SUPREME COURT OF FLORIDA

CASE NO. 65,229

DCA-3 NO. 83-915

0/A 4-11-85

PRIME MOTOR INNS, INC.;
PRIME MANAGEMENT CO., INC.;
and PRIME-FLORIDA, INC.,

Petitioners

vs.

IRVING WALTMAN; ALBERT COHEN;
AND W&C ASSOCIATES, LTD.,

Respondents.

BRIEF OF RESPONDENTS ON THE MERITS

LAPIDUS & STETTIN, P.A.
Attorneys for Respondents
2222 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-5690

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

INTRODUCTION

The Petition for Discretionary Review seeks to overturn a decision of the Third District Court of Appeal; Waltman & Cohen v. Prime Florida, 446 So.2d 185 (Fla. 3d DCA 1984). The parties will be referred to as they appeared in the trial court. Reference to the record on appeal will be by the letter "r". Reference to the transcript will be by the letter "tr".

Although this Court has accepted jurisdiction, since the order was here entered, this Court has again addressed the point on which conflict jurisdiction is claimed. A section of this brief will be addressed to the jurisdictional point, in light of the recently decided case.

JURISDICTION

In Farish v. Bankers Multiple Line Insurance Company, 425 So.2d 12 (Fla. 4th DCA 1982), the Fourth District reversed an order granting a new trial. The opinion states:

> "The trial judge stated that his failure to give Florida Standard Jury Instruction 6.12 constituted error because the instruction as given fails to inform the jury of its discretion to assess punitive damages. . ."

This Court held that the instruction given was proper and reversed. Quashing the Fourth District, Bankers Multiple Line Ins. Co. v. Farish, _____So.2d _____, 10 FLW 66, (opinion dated January 24, 1985), this Court revisited judicial discretion in the granting of a new trial. It held the instruction given was error. It held further:

> "The jury in this case could have been confused. At least the trial judge, who was there, thought so. A trial judge is given broad discretion in granting new trials, and, when there is a reasonable basis to exercise that discretion, an appellate court should not disturb it. . ."
> (Emphasis added)

In the decision here sought review, the district court of appeal followed the standard set out in Bankers Multiple Line Ins. Co., (supra). It found, however, that there was no reasonable basis in the record to exercise the discretion to grant a new trial. The opinion of the Third District Court of Appeal, it is respectfully submitted, conflicts with no opinion of this Court nor any opinion of any other district court of appeal.

STATEMENT OF THE FACTS AND CASE

After a four day trial, a jury returned special interrogatory verdicts, finding that the Defendants had breached their fiduciary obligations and defrauded the Plaintiffs. They assessed damages at Five Hundred Thousand Dollars on one count and Two Hundred Thousand Dollars on another (r 605-606). Defendants moved for judgment n.o.v., for a new trial and for a remittitur (r 608-620). None of the motions claimed that the jury was confused because the two claims were tried together.

On February 7, 1983, Defendants argued their motions to the trial judge (r 643-680). No claim was made that the jury was confused by the two claims being tried together. At the conclusion of the hearing, the trial judge stated, on the record:

> "As to the case of W&C Associates, Limited's claims against Prime Management Associates for the sale of three Howard Johnsons from Prime Motor Inns, Incorporated I let that case go to the jury because I felt that there was an aura of bad faith in having a partner and not buying that property together with your partner, and then going out on your own and buying it.
>
> "But, I think that the jury's verdict is excessive, and I will grant a new trial on damages. . ." (r 679 - transcript of proceedings taken February 7, 1983).

This was the sole ground stated by the trial judge at the oral argument on motion for new trial for setting aside the Five Hundred Thousand Dollar verdict.

Defendants' counsel submitted a six-page order. On March 9, 1983, the parties appeared before the trial judge to "settle the order".[1] The court, at that hearing, commented that the order submitted was not as he had ruled (App. C, page 20-21). He reiterated:

> "THE COURT: --but I think I left a question of bad faith, when they then went out and bought it themselves.
>
> "Therefore, the issue of bad faith was a proper issue for a jury to resolve, but I thought--I think Mr. Lapidus is correct. I think that the damages were the only thing that I set aside on that basis. . ."
> (App. C, page 4)

As the trial judge orally ruled in February and reiterated in March, the sole ground for setting aside the Five Hundred Thousand Dollar verdict was that, in his view, it was excessive. This was the sole ground expressed in the written order signed by the court. The trial judge did not find the jury to be confused because two claims were tried together. The trial judge did not find the jury to be confused because inadmissible evidence was brought before them. The trial judge did not find that any inadmissible evidence was presented to the jury. The trial judge found only that the verdict was excessive. The Third District Court of Appeal found the record contained substantial evidence upon which a jury could have based

---

[1]The transcript of the March 9th hearing is appended to Petitioners' Brief as "App. C". The transcript is not part of the record on appeal and so far as can be determined, has never been filed in the trial court.

its verdict and reversed. It was correct. The evidence of the record was not just barely sufficient, it was overwhelming.

The Two Hundred Thousand Dollar verdict on the second claim was set aside by the trial judge and a judgment n.o.v. entered for the Defendants. It was reversed by the Third District Court of Appeal because the Defendants had not moved for a directed verdict at the close of all of the evidence. Even if they had, a prima facie case was made. The trial judge here sought to act as a seventh juror.

The record reflects that the Defendants cheated their partners and old friends out of the profits of two business ventures. A jury so found. The evidence supports the verdict.

The events leading up to this case began in the early 1970's.

Defendant, Prime Motor Inns, Inc. is now a public company listed on the New York Stock Exchange. Its president, Peter Simon, knew Albert Cohen, one of the Plaintiffs from high school (tr 357). In the early 1970's, Cohen and his law partner, Irving Waltman, entered into two business ventures with Prime Motor Inns, Inc. and its subsidiary companies to operate six motels in Florida; three Howard Johnsons and three Ramada Inns. This lawsuit, charging breach of fiduciary obligation between partners and unlawful dividends to a majority shareholder, arose out of those business ventures and two separate incidents in 1980 and 1981, initiated and consummated

by Prime Motor Inns, its subsidiary, Prime Management Co., Inc. and their officers.

One of the two ventures between the parties was Prime Southern Joint Venture. The partnership began in 1970 and was owned, fifty percent by the Defendant, Prime Management, Inc. and fifty percent by the Plaintiff, W & C Associates, Ltd., a limited partnership; the general partners of which are Albert Cohen and Irving Waltman[2] (tr 132-133). The venture was formed to lease and operate three Howard Johnson Motels[3] (tr 133-134). All three leases were identical. Each contained, in Article 38, a right of first refusal (tr 134, Ex. 17):

> "The landlord hereby grants to the tenant a right of being first to purchase the demised premises on the same terms and at the same price as the offer submitted to the landlord for the purchase of same."
> (tr 134)

---

[2]The limited partners were various relatives of Waltman and Cohen.

[3]The parties divided the "operation" from "management". The three Howard Johnson Motels, as well as the three Ramada Inns were "managed" by State Southern, Inc., a corporation owned by Waltman and Cohen. State Southern got a three percent management fee, hired and fired personnel and handled the day-to-day business. It had no interest in the leases. It was hired by the "operators" of the motels, who held the leases, provided the funds to operate, earned the profits or suffered the losses of the business (tr 148-150).

In 1980, the landlord of the three Howard Johnsons was Vyquist Trust (tr 135). The leases provided the landlord a net income of Two Hundred Eleven Thousand Dollars per year (tr 142). Because the landlord took the depreciation most of that income was tax free (tr 142). In October of 1980, Vyquist sold the landlord's interest in the three Howard Johnson Motor Inns for One Million One Hundred Seventy-eight Thousand Dollars to Prime Motor Inns, Inc. (tr 143).[4] The interest was worth Two Million Dollars at the time of the sale (tr 144, tr 318). The landlord's interest was sold for Eight Hundred Twenty-two Thousand Dollars less than its market value. Vyquist had offered to sell to the joint venture. Plaintiff, W&C Associates, Ltd., requested that the joint venture buy it (tr 322) and offered to pay for its fifty percent (tr 173). Prime Management, the subsidiary of Prime Motor Inns, a Defendant in this cause, and the other fifty percent venturer, however, refused to allow the venture to purchase the landlord's interest (Ex. 26, tr 322). Its parent, Prime Motor Inns, Inc. purchased the entire landlord's interest instead.[5] The offer to purchase had come from Prime Motor Inn. The jury, given a special interrogatory

---

[4] A tax free return of eighteen percent.

[5] In their brief, Defendants point out that Vyquest and Prime Motor Inns were in litigation. Plaintiffs have no interest in Prime Motor Inns, the parent company, and had no interest in that litigation. Yet their asset was used to settle that litigation. On P. 4 of their brief, the Defendants state:

> "The parties mutually agreed to use a sale of the three Howard Johnson's properties as a means of settling their differences. . ."

The parties referred to were Prime Motor Inns and Vyquest, not the Plaintiffs.

verdict form, found that the Defendant, Prime Management Co.:

> ". . .fail[ed] to act in good faith and with honesty and fair dealing toward W & C Associates, Ltd., by failing to agree to exercise the right of first refusal."
> (r 605)

The jury assessed damages on this claim of Five Hundred Thousand Dollars in favor of W & C Associates, Ltd. and against Prime Management.[6]

Plaintiffs had sought punitive damages for breach of fiduciary obligation (r 8-10). The trial judge struck punitive damages at the charge conference (tr 434).

The second venture between the parties was Prime Florida, Inc., a corporation formed in 1973, to lease and operate three Ramada Inns (tr 95-96, Ex. 3). Eighty percent of the stock of Prime Florida was owned by the Defendant, Prime Motor Inns, Inc. and twenty percent of the stock by the Plaintiffs, Irving Waltman and Albert Cohen. In 1981, Prime Motor Inns caused Prime Florida to sell its interest in one of the Ramada Inns, the Hallendale Ramada Inn. The total purchase price was Four Million Dollars (tr 120). Included in the sale were the fee interest and the restaurant, both owned by Prime Motor Inns. Of the purchase price, One Million Eight Hundred Sixty-seven Thousand Two Hundred Sixty Dollars was attributable to Prime Florida's interest in the motel (tr 128). All of the purchase price

---

[6]One-half of the difference between the value of the fee at the time of the sale and the purchase price plus interest.

went to Prime Motor Inns. No part of the purchase price went to the Plaintiffs, Waltman and Cohen, the twenty percent stockholders of Prime Florida (tr 130). Irving Waltman received notice of the sale from Mel Taub, Prime Motor Inns' Vice President:

> "He, at that time, told me that Hallandale has been sold, and I asked him, I said what do you mean Hallandale has been sold? He said, we sold everything. I said, the operation, too? He said, yes. I said, I don't quite understand what you're talking about. I said, what happened to Prime Florida? He said, Prime Florida is out. I said, Prime Florida gets no apportion whatsoever of the money? He said, no. I said, what happened then to Mr. Cohen's interest and to my interest? He said, you come out better. I said, how? He said, I have a letter on tape, which I'll send to you. . ."
> (tr 112)

At trial, Defendants offered a variety of explanations for their failure to distribute any portion of the sale price to the minority stockholders. First, they claimed that the buyers had promised to pay Waltman and Cohen twenty percent of the profits of the motel (tr 116-118). Next, they claimed that since the fee interest and a restaurant across the road were also sold, the leasehold owned by Prime Florida was worth nothing and no part of the purchase price was attributed to it (tr 488-489). Finally, they claimed no lease existed.

The lease between Prime Motor Inns, Inc., the parent, and Prime Florida, Inc., the subsidiary, was never produced. It was to have been

prepared and executed by Prime Motor Inns (tr 96). On July 13, 1972, Prime Equities, the predecessor of Prime Motor Inns, applied for a Ramada franchise for a motel in Hallandale (Ex. 1). The franchise was issued on August 31, 1972 (Ex. 2). It was assigned to Prime Florida, Inc. on January 16, 1975, the Assignment approved by Ramada Inns (Ex. 5). On June 1, 1973, Prime Florida, Inc., executed a Management Agreement with State Southern Management Co. to manage the Hallandale Ramada. The agreement acknowledged that Prime Florida, Inc. was the lessee of the Hallandale Ramada (Ex. 4). In October of 1974, Prime Management Company, a Prime Motor Inns subsidiary, executed an Assignment of the Hallandale Ramade lease to Prime Florida (Ex. 8). It was to be redone by the Defendant, Prime Motor Inns' lawyers because the wrong company assigned the lease and it included the lease of a restaurant, as well as the motel (tr 98-99). On April 7, 1977, Melvin Taub, Defendant, Prime Motor Inns' Vice President, wrote to Irving Waltman acknowledging that Prime Florida owned the lease on the Hallandale Ramada Inn (Ex. 8). Finally, the 10-K reports filed by the Defendant, Prime Motor Inns, with the Securities and Exchange Commission each year, reflected that Prime Florida, Inc., operated the Hallandale Ramada Inn, pursuant to a long-term lease (tr 103-107, Ex. 20, Ex. 21, Ex. 22).

The jury was given, on this issue, also a special interrogatory

verdict.[7] They were asked and answered:

> "Did Prime-Florida, Inc. have a written leasehold interest in the Ramada Hallandale Inn? Yes.
>
> "Did Prime Motor Inns, Inc. divert proceeds of sale of Prime-Florida, Inc.'s assets to its own use without making a pro rata payment to Waltman and Cohen as the other 20 percent shareholders in Prime-Florida, Inc.? Yes."
> (tr 774)

The jury assessed damages on this claim in favor of Irving Waltman and Albert Cohen and against Prime Motor Inns in the amount of Two Hundred Thousand Dollars.

Defendants had moved for a directed verdict at the conclusion of Plaintiffs' case.[8] The motion was denied. At the conclusion of all of the evidence, the following took place:

> "THE COURT: Is the defense now resting?
>
> "MR. DUNN: Yes, Your Honor.
>
> "THE COURT: Do you have any rebuttal evidence you wish to offer?
>
> "MR. LAPIDUS: No, sir.
>
> "THE COURT: Do you now rest?
>
> "MR. LAPIDUS: We rest.

---

[7]The special interrogatory verdicts were prepared and tendered by the Defendants. They were given, by the Court, over the strenuous objection of Plaintiffs (tr 642-643).

[8]They never actually moved for a directed verdict. The record reflects they just began arguing the law (tr 440).

"THE COURT: Ms. Davis, take the jury out. Bring with you a yellow pad and ask each of the jurors to indicate what they would like to have for lunch.

"I will instruct the jury and we will try to save this afternoon by staying out for about five minutes, coming back, and proceeding with the final argument and the instructions to the jury.

"By the time they retire for the purpose of deliberations on a verdict, your lunch will be served to you in the jury room.

"We will take a five-minute break. You all can prepare yourself for the final argument or whatever motions you want to make.

"(Thereupon, a brief recess was had, after which the following proceedings took place.)

"(Thereupon, at 12:00 o'clock p.m. the jury entered the courtroom and the following proceedings took place:)

"MR. LAPIDUS: May it please the Court.

"Ladies and gentlemen of the jury, on behalf of my clients and of myself. . ."
(tr 705-706) (Emphasis added)

The Defendants never moved for a directed verdict at the close of all of the evidence nor did they move for a directed verdict at the charge conference. It is respectfully submitted that the record reflects no motion for directed verdict.

On December 27th, 1982, Defendants moved for a new trial, for judgment in accordance with the motion for directed verdict and for a remittitur (tr 608-620). On April 14, 1983, the court granted Defendants'

motion for judgment in accordance with the motion for directed verdict on the Prime Florida claim (Two Hundred Thousand Dollars) and granted a new trial on damages only on the Howard Johnsons' claim (Five Hundred Thousand Dollars) (tr 684-687). The sole ground for new trial on damages was:

> "This Court finds that the jury's verdict of Five Hundred Thousand Dollars in damages was excessive and contrary to the manifest weight of the evidence. . ."

This appeal ensued.

SUMMARY OF ARGUMENT

I

The trial judge's order directing a new trial on damages stated the grounds upon which it was based. The trial judge found that the verdict was excessive. Rule 1.530(f), Fla.R.Civ.P., requires that such an order contain specific grounds for its granting. The trial judge did not set out his reasons for finding the verdict excessive and the Third District Court of Appeal found no support in the record for stated ground. The decision of the Third District Court of Appeal was correct and followed Griffis v. Hill, 230 So.2d 143 (Fla. 1969) and Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978).

II

The Defendants never moved for a directed verdict at the close of the evidence. A Judgment N.O.V. could not be granted; Rule 1.480(b), Fla.R.Civ.P. Even if Defendants had so moved, an overwhelming case was made for jury determination.

ARGUMENT

I

THE THIRD DISTRICT WAS CORRECT IN REVERSING THE TRIAL JUDGE'S ORDER GRANTING A NEW TRIAL IN THE HOWARD JOHNSONS' CASE.

A. GROUNDS WERE STATED IN THE ORDER.

Rule 1.530(f), Fla.R.Civ.P., provides:

> "ORDER GRANTING TO SPECIFY GROUNDS. All orders granting a new trial shall specify the specific grounds therefor. If such an order is appealed and does not state the specific grounds, the appellate court shall relinquish its jurisdiction to the trial court for entry of an order specifying the grounds for granting the new trial."

In the order of April 14, 1983 entitled ORDER ON DEFENDANTS' MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, FOR NEW TRIAL OR ALTERNATIVELY FOR REMITTITUR the trial court held:

> "As to the case of W&C Associates, Ltd., against Prime Management, Inc., regarding the sale of the three Howard Johnson Motor Inns, this Court finds that the jury's verdict of $500,000.00 in damages was excessive and contrary to the manifest weight of the evidence. . ."

The trial court's specific grounds for setting aside the verdict were set out in the order, the trial judge found the verdict excessive.

Almost the exact same order was entered by the trial court in Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978). That order, set out in the opinion of this Court, was:

> "This cause coming on to be heard before the Court upon the motion of the defendants for a new trial. The Court heard argument of counsel for the respective parties, both plaintiff and defendants. The Court is of the opinion that the compensatory damages awarded are adequately sustained by the evidence but that the amount of punitive damages is so grossly excessive and contrary to the evidence as to shock the conscience of the Court. . ."

In its opinion affirming the district court's reversal of the order, this Court requested that reasons for the grounds stated in the order be set out by trial judges to facilitate appellate review. However, the lack of a reason for stated grounds did not and does not require that the matter be returned to the trial court to redraw an order. The rule only requires a ground for the order, not the reasoning upon which the trial judge arrived at the ground. In Wackenhut Corp., this Court made an independent review of the record in search of support for the conclusion of the trial judge that the verdict was excessive. It found none and affirmed the district court's order.

In the decision sought review, the Third District did exactly the same thing. In its opinion it found:

> "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 $500,000.00 on appellants second claim, noting particularly

> a form filed with the Securities & Exchange Commission; we therefor hold that the trial court erred in granting a new trial on the issue of damages. . ."

There is no conflict on this point nor did the district court err in the standard it applied.

The cases cited by Defendants are inapposite. In Rodewald v. Lawton, 394 So.2d 1143 (Fla. 4th DCA 1981), no specific ground was stated in the order, rather various alternative possibilities were recited. The matter was relinquished back to the trial judge to pick which possibility he relied upon in granting the new trial. In Seaman v. Zank, 375 So.2d 10 (Fla. 4th DCA 1971) no ground at all was set forth in the order. Jurisdiction was relinquished to the trial court for the purpose of the entry of an order specifying the grounds for the granting of the new trial.

In the case at bar, the trial judge did not find that the jury was affected by any extra-record activity. He stated the verdict was excessive. The Third District reviewed the record and found the verdict to be supported by the evidence. No conflict exists.

B. SUFFICIENT EVIDENCE WAS PRESENT TO SUPPORT THE JURY VERDICT.

In Allred v. Chittenden Pool Supply, Inc., 298 So.2d 361 (Fla. 1974), this Court held that in reviewing the granting of a new trial, the appellate court is limited to those grounds set out in the order. The sole question then, on appeal, is whether the record supports a jury verdict in the amount of Five Hundred Thousand Dollars on the Howard Johnsons' claim.

The jury found that the Defendant, Prime Management Company, had failed to act in good faith and with honesty and fair dealing toward W&C Associates, Ltd., its partner, in failing to agree to exercise the right to first refusal. The trial judge did not disturb that finding. The sole point raised is whether there was evidence to justify a jury finding that the fee interests purchased in bad faith were worth a million dollars more than was paid for them.

Was there sufficient evidence to show the value of the three fee interests? Was there sufficient evidence to show what was paid for them? These are the only two questions on this point.

Albert Cohen, Plaintiff, a partner in the partnership that owned the leases, a real estate broker and lawyer who had operated for thirteen years motels in the State of Florida, testified that the three fee interests under

the hotels were worth Two Million Dollars (tr 319). No objection was raised to his offering an opinion as to the value of the fees. No objection was made to his competency to testify.[9]

An appellate court may not set aside or reverse a judgment or grant a new trial on the basis of admitted evidence absent a timely objection; Section 90.104 Fla.Stat. The Statute, part of the evidence code, is a codification of the Florida common law set out in Jennings v. Stewart,

---

[9] "Q What do you value the fee to be?

"A I value that the fees are -- for the three Howard Johnson's?

"Q Yes, sir.

"A Approximately three thousand.

"Q Based on what?

"A Based on the --

"MR. STEARNS: I can't hear the witness.

"THE COURT: Speak a little louder.

"THE WITNESS: I value it around two million, and it's valued on the two million dollar net income and the three of them throw-off.

"Q [By Mr. Lapidus] All right. . ." (Tr. 319)

308 So.2d 611 (Fla. 3d DCA 1975):

> "The remaining two points claim procedural errors during a four-day trial. The second point, which is directed to the receipt of expert testimony, does not present reversible error under the rule stated in Lineberger v. Domino Canning Co., Fla. 1953, 68 So.2d 357, which is that an appellate court will not consider grounds or objections to testimony which were not raised in the trial court. . ."

Having failed to object to the admission of Mr. Cohen's testimony, Defendants cannot here argue, for the first time, that there was no evidence to support the value of the fees because Mr. Cohen's testimony was inadmissible.

Irving Waltman, also a partner in the partnership which leased the property and owned the right of first refusal, also a real estate broker and a lawyer, who had operated motels for the same length of time, also testified as to the value of the fee (tr 143-144). The court provisionally admitted the testimony subject to cross-examination and a later motion to strike (tr 144). Although Defendants cross-examined Mr. Waltman at length on his qualifications to testify, they never moved to strike his testimony. They cannot here argue error in its admission.

Even if Defendants had preserved the point for appellate argument, the admission of the testimony was not error. In Vitale Fireworks Manufacturing Co., Inc. v. Marini, 314 So.2d 176 (Fla. 1st DCA 1975), the court

held:

> "It is the duty of the trial court to determine the qualification of an expert witness on the subject matter on which he testifies and his judgment will not be disturbed on appeal unless a clear abuse of discretion is made to appear. . ."

The three Howard Johnsons were held by Prime Southern Joint Venture, a partnership, consisting of Prime Management, fifty percent, and W&C Associates, Ltd., fifty percent. W&C Associates is a limited partnership. Albert Cohen and Irving Waltman are the general partners (tr 133). Mr. Cohen is a registered real estate broker (tr 318). He operates six motels (tr 348). He is familiar with the cost of construction of motels (tr 357). He has bought and sold properties (tr 329). Defendants never challenged his expertise and never objected to his opinion testimony. On cross-examination they twice sollicited his opinion as to the valuation of the fee (tr 362, tr 404). There is sufficient evidence in the record to support a jury determination that the fees were worth Two Million Dollars.

Defendants next argue that the purchase price of the fee was not established since cash and stock were paid and the Plaintiffs were not competent to testify as to the value of the Vyquest shares given as part payment. Exhibit 21 in evidence is a 10-K filed by the Defendants with the Securities and Exchange Commission. Note 5 to the Exhibit states:

> "On October 17, 1980 the company acquired three motor inns from Vyquist for a total consideration of $4,035,000.00 of which $530,000.00 was attributed to the fair value of the Vyquest shares. . ."

There was no necessity to prove up by testimony the value of the Vyquist shares. Defendants' own filing with the Securites and Exchange Commission established it.[10]

There was sufficient competent testimony before the jury upon which it could base a verdict of Five Hundred Thousand Dollars. The trial judge did not find the jury determination was based upon inadmissible evidence in his order granting new trial. The jury is the sole judge of issues of fact; Jefferson Realty v. United States Rubber Co., 222 So.2d 738 (Fla. 1969).

The verdict as to the Howard Johnsons Motor Inns was within the range of testimony. It did not exceed the damage testimony. It was error to set it aside as "excessive".

---

[10]The Four Million Thirty-five Thousand Dollar figure set out in the 10-K is the gross price with mortgages. The testimony of Waltman and Cohen was as to the equity, the value above the mortgages. The amount of mortgages on the property was never at issue.

II

THE THIRD DISTRICT WAS CORRECT IN REVERSING THE JUDGMENT N.O.V.

Defendants argue that the opinion of the Third District was a triumph of form over substance. They point to the order granting judgment n.o.v. entered by the trial judge in which the judge recites that he had implied to counsel for all parties that motions for directed verdict were reserved and argument on those motions on which the court reserved ruling could be made subsequent to the verdict's return.

There is absolutely no support in the record for such a statement! There is none! It never happened! A court reporter was present at all times during this trial. The record belies any such action. A trial judge cannot create a record. The Defendants failed to move for a directed verdict at the close of all of the evidence. That is what the record reflects. After the close of all of the testimony, the trial court turned to Defendants' counsel and stated:

> "THE COURT:. . .We will take a five-minute break. You all can prepare yourselves for final argument or whatever motions you want to make. . .
>
> "(Thereupon, a brief recess was had, after which the following proceedings took place.)
>
> "(Thereupon, at 12:00 o'clock p.m. the jury entered the courtroom and the following proceedings took place:)
>
> "MR. LAPIDUS: May it please the Court.

> "Ladies and gentlemen of the jury, on behalf of my clients and of myself I would like to thank you for your patience and your courtesy and attention in these last three or four days. . ." (tr 706-707)

Defendants' counsel made no motion for directed verdict although invited to do so by the court. We are limited to the record. No contention is made that it does not accurately reflect what occurred before the court. No motion was made. No implied reservation occurred.

In the opinion here sought review, the Third District Court 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 process. Finding that appellants' position is supported by law, 6551 Collins Avenue Corp. v. Miller, 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 was not even a motion made for a directed verdict at the charge conference. Rule 1.480, Fla.R.Civ.P. states that "a motion for a directed verdict shall state the specific ground therefor. . ."

At the conclusion of Plaintiffs' case, Defendants moved for a directed verdict on grounds that there were insufficient proof of damages, and that "breach of fiduciary standard has not been met" (tr 418-426). The court denied the motion:

> "I think its sufficient evidence. The prima facie case has been made to allow it to go to the jury, and I will allow it to go. . ." (tr 439)

Defendants then began presenting their case.

In the middle of Defendants' case, the court conducted a charge conference. Defendants did not ask for a preemptory charge. At the conclusion of the conference, after Plaintiffs had objected to the charges being given by the court that were offered by the Defendants, the following colloquy appeared in the record:

> "MR. STEARNS: For the record, my only objection at this point of the instructions is that we are instructing the jury at all. I do not think the case should go to the jury.
>
> "THE COURT: Do you want me to eliminate it?
>
> "MR. STEARNS: Oh, I would still ask for a directed verdict, but we've argued that. I think the issue on the Ramada Hallandale is an issue. My instructions on that issue. My instructions on that issue is for the purpose of complying with the Court's ruling.
>
> "THE COURT: I think the law provides that it be heard.
>
> "MR. STEARNS: I think that is correct. . ." (tr 643)

In the order granting n.o.v., the trial court refers to that colloquy as a motion for directed verdict made at the charge conference. Even if the colloquy between counsel and the court could be considered as a motion for a directed verdict, it does not meet the requirements that such a motion set out the specific grounds upon which it is based. Construing the identical federal rule, in Clark v. Central States Dredging Co., 430 F.2d 63

(8th Cir. 1970), the court held:

> ". . .at the close of all of the evidence defendant merely made the following oral motion:
>
> > "Your Honor, at this time defendant makes an oral motion for a directed verdict at the conclusion of all the evidence and asks leave of the court to file a written motion setting forth the grounds tomorrow morning; since court is adjourning now.'
>
> "The judgment was entered on the jury's verdict on the 16th day of April, 1969. Defendant did not file a written motion setting forth any grounds to base it on until April 17, 1969, the day following the entry of the judgment. Thus, the court was not apprised of the grounds for defendant's motion until after the judgment was entered and there was a failure to comply with Fed.R.Civ.P. 50(a), which provides, 'a motion for a directed verdict shall state the specific grounds therefor.' . . ."

The announcement by counsel for Defendants that he did not think the case should go to the jury does not comply with the rule requiring a motion for directed verdict to state specific grounds therefor. The colloquy, as a motion, was a nullity.

Even if a motion had been made at the charge conference, as found by the Third District Court of Appeal, the charge conference was held in the middle of Defendants' case. Defendant, although invited to move at the conclusion of all of the evidence, failed to so move. Having

failed to move for directed verdict at the conclusion of the evidence, judgment n.o.v. cannot be entered. See, Honda Motor Co., Ltd. v. Marcus, 440 So.2d 373 (Fla. 3d DCA 1983) and 6551 Collins Avenue Corp. v. Millen, 104 So.2d 337 (Fla. 1958).

There are exceptions to the rule that judgment n.o.v. may not be entered unless a motion for directed verdict is made at the close of the evidence. Failure to renew a motion at the close of all of the evidence will be excused where defendant requests, at a charge conference held after all the evidence has been completed, a preemptory charge that the jury find for the defendant; Pittsburgh Des-Moines Steel Company v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976); where the trial judge, on the record, states that the motions could be made after the verdict has been returned without the movant waiving his rights; Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969), Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982); where the trial judge reserves ruling on the motions made at the close of the plaintiff's case; Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981), Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970). Finally, in Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018 (5th Cir. 1979), the Fifth Circuit held that a motion made [11] after the close of the evidence, after the jury had

---

[11]The court characterizes the motion as a "formal motion".

been charged and had retired, but before it had begun to deliberate, was timely. The court reiterated:

> "it is the law in this circuit, as generally elsewhere, that the sufficiency of the evidence supporting a jury verdict is not reviewable on appeal, nor may a motion for judgment n.o.v. be granted, unless a motion for directed verdict was made at the close of all the evidence by the party seeking that review. . ."

Finally, it ought be noted that failure to renew a motion for directed verdict will not impede judgment n.o.v. if there is fundamental error in the record, Honda Motor Co., Ltd. v. Marcus, (supra).

None of the exceptions were here present. No preemptory instruction was requested, the trial judge did not, on the record, reserve. Defendants argue finally that fundamental error existed in the Ramada case because the Plaintiffs failed to produce a written lease on the Ramada Inn and the jury found, in a special interrogatory verdict, that such a lease existed. The lease was between the Defendant, Prime Motor Inns, Inc., as landlord, and the Defendant, Prime Florida, Inc., as tenant. Eighty percent of Prime Florida, Inc.'s stock was owned by Prime Motor Inns, Inc., the landlord. The lease was to have been prepared by the Defendants and kept by the Defendants in their possession. The jury could have inferred the lease existed from the Defendant's filings with the Securities and Exchange Commission which acknowledged the existence of the lease (Ex. 20, 21), the management agreement with State Southern which

acknowledged the lease (Ex. 4), Defendants' letter to the Plaintiffs dated April 7, 1977, acknowledging the existence of the lease (Ex. 8);[12] the Buy-Sell Agreement signed by the Defendants acknowledging the lease (Ex. 3). The question of the existence of the lease was for the jury. Parol evidence as to the existence of a written document is admissible where the existence of the document as opposed to its terms are at issue. In Wilson v. Jernigan, 49 So.44 (Fla. 1909), this Court held:

> "We would also call attention to the principal that 'where the matter to be proved is simply the fact that a contract has been made, as distinct from its terms or provisions, the best evidence rule does not apply in parol evidence as admissible. . ."

See also, Firestone Service Stores v. Wynn, 179 So. 175 (Fla. 1938), Action Fire Safety Equipment v. Biscayne Fire Equipment Company, 383 So.2d 969 (Fla. 3d DCA 1980). The question of the existence of the lease which Defendants acknowledged, it was their responsibility to prepare, sign and keep, was the jury determination. The jury determined that the lease existed. No fundamental error appears in this record.

---

[12] Written by Mel Taub, Defendants' Vice President and General Counsel, who was to have prepared the lease.

CONCLUSION

The decision of the District Court of Appeal, Third District does not conflict with any decision of this Court or of the other district courts of appeal. The district court of appeal correctly followed the law. The trial judge's order entering judgment n.o.v. was improper. The trial judge's order entering a new trial on damages was improper. The Writ ought be discharged. Decision of the Third District Court of Appeal ought be approved.

Respectfully submitted,

LAPIDUS & STETTIN, P.A.
Attorneys for Respondents
2222 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: 358-5690

By _____
RICHARD L. LAPIDUS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Respondents' Reply Brief on the Merits was mailed to RICHARD M. DUNN, ESQ., 1680 One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131 and EUGENE E. STEARNS, ESQ., Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., 2800 One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131 this 27 day of February, 1985.

By _____
RICHARD L. LAPIDUS