O/A 4-11-85

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.

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

Respondents.

BRIEF OF PETITIONERS ON THE MERITS

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ATTORNEYS FOR PETITIONERS

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INTRODUCTION

Petitioners submit this initial brief on the merits pursuant to the January 10, 1985, order of this Court accepting direct conflict jurisdiction.

References to the record before the District Court are designated "R." and references to the transcript of trial are designated "T." Plaintiffs/respondents' exhibits at trial are designated "P.E." and defendants/petitioners' exhibits at trial are designated "D.E."

PARTIES AND RELATED PERSONS

Petitioner Prime Motor Inns, Inc. (Prime Motor Inns) is a public company engaged in the business of owning and operating motels throughout the United States. It has a wholly owned subsidiary, Prime Management Company, Inc. (Prime Management) through which it conducts some of its business.

Respondents Irving Waltman (Waltman) and Albert Cohen (Cohen) are the general partners in a limited partnership identified as W&C Associates, Ltd. (W&C Associates). They also own all of the common stock in State Southern Management Co., Inc. (State Southern), a Florida corporation.

In the early 1970's, petitioners and respondents entered into a series of business relationships to operate three Howard Johnson's motels and three Ramada Inns, all of

which are located in Florida. As part of these relationships, two jointly owned entities were formed: (1) Prime Southern Joint Venture (Joint Venture), owned one-half by Prime Management and one-half by W&C Associates, and (2) Prime-Florida, Inc., (Prime Florida) a Florida corporation, the stock of which is 80% owned by Prime Motor Inns and 20% owned by Waltman and Cohen individually.

STATEMENT OF THE CASE AND FACTS

This case arises out of two separate, complex commercial lawsuits involving at least ten different entities, four parcels of real estate, and entirely different issues of fact which were consolidated into a single jury trial over petitioners' objections. Even the counsel for respondents, who were plaintiffs below, admitted that it was a complicated and confusing case for a jury to understand. (T. 581, 583, 623). And the trial judge subsequently admitted that his decision to consolidate was an error. Transcript of Hearing, March 9, 1983, at 13. The judge specifically said:

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

Id.

Because the two cases were entirely unrelated, the recitation of the procedural history and facts of each action must be set out separately in this statement. One of

the actions focuses on three Howard Johnson's motels and is thus referred to as "The Howard Johnson's Case"; the other action focuses on one Ramada Inn located in Hallandale, Florida, and is referred to as "the Ramada/ Hallandale Case."

A. The Howard Johnson's Case.

In 1970, Prime Motor Inns built three Howard Johnson's motels in Central Florida, which it in turn leased to the Joint Venture between Prime Management and W&C Associates. That lease gave the Joint Venture 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." (P.E. 17, 18 & 19).

In 1971, Prime Motor Inns sold the three Howard Johnson's properties to Vyquest Trust ("Vyquest"), an investment trust. (T. 446). The lease and right of first refusal survived that sale.

In 1979, Vyquest and Prime Motor Inns had merger discussions which culminated in a written agreement in December of 1979. (T. 654). The merger did not take place, however, because the price of Prime Motor Inn's stock in early 1980 did not meet the conditions of the agreement. (T. 654). Prime Motor Inns then attempted a takeover of Vyquest by tender-offer and embarked on the acquisition of additional Vyquest stock. (T. 455, 654). Litigation erupted between Vyquest and Prime Motor Inns in April of

1980, each party accusing the other of securities violations and fraud. (T. 656).

After the expenditure of over $1,100,000 in combined legal fees and costs, Vyquest and Prime Motor Inns decided in the summer of 1980 that it would be desirable to settle the disagreements arising from the attempted takeover of Vyquest and its aftermath. (T. 458, 676). At the same time, Vyquest had independently decided to sell the Howard Johnson's property. (T. 658). The parties mutually agreed to use a sale of the three Howard Johnson's properties as a means of settling their differences. (T. 662-663). Under the terms of the settlement, Vyquest was to convey title to the three Howard Johnson's motels to Prime Motor Inns, and in return Prime Motor Inns was to pay Vyquest four separate elements of consideration:

(a) $485,000.00 cash;

(b) 151,400 shares of Vyquest stock (8.1% of the then outstanding shares of Vyquest stock);

(c) An agreement not to attempt a takeover of Vyquest for a period of three years (the "go-away agreement"); and

(d) A general release releasing Vyquest from any claims resulting from the proxy contest and abortive takeover attempt. (T. 170, 457).

Notice of the sale was given to W&C Associates (T. 136), and Waltman himself was sent a copy of the agreement for sale.

(T. 140-141). Waltman, on behalf of W&C Associates (a 50% owner of the Joint Venture), informed Prime Management (the other 50% owner of the Joint Venture) that he wanted the Joint Venture to exercise the right of first refusal given to the Joint Venture by the lease with Vyquest. (T. 141). Prime Management informed Waltman that it was not interested in having the Joint Venture exercise the right of first refusal. (T. 140, P.E. 27). A lawsuit followed (Eleventh Circuit Case No. 81-6809).

At trial, W&C Associates contended that Prime Management's failure to exercise the right of first refusal as requested by W&C Associates, followed by the purchase of the three Howard Johnson's motels by Prime Motor Inns (the parent of Prime Management), was a breach of fiduciary duty. W&C Associates further contended that the purchase price paid by Prime Motor Inns for the property was below its market value, thereby evidencing bad faith on the part of Prime Management. Finally, W&C Associates contended that they were entitled to damages in the amount of one-half (being a one-half owner of the Joint Venture) of the difference between the market value of the three motels and the amount actually paid by Prime Motor Inns for the motels.

The only witnesses called by W&C Associates to support its liability and damage theories were Waltman and Cohen themselves. They testified as fact witnesses, and then, over extensive objection, they further testified as expert witnesses, giving opinions as to the value of the

three motel properties and as to the value of only two of the four elements of consideration paid by Prime Motor Inns for the three motels. (T. 89-249, 316-408). No expert witnesses, or other witnesses any any kind, were called at trial, and W&C Associates relied solely on the testimony of Waltman and Cohen as to the alleged differential between market value and price paid not only to establish the amount of damages but also to establish liability itself for the alleged breach of fiduciary duty.

Waltman first testified that the total consideration given by Prime Motor Inns to Vyquest for the three motels was $1,166,000.00, later changing that figure to $1,178,000.00. (T. 143, 167, 170). Waltman further testified that his determination of the amount of consideration paid by Prime Motor Inns was based upon his addition of the amount of cash ($485,000.00) paid plus his assumed value of the stock given to Vyquest by Prime Motor Inns. (T. 170). He admitted on cross-examination, however, that he did not actually know the value of the Vyquest stock and was not competent to testify as to its value in any event. (T. 171, 173). He also admitted that he was not competent to testify about, and did not know, the value of the release or the value of the "go-away agreement," both of which were part of the consideration paid by Prime Motor Inns to Vyquest for the three motels. (T. 172, 173). Cohen's testimony is essentially identical. (T. 339, 342, 343, 345).

With respect to Waltman and Cohen's opinion as to the fair market value of the stock paid by Prime Motor Inns to Vyquest as part of the consideration, they each admitted that they were not stock brokers and that they had no expertise in valuing stock. (T. 171, 342). In fact, Waltman admitted on cross examination that he had no personal knowledge of the value of these shares. (T. 172).

With respect to the value of the "go-away agreement" and the general release paid to Vyquest by Prime Motor Inns as part of the price for the three motels, neither Waltman or Cohen had any real idea of what it was, much less what it was worth:

> Q. Sir, do you know anything that Prime [Motor Inns] gave to Vyquest that might have been worth $900,000?
>
> A. I don't know of anything they gave that could have been worth $900,000. I know from what I read in the newspaper, there was something called a go away. Whatever that means.

(T. 339). They admitted that both the "go-away agreement" and the general release had some value, but they further admitted that they did not know the value of either. (T. 404, 405).

Waltman also testified, over strenuous objection as to his qualifications, that it was his opinion that the market value of the three motels was $2,000,000.00 based upon a one-year income figure of $211,000.00 for all three motels. (T. 144).

Although Waltman and Cohen are in the motel management business, neither of them has any education or training as an appraiser. (T. 170). Neither of them had, within the past twenty years, represented anyone as a broker or sales agent in the purchase or sale of motels (T. 169), and neither had ever previously purchased or sold a motel (T. 169). Neither established any basis for their opinion testimony on the value of motels in Florida.

At trial, Prime Motor Inns vigorously objected to any of the testimony as to value because of Waltman and Cohen's admitted lack of expertise. (T. 128, 143, 226, 325). Nonetheless, the trial court ruled that they were qualified to testify as expert witnesses. (T. 144; 226-229).

By contrast, Prime Motor Inns and Prime Management offered testimony of a recognized expert witness, Marc Perkins of Raymond James and Associates, who testified that the cash, the stock, the "go-away agreements" and the general release were at least equal in value to the three motels, even assuming a value of $2,000,000.00 as claimed by Waltman in his testimony. (T. 534, 536).

Moreover, Brian Vesley, President of Vyquest, which had sold the motels, testified that the three motels were sold to Prime Motor Inns for their fair market value in an arms-length transaction. (T. 675). He testified that the settlement of the dispute between Vyquest and Prime Motor Inns was worth a substantial amount to Vyquest and

that Vyquest did not sell the property for either $1,166,000.00 or $1,178,000.00 cash. (T. 669, 670). He testified that payment of the block of Vyquest stock, the "go-away agreement," and the general release were all very important to the sale and that the value to Vyquest of what it received from Prime Motor Inns was worth more than what it gave up in value in the form of the three motels. (T. 675).

Neither at trial nor in their closing argument did Waltman and Cohen offer any explanation for their theory that Vyquest voluntarily sold the three motels to Prime Motor Inns for $822,000.00 less than their fair market value, and they even admitted that the sale of the Howard Johnson's motels by Vyquest to Prime Motor Inns was an arm's-length transaction. (T. 165). At closing, Waltman and Cohen simply claimed that they were entitled to damages of $411,000.00 plus interest at the statutory rate for a total of $460,320.00 calculated as follows: $2,000,000.00 (their "opinion" of value of the three motels) less $1,178,000.00 (their "opinion" of value of the consideration paid by Prime Motor Inns) divided by 2 (because they own one-half the Joint Venture) = $411,000.00 plus statutory interest. (T. 173).

As to the alleged liability of Prime Management for breach of fiduciary duty, the trial court properly instructed the jury that Prime Management did not have a duty to agree with W&C Associates that the right of first

refusal should be exercised. (R. 561). The trial court further instructed that any finding of liability would have to be based upon proof that Prime Management failed to act in good faith and with honesty and fair dealing toward W&C Associates. (R. 561). A copy of the jury instruction is appended to this Brief as Appendix A.

The only evidence of "bad faith" on the part of Prime Management introduced by W&C Associates at trial was Waltman and Cohen's contention that Prime Management's parent, i.e. Prime Motor Inns, received a tremendous profit because of the $822,000 difference between their "opinion" of the fair market value and their "opinion" of the price Prime Motor Inns paid for the three motels. (T. 715).

As to the alleged damages, the trial court correctly instructed the jury that in determining the purchase price of the three motels paid by Prime Motor Inns, it should consider the economic value of each of the four elements of consideration, i.e., the cash, the common stock in Vyqyest, the "go-away agreement," and the general release. (T. 758). The jury, however, returned a verdict on this claim for the plaintiffs in the amount of $500,000.00, which, inexplicably, was $40,000.00 higher than even the unsubstantiated figure argued to the jury by Waltman and Cohen. See the "Special Verdict Form" as executed by the jury and appended to this brief as Appendix B.

Following the jury verdict, petitioners moved for judgment in accordance with motion for directed verdict and

alternatively for new trial. After extensive argument, the trial judge stated in open court that he was denying the motion for judgment in accordance with motion for directed verdict, denying the motion for new trial as to liability, but granting the motion for new trial as to damages because the amount of damages awarded the jury was clearly "excessive and contrary to the manifest weight of the evidence."

Prior to executing a written order of the post-trial motions, additional argument occurred over the form and substance of the order. Respondents' counsel stated that he would appeal the order but objected to the inclusion of specific grounds in the order for new trial:

> MR. LAPIDUS: ...What we are here on is the Order on the Motion for New Trial.
>
> I suggest, let us get that settled. There, of course, will be an appeal. I assume both parties are going to appeal it.
>
> Let us get this thing moving. I submit that the Order that I submitted to the Court tracked the Court's language. I picked it up right from the transcript, and I tracked the language of the Court, and I think it is proper, and I did what the Court said.
>
> ....
>
> The sole ground Your Honor ruled on, as stated in the transcript, was that the verdict was excessive, and that is what is set out in the Order.

Transcript of Hearing, March 9, 1983, at 16-18.

In response, petitioners' counsel prophetically, but unsuccessfully, urged the court to delineate the specific grounds for the new trial order as required by Rule 1.530(f):

> MR. STEARNS: Rule 1.530 requires on Motions for New Trial, that the Order entered state specific grounds.
>
> ....
>
> In this particular case, at some point, there has to be the specific grounds stated, which are not stated in the Order which Mr. Lapidus sent to the Court.
>
> If the specific grounds aren't stated, then all that happens is that the District Court of Appeals has to relinquish jurisdiction to send it back to Your Honor to give the specific grounds.
>
> I don't believe Mr. Lapidus has raised any objection whatsoever to the specific grounds which we have stated in our Proposed Order. He merely wants to put the Order in the posture which is going to create the most difficulty for it on appeal, which I don't think is appropriate.

Transcript of Hearing, March 9, 1983, at 17-18. A copy of the full transcript is appended to this brief as Appendix C.

At the conclusion of the argument, the trial court executed the order granting a new trial without specifying the reasons for the order as required by Rule 1.530(f). A copy of the "Order On Defendants' Motion For Judgment In Accordance With Motion For Directed Verdict, For New Trial Or Alternatively For Remittitur" is appended to this brief as Appendix D.

W&C Associates then appealed the order granting new trial to the Third District Court of Appeal, and, as predicted below, they argued in Point III of their initial brief on appeal that the order granting new trial should be reversed because it failed to specify grounds as required by Rule 1.530(f) and because there was sufficient evidence for the jury to have found for them. Thus, W&C Associates were in the unique position of seeking reversal based upon the error they had promoted.[1] A copy of Point III of W&C Associates' brief is appended to this brief as Appendix E.

Petitioners brought a cross-appeal challenging the denial of a directed verdict on liability and damages, and, alternatively, the denial of the motion for new trial on liability.

In support of affirming the new trial order, petitioners argued to the Third District the improper consolidation for trial of two complex and unrelated cases, the admission of wholly incompetent "expert" testimony upon

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[1] In their brief in opposition to jurisdiction in this Court, W&C Associates reversed their field again, arguing that the trial court had given specific grounds for awarding a new trial:

> The specific grounds for the ORDER GRANTING NEW TRIAL was set out by the order as required by Rule 1.530(f). ...The reason for that ground was not set out in that ORDER nor does it have to be.

Brief of Respondents on Jurisdiction at 4.

which the verdict was based, the failure of W&C Associates to offer any evidence at all on the essential elements of their case, and the jury verdict itself which awarded to W&C Associates substantially more than they had sought.

In deciding this case on appeal, the Third District did not mention the points raised by petitioners that the two unrelated cases were improperly consolidated, that the verdict was predicated upon the admission of wholly incompetent "expert" testimony, that no evidence was offered at all as to essential elements of the claim (i.e., the value of the release and the "go away agreement"), or that the verdict was substantially in excess of the amount which W&C Associates had claimed in their testimony and argument. The Third District also did not comment on the unlikelihood that Vyquest, the public company that sold the three motels, entered into an arms-length agreement to sell these three motels for a price $822,000 less than their fair market value.

The Third District opinion was silent as to the cross-appeal brought by petitioners.

Instead, the Third District dealt only with the propriety of the new trial order opining that: "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," citing this Court's decision in Griffis v. Hill, 230 So.2d 143 (Fla. 1969). The Third District then ruled:

> 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' [Howard Johnson's] 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. We reverse the order granting a new trial and reinstate the jury verdict of $500,000 as to the [Howard Johnson's] claim.

Opinion at 2. A copy of the entire Third District opinion is appended to this brief as Appendix F.

B. The Ramada/Hallandale Case.

In 1974, Prime Motor Inns built the 103 room Ramada Inn of Hallandale on one parcel of property and at the same time built a restaurant, "The Agora," on an adjacent parcel of property. Prime Motor Inns did not own the land upon which the motel built, but it did own a long term ground lease giving it the right to construct the facilities. (T. 190).

Prime Motor Inns then entered into a written, long term motel operating lease agreement with its subsidiary Prime Management for the motel only. (T. 463). Prime Management, in turn, entered into an oral lease agreement with Prime-Florida, the Florida corporation owned 80% by Prime Motor Inns and 20% by Waltman and Cohen, to operate the motel for an unspecified term. (T. 464, 192, 211). As a final step, Prime-Florida entered into a management agree-

ment for the motel with State Southern, the Florida corporation wholly owned by Waltman and Cohen. Through State Southern, Waltman and Cohen actually operated the motel.

With the exception of one or two years, Prime-Florida lost money from its oral lease on the Ramada/ Hallandale while State Southern (wholly owned by Waltman and Cohen) always received its management fee. (T. 189, 356).

In January 1981, Prime Motor Inns sold the Ramada Inn of Hallandale and The Agora restaurant to a third party, Ramada Hallandale Associates, Ltd., in an arms-length transaction. The total sale price was $4,000,000.00, and for that price, Prime Motor Inns conveyed to Ramada Hallandale Associates the ground lease, the motel building itself, the Agora Restaurant, and all of Prime Motor Inn's contractual rights arising out of its ownership of the motel building, specifically including the motel operating lease given to Prime Management. (D.E.B; P.E. 5, 7, 12, 9, 8 & 13). After the sale, State Southern, owned by Waltman and Cohen, continued to operate the motel, only now for a new owner.

As a result of the sale, Waltman and Cohen brought suit individually against Prime Motor Inns (Eleventh Circuit Case No. 81-4519) contending that Prime-Florida had a long-term lease for the motel with Prime Management and that Prime Motor Inns had paid itself an illegal dividend from Prime-Florida when it "sold" the "leasehold interest." (R. 225-230). Waltman and Cohen further contended that of the $4,000,000.00 total purchase price, which included

$3,000,000 for the motel and $1,000,000 for the restaurant, the sum of $1,867,260.00 should be allocated to the "sale" of the oral motel operating lease. Thus, they contended that the unwritten operating lease, which had lost money over its entire term, had a present economic value substantially in excess of the bricks and mortar. They further contended that because they were 20% owners of Prime-Florida, they were entitled to receive 20% of that sum.

As to the first element of their claim -- the alleged existence of a motel operating lease from Prime Management to Prime-Florida sufficient to satisfy the statute of frauds -- both Waltman and Cohen testified that they had never seen a written lease agreement and that they did not even know whether or not such a lease existed:

> Waltman
>
> Q. Yes, sir, and where is the lease agreement that you based that [Ramada] claim on?
>
> A. Either Prime has it up north, if they have it.
>
> Q. Have you ever seen it?
>
> A. No. (T. 192).
>
> * * *
>
> Q. Have you seen the lease that you're making your claim on?
>
> A. No, it was never sent to me. (T. 211).
>
> Cohen
>
> Q. Do you know if that lease agreement [Ramada] exists?

A. No, I do not. I was told it was being prepared over many, many years by people in Prime. (T. 376).

* * *

Q. Did you ever have a written lease for either three Ramada's?

A. We have never seen a written lease, requested countless times. It was to follow the same format as Howard Johnsons. (T. 399).

The testimony of Melvin Taub of Prime Motor Inns clearly established that as a matter of fact no written lease existed:

Q. What kind of relationship existed between Prime Management and Prime-Florida?

A. We operated the properties as though there had been a lease.

Q. Was it essentially an oral lease?

A. Exactly. Right. It was an oral lease. We had State Southern down here managing the property.

(T. 464). Thus, it was undisputed at trial that there was no written lease owned by Prime-Florida in the Ramada/ Hallandale Motel.

As to the second element of the claim of Waltman and Cohen presented to the jury -- the value of the alleged lease -- the only testimony was that of Waltman. When asked by his counsel what portion of the $4,000,000 sale price was "attributable to Prime-Florida's ownership," he said, over

vigorous objection as to his competency, that it was $1,867,260. (T. 128).

Mr. Waltman repeated that assertion to the jury several times in leading questions:[2]

> Q. $1,867,000.00, correct?
>
> A. Right.

(T. 130).

Waltman admitted, however, that he was not an appraiser (T. 170), that he had no training as an appraiser (T. 170), and that he had never previously testified as to the value of motels or motel leases. (T. 169). Waltman also admitted that he did not know the value of the ground lease, the value of the motel building, the value of the Agora Restaurant, or the value of the restaurant lease. (T. 192, 193).

On further cross-examination, Waltman revealed that he arrived at the figure of $1,867,260 as the value of

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[2] In addition to permitting Waltman and Cohen to testify as experts without any predicate establishing their expertise, the trial court granted Waltman and Cohen's counsel unlimited discretion to lead his witnesses:

> THE COURT: Well, due to the complexity of the numerous parties, I'm going to allow him to lead the witness.

(T. 108).

the lease by simply multiplying the 1980 net income (one of the only years the motel lease made money) by twenty. (T. 205). He did not reduce the figure to present value nor did he consider relevant his own admission that since its inception in 1974, the property, in his own words, "might have been an even situation." (T. 189).

Waltman stated that he got the idea to use the multiple of twenty because that is the number the people at Prime Motor Inns told him was used by the buyers in figuring their investment in the venture as a tax shelter. (T. 129). He offered no explanation as to the relevance of that multiple as it pertained to the evaluation of the lease, and he offered no testimony as to the accepted methods for valuing the alleged lease. Waltman actually admitted that based on the performance of the property, if it had not been sold, Prime-Florida would not have earned anything from the lease. (T. 212).

Despite the uncontroverted evidence to the contrary, the jury, on a special verdict form, found that Prime-Florida had a written lease on the Ramada/Hallandale motel. In a separate question on the verdict form, the jury found that Prime Motor Inns diverted assets to itself from Prime-Florida without paying a 20% share to Waltman and Cohen and that the amount of funds diverted was $3,000,000.[3]

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[3] Because Cohen admitted that the value of the restaurant was $1,000,000, this amount must be subtracted from

[Footnote Continued On Next Page]

Moreover, the jury determined that Waltman and Cohen's 20% share of the $3,000,000 in diverted funds is $200,000 despite an express statement on the special verdict form that Waltman and Cohen's share "must be 20% of the amount given in your answer to question number 6," which was $3,000,000. See the "Special Verdict Form" appended to this brief as Appendix B. The jury's verdict thus cannot be reconciled either with itself or with the uncontroverted evidence in the case.

On petitioners' post-trial motion for judgment in accordance with motion for directed verdict or for new trial, counsel for Waltman and Cohen argued that petitioners had waived any directed verdict argument. The trial judge, however, specifically found that Prime Motor Inns had properly made its motions for directed verdict. See Appendix C to this brief.

The trial judge then granted the motion for judgment in accordance with motion for directed verdict, saying:

> As to the claim of Waltman and Cohen against Prime Motor Inns arising

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3 [Continued From Previous Page]

the total sale price ($4,000,000) to arrive at the total value of the motel building, the ground lease, and the motel operating lease, which comes to $3,000,000. By valuing the oral motel operating lease at $3,000,000 in its verdict, the jury has concluded that the motel building and the ground lease had a value of zero.

> out of the sale of the Ramada-Hallandale, it appears undisputed that no written lease ever existed between Prime-Florida, Inc. and Prime Management, Inc. Certainly, no written lease was introduced into evidence by either party.
>
> Waltman and Cohen's claim for damages was solely based upon their claim that a leasehold interest existed on the property for an extended term of years which leasehold interest they claim was wrongfully terminated. It being without dispute at the close of plaintiffs' case that the lease did not exist, a directed verdict should have been granted at that time and this claim should not have been give to the jury to decide.

See Appendix C to this brief.

The trial judge also made the following specific findings:

> Moreover, the following findings of the jury are determined by the Court to be contrary to the manifest weight of the evidence presented at trial:
>
> a. That Prime-Florida, Inc. had a written leasehold interest in the Ramada/Hallandale Inn.
>
> b. That Prime Motor Inns, Inc. diverted proceeds of sale from Prime-Florida, Inc.'s assets.
>
> c. That Prime Motor Inns, Inc. wrongfully diverted to itself the sum of Three Million Dollars ($3,000,000.00).
>
> d. That Waltman and Cohen's share of the sums diverted by Prime Motor Inns, Inc. is in the amount of Two Hundred Thousand Dollars ($200,000.00).

> The inconsistency in the jury's answers to the Special Verdict Form indicates that the jury was confused and unable to properly render a verdict based upon the evidence on this claim. The Court further finds that the award of Two Hundred Thousand Dollars ($200,000.00) for the Ramada-Hallandale claim is clearly excessive.

See Appendix C to this brief. Although setting forth these findings, the trial judge declared that the motion for new trial was moot because he had granted the directed verdict motion.

On appeal, the Third District reversed, saying:

> Appellants assert that reversal is required because appellees failed to move for a directed verdict at the close of all the evidence; appellee's 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, 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 [Ramada/Hallandale] claim.

See Appendix F to this brief.

SUBSEQUENT EVENTS[4]

After the briefs on jurisdiction had been filed in this Court, the lower court followed the mandate of the Third District and reinstated the jury verdicts. Because the motion for new trial was no longer moot, the trial judge heard argument and granted a new trial as to the Ramada/ Hallandale claim setting forth specific reasons for doing so. A copy of that order is appended to this brief as Appendix G.

Among other things, that order found:

> As I have previously stated on the record in this case, the joinder of these two cases -- the Howard Johnsons claim and the Ramada Hallandale claim -- dealing with different subject matters, nine different parties, and four parcels of property was prejudicial error.
>
> ....
>
> Plaintiffs' credentials as experts in the valuation of the oral lease were seriously deficient and the jury should not have been permitted to hear their testimony as experts. The admission of that testimony by the trial court was prejudicial error.

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[4] The brief discussion of these subsequent events is included only because a second petition for certiorari has been filed in the Ramada/Hallandale case and because petitioners determined that they would be remiss in not bringing this to the Court's attention.

....

On the basis of the evidence presented at trial, Plaintiffs failed to prove a valid written lease with economic value, failed to prove the sale of the leasehold interest by Prime to a third party, and failed to prove that Prime diverted any sale proceeds without payment to Waltman and Cohen. Plaintiffs failed to prove their case.

The jury however, found the existence of a leasehold interest, found the sale of that interest by Prime, found that Prime wrongfully diverted 3 million dollars to itself without paying Prime-Fla. its pro rata share and concluded that 20% of 3 million dollars was $200,000.00. Obviously, the jury was confused - these findings are erroneous, inconsistent, contrary to the manifest weight of the evidence and not in compliance with the trial court's instructions.

The verdict was also excessive in that according to the jury's verdict, the leasehold interest was worth 3 million dollars, or equal to the value of the building itself. Perhaps the jury mistakenly valued the motel building in which Prime-Fla. had no interest instead of the lease.

Having listened to the evidence, this court concludes that the jury was deceived as to the force and credibility of the evidence or misconceived the legal effect of the evidence, and that the verdict of the jury was against the manifest weight of the evidence. Therefore, I find that Defendants are entitled to a new trial on the Ramada Hallandale claim.

Order on Pending Motions at 3-4, 6-7; Appendix G to this Brief.

Waltman and Cohen appealed that order and also sought review of the order by petition for writ of certiorari in the Third District Court of Appeal (Third District Case Number 84-1519) contending that the trial court was without authority to enter the new trial order since the District Court had, in setting aside the directed verdict, ordered the jury verdict reinstated. The Third District Court of Appeal granted the petition and quashed the new trial order on October 2, 1984, and Waltman and Cohen then voluntarily dismissed their appeal.

Petitioners filed a motion for rehearing and motion for rehearing en banc with the Third District, which was denied on January 22, 1985, after this Court had accepted jurisdiction of the present case. Judges Pearson and Ferguson dissented from the decision to reject en banc rehearing. Judges Schwartz and Jorgenson, without other explanation, recused themselves from that decision. Petitioners have filed a notice to invoke discretionary jurisdiction of this Court and have commenced the process to effect certiorari review of that decision as well.

SUMMARY OF ARGUMENT

In the Howard Johnson's case, the Third District failed to send the order granting a new trial on damages back to the trial court for a specification of reasons as required by Rule 1.530(f), Florida Rules of Civil Procedure. This error was compounded when the Third District proceeded on its own to review the record with an erroneous assumption as to the standard to be used by the trial judge in considering a motion for new trial and without applying the abuse of discretion standard of appellate review for orders granting a new trial.

Had the Third District applied the proper standards and carefully reviewed the record in this case, it would have determined that a new trial was warranted not only on damages but on liability, as well. Indeed, a directed verdict for petitioners was justified.

In the Ramada/Hallandale case, the Third District clearly erred in reversing the trial court and holding that petitioners waived their right to move for judgment in accordance with motion for directed verdict. Moreover, the record fully supports the grant of a directed verdict for petitioners.

ARGUMENT

POINT I

THE THIRD DISTRICT ERRED IN REVERSING THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL IN THE HOWARD JOHNSON'S CASE.

In reversing the trial court's grant of a new trial in the Howard Johnson's case, the Third District made four distinct errors in direct and express conflict with the decisions of this Court and of other district courts of appeal.

A. The Third District Failed To Relinquish Its Jurisdiction To The Trial Court For Entry Of An Order Specifying The Grounds For Granting A New Trial.

The trial court's order granting a new trial in this case simply states "that the jury's verdict of $500,000.00 in damages was excessive and contrary to the manifest weight of the evidence." Order at 3; Appendix D. As set forth fully in the statement of the case and facts of this brief, these conclusory statements of the trial court were induced, over objection of petitioners, by counsel for W&C Associates:

> The sole ground Your Honor ruled on, as stated in the transcript, was that the verdict was excessive, and that is what is set out in [my] order.

Transcript of Hearing, March 9, 1983, at 18; a copy of the entire transcript is appended to this Brief as Appendix C.

On appeal, W&C Associates changed positions and contended that the order was inadequate. They said:

> There is no reference to the record. There are no specific findings or conclusions that the jury was influenced by something outside the record.

Brief at 20; Appendix E to this brief. Based upon this argument and the further argument that there was sufficient evidence to support the jury verdict, W&C Associates sought reversal of the new trial order.

The Third District filed an opinion recognizing that a trial court must state the reasons for granting a new trial and further recognizing that the purpose of such a rule is to "enable" the district court to conduct its review:

> Turning to the second claim, we reiterate the rule that the 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.

See page 2 of the opinion of the Third District appended as Appendix F to this brief.

Despite the recognition, however, that a statement of reasons from the trial court is an essential precondition

that enables a district court to commence its review, the Third District did not relinquish its jurisdiction to the trial court as commanded by Rule 1.530(f), Florida Rules of Civil Procedure:

> All orders granting a new trial shall specify the specific ground thereof. 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.

(Emphasis added).

Instead, the district court stated that it was "unable to discern reasons justifying the trial court's decision to grant a new trial," reversed the order granting a new trial, and, in accordance with respondents' argument, ordered reinstatement of the jury verdict. See Page 2 of the opinion of the Third District appended as Appendix F to this brief.

This decision of the Third District is in direct and express conflict with the Fourth District's decision in Seaman v. Zank, 375 So.2d 10 (Fla. 4th DCA 1979). In Seaman, the Fourth District observed that:

> 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 ... verdict ... without prejudice, sympathy or misunderstanding of the evidence entering into the award.

375 So.2d at 10. The Fourth District then, without equivocation, ruled:

> Accordingly, pursuant to Fla. R. Civ. P. 1.530(f), jurisdiction is hereby relinquished to the trial court for thirty days for the entry of an order specifying the grounds for granting a new trial.

Id. To exactly the same effect is Rodewald v. Lawton, 394 So.2d 1143 (Fla. 4th DCA 1981) and Kerns v. Ryan, 375 So.2d 15 (Fla. 4th DCA 1979).

Lest there be any question on the matter, this Court has clearly held that the word "shall" when used in statutes or in rules of court such as Rule 1.530(f), "according to its normal usage, has a mandatory connotation." Neal v. Bryant, 149 So.2d 529 (Fla. 1962); see, e.g., S.R. v. State, 346 So.2d 1018 (Fla. 1977) ("Although there is no fixed construction of the word "shall," it is normally meant to be mandatory in nature.")

W&C Associates has taken the position before this Court, in its brief on jurisdiction, that it was sufficient for the trial court to state that the verdict was "excessive and contrary to the manifest weight of the evidence." Brief of Respondents on Jurisdiction at 4. This view, which is contrary to W&C Associates' position in the Third District, has been rejected by this Court. See Stewart Bonded Warehouse v. Bevis, 294 So.2d 315, 317 (Fla. 1974) where this Court said that the reasons for a new trial order "must be set forth so as to be susceptible to review," suggesting in

the next paragraph the necessity to lay out facts. See additionally Wackenhut Corporation v. Canty, 359 So.2d 430, 434-435 (Fla. 1978); Cohen v. Margoa, Inc., 309 So.2d 539, 540-41 (Fla. 1975) (Ervin dissenting).

Clearly, the Third District erred in failing to relinquish its jurisdiction to the trial court for entry of an order specifying the grounds for granting a new trial.

B. The Third District Misstated The Test To Be Applied By The Trial Court In Granting A New Trial As to Damages.

The Third District stated in its opinion in this case that "[t]he 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," citing Griffis v. Hill, 230 So.2d 143 (Fla. 1969). Opinion at 2; Appendix F to this brief.

Griffis, a case dealing with inadequacy of damages rather than excessiveness of damages as in this case, does set forth the standard cited by the Third District. Aside from the difference in the factual situation between Griffis and the present case, however, Griffis appears to have been superseded by subsequent decisions of this Court.

For example, in one of its most recent cases on new trial orders, this Court expressly said "[a] jury's determination of damage is reviewable by the trial judge on precisely the same principles as govern his superintendence

of determinations of liability." Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So.2d 1039, 1042 (Fla. 1982). Those principles are: "The verdict must be manifestly against the weight of the evidence or demonstrably the product of influence from outside the record." Id. See also Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981); Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980);[5] Wackenhut Corporation v. Canty, 359 So.2d 430 (Fla. 1978); Castlewood International Corporation v. LaFleur, 322 So.2d 520 (Fla. 1975); Laskey v. Smith, 239 So.2d 13 (Fla. 1970); Hodge v. Jacksonville Terminal Company, 234 So.2d 645 (Fla. 1970); Cloud v. Fallis, 110 So.2d 669 (Fla. 1959).

Without doubt, the Third District's misstatement of the standard to be applied by the trial judge contributed to its erroneous reversal of the order granting a new trial. By misapprehending the responsibility of the trial judge to be one of assessing the reasonableness of the jury's verdict instead of appraising the fundamental fairness of the trial as this Court's decisions require, the Third District simply

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[5] In their brief on jurisdiction, respondents incorrectly state that Baptist Memorial Hospital involves "the setting aside of jury verdicts and granting of new trials on liability and damages." Brief of Respondents On Jurisdiction at 5. In fact, the defendant admitted liability in Baptist, and the new trial was as to damages only. 384 So.2d at 145.

was not in the correct frame of mind to conduct an appropriate review of the factual record or of the actions below.

C. The Third District Failed To Find That The Trial Judge Abused His Discretion In Granting A New Trial.

This Court has often restated, perhaps with some irritation in one recent case, that the standard for district court review of orders granting new trials, is whether the trial judge abused his broad discretion:

> 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.

Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981).

In Kikis, the district court had reversed an order granting a new trial, saying:

> There was evidence in the record to support the jury verdict and no reversible trial error occurred warranting either a judgment for the defendant or a new trial.

Id. This Court quashed the district court's decision because the district court had failed to apply the abuse of discretion standard. 401 So.2d at 1343.

Similarly in Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145, 146 (Fla. 1980), this Court quashed a district court decision reversing a grant of new trial on damages alone. Once again, the district court had failed to determine that the trial judge had abused his broad discretion. Id.

The point, made in yet another decision of this Court, is that:

> Since at least 1962, it has been the law of Florida that a trial court's discretion to grant a new trial is "of such firmness that it would not be disturbed except on clear showing of abuse ...."

Castlewood International Corporation v. LaFleur, 322 So.2d 520, 522 (Fla. 1975).

In this case, the Third District has reversed the order granting a new trial on almost exactly the same erroneous grounds used by the district court in Kikis. The Third District Court has said in this case:

> 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' [Howard Johnson's] 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. We reverse the order granting a new trial and reinstate the jury verdict of $500,000 as to the [Howard Johnson's] claim.

Opinion at 2; Appendix F. The Third District's opinion contains absolutely no determination that the trial judge abused his discretion; indeed, the opinion does not even mention the abuse of discretion standard.

Quite clearly the decision of the Third District is in direct and express conflict with a long line of this Court's decisions. The decision of the Third District should be quashed with directions to reinstate the order granting a new trial.

D. The Third District Ignored The Reasons Justifying The Trial Court's Decision To Grant A New Trial.

When the Third District said in its opinion that "[w]e are unable to discern reasons justifying the trial court's decision to grant a new trial,"[6] it totally ignored a series of reasons clearly evident in the record and brought to the attention of the court by the petitioners.

First, there is the trial judge's own admission that it was prejudicial error to have consolidated these two complex, unrelated commercial cases. Transcript of Hearing, March 9, 1983, at 13. There is even the admission of counsel for respondents that it was a complicated and confusing case for a jury to understand. (T. 581, 583, 623).

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[6] This is all the more reason for requiring that district courts follow the mandate of Rule 1.530(f) and send new trial orders back for specification of reasons.

Even the most cursory review of the trial transcript shows that it was a mistake to combine these two cases.

Second, the evidence of values in the testimony of Waltman and Cohen was clearly incompetent. By their own admissions, neither Mr. Waltman nor Mr. Cohen had any knowledge or expertise that would permit them to testify as to the value of motels or motel leases or stock or "go-away agreements" or general releases, the elements of value critical in this case.

It is well settled in Florida that opinion testimony can only be given by those who are qualified by virtue of their specialized studies or experience on the particular subject matter of inquiry and even then the witness' opinion must be based upon sufficient data. Husky Industries, Inc. v. Black, 434 So.2d 988 (Fla. 4th DCA 1983). In Husky, the court held that a fire chief who was generally familiar with fire prevention and flashback in containers, but who has no experience with flame arresters generally or the particular type of container involved in that case, was not competent to testify as to the latter.

See also Sea Fresh Frozen Products, Inc. v. Abdin, 411 So.2d 218 (Fla. 5th DCA 1982) (expert in marine chemistry not permitted to testify in a marine area where he had never done any studies); Trustees of Central States Southeast and Southwest Areas Pension Fund v. Indico Corp., 401 So.2d 904 (Fla. 1st DCA 1981) (expert as to valuation of real estate for lending purposes not permitted to testify as

to values of real estate for sale, particularly in a geographic area where he was not knowledgeable); Haendel v. Paterno, 388 So.2d 235 (Fla. 5th DCA 1980) (expert on real estate values not permitted to testify as to the value of stock in a closely-held corporation); Warriner v. Doug Tower, Inc., 180 So.2d 384 (Fla. 3d DCA 1965) (lawyer not permitted to testify as to the value of services provided by real estate brokers).

While owners of property may give opinions as to the market value of real or personal property, when property is owned in corporate form, an officer or employee of that corporation cannot give opinion testimony without qualifying as an expert to testify as to value. Jones v. State, 408 So.2d 690 (Fla. 2d DCA 1982); Salvage & Surplus, Inc. v. Weintraub, 131 So.2d 515 (Fla. 3d DCA 1961); Washington Federal Savings and Loan Association of Miami Beach v. Zuckerman-Vernon Corp., 414 So.2d 219 (Fla. 3d DCA 1982).

Based on these authorities and the admissions of Waltman and Cohen set forth in the statement of the case and facts, it is clear that their testimony as to values was totally incompetent. Because Waltman and Cohen were the only witnesses as to those values, and because those values were central as to any jury determination on both liability and damages, the need to grant a new trial is readily apparent.

A final reason for granting a new trial ignored by the Third District was the patent inconsistency of the jury

verdict. In both cases the finding of damages exceeded even the wildest of respondents' claims, and in one case the jury could not even properly calculate 20% of the damages it found. Obviously the jury was confused.

Had the Third District thoroughly reviewed the record -- or returned the order granting a new trial to the lower court for a specification of reasons -- it certainly would have been able to discern the reasons for granting a new trial.

POINT II

THE THIRD DISTRICT INCORRECTLY REVERSED THE JUDGMENT ENTERED IN ACCORDANCE WITH PETITIONERS' MOTION FOR DIRECTED VERDICT IN THE RAMADA/HALLANDALE CASE.

In 6551 Collins Avenue Corp. v. Miller, 104 So.2d 337 (Fla. 1958), this Court held that a motion for directed verdict at the close of all the evidence is not necessary to the consideration of a motion for judgment in accordance with a motion for directed verdict where the trial judge made it clear that he was reserving ruling upon the motion for directed verdict made after the plaintiff's case until after a jury verdict. 104 So.2d at 341. The rationale for this rule was explained as follows:

> [I]t would seem to be an unnecessary adherence to the technicalities of procedure to hold that the defendant must make the useless gesture of 'renewing' his motion at the close of all the evidence in order to avoid a charge of 'waiver' - since, obviously, the defen-

> dant cannot waive a motion that is resting in the bosom of the court, so to speak.

Id.

The trial court in this case, in its order granting judgment in accordance with motion for directed verdict, specifically spelled out the manner in which the directed verdict motion had been made, finding that to not consider the motion would be a triumph of form over substance:

> At the conclusion of plaintiffs' case, defendants moved for directed verdict on each of the claims which plaintiffs had brought. That motion was granted in part and denied in part at that time. Defendants renewed their motions for directed verdict at the beginning of the charge conference and at the conclusion of the charge conference on the last day of the trial of this cause. In submitted proposed jury instructions on issues relating to these claims, defendants renewed their motions arguing that there was no issue of fact on these issues and that the jury should not be instructed at all. The Court reserved ruling on these renewed motions. Following the charge conference relatively brief additional evidence was offered, almost all of which was directed to the Howard Johnsons claim. None of the testimony adduced after the motions for directed verdict were renewed prompted this Court to grant defendants' motion for directed verdict. Because the trial was concluding on a Friday afternoon, the Court requested that counsel proceed with dispatch to closing arguments after the last witness in order to permit the jury time to consider the case that afternoon. The Court implied to counsel for all the parties that motions for directed verdict and argument on those motions upon which the Court reserved ruling could be made subsequently. Plaintiffs have not been prejudiced in

> any way by the consideration of the motions for directed verdict and to not consider these motions would be a triumph of form over substance. Plaintiffs were fully aware of the grounds of the motion for directed verdict and had every opportunity to attempt to cure any defects in their proof before the case was submitted to the jury. Accordingly, this Court finds that the motion for directed verdict made by defendants was timely and proper.

Appendix C to this Brief. See also the trial court's statement to the same effect on the record immediately after trial. (T. 781).

The Third District, however, cited 6551 Collins as its basis for reversing the trial court's entry of judgment in accordance with the motion for directed verdict, saying "reversal is required because [petitioners] failed to move for a directed verdict at the close of all the evidence; [petitioners'] motion for a directed verdict was made during the charge conference held while trial was still in progress." Opinion at 2; Appendix F to this Brief. In so stating, the Third District totally ignored the trial court's reservation of ruling on the renewed motions made at the charge conference and the clear statement of law in 6551 Collins. (R. 685; T. 781). The Third District's finding of a waiver is, therefore, in direct conflict with this Court's ruling in 6551 Collins.

In 6551 Collins, this Court adopted the liberal view of most federal courts under the similar provisions of Rule 50(b), Federal Rules of Civil Procedure and held that a

motion at the close of all the evidence is not always required in order to entertain a motion for judgment in accordance with a motion for directed verdict. Although most of the federal decisions in this area occurred after 6551 Collins, the rationale of 6551 Collins is reflected in the continuing decisions of the federal courts: Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884 (5th Cir. 1984), reh. en banc denied 741 F.2d 1381 (5th Cir. 1984); Villanueva v. McInnis, 723 F.2d 414 (5th Cir. 1984); Bohrer v. Hanes Corporation, 715 F.2d 213 (5th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1284 (1984); Ebker v. Tan Jay International Ltd., 739 F.2d 812 (2d Cir. 1984); Pittsburgh Des Moines Steel Company v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976); Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981); Halsell v. Kimberly Clark Corp., 683 F.2d 285 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983); Bayamon Thom McAnn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969); Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970), cert. denied sub nom. Beaumont v. Aussenheimer, 400 U.S. 882 (1970); Jack Cole Co. v. Hudson, 409 F.2d 188 (5th Cir. 1969); Roberts v. Pierce, 398 F.2d 954 (5th Cir. 1968); Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018 (5th Cir. 1979), reh denied, 603 F.2d 860 (5th Cir. 1979); Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), vacated and remanded on other grounds, 451 U.S. 978 (1981); Brown v. American Mail Line, Ltd., 625 F.2d 221 (9th Cir. 1980).

As explained by the Fifth Circuit and other federal courts, the liberal spirit imbued in the Federal Rules of Civil Procedure by Federal Rule 1 permits technical noncompliance with Rule 50(b) where the circumstances satisfy the rule's purpose of informing the trial court and opposing counsel of a challenge to the sufficiency of the evidence. E.g., Adjusters Replace A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 888 n. 3 (5th Cir. 1984) reh en banc denied, 741 F.2d 1381 (5th Cir. 1984); Villanueva v. Mcnnis, 723 F.2d 414, 416-8 (5th Cir. 1984); Bohrer v. Hanes Corporation, 715 F.2d 213, 217 (5th Cir. 1983).

In Villenueva v. McInnis, the purpose of Rule 50(b) was held to be fulfilled where the defendant's attorney objected to jury instructions pertaining to the plaintiff's claim after the presentation of closing arguments and the jury charge. 723 F.2d at 417-418. Similarly, in Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018 (5th Cir. 1979), the defendants' objections to certain interrogatories to be submitted to the jury, made after closing argument and after the delivery of instructions but before the jury retired, were considered sufficient to preserve the right to move for judgment notwithstanding the verdict. The court, in so holding observed:

> Logic and the reasons underlying Rule 50(b) support our holding. Neither of these defendants can fairly be said to have gambled on the verdict only later to question the sufficiency of the evidence on appeal. Their objections to

> giving the jury the issue of design defect were stated clearly and specifically on the record before its deliberations began, and they are the same ones defendants urged in their prior motions for directed verdict at the close of plaintiff's case and in their motions for judgment n.o.v. below and here. Certainly defendants did not ambush court or opposing counsel.

597 F.2d at 1026.

The purpose of the renewal requirement likewise is met where a proposed jury instruction is, in effect, a motion for directed verdict. Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979). Pittsburgh-Des Moines Steel Company v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976). In Bachtel a proposed instruction which would have required the jury to find for the defendant was considered sufficient, together with the directed verdict motion made at the close of the plaintiff's case, to raise the issue of sufficiency of the evidence. 605 F.2d at 441-442. In Pittsburgh-Des Moines Steel Company, the defendant's proposed instruction, which pre-empted the plaintiff's cause of action under a particular statute, was also held an adequate predicate for a motion for judgment notwithstanding the verdict.

A motion for directed verdict at the close of all the evidence is also not necessary where a motion was made at the close of the plaintiff's case, the trial court implied that the record was preserved, and only brief evidence not relevant to the issues raised in the motion fol-

lowed the motion. Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968, 972 (1st Cir. 1969); Beaumont v. Morgan, 427 F.2d 667, 670 (1st Cir. 1970); Halsell v. Kimberly Clark Corp., 683 F.2d 285 (8th Cir. 1982).

Some federal circuits have even provided that a renewed motion for directed verdict is not required where the evidence following the directed verdict motion, although extensive, only strengthens the defendant's case, and the court expressly or impliedly assured that the record was preserved. Moran v. Raymond Corporation, 484 F.2d 1008 (7th Cir. 1973); Ebker v. Tan Jay International Ltdi., 737 F.2d 812 (2d Cir. 1984).

In Moran v. Raymond Corporation, the Seventh Circuit explained that the quantity of evidence following the directed verdict motion is of little significance

> where the trial judge has reserved ruling on the first motion until after all the evidence has been put in and, at the time of the ruling, the evidence and issues are no weaker from the viewpoint of the movant than those which would have been presented had the second motion been filed.

484 F.2d at 1012.

Under 6551 Collins, which adopted the principles of the federal decisions set forth above, it is clear that petitioners' actions in this case were more than sufficient to support a motion for judgment in accordance with the motion for directed verdict. The trial court and Waltman

and Cohen were fully advised at all times that petitioners were challenging the sufficiency of Waltman and Cohen's evidence as to the existence of a written lease. The Third District's decision clearly conflicts with 6551 Collins.

POINT III

THE THIRD DISTRICT ERRED IN FAILING TO RULE ON THE CROSS APPEAL WHICH SOUGHT REVERSAL OF THE TRIAL COURT'S ORDER DENYING THE MOTION FOR NEW TRIAL ON LIABILITY IN THE HOWARD JOHNSON'S CASE AND REVERSAL OF THE TRIAL COURT'S ORDER DENYING THE MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT.

Petitioner's motion for new trial in the Howard Johnson's case included not only a request for a new trial as to damages (which was granted) but also a request for new trial as to liability (which was denied). Petitioners also moved for judgment in accordance with motion for directed verdict. Although petitioners filed a cross-appeal to seek review of the trial court's failure to grant a new trial on liability and the trial court's refusal to grant petitioner's motion for judgment in accordance with motion for directed verdict, the Third District simply did not consider the cross-appeal in its opinion.

Clearly it was error for the Third District to totally ignore and not even rule on the cross-appeal. Moreover, the facts of this case establish that it was error not to require the grant of a judgment in accordance with motion for directed verdict or of a new trial on liability.

In an attempt to establish liability in the Howard Johnson's case, W&C Associates contended at trial that as a 50% participant in the Joint Venture, Prime Management had a duty to join with W&C Associates to exercise the Joint Venture's right of first refusal in the Howard Johnson's lease, arguing that Prime Management's failure to exercise the right breached a fiduciary duty to W&C Associates. (T. 65).

W&C Associates, however, offered into evidence the Joint Venture agreement which governed the conduct of Prime Management and W&C Associates with respect to the Howard Johnson's lease. (P.E. 23). That agreement specifically provides that Prime Management and W&C Associates can compete with each other in commercial enterprises, including the ownership of real estate. (P.E. 23, Appendix B). Waltman and Cohen even testified that they knew Prime would be competing with them and that no language in the Joint Venture agreement compelled Prime Management to exercise the right of first refusal. (T. 147, 148, 407).

Based upon this evidence, the trial judge rejected the theory that Prime Management had to exercise the right of first refusal and so instructed the jury. See Appendix A to this brief. The trial judge did, however, accept W&C Associates' second theory upon which the jury could find petitioners liable to W&C Associates, that is, the petitioners failed to act in good faith. Accordingly, the trial judge instructed the jury that to find liability, they must

find that petitioners acted in bad faith. See Appendix A to this brief.

The only evidence of bad faith offered by W&C Associates was the same incompetent evidence they relied upon in an attempt to prove their damage case - that Prime Motor Inns benefitted because their "opinion" of the fair market value of the Howard Johnson properties exceeded their "opinion" of the purchase price paid by Prime Motor Inns. (T. 713). Thus W&C Associates relied solely on their damage testimony to establish their theory of liability, i.e., that petitioners had acted in bad faith.

The trial judge, however, has ruled that the damages awarded by the jury was contrary to the manifest weight of the evidence and excessive. As shown in the statement of the case and facts in this brief, the damage proof was wholly inadequate at trial since Waltman and Cohen were totally incompetent to testify as "expert" witnesses, and even then they gave testimony as to only two of the four elements of consideration paid by Prime Motor Inns: the value of the cash and the stock shares transferred.

Because W&C Associates' testimony was rejected by the trial court in granting petitioners a new trial as to damages, the trial court erred in failing to also grant a new trial as to liability in the Howard Johnsons' case since it was the same evidence upon which W&C Associates based their theory of liability.

Indeed, petitioners are entitled to a directed verdict on the entire claim. No reasonable minds can differ. Forshee v. Peninsular Life Insurance Company, 370 So.2d 842 (Fla. 3d DCA 1979).

CONCLUSION

This Court has jurisdiction. Petitioners request this Court to take the following actions:

A. Howard Johnson's Case

1. Grant petitioners a directed verdict, or, alternatively,

2. Grant petitioners a new trial on liability and restore the trial court's grant of a new trial on damages, or, alternatively,

3. Restore the trial court's grant of a new trial on damages, or, alternatively,

4. Remand the new trial order to the trial court for specification of reasons for the grant of a new trial.

B. Ramada/Hallandale Case

1. Restore the trial court order directing a verdict for petitioners, or, alternatively,

2. Remand the case to the Third District to consider the trial court's grant of a directed verdict on the merits.

Respectfully submitted,

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By _____
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EUGENE E. STEARNS

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct 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 29TH day of January, 1985.

_____ For
EUGENE E. STEARNS

WBVS12B