O.A 4-11-85
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IN THE SUPREME COURT OF FLORIDA

FILED
MAR 19 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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 THE MERITS

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STATEMENT OF THE CASE AND FACTS

The respondent Honeywell[1/] files this brief on the merits in support of the decision of the District Court of Appeal, Third District, which reversed for a new trial on damages a verdict and judgment for more than $12,000,000.00 for a burglary loss assertedly resulting from the failure of an alarm system for which Honeywell charged Trend an $800 installation fee and $65 per month for monitoring and service. (PX 7).

Honeywell disagrees with Trend's statement of the case and facts on a number of material points. First, it is not a "fact" as Trend asserts (TB 1, 3) that some eight million dollars of Trend's inventory of jewelry and precious metals was stolen. While the jury awarded compensatory damages of $8,037,674.60 (R 442; T 1169), the same amount computed by Jay Weinberg (T 1169; PX 46), that verdict has been reversed by the district court. Therefore, neither the verdict nor the highly disputed evidence on which it rested establishes as a fact Trend's asserted value of its stolen inventory. In the present posture of this case, Trend's claimed value remains unsubstantiated and subject to being controverted by Honeywell's evidence on remand.

Trend's hyperbolic assertion that it introduced "overwhelming evidence" of fraudulent misrepresentation (TB 1) is also

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1/ This brief will use the same party designations and abbreviations used in Trend's brief on the merits. In addition, the abbreviation "TB ___" will be used to refer to Trend's brief on the merits.

unsupported. The law of the case is simply that Trend introduced evidence sufficient to go to the jury on misrepresentation and that the jury resolved that issue against Honeywell.

The statement that defects in the alarm system "permitted the burglars to gain entrance undetected" (TB 1), for which Trend provides no record reference, is unsupported by the evidence at trial. The asserted failure of the alarm system had nothing to do with the burglars gaining entrance undetected into Trend's building. There was no indication of forcible entry through any exterior entrance, (T 467-468, 493, 984, 1992, 1995-1996), which suggested that the burglars had somehow concealed themselves in the building overnight. (T 983-985, 1023, 1209).[2/]

Trend's assertion that the burglars were permitted without detection "to work uninterrupted for many hours" (TB 1) is misleading because it tends to create the erroneous impression, by omitting reference to material evidence, that the burglars were required to spend "many hours" to gain possession of the goods that were ultimately taken from the premises. The evidence shows that the burglars had virtually immediate access to the vast amount of merchandise which Trend claims to have

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2/ It is also not true, as Trend states in footnote 2, that the jury's finding of misrepresentation was "uncontested" in the district court of appeal. (TB 2). Honeywell urged that it was entitled to a new trial on all issues, including the asserted misrepresentations which related primarily to the system's compliance with Underwriters Laboratory Standards. The ground for Honeywell's contention was that the trial judge had erroneously given a negligence per se instruction concerning violation of Underwriters Laboratory Standards. (T 1673-1680, 2365; R 370). The opinion of the district court did not address this issue, and limited the new trial to damages only.

lost. The burglars attempted to enter three of the four safes which Trend had on the premises, but the only one they succeeded in entering was an old safe which was not burglar-proof and which was broken into by simply punching out the center locking device. (T 419-420, 431; PX 22H). There was no evidence that the successful entry into this deficient safe would have taken more than a short time. The rest of the "many hours" during which the burglars were apparently on the premises was obviously spent in unsuccessfully trying to break into the other safes with torches and drills. (T 419, 421-422; PX 22-23).

According to inventories made by Jay Weinberg after the burglary, the value of the goods which remained on the premises, including those in the unentered safes, came to $929,000.00. (T 1122, 1129; PX 34). Thus, if Trend's evidence of the amount of its loss is to be believed, it left more than eight million dollars worth of precious metal lying about the premises or in the one safe which was not burglar-proof, (T 2037-2040, 1634-1636, 1623-1624; DX A-7 and A-8 for ID),[3/] while using its three burglar-proof safes to secure less than one million dollars worth of its assets.

3/ Honeywell proffered evidence regarding the security requirements and warranties under Trend's burglary insurance policy on the issue of Trend's comparative negligence. That evidence demonstrated that Trend's principals had been specifically advised by their insurance agent that the safe broken into was not an approved safe for insurance purposes, that it provided poor resistance against burglary, and that merchandise kept in that safe would not be covered under Trend's burglary policy. (T 2037-2039, 1623-1624, 1635-1636; DX A-7 and A-8 for I.D.). However, this evidence was excluded under the court's "collateral source" ruling (T 1642, 2040), along with all other evidence touching on the question of Trend's insurance.

Trend's description of the amount of its claimed loss (TB 2-5) is so highly selective in referring to the evidence that it creates a misleading impression about the case on damages as a whole. To avoid repetition Honeywell will generally reserve further discussion of that evidence for the argument portion of this brief. Honeywell takes particular exception, however, to Trend's over-simplified description of Jay Weinberg's conversion of the lost jewelry inventory "to the price of gold or silver on the day of the loss" (TB 3), and its contention that the value of Trend's inventory in November 1979 "was not an issue in the case ..." (TB 5). As Honeywell will demonstrate in the argument portion of this brief, Jay Weinberg's so-called "conversion" of the jewelry to the market price of gold or silver on the date of the loss was fallacious, and the running value of Trend's inventory from the time of the March 1979 evaluation for tax purposes to the date of the burglary was highly material to the issue of damages in this case.

Trend's statement of the case attempts to discredit the district court's decision by asserting that it did not apply an abuse of discretion test in ordering a reversal for exclusion of Trend's expert testimony and that it did not find "prejudicial or harmful error." (TB 5). As Honeywell will demonstrate in its argument, the district court correctly followed established precedent and the applicable test in ordering a new trial on damages, and implicitly found that the trial judge's erroneous evidentiary ruling was prejudicial.

SUMMARY OF ARGUMENT

Interest is not recoverable on an unliquidated claim unless the claim is subject to liquidation by simple computation. Inasmuch as Trend's unliquidated damage claim was not capable of being liquidated by simple computation, the jury's award of prejudgment interest was improper and its disallowance by the Third District Court of Appeal was mandated by the prevailing Florida law. The rule that a verdict can liquidate a debt and fix it as of a prior date does not extend to unliquidated property loss or damage claims.

The issues raised by Points II and III of Trend's brief are not directly related to the legal questions surrounding the asserted conflict on prejudgment interest and they do not involve any other conflict. Accordingly, this Court should limit its review of this case to the issue raised by Point I of Trend's brief.

The credibility of a qualified expert witness is an issue for the jury to determine. In this case, the trial court usurped this function when it excluded testimony by Honeywell's accounting experts and related exhibits. There were no objections to the qualifications of Honeywell's experts, and their testimony was a valid attempt to establish a correct estimate of the value of Trend's inventory at the time of the loss. The exclusion of the testimony and related exhibits, which was implicitly based on a perceived lack of their credibility, was erroneous and prejudicial.

The evidence of Trend's evaluation of its inventory for insurance purposes was offered by Honeywell to contravene Trend's claim that the burglary loss was more than $8,000,000.00, not to establish "collateral source insurance benefits." Accordingly, the holding of the district court that such evidence will be admissible on remand does not contravene Florida law on the subject of collateral source evidence. The trial court's exclusion of this highly relevant and crucial evidence was highly prejudical to Honeywell's case and required the granting of a new trial on damages.

The district court's reversal for a new trial on damages was correct on the alternative grounds that: (1) the trial judge committed prejudicial error in permitting into evidence a document purporting to be an inventory performed on December 21, 1979, because the document was inadmissible hearsay, lacked trustworthiness, and was an inadmissible copy; and (2) that the evidence of Trend's representation of the value of its inventory for insurance purposes was erroneously excluded, to the prejudice of Honeywell.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE AWARD OF PREJUDGMENT INTEREST WAS IMPROPER.

A. A Jury Award of Pre-Judgment Interest on Trend's Unliquidated Claim for Its Burglary Loss Is Not Legally Warranted Under the Facts of This Case.

Trend does not contend that its claim for the burglary loss was liquidated when the case was presented to the jury. Instead, Trend urges that since this is a case of property damage, the jury should award interest from the date of the loss notwithstanding the unliquidated nature of the claim. Moreover, Trend contends that:

> The distinction the Third District missed is that, while prejudgment interest may only be added to the verdict after the fact by the trial court if the claim is for liquidated damages, a jury is empowered to award prejudgment interest on an unliquidated property damage claim. (TB 12).4/

In weighing this contention, this Court should consider the context in which the jury here was "empowered" to award prejudgment interest. Over Honeywell's objection, the trial judge instructed the jury to award, as a separate item of damage, prejudgment interest at the rate of twelve percent from the date of the loss to the date of the verdict. (T 1702-1703, 2176, 2371, 2376; R 379, 381). Under this instruction, which amounted to a directed verdict on the issue, the jury had no choice but to

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4/ Trend also suggests that cases precluding a judge from adding interest to an amount awarded by a jury for loss or damage to property are inapplicable to this case. (TB 17, footnote 5).

award pre-judgment interest based on a simple mathematical computation. Thus, there is little, if any, practical difference between the "jury" award of interest in this case and the situation where a trial judge improperly adds interest to a jury verdict. The jury was given no discretion whatever.

Trend contends that Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transportation & Manufacturing Co., 27 Fla. 1, 157, 9 So. 661 (1891) is the progenitor of a line of cases which entitles Trend to pre-judgment interest in this case. In tracing the development of Florida law, however, Trend does not mention Sullivan v. McMillan, 37 Fla. 134, 19 So. 340 (1896). In Sullivan, this Court referred to its holding in Peninsular Land, decided only five years previously, as having "allowed interest on an unliquidated claim of damages ...". Sullivan, 19 So. at 343. Immediately following its discussion of Peninsular Land, however, the Sullivan court stated:

> Without setting forth even a brief summary of the evidence in this case, we think it sufficient to say that it was so exact and definite as to the amount of damages sustained by the plaintiffs, and the elements of the same, that it only required a simple computation by the jury to fix the amount. We think the case falls within the rule stated, that the damages could be readily liquidated and ascertained by the jury by a simple computation, and that the plaintiffs were entitled to interest thereon. (Id. at 343; emphasis added).

It is thus clear that while this Court recognized that under Peninsular Land interest could be allowed "on an unliquidated claim of damages", that entitlement remained subject to an important condition under "the rule stated". That rule, as

stated in Sullivan based on its analysis of Peninsular Land and other authorities, is that for pre-judgment interest to be awarded, the unliquidated damages must be capable of being "readily liquidated and ascertained by the jury by simple computation." Since Trend's unliquidated damage claim could not be readily converted by a jury into a liquidated amount by "simple computation", the decision below is entirely consistent with Peninsular Land, as interpreted in Sullivan.

There is no basis for Trend's contention (TB 17) that the District Court below "ignored or refused to follow the long line of cases" discussed by Trend on pages 12-17 of its brief. In the first place, the cases of Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687 (1907) and Department of Transportation v. Hawkins Bridge Co., 457 So.2d 525 (Fla. 1st DCA 1984), are straight contract claims for damages, and thus are not authoritative on the question of a defendant's liability in tort for pre-judgment interest. The case of Jackson Grain Co. v. Hoskins, 75 So.2d 306 (Fla. 1954), is essentially a breach of warranty action based on a varietal difference in seeds furnished by a wholesaler to a farmer. This Court determined 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. This court's passing observation in Hoskins that pre-judgment interest has been approved in "some" actions in tort other than personal injury actions is obviously not an endorsement of a rule that pre-judgment interest is invariably recoverable in tort actions for property damage.

The case of Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935), in which this Court permitted a jury's award for pre-judgment interest to stand insofar as it related to property damage, does not support Trend's contention that it is entitled to pre-judgment interest in this case. In Zorn, there was no dispute about the quantity of the property involved. It was one automobile belonging to the plaintiff which was damaged in a collision in which the defendant was at fault. There was obviously evidence introduced as to the extent of the damage or the cost of repair, and, so far as the opinion shows, that evidence was not even in dispute. Accordingly, the Zorn decision is not contrary to the rule recognized in Sullivan that interest is allowable on an unliquidated damage claim, provided "the damages could be readily liquidated and ascertained by the jury by simple computation ..." Sullivan, 19 So. at 343.

The case of Srybnik v. Ice Tower, Inc., 183 So.2d 224 (Fla. 3d DCA 1966), cert. den. 192 So.2d 492 (Fla. 1966), does not support Trend's contention that pre-judgment interest is recoverable in an action for misrepresentation, notwithstanding the indeterminate nature of the damages. While the appellant contended in that case that pre-judgment interest "was improper because the damages were unliquidated and uncertain" (183 So.2d at 225), there is no suggestion in the opinion that the court agreed with that characterization in allowing the jury's award of pre-judgment interest to stand. So far as the opinion shows, the award was affirmed because the damages were capable of being liquidated by simple computation.

For similar reasons, the case of Tampa Electric Co. v. Stone & Webster Eng. Corp., 367 F. Supp. 27 (M.D. Fla. 1973) provides no support for awarding pre-judgment interest in a case involving tortious property damage which cannot be ascertained by simple computation. In fact, only a simple computation was involved in that case, since the court indicated that its judgment would reimburse the injured party "for what he would have earned on the money used to repair the damaged property until the time of the entry of judgment." Id. at 36. That amount was, quite obviously, readily ascertainable by simple computation, applying the prevailing interest rate to the amount expended for repairs.

A United States District Court in Tennessee, applying Florida law, has examined this Court's early decisions on pre-judgment interest, including Zorn, Jackson Grain, and Griffing Bros. Tampa Electric Co. v. Nashville Coal Co., 214 F. Supp. 647 (M.D. Tenn. 1963). That court concluded that those early decisions did not conflict with, but supported, the current Florida law as expressed in 9 Fla. Jur., Damages, §86 (1956), 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 unliqui-

> dated, is capable of ascertainment by mere computation, or by reference to well-established standards of value.5/

The rule just quoted correctly describes this Court's rulings on pre-judgment interest, and provides an accurate summary of Florida law, at least insofar as it existed prior to the decisions of the District Court of Appeal, First District, to be discussed under the next sub-point.

B. The Rule in Debt Cases That a Jury Verdict Has the Effect of Fixing Damages As of a Prior Date for Purposes of Pre-Judgment Interest Should Not be Extended to Tort Actions in Which Unliquidated Damages for Loss or Destruction of Property Cannot be Readily Determined by Simple Calculation.

As Trend acknowledges, the rule that a verdict can liquidate a claim and fix it "as of a prior date" has heretofore been applied in cases involving debts, as distinguished from unliquidated damage claims. (TB 27). For example, in English and American Ins. Co. v. Swain Groves, Inc., 218 So.2d 453 (Fla. 2d DCA 1969), it was held that the insurer was liable under the terms of a policy of crop insurance for pre-verdict interest starting sixty days after it had waived formal proofs of loss. In discussing entitlement to pre-judgment interest, the court stated:

> In actions ex contractu it is proper to allow interest at the legal rate from the date the debt was due. The fact that there is an honest and bona fide dispute as to whether

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5/ 214 F.Supp. at 657. The quoted section is now contained, with minor modifications, in 17 Fla. Jur. 2d, Damages, §83 (1980).

> the debt is actually due has no bearing on the question. If it is finally determined that the debt was due, the person to whom it was due is entitled not only to the payment of the principal of the debt but also to the interest at the lawful rate from the due date thereof.... Whenever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date. (Id. at 457; emphasis added, citations omitted).

When the last sentence of the above quotation is considered in light of the repeated characterization of the claim as a "debt", it is clear that Swain does not hold, or even suggest, that verdicts for general damage claims fix the amount of such claims "as of a prior date" so as to entitle the plaintiff to pre-judgment interest. Rather, the court was merely holding that when a claim for a debt, even though disputed, is liquidated and fixed by a verdict as of a prior date, then interest is recoverable from that date. See, Bryan and Sons Corp. v. Klefstad, 265 So.2d 382, 385 (Fla. 4th DCA 1972), recognizing the distinction, for purposes of pre-judgment interest, between judgments for debt or liquidated claims and judgments for damages.

The accepted definition of "debt", as adopted by this Court in Holman v. Hollis, 94 Fla. 614, 114 So. 254 (1927), is:

> That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay another; a thing owed. (Id., 114 So. at 255).6/

In State ex rel Lanz v. Dowling, 92 Fla. 848, 110 So. 522 (1926), this Court held that "debts," as used in the Florida Declaration of Rights prohibiting imprisonment for debt, "must be those aris-

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6/ See also Smith v. Fechheimer, 124 Fla. 757, 169 So. 395, 398 (1936), adopting a paraphrase of the Holman definition.

ing exclusively from actions ex contractu," and that the term was never meant to include "damages arising in actions ex delicto ...". Id., 110 So. at 525; emphasis added. Honeywell's pre-judgment liability in this case clearly was not in any sense based on a "debt", as that term has always been defined by this Court. The liability is clearly for "damages arising in actions ex delicto" which are excluded from the definition of debt. Id.7/

Bergen Brunswig Corp. v. State Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982), cert. den. 426 So.2d 25 (Fla. 1983), on which Trend so heavily relies, was an action for misappropriation of funds derived from a contractual arrangement between the defendant and the plaintiff, a state agency. In effect Bergen became a debtor of the State immediately upon misappropriating funds belonging to it, even though the amount of the defalcation was not determined until the verdict was returned. When Bergen is considered in this context of debtor-creditor relationship, as it properly should be, Trend is correct in saying that its approach is "neither radical nor novel". (TB 27). Since a judgment for conversion creates, in effect, a debtor-creditor relationship by operation of law, the

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7/ This is true notwithstanding that Trend's claim had its ultimate origin in the alarm contract with Honeywell. Trend was able to vitiate that contract, including its exculpatory and limitation of liability provisions (PX 7), by its claim for tortious misrepresentation. (See TB 2, footnote 2). Accordingly, Trend cannot with any consistency contend that its damages are an amount "due" or "owed" under the terms of the contract. Smith, 169 So. at 398; Holman 114 So. at 255. Rather, this claim is for "damages arising in actions ex delicto". Dowling, 110 So. at 525.

conversion cases are governed by the same pre-judgment interest rule as the cases involving debts. See, e.g., Exxon Corp. v. Ward, 438 So.2d 1059, 1060 (Fla. 4th DCA 1983).

Trend's advocated extension of the Bergen case urged on this Court is radical and novel, however. It would overturn the longstanding rule that pre-judgment interest on damage claims is not allowable unless "the damages could be readily liquidated and ascertained by the jury by simple computation ...". Sullivan, 19 So. at 343. Since every damage verdict, in effect, fixes damages as of a prior date (the date of injury or loss), Trend's theory would allow recovery of pre-judgment interest in all cases involving property loss or damage, no matter how indeterminate or uncertain those damages might be.

The very concept of interest presupposes a duty to pay a fixed sum. As Trend acknowledges, the rationale for disallowing pre-judgment interest on unliquidated claims is that the defendant has no way of knowing the amount it is obliged to pay until the verdict is rendered. (TB 25). Tampa Electric Co. v. Nashville Coal Co., supra, 214 F.Supp. at 658. ("There was no way that the defendants could reasonably know, with any degree of definiteness or certainty, the amount they owed to the plaintiff with respect to this item until these conflicting factual and legal questions were determined"); Cavic v. Grand Bahama Dev. Co., Ltd., 701 F.2d 879, 888 (11th Cir. 1983). This rationale plainly applies to the present case.

Honeywell was not charged with misappropriating Trend's funds or property. Moreover, Honeywell was not charged with

causing the burglary, or even with failing to prevent it. The claim is that, had Honeywell's alarm system performed as represented, the burglary might have been halted in progress. Since the burglars had apparently concealed themselves inside the premises, and since vast amounts of gold and silver were (according to Trend's contention) lying about the premises for the taking, the burglars could have made away with a large part, if not all, of the loot even if the alarm system had performed as intended. Furthermore, Honeywell asserted a defense of comparative negligence, based on Trend's failure to exercise reasonable care for the safekeeping of its own inventory. Thus, even aside from the uncertain and unliquidated nature of the total amount of the burglary loss, the portion of the loss for which Honeywell would be responsible could not be established until the time of trial. Chicago Ins. Co. v. Argonaut Ins. Co., 451 So.2d 876, 877 (Fla. 4th DCA 1984), pet. for rev. dism., 458 So.2d 273 (Fla. 1984). Finally, Honeywell could not know that it "owed" Trend anything until after all disputed liability issues had been decided and the court had determined that Honeywell was not entitled to the benefit of the limitation of liability provisions of the contract. (See TB 2, footnote 2, and cases cited). See, Parker's Mechanical Contractors, Inc. v. Eastpoint Water and Sewer District, 367 So.2d 665, 668-670 (Fla. 1st DCA 1976), cert. denied 378 So.2d 347 (1979).

Trend contends that the rule applied below is unjust because it does not focus on the plaintiff and because it provides a "windfall" to the defendant. (TB 26). There is no wind-

fall to Honeywell where it (unlike a defendant in a conversion case) did not have any use or benefit of Trend's property during the pendency of the unliquidated claim. Also, there is no windfall when Honeywell had no means of knowing the exact amount, if any, "owed" to Trend, and was simply exercising its constitutional right to contest an unliquidated damage claim in tort. In any event, it is difficult to see any possible windfall to Honeywell when Trend is seeking more than $8 million compensatory, plus punitive, damages for the failure of a system for which Honeywell received only an $800 installation fee and $65 per month service charge.

A certain amount of delay and expense is an inherent and unavoidable part of the adversarial judicial system to which our society is committed. Trend's arguments for "full compensation" could just as well be advanced in favor of allowing attorneys' fees and full costs to a prevailing party, to make him fully "whole". The courts have consistently rejected such arguments, however, leaving the parties who avail themselves of the benefits of the judicial system to bear a part of its inevitable expense. See Dorner v. Red Top Cab & Baggage Co., 37 So.2d 160, 161 (Fla. 1948); Shavers v. Duval, 73 So.2d 684, 686 (Fla. 1954).

The idea of "full compensation" should be a two-way street. If a plaintiff who successfully asserts an unliquidated damage claim is entitled to be made fully whole by the award of pre-judgment interest, a defendant who successfully defends such a claim should, in all fairness, be made "fully whole" by awarding him attorney's fees and all costs. Otherwise, the vic-

torious defendant suffers an unjust loss, and comes out less than "whole", even though he has been judicially vindicated of all wrongdoing. Through long experience, however, the law has wisely recognized the inherent limitations of the judicial system, with its inevitable delays and expense, and does not award either attorney's fees or pre-judgment interest on unliquidated claims.

Finally, it would be inequitable to adopt a rule which would indiscriminately visit on a defendant the entire consequences of judicial delay in resolving claims for unliquidated damages, without regard to the extent that the delay or the unliquidated nature of the claim is attributable to the plaintiff. In the present case, for example, Trend cannot legitimately claim freedom of responsibility for the delay in reducing its claim to judgment or for the unliquidated nature of the claim. Trend's complaints were amended several times (R 37-34, 46-54, 73, 101-106), with the last amendment being granted in February, 1983, so as to require the entry of an order resetting the trial date. (R 233-234, 246).

Neither can Trend absolve itself of responsibility for the indeterminate nature of its claim. The complaint on which the case went to trial does not assert a compensatory claim in any specific amount, but merely seeks compensatory and punitive damages of more than one million dollars. (R 101-106). Trend could not provide Honeywell's experts with any inventory records, because no perpetual inventory had been kept. (T 1382, 1794, 1797, 1405-1406, 1435). The purchase and sales records which were produced provided no means by which Honeywell's accountants

could determine the description or weight of items bought and sold or the actual cost of sales for jewelry. (T 1474, 1489, 1794-1795, 813, 1390, 1398, 1405-1406, 1839-1840, 1845, 1877-1878, 1911, 1164, 1197, 1199).[8/] Honeywell's experts did not even receive the explanation for Trend's "constant dollar" computations until the time of trial. (T 1428-1430, 1435).

The disallowance of pre-judgment interest by the Third District was mandated by the prevailing Florida law. Trend has demonstrated no valid reasons why this Court should now depart from the rule which it has followed since its 1896 decision in Sullivan. The application of the existing rule results in no injustice in this case, and there are no compelling policy reasons which justify abandonment of the established rule in favor of the innovative rule advocated by Trend.[9/]

8/ See also the discussion at pages 41-49 of this brief concerning the copy of the December 21, 1979 jewelry inventory which Trend used as a starting point to compute its claimed loss of gold jewelry. The suspect nature of that inventory adds to the uncertainty of the amount of Trend's claim.

9/ If this Court should decide that pre-judgment interest is recoverable, the rate of twelve percent was erroneously applied by the trial court. The statutory rate in effect at the time of the "maturity" of the obligation governs. Board of Public Instruction v. Wright, 76 So.2d 863, 866 (Fla. 1955). See also, E & A Concrete v. Perry, 379 So.2d 1015 (Fla. 1st DCA 1980), following Wright, supra, and holding that interest on Worker's Compensation benefits which became due before the effective date of the applicable interest statute for compensation claims, accrued at the rate in effect before the new statute. In the present case, any obligation to pay interest necessarily would relate back to the date of the loss, so the statute in effect on the date of "maturity" should control. Under that statute, §687.01, Florida Statutes (1979), the applicable rate is six percent. If this Court should decline to follow Wright, which fixes the interest rate as of the date of maturity, Honeywell alternatively relies on the last two cases cited in Trend's footnote 8 (TB 28), requiring interest to be (cont'd)

POINT II

THE DISTRICT COURT DID NOT ERR IN REVERSING FOR A NEW TRIAL ON DAMAGES BASED ON THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL EXCLUSION OF THE TESTIMONY OF HONEYWELL'S EXPERT ACCOUNTING WITNESSES AND RELATED EXHIBITS.

Honeywell recognizes that this Court, having accepted jurisdiction, may in its discretion undertake a complete review of all issues before the district court, regardless of whether the rulings on those issues were urged as a basis of conflict. (TB 30 and cases there cited). However, the very existence of that discretion implies that there can be circumstances under which this Court will decide that judicial restraint is the better course and that its review should be limited to the matters of conflict on which guidance is needed for the bench and bar. This case calls for such judicial restraint.

It may be that Florida courts and lawyers need guidance on pre-judgment interest, in light of Bergen and the apparent interpretation placed on it by Federal Deposit Insurance Corp. v. Carre, 436 So.2d 277, 280 (Fla. 2d DCA 1983) (TB 19-20). However, the limited purposes for which the Constitution grants this Court power to review decisions of district courts are in no way furthered by expanding review in this case to include the matters of evidence and prejudicial error encompassed by Trend's points II and III.[10/] The district court below, after thoroughly

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assessed at six percent up to the effective date of the July 1, 1982 amendment to §687.01. See also, Myers v. Carr Construction Co., 387 So.2d 417 (Fla. 1st DCA 1980).

10/ Although Trend initially conceded that the District Court's ruling on the issues raised by Point II presented no basis for conflict jurisdiction, it now belatedly argues that (cont'd)

reviewing the lengthy record, voluminous exhibits, and the evidence in a trial transcript nearly 2,400 pages long, expressly determined that the trial judge had committed error in excluding Honeywell's key expert witness testimony and exhibits on the crucial issue of damages, and implicitly decided that the error was so prejudicial as to require a new trial on damages.

These issues (like those raised by Trend's Point III) are not directly related to the legal questions surrounding the asserted conflict on pre-judgment interest. No legitimate constitutional purpose is served by this Court expending its time and energies on questions which have been decided, without conflict, by a district court of appeal. For this Court to use a conflict on an entirely separable issue as a wedge to undertake a complete second appellate review of matters already thoroughly considered by the district court and decided without conflict, is to indirectly afford a second appeal, which was never contemplated by amended Article V of the Florida Constitution. The spirit of Article V dictates that, in the circumstances presented by this case, this Court should recognize that district courts of appeal are ordinarily courts of final appellate resort.

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there is "probably" a conflict on that point as well. (TB 30-31). For reasons which Honeywell will discuss in the course of its arguments on the merits of this point, there is no direct and express conflict on the issues raised by Point II. Trend also contends that its present Point III (TB 42) involves a conflict, but for the reasons argued in Honeywell's jurisdictional brief and its ensuing argument on the merits of Point III, there is no express and direct conflict on that point either. If the Court accepted jurisdiction solely on the basis of conflict on the pre-judgment interest issue (as Honeywell's counsel believes probable) then the court should in its discretion decline to review the issues raised by Point III (and by respondents' point as well) for the same reasons which are discussed above.

Trend commences its argument under this point by making the broad unqualified assertion that all questions of evidence, including the admissibility of expert opinions, are matters "entrusted to the broad discretion of the trial judge on the spot." (TB 29). Neither the authorities cited by Trend nor the general law of Florida supports such a sweeping entrustment of all evidentiary matters to the broad discretion of the trial judge. It is true that on certain matters of evidence, such as the subjects appropriate for expert testimony, the trial judge has broad discretion, as this court recently recognized in Town of Palm Beach v. Palm Beach County, 460 So.2d 879, 882 (Fla. 1984).11/ In Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980), however, this Court emphasized the importance of appellate courts recognizing "the distinction between an incorrect application of an existing rule of law and an abuse of discretion." Id. at 1202. The "reasonable man" test invoked by Trend applies

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11/ The Town of Palm Beach decision held that expert opinion testimony that certain County police road and park services did not provide "real and substantial" benefits to municipalities was improperly admitted, on the ground that the testimony "tells the trier of fact how to decide the case, and does not assist in determining what has occurred . . ." . Although this Court recognized that the trial judge "has broad discretion in determining the subject on which an expert may testify," it also noted that the trial court's decision "will be disregarded if that discretion has been abused." 460 So.2d at 882. Significantly, in reversing the trial court this Court did not incant any stock phrase reversing for "abuse of discretion". This Court simply stated: "That particular opinion testimony should not have been admitted or considered by the trial court." Id. at 882.

only to appellate review of "a true discretionary act," where "the appellate court must fully recognize the superior vantage point of the trial judge ...". Id. at 1203.

The mere existence of some measure of discretion by a trial judge in receiving expert testimony does not mean, and should not mean, that every ruling by a trial judge excluding expert testimony must be affirmed "[i]f reasonable men could differ as to the propriety of the action taken by the trial court ...". Id. at 1203. The courts of Florida have repeatedly found reversible error, without making any express finding of an "abuse of discretion", where expert opinion evidence has been improperly excluded by trial courts.[12/] Notwithstanding that a trial judge

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12/ See, e.g., Schwartz v. M.J.M. Corp., 368 So.2d 91 (Fla. 1979) (Error to exclude testimony of safety engineer, concerning safety of stairway); Hobbs v. Sauers, 359 So.2d 914 (Fla. 3d DCA 1978) (Testimony of treating physician, concerning permanency of plaintiff's condition, improperly excluded); Seibels, Bruce & Co. v. Giddings, 264 So.2d 103, 105-106 (Fla. 3d DCA 1972) (Trial court "committed error" in excluding answers of accident reconstruction expert to hypothetical questions based on conflicting evidence); Red Carpet Corp. of Panama City Beach v. Calvert Fire Insurance Co., 393 So.2d 1160, 1161 (Fla. 1st DCA 1981) (Reversible error to exclude expert testimony of insurance adjusting expert, concerning handling of claims); Millar v. Tropical Gables Corp., 99 So.2d 589 (Fla. 3d DCA 1958) (Error for trial court to exclude expert testimony).

Even in the area of qualifications of experts, which is clearly within the trial court's discretion, trial judges have frequently been reversed without explicit findings of abuse of discretion. Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981) (Error to exclude testimony of neurosurgeon in suit against certified gynecologist and anesthesiologist); Wright v. Schulte, 441 So.2d 660 (Fla. 2d DCA 1983), pet. rev. denied, 450 So.2d 488 (Fla. 1984) (Error to exclude testimony of gynecologist in an action against surgeon); Mitchell v. Angulo, 416 So.2d 110 (Fla. 5th DCA 1982) (Error to exclude testimony of board certified physician in an action against non-certified physician); Hawkins v. Schofman, 204 So. 2d 336 (Fla. 3d DCA 1967), cert. den., 211 So.2d 215 (Fla. 1968) (Error to exclude testimony of physician who had no (cont'd)

has discretion regarding certain aspects of the admission of expert testimony, it is not his function to refuse to accept such testimony on the ground that he (or even a hypothetical reasonable man) would personally disagree with the expert's methodology of an expert whose qualifications are unquestioned.

Under Rochelle v. State Road Department, 196 So.2d 477 (Fla. 2d DCA 1967), followed by the district court below, a trial judge's disagreement with an expert's methodology is not grounds for exclusion of the testimony "unless the method used by the witness is so totally inadequate or improper that adoption of the method would require departing from all common sense and reason or would require adoption of an entirely new and totally unauthenticated formula in the field of ..." the witness' expertise. Id. at 479. Trend argues that the Rochelle test is "highly questionable" (TB 29) but can cite no case where the test has been overruled or even questioned. The Rochelle test does not, as Trend contends, place the admissibility of an expert's opinion within the expert's own "discretion". Rather, the rule is simply a specific application of the general rule that questions of credibility of all witnesses, including experts, are for the trier of fact. Glades County Sugar Growers v. Gonzalez, 388 So.2d 333, 335 (Fla. 1st DCA 1980).

Although the trial judge here did not expressly base his ruling on a perceived lack of credibility of Honeywell's

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personal experience in performing the operation in question), and Ashburn v. Fox, 233 So.2d 840 (Fla. 3d DCA 1970) cert. granted 238 So.2d 428 (Fla. 1970), cert. dismissed, 242 So.2d 873 (Fla. 1971) (Error to exclude testimony of medical doctor in suit against osteopath).

experts, he did so implicitly. When he sustained Trend's objection, he necessarily rejected as unworthy of belief the experts' testimony that Trend's records were inadequate to perform the computations in the way Trend contended they should be performed, that the cost of goods approximated their market value, and that their method produced a fair estimate of the market value of the loss. That this testimony may have conflicted with Trend's evidence "did not give the trial judge the discretion to exclude ... [Honeywell's] expert testimony and any challenge to the experts' premises should have come from appellees on cross-examination." Division of Administration, etc. v. Decker, 408 So.2d 1056, 1058 (Fla. 2d DCA 1981).

The rule advocated by Trend would, in effect, overturn the sound precedent that the credibility of a qualified expert is for the jury to determine, not the trial judge. If Trend's argument should prevail, it would place a trial judge in the role of a super-juror, who could exclude the testimony of expert witnesses based on his personal perception of their lack of credibility. Moreover, his assessment of expert credibility would be impervious to appellate review so long as a "reasonable man", similarly charged with weighing the witness's credibility, might agree with him.

Contrary to Trend's contentions, the testimony of Honeywell's two damage experts, Mr. Campos and Mrs. Robinson, was based on a valid attempt to establish a correct estimate of the

value of Trend's inventory at the time of the loss.[13/] The exclusion of this testimony cannot be justified on the ground that Trend produced testimony tending to show that its records were adequate for its computations of a vastly greater market value, purportedly converting each transaction to a constant gold value. The evidence on this subject was in sharp conflict, and Honeywell was entitled to introduce expert testimony based on the evidence viewed in a light most favorable to it. Seibels, supra, 264 So.2d at 105-106.

Trend relies on a simplistic explanation of Jay Weinberg's efforts to use "constant dollars" to convert all purchases and sales of jewelry to the market price of gold on the date of the loss. (TB 32).[14/] Jay Weinberg's own testimony, as well as simple logic, discloses a major fallacy in Trend's approach. The fallacy is that the precious metal content of the gold jewelry represented only a part (or "preponderance") of its value. (T 1270). Given this obvious fact, the purchase of a certain dollar

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13/ See Worcester Mutual Fire Insurance Co. v. Eisenberg, 147 So.2d 575, 576 (Fla. 3d DCA 1962); noting Florida's adherence to the "broad evidence rule" in cases where "actual cash value" is the measure of damage for loss of personal property, and stating:

> Under this rule, any evidence logically tending to establish a correct estimate of the value of the damaged or destroyed property may be considered by the trier of facts to determine 'actual cash value' at the time of loss. (Id. at 576; Emphasis Added).

14/ There is an apparent typographical error in Trend's discussion of this issue. The third line in the first full paragraph at TB 32 states that the price of gold on December 3, 1979 was $128.75 an ounce. The figure should be $428.75. (PX 30, page 6).

amount of gold jewelry on December 3, 1979, cannot simply be multiplied by 1.42 to arrive at the dollar value of that purchase as of the date of the loss. (TB 32). Some type of conversion obviously has to be made, taking into account that only a part of the total value of a piece of jewelry will fluctuate with the price of gold. Jay Weinberg's testimony does not disclose what formula he used, or, indeed, whether he even took this factor into account in arriving at his figures. (T 1156-1168). Another fallacy inherent in Jay Weinberg's approach is that changes in the market price of the metal were not reflected in Trend's selling price to one of its major customers, J. C. Penney, because of a fixed pricing arrangement with that customer. (T 1275-1276; R 556, 585-586). For some of the asserted losses, Jay Weinberg had to rely on his memory. (T 1151, 1155).

Honeywell's damage experts were certified public accountants with the firm of Campos and Stratos, which specializes in the evaluation of claims involving damage to or loss of property. (T 1375, 1778-1779). Mr. Campos has special experience and expertise in investigative accounting to determine losses in the wholesale jewelry business. (T 1782-1783). There were no objections to the expert qualifications of either witness, and Campos was expressly declared by the trial judge to be an expert. (T. 1783).

Campos and Robinson, having been retained by Honeywell in connection with this litigation, went to Trend's premises to review its records in an attempt to reconstruct the value of the inventory as of the date of the burglary. (T. 1376, 1383-1384,

1788-1789). Under the pre-trial discovery procedures in this case, Trend was required to make all its pertinent records available to them for inspection and analysis. (T 1204-1205, 1224-1225).

Honeywell's accountants used as a starting point the figure reported by Trend as the value of its inventory in its federal income tax return filed March 31, 1979. (T 1383-1384, 1760-1761, 1797, 1837). The return gave only a dollar amount for inventory. (T 1383; DX D, Schedule A, page 2). Honeywell's experts asked for, but did not receive, the inventory or "count sheets" which formed the basis for the return. (T 1383, 1405-1406, 1435, 1768, 1797). In fact, Robinson and Campos were never provided any of the inventory records they requested, because no perpetual inventory had been kept. (T 1382, 1794, 1797, 1405-1406). The accountants were given records consisting of sales slips and shipping invoices purportedly representing disbursements of inventory (T 1383, 1795, 1390), and invoices, tickets, and checks reflecting purchases of jewelry and scrap. (T 1385-1387, 1813, 1391). However, these documents provided no means by which Honeywell's experts could determine the description of items or the weight of scrap and jewelry bought and sold during the period in question or the actual cost of sales for the jewelry. (T 1474, 1489, 1794-1795). The checks written by Trend's buyer, Mr. Baronson, did not have any memos on them as to which jewelry purchase invoices he was paying, and the amounts did not match up with the purchase invoices. (T 1385-1388). The purchase and sales records provided no consistent or complete

description of items or weights. (T 813, 1390, 1398, 1405-1406, 1794-1795, 1839-1840, 1845).

Much of Jay Weinberg's own testimony corroborated the testimony of Honeywell's experts concerning the lack of consistency and completeness in Trend's records. Jay Weinberg acknowledged that the invoices showed that some customers were sold jewelry on a weight basis, and others on a unit basis. (T 1164, 1197, 1199). He also testified that it was not possible to determine from Trend's records how many "pieces" of merchandise were on hand or had been shipped out. (T 1258-1260). There was also testimony from Trend's accountants tending to show the inadequacy of Trend's records to determine the cost or amount of inventory. (T 1884, 1893-1894, 1896, 1918).

Honeywell's experts testified unequivocally that Trend's records did not provide an adequate basis for converting to a constant value of gold throughout the period covered by their transition inventory, because there was no adequate or consistent description of the goods on hand originally, or of purchases or sales by description or weight. (T 1382, 1794-1795, 1768, 1383, 1797, 1385-1387, 1813, 1390-1391, 1394, 1398, 1839-1840, 1405-1406). Campos testified that as an accountant, the only proper way to analyze the inventory value using a constant figure is to "have a unit itemization of the inventory indicating quantity, descriptions and ins and outs from the beginning to the end." (T 1845). According to Mrs. Robinson, the method they used was "the most accurate method that was possible, given the lack of records by Trend." (T 1490).

Together, Honeywell's expert accountants spent some four hundred hours analyzing Trend's records and in preparing their computations. In their judgment as accountants, the only way of arriving at a valid estimate of the value of Trend's inventory as of the date of the loss, given Trend's inadequate records, was the method which they had followed. Based on their experience and familiarity with Trend's records, it was their view that their figure of $533,000 dollars would approximate market value. (T 1440, 1448, 1760). Considering the severe limitations placed on Honeywell's experts by Trend's inadequate record-keeping, their testimony, arrived at after a thorough analysis of Trend's records, could not properly be rejected by the trial judge based on his view that their "methodology" was improper.

Just as Trend's discussion of Jay Weinberg's calculations omits a key factor,[15/] its simplistic description of the computations by Honeywell's experts is also fallacious and omits reference to a central part of the process by which they arrived at their estimate of Trend's loss. (TB 33). Honeywell's accountants did not simply add and subtract dollar amounts of sales and purchases to arrive at their $533,000.00 estimate of the loss. The excluded exhibit, PX 1-D for I.D. shows, in addition to the total dollar amount of purchases and sales during the transition inventory period, the "cost of sales". On PX 1-C, it is this "sales at cost" figure, not the dollar amount of sales,

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15/ See TB 32, and the discussion at pages 26-27 of this brief.

that is subtracted from the amount of purchases to arrive at the net change in inventory. (T 1415-1417). Honeywell's accountants based their cost of sales computations on an extensive samplying of Trend's actual purchases and sales from October 19, 1979 through February 1980, taking into account the average price of gold for each transaction (T 1475; R 541, 594-595), and on standard publications for the wholesale jewelry industry. (T 1474, 1489, 1557). They also took into account the records, including inventory turnover, and statistics as to changes in the market price of gold and silver, so they could be sure of the reasonableness of their conclusion, which was that the market value of the inventory was essentially the same as the figure to which they testified. (T 1489; R 558-559, 561).

Contrary to Trend's contention (TB 35), Honeywell's experts took into account both the 3 to 5 day turnover of scrap (T 1525) and the less frequent turnover of jewelry. Mrs. Robinson noted that Trend's records reflected that its goods were not held for months at a time, but would be "turning over a little more quickly in the rising market". (T 1475). Campos explained on deposition that the 45-day turnover for jewelry shown on DX A-6 for I.D. (referred to at TB 35) represented the number of days it would take to deplete Trend's jewelry inventory to zero. (R 603). This explanation corresponds with his proffered testimony at trial that jewelry purchased before January 20, 1980 (the date gold reached its peak value; PX 30, page 8), had been substantially disposed of by the time of the burglary. (T 1770).

The beginning inventory figure of 1.7 million dollars was at cost. (T 1762). Moreover, the dollar amount of each successive purchase obviously reflected Trend's cost and thus bore a direct relationship to market value (which in turn reflected the price of gold) at the time of each purchase. Likewise, the dollar amount of each successive sale of a part of Trend's inventory would reflect market conditions, including increases or decreases in the price of gold, at the time of that sale. By applying the applicable cost of sales percentage, the accountants converted the dollar amounts of each successive sale into the cost of goods sold. (T 1415, 1417).

Based on information they had received, Honeywell's experts concluded that the relationship of cost to market value was fairly close, within a spread of ten percent. (T 1764, 1423). By applying the inventory transition method, continuously subtracting the dollar amounts of sales adjusted to cost and adding in the dollar amounts of purchases reflecting Trend's cost at the time of each transaction, the running evaluation of the inventory, which turned over many times between March 1979 and March 1980, constantly reflected the cost of goods, which in turn continuously bore a relationship to market value. Thus, at the end of the transition inventory period, the figure of $1,847,829.00 represented the cost of the inventory (PX 1-C and 1-D for I.D.), which in turn approximated market value. (T 1767). From this figure, Honeywell's experts subtracted $1,314,813.00, the amount of inventory remaining after the burglary (including that in safe deposit boxes), to arrive at their

estimate of a loss of $533,016.00, which approximated market value at the time of the burglary (PX 1-E for I.D.; T 1764, 1488). This testimony was not simply "one of a multitude of opinions" (TB 31, 33) of Honeywell's experts; it was the central core of Honeywell's case on the crucial issue of damages. The exclusion of this evidence thwarted Honeywell's efforts to present its affirmative case on damages to the jury.

The exclusion of this key expert testimony was highly prejudicial and clearly not harmless error, as Trend contends. (TB 38-42). In the first place, the "alternate calculations" to which Honeywell's experts testified were not prepared "in apparent anticipation of the market value objection" (TB 39). These were calculations performed to test Trend's attempt to use a "constant dollar" computation. Since Honeywell's experts did not receive the explanation for Trend's claim using the "constant dollar" method until June 13, 1983, just four days before Mrs. Robinson's testimony (T 1428-1430), those calculations were necessarily performed during trial.

The prejudice resulting from the trial court's improper exclusion of Honeywell's expert testimony is readily apparent. Honeywell's experts were precluded from testifying that they had determined, based on their expertise and their extensive analysis of Trend's records, that the amount of the loss was $533,016. (T 1440, 1488, 1760; PX 1-D for I.D.). They were also deprived of the opportunity to explain, by use of the detailed exhibits,

charts and slides which they had prepared, the manner in which they arrived at their conclusions based on Trend's records. (T 1412-1451, 1488-1490, 1760-1770; PX 1C, 1D, 1E for I.D.; DX A-6 for I.D.).

The prejudice flowing from the exclusion of the heart of Honeywell's case on damages was not erased or ameliorated by other testimony which these experts were permitted to give. Having been deprived of the opportunity to affirmatively present and explain their opinion of the proper computation of the amount of lost inventory, they were relegated to the essentially negative function of finding fault with Jay Weinberg's methods and the records on which he relied. (T 1511-1559, 1576-1604, 1778-1856). For example, though Mr. Campos thought it fallacious to use a "constant value" computation given Trend's inadequate records (T 1845),[16/] he and Mrs. Robinson tested Trend's calcula-

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16/ The problem with Trend's computations lay not in the "method" used, which was acceptable (T 1478; TB 33); but in the lack of sufficient records to determine the amounts or weights involved in each inventory transaction. It is not true, as Trend contends, that Trend's accountants endorsed Trend's approach and rejected Honeywell's. (TB 33, 36, footnote 10). In fact, Berkowitz testified that if you don't have the amounts or unit information in the underlying transaction documents, you would be unable to do an inventory transition using units. (T 1896). This testimony, along with the admissions by Trend's accountants that Trend's records were inadequate to determine the cost or amount of inventory (T 1884, 1893-1894, 1896, 1918), confirms the problem encountered by Honeywell's experts -- Trend's records were inadequate to determine the amounts or units involved in inventory transactions, thereby rendering it impossible to convert each transaction into "constant dollars".

Although Trend's other accountant, Dix, testified that the method suggested by Trend's counsel would be "an accepted method" (T 1925; TB 33) he did not state that it was the only acceptable method, nor did he criticize the approach used by Honeywell's experts. (T. 1924, 1927). No accountant challenged (cont'd)

tions shortly before and during trial, using the "constant value" method. (T 1439, 1576, 1845).

From those computations just before and during trial, Honeywell's experts determined that the value of the stolen inventory of jewelry was approximately $238,000. (T 1576, 1580, 1604, 1846). Mr. Campos was also permitted to testify generally that based on his tests and his work with the books and records, he would expect the loss to be between $250,000 and $500,000. (T 1842). The limited damage testimony which Honeywell's experts were permitted to give afforded no acceptable substitute for the excluded testimony and exhibits detailing and documenting their computations. The jury was left with only a fragmentary, negative view of Honeywell's case on damages. They were never afforded the opportunity of hearing and seeing the full computations of both sides, or of comparing those computations with the records and evidence to determine whose computations were the more persuasive.

The prejudicial effect of the ruling becomes even more apparent when considered in the light of the able jury summation presented by Trend's counsel, in which he effectively exploited the favorable evidentiary ruling. He reminded the jury that Honeywell's counsel had told them in opening statement that they were going to prove that the loss was "not a penny more" than $533,000. (T 2214). He argued that Honeywell, having said that

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the validity of the computations of Honeywell's experts; the trial judge simply sustained the repeated objections by Trend's counsel based on the asserted "failure or impropriety of their methodology". (T 1406-1410, 1434, 1440-1450, 1456-1457, 1490-1491, 1494-1498, 1507-1508, 1750, 1758, 1770-1776, 2129-2130).

it was going to prove this "nine ways from Sunday" never proved it "the first way", because "they could not get their story straight." (T 2215). He went on to charge that the reason Honeywell's experts "didn't come up with anything" was that "they ignored the records." (T 2257).

He charged that Mr. Campos presented no "schedules" or "real calculations" and "no hard evidence whatsoever" (T 2260),[17] and that: "The case is over and they still have not come up with something to refute any one of those numbers," even "after working on them right in here while the trial is going on." (T 2262). The jury's verdict was in the exact amount, to the penny, suggested by Trend's counsel in his summation. (T 2269; R 494-495). The exclusion of Honeywell's evidence was erroneous, and the error plainly resulted in substantial prejudice to Honeywell. Thus, the decision of the district court reversing on this ground for a new trial on damages was correct and is not in conflict with any prior Florida decisions.

POINT III

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE EVIDENCE OF TREND'S EVALUATION OF ITS INVENTORY FOR INSURANCE PURPOSES WOULD BE ADMISSIBLE ON REMAND.

The district court was eminently correct in ruling that, on retrial, excluded evidence that Trend valued its inventory at $1.6 million in an application for insurance will be

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17/ Of course, the only reason for the absence of such evidence to support the $533,000 figure is that Trend had been successful in inducing the trial judge to exclude it.

admissible on the issue of the amount of the burglary loss. That holding is not, as Trend contends, contrary to Florida law on the subject of collateral source evidence.

The evidence was not offered for the purpose of establishing "collateral source insurance benefits", as Trend repeatedly contends. Rather, the evidence was to controvert Trend's claim the amount of the burglary loss was more than $8,000,000.00. The excluded evidence established that in December 1979, Trend represented to its insurer that the value of its stock was $1.6 million, according to an inventory purportedly conducted on November 3, 1979. (DX A-7 and A-8 for I.D.; T 2036, 2028-2030, 626-637, 1175-1181, 1626-1628). This representation was made simultaneously with the jewelry inventory Trend claimed to have performed on December 21, 1979. According to that inventory, the authenticity and accuracy of which were strenuously challenged by Honeywell, Trend's finished gold jewelry alone was valued at approximately $5.6 million on that date. (T 1847; PX 42).

The excluded evidence weighs heavily against Trend's contention that its inventory of jewelry was worth as much as it claimed. Trend's trial counsel argued that the dramatic increase Trend claimed in its inventory was attributable to the rapid rise in the price of gold after March 1, 1979, when the inventory was valued at $1.6 million. (T 29-30; 2262-2263, 2351). Yet the excluded evidence establishes that despite the rise in price of gold from $239 an ounce on March 1 to $373 an ounce on November 3, Trend represented that the total value of its inventory had not increased substantially between those dates.

There is ample authority that the amount for which a party insures his property is admissible, either as direct evidence of value, or as impeachment evidence where the party testifies to a higher value than the amount for which he insured the property.[18/] In this case the evidence went beyond proving the amount for which Trend insured its property; it established an express representation that the amount of the inventory was only $1.6 million as of November 3, 1979. (DX A-7 and A-8 for I.D.; T 1626-1628). This direct evidence of the inventory value on that date is just as much "an issue in the case" (TB 5, 47) as the value on December 21, 1979, the date of the purported jewelry inventory Trend used as the starting point for its computations.

The collateral source cases on which Trend relies, (TB 45-46)[19/] do not support the contention that Trend's representations of the value of its inventory could be properly excluded under the collateral source rule. Those cases simply held, on their particular facts, that reversible error was committed in permitting defendants to introduce evidence of social security, workers' compensation, or welfare benefits for the purpose of

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18/ See Shultz v. Commission of Assessment and Taxation, 85 A.D.2d 928, 437 N.Y.S.2d 78 (1981); Blount v. McCurdy, 593 S.W.2d 468, 470 (Ark. App. 1980); McDowell v. Schuette, 610 S.W.2d 29, 41 (Mo. App. 1980); Kelley v. Sonny Boy Appaloosas, Ltd., 491 P.2d 61, 71 (Colo. App. 1970).

19/ Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975); Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982); Clark v. Tampa Electric Co., 416 So.2d 75 (Fla. 2d DCA 1982), cert. den. 426 So.2d 29 (1983); and Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA 1973), cert. den. 285 So.2d 414 (Fla. 1973). (TB 44-45). The other cases cited at TB 43 stand primarily for the proposition that collateral source benefits do not reduce damages, which is not the issue here.

casting doubt on the plaintiffs' motivation to return to work. The application in those cases of the balancing test prescribed by Section 90.403, Florida Statutes, weighing probative value of relevant evidence against potential prejudice, does not establish an invariable rule that all relevant evidence which may incidently involve collateral source benefits must be automatically excluded.

Under Sections 90.401 and 90.402, Florida Statutes, all relevant evidence, defined as evidence tending to prove or disprove a material fact, is admissible, except as provided by law. Clearly, the evidence in this case meets that test. Section 90.403 creates a limited exception to the admissibility of relevant evidence, where its prejudice would outweigh its relevancy. That rule should, however, be applied cautiously and sparingly, and limited to cases where unfair prejudice substantially outweighs probative value. See U.S. v. McRae, 593 F.2d 700, 707 (5th Cir. 1979), construing the federal counterpart to Section 90.403.

As stated in Barnett v. Butler, 112 So.2d 907, 909 (Fla. 2d DCA 1959), "the court is not required so diligently to exercise caution in ... [barring evidence of liability insurance] as to cause injustice to the plaintiff." In Barnett, a trial judge was reversed for excluding evidence of liability insurance where the evidence was relevant to prove ownership. The Barnett decision also confirms that prejudice which might otherwise

result from the mention of insurance can be cured by an appropriate limiting charge.[20]

Under the facts of this case, this crucial evidence bearing directly on the value of Trend's inventory was clearly relevant and material. Moreover, its high degree of relevancy so far outweighed any unfairly prejudicial effect (especially since a limiting instruction can obviate prejudice), that it would be error or an abuse of discretion to exclude the evidence.

20/ For other Florida authorities affirming that a limiting or cautionary instruction can be effective in obviating prejudice which might otherwise result from evidence or mention of insurance, see, Lambert v. Higgins, 63 So.2d 631, 633 (Fla. 1953); Wall v. Little, 102 Fla. 1015, 136 So. 676, 677 (1931); Rosenberg v. Coman, 134 Fla. 768, 184 So. 238, 240 (1938); Ryder v. Plumley, 138 Fla. 378, 189 So. 422, 425 (1939); and Walt Disney World Co. v. Merritt, 404 So.2d 1077 (Fla. 5th DCA 1981). See also, United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980), holding that the efficacy of a limiting instruction is a factor which the trial judge should carefully consider before excluding relevant evidence under Federal Rule 403.

POINT RAISED BY RESPONDENTS

THE DISTRICT COURT'S REVERSAL FOR A NEW TRIAL ON DAMAGES IS CORRECT FOR REASONS OTHER THAN THOSE STATED IN THE OPINION.21/

A. The Trial Judge Committed Prejudicial Error in Admitting Into Evidence a Document Purporting to be a Copy of Trend's December 21, 1979 Inventory.22/

Jay Weinberg, Trend's only damage witness, based his calculation of the claimed $4.9 million loss of finished gold jewelry on a 14-page document purporting to record the results of

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21/ See pages 20-21 of this brief, for a discussion of this Court' s proper discretionary role in deciding questions outside the scope of conflicts on which its jurisdiction depends. If this Court should decide in its discretion to review Trend's Points II and III, then it should consider this point raised by Honeywell also. If the result reached by a lower court is correct, the appellate court will affirm, regardless of the reasons given by the lower court for its opinion, and an appellee is therefore entitled to raise alternative grounds for affirmance. See 3 Fla.Jur.2d, Appellate Review, §§296-297. There is no reason why this universal rule of appellate practice should not apply in this Court, should it decide in its discretion to undertake a review of the case "as completely as though such case had come originally to this court on appeal." Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977).

22/ In the district court, Trend contended that Honeywell's trial attorney had not properly preserved his objections to the admission of the inventory. This contention lacked merit. On June 13 Honeywell's trial counsel raised all the objections to the exhibit argued in this point. There could be no doubt that the judge was fully aware of the objections, since they were supported by a memorandum of law and argued through four pages of the transcript. (T. 510-513). Honeywell's counsel voiced his objections twice again on June 15, just before and during Jay Weinberg's testimony. (T. 1087, 1134-1135). When the exhibit was actually offered shortly thereafter, Honeywell's counsel stated, "No additional objection" (T. 1160; emphasis added), thereby indicating that he had no further arguments against the admission of the exhibit, beyond those advanced previously. When the trial judge then stated, "It will be admitted" (T. 1160), he thereby overruled the objections which Honeywell's counsel had previously argued.

an inventory conducted at Trend on December 21, 1979. (T 1156-1157; PX 42). The document was admitted into evidence over the objections of Honeywell, which asserted that the document was hearsay which did not come within the business records exception to the hearsay rule, that it was not Trend's regular business practice to generate such a document, that it was an inadmissible copy, and that it lacked trustworthiness. (T 510-513, 1087, 1160).

Jay Weinberg identified PX 42 as a jewelry inventory prepared at his request on December 21, 1979, by Mr. Seigel, then head of Trend's jewelry department, to determine the need for reordering stock. (T 1157-1159, 1161). Mr. Seigel was deceased at the time of trial. (T 1250). Jay Weinberg was present during only about a third of the inventory which resulted in the preparation of the document. (T 1158). According to Weinberg, Seigel wrote the entire document. (T 1249-1250).

Because the document was offered to prove the truth of its entries and was prepared by an out-of-court declarant, it came squarely within the hearsay definition of §90.801, Florida Statutes. The question is whether the exhibit was admissible under the hearsay exception of §90.803(6), pertaining to records of a regularly conducted business activity. Under that subsection, a document that meets the following tests can be admitted notwithstanding the hearsay rule:

> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted busi-

> ness activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness.

The copy of the December 21, 1979, inventory did not satisfy the requirements for admissibility under the above criteria for at least three reasons. First, it was not the "regular practice" of Trend to prepare this type of document. Second, there was no evidence that the entries on the document, especially those that had been changed, were made at or near the time the inventory was taken, or that they were made by a person with knowledge. Third, the evidence discloses "other circumstances" showing a lack of trustworthiness, particularly in view of the unexplained absence of the original document.

In considering each of the deficiencies of the exhibit, it is important to keep in mind the underlying basis for the business records exception to the hearsay rule. The primary justification for the exception is the increased probability of trustworthiness of regularly kept business records. National Car Rental System, Inc. v. Holland, 269 So.2d 407, 413 (Fla. 4th DCA 1972); McEachern v. State, 388 So.2d 244, 246 (Fla. 5th DCA 1980). The key to admissibility is the comparatively high degree of accuracy and trustworthiness which is insured by systematic checking, by continuity and regularity in maintaining the records, and by the business' reliance on such records prepared by an employee as part of a continuing job. Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296, 310 (W. Va. 1980); Rice v.

United States, 411 F.2d 485 (8th Cir. 1969); 5 West's Florida Practice, Evidence, §90.803, p. 468.

The evidence affirmatively shows that it was not the regular practice of Trend's business activity to make such a record as the December 21 inventory. The inventory was an isolated occurrence; Trend had never before taken an inventory in December. (T 1244). The normal practice was for Trend to conduct its inventory at the end of its fiscal year in March. (T 671-672, 2022-2023). Moreover, this type of inventory was not the normal way of determining a need for reordering merchandise. Jay Weinberg testified that the only inventory procedure he used for reordering jewelry was his own day-to-day "eyeballing" of the stock, and notes which he jotted down and used when he spoke to Mr. Baronson by telephone. (T 1198-1200; see also the argument by Trend's counsel at T 513, lines 17-24).

It is crucial to the business records exception that "entries be prepared as a regular part of the business ...", such as a "... a part of a series of entries or reports, not a casual or isolated one." Hiram Ricker & Sons v. Students International Meditation Society, 501 F.2d 550, 554 (1st Cir. 1974). Without this safeguard, "there is no basis for the presumption of reliability which is at the heart of the exception." Id.

For memoranda to be admissible under Federal Rule of Evidence 803(6)[23/] the proponent must show that the "entries were

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23/ The Florida version of the business records exception is virtually identical to Federal Rule 803(6). The only difference is that the Florida statute excludes opinions from the exception. Section 90.803(6)(b), Florida Statutes (1983).

made pursuant to a systematic and routine procedure for the conduct of business, one characterized by careful checking and habits of precision and regularity...". Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., 505 F. Supp. 1190, 1233 (E.D. Pa. 1980) (Emphasis added). Thus, it has been held that an employee's memorandum which was "specially requested" by a superior was not made in the "regular practice" of a business activity, and therefore was not admissible under the business records exception. Johnson & Johnson v. W. L. Gore & Associates, Inc., 436 F. Supp. 704, 714, footnote 17 (D.C. Del. 1977). Since the evidence in this case demonstrates without dispute that the December 21 inventory was "specially requested" as a one-time-only project, it did not meet the "regular practice" requirement of the exception and should have been excluded for that reason.

The second reason that the exhibit does not meet the requirements of the exception is that Trend made no showing that the entries on the copy introduced at trial were made "at or near the time" of the inventory by "a person with knowledge" of the accuracy of the entries. The original of the December 21 inventory was never produced.[24/] Jay Weinberg testified, "I have not

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24/ It is also significant that not even a copy was produced during the weeks Honeywell's accountants were at Trend for examination of its records. They repeatedly requested all inventory documents from the persons at Trend charged with production (including Bertie Weinberg, one of Trend's principals) but were not given the December 21 inventory or any other inventory documents. (T 1382, 1387, 1478, 1789-1791, 1794). They did not see a copy of the December 21 inventory until "many months later" after it had been produced directly to Honeywell's counsel. (T 1382, 1387). This combination of the delay in production and the death of Mr. Seigel prevented Honeywell from ever having the opportunity to put questions about the purported document to the person who supposedly prepared it.

seen it". (T 1249). His testimony did not even disclose when he first saw a copy; only that he had used the inventory for reordering some time before the burglary. (T 1159). Jay Weinberg acknowledged that there were entries where it appeared that Seigel had "scratched something out, or made an error," and had initialed the changes. (T 1250-1251). He did not know, however, that Seigel had in fact put his initials there or why they were there. When asked, Weinberg answered, "I would only be speculating". (T 1251). It would also be speculating to assume that all the entries, including those which had been altered, as shown on the copy introduced at trial, had been made at or near the time the inventory was taken, or that they had been made by a person with knowledge of the inventory, or from information transmitted by such a person.

Significantly, the evidence not only did not disclose when the changes had been made or by whom; it also did not show when the copy introduced as PX 42 had been made. As Jay Weinberg testified, "copies of copies of copies have been made." (T 1248). There is no way of determining whether all the copies were identical, showing the same changes; or whether changes were entered on the original after the copy introduced as PX 42 was made. Trend never established that the exhibit actually introduced, with its unexplained corrections and changes, was a duplicate of an original made at or near the time of the event it was purportedly recording. For all the evidence shows, changes, additions or deletions could have been made to the original days, weeks, or even months after December 21, and there is no way of

knowing whether the amendments were made by a person with knowledge.

The requirement that a record be made contemporaneously with the event it records is essential to the business records exception. Yates v. Helms, 154 So.2d 731, 733 (Fla. 2d DCA 1963); Parker v. Priestley, 39 So.2d 210, 215 (Fla. 1949); E.Z.E., Inc. v. Jackson, 235 So.2d 337, 339 (Fla. 4th DCA 1970). (Erroneous admission of ledger book entries in violation of the "contemporaneous" requirement held reversible error, where the exhibit constituted the sole basis for the defendants' claimed set-offs.)

The third reason the December 21 inventory did not come within the business records exception is that there was cogent evidence of circumstances showing a lack of trustworthiness of the document. In addition to the inexplicable absence of the original and the unavailability of Mr. Seigel who actually prepared the inventory, there is no evidence that anyone else connected with Trend had seen either the original or a copy of the inventory until after the March 1980 burglary. Bertie Weinberg and Trend's two accountants (one of whom was regularly on Trend's premises during the period in question), all testified that they had not seen it. (T 1879-1880, 1910, 2023). Bertie Weinberg could not recognize the handwriting on the exhibit or remember whose it was. (T 2023-2024). Moreover, neither the fiscal year-end inventories, nor inventories of any other date preceding the burglary were ever produced or offered into evidence by Trend. Although Trend's income tax returns were purportedly based on

fiscal year-end inventories, Trend's own accountants had never seen any inventories, and had been provided with only a dollar figure for the value of the inventory. (T 1877-1878, 1911). Despite the requests by Honeywell's experts for inventory records, they received none. (T 1383, 1768, 1797). Thus, there was no way to compare the December 21 inventory with any prior inventory document to determine whether the exhibit was prepared in accordance with any regularly established practice for preparing inventories in general.

Inexplicable adding machine tapes were included with the center pages of the inventory as introduced at trial. (PX 42). The tapes were on the copy of the inventory produced for Honeywell's accounting expert, Campos, but he could not identify or summarize the document through the tapes, and could obtain no explanation for them. (T 1799-1800). At trial, Jay Weinberg testified that he had never seen the tapes and could not explain why they were there, adding that they appeared to be extraneous. (T 1251-1252). Bertie Weinberg did not know the purpose of the tapes or how they related to the inventory. (T 2024).

When the "sources of information or other circumstances show lack of trustworthiness", then business records, even those regularly kept, are not admissible. 5 West's Florida Practice, Evidence, §803.6, p. 270 (1977). Factors to be weighed in evaluating trustworthiness include the existence of motive and opportunity to prepare an inaccurate record, the timing of the preparation, and the nature of the information recorded. E.N. Nason, Inc. v. Land-Ho Development Corp., 403 A.2d 1173, 1179, 1 A.L.R.

4th 306, 312-313 (Me. 1979); Advisory Committee Notes to Federal Rule 803(6); McCormick, Evidence §306 at p. 720 (2d ed. 1972). In the present case there was both motive and opportunity to prepare an inaccurate record or to alter a record which may have been accurate initially. In view of the compelling evidence of lack of trustworthiness, combined with the absence of evidence of the crucial circumstantial guarantees of trustworthiness imposed by Rule 90.803(6), the trial court should have sustained Honeywell's objections to the admission of the December 21 inventory.

The exhibit was also objectionable on the ground that it was not the original inventory. See, Section 90.952. Although 90.953 provides that a duplicate (such as a photographic copy; see, Section 90.951) is admissible to the same extent as an original, exceptions to that rule exist where a "genuine question is raised about the authenticity ..." or "[i]t is unfair, under the circumstance, to admit the duplicate in lieu of the original." For any or all the reasons stated, the inventory failed to qualify as an exception to the hearsay rule and should have been excluded from evidence.

B. The Trial Judge Erred in Excluding From Evidence Testimony and Exhibits Proving Trend's Evaluation of Its Inventory for Insurance Purposes.

For the reasons already discussed under Point III of this brief, the evidence of Trend's representations concerning the amount of its inventory was admissible, and is not properly excludable under the collateral source rule. The district court's opinion does not disclose why it did not rely on

exclusion of this evidence as an additional ground for granting a new trial on damages, and there is clearly no basis for Trend's assertion that the District Court "tacitly acknowledged" that there was no abuse of discretion by the trial judge. (TB 45). Since the exclusion of this evidence was highly prejudicial to Honeywell's case on damages, a new trial on damages should have been granted on this alternative ground.

CONCLUSION

The decision of the district court below is correct and should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on the Merits was hand delivered 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 15th day of March, 1985.

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