IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,861

FILED
SID J. WHITE
OCT 27 1989
CLERK, SUPREME COURT
By
Deputy Clerk

PAUL GORMLEY and JOSEPHINE GORMLEY,

Petitioners,

v.

GTE PRODUCTS CORPORATION,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

Phillip D. Blackmon, Esquire
PYSZKA, KESSLER, MASSEY,
WELDON, CATRI, HOLTON
& DOUBERLEY, P.A.
2665 South Bayshore Drive
Fifth Floor
Miami, Florida 33133

COOPER, WOLFE & BOLOTIN, P.A
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

Counsel for Respondent

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
Statement of the Case and Facts	2
Summary of Argument	3
Argument	
THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT OR FROM OTHER DISTRICTS. IT SIMPLY CREATED INTERNAL CONSISTENCY IN THE THIRD DISTRICT.	4
Conclusion	9
Certificate of Service	10

TABLE OF AUTHORITIES

Cases	Page
Clark v. Tampa Elec. Co., 416 So.2d 475 (Fla. 2d DCA 1982)	4
Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973)	3,4,6,8
Eichel v. New York Cent. R.R., 375 U.S. 253, 84 S.Ct. 316 (1963)	7
Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982)	4
Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982)	5
Seminole Shell Co. v. Clearwater Flying Co., 156 So.2d 543 (Fla. 2d DCA 1963)	5
Sosa v. Knight Ridder Newspaper, Inc., 435 So.2d 821 (Fla. 1983)	3,7
Stanley v. U.S. Fidelity & Guaranty Co., 425 So.2d 608 (Fla. 1st DCA 1982) rev'd on other grounds, 452 So.2d 514 (Fla. 1984)	6,7

INTRODUCTION

Petitioners/Plaintiffs PAUL and JOSEPHINE GORMLEY will be referred to as they stand before this Court, as they stood before the trial court and by name. Respondent/Defendant GTE PRODUCTS CORPORATION will be referred to as it stands before this Court, as it stood before the trial court and as GTE.

"A" refers to the appendix filed with Petitioners' brief. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The relevant facts are stated in the Third District's decision.

> During the trial of the case, the Gormleys testified, inter alia, to the value of their property loss. To impeach this testimony, the defendant offered a sworn proof of loss statement submitted by the Gormleys to their insurance carrier in which the Gormleys placed a lower value on the very same property. Over the Gormleys' objection, the trial court admitted the impeaching document.

(A. 2). The Third District held that the admission of the document was error, but was harmless under the circumstances. The court's reasoning is set out in the argument section of the brief.

SUMMARY OF ARGUMENT

There is no conflict between the Third District's en banc decision in this case and the decisions on which the Gormleys rely. The only case in Florida which specifically held that admission of collateral source benefits presumptively infected the determination of liability was the Third District's decision in Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973). The Third District has now altered the holding of its own decision. There is no inter-district conflict.

Nor is there any conflict with this Court's decision in Sosa v. Knight Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983). This Court did not find a presumption that the evidence of workers' compensation benefits in Sosa infected the liability determination. To the contrary, the Court ruled on whether the evidence of compensation benefits could have been considered improperly on the defense of workers' compensation immunity, a liability issue. This Court noted separately that such evidence also may be relevant to damages.

The Third District simply reanalyzed and rewrote a case from its own district. Such a decision is not subject to review here.

ARGUMENT

THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT OR FROM OTHER DISTRICTS. IT SIMPLY CREATED INTERNAL CONSISTENCY IN THE THIRD DISTRICT.

The Gormleys claim that the decision in this case conflicts with a series of decisions which "specifically hold that introduction of collateral source evidence misleads the jury on the issue of liability and, thus, its admission by a trial court constitutes reversible error". The Gormleys are incorrect. There is no conflict because none of the cases on which they rely for conflict so hold.

In Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973), the Third District held generally that the admission of collateral source evidence is error. It also held that a jury presumably considers collateral source evidence on the issue of liability and therefore the admission of such evidence is harmful and requires a new trial on both liability and damages. Several decisions in other districts have cited Cook. Those are the decisions on which the Gormleys rely for conflict. But there is nothing to show that those later decisions in fact addressed the presumption/harmfulness issue, rather than the simple question of whether the admission of the evidence was error.

Clark v. Tampa Elec. Co., 416 So.2d 475 (Fla. 2d DCA 1982) is simply a rote recitation of the general rule of admissibility stated in Cook.

Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982) is not

pertinent. The jury found liability, but awarded inadequate damages. Quite properly, the Second District reversed for a new trial on damages only because the trial court had erroneously admitted collateral source evidence. Obviously the Cook "presumption" that collateral source evidence infects the jury's determination of liability was irrelevant in light of the jury's finding of liability.

In Kreitz v. Thomas, 422 So.2d 1051 (Fla. 4th DCA 1982), the plaintiff claimed a very small permanent injury. The court found that the introduction of collateral source evidence affected the jury's determination on permanency. The jury never decided the issues of liability, i.e., negligence and causation.

Finally, Seminole Shell Co. v. Clearwater Flying Co., 156 So.2d 543 (Fla. 2d DCA 1963) is completely irrelevant. The court there held that the admission of evidence that the party had insurance coverage was harmful error only because the trial court delayed in giving a cautionary instruction on the issue. 156 So.2d at 545 ("Where insurance coverage of a party has been inadvertently mentioned by a witness during the course of trial, it may become harmless error by appropriate charge by the court at that particular time").[1/] The fact that such "error" could be

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[1/] The court also made a passing reference to the later admission of evidence that the party had been partially compensated by his insurance company. The court noted that this evidence was irrelevant. It did not discuss the issue any further, nor did it discuss the question of whether such evidence "presumably" infected the liability determination.

cured by a timely cautionary instruction belies the Gormleys' argument that the admission of similar evidence is presumptively harmful to a determination of liability.

The limited nature of the Third District's holding in Cook on the "presumption" was aptly explained by the First District in Stanley v. U.S. Fidelity & Guaranty Co., 425 So.2d 608 (Fla. 1st DCA 1982), rev'd on other grounds, 452 So.2d 514 (Fla. 1984). As the First District stated:

> The court also said in Cook that "the evidence was presumably considered without qualification as bearing on a basic fact essential to liability." 277 So.2d at 850. The literal accuracy of that statement is difficult to prove from the facts appearing in the opinion; how social security and workers' compensation benefits bear on "a basic fact essential to liability" in a medical malpractice case does not readily appear. The quoted language evidently was taken from the Supreme Court's opinion in Tipton v. Socony Mobil Oil Co., 375 U.S. 34, 37, 84 S.Ct. 1, 3, 11 L.Ed.2d 4, 6 (1963), mentioned in Eichel, . . . In Tipton the claimant's acceptance of benefits under the Longshoremen's and Harbor Workers' Compensation Act was literally relevant to "a basic fact essential to liability" under the Jones Act, that claimant was a seaman and not an off shore drilling employee.

425 So.2d at 617, n.14. Therefore it appears that the Cook presumption language arose from a misreading of the federal case on which it relied. In the underlying federal decision, the collateral source evidence in fact related to a liability issue - whether the plaintiff was a *seaman under the Jones Act*. The same simply could not be said in a medical malpractice case.

The Gormleys also claim that the Third District's decision

here conflicts with this Court's decision in Sosa v. Knight-Ridder Newspapers, Inc., 435 So. 2d 821 (Fla. 1983) because this Court in that case ordered a new trial on liability based on the admission of "collateral source evidence". Again, there is no conflict. This Court's affirmance of the new trial order in Sosa was based on the admission of evidence of workers' compensation benefits on which the jury could have relied in determining the defendants' workers' compensation defense. The evidence was obviously relevant to that liability issue, in addition to its relevance to the payment of damages from an alternative source. In fact, this Court specifically noted in Sosa that such evidence could be used for those two alternative purposes. 435 So.2d at 826. Compare Stanley, supra, 425 So.2d at 617, n.14 (citing Tipton, supra and noting the dual use for collateral source evidence which may, in certain circumstances, be relevant to both liability and damages).

The Gormleys conclude with the statement that the Third District's decision conflicts with the United States Supreme Court decision in Eichel v. New York Cent. R.R., 375 U.S. 253, 84 S.Ct. 316 (1963). This Court has no jurisdiction over conflict with federal cases on questions of state appellate procedure. In any event, the pertinent portions of Eichel support GTE on this issue. In Eichel, the trial court excluded evidence of disability pension payments which had been offered to impeach plaintiff's testimony as to his motive for not returning to work. The court of appeals reversed and held the evidence was admissible. It re-

manded for a new trial "limited, however to the issues of injury and resulting damages . . .". 375 U.S. at 254, 84 S.Ct. at 317. Obviously the court of appeals determined that collateral source evidence related only to damages, not liability.

In sum, the only case in Florida which had actually held that receipt of collateral source benefits infected liability was Cook. The Third District has now properly receded from Cook and has held that receipt of such benefits only infects the issue of damages. Since the Third District has done no more than alter the law in its own district, there is no inter-district conflict on which this Court's jurisdiction can be based.

CONCLUSION

For the foregoing reasons, Respondent GTE respectfully requests this Court to find it does not have jurisdiction.

Respectfully submitted,

Phillip D. Blackmon, Esquire
PYSZKA, KESSLER, MASSEY,
WELDON, CATRI, HOLTON
& DOUBERLEY, P.A.
2665 South Bayshore Drive
Fifth Floor
Miami, Florida 33133

COOPER, WOLFE & BOLOTIN, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

By:

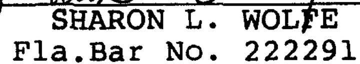
SHARON L. WOLFE
Fla.Bar No. 222291

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of October, 1989 to: Keith A. Truppman, Esquire, RESS, MINTZ & TRUPPMAN, P.A., 1700 Sans Souci Boulevard, North Miami, Florida 33181.

Phillip D. Blackmon, Esquire
PYSZKA, KESSLER, MASSEY,
WELDON, CATRI, HOLTON
& DOUBERLEY, P.A.
2665 South Bayshore Drive
Fifth Floor
Miami, Florida 33133

COOPER, WOLFE & BOLOTIN, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

By: 
SHARON L. WOLFE
Fla.Bar No. 222291