39,667

IN THE SUPREME COURT OF FLORIDA

CASE NO. 39,667

WILLIAM C. HOLBEIN and EDWARD RAY HOLBEIN,

Appellants,

vs.

RAY J. RIGOT,

Appellee.

REPLY BRIEF OF APPELLANTS

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STATEMENT OF THE FACTS

Appellants, WILLIAM C. HOLBEIN and EDWARD RAY HOLBEIN, will not unnecessarily repeat all the facts contained in their original Brief, but will present only the following facts in order to correct the inaccuracies contained in Appellee's Brief.

As previously stated in Appellants' original Brief, this is an appeal from the decision of the District Court of Appeal, Third District, which held that a portion of a foreign judgment awarding punitive damages obtained by Appellants against Appellee, RAY J. RIGOT, was not entitled to full faith and credit under the Constitution of the United States (233 So.2d 458.)

Appellants' Cross Action filed against RIGOT in the State of Texas alleged that RIGOT was doing business in the State of Texas pursuant to Article 2031b and that service of process could be had upon him by serving the Secretary of State of Texas. The Cross Action also alleged that RIGOT was employed by or associated with cross defendant, National Credit Service, the exact capacity and relationship to National Credit Service being unknown and that RIGOT either acting individually or in concert with National Credit Service made fraudulent, false and malicious representations, statements and promises which deceived Appellants and induced them to enter into an individual

territory franchise agreement (R.21-30).

The Final Judgment was entered in the State of Texas against RIGOT after he had been served pursuant to Article 2031b Vernon's Annotated Civil Statutes of Texas. The Interlocutory Default Judgment dated October 15, 1965, recited that RIGOT was "duly served with citation" in the manner and for the length of time prescribed by law as reflected in the Certificate of Service dated September 7, 1965, and that RIGOT was "doing business in the State of Texas pursuant to Article 2031b." (R.11-13).

The Certificate of Service of the Secretary of State of Texas and the registered receipts clearly proved that the Secretary of State of Texas had forwarded a copy of the citation by certified mail return receipt requested to RIGOT in accordance with Article 2031b and that the return receipt was received by the Secretary of State on July 1, 1965 (R.165-167). Therefore, Appellee's statement on page 4 of his brief that it was not established whether he actually received the citation is refuted by the evidence and reaffirmed by his subsequent admission that he had received notice of the law suit (R.145, 195, 196).

After the valid Final Judgment had been entered against RIGOT inthe State of Texas, Appellants filed suit in the Circuit Court of Dade County, Florida, on the foreign judgment (R.1-12). RIGOT answered (R.14-16) but contrary to

his statement on page 5 of his brief, the trial Court did not strike portions of his answer based on lack of jurisdiction over defendant and that he was not served with process (Paragraph 5 of Answer (R.19), and did not strike RIGOT's denial of doing business in the State of Texas (Paragraph 8 of defendant's answer, R.15, 38, 40).

Appellee's statement on page 5 that the Circuit Court did not decide or rule on the question of personal jurisdiction or validity of the Texas judgment is also erroneous because these defenses were not stricken — RIGOT had the opportunity in the Circuit Court to present evidence on the question of personal jurisdiction as well as the question of whether he was doing business in the State of Texas and the validity of the Texas judgment, but he simply failed to offer any evidence to dispute these facts (R.171-218).

The trial Court after hearing all the testimony entered the Final Judgment in favor of Appellants based on the entire amount of the Texas judgment. The trial Court held that RIGOT had failed to establish any valid reason why the Texas Final Judgment should not be given full faith and credit (R.219, 220).

Appellee's main contention in the trial Court was that he was entitled to a second notice concerning the assessment of damages (R.184,185,186,202,204,208,210 and 214). Appellee's

argument in the District Court of Appeal, Third District, was directed toward the fact that the trial Court erred in giving full faith and credit to the Texas judgment because he had not been notified after default that the cause would be tried to assess damages and that the $25,000.00 punitive damage award was in effect a penalty which should not be enforced by another state (R.222).

It is therefore submitted that Appellee's statement on page 5 of his brief that neither the District Court nor the Circuit Court decided or ruled upon questions of personal jurisdiction or validity of the Texas judgment is refuted by the record. On the contrary, Appellee had the opportunity in the trial Court to present evidence on this point but simply failed to do so, and on appeal, Appellee merely questioned the right of a Texas court to award damages after the entry of the default judgment without giving him a second notice. Stated otherwise, Appellee did not contest the fact that the Texas court had personal jurisdiction over him or that he was not doing business in the State of Texas. Therefore, Appellee's statement that the District Court overlooked or chose to ignore his defenses of lack of personal jurisdiction and that an invalid foreign judgment was not entitled to full faith and credit is refuted by the record on appeal.

The lack of evidence on these issues and the narrow

issue on appeal raised by Appellee is also clearly reflected in the opinion of the District Court of Appeal, Third District, which reads as follows:

> "Upon the issues made by the plaintiff's complaint and the defendant's answer, the case was tried before the Court. The defendant admitted that he had lived in Florida since 1954, had received notice of the pendency of the Texas proceedings through the U.S. Mail but no other notices. After hearing the testimony and considering the documents, the Court entered final judgment in favor of the plaintiffs for the full amount of the Texas judgment plus interest and costs. Defendant did not at any time allege or assert fraud, nor did he allege or assert any proceeding in Texas challenging the jurisdiction of the Texas Court and did not present any evidence in this cause proving that he had never transacted or done business in the State of Texas."

* * * *

POINT ONE

THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ERRED IN HOLDING THAT THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES WAS INAPPLICABLE TO A FOREIGN JUDGMENT AWARDING PUNITIVE DAMAGES WHERE THE PUNITIVE DAMAGES WERE AWARDED IN ORDER TO AFFORD PLAINTIFFS A PRIVATE REMEDY FOR INJURY FROM A WRONGFUL ACT RATHER THAN A FIXED PENALTY PROVIDED BY STATUTE TO PUNISH AN OFFENSE COMMITTED AGAINST THE STATE.
(Raised by Plaintiffs Assignments of Error Nos. 1,2,3,4, and 5.)

ARGUMENT

The Texas Final Judgment which awarded Appellants punitive damages was based on a cause of action founded upon false and fraudulent representations maliciously made with intent to deceive. The Texas judgment which awarded Appellants punitive damages was not based upon a Texas penal statute but

rather upon the common law of Texas which is similar to the law of Florida as stated in Winn & Lovett Grocery Co. v. Archer, 126 Fla.308, 171 So.214 where this Honorable Court held that fraud or malice entitled one to recover punitive damages and that punitive damages are assessable where the circumstances show that defendant's conduct is wanton and malicious to such an extent that the measured compensation of the plaintiff should have an additional amount added thereto as "smart money" against defendant by way of punishment or example as a deterrent to others inclined to commit similar wrongs.

The law cited in Appellants' original Brief points with crystal clarity to the fact that the District Court of Appeal, Third District, erred in failing to afford the entire Texas Final Judgment full faith and credit under Article IV, Section 1 of the Constitution of the United States.

The only exception to this constitutional guarantee is that penal statutes of one state do not have extraterritorial effect. But the type of statute which qualifies as a penal statute as contrasted to a remedial statute was clearly distinguished in Huntington v. Attrill, 146 U.S.657, 13 S.Ct.224, 36 L.Ed.1123 where the Court said that the test whether a law is penal is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual. The Court also said that a penal statute in the international sense cannot be

enforced in the Courts of another state if its purpose is to punish an offense against the public justice of the state rather than to afford a private remedy to a person injured by the wrongful act.

This leading case, which has been the guidepost for all future decisions, was followed in James-Dickinson Farm Mortg. Co. v. Harry, 273 U.S.119, 47 S.Ct.308, 71 L.Ed.569 where the Court held that punitive damages are recoverable at common law in many states and a statute providing for their recovery is not a penal law. Accordingly, an Illinois court properly awarded plaintiff damages against a citizen of Texas resulting from false representations by which plaintiff was induced to purchase a tract of land in Texas. Plaintiff's complaint was based on common law liability and a Texas statute.

The following decisions cited in Appellants' original Brief have also followed Huntington by holding that only statutes which are penal in the international sense may not be enforced in the Courts of other states. The Courts have held that a statute is penal within the rules of private international law where it awards a penalty to the state or to a public officer or to a member of the public suing in the interest of the whole community to redress a public law, whereas a statute is not penal in the international sense where the offender is punished but the purpose of the punishment is reparation to those

aggrieved by his offense: Loucks v. Standard Oil Co., 224 N.Y.99, 120 N.E.198; Interstate Savings & Trust Co. v. Wyatt, 63 Colo. 1, 164 P.508; Landum v. Livingston, Mo.App.1965, 394 S.W.2d 573.

It is therefore submitted that the Texas Final Judgment awarding punitive damages based on proven allegations of maliciously made false and fraudulent representations, statements and promises, with intent to deceive was based on common law liability rather than a penal statute. The punitive damage award punished Appellee but also constituted reparation to Appellants who were aggrieved by Appellee's acts.

In an attempt to avoid this principle of law, Appellee does not distinguish the applicable cases cited in Appellants' brief but argues that all punitive damages are penal and that the District Court did not err in refusing to enforce the penal provisions of a Texas judgment.

Punitive damages are imposed at the discretion of the jury and thedegree of punishment must always be dependent upon the circumstances of each case as well as upon the demonstrated degree of malice, wantonness, oppression or outrage found by the jury from the evidence. Winn & Lovett Grocery Co. v. Archer, supra. Stated otherwise, they are related or must bear a relationship to the degree of wrong committed. Merely because this Honorable Court in Florida East Coast Ry. Co. v.

McRoberts, 111 Fla.278, 149 So.631 disallowed punitive damages under Florida's Wrongful Death Act does not mean that punitive damages based on common law liability arising from fraud is a penal statute in the international sense. The decision in the McRoberts case was based on the fact that Florida's Wrongful Death Statute does not allow an award of punitive damages and therefore a default which admitted the cause of action did not admit the punitive damage count of the complaint. This decision does not aid Appellee.

Appellee also argues that the discretionary availability of punitive damages evidences their penal nature. But this argument is again irrelevant because the United States Supreme Court in Huntington v. Attrill, supra, held that only a statute which is penal in the international sense, that is, a statute which had as its purpose the punishment of an offense against public justice cannot be enforced in a court of another state.

It is therefore submitted that the discretionary aspect of punitive damages is immaterial because whether the amount is fixed or discretionary is not the determining factor but, rather, whether the intent is to punish an offense against the public justice or to afford a private remedy to a person injured by a wrongful act.

Finally, Appellee argues that the nature of punitive damages in Florida is the same as in Texas and that this somehow precludes the enforcement of the Texas Final Judgment awarding punitive damages in the State of Florida. However, in Pan American Petroleum Corporation v. Hardy, Tex.Civ.App. 1963, 370 S.W.2d 904, cited by Appellee, the Court said that punitive damages may be awarded in addition to compensatory damages where a defendant acted wilfully or fraudulently and that further compensation may be allowed by law in addition to actual damages by way of punishment as an example for the good of the public, and may also include compensation for inconvenience, reasonable attorney's fees and other losses too remote to be considered under actual damages.

The description of the type of punitive damages which may be awarded in a Texas court eliminates any argument that punitive damages are awarded to punish an offense against public justice, rather than to afford an individual redress for a private wrong. Even Burke v. Bean, Tex. Civ. App. 1963, 363 S.W.2d 366 (also cited by Appellee) held that punitive damages in the amount of $2,000.00 and compensatory damages of $500.00 or a ratio of 1 to 4 was not excessive.

Therefore, Appellee's argument which classifies all punitive damages as penal without attempting to distinguish them as the United States Supreme Court did in Huntington v.

Attrill, is without effect. It is true that punitive damages do punish a malicious or fraudulent tort-feasor, but the test to determine whether the punitive damages are penal and therefore unenforceable in another state does not end at this point — rather the determining factor is whether the penal damages afford an individual a private remedy for injury from a wrongful act rather than a fixed penalty provided by statute to punish an offense committed against the state.

The award of punitive damages in the Texas Court against Appellee afforded Appellants a private remedy for an injury caused by Appellee's wrongful act, and was not based on a fixed penalty as provided by a Texas statute to punish an offense committed against the State of Texas. Therefore, the Constitution of the United States guaranteed Appellants the right to enforce the entire Texas judgment in the State of Florida.

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.

ARGUMENT

Succinctly stated, Appellee argues under this point that he was entitled to a second notice for the hearing on damages and the failure of the Texas Court to give him a

second notice constituted a denial of due process. This argument is devoid of merit for the following three reasons:

First, Appellee never filed any cross assignments of error contesting the constitutional authority of the Texas Court to assess punitive damages against him without affording him a second notice, after the default judgment had been properly entered against him. Therefore, this argument which is unsupported by any assignment of error must fail in accordance with the following decisions: C.& D. Farms, Inc. v. Cerniglia, Fla.App. 1966, 189 So.2d 384; State v. City of Hialeah, Fla. 1959, 109 So.2d 368; Regero v. Daugherty, Fla. 1953, 69 So.2d 178; Fla. Nat. Bank of Jacksonville v. Kassewitz, 156 Fla.761, 25 So.2d 271; Henderson v. Usher, 125 Fla.709, 170 So.846.

Secondly, if Appellee's argument under this point, which is vague, questions the constitutionality of Rule 243 of the Texas Rules of Civil Procedure he is likewise estopped to argue this point for the simple reason that the validity of this Texas statute was not challenged or ruled upon by the trial Court or the District Court of Appeal and therefore cannot be the subject of appellate review before this Honorable Court: St. Paul Fire & Marine Insurance Co. v. Hodor, Fla.App. 1967, 200 So.2d 205; Lipe v. City of Miami, Fla. 1962, 141 So.2d 738; Carlton v. Fidelity & Deposit Co. of Maryland, 113 Fla. 63, 154 So.317.

Thirdly, it is undisputed that Appellee was served with process and received notice of the Cross Action filed by Appellants, but chose to ignore it rather than actively defend on the question of liability or damages. The constitutional requirement of notice which affords due process requires only one notice — two notices are unnecessary. This principle of law is substantiated on the following decisions:

State v. Goodbar, Mo. 1957, 297 S.W.2d 525 (The essence of due process is notice of pendency of the action and an opportunity to be heard. Standard Oil Co. v. State of New Jersey, 341 U.S.428, 71 S.Ct.822, 95 L.Ed.1078. Due process does not require notice that some particular step must be taken or that certain procedure be followed; the opportunity afforded is to make a choice of whether to appear or default, acquiesce or contest. Mullane v. Central Hanover Bank & Trust Co., 339 U.S.306, 70 S.Ct.652, 94 L.Ed.865. Therefore, plaintiff was not required to advise defendant to file an answer.)

Collins v. North Carolina State Highway, Etc., 237 N.C.277, 74 S.E.2d 709 (The notice required by the Constitution of the United States is the notice inherent in the original process whereby the Court acquires original jurisdiction and not notice of the time when the jurisdiction vested in the Court by the service of the original process will be exercised. After

the Court has once obtained jurisdiction in a cause through the service of original process, a party has no constitutional right to demand notice of further proceedings in the cause. 12 Am.Jur. Constitutional Law, Section 594; 16 C.J.S. Constitutional Law Section 619).

Gray v. Hall, 203 Cal.306, 265 P.246 (After jurisdiction has attached, the party has no constitutional right to demand notice of further proceedings. Notice essential to due course and process of law is the original notice whereby the Court acquires jurisdiction and is not notice of the time when jurisdiction, already completely vested, will be exercised. Whether notice of subsequent proceedings, after the Court has acquired jurisdiction by original process, will or will not be required is a matter of legislative discretion).

Taintor v. Superior Court, 95 Cal.App.2d 346, 213 P.2d 42 (After entry of default, Petitioner not entitled to notice of hearing as a result of which judgment was entered against him. There is no constitutional right to notice of such subsequent proceedings.)

Therefore, Appellee's argument under this Point, which in effect, contends that he was entitled to receive two notices, is devoid of merit and must be rejected.

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.

ARGUMENT

Appellee also argues under this Point that the Texas Court never acquired jurisdiction over him because he was not doing business in the State of Texas; and even if this question were decided against him, the cause of action sued upon (fraud) was not incidental to the conduct of business which he conducted in the State of Texas, or that the cause of action did not arise out of Appellee's conducting business in Texas. Appellee further argues that neither the Circuit nor the District Court of Appeal ruled on the question of personal jurisdiction and also states that the Circuit and the District Court of Appeal "incorrectly declined to rule on the question of personal jurisdiction." Again, this argument under this Point is devoid of merit for the following two reasons:

First, Appellee's failure to file cross assignments of error to support this argument precludes appellate review in accordance with the cases cited on page 12 of this brief.

Secondly, Appellee's answer to Appellants' complaint filed in the Circuit Court alleged that he was not served with process and that he never transacted business in the State of

Texas (Paragraphs 5 and 8 of defendant's answer R.15). These paragraphs were not stricken by the Court R.34).

However, at trial Appellee failed to present one scintilla of evidence to substantiate his defense that he had not been served with process and that he was not doing business in the State of Texas or that Appellant's cause of action did not arise out of any business Appellee conducted in the State of Texas (R.171-218).

The Final Judgment of the Circuit Court which afforded the Texas Final Judgment full faith and credit recited that Appellee "had failed to establish any valid reason why said final judgment should not be given full faith and credit". (R.219). Therefore, the Circuit Court did rule on Appellee's answer pertaining to lack of personal jurisdiction and correctly ruled adverse to him for the simple reason that he failed to present any evidence to support his defenses.

Contrary to Appellee's contention the District Court of Appeal did not "incorrectly decline" to rule on the question of personal jurisdiction for the simple reason that the point was never raised in the District Court of Appeal as reflected in Appellee's Assignments of Error (R.222), but even assuming this point had been properly raised on appeal the decision was correct because the record amply supports the District Court's statement that Appellee did not present any evidence in this

cause to prove that he had never transacted or done business in the State of Texas.

Appellee seeks another chance at bat to present evidence which he failed to present during the first trial of this cause on his defenses of alleged lack of personal jurisdiction and not doing business in the State of Texas. Having failed to present any evidence at trial, Appellee is not in any position to seek a new trial.

CONCLUSION

The Texas Final Judgment awarding punitive damages is entitled to full faith and credit in the Florida courts because the cause of action was not based on any Texas penal statute or law, butrather was based on common law or civil liability arising out of false, fraudulent and malicious misrepresentations. The award of punitive damages did not punish Appellee for a public wrong, but rather afforded Appellants a private remedy for a wrongful act committed by Appellee. The award of punitive damages is therefore entitled to the constitutional guarantee and the failure of the District Court of Appeal to affirm this portion of the Texas judgment requires reversal.

It is further submitted that Appellee's argument which seeks to reverse the entire decision of the District Court of Appeal and a new trial in the Circuit Court is totally devoid

of merit. Appellee was not entitled to two notices of hearing for the Constitution only requires one notice of hearing and the Texas statute satisfies this constitutional guarantee. Furthermore, any argument directed towards lack of personal jurisdiction over Appellee on the ground that he was not doing business in the State of Texas is also spurious as evidenced by his failure to present any evidence on this point during trial in the Circuit Court when ample opportunity was presented.

WHEREFORE, Appellants, WILLIAM C. HOLBEIN and EDWARD RAY HOLBEIN, respectfully request this Honorable Court to quash the portion of the decision of the District Court of Appeal, Third District, which refused to give full faith and credit to the portion of the Texas judgment awarding punitive damages and to enter a decision affirming the Final Judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellants was furnished by mail to HORTON & SCHWARTZ, ESQS., Attorneys for Appellee, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130, and DENNIS I. HOLOBER, ESQ., Attorney for Appellee, Suite 10-L, 407 Lincoln Road, Miami Beach, Florida 33139 on this 30th day of December, 1970.

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