39,667

IN THE SUPREME COURT OF FLORIDA

Case No. 39,667

WILLIAM C. HOLBEIN and
EDWARD RAY HOLBEIN,

Appellants,

-v-

RAY J. RIGOT,

Appellee.

APPEAL FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BRIEF FOR APPELLEE

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and

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STATEMENT OF CASE

Plaintiffs below, William C. Holbein and Edward Ray Holbein, will be referred to herein as Appellants. Defendant below, Ray J. Rigot, will hereinafter be referred to as Appellee.

All emphasis will be that of the courts, unless otherwise indicated. Reference to the pages of the Record on Appeal will be designated as "R".

The Appellants filed a complaint in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, upon a judgment rendered in a court of the state of Texas. (R. 3-4) The Circuit Court entered a Florida judgment (R. 39-40) from which Appellee entered his Notice of Appeal to the District Court of Appeal of Florida, Third District.

The District Court of Appeal opined that the Texas judgment was entitled to full faith and credit insofar as compensatory damages but that the penalty assessed against a Florida resident, Appellee, by the foreign court was not entitled to full faith and credit under the Constitution of the United States. (R. 1-2)

Appellants then simultaneously filed their Petition for Writ of Certiorari and Notice of Appeal to this Honorable Court, which denied the Petition for Writ of Certiorari and denied Appellee's Motion to Dismiss the Appeal.

POINTS INVOLVED ON APPEAL

POINT ONE

WHETHER THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, ERRED IN REFUSING TO ENFORCE THE PENAL PROVISIONS OF A JUDGMENT OF A SISTER STATE? (Raised by Appellants' Assignment of Error Nos. 1 and 2)

POINT TWO

WHETHER THE TEXAS COURT WAS WITHOUT CONSTITUTIONAL AUTHORITY TO ASSESS PUNITIVE DAMAGES FOR THE REASON THAT RULE 243 OF THE TEXAS RULES OF CIVIL PROCEDURE WAS UNCONSTITUTIONALLY APPLIED TO APPELLEE? (Raised by Appellants' Assignments of Error Nos. 3 and 4)

POINT THREE

WHETHER THE INVALID JUDGMENT RENDERED IN TEXAS COULD HAVE BEEN ACCORDED FULL FAITH AND CREDIT SINCE THE TEXAS COURT NEVER ACQUIRED PERSONAL JURISDICTION OVER THE APPELLEE? (Raised by Appellants' Assignment of Error No. 5)

STATEMENT OF FACTS

Appellants were defendants in an action instituted in the state of Texas and filed a cross-claim against Appellee, alleging that Appellee fraudulently induced Appellants to enter into a franchise agreement with National Credit Service Division of International Credit Corporation, a California corporation, with its principal offices and place of business in San Mateo, California. (R. 19-30)

Appellants alleged that Appellee was a non-resident of Texas and did not maintain a place of business in Texas. (R. 22) Appellants further alleged that Appellee was, at all times, acting on behalf of the corporation. (R. 23) Appellants additionally alleged that neither Appellee nor the corporation conducted business in Texas prior to the franchise agreement sued upon. (R. 25) Appellants failed to allege and otherwise failed to establish that Appellee was acting without authority for the corporation.

Appellants, however, concluded in their cross-claim, without alleging facts, that Appellee was subject to service

of summons by citation in Texas, (R. 22) and did make citation thereon. (R. 31) Not having established whether Appellee actually received citation, an Interlocutory Default Judgment was entered against Appellee on the 15th day of October, 1965. (R. 7, 11) Without notice of hearing or in any way attempting to advise Appellee, the Appellants scheduled a hearing on damages on the 7th day of March, 1966, five months after the entry of the Interlocutory Default Judgment, wherein a Final Judgment was rendered by the Texas court. (R. 11-13)

The judgment rendered against Appellee, without opportunity to be heard, was two-fold, to wit: compensatory damages and punitive damages. (R. 13)

Appellants filed suit in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, alleging that the foreign judgment, both the compensatory award and the punitive award, were entitled to full faith and credit in Florida. (R. 3, 4) Appellee answered, denying that the judgment, if valid, was entitled to full faith and credit, denying that the Texas court had jurisdiction over the person of the Appellee, and denying that Appellee conducted business in Texas.

(R. 14-16)

The Circuit Court, upon motion of Appellants, ordered stricken the denials of Appellee regarding Appellants' invalid judgment, ordered stricken the denial of personal jurisdiction, and ordered stricken the Appellee's denial of doing business in Texas. (R. 34) It thereupon entered judgment for compensatory as well as punitive damages. (R. 39-40)

The District Court of Appeal overlooked or chose to ignore Appellee's defenses of lack of personal jurisdiction and that an invalid foreign judgment is not entitled to full faith and credit. (R. 1, 2) Neither the District Court nor the Circuit Court decided or ruled on the questions of personal jurisdiction or validity of the Texas judgment, save for a recital that the Texas judgment appeared regular on its face. (R. 39-40)

ARGUMENT

POINT ONE

THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, DID NOT ERR IN REFUSING TO ENFORCE THE PENAL PROVISIONS OF A JUDGMENT OF A SISTER STATE.

A. The very nature of punitive damages is penal.

Penal laws are not only state imposed as defined by international custom, but also are imposed by the people of a state to accrue to individuals. They are manifested in terms of extraordinary liability in favor of the person wronged and are not related to those damages actually sustained. Huntington v. Attrill, 1892, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123. As Justice Peckham held in Washington Gaslight Co. v. Lansden, 1899, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543:

> Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff. 172 U.S. at 553.

It is readily ascertained by a reading of Washing-

ton Gaslight, supra, that the Supreme Court of the United States did not intend that Huntington be interpreted to limit the definition of a penalty to that of international custom. See also, Scott v. Donald, 1897, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 632.

Moreover, the Huntington case did not deal with punitive damages assessed against a tortfeasor or a penalty by any definition. The action was in the nature of a creditor's complaint involving a New York statute which authorized a remedial cause of action in favor of creditors defrauded by false statements regarding paid-in capital, uttered and signed by directors and officers. This statute was remedial only, damages assessed being only that amount actually suffered by the creditor at the hands of the directors and officers, giving:

> . . . a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. 146 U.S. 657, 676-77.

Punitive damages ". . . blend together the interests of society and of the aggrieved individual. . . ." Smith

v. Bagwell, 1882, 19 Fla. 117, 121. They have as a basic purpose, the punishment of the offender, thereby partaking ". . . of public wrongs, to a greater or less degree." Carraway v. Revell, Fla. 1959, 116 So.2d 16, 20.

To be sure, if this Court considered punitive damages as compensatory to any significant degree, in either the international sense or the legally-defined sense, it would not have disallowed punitive damages under Florida's Wrongful Death Act. Florida East Coast Ry. Co. v. McRoberts, 1933, 111 Fla. 278, 149 So. 631.

B. The discretionary availability of punitive damages evidences their penal nature; they are not available as a matter of right.

Punitive damages, and the determination of their availability, are conceived and effectuated by juridical manifestation of the public policy in the particular jurisdiction. Compensatory damages are available in every jurisdiction to reimburse an injured person for both direct and indirect damages, measured by the quantum of injury. In addition to compensatory damages, a jurisdiction may make available punitive damages, on behalf of its

public and measured by the wilfulness of the wrong and the financial solvency of the tortfeasor, as a deterrent and example to others of the public.

Punitive damages cannot be said to be remedial. Their award is discretionary and is available in a situation so that a particular kind of conduct, labeled as offensive to the public, may be punished. Curtis Publishing Co. v. Butts, 5th Cir. 1965, 351 F.2d 702 aff'd, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094; O'Brien v. Howell, Fla. 1957, 92 So.2d 608; Winn & Lovett Grocery Co. v. Archer, 1936, 126 Fla. 308, 171 So. 214; Fisher v. City of Miami, Fla. 1965, 172 So.2d 455; Carraway v. Revell, Fla. 1959, 116 So.2d 16; Kellenberger v. Widener, Fla. App. 1964, 159 So.2d 267; Sauer v. Sauer, Fla. App. 1961, 128 So.2d 761; Jacksonville Frosted Foods, Inc. v. Haigler, Fla. App. 1969, 224 So.2d 437; 22 Am. Jur. 2d, Damages § 237.

Judge Wisdom, in Northwestern National Casualty Co. v. McNulty, 5th Cir. 1962, 307 F.2d 432, held that:

> The Florida characterization of punitive damages as a penalty, imposed as a means of punishing the defendant in order to deter him and others from

> anti-social conduct, and to no significant extent compensation, conforms with the most widely accepted basis for punitive damages, in other American jurisdictions. At 436.

That Court decided a case wherein an automobile liability insurance company took the position that it was not liable to pay the punitive award against its insured. In that case the Court was, contrary to the cases cited in Appellants' brief, directly faced with the question of the nature of punitive damages. Judge Wisdom, speaking for an undivided Bench, defined the basis of punitive damages as punishment and, in holding that an insurance carrier is not liable for a penalty imposed on its insured, reasoned:

> Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against civil punishment that punitive damages represent. 307 F.2d at 440.
>
> It is no answer to say, society imposes criminal sanctions to deter wrongdoers; that it is enough when a civil offender, through insurance, pays what he is adjudged to owe. A

> criminal conviction and payment of a fine to the state may be atonement to society for the offender. But it may not have a sufficient effect on the conduct of others to make the public policy in favor of punitive damages useful and effective. . . . To make that policy useful and effective the delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people--the driving public--to whom he is a menace. 307 F.2d at 441-42.

See also, Nicholson v. American Fire and Casualty Co., Fla. App. 1965, 177 So.2d 52.

Thus, the availability of punitive damages over and above compensation is determined by their nature as a punishment manifested by ". . . extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered." Huntington v. Attrill, 1892, 146 U.S. 657, 667, 13 S.Ct. 224, 36 L.Ed. 1123. The jurisdiction may make punitive damages available in a particular case ". . . not because the party injured is entitled under the law to recover punitive damages as a matter of right, but as punishment to the wrongdoer. . . ." Florida East Coast Ry.

Co. v. McRoberts, 1933, 111 Fla. 278, 149 So. 631, 632.

Finally, if the judgment sub judice were a lump sum, it might be that full faith and credit should be accorded the entire judgment including a portion thereof which might have been awarded as punitive. There would be little basis for the forum court to determine which portion is attributable as a punishment. However, the judgment sub judice included a separate award for punishment, thereby guiding the forum court to make a positive identification of the punishment levied. Cf. Northwestern National Casualty Co. v. McNulty, 5th Cir. 1962, 307 F.2d 432.

C. The nature of punitive damages is the same in Florida and in Texas.

Florida law regarding the nature of punitive damages is controlling in a determination of whether they are a penalty. Huntington v. Attrill, 1892, 146 U.S. 657, 669-71, 13 S.Ct. 224, 36 L.Ed. 1123. However, even if Texas law were to be considered in a determination of the nature of punitive damages, the same result would be reached. That is, since punitive damages are available

in that jurisdiction in certain types of actions (including fraud), they are a punishment to the defendant and a warning and example to him and other members of the public in that jurisdiction, and are awarded in the interest of society, thereby accruing to the benefit of the public in that jurisdiction. Pan American Petroleum Corp. v. Hardy, Tex. Civ. App. 1963, 370 S.W.2d 904.

In a case wherein the major question was whether a corporation could be liable for punitive damages, the Supreme Court of Texas held that:

> The principle of exemplary damages is of ancient origin, found not only in the Code of Hammurabi and the Hebrew Laws, but in the early Anglo-Saxon Jurisprudence, and has come down to us through the common law. [Citations omitted]
>
> Since the Constitution of the state recognizes this ancient principle of the common law, and expressly provides for recoveries of punitive damages against corporations, we should regard its importance and give the provision such a construction as will effectively protect society against the violation of personal rights and social order by corporations, the purposes for which such damages are now generally awarded against individuals. [Citations omitted]
>
> . . .

> The rule that exemplary damages were to be awarded for 'example's' sake or as a punishment was very clearly established in this country. [Citations omitted] Fort Worth Elevators Co. v. Russell, Tex. S. Ct. 1934, 70 S.W.2d 397, 402-03.

Cf. Clay v. Atchison, T. & S.F. Ry. Co., Tex. Civ. App. 1918, 201 S.W. 1072, aff'd 228 S.W. 907; Burke v. Bean, Tex. Civ. App. 1962, 363 S.W.2d 366.

Accordingly, since punitive damages are penal, and since the law is well settled that states do not enforce penal provisions of sister states, the District Court of Appeal of Florida, Third District, correctly ruled that the punitive damages award was not entitled to full faith and credit in Florida.

POINT TWO

THE TEXAS COURT WAS WITHOUT CONSTITUTIONAL AUTHORITY TO ASSESS PUNITIVE DAMAGES FOR THE REASON THAT RULE 243 OF THE TEXAS RULES OF CIVIL PROCEDURE WAS UNCONSTITUTIONALLY APPLIED TO APPELLEE.

A default judgment admits only the cause of action and defendant's commission of the acts, not punitive damages. Florida East Coast Ry. Co. v. McRoberts, 1933, 111 Fla. 278, 149 So. 631.

A judgment entered against a party without hearing or without affording him an opportunity to be heard, is not a judicial determination of his rights, and the judgment is not entitled to full faith and credit. U.S. Const., 14th Amend.; Washington Gaslight Co. v. Lansden, 1899, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543; In re Noell, 8th Cir. 1937, 93 F.2d 5. Not having noticed Appellee of the hearing on damages, the Texas court and Appellants were particularly abusive of this basic constitutional guarantee by placing reliance on a Texas case decided under a different rule (albeit the forerunner of Rule 243, Texas Rules of Civil Procedure). Cf. Western Union Telegraph Co. v. Skinner, Tex. Civ. App. 1910, 128 S.W. 715, 60 Tex. Civ. App. 477.

Punitive damages are assessed in order to punish, not to place the wrongdoer on the welfare rolls. The amount awarded must be awarded with some knowledge of the party's ability to pay. Therefore, the trier of fact is required to gain knowledge of the party's financial condition before assessing punitive damages. Accordingly, a hearing, with notice thereof, is necessary to make such a determination. Washington Gaslight Co., supra.

Without notice of hearing or in any way attempting to advise Appellee, the Appellants scheduled a hearing on damages wherein a final judgment was rendered. (R. 11-13) The judgment rendered, without opportunity to be heard, was two-fold, to wit: compensatory damages and punitive damages. Since Appellee was not afforded the opportunity to be heard, the Texas court could in no way determine the financial capability of the Appellee, and it could not make a judicially-sound or factually-precise determination of what amount of damages would properly punish the Appellee.

There might be nothing constitutionally forbidden by awarding compensatory damages outside the presence of the defendant so long as the defendant chooses not to be present. The amount of compensatory damages necessarily reflects the proof of injuries suffered by the plaintiff. However, the amount of punitive damages must be measured by the defendant's ability to pay. Therefore, he must be given an opportunity to give evidence of his financial solvency.

Accordingly, Appellee was denied due process of

law by the application of Rule 243, Texas Rules of Civil Procedure, and the punitive damages awarded should not be given full faith and credit. It should be noted that if the judgment at bar were a one-figure lump sum judgment, inherently including some aspect of punishment, the conclusion might be different. Cf. Northwestern National Casualty Co. v. McNulty, 5th Cir. 1962, 307 F.2d 432. However, in the case at bar the judgment specifically noted which portion of the award of damages was remedial and which portion was for punishment.

POINT THREE

THE INVALID JUDGMENT RENDERED IN TEXAS COULD NOT BE ACCORDED FULL FAITH AND CREDIT AS THE TEXAS COURT NEVER ACQUIRED PERSONAL JURISDICTION OVER THE APPELLEE.

In accordance with the holdings articulated in the following cases, lack of jurisdiction over the person is subject to appellate determination at any time subsequent to the rendition of judgment where a court has not laid to rest the question. Pendleton v. Russell, 1891, 144 U.S. 640, 12 S.Ct. 743, 36 L.Ed. 574; Hanson v. Denckla, 1958, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283; People ex rel.

Jones v. Chicago Lloyds, 1945, 391 Ill. 492, 63 N.E.2d 479, cert. den'd, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488. In the case at bar, no court concerned itself with the question of personal jurisdiction, not even for a mere recital in the Texas judgment. (R. 5-13)

An action for fraud and deceit is strictly an in personam action both in Florida and in Texas. Personal service of the complaint and summons is a constitutional requirement of the federal constitution in all in personam actions. U.S. Const., 14th Amend.; Pennoyer v. Neff, 1877, 95 U.S. 714, 24 L.Ed. 565; Haddock v. Haddock, 1906, 201 U.S. 562, 26 S.Ct. 525, 50 L.Ed. 867.

The only two juridically-approved intrusions into this basic constitutional and common law right are pursuant to the implied consent theory and the "minimal contact" theory, manifested by legislation in what are commonly termed long-arm statutes. International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; Hess v. Pawloski, 1927, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091. Cf. Wuchter v. Pizzutti, 1928, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446, and Cherry v. Heffernan, 1938, 132 Fla. 386, 182 So. 427. It is of no

relevance to the case at bar to consider those cases dealing with a non-resident motor vehicle operator negligently causing an accident and being served through a state officer pursuant to state statute.

Thus, the point for consideration herein is whether the Appellee, a citizen and resident of Florida, (R. 14) was alleged to have had or actually had sufficient contact within the state so that jurisdiction over his person could be obtained by service on a state officer in Texas. That question revolves around the more basic question of whether the Appellee was doing business in Texas.

Actually "doing business" within a state is required where jurisdiction over the person is obtained by the applicable state long-arm statute. International Shoe Co. v. State of Washington, supra; Hanson v. Denckla, supra; Perkins v. Benquet Consolidated Mining Co., 1952, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485; McGee v. International Life Ins. Co., 1957, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223. Such is the case under Article 2031-b, Vernon's Annotated Civil Statutes of Texas.

Temporary conduct of business is not sufficient to

establish minimal contact under Texas law. Allied Finance Co. v. Prosser, 1961, 103 Ga. App. 538, 119 S.E.2d 813.

Further, mere solicitation of business is not sufficient to establish minimal contact. Peterson v. U-Haul Co., 8th Cir. 1969, 409 F.2d 1174; Wilshire Oil Co. of Texas v. Riffe, 10th Cir. 1969, 409 F.2d 1277; Richter v. Impulsora DeRevolcadero, S.A., S.D.N.Y. 1967, 278 F. Supp. 169; Metropolitan Staple Corp. v. Samuel Moore & Co., S.D.N.Y. 1967, 278 F. Supp. 85; DiVecchio v. Gimbel Brothers, W.D. Pa. 1966, 40 F.R.D. 311.

Moreover, even if this Court were to decide that Appellee was "doing business" within the articulated factual definitions, the next question to be determined is whether the cause of action was incidental to or arose out of that conduct of business.

The cause of action sued upon (fraud), without conceding that Appellants pleaded or otherwise established that cause of action, could not have been incidental to conducting business when the business alleged to have been conducted by Appellee was concluded. In other words,

taking Appellants' allegations as true, but without conceding same, the most generous interpretation of Appellants' allegations is that the Appellee fraudulently induced Appellants to enter into a business. There is nothing to indicate that Appellee repeatedly engaged in this business or that Appellee had the intention to repeatedly engage in this business. See, Allied Finance Co. v. Prosser, supra. The Appellants, themselves, alleged that Appellee never before sold a similar franchise in the area (R. 25) and that Appellee did not maintain a place of business in the state of Texas. (R. 22) Significantly, once the credit card franchise was purchased by Appellants, the duties, if any, of Appellee in the state of Texas concluded.

In addition, the cause of action, without conceding that Appellants initially alleged a cause of action, did not arise out of Appellee's conducting business in Texas. It is not disputed that the corporation may have conducted business in Texas. It apparently intended to sell a franchise within that state and then oversee the continuance of that franchise in order that profits would

accrue to it. The only purpose for the Appellee's temporary presence with the state was to sell that franchise. As soon as this object was accomplished, the Appellee's purpose was concluded. Thus, if fraud occurred from the doing of business within the state, it would necessarily be fraud practiced by the corporation. If fraud were practiced by the Appellee, it did not arise out of the operations of the business of the corporation. Rather, it would have occurred as an isolated transaction by the Appellee personally. Accordingly, there is no way in which the Appellee could have been served under Article 2031-b, Vernon's Annotated Civil Statutes of Texas, by serving the Secretary of State. That means of service of process is only proper when the cause of action being sued upon arose from the conduct of business within the territorial jurisdiction of the state of Texas.

Accordingly, since both the Circuit Court and the District Court of Appeal of Florida, incorrectly declined to rule on the question of personal jurisdiction, and since the foreign judgment was accorded full faith and credit, not only must this Court consider the question, but it must also decide that the Texas judgment was invalid for

the reason that the Texas court did not acquire jurisdiction over the person of the Appellee. Therefore, the Texas judgment is not entitled to full faith and credit.

CONCLUSION

Appellee, in accordance with the above-cited authorities and above-stated reasons, respectfully requests this Honorable Court to:

1. Reverse the decision of the District Court of Appeal, Third District, and direct that the case be re-tried in the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida, or

2. Affirm the decision of the District Court of Appeal, Third District, as to its holding that punitive damages are not entitled to full faith and credit under the applicable laws, and reverse and direct that the case be re-tried in the Circuit Court on the question of the validity of the foreign judgment, or

3. Affirm the decision of the District Court of Appeal, Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was furnished by mail to Wm. R. Dawes, 1145 Ingraham Building, Miami, Florida 33131 and Jeanne Heyward, 808 Concord Building, Miami, Florida 33130, Attorneys for Appellants, this 13th day of September, 1970.

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