O/C 5-8-90

IN THE SUPREME COURT OF FLORIDA

CASE NO: 74,861

THIRD DISTRICT CASE NO: 86-1987

PAUL GORMLEY and
JOSEPHINE GORMLEY,

Petitioners,

vs.

GTE PRODUCTS CORPORATION,
etc., et al.,

Respondents.
_____/

PETITION FOR REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF BY FLORIDA DEFENSE LAWYER'S ASSOCIATION

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INTRODUCTION

Petitioners/Plaintiffs below, PAUL GORMLEY and JOSEPHINE GORMLEY, will be referred to as the "PETITIONERS". The Respondent/Defendant below, GTE PRODUCTS CORPORATION, will be referred to as the "RESPONDENT". All emphasis is added unless otherwise indicated. "A" refers to the appendix filed with the PETITIONERS' brief.

STATEMENT OF THE CASE AND FACTS

The Amicus relies upon the statement of the case and facts as outlined in the majority opinion of the District Court of Appeal, Third District, and as supplemented in the RESPONDENT's Brief on the merits and on jurisdiction.

SUMMARY OF ARGUMENT

The admission into evidence of the sworn proof of loss was relevant, material, and justifiable impeachment as was held by the Court below. The only error which was found to be **harmless** was the failure to redact that portion of the document which suggested available insurance benefits to the PETITIONERS. There was no request by PETITIONERS for a special limiting or curative instruction at the time of the admission of the document, there was no request for a redacting to eliminate erroneous references to insurance, there was no request for a mistrial and there was no request for a collateral source jury instruction by the PETITIONERS. When the jury returned a special interrogatory verdict finding no liability, the Court of Appeals ruled that the

PETITIONERS had not demonstrated that the error was harmful and thus reversible.

As noted by the dissent in footnote 5, the Third District recognized that it can overrule and/or recede from its own cases; i.e., Cook v. Eney, 277 So.2d 848 (Fla. 3rd DCA 1973), cert. denied 285 So.2d 414 (Fla. 1973). The Third District did just that. Receding from its prior decision in Cook does not conflict with this Court's opinion in Sosa v. Knight-Ridder Newspaper, Inc., 435 So.2d 821 (Fla. 1983). To the contrary, in Sosa the admission of collateral source information was factually found prejudicial to the only one liability issue answered by the jury, to wit: status-employee vs. independent contractor. There was no "presumptive prejudice" mentioned in the opinion.

The Third District's abolition of the "presumptive prejudice rule" suggested in Cook v. Eney is in line with this Court's precedent in Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978); Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980). The Third District followed Whitman and Colonial Stores in Pfister v. Parkway General Hospital, Inc., 405 So.2d 1011 (Fla. 3rd DCA 1981) and was simply housekeeping here to harmonize its previous decision in Cook by receding from that holding to the extent that it conflicted with Pfister, Colonial, and Whitman. This is not new, it is a reaffirmation of the long standing axiom that error must be prejudicial and harmful to be reversible. Stecher v. Pomeroy, 253 So.2d 421 (Fla. 1971).

It is respectfully requested that this Court deny the

Petition and let stand the Third District's opinion.

ARGUMENT

DOES THE DISTRICT COURT'S HARMONIZING OF ITS OWN OPINIONS BY RECEDING FROM THE PRESUMPTIVE PREJUDICE RULE IN COOK V. ENEY CREATE CONFLICT JURISDICTION WITH THIS COURT? NO.

WAS THE ERROR IN FAILING TO REDACT PORTIONS OF THE SWORN STATEMENT OF LOSS WHICH REFERRED TO POTENTIAL INSURANCE COVERAGE PREJUDICIAL ERROR REQUIRING REVERSAL WHEN THE JURY RETURNED A SPECIAL INTERROGATORY VERDICT FINDING NO LIABILITY? NO.

JURISDICTION

The Amicus is not unmindful of the fact that this Court has in its Order of February 1, 1990 preliminarily accepted jurisdiction, however, this Court has subsequently declined jurisdiction when it was improvidently granted. See Hanft v. Phelan, 488 So.2d 531 (Fla. 1986); Quevedo v. State, 436 So.2d 87 (Fla. 1983).

In 1980, Article V, §3B of the Constitution was amended to limit this Court's jurisdiction with respect to intradistrict conflicts. Rule 9.030(a)(2)(A)(iv) of the Fla.R.App.P. specifically outlines the discretionary jurisdiction of this Court and states:

> "The discretionary jurisdiction of the Supreme Court may be sought to review: (A) decisions of District Courts of Appeal that: ...(iv) **expressly and directly conflict** with the decision of another District Court of Appeal or the Supreme Court on the same question of law."

The Committee Notes to the 1980 amendment state:

> "The new Article also **terminates** Supreme Court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in Rule 9.331."

In this case the intradistrict conflict was resolved below by the en banc decision wherein the Court receded from the presumed prejudice rule in Cook v. Eney and harmonized its own decisions by the reaffirmation of the long standing axiom that error must be harmful to be reversible and the burden to prove harmful error is upon the Appellant and will not be presumed. Gormley, 731, 732.

The asserted basis for invoking the jurisdiction of this Court is the case of Sosa, supra, cited by the dissent in footnote number 5 and relied upon by the PETITIONERS. Sosa supports the position of the RESPONDENTS herein and the decision of the majority below. In Sosa this Court determined that the admission of collateral source evidence specifically affected the issue of liability (specifically the determination of whether the plaintiff was an employee or an independent contractor-demonstrable prejudice) and thus mandated a new trial. This Court held that the defense reference to application and receipt of workmen's

compensation benefits by Sosa's family from the defendant and that such established that Sosa was in fact an employee as opposed to an independent contractor, was error that affected not just damages but liability. (A special interrogatory verdict determining status). Cook v. Eney was not discussed in Sosa, was not relied upon in Sosa, and the Sosa Court did not in any manner or form adopt or approve a presumptive prejudice rule for the erroneous admission of collateral source evidence at trial.[1]

As the dissent pointed out in footnote number 5, the Third District as well as any District Court has the authority to overrule, recede from, or harmonize any of its own prior precedent which it feels necessary. This it has done by receding from Cook v. Eney and this does not provide a basis for review by this Court.

RECEDING FROM THE PRESUMED PREJUDICE RULE OF COOK V. ENEY, ALIGNS AND HARMONIZES THE THIRD DISTRICT WITH EXISTING PRECEDENT THAT ERROR MUST BE SHOWN TO BE PREJUDICIAL TO BE REVERSIBLE

It is axiomatic that one seeking review has the burden to establish error clearly in the record and that the error was indeed prejudicial and harmful error requiring reversal. The failure to do so mandates affirmance. City of Miami v. Hollis, 77 So.2d 834 (Fla. 1955). See also Fla. Jur. 2d Appellate Review, Sections 316, 357-364, and the cases cited therein. The Third District simply re-affirmed this axiom. The only difference is that in examining

[1]The distinguishing of other District Court's opinions citing Cook was adequately explained in the Third District's opinion and in the brief on jurisdiction filed by the RESPONDENTS.

this case they had occasion to pass upon a seemingly conflicting decision from their own district, Cook v. Eney. In re-affirming this recognized appellate axiom of requiring the party seeking review to clearly demonstrate error and the prejudicial effect thereof, the Third District receded from a prior holding which suggested that in the case of an erroneous admission of collateral source evidence prejudice would be presumed. To the extent that the Cook v. Eney case stood for the proposition of presumed prejudice it was receded from expressly in this case. This causes no interdistrict conflict nor conflict with any decision of the Supreme Court and is no occasion to exercise the Court's discretionary review authority.

The closest analogous case decided by this Court is Stecher vs. Pomeroy, supra. In Stecher, the defendant claimed error and sought reversal where the plaintiff's attorney in a personal injury action was allowed to mention liability coverage limits and the defendant was also refused a requested jury instruction to disregard such information. This Court held that under the circumstances it was **harmless** error.

This Court stated:

> "This recognition of harmless error in these particular circumstances is not to be regarded as approval by this Court of the mention of policy limits to a jury. This should not be done. Nor is it approval of the trial court's refusal to grant the requested instruction to disregard, which should have been given. It is simply held to be harmless error here where an examination of the entire record reflects a tone which indicates in no wise any adverse effect upon the jury's verdict. (Citations omitted)"

The argument by the plaintiff to the jury of liability policy limits in a personal injury case is the antithesis of the defense admitting and arguing collateral source information with respect to a plaintiff. There should be no different outcome all other things being equal when the party has failed to demonstrate prejudicial reversible error. There should be **no presumptive prejudice rule** regarding the admission of collateral source information in personal injury actions the same as when evidence of the existence of liability insurance or the extent of liability insurance is erroneously admitted. Both circumstances are error and the only question is and should be whether the error is prejudicial and adversely effected the litigants basic right to a fair trial.

As demonstrated in this case, a plaintiff can sit back after the introduction of erroneous collateral source information and wait to see through the verdict whether or not the result pleases him. If he has a good result he doesn't appeal. If there is a bad result he knows he gets a new trial and a second bite at the apple with the aid of the presumption and without proving prejudice. If the PETITIONERS had requested that the document be redacted and/or that the jury be given a curative instruction or limiting instruction at the time of the document's admission and if the PETITIONERS had requested a collateral source jury instruction, or requested a mistrial at the time of the erroneous admission of the collateral source information, one might be more sympathetic to their alleged plight, however, no such requests were made and as is

clearly seen from the record, this was a tactical move by PETITIONERS. Similar to the rule that a party damaged has a duty to mitigate damages, the Court should not countenance a presumptive prejudice rule when it cannot be demonstrated that the error was prejudicial and when the party seeking review has not done all within their power to correct the error of the Trial Court or at least give the Trial Court the opportunity to correct the error.

CONCLUSION

For all of the foregoing reasons, the PETITIONERS' writ should be denied.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been mailed this 9th day of April, 1990, to: Nancy Little Hoffman, Esquire, 2929 East Commercial Blvd., #502, Ft. Lauderdale, Florida 33308; Phillip D. Blackmon, Esquire, Grand Bay Plaza, 5th Floor, 1665 South Bayshore Drive, Miami, Florida 33133; Sharon L. Wolfe, Esquire, 44 West Flagler Street, #700, Miami, Florida 33130; and Keith A. Truppman, Esquire, 1700 Sans Souci Blvd., North Miami, Florida 33181.

BY: Michael J. Murphy
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