O/G 5-8-90

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,861

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PAUL GORMLEY and JOSEPHINE GORMLEY,

Petitioners,

vs.

GTE PRODUCTS CORPORATION,

Respondent.
_____/

BRIEF OF RESPONDENT GTE

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INTRODUCTION

Plaintiffs/Petitioners PAUL and JOSEPHINE GORMLEY will be referred to as they stood before the trial court and as GORMLEY. Defendant/Respondent GTE PRODUCTS CORPORATION will be referred to as it stood before the trial court and as GTE.

"R" refers to the record on appeal; "SR" refers to the supplemental record in the district court, which consisted of the sworn proof of loss statement; "T" refers to the trial transcript. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This Court has taken jurisdiction to review a decision of the Third District which held that the admission of a sworn proof of loss statement which GORMLEY had filed with his insurance company for property damage was harmless error. This Court should affirm.

The incident. A fire occurred in the GORMLEYS' home. They submitted a sworn proof of loss statement to their homeowner's insurer and stated under oath that their total property loss was $19,823.16. (T. 25).

Several years later, the GORMLEYS sued GTE under a products liability theory and sought both personal injury and property damage. They alleged that a GTE television set caused the fire. (R. 12). At trial, MR. GORMLEY said they suffered $68,700 in total personal injury and property damages. (T. 15, 23-24). GTE confronted MR. GORMLEY with the sworn proof of loss statement over the GORMLEYS' objection. (SR.). GTE's counsel asked MR. GORMLEY whether he signed the sworn proof of loss and whether it reflected the total loss suffered. MR. GORMLEY admitted he had signed the document and that it reflected the loss was $19,823.15. (T. 25, 26). He explained that the sworn statement covered only structural damage to the house. (T. 25-26).

Structural damage was only one of several elements of damage claimed. (R. 9-17). On its face, the proof of loss statement only referred to compensation for "property" damage. (SR.). It did not define property damage. The statement did not refer to personal injury damage, which the GORMLEYS also claimed. The

statement did not show actual payment or receipt of benefits. At most it showed the potential availability of insurance coverage for a limited item of damage. (SR.).

In closing, the GORMLEYS' counsel argued that the sworn proof of loss' figure only represented structural damage to the house and living expenses. (T. 99). GTE argument that the sworn proof of loss reflected on MR. GORMLEY's credibility and on the value of the loss the GORMLEYS sustained. (T. 107-09). The GORMLEYS never requested Fla.Std.Jury Instr. (Civ.) 6.13, the standard jury instruction on collateral source evidence. See (R. 127, 173-89).

The liability evidence. Richard Sanderson, GTE's expert witness, was the manager of product safety in GTE's consumer electronics television division. He said that 150,000 televisions similar to this one were produced. (T. 63, 65). GTE was notified of only one other fire which allegedly originated in a television of this type. (T. 69). He investigated the incident and it was obvious the fire originated outside the television set. (T. 69). Sanderson pointed that out to the individuals. They made no further claims and did not file suit. (T. 69).

The GORMLEYS' only liability evidence fell short of proof of negligence or strict liability. The fire inspector and an engineer both said the fire originated inside the television set. (R. 38-40, 43-45). No one said the fire was caused by any defect inside the set. For all the jury knew, the problem originated with faulty wiring in the house which caused a short in the set.

The verdict form. The GORMLEYS submitted the verdict form

which was used in this case. (T. 91; R. 127). It asked:

> 1. Was there negligence on the part of Defendant, GTE PRODUCTS CORPORATION, which was a legal cause of damage to Plaintiffs, PAUL GORMLEY and JOSEPHINE GORMLEY?[1/]
>
> YES _____ NO _____
>
> 2. Did GTE PRODUCTS CORPORATION, place the "25-inch Philco Color Television" on the market with a defect which was a legal cause of damage to the Plaintiffs, PAUL GORMLEY and JOSEPHINE GORMLEY?
>
> YES _____ NO _____

(T. 122). The form then asked two separate damage questions: property damage and personal injury. The GORMLEYS never requested a form which separated the elements of the liability case into negligence, causation and injury.

The jury responded "no" to each of the first two multi-issue questions. (T. 125). It never reached the questions of whether the GORMLEYS incurred property damage or personal injury damage.

The district court opinion. The en banc Third District assumed that the use of the sworn proof of loss was error. But it found that any error was harmless. It reached this conclusion through a multi-part analysis. First, the court found that collateral source evidence only pertained to the issue of damages. It overruled the contrary holding in Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973) which presumed that such evidence infected the liability determination. Then the court held that the appellants

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[1/] The court gave the jury a res ipsa loquitur instruction in connection with this issue. (T. 116).

had the burden of demonstrating that the collateral source evidence in fact affected the jury's determination of liability. The court reviewed the evidence in the case, in light of the questions on the verdict form, and concluded that the GORMLEYS had not met their burden of demonstrating harmful error. Therefore the court affirmed. Gormley v. GTE Products Corp., 549 So.2d 729 (Fla. 3d DCA 1989)(en banc).

SUMMARY OF ARGUMENT

This Court should affirm the Third District's conclusion that the admission of a sworn proof of loss statement signed by an insured and stating the amount of property damage he incurred was at most harmless error. Similarly, it is not reviewable under the two issue rule. The evidence only affected the issue of damages. It is not legally or logically related to a determination of liability. Therefore the Third District's conclusion that an appellant does not have the benefit of a presumption of error arising out of the admission of this evidence is correct. The Third District properly found that the GORMLEYS did not meet their burden of demonstrating that the sworn proof of loss prejudiced their liability case. There was more than substantial evidence on which the jury could have found GTE not liable. And the jury's no liability finding rejected both the separate entries on the verdict form for both personal injury and property damage, even though the sworn proof of loss only related to property damage. Finally, the sworn proof of loss did not show that the GORMLEYS had actually received any compensation.

The admission of this collateral source evidence is also not reviewable under the two issue rule. The jury answered multipart questions which included elements of negligence, causation and damage. Collateral source evidence only affects the issue of damage. It does not affect the issue of negligence. The reviewing court cannot determine from the jury's "no" to this multipart question whether it in fact reached the issue of whether GTE's

conduct caused damage. If the jury said "no" simply because it found GTE was not negligent or did not manufacture a defective product, then the admission of the collateral source evidence could not have infected the verdict. Review is barred by the two-issue rule.

Finally, GTE submits that the proper result here would be a finding that collateral source evidence is admissible under limited circumstances and the facts of this case present such circumstances. There are several reasons for reaching this conclusion. First, deciding the admissibility of a plaintiff's insurance on a case by case basis would be consistent with the manner in which this Court has decided the admissibility of evidence that a defendant is insured. If the evidence is relevant to an issue in the case and its probative value outweighs any prejudice, the evidence is admissible. There is no reason to grant plaintiffs any special treatment in the admission of such evidence. Second, the basis for the rule of per se inadmissibility and per se prejudice no longer exists. Cook v. Eney was premised on a United States Supreme Court decision which has been limited by the federal courts to its federal statutory context. Federal courts now hold that collateral source benefits may be admitted for purposes other than the reduction of damages and there is no per se rule of inadmissibility or of prejudice. Third, the majority of states now hold as the federal courts now hold - evidence of collateral source payments is admissible under limited circumstances.

Society's view of this evidence has obviously changed. Other jurisdictions have changed their views. And this State itself has changed. The legislature has adopted several collateral source statutes over the past few years, the most recent of which requires that evidence of collateral source payments be admitted into evidence and that the verdict be reduced accordingly. These statutes show that the evidence can be admissible. And they show that the legislature believes the evidence is not prejudicial because the legislature assumes that the jury can consider the evidence under proper limiting instructions. This Court should affirm the en banc Third District.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE ADMISSION OF THE PROOF OF LOSS STATEMENT WAS HARMLESS.

Assuming the trial court erred in admitting the sworn proof of loss statement for impeachment, that error was harmless. But see argument II, infra. The two issue rule precludes review. In any event, as the Third District found, the GORMLEYS were not prejudiced by the limited admission of this evidence.

Traditionally, the district courts have held that collateral source evidence is inadmissible, as the GORMLEYS reiterate in their brief at 10. The district courts have also held that the admission of such evidence is presumptively prejudicial. The Third District's decision here finds that such error can be harmless.

The issue of prejudice can be analyzed in two ways. First, this Court can affirm on the ground set out in the Third District's en banc opinion: collateral source evidence does not affect the issue of liability unless the appellant demonstrates otherwise and the GORMLEYS did not demonstrate that it did so here. Second, this Court can affirm on the ground set out GTE's briefs before the Third District: the two issue rule precludes review where the issues to which the collateral source evidence was relevant were part of a multi-issue question on the verdict form, the remaining issues of which were untainted. The GORMLEYS devote less than a page of their brief to the issue of prejudice for either reason. See GORMLEYS' brief at 17. Their cursory

argument never addresses the first ground - they ignore the majority opinion of the en banc court. The GORMLEYS only touch on the two issue rule and perfunctorily conclude that it does not apply to evidence of collateral source benefits. They never explain why. The GORMLEYS have fallen far short of demonstrating why this Court should reverse the en banc Third District.

a. The two issue rule precludes review.

Under the two issue rule, a case cannot be reversed where the jury answers a compound question which incorporated several concepts, only some of which are infected by the alleged error. The jury here answered two compound questions which asked whether GTE was negligent (or manufactured a defective product) and whether that conduct was a legal cause of loss, injury or damage. The jury's "no" to the liability questions could mean one of three things: GTE was not negligent and did not place a defective product on the market; the negligence or defective product was not a legal cause of the GORMLEYS' damages; or the negligence or defect was a legal cause of damage but the GORMLEYS did not incur that damage because they received collateral source benefits. The proof of loss statement only related to the last of these three possible conclusions, i.e., whether the GORMLEYS sustained property damage. It had nothing to do with whether GTE was negligent or made a defective product. Therefore the GORMLEYS cannot sustain their burden of demonstrating harmful error by showing error which infected each element of the questions on the verdict. Colonial Stores, Inc. v. Scarbrough, 355 So.2d 181

(Fla. 1978). See also Whitman v. Castlewood Int'l Corp., 383 So.2d 618 (Fla. 1980).

This Court has addressed the two issue rule in determining review of multiple counts submitted to a jury in a single question. E.g., Colonial Stores, supra; Whitman, supra. The district courts have applied the rule to the same sort of circumstance as Colonial Stores in which the jury determined two theories of liability. See, e.g., K-Mart Corp. v. Chairs, Inc., 506 So.2d 7, 9, n.2 (Fla. 5th DCA 1987); Getelman v. Levey, 481 So.2d 1236. 1238 (Fla. 3d DCA 1985). The district courts have applied this Court's two issue rule in a variety of other contexts. It has been applied to preclude review where a verdict could have been based on a finding of direct negligence by a defendant or vicarious liability and error was alleged only as to one of those issues. See, e.g., Allstate Ins. Co. v. A.D.H., Inc., 397 So.2d 928, 929, n.3 (Fla. 3d DCA 1981); Variety Children's Hosp., Inc. v. Perkins, 382 So.2d 331 (Fla. 3d DCA 1980), rev'd on other grounds 445 So.2d 1010 (Fla. 1984). It has been applied where the jury determined a single amount of damages which incorporated various elements and the alleged error only affected one element of damage. See, e.g., Howell v. Woods, 489 So.2d 154, 155 (Fla. 4th DCA 1986); Baroush v. Louis, 452 So.2d 1075, 1076-77 (Fla. 4th DCA 1984); Marks v. Delcastillo, 386 So.2d 1259, 1268, n.19 (Fla. 3d DCA 1980); McCoy v. Rudd, 367 So.2d 1080, 1081 (Fla. 1st DCA 1979). See also Florida East Coast Ry. Co. v. Gonsiorowski, 418 So.2d 382, 384 (Fla. 4th DCA

1982)(alleged error affected only part of verdict which pertained to first injury and jury was instructed to determine liability for two injuries). Finally, the rule has been applied to the issue of causation. Gonzalez v. Leon, 511 So.2d 606, at 607 (Fla. 3d DCA 1987).

These courts have relied on the two issue rule without regard to the nature of the alleged error, e.g., evidentiary error, jury instruction error or directed verdict error. The courts simply analyzed whether the alleged error had a legal relationship to one of the issues submitted to the jury. Gonzalez, supra (alleged error in failing to instruct jury that tortfeasor is liable for any additional harm caused by subsequent malpractice of treating physician); Howell v. Woods, supra (alleged error in denying standard jury instruction which requires reduction of damages to present value as requested by both parties); Florida East Coast Ry. Co. v. Gonsiorowski, supra (error in failing to instruct jury on plaintiff's status on the land and duty owed); Baroush, supra (alleged error in excluding evidence to impeach plaintiff's economist); Variety Children's Hosp., supra (alleged error in entering directed verdict on vicarious liability); McCoy vl. Rudd, supra (alleged error in admitting hearsay testimony on replacement cost).

None of these courts ever presumed that the alleged error could spill over to infect another issue to which it otherwise was not legally, or logically, related. Yet that was precisely the suggestion of the dissent in the Third District, as adopted

by the GORMLEYS here. The receipt of collateral source benefits is legally and logically related only to the issue of whether the plaintiff has sustained damages. See Sosa v. Knight Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983); Fla. Physician's Ins. Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984)("We cannot agree with the district court that such evidence tainted the jury verdict for the defendants on liability"); Eichel v. New York Cent. R.R. Co., 375 U.S. 253, 84 S.Ct. 316 (1963). See also cases cited infra at 15-16. That evidence is not related to the issue of whether a defendant was negligent, i.e., whether the defendant failed to use reasonable care. See also Gonzalez v. Leon, supra, 511 So.2d at 607 (recognizing that collateral source evidence only relates to damages by referring to collateral source instruction as "an instruction relating to damages only").

There is no reason to assume that a jury would be prejudiced in its negligence determination by such damage-related evidence. Juries are presumed to consider the court's instructions and to consider the evidence as it relates to the issues on which it was instructed. Eley v. Moris, 478 So.2d 1100, 1103 (Fla. 3d DCA 1985). The jury here was first instructed to determine whether GTE was at fault, either under a negligence standard or under strict liability. Then the jury was instructed to determine whether that fault caused damage. Finally it was instructed to determine separately the amount of that damage - property damage or personal injury damage. The jury here never reached a determination of the amount of personal injury or property damage. It

either found no fault or it found no causation. This Court should find that the two issue rule bars reversal.

b. There is no presumptive prejudice arising from the introduction of collateral source benefits, which only affects the issue of damages. The GORMLEYS failed to meet their burden of demonstrating that the evidence in fact affected the liability determination.

The Third District held that the evidence of collateral source benefits "affects only the question of damages in the absence of a showing that it affects the question of liability" and the appellant has the burden of demonstrating that effect. 549 So.2d at 731. The court concluded that the admission of collateral source benefits did not give rise to a presumption of prejudice on all issues.

The court then looked to whether the GORMLEYS had satisfied their burden of demonstrating that the evidence infected the liability findings. First, the Third District found that there was "more than substantial evidence upon which the jury could have concluded--as it did--that the defendant was not liable". 549 So.2d at 731. Second, it looked to the fact that the jury's no liability finding rejected the GORMLEYS' claims for both personal injury and property damage, even though the sworn proof of loss statement only pertained to property damage. Third, it looked at the fact that the sworn proof of loss only suggested that the GORMLEYS had insurance. It did not show that they were compensated in any way for the loss. 549 So.2d at 731-32. From these three factors, the Court concluded that the GORMLEYS had not dem-

onstrated that the use of the sworn proof of loss on property damage prejudiced their liability case.

As previously noted, the GORMLEYS have not presented any reason to reject the Third District's rationale - they simply have ignored it. And there are good reasons for adopting the Third District's analysis. Receipt of collateral source benefits is not relevant to "liability". It is only relevant to the issue of damages.[2/] See Eichel v. New York Cent. R.R. Co., supra. In Eichel, the trial court excluded evidence of disability pension payments which had been offered to impeach the plaintiff's testimony concerning his motive for not returning to work. The court of appeals reversed and held the evidence was admissible. It remanded for a new trial "limited, however, to the issues of injury and resulting damages . . .". 375 U.S. at 254, 84 S.Ct. at 317.[3/]

Other jurisdictions have reached the same conclusion that evidence of collateral source benefits only relates to damages. E.g., Hart v. W.H. Stewart, Inc., 564 A.2d 1250 (Pa. 1989)(improper admission of collateral source evidence harmless where jury found for defendant on issue of liability and never reached

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[2/] Juries are certainly capable of finding liability in the face of collateral source evidence. In Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982), the jury found liability, but awarded inadequate damages where the trial court erroneously admitted collateral source evidence. The jury's manner of dealing with the evidence was logical; the evidence did not infect its consideration of liability.

[3/] The United States Supreme Court then held that the trial court had properly excluded the evidence.

damages); Stickney v. Wesley Medical Ctr, 768 P.2d 253 (Kan. 1989)(admission of collateral source evidence harmless where jury found for defendant on liability and did not determine damages)(citing Wisker v. Hart, 766 P.2d 168 (Kan. 1988)); Fisher v. Thompson, 275 S.E.2d 507 (N.C.Ct.App. 1981)(admission of collateral source evidence not prejudicial because evidence only related to issue of damages).

Furthermore, the legislature itself has recognized that a jury is capable of considering collateral source evidence for a limited purpose without infecting the issue of liability. The collateral source statutes passed in recent years, e.g., Fla.Stat. § 768.50 (1985), Fla.Stat. § 768.76 (1986), Fla.Stat. § 627.7372 (1985), all require the admission of such evidence under limiting instructions. If the evidence were so terribly and presumptively prejudicial as to infect a jury's liability determination, then the legislature's contrary conclusion would be open to serious question. But in fact, juries regularly find liability in cases under these statutes where there is evidence collateral source payments. Obviously the juries are capable of following instructions and are capable of considering the collateral source evidence only where they are supposed to do so.

In sum, the conclusion of the Third District majority that the evidence did not infect the liability determination is sound and should be left undisturbed.

The dissent from the Third District en banc opinion claimed that the admission of collateral source evidence infects the is-

sues of liability and damage. It cites to several matters in support of its conclusion.[4/] First, the dissent cites Cook. Cook holds, with no explanation, that "the [collateral source] evidence was presumably considered without qualification as bearing on a basic fact essential to liability". Why? The evidence at issue in Cook was the receipt of social security and workers' compensation benefits offered for the limited purpose of impeaching plaintiff's motivation to return to work. That evidence had nothing to do with "liability". "Liability" consists of proof that a defendant breached its duty of care and that the breach caused damage. That is what the jury is instructed. Fla. Std.Jury Instr. (Civ.) 3.5 and 3.6. The fact that a plaintiff receives social security and workers' compensation benefits demonstrates several things: the plaintiff was injured; the plaintiff was injured on the job; the plaintiff is receiving some level of payment which may or may not be sufficient to compensate for his injury; or the defendant did not "cause" the plaintiff any damage because the plaintiff is already being compensated for the injury. But the receipt of such benefits could not possibly bear on whether the defendant's conduct was a breach of the applicable standard of care. Cook therefore cannot support the conclusion that receipt of collateral source benefits infects

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[4/] Since the GORMLEYS have not addressed this issue, GTE assumes that the primary source of argument in opposition to its position is the Third District dissent.

"liability".[5/]

Next, the dissent relies on this Court's decision in Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983) as strongly indicating an identical holding to Cook. But this Court did not address the issue. The issue in Sosa was whether a reference in closing argument to the receipt of workers' compensation benefits required a new trial where the first issue before the jury was whether the decedent was an employee of the defendant. This Court affirmed the new trial order because the reference to workers' compensation benefits in closing argument was not based on any evidence presented at trial.

> Although the trial court had ruled that respondent could present evidence of the payment of workers' compensation benefits for the purpose of indicating an acceptance by petitioner of Jose's status as an employee, the respondent presented no such evidence to the jury. As noted above, the first mention of workers' compensation benefits to the jury came during final argument by counsel for the respondent. The trial judge recognized the impact the remarks concerning workers' compensation benefits had on the jury in rendering its verdict concerning Jose's status at the time of the accident. In the order granting a new trial, the trial court found that the statements by respondent's counsel concerning workers' compensation payments were not supported by the evidence and could have improperly influenced the jury.

435 So.2d at 826. In its opinion, this Court also distinguished the two potential uses for this evidence: to show that the medi-

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[5/] Judge Schwartz also relies on a long series of decisions, all of which rely on Cook. 549 So.2d at 732-33. Since none of those decisions actually discuss the principle at issue here, they offer nothing in addition to Cook.

cal bills had been paid by another source, or to show that the decedent was an employee of the defendant, thereby making the defendant immune from suit. Id. Neither of those issues were questions of "liability" such as those presented here. In neither instance was the collateral source evidence considered in any way relevant to the question of whether the defendant breached the applicable standard of care.

The dissent then relies on Seminole Shell Co. v. Clearwater Flying Co., 156 So.2d 543 (Fla. 2d DCA 1963). Seminole Shell does not discuss the "issue" of whether receipt of insurance benefits is relevant to the issue of liability. It held that the evidence that the plaintiff had been partially compensated by insurance for the damage to his airplane was inadmissible because it was not relevant to any issues in the case. And it concluded: "For the reasons set forth herein the judgment is reversed for a new trial". 156 So.2d at 546. This Court should not find such a decision persuasive on an issue not raised or addressed.[6/]

However, there is an issue in Seminole Shell which is discussed in depth and which supports the conclusion of the Third District majority here. Seminole Shell recognizes that mention of insurance coverage may become harmless error by virtue of an appropriate jury charge at the appropriate time. Id. at 545. This recognition plainly supports the Third District's conclusion that receipt of such evidence is not presumptively prejudicial. It

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[6/] If anything, the decision supports GTE on two issues, which are discussed in argument II, infra.

also supports the conclusion that the GORMLEYS did not meet their burden here of demonstrating prejudice. At the time the sworn proof of loss was admitted into evidence, the GORMLEYS did not request a limiting instruction. Furthermore, they did not request the standard instruction which would have told the jury not to consider damages paid by collateral sources. Fla.Std.Jury Instr. (Civ.) 6.13. In sum, the Third District properly found that the admission of collateral source evidence was harmless because it only went to the issue of damages and the GORMLEYs failed to demonstrate that the evidence prejudiced them in the jury's determination of liability.

II. THIS COURT SHOULD FIND THAT RECEIPT OF COLLATERAL SOURCE BENEFITS MAY BE PERMITTED ON A CASE BY CASE BASIS UNDER THE BALANCING ANALYSIS OF FLA.STAT. § 90.403.

This Court has never squarely addressed the issue of whether evidence that a plaintiff has received collateral source benefits is always error and is always prejudicial. This case is an excellent opportunity for this Court to address the question and to find that under certain limited circumstances, such as the facts of this case, evidence of the receipt of such benefits is admissible for limited purposes.

Most jurisdictions exclude evidence of collateral source benefits when offered only for the purpose of reducing a plaintiff's recovery. E.g., Fla. Physician's Ins. Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984). However, receipt of such benefits also may be admissible for other purposes. The evidence may

be relevant to impeach a plaintiff's motive in not returning to work or, as here, to impeach a plaintiff's valuation of his damages. Until recently, the cases in Florida have uniformly held that such evidence is not admissible. GTE suggests that this Court should modify the rule. This Court should find that the more appropriate means of dealing with such evidence is to allow the trial court the discretion to admit, subject to the qualifications of Fla.Stat. § 90.403.

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. . . .

There are several reasons for adopting this balancing approach to the admission of relevant collateral source evidence and rejecting the per se inadmissibility/prejudice rule of cases like Cook. First, the balancing approach would make the admissibility of the evidence of insurance available to the plaintiff consistent with this Court's decisions on the admissibility of evidence of insurance available to the defendant. Second, this approach would recognize that the federal decisions have changed their approach since Eichel, on which Cook relied. And finally, the balancing approach would be consistent with the majority of other jurisdictions in the country.[7/]

[7/] Amicus, Academy of Florida Trial Lawyers, suggests that there is no reason for the Third District to have departed from long standing precedent. It states that 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 (continued...)

First, deciding the admissibility of collateral source evidence on a case by case basis would be consistent with the decisions which adopt a similar approach for the use of evidence that a defendant is insured. Josey v. Futch, 254 So.2d 786 (Fla. 1971); Stecher v. Pomeroy, 253 So.2d 421 (Fla. 1971). See generally Seminole Shell Co. v. Clearwater Flying Co., 156 So.2d 543 (Fla. 2d DCA 1963).

Seminole Shell, one of the decisions on which dissent here relied, recognizes that evidence of insurance benefits generally may be relevant in certain cases. "The subject of insurance has at times been permitted before the jury when relevant". 156 So.2d at 544. This is consistent with this Court's recognition in Sosa that receipt of workers' compensation benefits may be relevant to show employment status. 435 So.2d at 826. See also Barnett v. Butler, 112 So.2d 907 (Fla. 2d DCA 1959)(evidence of insurance coverage admitted to prove ownership of vehicle).

Both Stecher and Josey recognized that evidence of a defendant's insurance may be relevant and admissible under some circumstances. There is no reason to conclude otherwise when ruling on the admissibility of evidence that a plaintiff has available

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[7] (...continued)
conflict in controlling decisions". As demonstrated here, the Academy is not entirely accurate. The collateral source rule has been substantially eroded by the legislature in recent years. It has become increasingly unpopular in this state. E.g., Fla.Stat. § 627.7372 (1985); Fla.Stat. § 768.50 (1985); Fla.Stat. § 768.76 (1986). This change in the societal view of the rule is not limited to Florida, as will be shown in this argument. There have been changes in the rule throughout the country and the changes in Florida and other jurisdictions do warrant a departure from precedent.

insurance. If the evidence is relevant, it should be admitted.

Second, the basis for the rule in Cook is no longer viable and therefore Cook itself should be reexamined. Cook relied on the United States Supreme Court decision in Eichel, supra. But the federal courts have limited Eichel to its federal statutory context. See DeMedeiros v. Koehring Co., 709 F.2d 734, 741 (1st Cir. 1983); Savoie v. Otto Candies, Inc., 692 F.2d 363, 371, n.8 (5th Cir. 1982). Collateral source benefits may be admissible for purposes other than reducing the damage award. Such benefits are admissible to establish the extent of the plaintiff's injury or to show that the plaintiff had a motive for feigning injury. Gates v. Shell Oil, 812 F.2d 1509, 1513 & n.3 (5th Cir. 1987)(evidence of receipt of compensation benefits may be admitted for a limited purpose if there is little risk of prejudice and court gives limiting instruction); Lange v. Missouri Pacific R.R. Co., 703 F.2d 322 (8th Cir. 1983)(collateral benefits may be admitted to impeach plaintiff who misleads jury); Savoie v. Otto Candies, Inc., supra; Hannah v. Haskins, 618 F.2d 373 (8th Cir. 1980)(citing Thompson v. Kawasaki Kisen, K.K., 348 F.2d 879 (1st Cir. 1965)).

The limitations on Eichel were explained in Savoie, supra, when it discussed Eichel's companion case, Tipton v. Socony Mobil Oil Co., 375 U.S. 34, 84 S.Ct. 1 (1963). In Tipton, the Supreme Court recognized that evidence of receipt of collateral source benefits would have been admissible for a limited purpose, other than for the purpose of reducing the plaintiff's recovery. 692 F.2d at 369 (quoting 375 U.S. at 35-36, 84 S.Ct. at 2). The

Savoie Court then noted that

> [E]ven evidence that a person has liability insurance may be admissible when it is relevant to some disputed matter other than simply whether that person acted negligently or otherwise wrongfully.

692 F.2d at 369. Compare Josey v. Futch, supra; Stecher v. Pomeroy, supra (each holding that under Florida law, evidence that the defendant has insurance may be admissible if relevant to the issues in the case). The Savoie court then concluded that no improper use had been made of evidence that the plaintiff received maintenance payments.

> Here, no improper use was made of the evidence of Candies' maintenance payments. They were not used to urge that the jury should find for Savoie because Candies had demonstrated its financial ability to pay for his injury, or to show that Candies was negligent or had admitted liability, or to show the extent of Savoie's injury or damages. There is no claim of prejudice as to any of such matters. The evidence was used only on the question of seaman status, and even there not as being a matter determinative of such status. The trial judge was careful to instruct the jury that this evidence was not determinative, and that notwithstanding the maintenance payments the issue of seaman status remained a fact question to be resolved by the jury under the law as covered by the other portions of the court's charge.

692 F.2d at 370 (emphasis by court).

This holding in Savoie, and the similar holdings in the cases cited above, demonstrate that the federal courts do not strictly apply Eichel. The per se rule adopted in Cook was premised on Eichel. Since even the federal courts do not give Eichel that kind of interpretation, this Court should conclude that Cook's per

se rule is no longer viable.

Finally, and perhaps most importantly, adoption of the rule that collateral source evidence may be admitted, within the trial court's discretion, would be consistent with the majority rule throughout the country. Attached to this brief is an appendix which contains a list of the states in which evidence of collateral source benefits is admitted and the general circumstances under which it is admitted. A detailed discussion of the cases is not necessary. The list contains brief descriptions of the circumstances under which the evidence was admitted. A review of these cases demonstrates that the majority of states are of the view that juries can limit their consideration of collateral source evidence to the particular issue on which it is admitted. Such evidence may, in certain circumstances, be relevant to an issue other than the reduction of damages. If it is so relevant, then the jury is entitled to consider it, under appropriate instructions.

Here, GTE submitted a sworn statement from MR. GORMLEY as to the value of his property loss. The document was an admission of a party as to value. Its relevance is without question. In fact, it is an even more probative piece of evidence than the usual collateral source evidence. Generally, a defendant will introduce the fact that the party received benefits from another source to show malingering. But the evidence does not include any statements by the party himself. Here, on the other hand, this Court is faced with the use of an admission; in fact it is a statement

under oath. Such evidence has substantial probative value. See Gothard v. Marr, 581 S.W.2d 276 (Tex.Ct.App. 1979)(proof of loss admitted to impeach plaintiff's testimony that he never signed any statement concerning the scope of his injuries; evidence had "substantial probative value").

Furthermore, when the evidence was offered, the GORMLEYS did not even request a limiting instruction in a reasonable attempt to mitigate the prejudice which they now claim attached to the evidence. Yet they have the burden of requesting such an instruction. See Sherman v. Burke Contracting, Inc., 4 F.L.W. Fed. C1, C3 (11th Cir. Jan. 16, 1990); Savoie v. Otto Candies, supra, 692 F.2d at 370 (where evidence is admissible for one purpose and not for another, the objecting party has the burden of requesting a limiting instruction). Nor did the GORMLEYS request the standard collateral source instruction at the conclusion of the case.

In sum, changes in society's approach to this issue through the passage of collateral source statutes, changes in the federal law on which the Third District's per se rule of inadmissibility had been based and changes in the caselaw of other jurisdictions all support the conclusion that evidence of collateral source benefits may be admissible, with a limiting instruction, if relevant to issues other than the reduction of damages. This case presents a fact situation in which it is quite appropriate to adopt such a rule. This Court should find that the trial court did not abuse its discretion in allowing the sworn proof of loss to be admitted for a limited purpose.

CONCLUSION

For the foregoing reasons, Respondent GTE PRODUCTS CORPORATION respectfully requests this Court to affirm the judgment of the trial court and the decision of the en banc Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of April, 1990 to: Keith A. Truppman, Esq., Counsel for Petitioners, 1700 Sans Souci Boulevard, North Miami, Florida 33181; Nancy Little Hoffman, Counsel for Amicus Florida Academy of Trial Lawyers; and Michael J. Murphy, Esquire, Counsel for Amicus Florida Defense Lawyers Association, 4601 Ponce de Leon Boulevard, Suite 100, Coral Gables, Florida 33146.

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