IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,532

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

Petitioners.

vs.

HONEYWELL, INC. and AETNA
CASUALTY & SURETY COMPANY,

Respondents.
_____/

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

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioners' seek to invoke this Court's discretion to review a decision of the District Court of Appeal, Third District. The Petitioners are family businesses which manufacture and sell jewelry and trade precious metals. Respondent, Honeywell, Inc., installed and monitored a burglar alarm system that was supposed to protect these businesses. On the weekend of March 8, 1980, the Petitioners' premises were broken into and, over a period of many hours, $8,037,674.59 worth of jewelry and precious metals were stolen.

The Petitioners sued Honeywell for fraud, negligence, gross negligence and breach of contract, seeking compensatory damages, interest and punitive damages. After twelve days of trial, the jury found Honeywell guilty of fraudulent misrepresentation of the alarm system and its capabilities which was the legal cause of Petitioners' loss.[1] Compensatory damages were assessed at $8,037.674.60 together with $3,171,027.72 in prejudgment interest and $1,000,000 in punitive damages. (A. 7-9). The Third District affirmed as to fraud and liability but reversed as to damages. Three holdings were involved.

First, error was found in the exclusion of a portion of Honeywell's accountant's testimony concerning the value of Petitioners' losses. While Petitioners believe this was a gross interference with the trial court's discretion and a flaunting of the harmless error rule, the

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[1] The jury also found that Honeywell was negligent, breached its contract and was guilty of gross negligence. Those findings became superfluous in light of the finding of fraud. The evidence of fraud at trial was overwhelming and the merits of that finding were not contested below. The fraud finding also rendered moot Honeywell's standard exculpatory and liquidated damage defenses since a party cannot contractually immunize itself from its own fraud. Oceanic Villas v. Godson, 148 Fla. 454, 4 So. 2d 689 (1941); Mankap Enterprises, Inc. v. Wells Fargo Alarm Services, 427 So. 2d 332 (Fla. 3d DCA 1983); Zuckerman Vernon Corp. v. Rosen, 361 So. 2d 804 (Fla. 4th DCA 1978); Fuentes v. Owen,310 So. 2d 458 (Fla. 3d DCA 1975).

ruling as stated does not create the kind of express, direct decisional conflict necessary to trigger this Court's discretionary jurisdiction. However, the decision on the remaining two holdings does.

As an element of their damages Petitioners sought prejudgment interest. The jury was instructed on prejudment interest and the jury verdict specifically included prejudgment interest (A. 5-9). The Third District acknowledged in its opinion that this was jury awarded prejudgment interest (A. 2). Despite this fact, however, the Third District found

> error in the trial court's award of prejudgment interest on an unliquidated claim

(A. 3) (emphasis added). It is the Third District's decision that a jury may not award prejudgment interest as damages on an unliquidated property damage claim that constitutes the first express and direct conflict with decisions of this Court as well as other district courts of appeal. Beyond this, the Third District's decision that the damages were "unliquidated" because "the quantity of precious metal lost is in dispute" (A. 3) is directly in conflict with a decision of the First District holding that, even if the amount of damages is in dispute, when the verdict has the effect of fixing damages as of a prior date the damages are liquidated for purposes of prejudgment interest.

The other express and direct conflict contained in the Third District's decision relates to the collateral source rule. Petitioners purchased insurance covering losses due to theft. The trial court held that this constituted a collateral source benefit and excluded evidence relating to this insurance. The Third District did not dispute the fact that the insurance was a collateral source benefit, but held that Petitioners' insurance application, which contained a representation as

to inventory on hand some five months prior to the burglary, would be admissible upon retrial of damages "to impeach subsequent statements pertaining to the value of the loss." (A. 3). The decision that relevancy for impeachment purposes overrides the collateral source rule directly conflicts with decisions of other district courts of appeal on the same question of law.

ARGUMENT ON JURISDICTION

I

THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW BY HOLDING THAT A JURY MAY NOT AWARD PREJUDGMENT INTEREST AS AN ELEMENT OF DAMAGES ON AN UNLIQUIDATED PROPERTY DAMAGE CLAIM.

The law of this State is that, in either a tort or breach of contract action, the jury may award prejudgment interest as damages on an unliquidated claim for property (as opposed to personal injury) damages. On the other hand, when the jury does not award prejudgment interest on such a claim, prejudgment interest may be added to the verdict by the trial court only when the claim is for liquidated damages.[2] The Third District applied the latter rule to the former situation -- it took away the jury's award of prejudgment interest for the express reason that it was awarded "on an unliquidated claim" (A. 3). The Third District's decision directly conflicts with numeous decisions of this Court and other district courts of appeal on the same question of law.

The conflict begins with the case of Jacksonville,T. & K. W. Ry.

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[2] An excellent discussion of these principles of Florida law is contained in E.S.I. Meats, Inc. v. Gulf Florida Terminal Co., 639 F. 2d 1348, 1355-1357 (5th Cir. 1981); Plantation Key Developers, Inc. v. Colonial Mortgage Co. of Indiana, Inc., 589 F. 2d 164, 170-172 (5th Cir. 1979).

Co. v. Peninsular Land, Transportation & Manufacturing Co., 27 Fla. 1, 9 So. 661 (1891), a case involving a suit for negligent destruction of a hotel -- a tort action for unliquidated property damages. At the trial, the jury was instructed:

> That the measure of damage in cases of this kind is the value of the property at the time it was destroyed, with interest at the rate of 8 percent per annum....

9 So. at 679. The jury awarded prejudgment interest. This Court affirmed, holding as follows:

> Upon the question of the allowance of interest as a matter of right upon the amount of damages found by the jury, from the date of the destruction of the property in cases like this, where the damages sued for are unliquidated, the following authorities, with others that we have examined, hold, in effect, that the jury may, at their discretion, allow and include interest in their verdict as damages, but not as interest [per se]....
>
> * * *
>
> [The plaintiff], before and at the time of destruction, was entitled to his property and the beneficial use of it; and instantly, upon such destruction, becomes, under the law, entitled to its value in money at the hands of the wrong-doer, and can sue instantly for such value. Because, through the law's delays, no opportunity is afforded to have the amount of that value declared by a jury for a year, perhaps several years, is it right that the loser shall, during that time, be kept out of both his property, its use, and its value, without some remuneration for the retention by the wrongdoer of such value? Upon every principle of right we cannot think so....The established measure of damages in such cases being complete compensation we feel that it would be doing a positive wrong to the plaintiff were we, because of those instructions on the question, to order either a new trial, or a remittitur [of the interest] to which, upon every principle of right, the plaintiff is justly entitled.

9 So. at 684-686 (citations omitted) (emphasis added)). The Third District's decision that the jury could not award Petitioners prejudgment interest on the unliquidated value of their lost property is in obvious

conflict with this Court's 1891 decision - and the law has been the same ever since.

Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935), involved personal injuries and the loss of a vehicle in an automobile accident. A negligence action was brought for both personal injuries and property damages, and the jury was instructed

> to reduce their judgment to a money value by allowing 8 percent interest thereon from the date of the injury if definitely proven.

162 So. at 880. Interest was awarded, and this Court held that the prejudgment interest was proper insofar as it related to property damages:

> This court has upheld interest on damages to property and for breach of contract from the date of the accrual of the cause of action.

162 So. at 880-881 (citations omitted). The Third District's decision eliminating the jury's award of interest on Petitioners' property damage directly conflicts with Zorn.

In Jackson Grain Co. v. Hoskins, 75 So. 2d 306 (Fla. 1954), this Court again considered whether prejudgment interest could be awarded by a jury on an unliquidated property damage claim. Like the instant case, the action was based upon a misrepresentation made in a contractual setting. The defendant had mislabeled its tomato seeds and the plaintiff claimed that the crop produced was much smaller and less marketable than it would have been if the seeds had been of the represented variety. The lost value of the intended crop was sought as damages. The jury awarded prejudgment interest[3] and the trial court ordered it remitted. This Court ordered the interest award reinstated, stating:

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[3] The jury had been given a verdict form which, after the space for damages, stated "with interest at the legal rate from May 22nd, 1950, the date of the last sale of tomatoes." 75 So. 2d at 310.

> In actions growing out of contract and in some actions in tort we have approved the recovery of interest from the time of accrual of the cause of action, but in personal injury cases we have consistently declined to approve interest before entry of judgment....
>
> Apparently an exception to the allowance of interest has been made in personal injury cases because of the speculative nature of some items of damage, such as mental anguish, and the indefiniteness of items such as future pain and suffering.
>
> We cannot find in the present controversy the elements, speculative as the damages may appear, that would warrant a decision holding that no interest was recoverable at the time of the verdict so we conclude that the judge erred when he eliminated that part of the recovery.

75 So. 2d at 310. The Third District's decision that the jury could not award Petitioners prejudgment interest because their property damages were "unliquidated" is also in direct conflict with Jackson Grain.

Space does not permit analysis of all of the conflicting cases on this issue. However, reference to or application of the principle that a jury (or the court in a non-jury action) may award prejudgment interest as part of its damage award on an unliquidated claim, whereas the trial court may only add it ministerially after a jury verdict if the claim is liquidated, can be found in numerous cases. See, e.g. Griffing Bros Co. v. Winfield, 53 Fla. 589, 43 So. 687, 691 (1907); Shoup v. Waits, 91 Fla. 378, 107 So. 769, 770 (1926); Broward County v. Sattler, 400 So. 2d 1031, 1033 (Fla. 4th DCA 1981); United Bonding Ins. Co. v. Crum, 239 So. 2d 600 (Fla. 2d DCA 1970); Vacation Prizes, Inc. v. City National Bank, 227 So. 2d 352, 353 (Fla. 2d DCA 1969). The Third District's decision expressly and directly conflicts with this principle of Florida law, and with the decisions of this and other courts which express it. The conflict should be resolved.

II

THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW BY HOLDING THAT A DAMAGE CLAIM IS UNLIQUIDATED IF BASED UPON DISPUTED EVIDENCE WHEN THE VERDICT HAS THE EFFECT OF FIXING DAMAGES AS OF A PRIOR DATE.

Even if the test of Petitioners' entitlement to prejudgment interest is, as the Third District believed it to be, whether their damages were liquidated or unliquidated, the decision that the damages in this case were unliquidated is in direct conflict with the First District's decision in Bergen Brunswig Corp. v. State Department of Health and Rehabilitative Services, 415 So. 2d 765 (Fla. 1st DCA 1982). Although the verdict in this case fixed to the penny Petitioners' damages as of the date of the burglary, the Third District found the damages to be unliquidated because there was disputed evidence concerning the amount of property stolen (A. 3). In reversing a denial of prejudgment interest by the trial court,[4] the First District expressly rejected this "disputed evidence" test in Bergen:

> [I]n Florida there has evolved a principle that prejudgment interest may be awarded when damages are a fixed sum or an amount readily ascertainable by simple calculation and not dependent on the resolution of conflicting evidence, inferences, and interpretations. Indeed, this court has recited such, in dicta, as the applicable rule. However, we now determine that the better view is that ..., for the purpose of assessing prejudgment interest, a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date. Such a rule eliminates the unwarranted disparate treatment of those litigants who contest liability only, and those who contest the measure of damages.

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[4] Unlike the instant case, the issue of prejudgment interest was not submitted to the jury in Bergen, 415 So. 2d at 767 n.2.

415 So. 2d at 767 (citations omitted).[5]

The unacceptable result of this direct conflict is that Petitioners are entitled to $3,171,027.72 in prejudgment interest in Tallahassee but none in Miami. The conflict should be resolved.

III

THE DISTRICT COURT'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURT'S OF APPEAL ON THE SAME QUESTION OF LAW BY HOLDING THAT EVIDENCE OF THE EXISTENCE OF COLLATERAL SOURCE BENEFITS IS ADMISSIBLE WHEN RELEVANT FOR IMPEACHMENT PURPOSES.

The Petitioners had purchased insurance to protect themselves. At trial, Honeywell sought to introduce Petitioners' insurance application which contained a representation of disputed origin that, as of November 3, 1979, the inventory on hand was $1,600,000.00. Honeywell claimed this evidence of collateral source insurance was admissible because it tended to impeach Petitioners' claim that as of March 9, 1980, some five months later, there was over $8 million in inventory on hand.

The trial court held that Petitioners' insurance was a collateral source benefit and excluded the evidence. Although not taking issue with the fact that the insurance was a collateral source,[6] the Third District held that the insurance application was admissible for impeachment purposes. The question of collateral source admissibility versus relevancy for impeachment purposes has reached the district courts of

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5 The Second District has acknowledged that the First and Third Districts are now applying different rules to determine if damages are liquidated for purposes of prejudgment interest. Federal Deposit Ins. Corp. v. Carre, 436 So. 2d 277, 230 (Fla. 2d DCA 1983).

6 The collateral source rule finds its classic application in personal injury cases, but it is settled law that it applies with equal force in actions based upon tort or contract for property damages. See, e.g. Robert E. Owens & Associates, Inc. v. Gyongyosi, 433 So. 2d 1023 (4th DCA 1983); Walker v. Hilliard, 329 So. 2d 45 (Fla. 1st DCA 1976).

appeal several times, and in each instance the decision was contrary to and in direct conflict with the Third District's decision.

In Williams v. Pincombe, 309 So. 2d 10 (Fla. 4th DCA 1975), the plaintiff claimed she was unable to return to work following a 1972 automobile accident. The trial court admitted evidence that the plaintiff had been receiving collateral source benefits (welfare payments) since 1970 to impeach her stated desire to return to work following the accident. The Fourth District reversed, holding that the collateral source evidence was inadmissible despite its intended use as impeachment evidence.

In Grossman v. Beard, 410 So. 2d 175 (Fla. 2d DCA 1982), the Second District faced the same question of law. The plaintiff sought to recover for past and future psychiatric treatment. The defendant was allowed to introduce evidence of collateral source benefits (Workers Compensation) to challenge the reasonableness and necessity of the extended psychiatric treatment inasmuch as the defendant's expert testified that the treatment would be ineffective unless the plaintiff paid for it. The Second District reversed on the grounds that the policy behind the collateral source rule precluded introduction despite relevance for impeachment purposes. Accord, Clark v. Tampa Electric Co., 416 So. 2d 475 (Fla. 2d DCA 1982) (reversal required by implication of existence of collateral source benefits in attempt to impeach plaintiff's veracity).

The Third District's decision that evidence of the existence of Petitioners' collateral source benefits is admissible for impeachment purposes flies in the face of the public policy behind the collateral source rule and is in direct conflict with the Fourth District's decision in Williams and the Second District's decisions in Grossman and Clark.

It is a conflict which should be resolved by this Court.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court exercise its discretion to accept jurisdiction to review the decision below.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 6th day of July, 1984, to Lawrence Fuller of Fuller & Feingold, 1111 Lincoln Road, Miami Beach, Florida 33139; Kenneth J. Kavanaugh, 400-B Caribank Tower, 848 Brickell Avenue, Miami, Florida 33131, Attorney for Respondents; and to James E. Tribble of Blackwell Walker Gray Powers Flick & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, Attorneys for Respondents.