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

REPLY BRIEF OF PETITIONERS, PAUL GORMLEY and JOSEPHINE GORMLEY

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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 STATEMENT.

REPLY ARGUMENT

The main thrust of Respondent's answer brief is that the two-issue rule precludes review of the undisputed improper introduction of collateral source benefits, to the jury at the trial level. The cases relied upon by Respondent, with reference to the two-issue rule, never considered and do not address the application of this technical procedural rule to situations where the trial court improperly allows the introduction of collateral source benefits to a jury. The Respondent's sole basis for the application of this procedural rule to the case sub judice is based upon the ill-founded premise that **improper introduction of collateral source benefits affect the issues of damages only.** This premise ignores the vast body of case law which specifically disallows the introduction of collateral source benefits and holds that the introduction of such evidence is of such a prejudicial nature that it warrants the granting of a new trial on both the issues of liability and damages. (Petitioner's Main Brief at P.13-16.)

Furthermore, even the majority opinion in Gormley v. GTE Products Corporation, 549 So.2d 739 (Fla. 3rd DCA 1989) acknowledges that the two-issue rule would not be involved in the present analysis unless the decision of Cook v. Eney, 277 So.2d 848 (Fla. 3rd DCA 1973) and its vast following is overruled. (549 So.2d at 731 Footnote #2.) Neither the majority decision in Gormley, supra., nor the Respondent

herein, provide this court with any valid basis for departing from the long standing rule embodied in Cook v. Eney, supra. Quite the contrary, the majority opinion concedes that the improper introduction of collateral source benefits was prejudicial and would have required reversal under existing case law. The majority further admits that historically the burden of showing that this improperly admitted evidence did not influence the jury on liability would have been on the Defendant, who sought the benefit of the evidence. The majority opinion without adequate rationale merely shifted this newly assigned burden to Petitioners herein.

Respondent's assertion that "the receipt of collateral source benefits is legally and logically related only to the issue of whether the Plaintiff has sustained damages" (Respondent's Brief at Page 13) is not only contrary to the majority opinion, but also to the long series of decisions following Cook v. Eney. The United States Supreme Court's per curiam decision in Eichel v. New York Central R.C.O., 375 U.S. 253, 255, 84 S.Ct. 316, 11 L.Ed. 2d 307 (1963) acknowledged that the improper introduction of collateral source benefits involves "a **substantial likelihood of prejudicial impact**". Furthermore, the Florida Supreme Court in Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983), recognized that improper reference to collateral source benefits could have improperly influenced the jury and warranted the granting of a new trial. Respondent summarily

dismisses the validity of Cook v. Eney and its progeny without any legal or logical justification. Both at the trial level and presently, the Petitioners rely upon the logic and wisdom of the numerous justices who have addressed this issue in the United States Supreme Court's decision of Eichel v. New York Central R.C.O., the Florida Supreme Court's decision of Sosa v. Knight-Ridder Newspapers, Inc., and the First, Second, Third and Fourth District Courts of Appeal in a myriad of decisions as fully outlined in Petitioners' Main Brief. (Petitioners' Main Brief P.15.) [1]

Respondent next contends that the Petitioners should have requested a collateral source instruction to have alleviated the admitted error of the trial judge. The Plaintiff in the case of Clark v. Tampa Elec. Co., 416 So.2d 475 (Fla. 2d DCA 1982) was placed in a similar position to that of the Petitioner herein. The defense counsel in Clark, supra., was permitted to cross-examine the Plaintiff's psychiatrist as to how much money the Plaintiff made before and after a particular accident. After the Plaintiff unsuccessfully moved

1 Respondent's reliance upon Florida Physician's Insurance Reciprocal v. Stanley, 425 So.2d 608 (Fla. 1st DCA 1982) rev. den., sub.nom. on other grounds, 452 So.2d 512 (Fla. 1984) is misplaced. The First District Court of Appeals specifically recognized that the improper admission of collateral source evidence had a specific articulable propensity for genuine prejudice on liability issues. The Florida Supreme Court reversed, holding merely that governmental or charitable benefits available to all citizens would not be considered improper collateral source evidence and, thus, its introduction into evidence did not taint the jury verdict.

for a mistrial, the Second District Court of Appeals recognized "when the motion was denied, the Appellant's counsel, **finding himself between a rock and a hard place,** requested the Court to give an instruction on the collateral source rule, which the Court did". The Petitioner herein was placed in a similar position with regard to the improper introduction of the "Sworn Statement and Proof of Loss" and firmly believed that this instruction would merely stress the importance of this prejudicial collateral source document. As succinctly stated in Clark v. Tampa Elec. Co., 416 So.2d at 476:

> ...the collateral source instruction, which it **should not have been necessary for Appellants to request in the first place, was too little and too late to undo the damage done** by the series of questions and answers concerning Clark's finances, which this court and others have clearly and unequivocally held to be impermissible.

Petitioners submit that a collateral source instruction would not have alleviated the substantial prejudice already incurred by the introduction of the "Sworn Statement and Proof of Loss" and subsequent comments by defense counsel in closing argument. The Petitioners both previously moved in limine to exclude this collateral source document and subsequently objected at the time the Respondent moved said document into evidence. The trial court's ruling in permitting the introduction of this collateral source evidence was explicit

and definitive. Any further pursuit by Petitioners would have been a completely useless course of action. In Palmerin v. City of Riverside, 794 F.2d 1409, 1413 (9th Cir. 1986), the United States Court of Appeals wisely held:

> Accordingly, we hold that where the substance of the objection has been thoroughly explored during the hearing on the motion in limine, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence.

Numerous Florida courts have specifically held that a motion in limine and contemporaneous objection when the evidence is offered, sufficiently preserves error for appellate review. Fincke v. Peeples, 476 So.2d 1319 (Fla. 4th DCA 1985); Swan v. Florida Farm Bureau Insurance Company, 404 So.2d 802 (Fla. 5th DCA 1981); Rindfleisch v. Carnival Cruise Lines, Inc., 498 So.2d 488 (Fla. 3rd DCA 1986).

Furthermore, the Florida Supreme Court has consistently held that "a lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless". Brown v. State, 206 So.2d 377, 384 (Fla. 1968); J. B. Thomas v. State of Florida, 419 So.2d 634 (Fla. 1982); Bailey v. State, 224 So.2d 296 (Fla. 1969); Kidd v. State, 486 So.2d 41 (Fla. 2nd DCA 1986).

The Respondent, unable to find adequate case law within the State of Florida to support its position, erroneously

looks to other jurisdictions for support.[2] For almost two decades, the courts within the State of Florida have consistently followed the reasoning and logic of the Cook v. Eney decision. Neither the Respondent, nor the majority's opinion in Gormley have presented any valid reason to deviate therefrom.

2 There are other jurisdictions that specifically follow the Eichel decision. For example, see Cates v. Wilson, 361 SE.2d 734 (N.C. 1987). The Supreme Court of North Carolina specifically held that the erroneous admission of collateral source evidence involves a substantial likelihood of prejudicial impact and warrants the granting of a new trial.

CONCLUSION

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

Respectfully submitted,

RESS, MINTZ & TRUPPMAN, P.A.

By _____
KEITH A. TRUPPMAN

CERTIFICATE OF MAILING

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Brief of Petitioners PAUL GORMLEY and JOSEPHINE GORMLEY, were mailed this 25 day of April, 1990, to: PHILLIP D. BLACKMON, ESQUIRE, Grand Bay Plaza - 5th Floor, 1665 South Bayshore Drive, Miami, Florida 33133; SHARON L. WOLFE, ESQUIRE, Courthouse Tower - Suite 700, 44 West Flagler Street, Miami, Florida 33130; MICHAEL J. MURPHY, ESQUIRE, Gaebe, Murphy, Mullen & Antonelli, 4601 Ponce de Leon Boulevard - Suite 100, Coral Gables, Florida 33146; and to NANCY LITTLE HOFFMAN, ESQUIRE, Barnett Bank Tower - Suite 502, 2929 East Commercial Boulevard, Fort Lauderdale, Florida 33308.

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