IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D06-5504

DONALD HOLLENBECK,
Appellant,

v.

L.T. Case No. 16-2004-CA-298

JOHN FRANKLIN HOOKS,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Plaintiff/Appellant, Donald Hollenbeck (the "Plaintiff"), appeals a final judgment rendered after jury trial. (R-II-390-93.)[1] Plaintiff asks this Court to grant a new trial based on the misconduct of opposing counsel, who improperly injected matters related to the parties' relative financial status and insurance at trial. (*See* R-II-237-46 (Plaintiff's Motion for New Trial).)

Facts Related to the Plaintiff's Claims for Damages

This action arose from an automobile accident that occurred in Jacksonville Beach on May 27, 2003. (R-I-48; Supp. R-II-4-5.) Defendant/Appellee, John Franklin Hooks (the "Defendant"), admitted liability, but denied that the Plaintiff suffered any damages or sustained any permanent injury as a result of the accident. (R-I-48; Supp. R-II-5.)

Plaintiff is learning disabled, with an IQ of approximately 71. (Supp. R-II-119-20; Supp. R-VI-624-25.) He is employed as a stock clerk with Publix. (Supp. R-II-119-20; Supp. R-VI-625-26.)

Plaintiff contends that he sustained injuries to his back, which requires ongoing treatment for pain, and injuries to his wrists, which required carpal tunnel

[1] References to the Amended Index to the Record on Appeal appear as "R," followed by the appropriate volume and page numbers (*i.e.*, R-II-386-87). References to the Supplemental Index to the Record on Appeal appear as "Supp. R," followed by the appropriate volume and page numbers (*i.e.*, Supp. R-II-120).

surgery. (*See* Supp. R-II-129; Supp. R-VI-649-52, 652-66, 656-58.) Although the Plaintiff initially alleged a claim for lost wages, he elected not to pursue that claim at trial. (Supp. R-II-141-42.) Plaintiff instead sought damages for his past and future medical expenses, together with his past and future non-economic losses, including pain and suffering. (Supp. R-II-141-42; R-VIII-50-51.)

Plaintiff presented evidence that his past medical expenses totaled $45,906.56. (Supp. R-VI-656; Plaintiff's Exh. 10.) His treating physicians testified that the automobile accident caused the Plaintiff's neck and back problems, and necessitated the surgery for carpal tunnel syndrome. (*See* Supp. R-III-201, 208-09, 216-17; Supp. R-VI-567-69.) Plaintiff had not complained of any pain or tingling in his wrists before the automobile accident. (Supp. R-VI-543-44.) One of the Plaintiff's treating physicians, Dr. Robert O. Sury, estimated that the Plaintiff suffered a twelve percent (12%) impairment rating and would require $2,500 each year for future medical treatment. (Supp. R-III-208, 216.) Given his life expectancy of 43.5 years, the Plaintiff also asked the jury to award future economic damages of $108,750 ($2,500 each year, multiplied by 43.5 years). (Supp. R-VIII-803.) Plaintiff also sought past non-economic damages of $162,212.40, and future non-economic damages of at least $194,499. (*Id.* at 807-808.)

The defense expert testified that the Plaintiff suffered only a lumbar sprain, which could be treated with physical therapy, massage, rest, ice, heat, and anti-inflammatory medications. (R-IX-185, 187-88.) Defendant's expert physician stated that in his opinion the Plaintiff suffered from other pre-existing, degenerative conditions unrelated to the automobile accident. (R-IX-173, 186.) He further testified that the automobile accident did not cause or contribute to the Plaintiff's carpal tunnel syndrome. (R-IX-178, 186; Supp. R-VII-720.)

Stipulation Related to Collateral Source Set-Offs

Plaintiff received $10,000 in personal injury protection (PIP) benefits from his automobile liability insurer, State Farm, and discounts totaling $13,786.68 from his healthcare providers. (*See* R-II-361-63; R-II-378-80.) The parties stipulated before trial to present any evidence of amounts paid by collateral sources to the trial court, rather than the jury, and to allow the trial court to calculate the amount of set-off after trial. (*See* R-II-203-204; R-II-378-80; *see also* Supp. R-III-183, 186-87.)

Consequently, the trial court instructed counsel to redact any references to the medical bills to be introduced at trial. (Supp. R-III-186-87.) The trial court ruled that the Defendant was not entitled to introduce evidence of insurance or the amount of medical expenses owed to the healthcare providers. (*Id.*) The trial court emphasized that the amount of the past medical expenses to be presented should be

the entire billed amount; "if there's any reduction to be made, it will be made post-trial." (*Id.* at 187.)

Voir Dire

Trial of this case began on April 17, 2006. During voir dire, six potential jurors stated that either they or members of their family had filed personal injury lawsuits, including claims for automobile accidents, medical malpractice, or other negligence. (Supp. R-II-56-62.) Counsel for the Plaintiff continued this line of questioning, asking whether any of the potential jurors had feelings or opinions against personal injury lawsuits, and whether any believed there should be a cap or limit on a jury's verdict in a personal injury case. (Supp. R-II-68-69, 79-80.) Counsel for the Plaintiff also questioned whether the potential jurors could agree not to worry about how the verdict in this case would be paid. (*Id.* at 86-87, 89-90.)[2] Defense counsel did not object to this questioning of the venire by the Plaintiff's counsel. (*See generally* Supp. R-II-33-90.)

Plaintiff seeks a new trial for improper comments made by defense counsel during voir dire. Counsel for the Defendant introduced himself to the jury, stating:

[2] Plaintiff's counsel initially asked this question of two individual members of the venire. (*Id.* at 86.) After the trial court expressed its concern that a potential juror would ask whether there was any insurance, counsel for the Plaintiff agreed to ask the venire, collectively. (*Id.* at 86-87.)

> My name is Arthur Hernandez. I'm a consumer justice attorney, and I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate. This is a simple case.

(R-VII-2.)

Counsel for the Plaintiff objected (*id.*), arguing that opposing counsel in fact represented "one of those big companies." (*Id.* at 3.) Plaintiff's counsel argued that this misrepresentation would lead the jury to believe that defense counsel only represented the individual Defendant, especially because of the prohibition against any mention of insurance. (*See id.*)

When asked by the trial court to define a "consumer justice attorney," counsel for the Defendant responded that he represented "a client who is a consumer and who is here for justice." (*Id.* at 4.) Counsel for the Defendant characterized his introduction as a response to the "litany of questions" by the Plaintiff with regard to "large verdict caps for insurance companies." (*Id.*)

The trial court sustained the objection (*id.* at 5-6), stating:

> There are many things we don't tell juries, including that there's an insurance company in the picture, and at the same time we strive not to actively misrepresent facts, and certainly it is true that you represent the insured. But I actually was concerned about the remark for a different reason.
>
> When you say you don't represent some fancy company, it's playing on the sympathies of the jury for an individual as opposed to a corporation, and even a corporation would be entitled to justice in our courts. I

> don't think that what I've heard today requires me to intervene, but I would be careful using the term "consumer justice attorney," because that's not a regular specialty and, again, it plays to the sympathies of the jury for an individual, and [Plaintiff's counsel] can't bring out the fact that there's a large corporation involved. But neither can either party, plaintiff or defendant, play on the sympathy or the fact they represent individuals.
>
> So while the objection is sustained, there was no visible impact on the jury. I don't think they, frankly, even understand the issues that we're concerned about here. So I don't see the need in this case for a curative instruction.

(*Id.* at 4-5.) Plaintiff moved for a mistrial, which the trial court denied. (*Id.* at 5.)

At the completion of voir dire, six jurors and one alternate were selected from the original venire. (Supp. R-II-91-103.) Immediately before the jury was sworn, counsel for the Plaintiff objected and renewed his motion for mistrial. (*Id.* at 105.) The trial court overruled the objection. (*Id.*)

Counsel for the Plaintiff renewed his original motion for mistrial during the testimony of one of the Plaintiff's treating physicians. (Supp. R-III-270.) The trial court noted that although it considered defense counsel's comment during voir dire to be improper,

> we are not dealing with a corporation so there is no problem with a corporation being treated unfairly by the question. We are, in fact, dealing with two individuals here.

(*Id.* at 272.) The trial court continued, stating:

> The jury need not know that there was an insurance company in the picture, and the Court continues to believe that there's no need for either a mistrial or a curative instruction in this instance, particularly since the comments were made without particular emphasis and there was no visible response from the jury.

(*Id.*)

Improper Introduction of Evidence Related to the Plaintiff's Insurance

Plaintiff also seeks a new trial based on the improper reference by defense counsel to the Plaintiff's "benefits" as a Publix employee and the direct testimony of the Defendant's evaluating expert that he had reviewed the "[r]ecords from State Farm and Blue Cross Blue Shield" that had been provided by defense counsel. (R-II-238-40.)

Evidence as to Plaintiff's "Benefits" with Publix

At trial, counsel for the Defendant sought to elicit testimony related to the Plaintiff's financial status. For example, he asked whether the Plaintiff had recently purchased a condominium for $125,000. (R-VIII-35.) Counsel for the Plaintiff promptly objected. (*Id.*) The trial court sustained the objection and instructed the jury to disregard defense counsel's question. (*Id.* at 39-40.)

Defense counsel continued to elicit testimony related to the Plaintiff's financial status. He established, through the Plaintiff's W-2's, the total taxable income earned by the Plaintiff at Publix for the preceding four years (2002-2005). (*Id.* at 41-48.) This evidence showed that the Plaintiff's income had increased each

year, from approximately $24,300 in 2002 to approximately $28,300 in 2005. (*Id.* at 42, 47.)

Defense counsel then asked the Plaintiff:

> As a full-time Publix employee you receive certain benefits; isn't that true?

(*Id.* at 48.) Plaintiff responded, "Correct." (*Id.*) When defense counsel attempted to ask the Plaintiff more specifically about those benefits, counsel for the Plaintiff objected. (*Id.*)

Counsel for the Plaintiff argued that the question was inflammatory, prejudicial, and irrelevant. (*Id.*) He added:

> When most people, whether lay or expert, hear the word benefits – a huge issue in this case is past economic damages. I've already heard about how he doesn't – he doesn't represent a big fancy corporation. Health insurance is in the case.

(*Id.* at 48-49.)

Defense counsel denied that he sought to introduce evidence of health insurance. (*Id.* at 49.) Instead, he asserted that his intended question was whether the Plaintiff received vacation pay. (*Id.*) When asked why that evidence was relevant, especially because evidence as to the Plaintiff's total income had already been introduced, defense counsel responded:

> To explain how he gets not only pay increases, but bonus production, he gets paid for vacation time that he doesn't use.

(*Id.*)

Counsel for the Plaintiff clarified, in response to the trial court's questions, that the Plaintiff was not making a claim for lost wages or future lost earning capacity. (*Id.* at 49-50.) He explained that he sought past and future medical expenses and past and future non-economic damages only, and informed the trial court that he had told the jury in opening statements that the Plaintiff did not seek past lost wages. (*Id.* at 50-51; *see also* Supp. R-II-141-42 (Plaintiff's opening statement).) Given this stipulation, the trial court directed counsel for the Defendant to move on to his next line of questioning. (R-VIII-51.)

Plaintiff's counsel, however, moved for a mistrial, arguing that "[the jurors] . . . heard the word benefits, and the connotation of the word benefits is a back-door statement to the jury that there's health insurance." (*Id.*) Defense counsel responded:

> Your Honor, benefits for Publix includes overtime pay, inventory bonuses, 401K, profit sharing, vacation time. They're additional benefits. I did not mention insurance. I have not mentioned insurance at all.

(*Id.*)

The trial court denied the motion for mistrial, but instructed the jury to disregard the preceding question and any answer or partial answer that may have been given. (*Id.*)

Evidence of State Farm and Blue Cross Blue Shield Records

Thereafter, the Defendant elicited testimony from Dr. Abraham Rogozinski, an orthopedic surgeon retained by the defense to evaluate the Plaintiff. (*See* Supp. R-VII-682; R-IX-104.) Dr. Rogozinski first testified that he had reviewed "the records that have been produced on Mr. Hollenbeck," as provided by defense counsel. (Supp. R-IX-111.) Dr. Rogozinski listed the sources of those records (copies of which he had brought to trial), stating:

> I saw records here contained from Baptist Medical Center, from Dr. Hudson, Dr. Lancaster, Dr. Sury, Dr. Kring. . . . Records from State Farm insurance and Blue Cross Blue Shield, records from Dr. Vincenty and Dr. Rivera, records from Publix. Additionally, I saw some records of Jacksonville Beach Surgical Center, and also had some records in the way of a deposition of Mr. Hollenbeck.

(*Id.* at 111-112.)

Counsel for the Plaintiff moved for a mistrial, arguing that this evidence of insurance prejudiced the Plaintiff, especially because the question of past economic damages was a key issue. (*Id.* at 112.) As counsel for the Plaintiff noted:

> I believe that the jury – I may have been surmising, but they're going to get in the back and they're going to say, why should we pay him his medical bills when he has Blue Cross Blue Shield? It was elicited, also, Judge, that he has, quote, benefits at Publix.

(*Id.*)

When defense counsel stated that he did not realize that Dr. Rogozinski would mention the insurance records (*id.* at 112-13), the trial court responded:

> Candidly, that's why you conference with your witness before trial so that you know what they're going to say. And I assume your office had sent the State Farm records and the Blue Cross Blue Shield records. They're not something you send to an expert – just the underlying medical and hospital records.

(*Id.* at 113.)

The trial court mentioned its concern that insurance had been repeatedly mentioned, noting that "in the plaintiff's case in chief there was mention of both Blue Cross Blue Shield and State Farm." (*Id.*)[3] The trial court thus reserved ruling on the motion for mistrial. (*Id.*)

The trial court also gave a curative instruction, which counsel for the Plaintiff approved. (*Id.* at 114-115.) The trial court instructed the jury to

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[3] For example, the Plaintiff's primary care physician, Dr. Deborah Wilkes, was asked during her videotaped testimony where the Plaintiff had undergone certain pain studies. She responded that "[i]t depends on his insurance . . . ." (Supp. R-III-347.) Dr. Wilkes also stated that she did not know whether it was because of insurance reasons that her office had a policy of not treating automobile accident injuries. (*Id.* at 351-52.) Plaintiff's counsel moved for a mistrial at the conclusion of Dr. Wilkes' videotaped testimony, alleging cumulative error. (*Id.* at 362-63.) The trial court denied the motion for mistrial, noting that the Plaintiff did not object when the videotaped testimony was shown to the jury. (*Id.* at 364.)

In addition, the Plaintiff testified that after his visit to the hospital emergency room on the day of the accident, he and his dad "drove . . . to State Farm to report the accident." (Supp. R-VI-637.) The trial court ruled that this accidental mention did not open the door to additional evidence of insurance. (*Id.* at 638-39.)

"disregard the mention of any records other than those from treating or evaluating health care providers." (*Id.* at 115.)

Instructions to the Jury, the Jury's Deliberations, and the Verdict

At the conclusion of the evidence, the trial court gave the standard jury instructions on negligence, causation, and damages. (*See* R-II-223-28; Supp. R-XIII-766-78.) The standard jury instruction on collateral sources was not requested or given. (*See* R-II-223-28; Supp. R-VIII-738-744.)

During the course of its deliberations, the jury submitted the following request for direction to the trial court:

> We do not believe Mr. Hollenbeck has sustained permanant [sic] injury per question 4, but would like to award damages for inconvenience, etc. It seems a conflict to answer no to question 4 and then have to skip question 5. Please advise.

(R-II-229; Supp. R-VIII-862.) The trial court instructed the jury that it must follow the instructions on the verdict form. (Supp. R-VIII-863.)

The jury rendered its verdict on April 24, 2006. (Supp. R-VIII-864-66; R-II-235-36.) The jury found that the May 27, 2003 motor vehicle collision was a legal cause of loss, injury, or damage to the Plaintiff, and that the Plaintiff suffered a permanent injury as a result. (R-II-235-36.) The jury awarded the Plaintiff $35,000 for past medical expenses, together with an additional $6,000 for past pain and suffering. (R-II-235-36; Supp. R-VIII-864-66.) The verdict form reflected

that a "no" answer to question 4 (did the Plaintiff suffer a permanent injury), had been marked out, and that a "yes" answer had instead been checked and initialed by the foreperson. (R-II-236.) The verdict form also showed that the past pain and suffering damages (question 5(a)) had been changed from $0 to $6,000, and that the future pain and suffering damages (question 5(b)) had been changed from $6,000 to $0 and initialed by the foreperson. (*Id.*)

After the verdict, the trial court denied the motion for mistrial related to the reference to the Blue Cross Blue Shield and State Farm records, as to which it had previously reserved ruling. (Supp. R-VIII-869-70.) The trial court found that this testimony did not impact the jury. (*Id.* at 870.)

The trial court had also reserved ruling on a motion for mistrial made by defense counsel as to certain comments made by the Plaintiff's counsel in his closing argument. (*See id.* at 868, 870; *see also id.* at 843 (rebuttal argument by Plaintiff's counsel asking the jury to "remember during the voir dire I asked . . . can you return a verdict based upon the evidence and not worry about how that verdict will be paid").) Once the trial court indicated that it was inclined to grant this motion for mistrial, the Defendant withdrew his motion, and accepted the jury's verdict. (Supp. R-VIII-871-72.)

Post-Trial Motions and Rulings

On May 4, 2006, the Plaintiff timely served the Motion for New Trial or in the Alternative, Motion for Additur Pursuant to F.S. § 768.74. (R-II-237-46.) As grounds for a new trial, the Plaintiff argued that counsel for the Defendant had engaged in misconduct when he: (1) improperly suggested that an adverse verdict would result in financial hardship to the Defendant; and (2) improperly elicited evidence of collateral sources available to the Plaintiff, including his "benefits" as a Publix employee and his State Farm and Blue Cross Blue Shield records. (R-II-237-40.)

The trial court rendered its Order Denying Plaintiff's Motion for New Trial or, in the Alternative, Motion for Additur on July 27, 2006. (R-II-346-69.) Also on July 27, 2006, the trial court entered its Order Reducing Jury Verdict by Amount of Collateral Sources and its Final Judgment for the Plaintiff. (R-II-360; R-II-361-63.) After the Defendant moved to alter or amend the Order Reducing Jury Verdict (R-II-364-67), the trial court entered the Corrected Order Reducing Jury Verdict by Amount of Collateral Sources. (R-II-378-80.) The trial court rendered its Amended Final Judgment for the Plaintiff on September 12, 2006. (R-II-386-87.) After allowing for set-offs for medical provider discounts and the payment of PIP benefits (R-II-378-80), the trial court ruled that the Plaintiff was entitled to recover $17,564.21 from the Defendant. (R-II-386-87.)

Meanwhile, the trial court denied the Defendant's Amended Motion for Attorney's Fees and Costs Pursuant to Fla. R. Civ. P. 1.442 and Fla. Stat. § 768.79 (R-II-368-75), ruling that the Defendant failed to identify with particularity the terms of the release required by the proposal for settlement. (R-II-383-85.)

Plaintiff timely filed his Notice of Appeal of the Amended Final Judgment on October 11, 2006. (R-II-390-93.) Defendant filed a Notice of Cross-Appeal of the Order Denying Defendant's Amended Motion for Attorney's Fees and Costs on October 31, 2006. (Supp. R-I-6-10.)

SUMMARY OF ARGUMENT

Plaintiff is entitled to a new trial based on the improper comments of defense counsel throughout this trial. First, defense counsel incorrectly and improperly suggested at voir dire that he represented the individual Defendant – "not some fancy company, not some conglomerate" – when, in fact, defense counsel was retained to represent the interests of the Defendant's insurer. Defense counsel's prejudicial statements reasonably led the jury to believe that any adverse verdict would be paid out of pocket by the individual Defendant, a simple merchant marine.

Defense counsel improperly referenced the wealth or poverty of a party, and sought to contrast the financial status of one party with the financial status of another. Given that any damages award would be paid by the Defendant's insurer – yet the Plaintiff could not introduce evidence to show that the Defendant was, in fact, adequately insured – defense counsel's incorrect statement was blatantly prejudicial. The jury's award of only $41,000 for past damages, together with its denial of future economic and non-economic damages, illustrates the prejudice caused by defense counsel's incorrect and misleading remarks.

This is not a case in which the jury heard only a single, isolated improper remark. Defense counsel compounded the prejudice when he asked the Plaintiff about his employee "benefits" and allowed his expert to testify that he had

reviewed records from State Farm and Blue Cross Blue Shield in evaluating the Plaintiff.

"Benefits" are commonly defined to include payments or services provided under an insurance policy. Regardless of whether defense counsel ever uttered the word, the jury understood this reference to the Plaintiff's employee "benefits" to mean "insurance." Defense counsel effectively planted the seed of insurance in the minds of the jurors. And any doubt that the jurors may have had was surely eliminated once the defense expert stated that he had reviewed the Plaintiff's State Farm and Blue Cross Blue Shield records.

The admission of this wholly irrelevant evidence entitles the Plaintiff to a new trial. Plaintiff was doubly prejudiced by the tactics of defense counsel. Not only did defense counsel characterize the Defendant as a simple working man who would be forced to bear the burden of an adverse verdict, defense counsel elicited testimony to suggest that the Plaintiff had his own health and automobile liability insurance. Consequently, the jury reasonably believed that while the Defendant may have lacked insurance, the Plaintiff did not. The trial court's curative instructions did not cure this prejudice to the Plaintiff. For these reasons, the trial court erred in denying the Plaintiff's repeated motions for mistrial, and his Motion for New Trial.

ARGUMENT

THE PLAINTIFF IS ENTITLED TO A NEW TRIAL BECAUSE DEFENSE COUNSEL INCORRECTLY SUGGESTED THAT THE INDIVIDUAL DEFENDANT – NOT "SOME FANCY COMPANY" – WOULD BEAR THE HARDSHIP OF AN ADVERSE VERDICT, AND ALSO IMPROPERLY SOUGHT TO ELICIT EVIDENCE OF THE PLAINTIFF'S INSURANCE.

Standard of Review

This Court reviews the trial court's denial of the Plaintiff's Motion for New Trial for an abuse of discretion. *See, e.g., Bocher v. Glass*, 874 So. 2d 701, 704 (Fla. 1st DCA 2004). Although the trial court's ruling is entitled to substantial deference,

> there is a point where the "totality of all errors and improprieties" are "pervasive enough to raise doubts as to the overall fairness of the trial court proceedings."

Id. (citation omitted). Defense counsel repeatedly exceeded the bounds of proper conduct when he incorrectly suggested that the Defendant, "not some fancy company," would bear the consequence of any adverse verdict, and improperly sought to introduce evidence of the Plaintiff's "benefits" and insurance with State Farm and Blue Cross Blue Shield. Plaintiff respectfully submits that he is entitled to a new trial. *See Bocher*, 874 So. 2d at 704-705.

A. Defense counsel incorrectly and improperly suggested that the individual Defendant would be forced to pay any adverse verdict out of pocket.

First, defense counsel improperly and incorrectly suggested at voir dire that the individual Defendant would be forced to pay the verdict out of his own pocket. (R-VII-2.) Defense counsel introduced himself as a "consumer justice attorney," and stated to the venire:

> I represent John Hooks, a merchant marine, not some fancy company, not some conglomerate. This is a simple case.

(*Id.*) Counsel for the Plaintiff immediately objected, arguing that defense counsel in fact represented "one of those big companies": evidence of insurance that the Plaintiff himself could not mention at trial. (*Id.* at 2-3.) The trial court declined to give a curative instruction, and denied the Plaintiff's motion for mistrial. (*Id.* at 4-5.)

Defense counsel's improper comments to the venire entitle the Plaintiff to a new trial. *See Padrino v. Resnick*, 615 So. 2d 698 (Fla. 3d DCA 1992); *Ballard v. American Land Cruisers, Inc.*, 537 So. 2d 1018, 1019 (Fla. 3d DCA 1988). Even though the Defendant was insured by Geico (and represented by an attorney retained by Geico), defense counsel introduced himself as a "consumer justice attorney," and incorrectly implied to the venire that a verdict against the Defendant – who was "not some fancy company, not some conglomerate," but merely "a

merchant marine" – would cause financial hardship. (R-VII-2.) Given that any damage award would in fact be paid by the insurer, this incorrect statement by defense counsel was blatantly prejudicial. *See Padrino*, 615 So. 2d at 698; *Ballard*, 537 So. 2d at 1020.

"[N]o reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's." *Sossa v. Newman*, 647 So. 2d 1018, 1019 (Fla. 4th DCA 1994) (citing *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 241 (Fla. 5th DCA 1991)). Courts in Florida adamantly enforce this rule; otherwise, "jurors have a tendency to favor the poor as against the rich." *Id.* at 1019; *see also State Farm Mutual Auto. Ins. Co. v. Revuelta*, 901 So. 2d 377, 379 (Fla. 3d DCA 2005) (finding that testimony as to plaintiff's lack of insurance – and the resulting verdict – "illustrate the danger that jurors may be influenced by evidence of a party's wealth or poverty and therefore sympathize with the financially stricken party"); *Padrino*, 615 So. 2d at 698 (reversing and remanding for new trial because of the prejudicial argument of defense counsel, who improperly capitalized on a juror's concern as to who would pay any damages awarded); *Ballard*, 537 So. 2d at 1020 (reversing and remanding for new trial based upon defense counsel's misleading statements to the jury that the individual defendant, who was adequately insured, would be forced to pay the verdict himself).

Here, defense counsel's misleading comments to the venire were especially troubling because the Plaintiff could not correct the error. (*See* R-VIII-2.) Under Florida law, evidence as to the Defendant's insurance was irrelevant and inadmissible. *See, e.g., Florida Drum Co. v. Thompson*, 668 So. 2d 192, 193 (Fla. 1996).

The trial court emphasized that "we are not dealing with a corporation, so there is no problem with a corporation being treated unfairly." (Supp. R-III-272; *see also* R-VII-4-5.) Yet the question of prejudice arises not merely because defense counsel's comment played on the jury's sympathies for an individual (*see* R-VII-4), but because this comment implied that the Defendant lacked insurance: an implication that the Plaintiff could not rebut.

Defense counsel's incorrect and misleading remarks prejudiced the jury. The trial court considered the remarks harmless, noting that the comments were "made without particular emphasis" and did not elicit any visible response from the jury. (R-II-350; Supp. R-III-272; R-VII-4-5.) The impact of defense counsel's comments, however, should be measured at the time the verdict was rendered – not when the statements were made. *See Padrino*, 615 So. 2d at 699 (ruling that the jury's denial of future medical benefits and damages for future loss of consortium "are explainable only as an impact of the prejudicial argument"); *Ballard*, 537 So. 2d at 1020 (finding that verdict of only $50,000 was "so shockingly inadequate

that it is explainable only as the result of the prejudicial impact of the impertinent issue to which we have referred").

The same jurors who heard defense counsel's improper voir dire comments awarded the Plaintiff only $35,000 in past medical expenses and $6,000 for his past pain and suffering. (R-II-235-36.) Despite the jury's finding that the Plaintiff sustained a permanent injury as a result of the collision – and evidence that his future economic damages alone will exceed $100,000 – the jury did not award any future economic or non-economic damages to the Plaintiff. (R-II-235-36.) The inadequacy of the damages awarded can be explained only as a result of defense counsel's incorrect and misleading remarks at voir dire.

B. Defense counsel improperly sought to elicit evidence related to collateral sources, including the Plaintiff's employee "benefits" and his records with State Farm and Blue Cross Blue Shield.

Defense counsel only compounded the prejudice caused by his improper voir dire comments when he attempted to introduce evidence related to the Plaintiff's health and automobile liability insurance. In addition to referring to the "benefits" that the Plaintiff receives as a full-time Publix employee (R-VIII-48), defense counsel allowed his expert to testify that he had received and reviewed records from State Farm and Blue Cross Blue Shield before evaluating the Plaintiff (R-IX-111-12). The jury heard these references to the Plaintiff's insurance even after the trial court admonished defense counsel to redact any reference to

insurance. (Supp. R-III-186-87) Because the trial court's curative instructions did not adequately remedy the prejudice caused by the improper comments of defense counsel, the Plaintiff is entitled to a new trial.

Generally, "[t]rial counsel have no right to implant the thought of insurance coverage in the mind of the jury . . . ." *Johnny Roberts, Inc. v. Owens*, 168 So. 2d 89, 92 (Fla. 2d DCA 1964) (citing *Carls Markets, Inc. v. Meyer*, 69 So. 2d 789 (Fla. 1953)). Although defense counsel referred to the Plaintiff's employee "benefits," he "planted in the minds of the jurors the seed of insurance just as surely as if he had mentioned it directly." *Nicaise v. Gagnon*, 597 So. 2d 305, 307 (Fla. 4th DCA 1992).

"Benefits" connotes health insurance. (*See* R-VIII-51 (objection of Plaintiff's counsel).) A "benefit" is commonly defined to include "financial help in time of sickness" or "a payment or service provided for under an . . . insurance policy." *Webster's New Collegiate Dictionary* 102 (1980 ed.); *see also* § 768.76(2)(a), Fla. Stat. (defining collateral sources).

It matters not, then, that defense counsel "never actually uttered the word 'insurance.'" *Nicaise*, 597 So. 2d at 307. Aside from defense counsel's reference to the Plaintiff's employee "benefits," any question that those "benefits" included health insurance was affirmatively answered once the Defendant's expert stated on

direct examination that he had reviewed records from State Farm and Blue Cross Blue Shield. (R-IX-111-12.)

Evidence of any payments made to a claimant (or on his behalf) by his health insurance or automobile accident insurance is prohibited under Florida law. *See Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991). "[T]he existence or amount of insurance coverage has no bearing on the issues of liability and damages and should not be considered by the jury." *Allstate Ins. Co. v. Wood*, 535 So. 2d 699, 699 (Fla. 1st DCA 1988) (citing *Beta Eta House Corp., Inc. of Tallahassee v. Gregory*, 237 So. 2d 163 (Fla. 1970)); *accord South Motor Co. v. Accountable Constr. Co.*, 707 So. 2d 909, 911 (Fla. 3d DCA 1998) (citations omitted).

To allow the jury to consider evidence of insurance creates the danger that the jury

> might be influenced thereby to fix liability where none exists, or to arrive at an excessive amount through sympathy for the injured party and the thought that the burden would not have to be met by the defendant.

South Motor Co., 707 So. 2d at 911 (quoting *Carls Markets*, 69 So. 2d at 793); *accord Crowell v. Fink*, 135 So. 2d 766, 768 (Fla. 1st DCA 1961).

Nonetheless, the trial court denied the Plaintiff's Motion for New Trial, ruling that its curative instructions adequately remedied any possible prejudice caused by the improper references to insurance. (R-II-351-52; *see also id.* at 353

(citing *Melara v. Cicione*, 712 So. 2d 429 (Fla. 3d DCA 1998), and *Compania Dominicana de Aviacion v. Knapp*, 251 So. 2d 18 (Fla. 3d DCA), *cert. denied*, 256 So. 2d 6 (Fla. 1971).) Contrary to the trial court's ruling, the admission of wholly irrelevant evidence of insurance entitles the Plaintiff to a new trial. *See South Motor Co.*, 707 So. 2d at 911-912.

First, any evidence related to the Plaintiff's employee "benefits" was not relevant to the questions of causation and damages to be decided by the jury. Counsel for the Plaintiff emphasized in his opening statement that although the Plaintiff "is entitled to make a claim for his lost wages, . . . he has chosen not to do so." (Supp. R-II-141-42.) Plaintiff announced to the jury his intent to seek only past and future damages for medical bills and pain and suffering. Yet before defense counsel ever mentioned the Plaintiff's "benefits," he introduced evidence of the Plaintiff's total taxable income for the previous four years (2002-2005). (R-VIII-41-48.) Evidence of the Plaintiff's employee "benefits" – even if limited to vacation pay, as defense counsel agued – was irrelevant to any question of damages to be decided by the jury. (*See id.* at 49-50.)

Similarly, evidence that State Farm or Blue Cross Blue Shield may have insured the Plaintiff was not relevant to any issue to be decided by the jury. Prior to trial, counsel for the parties stipulated that all collateral source set-offs, including any personal injury protection (PIP) benefits, would be addressed by the

trial court after the verdict. (R-II-378.)[4] The jury had no need to consider evidence of any potential collateral sources available to the Plaintiff in deciding whether to award damages. *See South Motor Co.*, 707 So. 2d at 912. Nor was the jury instructed to disregard any evidence of insurance in determining the Plaintiff's damages. (*See* R-II-223-28; Supp. R-XIII-766-78 (jury instructions).)[5] *See also* Fla. Std. Jury Instr. (Civ.) 6.13(a) (collateral source rule for tort actions, generally).[6]

The admission of evidence related to the Plaintiff's insurance was improper and prejudicial. *See South Motor Co.*, 707 So. 2d at 912; *accord Gormley*, 587 So.

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[4] *See Caruso v. Baumle*, 880 So. 2d 540, 545 (Fla. 2004) (ruling that although section 627.736(3), Florida Statutes, requires evidence of PIP benefits for purposes of set-off to be presented to the trier of fact, the parties may agree to present this evidence to the trial court after the trial); *see also Goble v. Frohman*, 901 So. 2d 830, 831-33 (Fla. 2005) (ruling that contractual discounts by the plaintiff's healthcare providers should be set off against any award of compensatory damages).

[5] Neither the Plaintiff nor the Defendant requested this instruction. (*See* Supp. R-VIII-738-44.)

[6] According to Florida Standard Jury Instruction (Civil) 6.13(a):

> You should not reduce the amount of compensation to which (claimant) is otherwise entitled on account of [wages] [medical insurance payments] [or other benefits (specify)] which the evidence shows (claimant) received from [his] [her] [employer] [insurance company] [or some other source]. The court will reduce as necessary the amount of compensation to which (claimant) is entitled on account of any such payments.

Fla. Std. Jury Instr. (Civ.) 6.13(a).

2d at 457-58. This is not a case in which the jury heard only a single, vague reference to insurance. *See Melara*, 712 So. 2d at 431. Instead, it is evident from the record that the Plaintiff was doubly prejudiced by the Defendant's tactics. Not only did defense counsel characterize the Defendant as a working man who would pay any verdict out of his own pocket, defense counsel elicited testimony to suggest that the Plaintiff had his own health and automobile liability insurance. The tactics of defense counsel reasonably led the jury to believe that while the Defendant may have lacked insurance coverage, the Plaintiff certainly did not.

Consequently, the jury may have been predisposed to reduce the award of future medical expenses, believing that those expenses would be paid by the Plaintiff's health insurer. Likewise, the jury may have been less likely to award significant past and future non-economic damages to the Plaintiff – notwithstanding the jury's finding of permanent injury caused by the Defendant – because of its belief that the Defendant would be forced to pay that verdict out of pocket.

This case illustrates the dangers of improperly injecting prejudicial and irrelevant evidence related to insurance at trial. *See Crowell v. Fink*, 135 So. 2d 766, 768 (Fla. 1st DCA 1961) (noting the damaging effect of testimony related to the existence of the plaintiff's automobile liability insurance: "the reverse of situations usually present in trials of this kind") (citing *Carls Markets*, 69 So. 2d at

793). Not only did the jury apparently believe that the Plaintiff sought "to obtain a double or triple payment for one injury," *Gormley*, 587 So. 2d at 458 (quoting *Clark v. Tampa Elec. Co.*, 416 So. 2d 475, 476 (Fla. 2d DCA 1982)), the jury likely reduced its award of non-economic damages out of sympathy for the individual Defendant, whom the jurors may have believed *uninsured*. Admission of the evidence related to the Plaintiff's insurance thus harmed the Plaintiff, while unfairly benefiting the Defendant. *See Crowell*, 135 So. 2d at 768; *cf. Carls Markets*, 69 So. 2d at 793 (noting the dangers typically created by the admission of evidence of the defendant's insurance).

Therefore, the trial court erred in denying the Plaintiff's motions for mistrial. *See South Motor Co.*, 707 So. 2d at 912; *Crowell*, 135 So. 2d at 769. Plaintiff is entitled to a new trial. *See South Motor Co.*, 707 So. 2d at 912.

CONCLUSION

For all the foregoing reasons, Plaintiff, Donald Hollenbeck, respectfully requests that this Court reverse the Order Denying Plaintiff's Motion for New Trial or, in the Alternative, Motion for Additur and the Amended Final Judgment for the Plaintiff, and remand for a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have delivered a copy of the foregoing by U.S. Mail to Elizabeth C. Wheeler, Post Office Box 2266, Orlando, Florida 32802-2266 (Appellate Attorney for Appellee); Arthur Hernandez, 2223 Oak Street, Suite 711, Jacksonville, Florida 32204 (Trial Attorney for Appellee); and Jeffrey R. Bankston, 2215 South Third Street, Suite 101, Jacksonville Beach, Florida 32250 (Trial Attorney for Appellant); this 25th day of June, 2007.

Rebecca Bowen Creed
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney