IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

RONALD HAMMOND,

Plaintiff,

v.

DEREK WILBOURN.

Defendant.

CIVIL ACTION FILE NO. 16EV002672

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR MOTION IN LIMINE

OVERVIEW

While racing to work one morning, Defendant ran full-speed through a red light, slamming his two and-a-half ton steel truck broadside into Plaintiff's two-door sedan; Plaintiff's car spun several times before finally coming to a stop on the side of the road. Unsurprisingly, Plaintiff sustained bodily injuries and property damage.

Despite Defendant's clear fault, he[1] refused to compensate Plaintiff.

So, to cover the cost of repairing his vehicle (and other damages he sustained), Plaintiff was forced to turn to other sources for funds—namely, his own auto insurer.

After Plaintiff's insurer paid to repair Plaintiff's vehicle, Defendant eventually (belatedly) partly reimbursed the insurer.

[1] Any reference to Defendant means Derek Wilbourn and any/all of his agents, including Defendant's auto liability carrier, Fred Loya Insurance.

Now, having apparently convinced himself that 'a day late and a dollar short' should be considered good enough, Defendant filed the subject motion by which he asks this Court to *as a matter of law* preclude Plaintiff from introducing at trial proof of damages sustained by him; damages directly and proximately caused by Defendant's negligence.

The legal question presented is a simple one:

> Can a defendant bar a plaintiff from presenting proof of damages proximately caused by the defendant's negligence merely because they were paid by the plaintiff's own insurance?

The answer, too, is a simple one:

> No.

Georgia courts have repeatedly made clear that in a negligence action like this, a defendant cannot use proof that plaintiff's damages were paid by a collateral source to defeat the plaintiff's recovery.

And the answer does not change merely because a defendant later reimbursed the source of the collateral funds before the case reached the jury. To the contrary, Plaintiff remains entitled to present proof of his damages, undiminished by payments made by his own insurer. And, after a verdict is handed down—but before it is reduced to judgment—the defendant may receive a credit for any amounts paid by him.

On this, Georgia law is clear.

DISCUSSION

Defendant's motion represents yet another in a long string of dilatory tactics by which he has needlessly expanded these proceedings and forestalled compensating Plaintiff for his injuries.

Since Defendant caused the accident over a year ago, nothing has changed in terms of Defendant's liability: today, yesterday, last week, last month, and last year, Defendant remains liable for the damages proximately caused by his negligence.

And yet, since the accident, Defendant has done everything in his power to delay resolution of this matter and to cause Plaintiff unnecessary trouble and expense.

The collateral source rule is well-established, and here, Defendant has offered no new argument.

The answer is quite simply No — Defendant is not entitled to summary judgment or any order that would preclude Plaintiff from presenting to the jury the property damages he sustained; he remains entitled to present all damages proximately caused by Defendant's negligence — and Defendant cannot use collateral source evidence to extinguish any part of Plaintiff's claims.

I. DEFENDANT CANNOT BAR PLAINTIFF FROM PRESENTING PROOF OF HIS PROPERTY DAMAGE MERELY BECAUSE IT WAS PAID BY PLAINTIFF'S OWN INSURER.

It hardly bears repeating that as the movant and the party not bearing the burden of proof at trial, Defendant successfully carries his summary judgment burden if he is able to "point out by reference to evidence in the record that there is an absence of evidence to support any essential element." *Cartersville Ranch, LLC v. Dellinger*, 295 Ga. 195, 199 (2014).

This he cannot do.

Before the Court is a simple negligence case; the elements are well-known. And the only element implicated by Defendant's motion is that of damages. But, Defendant's motion itself shows that he does not contend there to be an absence of proof as to that element. In fact, Defendant himself has introduced proof of Plaintiff's damages in support of his motion.

So, rather than arguing an absence of evidence, Defendant's position is:

(a) that the required element is somehow negated by Defendant's showing that damages were paid by Plaintiff's insurance carrier, Liberty Mutual;

Or:

(b) that Defendant is entitled to an order *in limine* barring Plaintiff from presenting evidence of his damages because they were paid by Plaintiff's insurance carrier, Liberty Mutual

(the choice, it seems, is ours).

Whichever way the motion is construed, it fails.

A. To dismiss plaintiff's property damage claim because repair costs were paid by plaintiff's insurer would constitute reversible error.

After having delayed, stalled, and done everything in his power stubbornly to forestall resolution of this straightforward, clear liability case, Defendant has now resorted to filing the subject motion.

In it, Defendant asks this Court to declare *as a matter of law*[2] that for some reason, he is exempt from the solid reach of Georgia's collateral source rule. To that end, Defendant aims to convince this Court that: "PLAINTIFF'S CLAIM AGAINST DEFENDANT WILBOURN SHOULD BE DISMISSED AS PLAINTIFF'S PROPERTY DAMAGE CLAIM HAS ALREADY BEEN PAID."

As legal support for this proposition, Defendant cites two cases—one from 1985 and the other from 1987.

Had Defendant been truly concerned with finding out whether his motion was supported by any actual law, he would have done well to begin by reading, for instance, the Georgia Court of Appeal's opinion in *Hoeflick v. Bradley*, 282 Ga. App. 123 (2006).

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[2] This assumes, of course, that one elects to treat Defendant's motion as one for summary judgment — because *who knows what the motion actually is*?

In what can only be viewed as yet another attempt to cause Plaintiff unnecessary trouble and expense, Defendant filed a motion with this Court—baptized it with two alternate titles, both radically different as to their legal meaning, standard, and effect—and left it up to Plaintiff's counsel and this Court to figure out precisely what it is Defendant is asking the Court to do.

And, by doing so, Defendant succeeded in delaying trial.

B. Hoeflick v. Bradley demonstrates that Defendant's position is foreclosed by the collateral source rule.

Hoeflick involved a negligence case in which the plaintiff's car collided with the defendant's cow which, according to the court's opinion, had apparently wandered onto the highway.

There were four (4) occupants in the plaintiff's car at the time of the bovine/automobile collision; one of these was Nancy Hoeflick, the plaintiff.

Hoeflick filed suit against the cow's owner seeking (in part) to recover for the property damage to her car. *Id.* at 124 ("$4,131 for damage to her vehicle, [and] $816 for a rental vehicle.")

The defendant moved for summary judgment arguing that because the property damage had been paid by auto insurance carrier (Hoeflick was a named-insured on her boyfriend's auto policy) the defendant was entitled to judgment as a matter of law as to her property damage. As a second basis, the defendant also argued that Hoeflick was not entitled to recover her property damage because she had assigned her right of action to the insurance carrier. The trial court granted the defendant's motion, thereby dismissing Hoeflick's property damage claims.

On appeal, its decision was reversed.

In explaining why the trial court's grant of summary judgment had been in error, the Georgia Court of Appeals explained that the collateral source rule preempted the defendant's argument:

> The rule **bars the defendant from presenting any evidence as to payments of expenses of a tortious injury paid for by a third party and taking any credit toward the defendant's liability and damages for such payments.**
>
> This is because a tortfeasor is not allowed to benefit by its wrongful conduct or to mitigate its liability by collateral sources provided by others.
>
> The collateral source rule applies to payments made by various sources, including insurance companies, beneficent bosses, or helpful relatives.

Id. (emphasis added). Given that plaintiff's property damage had been paid by automobile insurer, the defendant could not stop plaintiff from presenting her property damage to the jury. *Id*. ("*the fact that [the] insurer paid most of the repair costs was not relevant to the issue of whether [the defendant] was responsible for compensating [the plaintiff] for damage to her car.*").

Hoeflick is merely one case illustrating the impact of the collateral source rule in this context. *See also Kelley v. Purcell*, 301 Ga. App. 88, 91 (2009), *Polito v. Holland*, 258 Ga. 273, 274 (1988) ("The collateral source rule, stated simply, is that the receipt of benefits or mitigation of loss from sources other than the defendant will not operate to diminish the plaintiff's recovery of damages.").

In the case at bar, Defendant is asking this Court to do precisely what the Court of Appeals disallowed in *Hoeflick*: to foreclose Plaintiff from introducing proof of property damage *undisputedly paid by Plaintiff's own insurance carrier*.

This is not a murky area of law. The law here is clear—Defendant cannot reap the benefit of Plaintiff's collateral source of funds that were used by him to cover the cost of repairing damage caused by the Defendant's tortious conduct.

II. THE RECORD CONTAINS NO EVIDENCE THAT PLAINTIFF ASSIGNED HIS RIGHT OF ACTION.

In *Hoefleck* the Georgia Court of Appeals also addressed the identical second argument now being advanced by Defendant; namely, did the plaintiff assign her right of action?

There, in the same procedural context (*i.e.*, defendant's motion for summary judgment) the Court determined that a finding of assignment was not adequately supported by the record. This case is no different: Defendant has wholly failed to introduce evidence to support a finding *as a matter of law* that Plaintiff assigned his right of action.

The Liberty Mutual policy (Exhibit B)

In this case, Defendant attached to his motion an unsigned, non-certified copy of an insurance policy—unsworn to by any agent of the company—and purportedly issued by Liberty Mutual, pursuant to which Defendant contends payments were made.

There is no evidence, testimony, or proof in the record that the paper attached to Defendant's motion is the insurance policy in effect on the date of the accident and under which coverage was provided to Plaintiff, or that the terms were the same. *See Maloof v. Metro. Atlanta Rapid Transit Auth.*, 330 Ga. App. 763, 764 (2015) ("Admissibility of evidence on motion for summary judgment is governed by the rules relating to form and admissibility of evidence generally."); *Hagan v. Goody's Family Clothing, Inc.*, 227 Ga. App. 585 (1997) ("Evidence offered on motion for summary judgment is held to the same standards of admissibility as evidence at trial, and evidence inadmissible at trial is generally inadmissible on motion for summary judgment.").

But even assuming (without conceding) that the exhibit were in fact what Defendant claims it to be, no part of the document establishes what Defendant claims: *i.e.*, that Plaintiff assigned his right of action.

To the contrary, the text of the document itself makes clear that Plaintiff was not a party to the agreement.[3]

Moreover, the terms of the contract itself demonstrate that it in no way operates to effectuate an assignment of a right of action. Instead, the document expressly contemplates and provides for *this very scenario—i,e.*, one in which a plaintiff, insured under the policy, recovers damages from a liable third-party. To that end, the policy states:

> If we make a payment under this policy and **the person to or for whom payment is made recovers damages from another**, that person shall:
>
> 1. Hold in trust for us the proceeds of the recovery; and
> 2. Reimburse us to the extent of our payment after that person has been fully compensated for damages. However, **any reimbursement due to us shall be reduced by our pro rata share of attorney's fees and expenses of litigation incurred in bringing the claim**."

Def. Exhibit B, at 11 ("OUR RIGHT TO RECOVER PAYMENT") (emphasis added).

As such, the policy itself—even if it were admissible—plainly does not establish an assignment by Plaintiff of his right of action.

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[3] Here, as in Hoeflick, Plaintiff is not a named-insured, rather, he is merely a listed driver under the policy.

<u>Liberty Mutual's "Release" of Plaintiff's rights</u> (Exhibit J)

In support of his motion, Defendant also offers up a document that on its face appears to have been executed in August 2016—approximately 3 months into the current lawsuit.

The document—signed only by an employee of Plaintiff's UM carrier, which at the time of the document's execution founds itself facing potential UM exposure (and whose interest is therefore plainly adverse to Plaintiff's to the extent of any possible excess judgment against Defendant)—purports to, *on behalf of Plaintiff,* release Defendant from … well, from everything:

> [A]ny and all claims, actions, causes of action, liens known and unknown, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned [*i.e*., a Liberty Mutual claims representative, apparently located in Lehigh County, Pennsylvania] or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen property damage and the consequences thereof resulting or to result from the occurrence on or about the 22nd of March 2016.

Def. Exhibit J.

In other words, Defendant would like to have this Court accept as undisputed material fact, that this self-serving document—signed only by the UM carrier's agent, months into the current lawsuit—operated, as a matter of law, to extinguish *Plaintiff's rights to recover* damages from the defendant.

Setting aside the glaring bad faith on display (*See* O.C.G.A. § 9-11-56(g) "Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Code section are presented in bad faith or solely for the purpose of delay, the court shall

forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt.") the absurdity of this proposition is self-evident.

Suffice it to say the affidavit should properly be stricken. *See Smith v. Dill's Builders, Inc.*, 332 Ga. App. 491 (2015) ("In order to be considered by the trial court, affidavits opposing summary judgment must be made on personal knowledge and must set forth such facts as would be admissible in the evidence. All hearsay evidence, unsupported conclusions, and the like, must be stricken or eliminated from consideration in a motion for summary judgment.").

Quite simply, the record contains no evidence of an assignment *by Plaintiff*. As such, Defendant's argument that Plaintiff is not a real party in interest fails as a matter of law.

III. DEFENDANT IS SIMPLY ENTITLED TO SET-OFF FROM THE VERDICT ANY SUMS PAID BY HIM (OR ON HIS BEHALF) PRIOR TO ENTRY OF JUDGMENT.

Returning now to Defendant's frivolous argument that somehow if Plaintiff is permitted to present all of his damages to the jury, Plaintiff will be "double-dipping" and the sky will crumble and fall—Georgia courts have made clear that this is hardly the case.

Time and time again, Georgia courts have explained that to eliminate any possibility of "double-recovery" (as Defendant unconvincingly claims is his fear), after a verdict is handed down, the Defendant may receive credit or set-off for any amounts previously reimbursed by him. *See MCG Health, Inc. v. Kight*, 325 Ga. App. 349, 353 (2013) (under collateral source rule, plaintiff is entitled to seek full recovery *undiminished by insurance* and "[t]o prevent a double recovery" this amount is reduced post-verdict by any sums "paid on the tortfeasor's behalf by his insurer"); *Andrews v. Ford Motor Co*., 310 Ga. App. 449, 477 (2011) (collateral source rule precludes evidence that a plaintiff received compensation, but double-recovery is prevented by plaintiff not being permitted to *collect* to extent compensation was already received); *Candler Hosp., Inc. v. Dent*, 228 Ga. App. 421, 423 (1997) ("plaintiff can recover from the jury all special damages provable, but cannot receive in judgment again what has already been paid by the defendant or on the defendant's behalf by an insurer."); *Myers v. Thornton*, 224 Ga. App. 326, 327 (1997) (defendants were entitled to a set-off against the verdict for sums paid to plaintiffs "on behalf of defendants via insurance proceeds for repairs to plaintiffs' damaged vehicle."); *Hall v. Helms*, 150 Ga. App. 257, 258 (1979) ("trial court erred in failing to grant the appellant's motion to reduce the verdict by . . . the amount previously paid by the [defendant, through his insurer] on the property damage claim.").

In short, Defendant need not fear a double-recovery by Plaintiff; the law has already supplied the solution.

CONCLUSION

Defendant appears to have great difficulty accepting the law as it clearly stands: In Georgia, Plaintiff is entitled to present to a jury all damages suffered by him proximately caused by Defendant's negligence.

And, though Defendant wishes it were otherwise, the well-established law in Georgia remains that the collateral source rules precludes Defendant from claiming the benefits of Plaintiff's insurance.

Plaintiff is entitled to pursue recovery in his own name as the real party in interest because the record contains no evidence that Plaintiff assigned his right of recovery.

What Defendant has aimed to do, and has succeeding in accomplishing once more, is nothing other than to delay, delay, delay resolution of this case.

Defendant's motion, however titled, should properly be **DENIED**.

Respectfully submitted this 25th day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR MOTION IN LIMINE** by sending a PDF copy of same via email to:

Anna K. Beaton, Esq.
Cruser & Mitchell, LLP
(abeaton@cmlawfirm.com)

Attorney for Defendant
Derek Wilbourn

This 25th day of March, 2017.

BLAIN LLC

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