IN THE SUPREME COURT OF FLORIDA

PRIME MOTOR INNS, INC.; PRIME MANAGEMENT CO., INC.,; and PRIME-FLORIDA, INC.,	:	CASE NO. 65,229 DCA-3 NO. 83-915
Petitioners,	:	
vs.	:	
DISTRICT COURT OF APPEAL, THIRD DISTRICT; IRVING WALTMAN; ALBERT COHEN; and W&C ASSOCIATES, LTD.,	:	
Respondents.	:	

BRIEF OF RESPONDENTS ON JURISDICTION

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INTRODUCTION

Petitioner has sought discretionary review in this Court. The parties will be referred to as they appear in this Court.

ARGUMENT

Petitioner contends that this Court has jurisdiction to review the decision of the District Court of Appeal in Waltman & Cohen v. Prime Motor Inns, Inc., _____ So.2d _____ (Fla. 3d DCA 1984) on grounds of "express and direct" conflicts.

Art. V § 3(b)(3), Fla. Const. vests jurisdiction in this Court to review any decision of a district court of appeal:

> ". . .that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. . ."

Jenkins v. State, 385 So.2d 1356 (Fla. 1980) decided three months after that provision was ratified by the people of this State, traced its history, purpose and significance in limiting and defining conflict jurisdiction in this Court. It held:

> "The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. . ."

The term "expressly" was defined in Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981). It was held that the district court need not explicitly identify the conflicting district court or Supreme Court decisions to vest jurisdiction so long as the conflict appears in the discussion of the legal principles in the decision sought review. The term "direct conflict" had

appeared in Art. V § 4(2), Fla. Const., the predecessor to Art. V § 3(b). In Ansin v. Thurston, 101 So.2d 808 (Fla. 1958) this court held:

> "'A conflict of decisions. . . must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions.'. . ."

Direct conflict must be patent, Florida Power & Light Co. v. Bell, 113 So.2d 697 (Fla. 1959) and must appear from the language of the decision alone. Mystan Marine, Inc. v. Harrington, 339 So.2d 200 (Fla. 1976).

Tested by these standards, the decision here sought review neither expressly conflicts nor directly conflicts nor patently conflicts with a decision of any other district court of appeal nor any decision of this court.[1] This court lacks jurisdiction.

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[1]The Committee Notes to Rule 9.120, Fla.R.App.P., state:

> "The jurisdictional brief should be a short, concise statement of the grounds for invoking jurisdiction and the necessary facts. It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue. . ."

Petitioners argue the merits with frequent reference to the transcript of testimony in the trial court, a document neither filed nor permitted to be filed with Petitioners' Brief on Jurisdiction; Rule 9.120(d), Fla.R.App.P. Petitioners also, in disregard of that rule, include in their appendix, the trial judge's order.

Express, direct conflicts is claimed with Seaman v. Zank, 375 So.2d 10 (Fla. 4th DCA 1979). There, in a per curiam opinion, the court held:

> "This is an appeal from an order granting a new trial to the defendants on both damages and liability. The trial judge failed to set forth in the order the specific grounds for granting a new trial. He merely stated that he was 'astounded' and that the jury could not have arrived at the $30,000.00 verdict on liability and damages without prejudice, sympathy or misunderstanding of the evidence entering into the award. . ."

In the opinion at bar, the district court of appeal here held:

> "Turning to the second claim, we reiterate the rule that a trial court order granting a new trial on the ground that the verdict is excessive and against the manifest weight of the evidence must state reasons supporting the court's conclusions. The purpose of the rule is to enable this court to proceed with appellate review. . ."

The specific ground for the ORDER GRANTING NEW TRIAL was set out by the order as required by Rule 1.530(f), Fla.R.Civ.P. and Seaman v. Zank, (supra). The single ground was that the verdict was excessive and against the manifest weight of the evidence. The reason for that ground was not set out in the ORDER, nor does it have to be, City of Hialeah v. Hurrell, 423 So.2d 994 (Fla. 3d DCA 1982), White v. Martinez, 359 So.2d 7 (Fla. 3d DCA 1978). The specific ground that the verdict was against the manifest weight of the evidence is sufficient if the record supports the ORDER; Baptist Memorial Hospital v. Bell, 384 So.2d 145 (Fla. 1980).

In the case at bar, the district court of appeal found that the record did not support the trial judge's findings that the verdict was against the manifest weight of the evidence. The decision does not conflict with Seaman v. Zank, (supra) where no ground was stated in the order. No conflict exists.

Petitioner next claims direct conflict with Baptist Memorial Hospital v. Bell, 384 So.2d 145 (Fla. 1980) and Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981). Both cases involve the setting aside of jury verdicts and granting of new trials on liability and damages.

In the case at bar, the trial judge did not set aside the jury's determination of liability. He set aside the jury's finding of damages, finding that the damages were excessive and against the manifest weight of the evidence. The district court of appeal found that the amount of the verdict was within the evidence presented as to damages. It held:

> "The test to be applied by the trial court before granting a new trial as to damages is whether a jury of reasonable persons could have returned the verdict. Griffis v. Hill, 230 So.2d 143 (Fla. 1969). We are unable to discern reasons justifying the trial court's decision to grant a new trial. On the contrary, we find sufficient evidence to sustain the jury award of $500,000 on appellants' second claim, noting particularly a form filed with the Securities Exchange Commission; we therefore hold that the trial court erred in granting a new trial on the issue of damages. See White. . ."[2]

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[2]White v. Martinez, 359 So.2d 7 (Fla. 3d DCA 1978).

In so holding, the district court of appeal followed the standards set by this Court in Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978) and Arab Termite & Pest Control v. Jenkins, 409 So.2d 1039 (Fla. 1982). In Arab Termite, citing Wackenhut, this Court held:

> "In Wackenhut this Court adhered to the settled rule that a trial judge may not substitute its judgment for that of the jury on the matter of damages and may enter an order or remittitur or new trial only when the record affirmatively shows the jury's verdict to be excessive or when the judge makes specific findings concluding that the jury was influenced by something outside the record. . ."

Although both Wackenhut and Arab Termite involve punitive damages, in Arab Termite this Court stated that the rule applied to either an award of compensatory damages or an award of punitive damages. See also, Ortega v. Perrini & Sons, Inc., 371 So.2d 203 (Fla. 2d DCA 1979).

Here, the district court of appeal found that the verdict was neither excessive nor that the trial judge had held that the jury was influenced by matters outside the record.

No conflict exists, jurisidcition is absent.

Petitioner next claims conflict with Cloud v. Fallis, 110 So.2d 669 (Fla. 1959). In Cloud v. Fallis, (supra), this Court held:

> "When the judge whom must be presumed to have drawn on his talents, his knowledge and his experience to keep the search for the truth in a proper channel, concludes that the verdict is against the manifest weight of the evidence, it is his duty to grant a new trial, and he should always do that if the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record. . ."

In the case at bar, the trial court found neither that the jury had been deceived as to the force and credibility of the evidence nor that they had been influenced by considerations outside the record. In its decision, the district court of appeal held:

> "We are unable to discern reasons justifying the trial court's decision to grant a new trial. On the contrary, we find sufficient evidence to sustain the jury award of $500,000 on appellants' second claim. . ."

No conflict exists between the two opinions. The lack of conflict becomes even more patent when Cloud is considered in the light of post-Cloud cases decided by this Court. In Laskey v. Smith, 239 So.2d 13 (Fla. 1970), this Court held:

> "In other words, the trial judge does not sit as a seventh juror with veto power. His setting aside a verdict must be supported by the record, as in Cloud v. Fallis, Fla. 1959, 110 So.2d 669, or by findings reasonably amenable to judicial review. Not every verdict which raises a judicial eyebrow should shock the judicial conscience. . ."

Citing both Cloud and Laskey, this Court, in Wackenhut Corp. v. Canty, (supra), held:

> "Since no basis appears in the record which would lead to the conclusion that the punitive damage award is excessive, the District Court was correct in reversing the trial court's order for new trial even though the District Court articulated an erroneous standard for review.

> "Accordingly, we reaffirm the Cloud rule as this court has applied it in Laskey to orders for new trial which are entered as alternative to remittiturs. Before such an alternative order may be entered either the record must affirmatively show the impropriety of the verdict or there must be an independent determination that the jury was influenced by considerations outside the record. The trial judge in this case acted as a seventh juror with veto power. The province of the jury ought not be invaded by a judge because he raises a judicial eyebrow at its verdict. . ."

No conflict appears, no jurisdiction exists.

Finally, Petitioner contends the decision of the district court of appeal directly and expressly conflicts with 6551 Collins Avenue Corp. v. Millen, 104 So.2d 337 (Fla. 1958). That case held:

> "From the record now before us it does not affirmatively appear that the trial judge reserved his ruling on defendant's motion for the purposes of considering it in the light of all the evidence, either at the close of all evidence or after verdict, nor does it appear that he did, in fact, consider all the evidence before making his ruling. This being so, the District Court of Appeal was eminently correct in dismissing an appeal in which the only question raised related to the sufficiency of the evidence. . ."

In the opinion here sought review, the district court of appeal held:

> "Appellants assert that reversal is required because appellees failed to move for a directed verdict at the close of all the evidence; appellees' motion for directed verdict was made during the charge conference held while trial was still in progress. Finding that appellants' position is supported by law, 6551 Collins Avenue Corp. v. Miller (sic) 104 So.2d 337 (Fla. 1958, we reverse the judgment in accordance with directed verdict and reinstate the jury verdict of $200,000 for the first claim. . ."

There is no conflict between the two cases. Petitioner here argues that the trial judge, in a transcript not before this Court, deferred ruling on a motion for directed verdict until after the jury verdict. The transcript, before the Third District Court of Appeal, belies this contention.[3]

No conflict appears, this Court ought decline to exercise jurisdiction.

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[3]Petitioner has improperly argued a non-existent record. Respondent, compounding the impropriety, would point out to this court that if they saw the record they would note that at the close of the evidence the trial judge invited Petitioner's counsel to make a motion for directed verdict. He declined the invitation on the record.

CONCLUSION

This Court lacks jurisdiction. Petition for discretionary review ought be denied.

Respectfully submitted,

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By _____
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I HEREBY CERTIFY that a true copy of the foregoing was mailed to RICHARD M. DUNN, ESQ., Attorney for Petitioner, One Biscayne Tower, Suite 1680, Miami, Florida 33131 and BRADFORD SWING, ESQ., Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., Co-counsel for Petitioners, 28th Floor, One Biscayne Tower, Miami, Florida 33131 this 18 day of May, 1984.

_____
RICHARD L. LAPIDUS