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,

v.

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

Respondents.

REPLY BRIEF OF PETITIONERS ON THE MERITS

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Waltman and Cohen's brief is far more notable for what it omits than for what it says. Apparently Waltman and Cohen have recognized that their position is indefensible and have simply chosen to ignore most of the facts and law involved in this case as set forth in petitioners' brief on the merits.[1]

REPLY TO WALTMAN AND COHEN'S STATEMENT OF THE FACTS AND CASE

Waltman and Cohen's statement of the facts and case consists of three apparent subsections. Taking each of these subsections in turn, the following omissions are glaring:

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[1] Waltman and Cohen's brief on the merits contains additional argument on jurisdiction premised on the recent decision of this Court in Bankers Mutiple Line Insurance Co v. Farish, 10 F.L.W. 66 (January 24, 1985). Respondents' Brief on Merits at 2.

Contrary to the inference of their brief that the Farish decision somehow changed this Court's position on appellate review of trial court orders granting new trials, the Farish opinion holds the same as this Court's long line of prior cases on the issue. E.g., Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981). The consistent holding of this Court has been that the trial judge has broad discretion in granting new trials. Id.

Also contrary to Waltman and Cohen's argument, the Third District did not follow this standard. The Third District's opinion never even mentioned the abuse of discretion standard. It focused instead on the jury's view of the evidence, rather than focusing on the judge's view of the fairness of the trial as this Court requires. For example, the Third District completely ignored the trial judge's own post-trial determination that consolidation had been a mistake causing the jury to be confused.

A. Procedural History (page 3 to page 6, line 2).

1. Waltman and Cohen ignore the fact that the jury's verdict of $500,000 in the Howard Johnson's case was $40,000 more than even their most outrageous claim at trial. See Petitioners' Brief at 6-10. They also ignore that the $200,000 verdict in the Ramada/Hallandale case was a product of obvious jury misunderstanding of the facts and arithmetic error. See Petitioners' Brief at 20-23.

2. Waltman and Cohen fail to note that the trial judge himself recognized the two cases as confusing when tried together. See Petitioners' Brief at 2. Moreover, they ignore the repeated statements of their own counsel that the matter was confusing as a result of two separate claims being made at the same time. Id.; T. 581, 583, 623. Additionally, Waltman and Cohen overlook the confusion suffered in general by the jury, a confusion evidenced by the jury's own verdict and recognized in the trial judge's order. See Petitioners' Brief at Appendix B and D.

3. Waltman and Cohen omit to state that the trial judge's order granting a new trial in the Howard Johnson's case does not set forth confusion or any other adequate explanation for the order because their own counsel strenuously objected to inclusion of such explanations. This was done despite petitioners' argument that Rule 1.530(f), Florida Rules of Civil Procedure, requires such explanations and despite petitioners' further argument that counsel for Waltman and Cohen were simply "setting up" the order for reversal on appeal. See Petitioners' Brief at 11-12.

4. By asserting as fact that the Third District "found the record contained substantial evidence upon which a jury could have based its verdict" and was, therefore, correct in reversing the grant of a new trial in the Howard Johnson's case (Brief of Respondents at 4-5), Waltman

and Cohen totally ignore this Court's long line of cases holding that an appellate court must determine whether the trial judge abused his discretion, not whether there is evidence to support a jury's verdict. See Petitioners' Brief at 34-36.

5. Waltman and Cohen ignore that at the close of plaintiffs' evidence in the Ramada/Hallandale case, the trial judge categorically stated that he was going to let the case go to the jury (T. 440-441), which ruling, under Florida law, clearly preserves the right to make any post-trial motions for judgment in accordance with a motion for directed verdict. See Petitioners' Brief at 21-23, 39-46. In addition, Waltman and Cohen ignore the many other steps taken by petitioners to preserve the right to make post trial motions. Id.

6. Finally, when baldly asserting "that the Defendants cheated their partners and old friends out of the profits of two business ventures," Waltman and Cohen's brief ignores: (a) that, by Waltman and Cohen's own testimony, neither venture made a profit during the overall term of the business relationship (T. 161-163, 188-189); (b) that Waltman and Cohen were well paid - regularly - for their services in actually running the motels in both ventures (T. 189-190); and (c) that Waltman and Cohen lost nothing in the sale of the motels. Petitioners' Brief at 2-27, 46-49.

B. Howard Johnson's Case (page 6, line 3 to page 8, line 12).

1. Waltman and Cohen ignore the Howard Johnson's Joint Venture Agreement, which, by its terms, provides that petitioners are free to disagree with Waltman and Cohen whether, among other things, the joint venture should exercise the right of first refusal. Petitioners' Brief at

47-49. Thus, as the trial judge himself ruled, there was nothing wrong, using Waltman and Cohen's own words, in "[refusing] to allow the venture to purchase the landlord's interest."

2. Waltman and Cohen ignore their own testimony that despite a one-year profit of $211,000, the joint venture failed to make any overall profit during its six year life (having substantial losses in certain years) and that the joint venture had severe cash flow problems. (T. 161-163, 188-189).

3. Waltman and Cohen also ignore the fact that they did not contribute any money to alleviate the cash flow problem of the joint venture and, indeed, regularly continued to take out their three percent management fee every month. (T. 162, 189).

4. Most importantly, Waltman and Cohen totally ignore two of the four elements of consideration when they claim that the sale price of the Howard Johnson's motels was $1,178,000. See Petitioners' Brief at 4, 6-9. When all four elements are considered, as stated by the only real expert who testified at trial (Marc Perkins), the sale price in actual fact equals or exceeds the $2,000,000 market value claimed by Waltman and Cohen. Only by thus ignoring half of the consideration paid for the motel properties can Waltman and Cohen make their claim that petitioners sold the motels for less than market value.[2] Id.

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[2] This claim is the sole basis upon which Waltman and Cohen premise their allegation that petitioners acted in bad faith toward them. That is, the claim forms not only their sole proof as to damages but also their sole basis for alleging liability.

C. Ramada/Hallandale Case (page 8, line 13 to page 13).

1. Waltman and Cohen ignore their own, unrebutted testimony at trial that they had never seen a written lease on the Ramada Hallandale motel (T. 192, 211, 399) and that they did not know whether one existed (T. 376). As Waltman and Cohen acknowledge on page 9 of their brief, no written lease was ever produced. In fact, none exists; there was only an oral lease that which was terminable at will. See Petitioners' Brief at 15-18. Waltman and Cohen have clearly failed to prove a written leasehold interest upon which they could maintain an action. The directed verdict was, therefore, completely justified and should be restored.

2. When claiming that Prime Florida's interest in the motel is worth $1,867,260, Waltman and Cohen fail to state that the interest to which they give such a value consists solely of an oral lease, terminable at will, on the motel only (thus excluding the restaurant). They also fail to state that this alleged value of the oral lease constitutes about 47% of the total sale price of a package consisting of: (a) a ground lease of the property (D.E. B#5); (b) title to the improvements, including the Ramada Inn Building itself (D.E.B. #7); (c) title to the furniture, fixtures and equipment on the property (D.E.B. #12); (d) an interest in a written operating lease (D.E.B. #9); (e) title to the Agora, a restaurant adjacent to the Ramada Inn building (D.E.B.), and (f) all interest as lessor in a lease of the restaurant (D.E.B, #13). See Petitioners' Brief at 18-21.

3. Waltman and Cohen also fail to state that their claimed value of $1,867,260 for the leasehold interest is premised solely on their own opinion testimony, which they are totally unqualified to give. See Petitioners' Brief at 18-20. Waltman testified that he was not an ap-

praiser, had no training as an appraiser, had never previously testified as to the value of motels or motel leases, and did not have any rational basis for using the formula he employed in computing the sum of $1,867,260.[3] Id.; T. 129, 169, 170, 189, 192-193, 205.

4. Waltman and Cohen ignore, in claiming that petitioners waived the right to move post trial for judgment in accordance with a motion for directed verdict, that the trial judge unequivocally ruled, after hearing petitioners' motion for directed verdict at the close of plaintiffs' case, that the Ramada/Hallandale case was going to the jury. (T.440-441). The judge flatly stated: "I will allow it to go to the jury. He has established a prima facie case." Id.

5. Waltman and Cohen ignore the statement of the Third District in its opinion dated February 7, 1984, that a motion for directed verdict was made during the jury charge conference just before the close of all the evidence. (Petitioners' Brief at Appendix F). Waltman and Cohen further ignore that there was no additional testimony after the charge conference about the existence of a written lease. (T. 644-706).

6. Waltman and Cohen ignore the statement of the trial judge in the post trial order granting judgment in accordance with a motion for directed verdict that:

> 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

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[3] Waltman and Cohen testified that of the four million dollar purchase price, one million was attributable to the restaurant in which they claimed no interest. (T. 395). Of the remaining three million dollars of the purchase price, Waltman testified that $1,867,260.00 was attributable to the oral lease and thus, only $1,100,000 of the price was attributable to the 103 room motel. This testimony is patently absurd.

> 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.

See Petitioners' Brief at Appendix D.

7. Finally, Waltman and Cohen ignore the statement of their own counsel made at the very close of the trial that he "understood [it] to be the case" that the trial judge had reserved the petitioners' right to move for directed verdict after the jury verdict was rendered. T. 781.

REPLY TO WALTMAN AND COHEN'S ARGUMENT

Waltman and Cohen totally fail to respond to Point III of petitioners' brief on the merits, which argues that it was error not to grant petitioners' motion for directed verdict in the Howard Johnson's case or, at the least, not to grant a new trial on liability as well as damages. Apparently they have no response.

Waltman and Cohen certainly cannot argue that this Court has no authority to consider petitioners' Point III. The case cited by respondents in the jurisdictional section of their brief on the merits, i.e., Farish, states: "Once we take jurisdiction because of conflict on one issue, we may decide all issues." 10 F.L.W. at 67. Moreover, this Court has previously stated:

> In her brief, respondent concluded that the issues were meritless and declined to respond to them before this Court. This could prove hazardous as we said in Bould v. Touchett ... "[i]f conflict appears, and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits."

Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984).

The portions of petitioners' brief on the merits to which Waltman and Cohen did respond is marked, like their statement of the facts and case, more by glaring omissions than by what they say.

I. The Third District Was Incorrect In Reversing The Trial Judge's Order Granting A New Trial Judge's Order Granting A New Trial In The Howard Johnson's Case.

A. Insufficient grounds were stated in the order.

1. Waltman and Cohen ignore their own inconsistency on whether the trial court's order granting a new trial sufficiently states the grounds for that order. They have taken absolutely opposite positions in the trial court, in the Third District, and in this Court on this issue depending solely upon the requirements of the moment. See Petitioners' Brief at 11-13. Indeed, over petitioners' objections, they told the trial judge that the statement of grounds in their draft order was sufficient, and then they told the Third District that the trial court's statement of grounds, which they prepared, was insufficient, all in a successful attempt to intentionally "sandbag" petitioners. Id.

2. Waltman and Cohen totally ignore the decisions of this Court requiring more explanation for a new trial order than provided in this case. See Petitioners' Brief at 31-32.

3. Waltman and Cohen ignore the fact that the trial judge did not include further explanation in his order granting a new trial solely at their behest. See Petitioners' Brief at 11-13.

4. Waltman and Cohen ignore the mandatory language of Rule 1.530(f), Florida Rules of Civil Procedure, that inadequate new trial orders shall be sent back to the trial court for explanation. See

Petitioners' Brief at 28-32. Instead, they argue that when faced with inadequately explained new trial orders, appellate courts should undertake a review of the entire record as in Wackenhut rather than returning the case to the trial court.

5. Finally, Waltman and Cohen ignore the fact that the new trial orders in Rodewald and Seaman contained at least some statement by the trial judge, however inadequate, just like the new trial order in this case. In any event, those cases applied Rule 1.530(f) as the Third District should have done in this case.

B. Insufficient evidence was present to support the jury verdict.

The inadequacy of Waltman and Cohen's evidence in the Howard Johnson's case has been set forth in detail in Petitioners' Brief at 3-15 and 46-49. Five comments are appropriate, however, on Waltman and Cohen's argument in this section of the brief.

1. It appears that Waltman and Cohen are attempting to extend their "sandbagging" of petitioners as far as this Court by claiming that review here is limited "to those grounds set out in the order." Brief of Respondents at 18. Considering their intentional error of inducing the trial judge to omit many of the reasons for the new trial order, Waltman and Cohen cannot now seek to limit review. See also Dania Jai-Alai Place, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984).

2. Waltman and Cohen's liability and damage proof rests solely on their testimony that the Howard Johnson's motels were sold for less than their fair market value. They now claim, falsely, that petitioners did not object to the competence of this testimony. Brief of Respondents at 18-20.

So that there can be no question about the existence of objections to the competence of Waltman and Cohen's testimony, a summary of such objections, including transcript excerpts, is appended to this brief.

Moreover, as this Court knows, continuous objections are not necessary when a specific objection has been made and a ruling secured. Letrilley v. Harris, 354 So.2d 1213 (Fla. 4th DCA 1978), cert. denied, 359 So.2d 1216 (Fla. 1978). This is so especially where the objection is overruled in no uncertain terms. Webb v. Priest, 413 So.2d 43 (Fla. 3rd DCA 1982).

In this case it is clear that petitioners strenuously objected as to any testimony by Waltman and Cohen regarding value, and it is equally clear that the trial judge unequivocally ruled that he would admit all such testimony. Repeated objections, although generally made, were unnecessary.

3. Waltman and Cohen claim that they were qualified to testify as experts. Brief of Respondents at 20-21. This argument, however, ignores the body of Florida law on qualifications of experts set forth in pages 37-38 of petitioners' brief.

4. Waltman and Cohen totally ignore two of the four elements of consideration paid for the Howard Johnson's motels, thus grossly understating the purchase price. See Petitioners' Brief at 4, 69.

5. The jury verdict substantially exceeds Waltman and Cohen's own testimony regarding the amount of damages claimed. See Petitioners' Brief at 6-10.

II. The Third District Was Incorrect In Reversing The Judgment N.O.V.

1. Waltman and Cohen argue extensively that as a matter of fact the trial judge did not impliedly reserve petitioners' right to move for dir-

ected verdict subsequent to the jury's return. Brief of Respondent at 23-24. They expressly deny the trial judge's statement to that effect in his order directing the verdict. Id. Yet they conveniently ignore their own counsel's admission of such an implied reservation at the very end of the trial. (T.781).

2. Waltman and Cohen next attack the statement in the opinion of the Third District - the very decision they seek to defend - which observes that petitioners moved for a directed verdict at the charge conference. Brief of Respondents at 24-26. To support that outrageous position, they select one quote, ignoring altogether the additional vigorous argument of petitioners at the charge conference that there was no evidence to prove a written lease. (T. 581, 582, 584, 588, 592).

3. Waltman and Cohen then claim that the charge conference "was held in the middle of Defendants' case." Brief of Respondents at 26-27. That gross misstatement of fact is belied by the trial transcript. T.649-706. In truth, the only proceedings after the charge conference, which occurred on the Friday morning the case went to the jury, was the live testimony of one witness in the Howard Johnson's case and the introduction a small segment of deposition testimony plus financial documents. Id. There was absolutely no additional testimony regarding the existence of a written lease, the fact issue upon which the directed verdict was granted. Id.

4. Waltman and Cohen totally ignore the trial judge's categorical statement at the close of all the evidence in the Ramada/Hallandale case that he was going to let the case go to the jury. (T.440-441). No doubt this omission was prompted by the holding of this Court in 6551 Collins Avenue Corp. v. Miller, 104 So.2d 337, 341 (Fla. 1958) 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 he was reserving ruling upon the motion for directed verdict made after the plaintiff's case until a jury verdict.

5. Waltman and Cohen also ignore the recent developments in the case law on preserving the right to make post-trial, directed verdict motions, all as set forth in petitioners brief at 39-46.

6. Finally, Waltman and Cohen incorrectly state that the trial judge's decision to set aside the jury's verdict in the Ramada/Hallandale case would not be considered both proper and necessary even if petitioners' motions for a directed verdict were considered untimely. Where a court finds the jury verdict is based upon an insufficiency of the evidence constituting plain error upon the face of the record, the court is empowered to vacate the jury's decision to avoid manifest injustice. See, Parker & Lloyd, P.A. v. Sullivan, 370 So.2d 412 (Fla. 4th DCA 1980); Honda Motor Co. Ltd. v. Marcus, 8 FLW 2172 (Fla. 3d DCA 1983); Pickard v. Maritime Holdings Corp., 161 So.2d 239 (Fla. 3d DCA 1964).

As in Pickard and Sullivan, there was insufficient evidence presented in this cause to support Waltman and Cohen's claim of illegal dividend with respect to the sale of the Ramada/Hallandale. No proof was presented that Prime-Florida had a written lease constituting a right to any profits of the sale. No competent evidence was offered to support a verdict that there was any difference between the sale price of the property and its market value.

The jury found a written lease existed despite all the evidence, including Waltman and Cohen's own testimony, to the contrary. They also

found that the amount taken was $3,000,000.00 and that 20% of $3,000,000.00 is $200,000.00. These findings were plain error on the part of the jury; therefore; the trial judge was correct in vacating the verdict even if the motions for directed verdict were untimely.

CONCLUSION

The relief requested in petitioners' initial brief should be granted.

Respectfully submitted,

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By [signature] FOR
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 25TH day of March, 1985.

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WPL140G