IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,532

TREND COIN COMPANY, d/b/a THE TRENDLINE, and PRECIOUS METAL BROKERS, INC.,

Petitioners,

v.

HONEYWELL, INC. and AETNA CASUALTY & SURETY COMPANY,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The respondents, Honeywell, Inc. and Aetna Casualty & Surety Company ("Honeywell"), the defendants in the trial court and the appellants in the District Court of Appeal, Third District, file this jurisdictional brief opposing the invocation by the petitioners Trend Coin Company and Precious Metal Brokers, Inc. ("Trend") of this Court's discretionary jurisdiction. The facts, for the purposes of determining whether the decision below "expressly and directly conflict[s] with the decision of another district court of appeal or of the Supreme Court on the same question of law"[1] are those which appear in the district court's opinion.[2]

1/ Florida Constitution, Article V, Section 3(b); Rule 9.030(a)(2)(A)(IV), Fla.R.App.Proc.

2/ See, e.g., Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980); Commerce National Bank in Lake Worth v. Safeco Insurance Co. of America, 284 So.2d 205, 207 (1972) and Boulevard National Bank of Miami v. Gulf American Land Corp., 189 So.2d 628, 629 (Fla. 1966).

The facts recited in the opinion below show that Trend suffered a burglary loss from its premises "of part of its stock of jewelry, gold and silver". (A. 1). It is not a fact, as Trend asserts on page 1 of its brief, that "$8,037,674.59 worth of jewelry and precious metals were stolen".[3/] It is true that the jury returned a verdict "awarding compensatory damages of more than $8 million ..." (A. 2), but that verdict, having been reversed on the ground that the trial court erroneously excluded Honeywell's expert accounting testimony (A. 2-3), [4/] clearly does not establish as a fact that the stolen property was worth what Trend claims it was worth. In the present posture of this case, the asserted value of $8,037,674.59 is nothing more than Trend's unsubstantiated claim, subject to being controverted by Honeywell's evidence on remand.

On the asserted conflict relating to pre-judgment interest, the entire holding of the district court is embraced in four short sentences:

> We also find error in the trial court's award of prejudgment interest on an unliquidated claim. Trend argues that interest is proper where the exact pecuniary loss can be ascertained by reference to market price or market value, citing Sullivan v. McMillan, 37 Fla. 134, 19 So. 340 (1896). Here, however, the exact loss cannot be

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3/ For that matter, it is not an established fact that Trend's premises were "broken into", as Trend asserts. The method by which the burglars obtained entry to the premises is not disclosed by the opinion below.

4/ Trend concedes, at pages 1-2 of its brief, that the reversal for a new trial on damages does not give a rise to any jurisdictional conflict. In the process of making this concession, Trend attempts to impugn the validity of the holding by asserting its belief that the reversal "was a gross interference with the trial court's discretion and a flaunting [sic] of the harmless error rule." This unwarranted assertion has no proper place in a jurisdictional brief and should be disregarded by this Court.

> ascertained because the quantity of precious metal lost is in dispute. See Alarm Systems of Florida, Inc. v. Singer, 380 So.2d 1162 (Fla. 3d DCA 1980).

The holding on which Trend relies for its asserted collateral source conflict is contained in two sentences:

> On retrial, excluded evidence that Trend valued its inventory at $1.6 million in an application for insurance is admissible to impeach subsequent statements pertaining to the value of the loss. Whether Trend's president signed a blank contract which was completed by an insurance agent or whether he himself filled in the amounts presents a question of fact for jury determination. (A. 3).

Trend asserts that the district court "did not dispute that the insurance was a collateral source benefit" (Trend's brief, page 2), and describes the opinion as holding "that relevancy for impeachment purposes overrides the collateral source rule" (Trend's brief page 3). The fact is that the district court did not undertake any discussion of the collateral source rule. As shown by the portion of the opinion just quoted, the court merely held that Honeywell will be entitled to show on remand that Trend submitted an application for insurance in which it valued its inventory at $1.6 million, that this evidence is admissible to impeach subsequent statements by Trend about the value of the loss, and that the conflicts in the evidence about who filled in the amounts is a question of fact for the jury.

Trend's statement of the case and facts is objectionable not only because it relies on "facts" not established by the record and not evident from the opinion below, but also because it is interspersed with argument about the asserted conflicts. For the purposes of this jurisdictional brief, Honeywell relies on the limited facts and procedural history appearing in the opinion below, the pertinent portions of which have been summarized above.

Honeywell will reserve discussion of the argumentative parts of Trend's statement for the argument portions of this brief.

JURISDICTIONAL ARGUMENT

Point I - No express and direct conflict with Jacksonville, T & K. W. Ry Co. v. Peninsular Land, Transportation & Manufacturing Co., 27 Fla. 1, 9 So. 661 (1891), Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935), Jackson Grain Co. v. Hoskins, 75 So.2d 306 (Fla. 1954), or with other cases relied on by Trend under Point I.

The action in Peninsular Land was to recover damages in trespass for the negligent destruction of a hotel and other buildings by a fire allegedly started from burning coals and cinders emitted from the smokestack of the defendant railroad's locomotive, 9 So. at 663-664, 669. While the court held that the jury had been properly instructed on allowing pre-judgment interest in that case, the opinion cannot be fairly read as holding that a tort claimant is invariably entitled to have a jury instruction on pre-judgment interest in all tort actions involving unliquidated damage to property, regardless of the reasons why the damages are unliquidated and regardless of the nature of the tort. In the Peninsular Land case, the buildings destroyed were readily identifiable, and their destruction was the result of a fire for which the defendant was directly responsible. In the present case, the quantity of the goods lost in the burglary was a major damage issue. Of the numerous facts bearing on this basic dispute, two were mentioned in the opinion below: (1) According to Honeywell's experts, Trend's records were so inadequate that estimates of value had to be based "on dollar amounts of purchases and sales rather than upon the weight and quality of the precious metals bought and sold" (A. 2), and (2) although Trend claimed a burglary loss of more than $8 million, it had, on its insurance application, valued its entire inventory at

$1.6 million. (A. 3). Moreover, while the defendant in Peninsular Land was charged with the direct negligent destruction of the plaintiff's property, Honeywell is not charged here with the conversion of Trend's property, and is therefore not necessarily liable for the entire loss. Rather, Honeywell's liability is limited to that portion of the burglary loss which is attributable to the failure of the alarm system to perform as represented. The possibility that the burglars would have absconded with some of the merchandise regardless of the effectiveness of the alarm system adds to the uncertainty of the amount for which Honeywell could be held liable.

Over the many years since Peninsular Land was decided, this Court has not viewed the opinion — as does Trend — as a broad pronouncement that pre-judgment interest is invariably recoverable in tort actions for loss or damage to property. Peninsular Land appears to have been cited by this Court only four times on the issue of pre-judgment interest, and has not been cited by any Florida appellate courts since 1935.[5/]

5/ See, Shepherd's Florida Citations, Case Edition, 1977, with supplements. In Sullivan v. McMillan, 37 Fla. 134, 19 So. 340 (the case cited by the district court below as having been relied on by Trend), this Court cited Peninsular Land as an instance in which it had "allowed interest on an unliquidated claim for damages ...". However, this Court in Sullivan went on to hold that the case before it "falls within the rules stated, that the damages could be readily liquidated and ascertained by the jury by simple computation, and that the plaintiffs were entitled to interest thereon". (19 So. at 343; emphasis added). The other cases which have cited Peninsular Land on pre-judgment interest are Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687, 691 (1907); Farrelly v. Heuacker, 118 Fla. 340, 159 So. 24, 25-26 (1935)(indicating that interest is not allowable "on the amount of pure tort verdict prior to rendition"); and Zorn v. Britton, 120 Fla. 304, 162 So. 879, 880-881 (1935).

(cont'd)

Much of the foregoing discussion applies with equal force to the other purported conflicts asserted by Trend. In Zorn, 162 So. at 880-881, the court held that it was error to instruct a jury to add pre-judgment interest to an award for both personal injury and damage to property arising out of an automobile collision. The Zorn Court cited Peninsular Land as an instance in which it had "upheld interest on damages to property and for breach of contract from the date of the accrual of the cause of action", and corrected the trial court's error by ordering a remittitur of one half the interest. In Zorn, however, it does not appear that there was any dispute about the quantity of the property involved -- one automobile belonging to the plaintiff was damaged, and there was presumably evidence regarding the extent of the damage or the cost of repair. The court's approval of jury-assessed pre-judgment interest on that type of an award does not give rise to any express, direct irreconcilable conflict with the present case, where the quantity of the stolen property is in sharp dispute.

The case of Jackson Grain Co. v. Hoskins, 75 So.2d 306 (Fla. 1954) approved the allowance of pre-judgment interest on a claim based on a varietal difference in seeds furnished by a wholesaler to a farmer. The court deter-

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In 1941, this Court may have tacitly abandoned the prejudgment interest holding of Peninsular Land. In Skinner v. Ochiltree, 148 Fla. 705, 5 So.2d 605, 608 (1941), the court held that it was error in a personal injury case to instruct the jury on pre-judgment interest and made the unqualified statement that: "In tort actions, interest runs from the judgment." In support of that holding, the court cited Latta v. New Orleans & M. W. Ry. Co., 131 La. 272,59 So. 250 (1912). The Latta case, on facts virtually indistinguishable from those in Peninsular Land, held that interest on a claim for property damages resulting from a fire caused by a railroad locomotive should be allowed only from the date of the judgment.

mined, in that particular type of action based on implied warranty and a per se violation of Florida's seed-labeling act, that a jury could award pre-judgment interest. In reviewing prior authorities on the subject, the court noted that it had approved the recovery of pre-judgment interest "[i]n actions growing out of contract and in some actions in tort" (75 So.2d at 310, emphasis supplied), but had consistently disallowed it in personal injury actions. The court's observation that pre-judgment interest has been approved in "some" actions in tort other than personal injury actions does not amount to a judicial declaration that pre-judgment interest is invariably recoverable in all tort actions for property damage. Again, as with the other cases on which Trend relies, the holding that prejudgment interest was recoverable in the particular case before this court does not give rise to an express and direct conflict with the holding in the present case, based on dissimilar facts and theories of recovery.

The decision below plainly is not in express and direct conflict with the five cases cited on page 6 of Trend's brief. Those cases deal with contract damages and the limited circumstances under which a trial judge can provide for pre-judgment interest where the matter has not been considered by a jury. Since the facts and legal questions in those cases differ from those of the present case, the express and direct conflicts for which Trend contends do not exist.

A United States district court in Tennessee, applying Florida law, examined this Court's early decisions on prejudgment interest, including Zorn, Jackson Grain, and Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687 (1907), on which Trend relies. The court in Tampa Electric Co. v. Nashville Coal Co., 214 F. Supp. 647 (M.D. Tenn. 1963) effectively concluded that those

early decisions did not conflict with, but supported, the current Florida law as expressed in 9 Fla.Jur., Damages (1956), §86 as follows:

> As a general rule, interest cannot be recovered on unliquidated claims or demands, as the person liable can be in no default for not paying where he does not know the sum he owes. *** However, exceptions to this rule are recognized. Thus, interest is allowed as part of the damages where the demand, though unliquidated, is capable of ascertainment by mere computation, or by reference to well-established standards of value.[6/]

The district court's decision here is in no way inconsistent with the prevailing Florida law on the subject of pre-judgment interest, and there is no express and direct conflict upon which to predicate this Court's jurisdiction.

Point II - No express and direct conflict with Bergen Brunswick Corp. v. State Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982)

The action in Bergen was for conversion of funds derived from a contractual arrangement, and the court's discussion of pre-judgment interest commenced with the observation that such interest may be awarded in conversion and ex contractu actions. The court's discussion of a verdict liquidating a claim and thereby rendering it subject to pre-judgment interest should be considered in the legal context out of which the question arose. Viewed in that context, there is no express and direct conflict with the holding in the present case, which did not involve a conversion of funds, but damages for loss of property.

6/ Id. at 657. The quoted section is now contained, with minor modifications, in 17 Fla. Jur.2d, Damages §83 (1980).

If the prerequisites for submitting a pre-judgment interest issue to the jury are otherwise met, as in the Bergen-Brunswick claim for conversion of monies, then a jury verdict may have the effect, as stated in Bergen-Brunswick, of fixing the amount of damages as of a prior date. It does not follow, however, that in all claims for property damage, regardless of the type of claim and the nature and quality of the proof of damages, that a jury verdict fixes the amount of damages so as to invariably require an award of pre-judgment interest. If two cases are distinguishable in their controlling factual elements, or if the points of law settled by them are not the same, then no conflict exists as a basis for this Court's jurisdiction. Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962). Under that principle, the Third District's decision does not conflict with Bergen-Brunswick or with any of the other cases on which Trend relies.

Point III - No express and direct conflict with Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975); Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982), or with Clark v. Tampa Electric Co., 416 So.2d 475 (Fla. 2d DCA 1982).

Grossman and Williams simply held, on their particular facts, that reversible error was committed in permitting defendants to introduce evidence of social security, workman's compensation, or welfare benefits for the purpose of casting doubt on a plaintiff's motivation to return to work. The Clark case held that prejudicial error was committed in permitting in the defense attorney in a personal injury case to ask a series of damaging and impermissible questions which could have induced the jury to believe that the personal injury plaintiff was receiving more income after the accident than before. All three cases relied on Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973), which stated that "in most instances the presence of benefits inuring

to the plaintiff as a result of his injuries is not a proper consideration for the jury." (277 So.2d at 850; emphasis added). The application in these cases of the balancing test, weighing probative value of relevant evidence against potential prejudice from collateral source evidence, does not establish an invariable rule that all relevant evidence which may incidentally involve collateral source benefits must be automatically excluded. Under the facts of the present case, the district court determined that Trend's evaluation of its entire inventory at $1.6 million in its insurance application was admissible to impeach its subsequent claims that it lost more than $8 million of its inventory in the burglary. This holding clearly creates no express and direct conflict with decisions of other district courts of appeal involving wholly dissimilar facts.

CONCLUSION

Since there is no express and direct conflict with any prior decision of this Court or of another district court of appeal, this Court lacks jurisdiction. The attempt to invoke this Court's discretionary jurisdiction should therefore be denied.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on Jurisdiction was mailed to LARRY S. STEWART, ESQ. and JAMES B. TILGHMAN, JR., ESQ., Stewart, Tilghman, Fox & Bianchi, Attorneys for Petitioners, 44 West Flagler Street, Suite 1900, Miami, Florida 33130, this 13th day of August, 1984.

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