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REPLY ARGUMENT I.

WRIGHT TOLD THE JURY ABOUT THE HOMEOWNER INSURANCE BECAUSE THE COURT HAD ALREADY RULED IT WAS ADMISSIBLE.

Royal Carpet argues that since Marcy Wright's counsel first mentioned insurance to the jury, she waived any objection. However, Wright's counsel's decision to tell the jury about insurance was caused by the trial judge's erroneously ruling at the onset of trial that the insurance payment was admissible. Since the Court ruled the jury could be told about the insurance payment, Wright's counsel tried to minimize the damage by telling the jury about it first.

Prior to trial, Wright filed a motion *in limine* to exclude mention of the insurance companies who insured the house, and the settlement with those companies. [R:902]

At trial before voir dire, Wright argued the motion asking the Court to exclude evidence that she had homeowners' insurance coverage, that she had filed suit against the insurance company, that the case was settled, and that the insurance coverage was paid. [T:9] Wright argued that the insurance was a "collateral source" and the fact that she had insurance which paid the claim is not relevant, highly prejudicial and confusing to the jury. [T:9]

Royal Carpet responded that Marcy Wright made admissions to the insurance company that should be presented to the jury, and the jury would not get the whole story without this information. [T:13] Royal Carpet further argued, "Because if the homeowners' insurance won't come in, I will not be able to get into the mitigation of damages issue." [T:13]

The circuit judge ruled that since Marcy Wright had received remuneration from another outside source, not a party to this litigation, Defendant had the "right to cross-examine her concerning a statement she might have made against her interest in this litigation. But that's as far as it goes." [T:21-22]

By its ruling, Wright was left to make the best of a bad situation by trying to minimize the damage done by the trial judge's ruling. Obviously, Wright was unable to do so as the jury found in favor of Royal Carpet.

In *Smith v. Crawford*, 937 So.2d 446, 447 (Miss.2006), the Mississippi Supreme Court allowed evidence of insurance because one of the parties opened the door: "This Court has made one exception to this general prohibition. Where a defendant makes an impermissible statement intimating that he does not have insurance, the plaintiff is justified to inform the jury just the opposite." However, in the case *sub judice*, the trial judge, not Wright, "opened the door." By telling the jury about insurance before Defendant did, Wright was merely trying to minimize the

damage from the prejudicial ruling. The fact that the trial judge decided to admit inadmissible evidence should not preclude an attorney from doing all he can do to minimize the prejudice.

REPLY ARGUMENT II.

BY DENYING WRIGHT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF INSURANCE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR.

Royal Carpet argues that Wright has failed to show that the admission of the evidence adversely affected a substantial right of hers.

However, the Mississippi Supreme Court has stated on numerous occasions that admission of evidence of insurance is reversible error, as stated in *Smith v. Crawford*, 937 So.2d 446, 447 (Miss.2006):

> There are numerous Mississippi cases which stand for the proposition that references to liability insurance are generally impermissible **and constitute reversible error**. *See Jackson v. Daley,* 739 So.2d 1031, 1039 (Miss.1999); *Morris v. Huff,* 238 Miss. 111, 117-20, 117 So.2d 800, 802-03 (1960); *Snowden v. Skipper,* 230 Miss. 684, 697, 93 So.2d 834, 840 (1957); *Avent v. Tucker,* 188 Miss. 207, 225-26, 194 So. 596, 602 (1940); *Herrin v. Daly,* 80 Miss. 340, 341-42, 31 So. 790, 791 (1902). (Emphasis added)

Repeatedly, the Mississippi Supreme Court has rejected exceptions to this rule:

> In *McCary v. Caperton,* 601 So.2d 866 (Miss.1992), we held that the **trial court committed reversible error** in allowing the defendant to introduce evidence of McCary's insurance coverage or benefits of sick leave. *Id.* at 869. We were asked to rule on the issue of whether an

> impeachment exception should be recognized under the collateral source doctrine. *Id.* Our decisions have not recognized an exception to the collateral source rule. *E.g., McCollum v. Franklin,* 608 So.2d 692, 695 (Miss.1992) (holding collateral source doctrine precludes defendant in automobile accident from cross-examining plaintiff as to whether plaintiff has received insurances proceeds, including plaintiff's health insurance); *Eaton v. Gilliland,* 537 So.2d 405, 408 (Miss.1989) (holding that defendant's attempted elicitation of evidence of insurance proceeds paid with respect to the accident by a collateral source could have been prejudicial and confusing, further the jury could have been left with the impression that the plaintiff was attempting to improperly and illegally "double dip" or receive a "wind fall" to which he was not entitled); *Central Bank of Miss. v. Butler,* 517 So.2d 507, 511 (Miss.1987) (holding that collateral source doctrine properly applied to prevent elicitation of evidence that plaintiffs received compensation from surety bond maintained completely independent of any efforts made by defendant); *Star Chevrolet Co. v. Green by Green,* 473 So.2d 157, 162 (Miss.1985) (holding that insurance in behalf of the plaintiff cannot be set up by the adverse party in mitigation of the loss); *Preferred Risk Mut. Ins. Co. v. Courtney,* 393 So.2d 1328, 1332-33 (Miss.1981) (holding that under the collateral source rule, a tortfeasor is not entitled to have the damages for which he is liable reduced by proving that an injured party has received compensation from a collateral source wholly independent of the tortfeasor).

Busick v. St. John, 856 So.2d 304, 309 (Miss.2003)(emphasis added)

As held in *Star Chevrolet Co. v. Green by Green,*473 So.2d at 162, insurance on behalf of the plaintiff cannot be set up by the adverse party in mitigation of the loss. To show that Wright had little or no loss is exactly the reason that Royal Carpet sought to introduce the evidence.

Royal Carpet also argues that the evidence is admissible to show that Wright made admissions against interest to the insurance company. The proof that insurance has paid a claim is not an admission against interest. Rather, it is proof of a collateral source, which is inadmissible. *Thornton v. Sanders,* 756 So.2d 15, 18 (Miss.App. 1999) (Mississippi does not recognize any exception to the collateral source rule). See also, *McCollum v. Franklin,* 608 So.2d at 695, *supra*; *Eaton v. Gilliland,* 537 So.2d at 408, *supra*; *Central Bank of Miss. v. Butler,* 517 So.2d at 511, *supra*; *Star Chevrolet Co. v. Green by Green,* 473 So.2d at 162, *supra*; *Preferred Risk Mut. Ins. Co. v. Courtney,* 393 So.2d at 1332-33, *supra.*

However, even if a defendant could show that the evidence is being offered for another purpose, it still must be filtered through Miss. R. Evid. 403:

> In view of the well-established policy of this State against interjecting such information in the trial without legitimate purpose other than as an attempt to color the juror's view of the case, we conclude that this policy ought to weigh heavily against admitting such evidence under Rule 403 even though some alternate basis for admitting it might have some arguable legal basis.

Toche v. Killebrew. 734 So.2d 276, 283 (Miss. App.1999)

The reason for the rule is that this evidence is substantially more prejudicial than any probative value this evidence might have, as stated in *Eaton v. Gilliland,* 537 So.2d 405 (Miss.1988):

> We are unable to say that the violation of this rule in attempting to reduce Gilliland's liability before the jury was not prejudicial and confusing. For certain the jury could have gotten the impression that Eaton was attempting to improperly and illegally "double dip" or receive a "wind fall" to which he was not entitled because 80% of the medical and hospital bills had already been paid by an insurance company which was, as a matter of law, wholly independent of him (Gilliland), the wrongdoer. . .Finding reversible error, we have no alternative except to remand this case to the Circuit Court of Forrest County for a new trial in a manner not inconsistent with this opinion.

Here, as in *Eaton*, the Court permitted a defense based on a theory that by having her own insurance coverage, Wright was attempting to "double dip" or "receive a windfall." As in *Eaton*, this is reversible error.

The Mississippi Supreme Court has repeatedly ruled that by allowing this information to be presented to the jury, the only recourse is a new trial. This information is so prejudicial, the Courts presume that it affects substantial rights.

CONCLUSION

The circuit court abused its discretion in denying Wright's motion in *limine* to exclude evidence concerning her receiving insurance payment. Wright's attempt to minimize the harmful effect of this evidence by mentioning it first was not a waiver of her right to exclude the highly prejudicial, inflammatory evidence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Appellants, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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The Honorable Lee J. Howard
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Post Office Box 1387
Columbus, MS 39703-1387

THIS the 7 day of July, 2009.

JIM WAIDE

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-TS-01668-COA

MARCY WRIGHT and JOHN ADAMS WRIGHT

APPELLANTS

VERSUS

ROYAL CARPET SERVICES, INC.

APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

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This, the 7 day of July, 2009.

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