, based upon the evidence presented during trial, totaling in excess of $7,000,000. (T. 715–734). NATIONWIDE acknowledged that the Plaintiff's damages were not slight, and acknowledged that the total damages of the Plaintiff caused by the crash were at least $584,000 (T. 749). The jury awarded DARRAGH a total amount close to the middle of what each party proposed, $3,994,461.63. (R. 487-488). Now NATIONWIDE argues it is "clearly excessive and improper". What?

After the jury's verdict of July 24, 2009, NATIONWIDE filed very boilerplate post-trial motions seeking a Remittitur (R. 872-873). NATIONWIDE did not set their motion for hearing. The Motion was denied by the Trial Court on August 7, 2009, without a hearing. (R-877-878).

NATIONWIDE is now essentially asking this Court to serve as a "seventh juror" in a case where NATIONWIDE admitted fault, admitted permanency as it relates to DARRAGH'S multiple surgeries and pain injection procedures, admitted reasonableness of all the past medical bills, and whose only defense was "how much is enough"? In Smith v. Brown, 525 So. 2d 868 (Fla. 1988), the Florida Supreme emphasized that the "reasonableness standard" applied to the trial court's determination that a jury verdict was against the manifest weight of the evidence. Justice Grimes, writing for the Court, succinctly explained the roles of the trial and appellate courts:

> [T]he trial judge should refrain from acting as an additional juror. Laskey v. Smith, 239 So.2d 13 (Fla.1970). Nevertheless, the trial judge can and should grant a new trial if the manifest weight of the evidence is contrary to the verdict. Haendel v. Paterno, 388 So.2d 235 (Fla. 5th DCA 1980). In making this decision, the trial judge must necessarily consider the credibility of the witnesses along with the weight of all of the other evidence. Ford v. Robinson, 403 So.2d 1379 (Fla. 4th DCA 1981). The trial judge should only intervene when the manifest weight of the evidence dictates such action. However, when a new trial is ordered, the abuse of discretion test becomes applicable on appellate review. The mere showing that there was evidence in the record to support the jury verdict does not demonstrate an abuse of discretion.

Similarly, in Brown v. Stuckey, 749 So. 2d 490 (Fla. 1999), regarding inadequate or excessive verdicts, the issue to be determined is whether the verdict is

contrary to the manifest weight of the evidence. A new trial may be ordered on the grounds that the verdict is excessive or inadequate when (1) the verdict shocks the judicial conscience or (2) the jury has been unduly influenced by passion or prejudice. The procedure under section 768.74, Florida Statutes (1997), for remittitur and additur apply only upon the proper motion of a party. Regardless of whether a new trial was ordered because the verdict was excessive or inadequate or was contrary to the manifest weight of the evidence, the appellate court must employ the reasonableness test to determine whether the trial judge abused his or her discretion. In this Case, the trial Court most certainly did not "abuse his discretion" in failing to reduce the verdict. NATIONWIDE provided absolutely NO GUIDANCE in its Motion as to how to reduce the verdict, and why. Indeed, NATIONWIDE proposed no figure at all.

In Hendry v. Zelaya, 841 So. 2d 572, 575 (Fla. 3d DCA 2003), the Court clearly addressed what happens when a party moving for Remittitur fails to suggest an amount to the trial Court. Hendry never suggested an amount for the trial court to grant as a remittitur. "Even at oral argument, Hendry could not give the court a figure which his client would consider as not excessive. In Brown v. Estate of Stuckey, 749 So.2d 490, 498 (Fla. 1999), the Florida Supreme Court stated that the "procedure under section 768.74, Florida Statutes (1997), for

remittitur and additur apply only upon the **proper motion** of a party." (emphasis added). We do not consider a motion for remittitur or additur which never suggests a figure to be a proper motion under the statute. What Hendry really wants is not a remittitur, but a new trial. Thus, we will review his motion as one seeking a new trial." Accordingly, NATIONWIDE's Motion claiming "excessiveness" of the jury verdict also **fails** procedurally. And further the Court did not abuse its discretion in denying NATIONWIDE's flawed post-trial motions.

CONCLUSION

The Judgment entered following the jury's verdict in this case should be affirmed, as it was not the product of errors or abuses of discretion by the trial Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 21st day of July, 2011, to: Richard Sherman, Esquire, 1777 South Andrews Ave., Suite 302, Fort Lauderdale, FL 33316.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Answer Brief of Appellee complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Jeffrey M. Byrd, Esquire
Florida Bar # 0959596
Jeffrey M. Byrd, P.A.
2620 E. Robinson Street
Orlando, FL 32803
(407)423-1313
Attorneys for the Appellee