O/A 4-11-85

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 THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This action was brought by the Petitioners, Trend Coin Company and Precious Metal Brokers, Inc. (hereinafter referred to collectively as "Trend"), two family businesses that were engaged in the wholesale jewelry business and in buying and selling precious metals. Trend sued Honeywell, Inc. (hereinafter "Honeywell") to recover for property losses suffered when some Eight Million ($8,000,000.00) Dollars of their inventory was stolen while the premises were being "protected" by a security system designed, sold, installed, maintained and monitored by Honeywell.

The trial of the case took twelve days. Twenty-six witnesses appeared and fifty-five exhibits were introduced. Trend introduced overwhelming evidence that Honeywell had fraudulently misrepresented the nature of the security system it installed, its capabilities, and the alarm response being provided by Honeywell. The evidence was also clear that the defects in the system as it existed, as opposed to the system as represented, permitted the burglars to gain entrance undetected and to work uninterrupted for many hours to carry off a staggering amount of jewelry and precious metals. The jury found that Honeywell's misrepresentations were a legal cause of Trend's losses (R. 420).[1] The jury also found that the value of Trend's stolen inventory on the day of its loss was $8,037,674.60, and assessed $3,171,027.72 in prejudgment interest and $1,000,000.00 in punitive damages. (R. 422).

On appeal to the District Court of Appeal, Third District,

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[1] In this brief, "R" will designate the record on appeal, "T" will designate the trial transcript, "PX" will designate Plaintiffs' exhibits, and "DX" will designate Defendants' exhibits.

Honeywell challenged neither the sufficiency of the evidence to support the jury's finding of fraud nor the instructions given to the jury regarding fraud. That essentially determined the liability portion of Honeywell's appeal.[2]

Trend presented its claim for damages through Jay Weinberg, who was the chief operating officer responsible for purchasing, ordering and sales (T. 1095, 1102-03). He generally described the business and explained how records were kept (T. 1095-1116). Using the purchase, sales, inventory and shipping records of the company, and summaries prepared from them, he explained how the loss was calculated at market value on the day of the theft. (T. 1122-1172).

Where specific stolen goods were identifiable, he simply valued those on the basis of the price of gold or silver on the day of the loss. For example, a salesman's sample case was taken, and there was a running inventory control card that showed what was in it. (T. 1131). Similarly, the burglars had taken jewelry from packages that had been returned by JC Penney, but left the packing slips showing what was in them on the floor (T. 1138-39). With regard to the scrap precious metals that the company purchased to ship to refiners, he simply went to the shipping records, identified the last shipping date for each category of scrap (14K gold,

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2 The jury also found that Honeywell was negligent, breached its contract and was guilty of gross negligence. However, these findings, and Honeywell's complaints about them, became superfluous in light of the uncontested fraud finding. The fraud finding also rendered moot Honeywell's standard exculpatory and liquidated damage clause defense since a party cannot contractually immunize itself from its own fraud. Oceanic Villas Inc. v. Godson, 148 Fla. 454, 4 So.2d 689 (1941); L. Luria & Son, Inc. v. Honeywell, Inc., 9 F.L.W. 2584 (Fla. 4th DCA Dec. 12, 1984); 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).

sterling silver, etc.), and totalled up the weight of all precious metals purchased since the last shipping date from the purchase invoices. These quantities were then valued at the price of gold or silver on the day of the loss (T. 1141-1148). With respect to finished jewelry, he began with a physical inventory taken on December 21, 1979, for reordering purposes, added in the purchases, subtracted the sales, and then subtracted the inventory that was left on the premises after the theft (T. 1156-1168). Most of the purchase and sales records for jewelry did not reflect the weight or quantity of the transaction, just the dollar value. In order to be sure to arrive at the true market value of the lost jewelry inventory, the dollar values of the purchases and sales were converted to the price of gold or silver on the day of the loss, so that the calculation was not skewed by the effect of a metals market that had ranged, for example from $240.00 to $850.00 for an ounce of gold. (T. 1156-1168; PX 30). The total market value of the jewelry and precious metals lost in the theft came to $8,037,674.59 (T. 1169; PX 46).

Honeywell took a multi-pronged approach to the damage case and called a total of seven witnesses. Through accountants it hired to review all of Trend's books and records, it sought to disparage the record keeping practices of Trend, to show that Trend's damage claim was unbelievable, and to come up with a much smaller value for the loss. On the poor records angle, the accountants testified at length that Trend's records were inadequate and unreliable (T. 1376-1406, 1517, 1520-1524, 1527-1544, 1788-1854). With regard to the believability of Trend's claim, the accountants testified from their review of the records and analysis that the claim was grossly overstated (T. 1838, 1947-49); that it made

Trend's cost or sales or profit margin totally inconsistent with its previous history and industry experience (T. 1520-21, 1529-30, 1834-35, 1840-42); that the claim if true would make Trend's inventory turnover totally out of whack with its prior experience and the industry experience (T. 1533-37, 1835); that the claim was completely at odds with Trend's tax returns (T. 1530-31, 1537-42, 1544, 1851-53); and that the claim could not be reconciled with what its financial statements showed in terms of assets, salaries and contributions to pension plans (T. 1543-44, 1853-54).

In terms of a smaller loss figure, Honeywell's accountants testified that Trend's tax returns showed the loss was in the $250,000.00-$500,000.00 range, that the same calculations Trend used showed the loss was only $238,000.00, and that, from all of their review of the records and all of the tests they performed, the loss was between $250,000.00 and $500,000.00. (T. 1530-31, 1537-42, 1544, 1842-43, 1846, 1851-53).

One of the calculations Honeywell's accountants performed showed a loss of $533,000.00. They admitted, however, that this calculation was not designed to show the market value of the loss (R. 554-555; T. 1422-23). They were only able to state that, all things considered, the result was in their judgment "related" to or "approximately" the market value of the loss (T. 1421-23, 1763). The trial court excluded that particular opinion.

Honeywell also attempted to impeach Trend's claim of loss by eliciting prior inconsistent statements or inconsistent facts from other witnesses. For example, Honeywell brought out from a police officer that one of the owners of Trend had reported immediately after the burglary

that the loss was in the $1-2 Million range (T. 434). And Honeywell called a former employee to describe what kinds and quantities of goods were kept in the safes and cabinets that were broken into so it could argue that the quantity of goods Trend claimed was lost just could not have been there (T. 1927-1930).

The trial court ruled out one item of attempted impeachment. Honeywell wanted to introduce Trend's insurance application for the year in question because it stated an inventory value as of November 3, 1979, of $1.6 Million Dollars (T. 11-48; DX for Id 7, 8). The inventory value as of November 3 was not an issue in the case, but Honeywell wanted to use it as one more starting point for an attack on the credibility of Trend's damage claim. On the other hand, the insurance application would necessarily have put collateral source benefits before the jury and created confusion because it had been the subject of a prior lawsuit wherein the carrier and agent were sued for denying coverage based in part upon the agent having filled in the inventory amount after the application was signed in blank (T. 11-48, 627, 635, 1176-77, 1625-33, 1637, 2030, 2034-35). For these reasons, the trial excluded the insurance application. (T. 11-48, 1637-42).

After hearing the evidence, the jury awarded Trend the exact amount it claimed in compensatory damages as the market value of the loss on the day of the burglary.[3]

On appeal, the District Court, without applying the test for an abuse of discretion, and without finding prejudicial or harmful error,

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[3] To be exact, the jury awarded $8,037,674.60 in compenstory damages, one (1¢) cent more than testified to by Jay Weinberg (R. 442, T. 1169).

reversed for a new trial on damages because "the trial court erred in excluding Honeywell's expert witnesses." 449 So.2d at 878.[4] The District Court also found error "in the trial court's award of prejudgment interest on an unliquidated claim", although this did not require a new trial on damages because the interest was a separate item on the verdict form (R. 422). Finally, without mentioning the collateral source rule or finding that the trial court abused its discretion in weighing probative value against prejudice and confusion, the District Court ruled that on retrial Trend's collateral source insurance application should be admitted for impeachment purposes. 449 So.2d at 878.

Trend's motion for rehearing in the District Court was denied on May 30, 1984, and the discretionary review of this Court was sought because the District Court's decision on prejudgment interest and the admissibility of collateral source insurance was in express and direct conflict with decisions of this Court and other district courts of appeal on the same question of law.

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4 No error was found in the award of punitive damages, but a new trial was ordered on this aspect of the damages as well. 449 So.2d at 878, citing, DuPuis v. 79th Street Hotel, Inc., 231 So.2d 532 (Fla. 3d DCA), cert. denied, 238 So.2d 105 (Fla. 1970) (if compensatory damages must be retried, punitive damages should be retried along with them.).

POINTS ON DISCRETIONARY REVIEW

POINT I

WHETHER THE DISTRICT COURT ERRED IN HOLDING AWARD OF PREJUDGMENT INTEREST IMPROPER WHERE AWARD WAS MADE BY JURY AND JURY VERDICT HAD THE EFFECT OF FIXING DAMAGES AS OF A PRIOR DATE

POINT II

WHETHER THE DISTRICT COURT ERRED IN REVERSING FOR A NEW TRIAL ON DAMAGES BASED ON THE TRIAL COURT'S EXCLUSION OF EXPERT TESTIMONY IN THE ABSENCE OF AN ABUSE OF DISCRETION AND PREJUDICIAL ERROR

POINT III

WHETHER THE DISTRICT COURT ERRED IN HOLDING EVIDENCE OF PETITIONERS' COLLATERAL SOURCE INSURANCE BENEFITS ADMISSIBLE BECAUSE OF RELEVANCE FOR IMPEACHMENT PURPOSES

SUMMARY OF ARGUMENT

Trend urges three points of error and conflict.

I

First, Trend was entitled to prejudgment interest on the damages for the loss of its property, even if those damages were "unliquidated." It is, and has been for some time, the law of this state that a jury may award prejudgment interest as an element of damages on an unliquidated property damage claim. The liquidated versus unliquidated distinction simply has no application in this situation. In expressly holding that the jury could not award prejudgment interest on Trend's unliquidated property damage claim, the District Court's decision was erroneous and in direct conflict with numerous decisions of this Court and other district

courts of appeal. Because of this error alone, the District Court's decision concerning prejudgment interest should be quashed.

Apart from the District Court's error in holding that property damages must be liquidated to support a jury award of prejudgment interest, the basis on which the Third District held the claim to be unliquidated, i.e., because the Defendant disputed the amount, is in express and direct conflict with a recent decision of the First District. The First District has rejected this approach, holding that whether a defendant disputes a claim for damages is irrelevant for prejudgment interest purposes. The test in the First District is whether the verdict or judgment has the effect of fixing damages due as of a prior date. Under this test, Trend's damages qualified for prejudgment interest because the jury's verdict had the effect of liquidating the damages at $8,037,674.60 as of March 9, 1980. It is Trend's belief that the First District's approach should be upheld because it is more workable and fundamentally fair. The "disputed evidence" approach has led only to judicial confusion, an increased appellate workload and unjustifiably disparate treatment of litigants.

II

Second, the District Court erred in reversing for a new trial on damages based on the trial court's exclusion of expert testimony without applying the abuse of discretion standard and in the absence of prejudicial or harmful error. One of several opinions offered by Honeywell's accountants on the value of Trend's loss was based on a calculation that admittedly was not designed to produce market value on

the day of the loss - the acknowledged measure of damages. The accountants were only able to speculate that the opinion was "related" to or should "approximate" market value. The exclusion of this particular opinion was well within the discretionary authority of the trial court. The Third District was in error in not applying that standard on review. Had that standard been applied, the trial court should have been affirmed because the exclusion of this evidence, under all the circumstances, was neither fanciful nor arbitrary, and certainly was not something no reasonable man could have done.

Beyond this, the trial court admitted several other opinions by the same experts which placed the value of the loss at the same or lower levels than the excluded opinion. This admission of substantially similar evidence makes the error, if any, harmless. That standard was also ignored by the Third District.

III

Third, the District Court erred in holding that, upon retrial, Trend's collateral source insurance application is admissible because of relevance for impeachment purposes. The District Court's decision expressly and directly conflicts with decisions of other district courts of appeal holding that relevance for impeachment purposes does not make evidence of collateral source benefits admissible.

In addition, this aspect of the District Court's decision amounts to a further substitution of its opinion for that of the trial court without regard to the abuse of discretion standard. Honeywell wanted to introduce Trend's insurance application because it contained a statement

that the value of its inventory on November 3, 1979, was $1.6 Million. But the value of the inventory as of November 3, 1979 had little to do with the value of the inventory on March 9, 1980, which Honeywell had many other ways of attacking. And admission of the insurance application carried with it the prejudice of putting Trend's insurance coverage before the jury. There was also great potential for confusing the jury because there was evidence that the insurance agent had actually filled out the application himself, and this had been the subject matter of an entirely different lawsuit against the insurance carrier. The trial judge's ruling was well within his discretion to weigh the probative value of this evidence against the potential for prejudice and confusion under Section 90.403, Florida Statutes.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING AWARD OF PREJUDGMENT INTEREST ON PETITIONERS' PROPERTY DAMAGE CLAIM IMPROPER WHERE AWARD WAS MADE BY JURY AND JURY VERDICT HAD THE EFFECT OF FIXING DAMAGES AS OF A PRIOR DATE.

Trend's claim for damages was based on the market value of its goods - jewelry and precious metals - on the day the property was lost due to Honeywell's fraud. By the time the case went to trial, Trend had been without the use of this property (or more to the point the monies its sale would have long since generated) for well over three years. In order to be fully compensated and made whole for the very real loss of the use of some Eight Million Dollars worth of its stock in trade for over three years, Trend sought prejudgment interest as an element of its damages. The jury was instructed on prejudgment interest (T. 2371), the verdict

form specifically included space for an award of prejudgment interest (R. 422), and the jury awarded it.

Although the Third District acknowledged in its opinion that the jury had awarded prejudgment interest, it went on to strip away the jury's award because Trend's claim was "unliquidated" 449 So.2d at 878. This holding was erroneous, and directly and expressly conflicts with numerous decisions of this Court and other district courts of appeal on the same question of law. Prejudgment interest can be awarded by the jury even when property damages are unliquidated. Section A of this point discusses this error, which by itself should result in the District Court's opinion being quashed as to prejudgment interest.

Section B of this point deals with a conflict of recent origin concerning how the determination as to whether damages are liquidated or not is to be made. The First District holds that the test is whether the verdict or judgment has the effect of fixing damages as of a prior date, while the District court in this case holds that the test is whether there is disputed evidence concerning the amount of damages. Although the District Court's application of the "disputed evidence" test in this case incorrectly assumes that the unliquidated character of Trend's damages is relevant to the jury's award of prejudgment interest, Trend's damages are nonetheless liquidated under the First District's more enlightened approach.

A. Jury May Award Prejudgment Interest As An Element Of Damages On An Unliquidated Property Damage Claim.

For almost 100 years the law of this State has been that a jury may award prejudgment interest as damages on an unliquidated claim for

property (as opposed to personal injury) damages in either a tort or contract action. 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. See, e.g., E.S.I. Meats, Inc. v. Gulf Florida Terminal Co., 639 F.2d 1348, 1355-1357 (5th Cir. 1981) (applying Florida law to property damage claim); Plantation Key Developers, Inc. v. Colonial Mortgage Co., 589 F.2d 164, 170-172 (5th Cir. 1979) (applying Florida law to unliquidated damage claim for fraud and breach of contract); Shoup v. Waits, 91 Fla. 378, 107 So. 769, 770 (1926); Broward County v. Sattler, 400 So.2d 1031, 1033 (Fla. 4th DCA 1981); Posner v. Flink, 393 So.2d 1140, 1141 (Fla. 3d DCA), cert. denied, 402 So.2d 612 (1981); Vacation Prizes, Inc. v. City National Bank, 227 So.2d 352 (Fla. 2d DCA 1969).

The development of the body of law under which Trend was entitled to prejudgment interest, and with which the Third District's decision conflicts, began with this Court's opinion in Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transportation & Manufacturing Co., 27 Fla. 1, 157, 9 So. 661 (1891). The case involved a suit for negligent destruction of a hotel by fire - 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]'....
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> [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 wrong-doer 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). Thus, as early as 1891, this Court held that a plaintiff had a right to have the jury award prejudgment interest on the unliquidated value of property destroyed by the tortious act of a defendant.

In Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687 (1907), this Court next considered the propriety of a jury award of prejudgment interest on an ex-contractu claim for unliquidated property damages. Involved was an agreement to maintain orange groves. The owner of the grove brought suit for breach of the agreement seeking damages for,

inter alia, diminution in the value of the grove because it had not been maintained as agreed by the defendant. Per instructions, the jury awarded prejudgment interest on this unliquidated claim, and this Court held that such an award was proper. 43 So. at 691. Thus, by 1907, it was the established law of Florida that prejudgment interest was properly awarded by a jury for unliquidated property damages arising out of tortious conduct or a breach of contract. The law has been the same ever since.

In Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935), this Court considered a personal injury action which also involved the loss of a vehicle. 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 the 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).

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 unliquidated lost value of the intended crop was sought as damages. 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. The jury awarded prejudgment interest and the trial court ordered it remitted. This Court ordered the interest award reinstated because:

> 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....
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> 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 even followed the above rule in Srybnik v. Ice Tower, Inc., 183 So.2d 224 (Fla. 3d DCA), cert. denied, 192 So.2d 493 (1966), a fraud claim for the decreased value of property not delivered in its represented condition. The trial judge acted as the trier of fact and awarded prejudgment interest as part of the damages. This was challenged on appeal because "the damages were unliquidated and uncertain." 183 So.2d at 225. Citing Zorn and Jackson Grain Co., supra, the court affirmed the award of prejudgment interest because

> ....this court and other courts have held that pre-judgment interest is allowed on a tortious claim which arises out of a contract.

183 So.2d at 225 (citations omitted).

In 1973 the United States District Court, Middle District of Florida, had before it a negligent property damage claim arising out of fire in Tampa Electric Co. v. Stone & Webster Engineering Corp., 367 F.Supp. 27 (M.D. Fla. 1973). As to whether the plaintiff was entitled to prejudgment interest on the property damage claim, the court held:

> Under Florida law the plaintiff is entitled to interest on the amount determined to be due because of the damage to property. Jacksonville, T. & K. W. Ry. Co. v. Peninsula Land, Transp. & Mfg. Co., 27 Fla. 1, 9 So. 661 (1891), Zorn v. Britton, 120 Fla. 304, 162 So. 879 (1935).
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> * * *
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> The justification for awarding interest on property damages is to reimburse the injured party for what he would have earned on the money used to repair [replace] the...property until the time of entry of the judgment.
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> * * *
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> The matter of interest on property damages will be submitted to the jury with instructions concerning the specific elements of damage upon which interest should be computed. The jury will decide the amount of the award.

367 F.Supp. at 36.

In further express and direct conflict with the District Court's decision in this case, the First District just four months ago approved a jury's award of prejudgment interest on an unliquidated claim for delay damages arising out of a construction contract:

> Under Florida law, a party may recover prejudgment interest on damages for breach of contract as an element of the damages. Like

> other elements of damages, the interest must be ascertained and assessed by the trier of fact, in this case the jury. Contrary to DOT's argument, the unliquidated nature of the claim does not make the interest award erroneous for, while a judge can only add an interest award onto a jury verdict of liquidated damages, the jury is empowered to award interest as damages regardless of its characterization as liquidated or unliquidated.

Department of Transportation v. Hawkins Bridge Co., 9 F.L.W. 2021 (Fla 1st DCA, Sept. 19, 1984) (emphasis in original).

In its decision in this case, the District Court ignored or refused to follow the long line of cases set forth above. From all of Trend's research, it appears that the decision of the District Court in this case is one of only two reported Florida decisions taking away a jury verdict for prejudgment interest in a property damage or ex-contractu claim for unliquidated damages. The other was McCoy v. Rudd, 367 So.2d 1080 (Fla. 1st DCA 1979).[5] The First District, however, has since receded from its ruling in McCoy in Bergen Brunswig Corp. v. State Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982), cert. denied, 426 So.2d 25 (1983), and has clearly rejected McCoy by acknowledging the rule that a jury can award prejudgment interest on unliquidated damages in Department of Transportation v. Hawkins Bridge Co., supra.

The Third District's decision in this case should suffer a

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[5] There are other cases holding that prejudgment interest is improper on unliquidated property damage claims, but they do not deal with the jury having awarded it as an element of the damages. See, e.g., Federal Deposit Ins. Corp. v. Carre, 436 So.2d 227 (Fla. 2d DCA 1983), cert. denied, 444 So.2d 416 (1984); Frank v. Engel Van Lines, Inc., 429 So.2d 333 (Fla. 3d DCA 1983); Alarm Systems of Florida, Inc. v. Singer, 380 So.2d 1162 (Fla. 3d DCA 1980).

similar fate at the hands of this Court. Not only is it contrary to the established law of this State, it is contrary to one of the most basic premises of the common law - the right to seek from a jury full compensation for damages suffered at the hands of another. Practical justice and fairness in compensating for lost property should equate with full compensation, which must include prejudgment interest as compensation for payment delayed by the trial process. It would be indulging in nothing short of fiction to pretend that a jury verdict for the value of property lost years before trial could provide full compensation without awarding interest for the period that Trend was deprived of its property. This Court stated in 1891:

> We cannot see either justice or completeness of the compensation dispensed under a rule that declares a party who wrongfully destroys another's property to be liable at the time of such destruction for the value thereof, but that permits the wrong-doer to withhold such value for years, without some compensation for such rentention.

Jacksonville, T. & K. W. Ry. Co., supra at 686. It is difficult to see how it could be otherwise today when litigation delays are longer and collecting interest on daily floats has become an art form.

B. Prejudgment Interest May Be Assessed When The Jury's Verdict Has The Effect Of Fixing Damages As Of A Prior Date.

The jury's verdict in this case fixed Trend's damages - the value of its lost property - as of the date of the burglary. However, the Third District concluded that Trend's damages were unliquidated and therefore unworthy of prejudgment interest because the amount of damages was

contested by Trend. 449 So.2d at 878. The conflict among district court decisions on the question of when the trial court may add prejudgment interest to a verdict or judgment is vividly illustrated by the fact that, even though Honeywell disputed the damage amount, it would have made no difference in the First District. The First District has expressly rejected this disputed evidence test in favor of the principle that damages are liquidated for purposes of prejudgment interest when a verdict has the effect of fixing damages as of a prior date.

> [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.

Bergen Brunswig Corp. v. State Department of Health and Rehabilitation Services, supra at 767 (citations omitted).[6] Thus, by the First District's test, Trend's damages are liquidated, and by the Third District's, they are not. The Second District has acknowledged that the First and Third Districts are applying different "liquidation" tests. It thinks the First District's approach is thought provoking, but is staying with the "disputed evidence" test. Federal Deposit Ins. Corp. v. Carre,

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[6] Unlike the instant case, the First District was confronted with the liquidated/unliquidated question in Bergen because the matter of prejudgment interest was not submitted to the jury. 415 So.2d at 767 n.2.

436 So.2d 277, 230 (Fla. 2d DCA 1983). In the context of this case, that means $3,171,027.72 in interest in Tallahassee and none in Miami or Tampa - the kind of conflict that should be resolved.

The issue of when commercial or property damage litigants are entitled to have prejudgment interest assessed by the trial court also needs to be resolved for reasons beyond the immediate conflict. Apart from the breath of fresh air injected by the First District's approach in Bergen, it can be said without hyperbole that the law on prejudgment interest is a mine field for litigants and courts alike. The law consists of decisions that cannot be reconciled, rules within rules, some bearing a relationship to rational public policy, others not, and, above all, so many reported appellate decisions on the subject that their very number attests to the confusion that reigns. Honest analysis demonstrates that the disputed evidence test for liquidated damages is ignored in many contexts, often in favor of the very test the First District espouses in Bergen. It also shows that its application frequently produces nonsensical, irreconcilable results. Finally, some thought makes it apparent that the rationale underlying the disputed evidence test is specious and unworthy of preservation.

The disputed evidence test for determining whether damages are liquidated or unliquidated for purposes of assessing prejudgment interest provides that, if the 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, they are liquidated and prejudgment interest may be assessed. Parker's Mechanical Contractor's, Inc. v. Eastpoint Water and Sewer District, 367 So.2d 665,

669 (Fla. 1st DCA), cert. denied, 378 So.2d 347 (1979); see, e.g., Town of Longboat Key v. Carl E. Widell & Son, 362 So.2d 719, 723 (Fla. 2d DCA 1978); Bergen Brunswig Corp. v. State Department of Health and Rehabilitative Services, supra at 767. When the rule is expressed, courts frequently acknowledge in the same breath that the distinction between unliquidated and liquidated damages is substantially blurred in Florida. Bergen Brunswig Corp. v. State Department of Health and Rehabilitative Services, supra at 767; Town of Longboat Key v. Carl E. Widell & Son, supra at 723. This is an understatement. The disputed evidence test is just plain ignored in many contexts.

For example, prejudgment interest is allowed on property damage claims for conversion without regard to whether there is disputed evidence concerning the value of the property converted. See, e.g., Page v. Matthews, 386 So.2d 815 (Fla. 5th DCA 1981); Gillette v. Stapleton 336 So.2d 1226, 1227 (Fla. 2d DCA 1976); Pettigrew v. W & H Development Co., 122 So.2d 813 (Fla. 2d DCA 1960). In Martin v. E.A. McCabe & Co., 113 So.2d 879, 882 (Fla. 2d DCA 1959), a bailor was held to be entitled to prejudgment interest on damages suffered from the destruction of a shipment of celery even though the court specifically noted that the amount of damages was disputed.

In inverse condemnation cases, where the value of the property taken is almost uniformly decided upon expert testimony based on conflicting evidence, influences or interpretations, prejudgment interest is allowed. County of Volusia v. Pickens, 439 So.2d 276, 278 (Fla. 5th DCA 1983); Stewart v. City of Key West, 429 So.2d 784 (Fla. 3d DCA 1983)[7]

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[7] The award of prejudgment interest in inverse condemnation actions is not to be confused with interest awards in eminent domain actions where

The rationale here is that the Florida Constitution, Art. X §6(a), requires persons to be fully compensated for the taking of their land, that a landowner loses the benefit of his property from the date it is taken, and that he is not fully compensated or made whole unless he receives interest on its value from the date of taking. Stewart v. City of Key West, supra at 785. Fortunately, fairness wins out over liquidation analysis in that situation. But how can it be any different with the loss of personal property. A basic tenant of both tort and contract law is that a plaintiff is to be fully compensated and made whole. There is no justification for allowing full compensation, including interest, when the value of real property is disputed, but not when the value of personal property is disputed.

In the context of contract debts, as opposed to contract damages, the courts of this state have already abandoned the disputed evidence test in favor of the approach urged on a larger scale by the First District in Bergen. When the action can be characterized as one for a debt rather than for damages, the verdict or judgment is allowed to "liquidate" the debt as of a prior date even when the amount of the debt is not a sum certain, but rather is disputed and can only be determined based on conflicting evidence, influences or interpretations. For example, in Peter Marich & Associates, Inc. v. Powell, 365 So.2d 754 (Fla. 2d DCA 1978), a suit for architectural fees which included a counterclaim for breach of contract and architectural malpractice, the court held:

> Though there was a bona fide question as to how much appellant was owed under the contract, once this issue was determined by the court appellant

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prejudgment interest is mandated by statute. Section 74.061, Florida Statutes.

was due interest from the date of entitlement.

365 So.2d at 756. Similarly, in Jockey Club,Inc. v. Bleemer, Levine & Associates Architects and Designers, Inc., 413 So.2d 433 (Fla. 3d DCA 1982), where the amount due for architectural services rendered was based upon expert testimony covering a whole range of factors, the Third District held that the trial court could assess prejudgment interest because the amount due became

> "as it were, liquidated by a jury verdict as to the amounts recoverable..."

413 So.2d at 434. A judgment has even been allowed to liquidate a disputed contract claim for lost profits and overhead. The court acknowledged that

> [t]he proof of lost profits and the allocation of overhead to a specific job is at best difficult,

but went on to state:

> Since the court found that damages were due as of a date certain, we believe the allowance of interest from that date is supported by English And American Ins. Co. v. Swain Groves, Fla. App. 1969, 218 So.2d 453, and United Bonding Insurance Company v. Crum, Fla. App. 1970, 239 So.2d 600.

Tech Corp. v. Permuitit Co., 321 So.2d 562, 563 (Fla. 4th DCA 1975). Again the approach urged by the First District in Bergen.

When the courts choose to apply rather than ignore the disputed evidence approach to liquidated damages, strange and conflicting results are often the consequence. For example, although someone whose personal property is converted, or the bailor of celery, is entitled to prejudgment interest on their property damages, the disputed evidence approach denies prejudgment interest to someone whose household furniture is destroyed by

a moving company, and to someone whose personal belongings are taken from their safe deposit box. Frank v. Engel Van Lines, Inc., 429 So. 2d 333 (Fla. 3d DCA 1983); Federal Deposit Ins. Corp. v. Carre, supra. Things get even stranger when an insurance company enters the picture. If the insurer pays a sum certain to the insured for uncertain property losses, the subrogation claim becomes liquidated and worthy of prejudgment interest. Alarm Systems of Florida, Inc. v. Singer, 380 So.2d 1162 (Fla. 3d DCA 1980). But if the property owner's negligence somehow contributed to the loss, the insurance company's liquidated chariot turns back into an unliquidated pumpkin - in the Fourth District at least. Chicago Ins. Co. v. Argonaut Ins. Co., 451 So.2d 876 (Fla. 4th DCA 1984). On the other hand, the First District, quite apart from its enlightened approach in Bergen, holds that a finding of comparative negligence on the insured's part does not muddy up the water enough to convert an insurance company's liquidated payment to unliquidated damages. A. O. Smith Harvestore Products, Inc. v. Suber Cattle Co., 416 So.2d 1176 (Fla. 1st DCA 1982).

Another example of the irreconcilable results produced by the disputed evidence test can be seen by comparing two recent Second District cases. In Beckerman v. Greenbaum, 439 So.2d 233 (Fla. 2d DCA 1983), the plaintiff brought suit on a contract which provided that, in return for promoting a building, he was entitled to five (5%) percent of the net profit upon its sale. The battle was over how much could properly be deducted from the gross sales price to get the net profit figure to which the five (5%) percent could be applied. Despite conflicting evidence, and an acknowledged "bona fide question" as to how much was owed, the court held the damages were liquidated and worthy of prejudgment interest. 439

So.2d at 237. Some seven months later, in Gulf Solar, Inc. v. Westfall, 447 So.2d 363 (Fla. 2d DCA 1984), the Second District denied prejudgment interest on virtually identical damages. The plaintiff brought suit for monies due him under an agreement entitling him to 2 1/2% of sales. Prejudgment interest was denied with a cursory citation to cases espousing the disputed evidence test. 447 So.2d at 336. Thus it is, at least in the Second District, that the disputed evidence test gets to the point that 5% of net profit is liquidated whereas 2 1/2% of sales is not.

In short, the disputed evidence test, when it is not ignored to achieve a just result, is a formula for disastrously unfair and uneven treatment of litigants. What is more, it is based on fundamentally unsound legal reasoning. The rationale for the disputed evidence test is that, when the amount of damages can only be determined by conflicting evidence, influences or interpretations, the defendant does not know how much to pay the plaintiff until the amount is determined at trial, and thus should not have to pay interest for not having paid that amount earlier. See, e.g., McCoy v. Rudd, supra at 1082. This treats interest like punitive damages by focusing on the defendant, i.e., when can an award of prejudgment interest against a defendant be justified. But interest is not a form of punishment for the defendant. It is "damages" for the delay in compensating the plaintiff. The defendant is never punished by an award of interest. By definition, the interest a defendant pays will be equal to the value of the use he had of money during a period of time when, but for the inherent delays of litigation, he would already have had to pay the plaintiff - a wash.

On the other side of the coin, by not focusing on the plaintiff, the disputed evidence rule ignores a basic principle of our legal system while building in a windfall for the wrongdoer. A basic premise of our common law is that a plaintiff is entitled to full compensation - to be made whole at the hands of the wrongdoer. From a full compensation standpoint, there is no justification for differentiating between plaintiffs whose damages are easily expressed in a nice neat number and those whose damages require more proof - the losses are just as real. You can be financially destroyed just as quickly by a fraudulent scheme or the loss of your inventory as by a default on a note. The First District was expressing a part of this phenomenon when it spoke of eliminating "the unwarranted disparate treatment of those litigants who contest liability only, and those who contest the measure of damages." Bergen, supra at 767. And there is certainly no justification for giving a windfall to a defendant who has caused losses whose amount can be disputed. The windfall is exemplified by the fact that, at today's interest rates, Honeywell could have paid the entire compensatory award to Trend out of interest earned on Trend's money if the trial had not occurred for six years after the loss. Under that scenario, Trend only gets compensated for half of its losses, and Honeywell only has to pay half of the damage.

Moreover, when the focus is shifted from the litigants to the judicial system itself, it is also clear that the disputed evidence (and therefore no prejudgment interest) rule should be rejected. It gives a substantial financial incentive to contest damages, and then to continue to litigate a case no matter how clear the existence of liability or the extent of the damages. The message is that the longer a defendant can

delay the trial, the less he will ultimately have to pay. Delay and court congestion results. Court congestion continues at the appellate level. As the cases cited in this brief demonstrate, the liquidated - unliquidated standard has become so confused with conflicting rulings that it no longer has any predictable meaning and is causing what amounts to de novo reviews by appellate courts in almost all cases where prejudgment interest is claimed.

On the other hand, the First District's approach is just and workable. It is easy to apply. (Does the verdict or judgment fix damages that were due or suffered as of a prior date?) In application, it will leave the existing right to prejudgment interest intact in most instances and expand it to areas where it belongs. Although the cases discussed in Section A, infra, already provide this relief where the jury awards the prejudgment interest, adoption of the Bergen approach will simplify the case law and make the approach to prejudgment interest more uniform. The Bergen approach will also keep prejudgment interest from being assessed where it is not warranted as, for example, in the case of compensation for future expenses or losses.

Finally, it must be noted that the First District's approach in Bergen is neither radical nor novel. It has been applied for years to "debts." And this Court as recently as 1980 characterized the approach as a general principle of prejudgment interest.

> As a general principle applicable to interest, whenever a verdict liquidates a claim and fixes that claim as a prior date, interest should follow from that date.

Behm v. Division of Administration, 383 So.2d 216, 218 (Fla. 1980). It is respectfully submitted that the time is ripe to make this general

principle the controlling principle for awards of prejudgment interest, and to abandon the disputed evidence test.

For the reasons expressed in either Section A or B above, it is respectfully submitted that the District Court's decision that Trend is not entitled to prejudgment interest should be quashed. Further, should the Court quash the District Court's opinion on the remaining points, it is requested that Trend's award of prejudgment interest be ordered reinstated in the modified amount of $2,054,561.75.[8]

POINT II

THE DISTRICT COURT ERRED IN REVERSING FOR A NEW TRIAL ON DAMAGES BASED ON THE TRIAL COURT'S EXCLUSION OF EXPERT TESTIMONY IN THE ABSENCE OF AN ABUSE OF DISCRETION AND PREJUDICIAL ERROR

The sole reason given by the District Court for requiring a new

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[8] Apart from their dispute concerning entitlement to prejudgment interest, the parties also differed at trial on the legal rate applicable to Trend's claim. Honeywell took the position that 6% was the appropriate rate because that is what the statute provided when Trend's claim "arose." Section 687.01, Florida Statutes (1979). Trend took the position, which it still endorses, that the amendment of Section 687.01 by Chapter 82-42, Laws of Florida, which was effective as of July 1, 1982, was an amendment to a remedial statute and thus immediately applicable to all pending actions. See, e.g., V. S. v. Vanella, 619 F.2d 384 (5th Cir. 1980); Myers v. Carr Const. Co., 387 So.2d 417, 418 (Fla. 1st DCA 1980) (remedial statutes "apply to remedies then invoked for currently accruing liability arising out of earlier events or claims"); Grammer v. Roman, 174 So.2d 443 (Fla. 2d DCA 1965). The trial court instructed the jury that the 12% rate applied. Since that time, several decisions interpreting the amendment have come out saying the proper method is to assess prejudgment interest at 6% until July 1, 1982, and at 12% thereafter. See, e.g., Kelly v. W & S Service Centers, Inc., 451 So.2d 1044 (Fla. 1st DCA 1984); Meigs & Cope Agency of Florida, Inc. v. Koffey, 435 So.2d 867 (Fla. 3d DCA 1983). If this indeed is the correct approach, the jury's prejudgment interest award needs to be mathematically adjusted downward from $3,171,027.72 to $2,054,561.75, the result if interest is awarded at 6 % until July 1, 1982, and at 12 % thereafter.

trial on damages was the trial court's exclusion of one of numerous opinions offered by Honeywell's experts. The trial court excluded this opinion because it was not based upon the market value of Trend's property on the day of the loss - the acknowledged measure of damages. The District Court reversed and ordered a new trial on damages because:

> [W]e cannot say that the method used by Honeywell's experts was totally inadequate or departed from all common sense and reason. Accordingly, we find that the trial court erred in excluding Honeywell's expert witnesses

449 So.2d at 878.[9] But what the District Court can or cannot say, or believes or does not believe, is not the test for reversing an evidentiary ruling by a trial judge. The admission or exclusion of evidence, in the form of an expert opinion or otherwise, is a matter entrusted to the broad discretion of the trial judge on the spot. The trial judge's ruling will not be disturbed absent an abuse of discretion. Town of Palm Beach v. Palm Beach County, 9 FLW 448 (Fla. Oct. 18, 1984); Buchman v. Seaboard Coast Line R. Co., 381 So.2d 229 (Fla. 1980); Hosbein v. Silverstein, 358 So.2d 43, 44 (Fla. 4th DCA 1978). To find an abuse of discretion, a district court must determine that the trial court's ruling was arbitrary or fanciful - that no reasonable man would take the view adopted by the court. Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980); Division

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9 The "totally inadequate or departed from all common sense and reason" language was the District Court's paraphrasing of a test espoused in Rochelle v. State Road Department, 196 So.2d 477, 479 (Fla. 2d DCA 1967). However, despite the seventeen (17) years that elapsed between the Rochelle decision and the District Court's decision, and the countless intervening decisions on the exclusion of expert testimony, many of which will be discussed below, the Rochelle test was mentioned only once - in a concurring opinion. It is a highly questionable test which in effect provides that an expert's opinion cannot be excluded unless the expert is abusing his discretion. But it is the trial court, not the expert, that is vested with the discretion.

of Administration v. Saemann, 399 So.2d 359, 361 (Fla. 4th DCA 1981) (applying Canakaris test to exclusion of expert testimony). The Third District did not make such a determination. As this Court said in its most recent quashing of a district court's meddling with the discretionary ruling of a trial court:

> [W]hen there is a reasonable basis to exercise [the trial court's] discretion, an appellate court should not disturb it.

Bankers Multiple Line Ins. Co. v. Farish, 10 FLW 66, 67 (Fla. Jan. 24, 1985).

Trend did not raise the District Court's interference with the trial court's discretion as a point of conflict in its jurisdictional brief. However, once conflict jurisdiction is taken, this Court may review all issues on the merits - particularly if they are briefed and dispositive of the case. See, e.g., Bankers Multiple Line Ins. Co. v. Farish, supra; Dania Jai-Alai Palace Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984); Savoie v. State, 422 So.2d 308 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977); Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012 (Fla. 1977) (Court going on to review and reverse district court finding that the trial court abused discretion in evidentiary ruling).

Beyond this, the Third District's decision probably is in express and direct conflict with decisions of this Court and other District Courts of appeal because the express reasoning used to reverse the discretionary ruling of the trial court shows the proper standard of review was not followed. In Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981), this Court reviewed a district court's reversal of a discretionary ruling of a

trial court. The district court's opinion did not admit to or identify any conflict, but this Court, holding that did not matter, stated:

> We have stated and restated the appropriate standard for district courts on review of a trial court's motion granting new trial. The test is whether the trial court abused its 'broad discretion'. If reasonable men could differ as to the propriety of action taken by the trial court, then there is no abuse of discretion.
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> * * *
>
> The district court's apparent failure to apply this standard requires that we quash the decision....

401 So.2d at 1342-1343 (citations omitted). The standard of review was the same here - abuse of the trial court's broad discretion. And the District Court's express reasoning shows the same "apparent failure" to apply the correct standard.

The evidence that the trial court rejected in the exercise of its broad discretion was one of a multitude of opinions held by two accountants hired by Honeywell to contest Trend's computation of its damages. After the theft, Trend calculated the market value of the inventory lost based on the nature of its business, the character of its records and the market conditions at the time. (T. 1122-1169).

There were two basic aspects of Trend's business. One was the wholesaling of gold and silver jewelry. Trend had a purchase slip for every purchase of jewelry, and a sales invoice for every sale. All of these were placed into evidence. As a rule, however, these documents only recorded the dollar amount of the purchase or sale, not the weight of the purchase and sale. Trend could not just add up the purchases and subtract the sales because each transaction was tied to the market price of gold or

silver at the time, and the period in question had witnessed the wildest market fluctuations in history. (T. 1156-1168). Gold began the fiscal year at $240.00 an ounce, rose some 354% to $850.00 an ounce during the year, and by the time of the burglary and fallen back to $609.00 an ounce (PX 30). Silver began the fiscal year at $7.44 an ounce and rose some 672% to $50.00 an ounce during the year, and by the time of the burglary had dropped to $32.75 an ounce. (PX 30). At the extremes, this would mean that the same dollar purchase on the low day represented three and one-half times as many ounces of gold as the same dollar value purchase on the high day. In the case of silver, almost seven times as many ounces would have moved for the same price. Since the legal measure of damages was the market value of the lost inventory on the day of the theft, adding and subtracting dollars which represented vastly different quantities of goods would not work.

It was thus necessary to adjust the purchase and sale prices for the market value on the date of the loss. For example, a purchase on December 3, 1979, when the price of gold was $128.75 an ounce, represented 1.42 times as many goods as the same dollar value purchase on the day of the loss, so all purchases on December 3, 1979, would be multiplied by 1.42. Once the dollar values of the purchases and sales had been adjusted in this fashion, the sales could be subtracted from the purchases to yield the market value of the inventory on the day of the loss. (T. 1156-1168).

The other aspect of Trend's business was the purchase of scrap precious metals which then would be sent to refiners to melt down into gold or silver. Determining the market value of the scrap inventory on the day of the loss was much easier. The purchase slips, all of which

were placed into evidence, recorded the weight or quantity of the purchase. Because scrap was shipped on a regular basis, Trend simply went to its shipping records, also in evidence, and determined the last date of shipment (generally just days before the burglary) for each category of scrap. From that date forward, the purchases were added up by weight and then valued according to the market prices of the precious metal in question on the day of the loss (T. 1141-48).

The accountants hired by Honeywell testified that this was "an acceptable approach" (T. 1478). An independent CPA who did work for Trend was also called by Honeywell as its own witness and testified that Trend's approach would produce the market value of the inventory on the day it was lost (T. 1924-1927).

Honeywell's accountants used several approaches to challenge the accuracy of Trend's claim and to determine a value of their own. Testimony concerning one of these approaches, and the number it produced, was excluded because it was not designed to give the market value on the date of the loss - the measure of damages. Under this approach, Honeywell's accountants took as a beginning inventory the inventory stated on Trend's prior tax return, which was valued at $240.00 an ounce for gold and $7.44 an ounce for silver. To that they simply added the dollar value of all purchases and subtracted the dollar value of all sales for the year, without adjusting them to account for the 354% to 672% swing in actual inventory represented by the dollars. Finally they subtracted the inventory of goods remaining after the theft, which was valued at $609.00 an ounce for gold and $32.75 an ounce for silver. (T. 1413-19). In effect, although a dollar in this calculation could represent up to almost

seven times as much actual inventory as another dollar, each dollar was given the same weight in determining the value of the lost property.

Chris Campos, the lead accountant on Honeywell's team, acknowledged during his deposition that the result of this calculation was not intended to represent the market value of the goods on the day of the loss, and that subtracting the market value of the inventory remaining after the loss from his dollar value calculation was like "mixing apples and oranges." All of this was before the trial court when admissibility of this evidence was being considered (R. 554-555, 595; T. 1422-1423). On voir dire examination, Honeywell's accountants also acknowledged that in conditions where the price swings were violent, their calculation just would not produce market value. (T. 1423-24). In point of fact, market swings during the period in question were violent. (T. 1100-1101; PX 30).

In an attempt to make their non-market value opinion admissible on the issue of market value, Honeywell's accountants testified that the $533,000.00 figure was "related" to market value, that they "thought" it was like market value, that there was a "tendency" for the market value to be in the "middle" of the purchase and sale prices, and that it should "approximate" market value (T. 1421-23, 1437-1438, 1763). But this was nothing more than opinioned conjecture without underlying facts to back it up. To hold that a trial judge is being arbitrary or fanciful, or acting as no other reasonable man could act, when he excludes an opinion that is supposed to be of market value, but which relies on a tendency to produce a relationship to get only an approximation of market value, is to ignore the meaning of the words arbitrary and fanciful.

In fact, the opinion was even more fragile than the accountants'

own descriptions indicated it to be. The very factual premise which was needed to produce the tendency, to produce the relationship, to produce the approximation of market value, did not even exist. For Honeywell's dollar volume calculation to even approximate market value under its own theory, Trend's inventory had to turn over very rapidly. If it didn't, the whole house of cards came tumbling down. Because of this, the accountants kept referring to the three to five day turnover Trend experienced in the scrap aspect of its business (T. 1525). But during the same time Trend had over $24 Million in jewelry sales (T. 1106; PX32), and some 63% of Trend's damage claim was for jewelry, not scrap metals. (PX 46). The accountants admitted the jewelry was held for a period of time (T. 1519), and they themselves determined that the jewelry inventory remained on hand for an average of forty-five (45) days (DX A6 for Id.). So much for rapid turnover. A quick look at precious metal prices for the year in question shows that a 45 day average hold time produces inherent value swings, and thus margins of error, of up to 97% on the up side (December 6, 1979 to January 21, 1980; PX 30) and 28% on the downside (January 21, 1980 to day of loss; PX 30). So much for "approximates."

In short, to get to market value from a calculation Honeywell's accountants admitted was not designed to produce market value, they had to speculate or conjecture that conditions were such that the two numbers would be about the same based upon an underlying fact - rapid inventory turnover - that they admitted in their own testimony was true for only part of Trend's business.

As the following cases demonstrate, the trial court, in situations like the instant case, has the discretion to, and in fact must,

exclude the testimony of a qualified expert on a subject matter that is otherwise properly the subject of expert testimony when the opinion offered is defective in methodology, lacks an underlying chain of reasoning, or is based in part upon missing or incorrect facts. The expert is not the final arbitrator of the admissibility of his own opinion. The trial court not only did not abuse its discretion, it ruled correctly.[10]

In Division of Administration v. Samter, 393 So. 2d 1142 (Fla. 3d DCA), cert. denied, 402 So.2d 612 (1981), the district court reversed because the trial court improperly admitted the testimony of an otherwise qualified expert concerning the value of land. The expert's opinion was based on his expert "extrapolation" of value from the sale of other properties which were in many respects not comparable. The expert tried to convert irrelevant incomparable sales to relevant market value data by evaluating the differences between the properties - much as Honeywell's experts tried to convert an admittedly non-market value number to market value by reaching conclusions concerning the difference between cost and market value in the fluctuating precious metals market. The district court held:

> [The expert's] attempt to convert the thus irrelevant to the hopefully relevant by applying a stated percentage of difference between the

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10 Honeywell should also have been hard pressed to claim that the judge abused his discretion in excluding this testimony because it called as its own witness a CPA who had previously done work for Trend who said that Honeywell's accountants' excluded approach was improper. This presumtively "reasonable man" testified that, if Trend's records didn't show the quantity of each purchase and sale, you could not just use the dollar values of the purchases and sales because of the wildly fluctuating market (T. 1895). Rather, you would have to convert the dollars to weights by referring to market prices at the time or convert to a constant dollar value - just what Trend did, and Honeywell's accountants failed to do in the excluded calculation (T. 1896-1898).

> two parcels runs afoul of the principle that...no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning.
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> * * *
>
> Apples may not be compared to oranges, even when an expert evaluates the botanical distinctions between them.

393 So.2d at 1145-46 (citations omitted). Presumably not having read this case, Honeywell's accountants actually admitted they were trying to compare apples to oranges (R. 595).

An expert simply may not use his "judgment" to make assumptions, like dollar volume approximating market value under certain conditions, and thereby produce an admissible opinion. See, e.g., Kelly v. Kinsey, 362 So.2d 402, 404 (Fla. 1st DCA 1978) (assumptions concerning annual wage increases based on "judgment" equals speculation). For example, in Walters v. State Road Department, 239 So.2d 878 (Fla. 1st DCA 1970), an appraiser was allowed to testify to the market value of condemned property by figuring the value of the land based on the market approach, and of two buildings on the property based on the cost approach and income approach. He then lumped the three values together and made adjustments he believed as a matter of judgment to be proper to produce the total market value. The First District found this to be nothing more than opinionated speculation or conjecture, and reversed. Honeywell's accountants did the same thing. They ran a calculation that admittedly was not designed to produce the market value of Trend's inventory on the day of the loss, and then concluded as a matter of judgment that the result "related" to or "approximated" market value. Such conclusory or

speculative opinions are inadmissible, and it is hardly an abuse of discretion to keep them out of evidence.

In Gesco Inc. v. Edward L. Nezelek, Inc., 414 So.2d 535 (Fla. 4th DCA 1982), cert. denied, 426 So.2d 27 (1983), the district court affirmed the trial court's exclusion of expert testimony concerning delay damages because the opinions were based on market assumptions which were not adequately supported by the record - just as Honeywell's accountants' opinion was based upon the unsupported assumption that all (as opposed to part) of Trend's inventory turnover was "rapid", that the market was not violently fluctuating, and that there was a tendency for the prices to come out in the "middle." Thus, in addition to the fact that Honeywell's accountants' opinion was based on judgmental speculation, the trial court was correct in excluding the opinion because even the assumptions underlying their conjecture were defective.

Plaintiffs submit that these authorities should and do represent the correct rule. The trial court does and should have discretion to exclude expert opinion evidence that is conjectural or speculative. More to the point, appellate courts should not disturb such a ruling where there is a reasonable basis for it. Here there was more than a reasonable basis to exclude the simple dollar volume calculation, and it was the Third District that erred in not following the standard of review that this Court has established.

Apart from reversing the trial court for its evidentiary ruling without finding an abuse of discretion, the District Court's reversal for a new trial on damages also flies in the face of the harmless error rule. Honeywell attempted to convince the District Court that the trial court's

ruling left it with virtually no expert testimony on damages, and apparently succeeded despite a clear record to the contrary. The Third District's decision states:

> [W]e find that the trial court erred in excluding Honeywell's expert witnesses.

449 So.2d at 878. But Honeywell's expert witnesses were not excluded - just one of a host of their opinions. They were allowed to provide the jury with almost 200 pages of expert testimony attacking Trend's loss and coming up with valuations of their own. (T. 1370-1406, 1517-1560, 1572-1600, 1778-1854).

In fact, in apparent anticipation of the market value objection, Honeywell's experts had prepared alternate calculations of the market value of the loss making the necessary conversions to a constant value (T. 1428-1434). They testified that this was an acceptable approach (T. 1478), and Honeywell's counsel represented to the trial court that it was the correct methodology (T. 1485). Based on these calculations, the experts testified that the market value of the loss was $238,000.00 (T. 1846). Thus, the net effect of the ruling Honeywell complains about was that their accountants testified that the loss was $238,000.00 instead of $533,000.00. The admission of evidence substantially similar to the excluded evidence makes the exclusion, even if error, harmless error. See, e.g., Green Companies v. Divincenzo, 432 So.2d 86, 88 (Fla. 3d DCA 1983); Palm Beach Plaza Center Corp. v. Carter Controls, Inc., 421 So.2d 812 (Fla. 4th DCA 1982).

Further, not only did Honeywell's experts testify to this calculation of the loss, but they provided the jury with the following opinions concerning the loss: that, based on their entire review of the

records, the inventory at the time of the loss was only 15% of what Trend claimed it to be (T. 1403); that, based on its own books and records, Trend's damage claim was grossly overstated (T. 1837-1838, 1947-49); that in their opinion the loss was between $250,000.00 and $500,000.00 (T. 1842-1843); that Trend's damage claim was totally at odds with its own tax returns, which showed the loss to be around $250,000.00-$500,000.00. (T. 1530-31, 1537-42, 1544, 1851-53); that Trend's damage claim would make its cost of sales or profit margin totally inconsistent with its previous history and the industry experience for the year in question (T. 1520-21, 1529-30, 1834-35, 1840-42); that Trend's damage claim would make its inventory turnover time totally out of whack with its prior experience and the industry experience in general (T. 1533-37, 1835); and that Trend's damage claim was torpedoed by its own financial statements which showed assets, salaries and contributions to pension plans totally inconsistent with an $8,000,000.00 loss (T. 1850-54).

As the case law demonstrates, with all of this substantially similar (if not more probative) evidence before the jury, the trial court's exclusion of one more calculation to produce the same figure of approximately $500,000.00 for the loss must, if error, be considered harmless error. For example, in Aiken v. Miller, 298 So.2d 477 (Fla. 1st DCA 1974), the First District held that the trial court's exclusion of an expert's testimony on causation of an eye injury was at best harmless error because another expert testified that the eye injury was probably related to the accident. In Alexander v. Alterman Transport Lines, Inc., 387 So.2d 422 (Fla. 1st DCA 1980), the First District held that it was error for the trial court to exclude the defendant's tax returns on the

issue of net worth for punitive damages purposes. The error was found to be harmless, however, because financial statements showing net worth were admitted and provided an ample basis for a larger award of punitive damages if the jury had been so inclined. In the instant case, there was more than enough evidence for a smaller award of compensatory damages if the jury had been so inclined. In Connell v. Green, 330 So.2d 473 (Fla. 1st DCA 1976), the exclusion of an attorney's opinion concerning the competence of a grantor was held to be clearly erroneous but harmless error where there was other testimony admitted concerning competency. This court, in Katz v. Red Top Sedan Service, Inc., 136 So.2d 11 (Fla. 3d DCA 1962), held that any error in excluding expert testimony concerning the permanency of an injury was harmless in view of the admission of other medical testimony concerning permanency.

Space does not permit analysis of all of the relevant harmless error cases. It can be said with confidence, however, that the exclusion of evidence is not to be considered harmful or prejudicial error where other substantially similar evidence has been admitted. There is never any speculation concerning whether the excluded would have been somehow more effective than the admitted. See, e.g., Corbett v. Seaboard Coastline Railroad Co., 375 So.2d 34 (Fla. 3d DCA 1979), cert. denied, 383 So.2d 1202 (1980) (any error in excluding evidence of lack of driver's license harmless where other evidence of driver's youth and inexperience admitted); Little v. Bankers National Life Ins. Co., 369 So.2d 637 (Fla. 3d DCA 1979) (any error in excluding letters written by flight surgeon harmless where substantially similar oral testimony admitted); Hinson v. Hinson, 356 So.2d 372, 374 (Fla. 4th DCA 1978) (error in failure to admit

business records harmless where employer allowed to testify regarding employment); Collard v. Keeton, 317 So.2d 121 (Fla. 3d DCA 1975) (any error in excluding hospital records harmless where other evidence of plaintiff's hypochondria admitted); Coral Plaza Corp. v. Hersman, 220 So.2d 672 (Fla. 3d DCA), cert. denied, 229 So.2d 867 (1969) (exclusion of letters harmless error where oral testimony concerning contents admitted); Stager v. Florida East Coast Railway Co., 163 So.2d 15 (Fla. 3d DCA 1964), cert. denied, 174 So.2d 540 (1965) (exclusion of doctors' testimony regarding inability to work harmless error where other doctors permitted to testify on subject); Delano Hotel, Inc. v. Gold, 126 So.2d 301 (Fla. 3d DCA 1961) (exclusion of corporate records harmless where testimony permitted on same subject).

Thus, it is submitted that the District Court's reversal for a new trial on damages because of the exclusion of expert testimony should be quashed for failing to follow the abuse of discretion test and for ignoring the harmless error rule. Since this ruling was the only basis cited by the district court requiring a new trial, the trial court's judgment should be reinstated, subject, of course, to this Court's decision on Point I concerning prejudgment interest.

POINT III

THE DISTRICT COURT ERRED IN HOLDING EVIDENCE OF PETITIONERS' COLLATERAL SOURCE INSURANCE BENEFITS ADMISSIBLE BECAUSE OF RELEVANCE FOR IMPEACHMENT PURPOSES

In the year preceding the burglary, as had been the custom for years, Trend purchased insurance which covered losses due to the theft. The insurance was paid for by Trend, and was purchased for its own benefit

(T. 626).

Except where abrogated by statute, Florida courts strictly follow the collateral source rule. The rule, which is one of both substantive law and of evidence, provides that total or partial compensation received by an injured party from a collateral source wholly independent of the wrongdoer will not operate to lessen the wrongdoer's liability for damages, and that evidence of such a collateral source is inadmissible. Stanley v. United States Fidelity & Guaranty Co., 425 So.2d 608, 609 (Fla. 1st DCA 1983), rev'd on other grounds sub nom. Florida Physician's Ins. Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984); Freeman v. Rubin, 318 So.2d 540, 544 (Fla. 3d DCA 1975). Insurance purchased by the plaintiff is the classic example of a collateral source benefit. And while the collateral source rule is typically applied in personal injury cases, it applies with equal force in cases seeking property damages based upon tort or contract liability. Robert E. Owen & Associates, Inc. v. Gyongyosi, 433 So.2d 1023 (Fla. 4th DCA 1983), cert. denied, 444 So.2d 417 (1984); Hartnett v. Riveron, 361 So.2d 749 (Fla. 3d DCA 1978); Walker v. Hilliard, 329 So.2d 44 (Fla. 1st DCA 1976); Allstate Mortgage Corp. v. Alpha Motors, Inc., 294 So.2d 100 (Fla. 3d DCA), cert. denied, 303 So.2d 640 (1974).

Trend's insurance was a collateral source. Just as evidence of the existence of receipt of collateral source benefits is inadmissible, evidence of the application for collateral source benefits is likewise inadmissible. Freeman v. Rubin, supra at 544 (reference to application for V.A. benefits impermissible). Nonetheless, the District Court held in its decision that, on retrial:

> [E]xcluded evidence that Trend valued its inventory at $1.6 Million in an application for insurance is admissible to impeach subsequent

statements pertaining to the value of the loss.

449 So.2d at 878.

In so holding that relevance for impeachment purposes makes evidence of collateral source benefits admissible, the Third District's decision demonstrates: express and direct conflict with decisions of other district courts on the same question of law; a lack of understanding of the collateral source rule and its purpose; and a further willingness to substitute its judgment on matters which rest in the sound discretion of the trial court.

The collateral source rule is a rule of substantive law - not a rule of relevancy. The exclusionary portion of the rule is based upon the common experience and belief that a jury's knowledge of the plaintiff's opportunity for compensation from a source other than the defendant has an insidious and prejudicial effect upon the plaintiff's ability to recover any damages, much less full compensation. That rule has always, until the District Court's decision in this case, prevailed over any claim that the collateral source was relevant for impeachment purposes. Were the rule otherwise, collateral source benefits would be admissible depending on the ingenuity of trial counsel in finding something to impeach, and the very reason for the rule would be circumvented.

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 usefulness 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), cert. denied, 426 So.2d 29 (1983) (reversal required by implication of existence of collateral source benefits in attempt to impeach plaintiff's veracity).

Until now, the Third District also followed this rule. In Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA), cert. denied, 285 So.2d 414 (1973), the court rejected the notion that evidence of collateral source benefits is admissible for the limited purpose of impeachment - in that case to challenge the plaintiff's motivation to return to work.

Based upon these authorities, the trial court was correct as a matter of law in holding Trend's insurance application inadmissible dispite Honeywell's claim that it was relevant for impeachment purposes.

Beyond this, the trial court was well within its broad discretion in excluding the insurance application purely as a matter of weighing the probative value of the evidence against its potential for unfair prejudice

or confusion of the issues under the Florida Evidence Code, Section 90.403, Florida Statutes. The Third District tacitly acknowleged that the trial court's exclusion of the insurance application was not an abuse of discretion by not finding it to be a ground for reversal. Rather, the District Court chose to substitute its judgment for the discretion of the trial court prospectively by telling the trial court how to exercise its discretion upon the retrial of damages - an equally impermissible interference with the discretion of the judge who is hearing the evidence and conducting the trial.

A quick look at the record before the trial judge as to the probative value of the evidence, and the prejudice and confusion that was just over the horizon of its admission, shows without question that the trial court exercised its discretion in a reasonable rather than fanciful fashion.

Trend's insurance policy expired and came up for renewal on October 21, 1979. (T. 2035-36). At that time, Trend decided to increase its coverage to $1.6 Million based upon its fiscal 1979 year end inventory of approximately $1.7 Million. (T. 1176-77). The renewal process dragged on and the application was finally signed in blank by Bertie Weinberg on December 21, 1979. (T. 2030-2034). Between the time of Trend's year end inventory and December 21, 1979, the price of gold rose 97% from $239 an ounce to $473 an ounce, and the price of silver rose 316% from $7.45 an ounce to $23.60 an ounce, leaving Trend underinsured. (PX 30). After the robbery, Trend made a claim against its insurance for the full $1.6 Million based on a loss in excess of $8 Million. The insurance carrier denied the claim because, among other things, it claimed that Trend had

understated its inventory in the application. (T. 1633).[11] The application contained a statement that an inventory had been conducted on November 3, 1979, and that the exact amount of the inventory was $1.6 Million. (DX for Id A-7, A-8).

Trend sued its carrier and Michael Wexler, its insurance agent, claiming in part that the alleged policy violations were the direct result of the misfeasance or malfeasance of Mr. Wexler. (T. 1637) Specifically, Trend claimed that Mr. Wexler had simply filled in the blank inventory amount to conveniently match the coverage requested (T. 2028-30, 2032-35), that there never was a November 3rd inventory, and that Trend had made no representations to him concerning inventory. (T. 1176, 2035). Mr. Wexler claimed, on the other hand, that he had discussed the matter with Mrs. Weinberg and that she had given him the $1.6 Million inventory figure. (T. 1625-33). The suit was settled before the instant case went to trial for $410,000.00. That settlement included an agreement that the carrier was subrogated to any recovery Trend might receive against Honeywell. (R. 484).

Honeywell wanted to introduce the insurance application, which included the coverage amount, to show that Trend represented its inventory to be $1.6 Million as of November 3, 1979. Trend's inventory as of November 3, 1979, however, was not an issue in the case. The issue was the inventory as of March 9, 1980. And since November 3rd there had been innumerable transactions and large increases and decreases in the inherent value of gold and silver. Honeywell really wanted the application for the

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11 The other ground upon which coverage was denied was that more than 5% of its goods were outside of approved safes at the time of the robbery.

prejudicial effect of showing that Trend had purchased insurance inasmuch as Honeywell's counsel admitted to the court that the evidence was cumulative (T. 21).

Against this claim of relevancy, the trial court had to consider the prejudice and confusion that would result. If the insurance application went in, the jury would know not only that Trend had insurance, but the amount of coverage. A jury's knowledge of the bare fact of the existence of collateral source benefits, even without the amount, is regarded as sufficiently prejudicial to require a new trial on both liability and damages. Grossman v. Beard, supra; Williams v. Pincombe, supra; Cook v. Eney, supra. Knowledge of the specific amount would have made the prejudice even worse. The jury would inevitably want to know whether some or all of the policy was collected, and whether Trend was getting a double recovery. And it could never have been known if the jury decided Trend was entitled to no recovery because it could have purchased more insurance to fully protect itself - a totally impermissible legal basis with more than a little appeal to a lay juror.

Beyond the prejudice, confusion of the issues would have resulted from what, in effect, would have been a retrial of Trend's suit against its insurance carrier. To challenge the $1.6 Million Dollar inventory, Trend's owners would have testified that they were asked by the insurance agent to sign the application in blank, that the inventory amount was merely filled in by the agent to match the requested coverage just as it had been in prior applications, and that there never was a November 3, 1979, inventory (T. 11-48, 1176, 2030-2035). To rebut this evidence, Honeywell would have sought to call the insurance agent to testify that

the inventory representations were made by Trend, not him (T. 1622-1633). To impeach the insurance agent, Trend would then have had to bring out the fact that it had sued him for filling out the application and for the denial of coverage based in part upon an understatement of the inventory (T. 1633-37). Somebody, no doubt, would have felt it necessary to introduce the fact that the suit against the carrier was settled for $410,000.00. The resulting lawsuit within the lawsuit would have been both confusing and prejudicial.

Privately purchased insurance is and should continue to be a collateral source that is not admissible into evidence. Furthermore, under the facts of this case and the collateral coverage lawsuit, it was entirely reasonable for the trial court to conclude that the potential for prejudice and confusion outweighed the probative value of the insurance application. Thus, it is submitted that the District Court erred in failing to follow the rule of inadmissibility of collateral sources and in further failing to follow the abuse of discretion standard on review. On either basis, this portion of the opinion below should be quashed.

CONCLUSION

For the above reasons and based upon the above authorities, Trend respectfully requests the following relief:

1. That the District Court's opinion be quashed and the trial court's judgment reinstated, with the interest reduced to $2,054,561.75 if necessary; or

2. If the Court affirms the District Court's reversal for a new trial on damages, that the Court quash those portions of the decision

providing that Trend is not entitled to prejudgment interest and that its application for insurance is admissible upon retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a ~~true~~ and correct copy of the foregoing was delivered by mail this 1st day of February, 1985, to: Lawrence Fuller, Esq., Fuller & Feingold, 1111 Lincoln Road, Miami Beach, FL 33139, Attorneys for Petitioners; and James E. Tribble, Esq., Blackwell Walker Gray Powers Flick & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, Attorneys for Respondents.

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