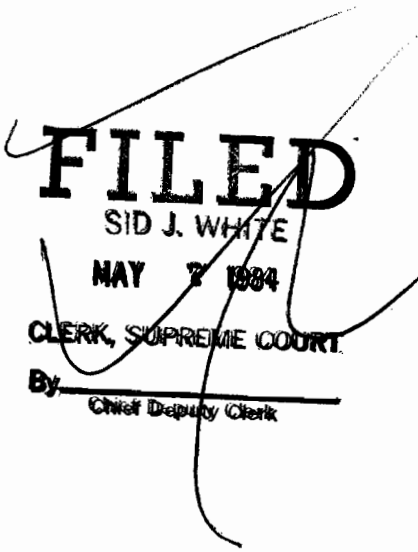
IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,229
DCA-3 No. 83-915



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

Petitioners,

vs.

DISTRICT COURT OF APPEAL,
THIRD DISTRICT; IRVING WALTMAN;
ALBERT COHEN; AND W&C ASSOCIATES, LTD.,

Respondents.

BRIEF OF PETITIONERS ON JURISDICTION

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INTRODUCTION

Petitioners respectfully request that this Court accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, to review a decision of the Third District Court of Appeal that expressly and directly conflicts with decisions of this Court and other district courts of appeal.[1]

FACTUAL AND PROCEDURAL STATEMENT

Over petitioners' objections, the trial court consolidated two complex commercial cases involving nine different entities, four parcels of real estate, and entirely different issues of fact into a single trial. Even the counsel for respondents, who were plaintiffs below, admitted that it was a complicated and confusing case for a jury to understand, and the trial judge subsequently admitted that his decision to consolidate was an error. Transcript of Trial at 581, 583, 623; Transcript of Hearing, March 9, 1983, at 13. The judge said:

> If I had the case to try over again, certainly it would have been tried separately, two things.

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[1] Petitioners have simultaneously filed a petition for writ of prohibition or alternative petition for writ of mandamus pursuant to Rule 9.100, Florida Rules of Appellate Procedure, asking this Court to require the Third District to refer the new trial order back to the trial court for inclusion of a specification of reasons in the order as required by Rule 1.530(f), Florida Rules of Civil Procedure.

At trial, again over petitioners' objections, respondents were permitted to testify as to the fair market value of real estate owned by a public company, the value of commercial leases, and the value of large blocks of stock in public companies despite their admissions that they had no expertise or training to testify on any of these subjects. Transcript of Trial at 169-173, 339, 342, 343, 345. This testimony was not only prejudicial but it was the only evidence of value presented by respondents at trial.

The jury returned a special verdict for respondents in both cases. In one case the verdict was facially inconsistent and totally unsupported by any evidence of any kind. In the other case the verdict was in excess of the amount claimed even by the incompetent testimony of the respondents.

The trial court granted a judgment for petitioners in accordance with motion for direct verdict in the first case and in the other case granted a motion for new trial stating that the jury's verdict was excessive and contrary to the manifest weight of the evidence without specifying the grounds for the order as required by Rule 1.530(f), Florida Rules of Civil Procedure. A copy of the trial court's order is appended as Exhibit A.

Although Rule 1.530(f) states unequivocally that if an order granting a new trial does not state the specific grounds upon which it is based "the appellate court shall relinquish its jurisdiction to the trial court for entry of

an order specifying the grounds for granting the new trial", the Third District in this case did not relinquish its jurisdiction. Instead, the Third District reversed the judgment in accordance with motion for directed verdict in the first case and reversed the order granting a new trial in the second case, reinstating the jury verdicts in both cases. A copy of the Third District's opinion is appended as Exhibit B.

EXPRESS AND DIRECT CONFLICTS

1. With Seaman v. Zane, 375 So.2d 10 (Fla. 4th DCA 1979).

The Third District's opinion in this case recognizes "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" and further recognizes that the order granting new trial in this case does not specify the grounds. Rather than relinquishing jurisdiction to the trial court, however, the Third District reversed the new trial order and reinstated the jury verdict.

As the Fourth District held in Seaman, Rule 1.530(f), Florida Rules of Civil Procedure, requires that when an order granting a new trial without specification of grounds is appealed, it must be sent back to the trial court. It is not proper to reverse the order and reinstate the jury verdict.

2. With Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980) and Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981).

In the present case the Third District reversed the trial court's grant of a new trial on the sole grounds that there was "sufficient evidence to sustain the jury award of $500,000.00 on appellant's second claim." Nowhere did the Third District find that the trial judge abused his discretion in granting a new trial.

This Court found in Baptist Memorial Hospital, however, that where the trial court ordered a new trial on the grounds, among others, that the verdict was excessive and that the verdict was contrary to the manifest weight of the evidence, the trial court's ruling should not be disturbed absent a clear finding of an abuse of discretion by the trial judge. This is especially true where error has been injected into the proceedings by the trial judge as in this case by the admittedly erroneous consolidation of cases. Sosa v. Knight-Ridder Newspapers, Inc., 435 So.2d 821 (Fla. 1983).

The Third District's decision also conflicts with Ford Motor Company in which this Court found that a district court's analysis of whether there was evidence in the record to support a jury verdict was not relevant to a determination of whether or not a new trial should be granted on the grounds that the verdict was contrary to the manifest weight of the evidence. The Court held:

> We have stated and restated the appropriate standard for district courts on review of a trial court's motion granting a new trial. The test is whether the trial court abused its "broad discretion." If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion.

Id. at 1342.

3. With Cloud v. Fallis, 110 So.2d 669 (Fla. 1959).

The Third District in this case stated: "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." The Third District then proceeded to attempt application of the standard itself, saying that "we find sufficient evidence to sustain the jury award."

This Court in Cloud, however, has ruled that a trial court's consideration of whether to grant a motion for new trial "is directed to the sound, broad discretion of the trial judge." 110 So.2d at 673. The "broad discretion" rule results because the trial judge "is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached." Id. This is especially so where the trial judge ordered a new trial not only because the verdict was excessive but also because it was contrary to the manifest weight of the evidence.

Cloud instructs that a trial judge must take an overview of the trial and examine its fundamental fairness when exercising his broad discretion to grant a new trial rather than confining himself to a narrow standard as stated by the Third District. It also instructs that a district court must not attempt to substitute itself for the trial judge as the Third District has done in this case but must, instead, confine itself to determining whether the trial judge abused his discretion in considering a motion for new trial.

4. With a proper application of 6551 Collins Avenue Corp. v. Miller, 104 So.2d 337 (Fla. 1958).

The Third District's decision holds that 6551 Collins requires reversal of a judgment in accordance with a motion for directed verdict when petitioners renewed a motion for directed verdict during a jury charge conference on the last day of trial instead of at the close of all the evidence.

Contrary to the Third District' interpretation, 6551 Collins holds that when a trial judge makes it clear, following a motion for directed verdict at the close of a plaintiff's case that he was defering ruling on the motion until after the case is decided by the jury, it was unnecessary for a defendant to make the useless gesture of renewing his motion at the close of all the evidence in order to file a post trial motion for judgment in accordance

with the motion for directed verdict. In this case, following petitioner's motion for directed verdict at the close of plaintiff's case, the trial court stated that plaintiff's proof had been sufficient and that the case would go to the jury. Transcript of Trial at 439-441. Petitioners renewed the motions during the charge conference and the Court again stated that the case should go to the jury. Transcript of Trial at 606, 610, 622, 635, 643. The Court found that it had reserved ruling on the motions. Exhibit A.

6551 Collins also holds that "the federal rule as to waiver may and should be applied in this situation in the same manner as it is applied in the federal courts." 104 So.2d at 340. The vast majority of federal authorities have held, under facts similar to those in this case, that due to the directive of the liberal provisions of Rule 1, Federal Rules of Civil Procedure, a motion at the close of all the evidence is not a necessary prerequisite to filing a post trial motion for judgment in accordance with the motion for directed verdict.[2] Bohrer v. Hanes Corporation, 715 F.2d

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[2] The relevant facts in this case are that the court pressured the parties to conclude the case as quickly as possible so that the case could go to the jury on Friday, December 17, 1982, (TR/572, 680, 693, 694); due to witness scheduling problems and concern about finishing the case, the court held the charge conference just prior to testimony by defendants' last witness, (TR/572, 644); at the charge conference, defendants argued vigorously the insufficiency

[Footnote Continued on Next Page]

213 (5th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1284 (1984); Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018 (5th Cir. 1979), reh. denied, 603 F.2d 860 (5th Cir. 1979); Halsell v. Kimberly Clark Corp., 683 F.2d 285 (8th Cir. 1982), cert. denied, _____ U.S. _____, 103 S.Ct. 1194 (1983); Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970), cert. denied sub nom. Beaumont v. Aussenheimer, 400 U.S. 883 (1970); Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969); Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981); Pittsburgh Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), overruled on other grounds.

Rule 1.010, Florida Rules of Civil Procedure, is exactly the same as Rule 1, Federal Rules of Civil Procedure, and given the liberal spirit imbued in both rules, the Third District's misapplication of 6551 Collins, creates a conflict. Lubell v. Roman Spa, Inc., 362 So.2d 922 (Fla. 1978).

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of the evidence with respect to the existence of a written lease, moved for directed verdict on three occasions and objected to instructing the jury at all during the conference, (TR/606, 610, 622, 635, 643); the only evidence introduced on the Ramada/Hallandale case after the charge conference was one and one-half pages of Cohen's deposition, which was totally unrelated to the directed verdict issue. (TR/648-705).

REASONS TO EXERCISE JURISDICTION

In its opinion the Third District has, without relinquishing jurisdiction to the trial court as provided by Rule 1.530(f), substituted its judgment for that of the trial court. Clearly, however, the trial court was better positioned to evaluate the gross error in the consolidation of unrelated cases, the admission of totally incompetent expert testimony, and the weight of the evidence introduced.

By its opinion in this case, the Third District, with Judges Pearson and Ferguson dissenting, has adopted a totally new standard for review of new trial orders. That is, regardless of whether the petitioners were prejudiced by events of the trial, by the admission of incompetent evidence, by the improper consolidation of unrelated cases, or by a jury simply incapable of properly filling out the verdict form, all of this prejudice is somehow forgiven if there is any evidence to support the verdict no matter how insubstantial that evidence is.

If this decision by the Third District is permitted to stand, not only will the petitioners have been denied the opportunity for a fair and impartial trial resulting in the totally unjust award of $700,000 to these respondents, but, if followed in other cases, the role of the trial court in reviewing post-trial motions in the Third District will become limited to a simple analysis of whether there was any evidence to support the jury's verdict. Thus,

one of the most important rights that a litigant has to insure the fairness of the trial proceedings will be eliminated and the role of the trial court which observed the proceedings first hand will become that of a functionary.

Moreover, allowing the decision of the Third District to stand will result, as the trial judge stated, in "a triumph of form over substance" in consideration of motions for judgment in accordance with motions for directed verdict. Exhibit A. As presently constituted, the opinion of the Third District requires formal renewal of such motions at the absolute end of all the evidence even when the trial judge has expressly stated that he is reserving ruling on directed verdict motions until after the verdict is rendered.

CONCLUSION

This Court has jurisdiction to review the decision of the Third District and should exercise that jurisdiction to reinstate the trial judge's grant of a new trial and judgment in accordance with motion for directed verdict entered after his determination that the trial was fundamentally unfair.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed to Richard L. Lapidus, Esq., Lapidus & Stettin, P.A., 2222 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, this 4TH day of May, 1984.

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