D.A 4-11-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,532

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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' REPLY BRIEF ON THE MERITS

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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

A. The Jury Was Properly Instructed On Interest And Was Empowered To Award It Under The Facts Of This Case.

Although Honeywell now concedes that a jury can award prejudgment interest on unliquidated damages,[1] it has conjured up three reasons why the Third District was justified in stripping away the jury awarded prejudgment interest in this case.

First, Honeywell contends that the award should fall in this case because the jury instructions were too mandatory in nature, giving the jury "no discretion whatever" (Honeywell's brief, ["HB"] 7-8).[2] Not so. The precise issue, instructions couched in terms of the plaintiff's right, as opposed to the jury's discretion to award prejudgment interest, has been decided against Honeywell by this Court. In Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transportation & Manufacturing Co., 27 Fla. 1, 157, 9 So. 661 (1891), the

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1 This is a far cry from the position it attempted to foist on the trial court, and foisted on the Third District. In both of those forums it emphatically contended the prejudgment interest was never proper on unliquidated damages. (R. 460-63).

2 The instruction to the jury on prejudgment interest was as follows:

> Question number 12 on the verdict form reads as follows. What is the interest on the Plaintiff's loss? As an answer to that question, you should calculate interest at the rate of 12 percent per annum from March 9, 1980, to the present.

(T. 2371). This language is hardly akin to a directed verdict. Command language, like "shall" or "must", was not used. The operative word, "should", regularly appears in the Florida Standard Jury Instructions concerning damages, and is not thought to direct a verdict where it appears. See, e.g., Fla. Std. Jury Instr. (Civ.) 6.1(a), 6.1(b).

jury was mandatorally instructed that the measure of damages included "interest at the rate of 8 percent per annum." 9 So. at 679. The propriety of the jury being instructed on the plaintiff's entitlement to prejudgment interest as a matter of right was raised, and confirmed by this Court:

> 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 remittur [of the interest] to which, upon every principle of right, the plaintiff is justly entitled.

9 So. at 686.

Ever since, this Court has approved prejudgment interest language in jury instructions or verdict forms that is more "mandatory" than the language in this case. See, e.g., Jackson Grain Co. v. Hoskins, 75 So.2d 306, 310 (Fla. 1954) (space on verdict form for damage amount followed by "with interest at the legal rate from May 22nd, 1950..."); Zorn v. Britton, 120 Fla. 304, 162 So. 879, 880 (1935) (jury instructed "to reduce their judgment to a money value by allowing 8 percent interest thereon from the date of the injury").

Second, Honeywell contends that, while a jury can award prejudgment interest on unliquidated property damages, there is a corollary to this rule providing that a jury can only do so if the damages can be "readily liquidated and ascertained by the jury by simple computation." (HB 8-9). This supposed corollary is the product of a misreading of Sullivan v. McMillan, 37 Fla. 134, 19 So. 340 (1896). Struggling with the concept of liquidated versus unliquidated damages, this Court in Sullivan repeated the relied upon language in the context of examining various rules for determining when damages should be considered liquidated, not as a limitation on the rule that a jury can award prejudgment interest on unliquidated damages. 19 So. at 342-343.[3] That this

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[3] Although not accurately cited, Honeywell's reliance upon Sullivan is telling on the point just discussed. The jury instruction on prejudgment

is so is demonstrated by the fact that the Sullivan case was not cited in the Florida cases relied upon by Trend to demonstrate error and conflict, and that it has never been cited by a Florida court as limitating a jury's right to award prejudgment interest on unliquidated damages.[4]

Third, Honeywell suggests that the cases relied upon by Trend are all distinguishable on the facts (HB 9-11), but succeeds only in creating distinctions without differences. The overriding fact is that the cases cited by Trend hold, in contract and tort actions for property damages, that a jury can award prejudgment interest even when the damages are unliquidated. Honeywell has failed to cite a single case holding to the contrary - in reliance upon the Sullivan "corollary" or otherwise.[5]

B. The Test For Liquidated Damages Should Be Whether The Verdict Has The Effect Of Fixing Damages As Of A Prior Date.

On this point, Honeywell argues that if Bergen is simply viewed as

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interest was almost identical to the one Honeywell complains about here. 19 So. at 342 (jury "should assess the damages, with 8 percent interest, from whatever date the evidence showed the contract would be completed").

4 Ironically, if a Sullivan "rule" exists, it is based on language therein to the effect that damages should be considered liquidated when a judgment has the effect of fixing them as of a prior date. This is the test advocated by Trend in Point I(B) of its briefs and by the First District in Bergen Brunswig Corp. v. State Dept. of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982). This is the proposition that Sullivan is most often cited for. See Brite v. Orange Belt Securities Co., 133 Fla. 266, 182 So. 892, 896 (1938); Treadway v. Terrell, 117 Fla. 838, 158 So. 512, 519 (1935); McMillan v. Warren, 59 Fla. 578, 52 So. 825, 827 (1910); U.S. Home Corp. v. Suncoast Utilities, Inc., 454 So.2d 601, 606 (Fla. 2d DCA 1984); Nationwide Mutual Ins. Co. v. Griffin, 222 So.2d 754, 756 (Fla. 4th DCA 1969); Huntley v. Baya, 136 So.2d 248, 251 (Fla. 3d DCA 1962); Bailey v. Swartz, 97 So.2d 310, 311 (Fla. 3d DCA 1957). The language seized upon by Honeywell has never been cited or relied upon in a single Florida case.

5 Honeywell does seem to imply that Tampa Electric Co. v. Nashville Coal Co., 214 F.Supp. 647 (M.D. Tenn. 1963), stands for this proposition. (HB 11-12). It does not. Putting aside the questionable significance of the Middle District of Tennessee's views, the case was a non-jury case, and the issue of the jury's right to award prejudgment interest never came up. The case has never been cited for the proposition that a jury cannot award prejudgment interest on unliquidated damages.

another debt case, then the rule announced - that henceforth damages would be considered liquidated when a verdict has the effect of fixing them as of a prior date - is not new at all.[6] But both the First and Second District thought something new, the rejection of the disputed evidence test, was going on in Bergen. 415 So.2d at 767; Federal Deposit Ins. Corp. v. Carre, 436 So.2d 227, 230 (Fla. 2d DCA 1983). And Honeywell lamely acknowledges the conflict, agreeing that in light of these cases "Florida courts and lawyers [may] need guidance on prejudgment interest." (HB 20).

Ironically, while arguing that the Bergen test should not be adopted, Honeywell fails to even mention (much less defend) the disputed evidence test - the heart of the conflict and the test it relied upon so heavily in its efforts to deprive Trend of prejudgment interest in the trial and district court. (R. 460-63). Sensing its indefensibility, Honeywell does not challenge the fact that the disputed evidence test produces irreconcilable results and unfairly disparate treatment of litigants. Instead, it simply asks the Court to ignore the problem by pretending Bergen is just another debt case.

Finally, Honeywell argues against adoption of the Bergen test by parading the horribles. Allowing prejudgment interest where damages are fixed as of a prior date would, Honeywell argues, lead directly to the allowance of full costs and attorneys' fees in all cases because full compensation is a "two-way street." This domino theory argument is a poor analogy, ignoring the fact that both sides bear the burden of costs and attorneys' fees, while the burden of the loss of use of funds (interest) is borne only by the plaintiff denied prejudgment interest. Honeywell further pleads that the burden of delay

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[6] The fiction indulged in by Honeywell to put Bergen in "proper" perspective is that a judgment for conversion creates, "in effect", a debtor-creditor relationship. (HB 14). If that is so, Trend's judgment for fraud ought to create the same relationship, and be entitled to the same prejudgment interest.

should not be unfairly visited on the defendant because plaintiffs can cause delay too. Plaintiffs can cause delay, but the defendant gets the use of the money (interest) during the delay, while the length of the delay only determines whether the plaintiff will fall a little or a lot short of full compensation.

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

Honeywell urges the Court not to consider this point, suggesting that it would somehow be constitutionally inappropriate to do so since the matter was not included in the jurisdictional briefs. This Court has rejected such pleas in the past, noting that it is not only its prerogative but its duty to consider all issues raised so that the judicial process will operate in an efficient and speedy rather than piecemeal fashion. See Savoie v. State, 422 So.2d 308, 312 (Fla. 1982); Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977).

Honeywell's argument on the merits of this point distorts or ignores both the controlling legal principles and the evidence before the trial court. First, in implicit recognition of the fact that the district court did not give proper consideration to the trial court's discretionary decision to exclude expert testimony, Honeywell argues that the trial court did not really have "true" discretion - just "some measure" of it. (HB-22-23). Whatever that is supposed to mean, the fact is that the admission or exclusion of evidence, expert or otherwise, is a discretionary act which should not be disturbed absent a clear showing of abuse of discretion. See, e.g., Warner v. Caldwell, 354 So.2d 91, 97 (Fla. 3d DCA 1977), cert. denied, 361 So.2d 836 (1978); Guy v. Knight, 431 So.2d 653, 656 (Fla. 5th DCA), cert. denied, 440 So.2d 352 (1983);

Dale v. Ford Motor Co., 409 So.2d 232, 234 (Fla. 1st DCA 1982).

Next, rather than respond to the cases cited by Trend in support of the trial court's exclusion of the dollar volume calculation (Trend brief ["TB"] 36-38), Honeywell sidesteps the issue and suggests that the trial judge invaded the jury's province by deciding to exclude based upon the accountants' credibility. (HB 24-25). But the trial court never mentioned credibility, and it had nothing to do with the ruling. The inadmissibility of the dollar volume calculation was established by what Honeywell's accountants said: that the excluded opinion was based on a calculation not intended to represent market value; (R. 554-555; 1422-1423); that the last step in the calculation, subtracting the goods remaining after the theft at market value, was like "mixing apples and oranges" (R. 595); that, where the market swings were violent, their method would not work (T. 1423-24); and that they only "thought" the loss figure they came up with was "related" to market value because of a "tendency" for the market value to be in the "middle" of purchase and sale prices. (T. 1421-23, 1437-1438, 1763).

Then, in an effort make the trial judges' ruling appear less than reasonable, Honeywell spends eight pages of its brief massaging the facts. The principal themes are that the excluded calculation represented the best that Honeywell's experts could do given Trend's poor records; that, by applying cost of sales percentage to the dollar volume calculation, the failure to consider widly fluctuating precious metal prices was somehow cured; and that the excluded opinion did not ignore the less than rapid turnover of Trend's jewelry inventory. (HB. 26-33).[7] Each theme is calculated to mislead.

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[7] Honeywell does spend some time talking about the qualifications of its experts (HB 27-28), but these were never challenged. It also spends some time denigrating the method used by Trend to calculate its loss (HB 26-27), but it was never objected to in the trial court or the Third District, and Honeywell's experts, its counsel and independent witnesses are all on record stating that

Trend's records. Although all of Trend's purchase and sale invoices had the price, not all had the weight or a description of the units sold. This meant that the simplest way to determine the loss - adding the quantity bought, subtracting the quantity sold, and pricing the result based upon market values as of the day of the loss - was unavailable. But, contrary to Honeywell's assertion, the records necessary to calculate the loss based upon constant dollars, i.e., adjusting the purchase and sale prices to market value on the day of the loss before adding and subtracting them,[8] were available. Not one of Honeywell's record citations reveals a complaint by their experts that the records were insufficient to convert to constant dollars. Rather, the complaint is that they were insufficient to permit adding and subtracting everything by weight or quantity in the first instance. (HB 29). All that was necessary to convert to constant dollars was the very same records Honeywell's experts used to get the purchase and sale prices they added up, a list of the price of gold and silver on each day in question, and a calculator. In fact, the records had to be sufficient because Honeywell's own accountants actually performed the constant dollar value calculation and testified to its result! (T. 1428-1434; 1846). Honeywell is banking on this Court missing the difference between the adequacy of the records to calculate the loss based on units or weight, and their adequacy to convert purchase and sale prices into adjusted or constant dollar value.[9]

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the method was proper and acceptable. (T. 1478, 1485, 1897-98, 1924).

8 This method in effect converted the purchase and sale prices back into quantity. (T. 1897-98).

9 This is precisely the confusion that Honeywell was able to create in the Third District's mind. (A. 2). But it is all laid out in just a few pages of the testimony of Mr. Berkovitz, an accountant called as a witness by Honeywell, but whose testimony it now seeks to badly mischaracterize. (HB 34 N.16). Mr. Berkovitz said the first choice was to add the purchases and subtract the sales by weight, then value them as of the loss date. (T. 1893). Asked if he would

Cost of sales. Trend did omit any reference to the cost of sales component of the excluded calculation in its main brief. It did so because this component did not produce the fatal flaw in Honeywell's analysis. And it most certainly did not, as Honeywell seems to suggest, cure it! (HB 30-33). The concept of cost of sales works as follows. If Trend bought and sold $100 of silver in one day, this would not be a wash in terms of inventory because the price of the sale includes a mark-up. In other words, the quantity of silver sold for $100 may only have cost $80, leaving $20 worth of silver from that day's transactions still in inventory. The cost of sales in this example would be $80, and if you are trying to compute inventory you only subtract the cost of sales rather than the sales price because $20 worth of silver still remains in inventory. This is all well and good, but it does not address the real problem - that the $80 being subtracted one day could represent as much as 672% more silver than the same $80 being subtracted on another day. This is the intolerable margin of error, and Honeywell's accountants admitted that their analysis, complete with the cost of sales component, would not produce market value in the face of violent market swings. (T. 1423-24).

The rapid inventory turnover. Honeywell states that its accountants did consider both the rapid turnover of scrap and the less than rapid turnover of jewelry (HB 31). The obvious inference is that they took into account the 45-day turnover time for jewelry when arguing that their non-market value calculation was "related" to market value because of Trend's rapid inventory turnover. Not true. The only context in which Honeywell's accountants

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do the same thing using purchase prices (like Honeywell's experts did) if the records did not all have weights, he said "not really, no", because the value of precious metals was changing too rapidly. (T. 1895). Under these circumstances, he testified, you would use the records of purchase and sale prices and convert these prices back to quantity or constant dollar values using the market values at the time of each transaction (T. 1895-1898) - just like Trend did.

acknowledged the 45-day turnover time for jewelry was when they were comparing this to industry averages and using it as one way to attack Trend's damages. (T. 1533-37, 1835). It was never mentioned when inventory turnover time was being touted as the link between market and non-market value. In this context all that was mentioned was the 3-5 day turnover, or "very quick" or rapid turnover. (T. 1423, 1763).

Finally, in considering Honeywell's argument that exclusion of this one calculation and opinion was prejudicial, it must first be noted that Honeywell has declined to comment on or challenge the thirteen cases cited by Trend for the proposition that the admission of evidence substantially similar to that which is excluded renders any error harmless. (TB 39-42). If there was any error here, it was rendered harmless in just this fashion. Honeywell complains that the opinions its experts offered on the value of the loss were not as good as the excluded opinion because they were not allowed to say that the loss was precisely $533,016, and because there were no detailed exhibits or charts to back up their alternate opinions on the value of the loss (HB 33-34). This is nonsense. First, Honeywell's accountants did have detailed calculations to back up their loss figure of $238,000. (PX for ID, 1F, 1G, 1H, 1I, 1J and 1K). Honeywell just made a strategy decision not to put them into evidence.[10] Second, there was nothing anymore precise about the $533,016 figure than there was about the $238,000 or the $250,000-$500,000 figures testified to. Honeywell admits in numerous places in its brief that the $533,016 figure was just an estimate, and its accountants gave it a 10% swing either way ($106,000 spread) in terms of accuracy.[11]

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10 This is what produced the comment in final argument about no schedules or real calculations that Honeywell makes reference to on page 36 of its brief.

11 For these reasons, even if the opinion had been admitted, counsel for Honeywell would have been open to the same jab in final argument concerning

Honeywell's counsel wanted to disprove Trend's loss "nine ways from Sunday." (HB 36). The trial court kept one way out, but the other eight ways went into evidence. (TB 39-40). Eight is enough.

III

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

By its silence on the issue, Honeywell acknowledges that Trend's insurance application was evidence of a collateral source benefit. Yet, citing no Florida case law, Honeywell asserts that it was error for the trial court to exclude it because it was relevant impeachment evidence.[12] The existing Florida law is to the contrary. Relevancy for impeachment purposes does not overcome the policy behind the collateral source rule so as to make evidence of collateral source benefits admissible. See Clark v. Tampa Electric Co., 416 So.2d 475 (Fla. 2d DCA 1982); Grossman v. Beard, 410 So.2d 175 (Fla. 2d DCA 1982); Williams v. Pincombe, 309 So.2d 10 (Fla. 4th DCA 1975); Cook v. Eney, 277 So.2d 848 (Fla. 3d DCA).

The best that Honeywell can come up with is an argument that the trial court should have found that the relevancy of this evidence outweighed its potential for prejudice and confusion under Section 90.403, Florida Statutes. But this is the classic discretionary evidentiary ruling - entrusted to the trial judge who is seeing and hearing it all in a "living trial." A reading of

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proof that the loss was "not a penny more" than $533,000. (HB 35).

12 Honeywell does cite several out-of-state cases for the proposition that the insured value of property can be used for impeachment purposes. (HB 38n.18) But none of these cases mention the collateral source rule or address the issue in a context where the rule is applicable. See Shultz v. Commission of Assessment and Taxation, 85 A.D. 2d 928, 447 N.Y.S. 2d 78 (1981); Blount v. McCurdy, 593 S.W.2d 468, 470 (Ark. App. 1980); McDowell v. Schuette, 610 S.W.2d 29, 41 (Mo. App. 1980); Kelly v. Sonny Boy Appaloosas, Ltd., 491 P.2d 67, 71 (Colo. App. 1971).

the parties' respective arguments on relevancy versus prejudice and confusion dramatically demonstrates that this weighing process was one that needed the input and discretion of the trial judge on the spot. Honeywell can make no showing that the decision was beyond the bounds of reason.

Finally, Honeywell's relevancy argument, while not even sufficient on its face to turn the trial court's discretionary ruling into legal error, is fraught with critical omissions and inaccurate inferences. First, there were two independent factors weighing against relevancy in the Section 90.403 analysis - the potential for prejudice and the potential for confusion of the issues. Although Honeywell attempts to address the former (HB 39-40n.20),[13] it does not even challenge the fact that admission of the insurance application would have raised confusing collateral issues and resulted in a trial within a trial. (TB 46-49). Second, in its attempt to make the alleged November 3, 1979, inventory figure seem a little more relevant than it was, Honeywell argues that the application containing that figure was signed on the same day Trend was valuing its gold jewelry at $5.6 million in another inventory. (HB 37). This is patently false. The December 21, 1979, inventory was by weight and quantity - not dollar value. (PX 42). The $5.6 million value was assigned to it after the loss, using the $609 an ounce value of gold on the date of the loss. (T. 1162). The valuation was thus much higher than it would have been based on the $473 an ounce value of gold on December 21 or the $239 an ounce value on November 3 (PX 30). The dramatic contrast in values Honeywell tries

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13 The Florida cases relied upon by Honeywell in this part of its brief have to do with mentioning the existence of liability insurance - not collateral source insurance. That is an entirely different issue and, apart from the various postures taken by the Florida Legislature on the subject, it has frequently been held by this Court that a jury is entitled to know of the existence of liability insurance. See e.g., Purdy v. Gulf Breeze Enterprises, Inc., 403 So.2d 1325, 1330 (Fla. 1981); Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969).

to create never existed.

POINT RAISED BY RESPONDENTS

IV

THE DISTRICT COURT'S REVERSAL FOR A NEW TRIAL ON DAMAGES WAS NOT RIGHT FOR THE WRONG REASONS

Demonstrating a lack of confidence in the district court's reversal for a new trial on damages based upon the exclusion of expert testimony, Honeywell asks this Court to hold that the district court was right for the wrong reason - that a new trial on damages is required because the trial court admitted a December 21, 1979 inventory without a proper business records predicate.[14] Although at this stage of the proceedings both the trial court and the district court have held that the inventory was properly admitted, Trend will briefly respond to Honeywell's argument.[15]

The inventory in question was taken and used by Trend to determine its reordering requirements for gold jewelry in January and February. (T. 1157-59). Jay Weinberg was the officer of Trend responsible for all ordering, purchases, sales and pricing. He directed the inventory, personally

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[14] Honeywell's claim with regard to the December 21, 1979 inventory is largely a tempest in a teapot. Its argument, directed to the exhibit itself (PX 42), completely ignores that fact that testimony as to its contents, and the value of the goods it represented, went into evidence without objection. (T. 1156-1160).

[15] Before proceeding to the merits of Honeywell's argument, it must also be pointed out that Honeywell waived its hearsay objection to the December 21 inventory. Honeywell first improperly tried to object to it two to three days before it was offered. (T. 500-513). The trial court reserved ruling. (T. 513-514). Honeywell again improperly attempted to object to the inventory before Jay Weinberg went on the stand, but gave no grounds and got no ruling. (T. 1087). When the exhibit was finally offered, Honeywell's counsel simply stated "No additional objection, Your Honor." (T. 1160). A trial judge is not expected to rule on evidentiary objections in advance, and they do not preserve the point for appeal. The objection must be made, with the grounds stated, at the time the evidence is offered. Prior objections or motions will not suffice. Parry v. Nationwide Mutual Fire Ins. Co., 407 So.2d 936 (Fla. 5th DCA 1982); Swan v. Florida Farm Bureau, Ins. Co., 404 So.2d 802 (Fla. 5th DCA 1981); see Dowd v. Star Manufacturing Co., 385 So.2d 179 (Fla. 3d DCA 1980).

participated in about a third of the process (T. 1102-1103, 1158, 1251),[16] and positively identified it at trial based on personal knowledge. (T. 1158-59).

The inventory was simply a weighing and counting of the gold jewelry on the premises as of December 21, 1979. (PX 42). It was prepared by Jerry Siegel, the head of the jewelry department, and partly by Jay Weinberg, both of whom had personal knowledge of the inventory because they were doing the weighing and counting. (T. 1156-1159).[17] They used sophisticated equipment and a process they had depended upon countless times. (T. 1157-1159). Jay Weinberg actually used the inventory in Trend's regular operations on December 21, 1979.[18] Thus, Honeywell's complaint that this business record was not made at or near the time of the inventory by a person with knowledge is baseless.

The weighing and counting of different categories of goods was an integral part of Trend's business. The process was repeated countless times every day by Trend, and specifically by Jerry Siegel, the other participant in the December 21 inventory. (T. 1158-59, 1181-82). These kinds of partial inventories were done when goods were received from suppliers (T. 1158-59);

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16 The fact that Jay Weinberg specifically requested this inventory was nothing unusual. In one fashion or another he requested all inventories - he was in charge of that part of the business. (T. 1102-1103). This was not the kind of special request that placed the records outside of normal business practices in the cases cited by Honeywell. See Hiram Ricker & Sons v. Students International Meditation Society, 501 F.2d 550 (1st Cir. 1974)(maintenance men spying on conventioneers to record their number); Johnson & Johnson v. W. L. Gore & Assoc., Inc., 436 F.Supp. 704, 714n.17 (D.C. Del. 1977)(boss requests subordinate to prepare memo four years later to vouch for boss' side of a dispute).

17 The fact that some 9 out of approximately 250 entries on the inventory contain corrections with Jerry Siegel's initials next to them added to, not subtracted from, the inventory's reliability. The initialling of corrections is standard practice even on legal documents.

18 Honeywell's quotation to the effect that Jay Weinberg had never seen the original inventory is taken out of context. He was testifying on the question of whether a copy was admissible at trial in lieu of the original, and he was simply stating that he no longer knew where the original was. (T. 1247-48).

when scrap metal was sold to Trend (T. 1144, 1152); when scrap metal was shipped to refiners (T. 1142-1144); when salesmen took jewelry out on consignment (T. 1130-31); and when goods came from Trend's own factory (T. 1153-55). The examples are numerous, and the Court has before it hundreds of exhibits which represent inventories of part of Trend's goods on specific dates. (PX 36, 37, 38, 39, 41, 42, 43). This is the kind of routine procedure, regularly relied upon, which establishes the accuracy underlying the business records' rule. The December 21 inventory is just one example of the endless inventories prepared as part of Trend's regular business practices.[19]

Honeywell's objection that the inventory was not prepared as part of Trend's regular business practice - that it never inventoried this category of goods on this particular date for this particular purpose before - is hypertechnical. The concept of a regular business practice is not so restrictive. For example, the fact that Greyhound never made a baggage strap tag for Mr. Smith going from Los Angeles to Evansville before did not make that business record inadmissible. Rice v. U.S., 411 F.2d 485 (8th Cir. 1969).

In determining whether a sufficient business records' predicate was established, the trial court had broad discretion. See, e.g., McEachern v. State, 388 So.2d 244, 246 (Fla. 5th DCA 1980); Dusine v. Golden Shores Convalescent Center, Inc., 249 So.2d 40 (Fla. 2d DCA 1971). The predicate was there, and the discretion was not abused.

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19 Honeywell attempts to create a false picture of irregularity by claiming that Trend only took inventories at the end of its fiscal year. It was only complete inventories of all goods for tax purposes that were taken at the end of each fiscal year. (T. 1183-84). The December 21 inventory was not a complete inventory for tax purposes. It did not, for example, include silver jewelry, gold or silver bullion, gold or silver coins, or gold or silver scrap. (T. 1137; PX 42, 46). For this reason, it is hardly strange that Trend's accountants never saw it. Similarly, there was nothing unusual in the fact that Bertie Weinberg never saw the inventory. Jay, not Bertie Weinberg, did the ordering. (T. 1102-1103).

Finally, Honeywell's argument that the inventory should have been excluded because a copy as opposed to the original was offered is without merit. Section 90.953, Florida Statutes, provides that a duplicate is admissible to the same extent as an original unless there is a genuine issue as to its authenticity. Although Honeywell had many complaints about the document, there was no evidence to contradict Jay Weinberg's direct authentication of the document. (T. 1159). Further, there was an independent basis for admitting the copy under §90.954(1), Florida Statutes, which provides that evidence of the contents of a document, other than the original, is admissible if "[a]ll originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith." There was no evidence that the original was destroyed in bad faith. To the contrary, as counsel for Trend represented and Jay Weinberg testified, the original of this and other documents had gone through another lawsuit in which Trend was represented by different counsel and could no longer be located. (T. 1133-37, 1247-1249). The admission of copies under such circumstances is proper. Fredericks v. Howell, 426 So.2d 1200 (Fla. 4th DCA 1983); Pennsylvania Nat'l Mutual Casualty Ins. Co. v. Burns, 375 So.2d 302 (Fla. 2d DCA 1979).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief on the Merits was hand delivered this 31st day of March, 1985, to: James E. Tribble, Esq., Blackwell Walker Gray Powers Flick & Hoehl, 2400 AmeriFirst Building, One S.E. Third Avenue, Miami, Florida 33131, Attorneys for Respondents.

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Finally, Honeywell's argument that the inventory should have been excluded because a copy as opposed to the original was offered is without merit. Section 90.953, Florida Statutes, provides that a duplicate is admissible to the same extent as an original unless there is a genuine issue as to its authenticity. Although Honeywell had many complaints about the document, there was no evidence to contradict Jay Weinberg's direct authentication of the document. (T. 1159). Further, there was an independent basis for admitting the copy under §90.954(1), Florida Statutes, which provides that evidence of the contents of a document, other than the original, is admissible if "[a]ll originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith." There was no evidence that the original was destroyed in bad faith. To the contrary, as counsel for Trend represented and Jay Weinberg testified, the original of this and other documents had gone through another lawsuit in which Trend was represented by different counsel and could no longer be located. (T. 1133-37, 1247-1249). The admission of copies under such circumstances is proper. Fredericks v. Howell, 426 So.2d 1200 (Fla. 4th DCA 1983); Pennsylvania Nat'l Mutual Casualty Ins. Co. v. Burns, 375 So.2d 302 (Fla. 2d DCA 1979).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief on the Merits was hand delivered this 31st day of April, 1985, to: James E. Tribble, Esq., Blackwell Walker Gray Powers Flick & Hoehl, 2400 AmeriFirst Building, One S.E. Third Avenue, Miami, Florida 33131, Attorneys for Respondents.

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