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.,

Respondent.

ON REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

MAIN BRIEF OF PETITIONERS, PAUL GORMLEY AND JOSEPHINE GORMLEY

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,861

PAUL GORMLEY and JOSEPHINE GORMLEY,

Petitioners,

vs.

GTE PRODUCTS CORPORATION, etc., et al.,

Respondent.

INTRODUCTION

This is a petition for review brought on behalf of Petitioners, PAUL GORMLEY and JOSEPHINE GORMLEY, for this Court's determination as to whether the Trial Court committed reversible error in denying Petitioners' Motion in Limine whereby Respondent was permitted to introduce into evidence a "sworn statement and proof of loss" disclosing the existence of collateral insurance coverage under a homeowners' insurance policy and allowing the Respondent to comment on said document in closing argument.

The Petitioners, PAUL GORMLEY AND JOSEPHINE GORMLEY, were the Plaintiffs below and will be referred to as such. The Respondent, GTE PRODUCTS CORPORATION/SYLVANIA CORPORATION, were the Defendants below and will be referred to herein as GTE.

The following symbols will be used in this Brief:

"R" Record on Appeal

"TR" Transcript of Testimony

"S" Stipulation Supplementing the Record on Appeal.

"A" Appendix attached hereto.

All emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

PAUL and JOSEPHINE GORMLEY initiated a products liability action against GTE seeking damages resulting from a fire occurring within their residence on January 22, 1981. The cause of action was initially brought under the theories of strict products liability, breach of an implied and express warranty and negligence, however, was submitted to the jury solely on the issues of strict products liability and negligence. (R 9-17, 173-189). The jury returned a verdict for the Defendant (Respondent herein) and a Final Judgment was entered in accordance therewith. (R 197). The Petitioners appealed the lower Court's decision to the District Court of Appeal of Florida, Third District. The District Court, on REHEARING EN BANC affirmed the lower Court's judgment for the Defendant; however, in doing so, rendered an opinion expressly and directly in conflict with numerous district court decisions and a decision of the Supreme Court of Florida on the same question of law (A1).

In the Plaintiffs' case in chief, Mr. Paul Gormley testified that he purchased a new GTE 25 inch television in the year 1980 (TR 3). The television was uncrated according to the instructions and placed in the corner of his home (TR 4). The GTE television received no repair work nor had any operational problems prior to January 22, 1981 (TR 3-4). On January 22, 1981, Mr. Paul Gormley heard a loud explosion and ran out into the hallway of his home. (TR 4-5). He look-

ed down the stairs and saw heavy smoke and flames and yelled to his family to get out of the house (TR 5). Subsequently, a neighbor called the fire department which arrived at the scene (TR 5-6). Mr. and Mrs. Gormley both suffered personal injuries and substantial property damage amounting to $68,700.00. (TR 15-18).

Mr. Franklin Barron, employee of the City of Miami Fire Department, responded to the scene and investigated the fire (TR 32). Inspector Barron testified that the fire was caused by the subject television set. (TR 38). Further, Inspector Barron testified that the origin of the fire was from within the television set. (TR 38-40). Mr. Frederic Berlowe, a licensed professional engineer, qualified in determining the cause and origin of fires, additionally testified that the fire occurred within the television set. (TR 43-45).

The Plaintiffs moved in limine to exclude a "Sworn Statement and Proof of Loss" submitted to their own homeowners insurance carrier, Old Republic Insurance Company, back in March of 1981. The Trial Court denied the Plaintiffs' Motion in Limine and allowed the Defendant to introduce into evidence this Sworn Statement and Proof of Loss disclosing the existence of collateral insurance coverage under the GORMLEY's homeowners insurance policy. It was the Defendant, GTE's, position throughout the litigation that they were entitled to a set-off [Motion for Set-Off, R129-130] or for an Order Limiting Plaintiffs' Claim for Property Damage to the Amount Specified in the Subject Proof of Loss (Defen-

dant's Motion to Limit Plaintiffs' Claim for Property Damage, R131-135). The improper references to Plaintiffs' receipt of collateral source payment was not inadvertently admitted but was consciously referred to during the trial to prejudice the Petitioners herein.

The Defendant established through cross-examination of Mr. Gormley that it was in fact his signature as well as his wife's on the Sworn Proof of Loss and that the document itself did state the full loss and damages from the fire was $19,823.16 (TR 25). The Sworn Statement and Proof of Loss was subsequently moved into evidence by the Defendants over the objection of Plaintiffs' counsel (S). Furthermore, the defense counsel made the following comments upon this exhibit in closing argument:

> "First of all, you heard the opening statement that, well, they had $80,000--that's what they said their damages were since 1981, at the time of the fire--but now, all of a sudden, today, the day of trial, they say well, not really, it was $68,000.
>
> Now, you heard me, you saw me show this document to Mr. Gormley. You are going to be able to bring this document back to the jury room with you. What it is is a sworn statement of proof of loss.
>
> You will be able to read this document. This document was not produced by the Defendant, GTE Corporation. It was not produced by American Manufacturers Insurance Company. You will be able to read this document. You will see down at the bottom that Paul and Josephine Gormley signed this document. It was notarized on the back in March of 1981.
>
> If you review the whole entire document, you will see that he says the whole loss of damages was $19,822.16.

> Well, again, ladies and gentleman, read this document. We didn't have anything to do with this, this was something that Mr. and Mr. Gormley signed back in 1981 indicating all their losses from this fire is the sum of $19,823.16." (TR 107-109).

Plaintiffs' counsel, in closing argument, attempted to explain away the collateral source document stating that the damage figure contained therein was merely for structural damage and did not include personal property, meals, clothes or furniture. (TR 98-99). Unfortunately, the situation could not be remedied during closing argument as the collateral source document would, in fact, go back into the jury room.

The only witness called by the Defendant, GTE, was Mr. Richard Sanderson. Mr. Sanderson testified over Plaintiffs' objection that approximately 150,000 models of this particular television set were produced and manufactured by GTE. (TR 69). Mr. Sanderson stated that there was only one incident reported in a similar model in West Virginia and it was obvious in that case that the fire originated external to the television set. He pointed this out to the homeowners and there was never any insurance claim or litigation in that particular case. (TR 69). Mr. Sanderson testified that he inspected the television set in this case in January of 1986 (TR 73), some six years after the fire. Mr. Sanderson further stated that he could not formulate any opinion as to the cause of any fire that would originate in the television set. (TR 74).

The jury then returned a verdict for the Defendants and a Final Judgment was entered. (TR 125).

ISSUE ON REVIEW

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING PETITIONERS' MOTION IN LIMINE WHEREBY:

RESPONDENT WAS PERMITTED TO INTRODUCE INTO EVIDENCE A "SWORN STATEMENT AND PROOF OF LOSS" DISCLOSING THE EXISTENCE OF COLLATERAL INSURANCE COVERAGE UNDER A HOMEOWNERS' INSURANCE POLICY AND ALLOWING THE DEFENDANT TO COMMENT ON SAID DOCUMENT IN CLOSING ARGUMENT.

SUMMARY OF ARGUMENT

The Trial Court committed reversible error in admitting into evidence a "Sworn Statement and Proof of Loss" disclosing the existence of collateral insurance coverage under the Appellants' homeowners insurance policy and allowing comment on said document in closing argument. The "Collateral Source Rule" specifically excludes evidence of benefits paid or payable to an injured party from a source wholly independent of the tortfeasor. If there is to be a windfall, it is more just that the injured party profit than allow the wrongdoer to be relieved of full responsibility for his wrongdoing. Even where the collateral source evidence is introduced for the limited purpose of rebuttal or impeachment, it has been consistently held, by a series of decisions addressed herein, to constitute reversible error. Cook v. Eney, 277 So.2d 848 (Fla. 3rd DCA 1973); cert. denied 285 So.2d 414 (Fla. 1973). The improper reference to collateral source benefits directly affects the liability verdict and is the fundamental basis of the collateral source rule. The likelihood of substantial prejudice and misuse by a jury clearly outweighs any probative value of this evidence. In the instant action, the Trial Court erred to the prejudice of the Appellants, in allowing the "Sworn Statement and Proof of Loss" into evidence and permitting defense counsel to comment on said document in closing argument.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING PETITIONERS' MOTION IN LIMINE WHEREBY:

RESPONDENT WAS PERMITTED TO INTRODUCE INTO EVIDENCE A "SWORN STATEMENT AND PROOF OF LOSS" DISCLOSING THE EXISTENCE OF COLLATERAL INSURANCE COVERAGE UNDER A HOMEOWNERS' INSURANCE POLICY AND ALLOWING THE DEFENDANT TO COMMENT ON SAID DOCUMENT IN CLOSING ARGUMENT.

The well established law in Florida provides that evidence of partial or complete compensation for an injury received from a source wholly independent of the tortfeasor cannot be admitted into evidence in order to reduce the damages recoverable from the person causing the injury. This is known as the Collateral Source Rule. Paradis v. Thomas, 150 So.2d 457 (Fla. 2nd DCA 1963); Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975); Janes v. Baptist Hospital of Miami, Inc., 349 So.2d 672 (Fla. 3rd DCA 1977); cert. denied, 355 So.2d 512 (Fla. 1978); Clark v. Tampa Electric Company, 416 So.2d 475 (Fla. 2nd DCA 1982); rev. denied, 426 So.2d 29 (Fla. 1982).

The Collateral Source Rule is applicable not only to tortious personal injuries, but also to tortious injuries to property; thus, a recovery of damages by an owner of property from the party who damages the property may not be reduced by the amount of insurance proceeds received by the owner from his insurance company. Walker v. Hilliard, 329 So.2d 44 (Fla. 1st DCA 1976). The basis for this rule is that a Plaintiff should be fully compensated by the tort-

feasor without any consideration being given to benefits that have been received by the injured person from sources such as insurance policies owned by the plaintiff or third parties, employment benefits, or social legislation benefits. Robert E. Owen and Associates v. Gyongyosi, 433 So.2d 1023 (Fla. 4th DCA 1983); Janes v. Baptist Hospital of Miami, Inc., 349 So.2d 672 (Fla. 3rd DCA 1977); cert. denied, 355 So.2d 512 (Fla. 1978); Walker v. Hilliard, 329 So.2d 44 (Fla. 1st DCA 1976); Paradis v. Thomas, 150 So.2d 457 (Fla. 2nd DCA 1963). If there is to be a windfall, it has been held to be more just that the injured party profit rather than allow the wrongdoer to be relieved of full responsibility for his wrongdoing. Walker v. Hilliard, at 45.

In the present action, the Trial Court committed reversible error in admitting evidence regarding collateral source benefits paid to the Plaintiffs by their own homeowners insurance carrier, Old Republic Insurance Company. The Trial Court admitted into evidence, over Plaintiffs' objection, a "Sworn Statement and Proof of Loss" which disclosed both the existence of insurance coverage under a homeowners policy and the implication that payments were made to the Appellants under said policy. (S) (A1). Additionally, the Trial Judge allowed the defense attorney over objection to make the following comments in closing argument:

> "You are going to be able to bring this document back to the jury room with you. What it is is a Sworn Statement and Proof of Loss. You will be

> able to read this document. This document was not produced by the Defendant, GTE Corporation. It was not produced by American Manufacturers Insurance Company. You will be able to read this document. You will see down at the bottom that Paul and Josephine Gormley signed this document. It was notarized on the back in March, 1981.
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> If you review the entire document, you will see that it says the whole loss of damages was $19,823.16. (TR 108)
>
> Well, again, ladies and gentlemen, read this document. We didn't have anything to do with this, this was something that Mr. and Mrs. Gormley signed back in 1981 indicating all their losses from this fire as the sum of $19,823.16." (TR 109).

The purpose of the Collateral Source Rule is to allow an injured person, such as the Petitioners herein, to recover full compensatory damages from the tortfeasor irrespective of the payment of any element of those damages by a source independent of the tortfeasor. Paul and Josephine Gormley paid a separate premium in order to avail themselves of insurance coverage under a homeowners policy with Old Republic Insurance Company. The Defendant tortfeasor is not permitted to avail himself of the benefits of any payments made by the Petitioners' own homeowners insurance carrier. Robert E. Owen and Associates v. Gyongyosi, at 1025.

In Walker v. Hilliard, 329 So.2d 44 (Fla. 1st DCA 1976), the Fourth District Court of Appeals stated:

> In tort actions, it is well settled that the recovery of damages by the owner of property from the party who damaged the property may not be reduced by the amount of insurance proceeds received by the owner from his insurance company.

In Janes v. Baptist Hospital of Miami, Inc., 349 So.2d 672 (Fla. 3rd DCA 1977) the court held:

> "As stated in Walker v. Hilliard, supra., it is well settled that recovery of damages from a tort-feasor may not be reduced by the amount of insurance proceeds received by the injured party from his insurance company; a wrongdoer should not be permitted to benefit from a policy of insurance where there is no privity between him and the Plaintiff's insurer, and the policy was written for the benefit of the insured and not the wrongdoer; if there must be a windfall, it is more just that the injured party profit, rather than the wrongdoer be relieved of full responsibility for his wrongoing."

Any payments that were made to the Plaintiffs by their own homeowners insurance carrier, or any Proof of Loss submitted in this regard would be inadmissible in a subsequent products liability action. In fact, the introduction of such evidence would have the tendency to confuse and mislead the jury on the issue of the Defendant's liability and its admission by the Trial Court would clearly constitute prejudicial error.

The Third District Court of Appeals in Cook v. Eney, 277 So.2d 848 (Fla. 3rd DCA); cert. denied 285 So.2d 414 (Fla. 1973) held that allowing defense counsel to question the Plaintiff in a medical malpractice suit with respect to his receipt of social security and workers' compensation benefits was prejudicial error, notwithstanding the contention that such evidence was offered for the limited purpose of rebutting or impeaching the Plaintiff's earlier testimony. The court explains that the purpose of the medical malpractice action was to attempt to establish liability on behalf of the Defendant and the admission of evidence of

collateral source benefits may indeed lead the jury to believe that the Plaintiff was trying to obtain a double or triple payment for one injury. Accordingly, the court in Cook v. Eney, held that the Plaintiff was entitled to a new Trial.

The United States Supreme Court decision of Eichel v. New York Central R.C.O., 375 U.S. 253, 84 S.CT. 316, 11 L.Ed.2d 307 (1963) addressed the precise issue herein and was the crux of the Third District Court's decision in Cook v. Eney, supra. The United States Supreme Court in Eichel v. New York Central R.C.O., supra., specifically stated:

> In our view, the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice in the receipt of a disability pension... It has long been recognized that evidence showing that the Defendant is insured creates a substantial likelihood of misuse. Similarily, we must recognize that the petitioners receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact.
>
> 375 U.S. at 255

Furthermore, the Supreme Court of Florida in Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821, 826 (Fla. 1983) upheld a trial judge granting a new trial due to the prejudicial impact of remarks concerning collateral source benefits. As aptly pointed out by the dissenting opinion in the case sub judice, (Al) the new trial order upheld by the Florida Supreme Court included the following:

> 7. This Court also grants the motion for new trial on the ground that this Court improperly allowed reference to collateral source to be made to the jury. The Trial testimony reflects that counsel for the plaintiff agreed only that certain bills "have been paid." ...In closing argument, counsel for the defendants argued over the plaintiff's objection overruled by this Court ... that the bills were paid by the workmens' compensation carrier. The argument advanced by counsel for the defendants was predicated on facts not in evidence for which a new trial by and the same is hereby granted.
>
> 435 So.2d at 821.

In the case at bar, the admission of the "Sworn Statement and Proof of Loss" and the subsequent comments during closing argument caused the jury to envision a double recovery for PAUL and JOSEPHINE GORMLEY should they have returned a verdict in their favor. The law as enunciated in Cook v. Eney, supra. has been followed in numerous other decisions.

[In accord see Parker v. Widman, 380 F.2d 433 (5th Cir. 1967); Stanley v. United States Fidelity and Guaranty Co., 425 So.2d 608 (Fla. 1st DCA 1982), rev. on other grounds; Florida Physicians' Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984); Tampa Sand and Material Co. v. Johnson, 103 So.2d 250 (Fla. 2nd DCA 1958); Sea Ledge Properties, Inc. v. Dodge, 283 So.2d 55 (Fla. 4th DCA 1973); Grossman v. Beard, 410 So.2d 175 (Fla. 2nd DCA 1982); Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982); Clark v. Tampa Electric Company, 416 So.2d 475 (Fla. 2nd DCA 1982); rev. denied 426 So.2d 29 (Fla. 1982); Goodman v. Roma Construction Company, Inc., 537 So.2d 597 (Fla. 3rd DCA 1988), rev. denied 544 So.2d 200 (Fla. 1989); Seminole Shell Company, Inc. v. Clearwater Flying Company, Inc., 156 So.2d 543 (Fla. 2nd DCA 1963); Freeman v. Rubin, 318 So.2d 540 (Fla. 3rd DCA 1975); Miami Beach Texaco, Inc. v. Price, 433 So.2d 1227 (Fla. 3rd DCA 1983); Skislak v. Wilson, 472 So.2d 776 (Fla. 3rd DCA 1985); Goff v. 392208 Ontario, Ltd., et al., 539 So.2d 1158 (Fla. 3rd DCA 1989)].

In Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975), welfare benefits were introduced for the purpose of

impeaching the Plaintiff's testimony regarding her motivation to return to work and the Court stated:

> Such evidence had the tendency to confuse and mislead the jury on the issue of the Defendant's liability and its admission by the Trial Court constituted error prejudicial to the Plaintiff. Accordingly, the Final Judgment entered in favor of the Defendants is reversed and the case is remanded for a new trial.

In Clark v. Tampa Electric Company, 416 So.2d 475 (Fla. 2nd DCA 1982); rev. denied, 426 So.2d 29 (Fla. 1982) the Second District Court of Appeal held that it was reversible error to permit defense counsel to cross-examine Plaintiff's psychiatrist as to how much money the Plaintiff made before and after the accident. **Even though no collateral source evidence was actually introduced nor improper argument made to the jury,** the court stated that the jury may have concluded that the Plaintiff was already financially well off and as such needed no additional recovery from the Defendant. In the present action, the jury apparently presumed that the Plaintiffs had already been compensated for the property damage to their residence and rendered a verdict for the Defendant to prevent a "double recovery". As such, the Trial Court clearly erred in allowing the "Sworn Statement and Proof of Loss" into evidence and allowing the defense counsel to make further comment upon said document in closing argument.

In the analagous case of Seminole Shell Company, Inc. v. Clearwater Flying, Inc., 156 So.2d 543 (Fla. 2nd DCA 1963) the inadvertent mention of collateral insurance coverage,

even with a curative instruction, was sufficient to require a new trial on both liability and damages. As previously addressed herein, the Respondent's introduction of collateral source benefits was not inadvertently made, but was a conscious, strategic decision utilized during the entire course of the trial to prejudice the Petitioners herein. In the decision of Carls Markets, Inc. v. Meyer, 69 So.2d 789 (Fla. 1953), the Supreme Court of Florida specifically disapproved of counsel intentionally mentioning insurance coverage with the rationale that this would adversely influence the jury verdict.

Respondents dispositive reliance on the two-issue rule is misplaced. It is apodictic that the improper introduction of collateral source benefits poisons the **entire jury verdict.** The dissenting opinion in the present case (A1) succinctly points out:

> Under Cook, however, it is given that the issues are not discrete, because the collateral source error is deemed, as a matter of law, to infect the liability verdict--indeed, this is the very nature of the rule itself. Thus, a "special interrogatory" demonstrating the basis of the verdict would be irrelevant and unnecessary to a showing of harmful error. To alter a well-founded principle of law regarding the presumptive existence of prejudice in order to render dispositive an otherwise irrelevant technical requirement concerning the preservation of error would result only in the procedural tail unjustifiably wagging the substantive dog.

As previously addressed herein, there is a vast body of case law in support of the decision of Cook v. Eney, supra. including the United States Supreme Court decision of Eichel

v. New York Central R.C.O., 375 U.S. 253, 84 S.CT. 316, 11 L.Ed.2d 307 (1963) and the Florida Supreme Court decision of Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983). The Petitioners respectfully submit that the doctrine of stare decisis warrants adherence to the ruling in Cook v. Eney, supra. and its' progeny. Old Plantation Corp. v. Maule Industries, 68 So.2d 180 (Fla. 1953). Accordingly this case should be reversed and remanded for a new trial.

CONCLUSION

Based upon the arguments, authorities and reasonings set forth herein, the case sub judice should be reversed and remanded for a new trial on all issues.

Respectfully submitted,

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BY _____
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CERTIFICATE OF SERVICE

THIS WILL CERTIFY that a true and correct copy of the foregoing Main Brief of Petitioners, PAUL GORMLEY and JOSEPHINE GORMLEY, has been mailed this 15th day of February, 1990, to: PHILLIP D. BLACKMON, ESQ., Grand Bay Plaza, Fifth Floor, 1665 South Bayshore Drive, Miami, FL 33133 and SHARON L. WOLFE, Attorney-at-Law, Courthouse Tower, 44 West Flagler Street, Suite 700, Miami, Florida, 33130.

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