O/a 5-8-90

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 74,861

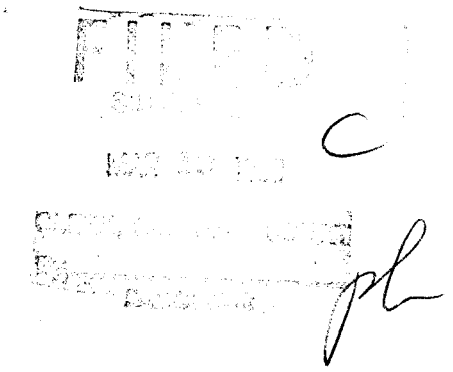
PAUL GORMLEY and JOSEPHINE GORMLEY,

Petitioners,

vs.

GTE PRODUCTS CORPORATION, ETC., ET AL.,

Defendants,



DISTRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS ON BEHALF OF PETITIONERS

Nancy Little Hoffmann, Esquire
NANCY LITTLE HOFFMANN, P.A.
2929 East Commercial Boulevard
Barnett Bank Tower, Suite 502
Fort Lauderdale, Florida 33308
305/771-0606

TABLE OF CONTENTS

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

QUESTION PRESENTED

WHETHER THE CONFLICT CREATED BY THE DECISION IN THIS CASE SHOULD BE RESOLVED BY QUASHING THIS DECISION, OVERRULING PFISTER V. PARKWAY GENERAL HOSPITAL, AND REAFFIRMING THE RULE ESTABLISHED IN COOK V. ENEY THAT ADMISSION OF IMPROPER COLLATERAL SOURCE EVIDENCE IS PRESUMED TO HAVE ADVERSELY AFFECTED A JURY'S VERDICT OF NO LIABILITY.

PREFACE

This brief is submitted on behalf of the Academy of Florida Trial Lawyers, which has been granted leave to appear as amicus curiae supporting the position of the Plaintiffs, PAUL AND JOSEPHINE GORMLEY. In this brief, the parties will be referred to either by name or as they appeared before the trial court. Any emphasis appearing in this brief is that of the writer unless otherwise indicated. Reference to the Appendix to this brief will be by A.1-6.

STATEMENT OF THE CASE

This products liability case was tried to a jury, resulting in a defense verdict. Plaintiffs appealed on the basis inter alia that the trial court had erred in permitting Defendants to introduce into evidence, and comment upon, a sworn proof of loss statement which they had submitted to their homeowner's insurance carrier after the defective television set caused a fire in their home.

The District Court of Appeal, Third District, after hearing oral argument on the appeal, sua sponte scheduled a rehearing en banc on the question of whether the court should recede from an earlier opinion, Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973), which had held that a plaintiff's liability case is presumed to have been prejudiced when the trial court erroneously admits evidence on the issue of receipt of collateral benefits.

On September 26, 1989, the Third District rendered an en banc opinion in which it held that the trial court did err in

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER - SUITE 502 - 2028 EAST COMMERCIAL BOULEVARD, FORT LAUDERDALE, FL 33308 - (305) 771-0606

admitting the proof of loss statement over the Plaintiffs' objection, the court stating that Defendant "was not entitled to show that the Gormleys were insured for the losses under their homeowner's policy and had therefore likely received collateral source benefits." Gormley v. GTE Products Corporation, 549 So.2d 729, 730 (Fla. 3d DCA 1989). The Third District further acknowledged that under its 1973 ruling in Cook v. Eney, this error would have required a new trial on both liability and damages, because the error was presumed to have affected the liability as well as the damage verdict. The court further acknowledged that its longstanding Cook decision had been consistently followed not only in the Third District but in other District Courts of Appeal decisions since that time. Noting that there were several apparently conflicting decisions, however, a 4-3 majority of the court announced that it now considered the better rule to be followed would be that "evidence of the receipt of benefits from collateral sources affects only the question of damages in the absence of a showing that it affects the question of liability." Gormley, supra at 731 (A.3). The stated basis for this change, without further analysis, was that the Cook rule "runs counter to the supreme court rule that the burden to demonstrate on appeal that an error was harmful is upon the appellant." Id. at 731 (A.3).

After stripping the Plaintiffs of their presumption of prejudice and holding that they now had the burden of establishing that the jury found against them on the liability

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER • SUITE 503 • 2930 EAST COMMERCIAL BOULEVARD, FORT LAUDERDALE, FL 33308 • (305) 771-0606

issue because of the improper evidence, the majority found that the Plaintiffs had failed to carry their newly assigned burden, and affirmed judgment for the Defendant. Id. at 732 (A.4).

The dissenting opinion (Chief Judge Schwartz, joined by Judges Hubbart and Ferguson) found there was no basis in the law for departing from the long standing Cook rule, because that rule was both "independently well founded" and "supported by a virtual unanimity of authority to the same effect." Id. at 732 (A.4). The dissent pointed out that there is a long series of decisions from the Third District which cite, rely upon and follow Cook, including very recent decisions; that the decision of this Court in Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983) strongly indicated an identical holding; and that Cook had also been followed by a series of decisions from other District Courts of Appeal in Florida. The dissent further pointed out that Cook was based on a United States Supreme Court decision on the same question, and that it was supported by a series of analogous Florida cases in which improper references to insurance have been held adversely to affect the question of the defendant's liability. Gormley at 732-733 (A.4-5).

Both the majority and dissenting opinions discussed the applicability of the "two-issue" rule, apparently agreeing that said rule should not impact upon a Cook v. Eney situation, although one case cited by the majority as establishing "conflict," [Pfister v. Parkway General Hospital, Inc., 405 So.2d 1011 (Fla. 3d DCA 1981), rev. den. 413 So.2d 876], on similar

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER - SUITE 530 - 9250 EAST COMMERCIAL BOULEVARD FORT LAUDERDALE, FL 33322 - (305) 776-2222

facts, based its decision squarely upon the "two-issue" rule without ever mentioning Cook v. Eney.

Plaintiffs have sought review of the Third District Court of Appeal en banc decision to recede from Cook v. Eney, based upon express and direct conflict with decisions from other District Courts of Appeal and from this Court which have followed the Cook v. Eney rule.

STATEMENT OF THE FACTS

The Academy adopts the statement of the facts as set forth by Plaintiffs in their initial brief on the merits.

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER • SUITE 503 • 2030 EAST COMMERCIAL BOULEVARD, FORT LAUDERDALE, FL 33308 • (305) 771-0606

SUMMARY OF ARGUMENT

The Academy suggests that this Court should disapprove the Third Disrict's decision to recede from Cook v. Eney, since that decision has been followed in all the District Courts of Appeal for many years and is based on unassailable principles of fairness as well as sound legal reasoning. Departure from established precedent should be approved only where there is sufficient justification, such as widespread societal or technological developments which mandate a change in the law to protect citizens' rights. Here, however, a sharply divided court has decided, 4-3, to change a long-standing substantive rule of law for no apparent reason other than to attempt to have it conform to an irrelevant rule of appellate procedure. We urge this Court to quash that decision and approve the rule established in Cook v. Eney.

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW

ARGUMENT

THE CONFLICT CREATED BY THE DECISION IN THIS CASE SHOULD BE RESOLVED BY QUASHING THIS DECISION, OVERRULING PFISTER V. PARKWAY GENERAL HOSPITAL, AND REAFFIRMING THE RULE ESTABLISHED IN COOK V. ENEY THAT ADMISSION OF IMPROPER COLLATERAL SOURCE EVIDENCE IS PRESUMED TO HAVE ADVERSELY AFFECTED A JURY'S VERDICT OF NO LIABILITY.

The Third District Court of Appeal, sitting en banc, was of the unanimous view that the trial court erred in admitting the insurance statement in this case over Plaintiffs' objection, finding a clear violation of the general rule prohibiting the introduction of evidence of the receipt of collateral source benefits. The court held that while the Defendant was entitled to try to convince the jury that the Gormleys had inflated their property losses, it was not entitled to show that they were insured under their homeowner's policy and had therefore likely received collateral source benefits. That conclusion is well supported in the law. See Walker v. Hilliard, 329 So.2d 44 (Fla. 1st DCA 1976); Skislak v. Wilson, 472 So.2d 776 (Fla. 3d DCA 1985); Miami Beach Texaco, Inc. v. Price, 433 So.2d 1227 (Fla. 3d DCA 1983).

The Third District also unanimously agreed that at the time this case was tried, and for the preceding 16 years, such an error would have required reversal for a new trial on both liability and damages.

Nonetheless, for reasons which are neither adequately explained in the majority's opinion nor supported by the law, the four to three majority of the court decided to change the law in this area. Instead of ordering a new trial, the majority held

that the Plaintiffs were no longer entitled to rely upon the presumption that the unfair trial resulting from the inadmissible insurance evidence affected the jury's finding of liability as well as damages. After placing this new burden upon the Plaintiffs, the majority then found that Plaintiffs had failed to carry it, and affirmed the judgment for the Defendant.

In deciding to change this long-standing rule of law, the majority did not give even lip service to principles of stare decisis, much less recite any established legal basis for departing from that doctrine in this case. As this Court held years ago in Old Plantation Corporation v. Maule Industries, Inc., 68 So.2d 180 (Fla. 1953), a court should respectfully consider the rule of stare decisis before changing a long-standing precedent. Even where a persuasive argument for change has been made, a court should not make such a change unless the argument is not only persuasive but "overwhelming." In deciding to follow prior case law regarding the applicable statute of limitations in a slander of title action, this Court stated

> If it were not for the fact that the overwhelming weight of authority is to the effect that the same statute governs both actions, and that such had been the law of the land for so long, we might be persuaded to that view. Respect for the rule of stare decisis impels us to follow the precedents we find to have governed this question for so long. This is especially true where the argument to change is persuasive but not overwhelming. We think the greatest good will be achieved and the greatest stability in the law maintained by adhering to the weight of authority instead of plowing new ground, especially when the only result would be to enlarge the time within which an action for slander of title could be commenced.

Id. at 183.

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER - SUITE 506 - 2000 EAST COMMERCIAL BOULEVARD FORT LAUDERDALE, FL 33308 (305) 771-0606

The Gormley majority, in receding from Cook v. Eney despite the fact that it had generated a considerable following around the state, failed to cite any of the exceptions to the doctrine of stare decisis which have on occasion been recognized by the courts in rare and unusual cases. This is not a situation where a rule has become outmoded or obsolete due to large-scale social and legal changes, or where continued existence of a rule of law was found to be fundamentally unjust, or where there was clear conflict in controlling decisions which required a choice between two existing rules of law. See Joseph v. State, 447 So.2d 243, 249-251 (Fla. 3d DCA 1983) (Hubbart, J., dissenting). Although the majority purported to find some cases in conflict with Cook v. Eney and its considerable progeny, thus requiring the court to "choose the rule to be followed," Gormley at 731, an examination of the cited cases reveals that no such conflict exists.

Peppe v. Clow, 307 So.2d 886 (Fla. 3d DCA 1974) is not even on point, since it involved a situation where the plaintiff introduced improper insurance evidence and recovered a verdict in his favor, and that error obviously would not require a retrial on liability. Cook involves the situation where the offending evidence may have influenced the jury to reach a verdict of no liability, thus requiring a retrial on liability as well as damages.

Pfister v. Parkway General Hospital, Inc., supra, also does not stand for the proposition for which it was cited by the majority, i.e., that a new trial on damages only is a sufficient

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER • SUITE 503 • 2028 EAST COMMERCIAL BOULEVARD, FORT LAUDERDALE, FL 33308 • (305) 771-2626

remedy to cure the error of admitting collateral source evidence. Pfister never reached that issue, nor did it even consider the effect of Cook v. Eney; rather, the court based its ruling on the "two-issue" rule.1/ Both the majority and the dissent in Gormley agree that the two-issue rule does not impact on the question of whether the Cook rule should continue to be followed. Pfister did not find that a new trial on damages would have been a sufficient remedy; indeed, in Pfister the defendant was found negligent as a matter of law. The Pfister court simply held that because a special interrogatory verdict was not used, it could not determine whether the jury may have based its decision on an alleged lack of causation. Since Pfister does not even mention Cook, one cannot say whether the Cook rule was simply not advanced by the plaintiff in that case or whether it was advanced and rejected. Pfister thus appears to be something of an anomaly in the case law which, while not in actual conflict with Cook, should be overruled because of its improper reliance on the two-issue rule and because Pfister apparently determined as a matter of law that collateral source evidence impacts only on damages -- a rule which would conflict even with the Gormley majority.

While the two-issue rule will not be dispositive here, it should be noted that Pfister and the more recent decision of

---

1/ This is a rule of appellate procedure established by this Court in Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978) which requires affirmance where the error affects only one of several separate issues and it cannot be determined from the verdict which issue was the basis for the jury decision.

Gonzalez v. Leon, 511 So.2d 606 (Fla. 3d DCA 1987), rev. den. 523 So.2d 577 (Fla. 1988), insofar as they appear to extend the two-issue rule to multiple elements in a single cause of action, may no longer be good law after this Court's decision in First Interstate Development Corporation v. Ablanedo, 511 So.2d 536 (Fla. 1987). The Academy shares Judge Ferguson's concerns in Brown v. Sims, 538 So.2d 901 (Fla. 3d DCA 1989), rev. pending Case Nos.: 73,949 and 73,964, that until a definitive pronouncement is made by this Court on the issue, practitioners in the Third District Court of Appeal will run the very serious possibility of having meritorious points on appeal rejected if they continue to rely upon the standard verdict forms approved by this Court and published in connection with the Standard Jury Instructions. Id. at 907, fn. 4.

In any event, the Gormley majority set forth no compelling reason why the long-standing rule in Cook v. Eney should now be abolished. Contrary to the majority's claim, Cook does not conflict with Whitman v. Castlewood International Corporation, 383 So.2d 618 (Fla. 1980) or Colonial Stores, supra, even if those cases are relied upon merely to support the general proposition that the appellant has the burden of proving harmful error. This Court made it clear in Colonial Stores that it was dealing with "a rule of policy, designed to simplify the work of the trial courts and to limit the scope of proceedings on review." Id. at 1186. An appellant has always had the burden of showing reversible error, Bolick v. Sperry, 82 So.2d 374 (Fla.

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER - SUITE 502 - 2028 EAST COMMERCIAL BOULEVARD, FORT LAUDERDALE, FL 33308 - (305) 771-0606

1955), yet this Court has also held that where error is clearly made to appear, injury is presumed to follow, Chimerakis v. Evans, 221 So.2d 735 (Fla. 1969), unless the record affirmatively shows the contrary. Division of Corrections v. Wynn, 438 So.2d 446, 449 (Fla. 1st DCA 1983).

The very nature of certain types of error requires reversal where it is difficult to determine the precise harmful effect of the error. For example, in Hernandez v. Virgin, 505 So.2d 1369 (Fla. 3d DCA 1987), prejudice was presumed as a matter of law as a result of a trial judge's off the record conversation with a deliberating jury, precisely because the appellate court could not know what effect this conversation had upon the jurors' minds. Similarly, in the collateral source cases such as Cook v. Eney and the present decision, one cannot know precisely what impact the offending evidence had upon the jurors' deliberations.

The United States Supreme Court observed long ago that evidence of collateral benefits is readily subject to misuse by a jury. Eichel v. New York Central Railroad Company, 375 U.S. 253, 255 (1963). Such evidence has a tendency to confuse and mislead a jury on the issue of the tortfeasor's liability as well as the amount of damages. Williams v. Pincombe, 309 So.2d 10, 11 (Fla. 4th DCA 1975). Indeed, this Court in Sosa v. Knight-Ridder Newspapers, Inc., supra, affirmed a new trial order on all issues based on improper remarks concerning worker's compensation benefits. This Court held that the record supported the trial court's conclusion that this evidence could have improperly influenced the jury.

NANCY LITTLE HOFFMANN, P.A.
ATTORNEY AT LAW
BARNETT BANK TOWER - SUITE 506 - 9250 EAST COMMERCIAL BOULEVARD FORT LAUDERDALE FL 33322 - 954 781 8880

Interestingly, the Gormley majority finds no fault with the Cook v. Eney rule, nor does it advance any compelling reason why that rule should be abolished. The Academy respectfully suggests that considerations of stare decisis, fairness and plain common sense should lead this Court to conclude that the decision below should be quashed and that the rule in Cook v. Eney be reinstated and approved by this Court. It was long ago pointed out that

> ...it is an established rule to abide by former precedent, where the same points come up again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion.

1 W. Blackstone, Commentaries 69. More recently, it has been observed that a court has the duty to abide by its own former decisions and not to depart from or vary them

> ...unless entirely satisfied, in the first place, that they were wrongly decided, and, in the second place, that less mischief will result from their overthrow than from their perpetuation. This is the proper application of the maxim, "stare decisis."

H. Black, Handbook on the Law of Judicial Precedents 10 (1912).

The present decision clearly departs from these respected principles of jurisprudence, and advances no legitimate reason for doing so. We respectfully urge this Court to quash it accordingly.