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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-992

LEON KOPEL,

Petitioner,

vs.

BERNARDO KOPEL and ENRIQUE KOPEL,

Respondents.
_____/

L.T. Case No.: 3D11-536

ON DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER, LEON KOPEL

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ARGUMENT

Bernardo did not file an answer brief, which the Court may regard as an "implicit acknowledgment" of the validity of Leon's appeal. *See Am. Bankers Ins. Co. v. State ex rel. Osceola Cnty. Clerk*, 45 So. 3d 540, 540 n.1 (Fla. 5th DCA 2010) (finding that appellee's failure to appear was "an implicit acknowledgment of the validity of this appeal").

As we show below, (I) new Count II related back to the original complaint because it was based on the same conduct as the original complant; (II) substantial, competent evidence supported the verdict; (III) the verdict was not inconsistent; and (IV) Leon did not improperly introduce evidence of Enrique's personal wealth.

I. EVEN THOUGH COUNT II STATED A NEW CAUSE OF ACTION, IT RELATED BACK TO THE DATE OF THE ORIGINAL COMPLAINT BECAUSE IT WAS BASED ON THE SAME CONDUCT ALLEGED IN THAT COMPLAINT

Enrique argues that Count II is a "new claim" that should not relate back, and that this Court lacks jurisdiction, because, when the Third DCA held that Count II did not relate back, it "did not use a test different from its sister courts or this Court" (br. at 22, 25). But this Court already has ruled that it has conflict jurisdiction (*see* initial br. at 12-13), and Enrique gives the Court no reason to reconsider that decision.

Enrique first argues that statutes of limitations were enacted to preclude "'gotcha' tactics and surprise," and that a "claim for money lent is not the same as

a claim that there was a contractual agreement whereby one party promised to pay money to another in exchange for the other's ownership in investments" (br. at 23, 25). But the relation-back rule does not require claims or legal theories to be exactly the "same" as those alleged in an original complaint; indeed, the rule is a long-established *exception* to statutes of limitation "[w]hen the original complaint gives fair notice of the factual underpinning for the claim." *Fabbiano v. Demings*, 91 So. 3d 893, 895-96 (Fla. 5th DCA 2012). Enrique himself admits that Florida Rule of Civil Procedure 1.190 permits relation back when a new claim arises from the "same conduct, transaction, or occurrence" set forth in the original (br. at 22-23). And his own authority makes the same point. *See Caduceus Props. LLC v. Graney*, 137 So. 3d 987, 992 (Fla. 2014) ("[T]he purpose underlying statutes of limitations—namely, preventing lack of notice and prejudice to the defendant—is not implicated where . . . the plaintiff's claims concern the same conduct, transaction, or occurrence at issue."); *Totura & Co. v. Williams*, 754 So. 2d 671, 680 (Fla. 2000) (recognizing the "conduct, transaction, or occurrence" test for relation back). Enrique further concedes that any claim arising from the "same general fact situation" alleged in the original complaint relates back (br. at 24-25 (citing *Caduceus*, 137 So. 3d at 992; *Mender v. Kauderer*, 39 Fla. L. Weekly D1537 (Fla. 3d DCA July 23, 2014)); 27 (citing *Dailey v. Leshin*, 792 So. 2d 527, 532 (Fla. 4th DCA 2001))). And he admits that the relation-back rule is "to be

liberally construed and applied" (br. at 24-25 (citing *Caduceus*, 137 So. 3d at 992; *Mender*, 39 Fla. L. Weekly D1537)).

Despite these concessions, Enrique complains that Leon "presents only the facts of the case generally" (br. at 2). But that is precisely all that is required, and there can be no dispute that, consistent with the relation-back rule, both the original complaint and the 2009 amended complaint address the "same general fact situation." Enrique does not dispute that both complaints involve the same parties and the same amount in controversy. He admits that, in 1994, Leon alleged that he lent $5 million to Bernardo and Enrique (br. at 9, 29). And he admits that, in 2009, Leon alleged that he lent $5 million to Bernardo, and that Bernardo and Enrique failed to repay it as promised (br. at 29-30). Thus, the facts and circumstances of Leon's 2009 claims appear on the face of the 1994 complaint, where Leon alleged that he "has sought repayment of the $5 million dollars he loaned Defendant [Bernardo]" and that "Defendants have failed and refused to repay Plaintiff the monies due him, despite his repeated demands" (A. 5). Enrique has known about the "general fact situation" giving rise to Leon's "new claim" for 20 years. *See Fabbiano*, 91 So. 3d at 895. Therefore, he has no basis to argue that "no reasonable person would compare these two factual scenarios and suggest that they were remotely stating the same facts, circumstances, conduct, transaction or occurrence" (br. at 20).

Enrique argues that "no Florida court holds that the test is merely whether the general facts originally pled permits entirely new legal claims based on entirely different detailed facts to relate back" (br. at 18-19), but that is simply not this case. Enrique cites *Keel v. Brown*, 162 So. 2d 321 (Fla. 2d DCA 1964), for the proposition that the relation-back doctrine applies when the amended complaint is based on the "same **specific** conduct, transaction, or occurrence between the parties upon which the plaintiff tried to enforce his original claim" (br. at 25) (Enrique's emphasis). But Enrique omits *Keel*'s next sentence: "[i]f the amendment shows the *same general factual situation* as that alleged in the original pleading, then the amendment relates back—even though there is a change in the precise legal description of the rights sought to be enforced, or a change in the legal theory upon which the action is brought." 162 So. 2d at 323 (emphasis added). Nevertheless, Enrique argues that *Keel*, *Fabbiano v. Demings*, 91 So. 3d 893 (Fla. 5th DCA 2012), and *Armiger v. Outdoor Associated Clubs, Inc.*, 48 So. 3d 864 (Fla. 2d DCA 2010), allowed relation back only because they involved "the same identical operative facts"; the "identical facts and parties"; and the "same parties and the same facts" (br. at 28-29). But Enrique is not quoting those cases, and nothing in them requires that the alleged facts be identical. To the contrary, all of them hold that claims relate back where, as here, they are based on the "same general factual situation" set forth in the original complaint (*see* initial br. at 12-14).

Enrique also argues that "Florida courts have consistently and repeatedly applied" Rule 1.190 by "precluding amendment whenever and wherever a 'new, different and distinct' cause of action has been brought" (br. at 24). But since the Florida Rules of Civil Procedure were adopted, only two published decisions—both from the Third DCA—have discussed a "new, different, and distinct" test: *Trumbull Ins. Co. v. Wolentarski*, 2 So. 3d 1050, 1055 (Fla. 3d DCA 2009), and the decision under appeal. *Trumbull* and the Third DCA below, however, applied the antiquated relation-back rule that Rule 1.190 eliminated (*see* initial br. 15-16).

Enrique cites other cases that, like the Opinion, rely on the antiquated rule, or are distinguishable because the new claim, unlike here, was actually different, or both. In *West Volusia Hospital Authority v. Jones*, 668 So. 2d 635 (Fla. 5th DCA 1996), the court relied on *Livingston v. Malever*, 137 So. 113 (Fla. 1931), for the proposition that an amendment may not relate back "where it states a new and distinct cause of action from that set forth in the original pleading." 668 So. 2d at 636. But *Livingston* preceded this Court's adoption of the modern rule (initial br. at 15). Moreover, in *West Volusia*, the amendment brought "an entirely new party into the lawsuit." 668 So. 2d at 636. *School Board of Broward County v. Surette*, 394 So. 2d 147, 154 (Fla. 4th DCA 1981), also stated (incorrectly) that the relation-back doctrine "does not authorize a new cause of action," and similarly held that "the amended complaint in the present case not only alleged a different

cause of action from that alleged in the original complaint, but it was also filed by a different party." *Dailey v. Leshin,* 792 So. 2d 527, 532 (Fla. 4th DCA 2001) (br. at 26), applied the antiquated rule that "[a]mendments generally do not relate back if they raise a new cause of action," and the court found that the plaintiff's action to rescind a loan agreement under a federal statute did not relate back to claims for fraudulent inducement and negligent nondisclosure because the mortgagor had contracted to sell the subject property, thus forfeiting any statutory grounds for rescission. *Page v. MacMullan,* 849 So. 2d 15, 16 (Fla. 1st DCA 2003), applied the superseded "cause of action" test as well, stating that "the controlling question is whether the new count in the complaint . . . states a new cause of action." Moreover, the court held that the plaintiff could not invoke the "relation back" doctrine to circumvent the Florida statute fixing March 1 as the deadline to apply for a homestead exemption. *Id.* And in *Leavitt Communications, Inc. v. Quality Communications*, 939 So. 2d 257, 258 (Fla. 1st DCA 2006), the plaintiff added a second check to an original complaint to recover on another check.

Finally, Enrique argues prejudice because the "oral agreement with Respondent occurred in front of the party's parents," who are now deceased (br. at 30). But Enrique ignores that Chana Kopel testified in 1997 about Enrique's promise to repay Leon in exchange for Leon's agreement to relinquish his ownership interests (A. 71-72), and that her testimony, including Enrique's

counter-designations, was admitted at trial (A. 68-80). Enrique cites *Surf Drugs v. Vermette,* 236 So. 2d 108 (Fla. 1970), for the proposition that "[c]auses of action should be decided on their merits, and not as the result of "surprise, trickery, bluff, and legal gymnastics" (br. at 23). But *Surf Drugs* did not address the relation-back doctrine, and it is *Enrique* who does not want this case "decided on the merits." Nor can he claim that "surprise" impaired his defense because Leon served the Fifth Amended Complaint twenty months before this case went to trial (A. 13).

II. SUBSTANTIAL, COMPETENT EVIDENCE SUPPORTED THE JURY'S VERDICT ON ALL COUNTS IN THE COMPLAINT

Enrique does not dispute that an appellate court should not disturb a jury verdict supported by substantial, competent evidence (initial br. at 9). And Leon identified substantial, competent evidence to support the jury's verdict, including his own testimony and the testimony of Chana Kopel and Michael Rosenberg (initial br. at 19-22).

In response, Enrique first argues that "Leon never put any documents into evidence" (br. at 15) and that "not a single document was introduced to support [Leon's] claims of a loan of any amount to anyone" (br. at 31). But Enrique does not identify any rule requiring Leon to introduce documents into evidence. And Enrique admits that Leon provided "oral testimony concerning the monies allegedly loaned and the alleged promises," and that, "[o]n this oral testimony, Leon obtained a jury verdict finding for him on all counts" (br. at 15). That

testimony alone is substantial, competent evidence of the parties' oral agreement. *See Fernandes v. Barrs*, 641 So. 2d 1371, 1374 (Fla. 1st DCA 1994) ("[T]here is sufficient competent substantial evidence in this conflicting testimony to support a conclusion that an oral contract did exist."); *Isaak v. Chardan Corp.*, 532 So. 2d 1364, 1366 (Fla. 2d DCA 1988) (holding that the trial court erred in finding "no substantial, competent evidence to support the existence of an oral contingency fee agreement," where a party "testified as to the terms of the agreement").

Enrique also argues that Leon relied on "bits and pieces of testimony taken out of context" (br. at 31), but does not explain how Leon mischaracterized any evidence; instead, he asks the Court to consider other "bits and pieces" of testimony to conclude that the jury's verdict was erroneous (br. at 20-21, 32). But an appellate court is "not at liberty to [ ] reweigh the evidence presented in the case to decide whether the jury reached a result supported by the evidence." *See Van v. Schmidt*, 122 So. 3d 243, 259 (Fla. 2013); *see also P & O Ports Fla., Inc. v. Cont'l Stevedoring & Terminals, Inc.*, 904 So. 2d 507, 510 (Fla. 3d DCA 2005) ("Although there was evidence to support a contrary conclusion, as there is substantial competent evidence to support the trial court's conclusions, we will not disturb the trial court's findings on appeal.")

Enrique also argues that Count III for unjust enrichment fails because there is no evidence that Leon conferred a direct benefit on Bernardo and Enrique (br. at

32). But he ignores the evidence that the repayment of debt to Chana and Scharja benefitted *both* Bernardo and Enrique (initial br. at 17). And he does not dispute that he controlled two corporations—Eminence Corporation, N.V. and Nautilus Holding Ltd., BVI—which received funds from Leon (br. at 4). Nor does Enrique address Leon's cases showing that an unjust enrichment claim can be brought against a corporation's controlling shareholder where the corporation received a benefit (initial br. at 18). Instead, Enrique cites *Peoples National Bank of Commerce v. First Union National Bank of Florida N.A.*, 667 So. 2d 876 (Fla. 3d DCA 1996). That case does not address benefits received by a controlling shareholder (initial br. at 18-19). And he cites a footnote from *Florida Power Corp. v. City of Winter Park*, 887 So. 2d 1237 (Fla. 2004), which merely recites the elements of an unjust enrichment claim. *Id*. at 1242 n.4.

Finally, Enrique does not address Leon's argument that the Third DCA applied the wrong standard of review. In considering whether the verdicts were against the manifest weight of the evidence, the court ordered not a new trial but judgment in Enrique's favor (initial br. at 24). Indeed, by arguing that he "[should] receive a new trial at a minimum," Enrique seems to concede that, if this Court agrees with the Third DCA that the verdict was against the manifest weight of the evidence, the proper remedy is a new trial (br. at 3).

III. THERE IS NO INCONSISTENCY IN THE JURY'S VERDICT

Enrique argues that the Court should order a new trial because the jury's verdict was inconsistent (br. at 33). This Court should not even consider this issue—or Enrique's argument about evidence of his wealth (issue IV below)—because Enrique did not file a notice of cross-appeal. *See State v. Trowell*, 739 So. 2d 77, 78 (Fla. 1999) (finding that the appellee "did not cross-appeal this ruling, and thus the propriety of the denial of relief on these issues is not before us").

A jury verdict is inconsistent only when it contains "two findings of fact [that] are mutually exclusive." *Smith v. Fla. Healthy Kids Corp.*, 27 So. 3d 692, 695 (Fla. 4th DCA 2010); *see also Deklyen v. Truckers World, Inc.*, 867 So. 2d 1264, 1266 (Fla. 5th DCA 2004) ("The jury made no finding of fact that was inconsistent with any other finding it made."). This Court has held that, "[w]hen the intent of the jury is apparent, their verdict will be sufficient to sustain a judgment entered in conformity with the intent of the verdict." *Cory v. Greyhound Lines, Inc.*, 257 So. 2d 36, 40 (Fla. 1971); *see also Sutton v. Grossteiner*, 781 So. 2d 411, 412-13 (Fla. 2d DCA 2000) (same).

That is precisely the case here, where the jury's verdict is consistent both internally and with the trial court's final judgment. On Count I, the jury found that in October 1991 Leon Kopel lent $5 million to Bernardo Kopel, which was not repaid (A. 445). On Count II, the jury found that both Bernardo and Enrique

breached their verbal agreement with Leon, causing damages of $5 million (A. 446-47). Thus, the verdict on Counts I and II are consistent with a $5 million final judgment. On Count III, the jury found that Bernardo and Enrique were unjustly enriched when Leon conferred a $10 million benefit on them (A. 447). Damages for unjust enrichment are measured "based on [the] value from [the] standpoint of the recipient of the benefits." *Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 85 So. 3d 1112, 1115 (Fla. 4th DCA 2012). Here, Bernardo and Enrique used Leon's money to assume full ownership over the subject properties, which were later sold for nearly $20 million (br. at 37). Moreover, any inconsistency as to Count III is harmless because the trial court reduced the damages award to $5 million—the amount Enrique concedes that Leon provided (br. at 7). *See Dessanti v. Contreras*, 695 So. 2d 845, 847 (Fla. 4th DCA 1997) (finding error to be harmless after trial court reduced amount of damages).

Enrique nevertheless argues that the jury verdict is inconsistent because, on Count II, it allocated $3 million to Bernardo and $2 million to Enrique (br. at 33). But any such "error" is harmless; Enrique does not dispute that he would be jointly and severally liable for the full $5 million, regardless of how the jury apportioned damages (initial br. at 23). Indeed, in Enrique's own authority, the court "declined to order a new trial or to remand for a reallocation of the various components of damage unless the *verdict taken as a whole* is grossly excessive or contrary to the

manifest weight of the evidence" (br. at 34) (citing *W. Boca Med. Center, Inc. v. Marzigliano*, 965 So. 2d 240, 244 (Fla. 3d DCA 2007) (emphasis in original)). And *West Boca* noted that the "manner in which the jury itself allocated the awards to the various elements of damages made no legal difference to the bottom line—the clearly sustainable gross amount which the defendant must pay the plaintiff for the injuries it caused." *Id*. at 244; *see also KMart Corp. v. Bracho*, 776 So. 2d 342, 343 (Fla. 3d DCA 2001) ("[T]he jury's arguable misallocation of the amounts returned may be regarded as no more than harmless error in light of the reasonableness and unassailability of the bottom line amount.").

Moreover, even if the verdict was inconsistent, Enrique supplied the verdict form requiring the jury to allocate damages between Bernardo and Enrique (R65, Ex. T9. 4, 16). "A party may not make or invite error at trial and then take advantage of the error on appeal." *Gonzalez v. State*, 136 So. 3d 1125, 1147 (Fla. 2014). Enrique cannot now demand a new trial based on an error in his own verdict form. *See Schaffer v. Pulido*, 492 So. 2d 1157, 1157 (Fla. 3d DCA 1986) ("Without dispute, the plaintiffs submitted . . . the verdict form that was used in this case. This being so, the plaintiffs invited the error, if any, which occurred below and may not complain on a motion for new trial or on appeal . . . .").

Finally, Enrique claims that the trial court erred when it reduced the amount of damages on Count III without ordering a new trial on damages (br. at 34-35).

But Enrique cites no authority for his position that the Court's action—which reduced the judgment against him by half—was improper. And Enrique did not argue in his initial brief below that he is entitled to a new trial on this basis (R67, Tab A), thus waiving the issue. *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) ("[A]n issue not raised in an initial brief is deemed abandoned.") (marks omitted).

IV. LEON DID NOT INTRODUCE IMPROPER EVIDENCE OF ENRIQUE'S PERSONAL WEALTH

Enrique also argues that Leon improperly was allowed to give the jury the "false implication that [Enrique] was extremely wealthy" (br. at 35). But the testimony he cites only shows that both Leon and Enrique agreed that Leon did not receive any distribution when the warehouse and shopping center were sold; their testimony does not address Enrique's wealth (A. 197, 353-54). Moreover, Enrique failed to contemporaneously object, thereby waiving this argument (*see* A. 197, 353-54). *See Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) ("Proper preservation of error for appellate review generally requires . . . . a timely, contemporaneous objection at the time of the alleged error.")

Enrique also argues that Leon's counsel made improper comments during opening and closing, but a "trial court has discretion in controlling opening and closing statements, and its decisions will not be overturned absent an abuse of discretion." *King v. State*, 130 So. 3d 676, 687-88 (Fla. 2013). Moreover, the statements identified by Enrique do not address the personal wealth of either

Bernardo or Enrique. Leon's counsel stated that "the evidence will show that those businesses were sold for $19 million and still Leon Kopel did not get a penny back" (Respondent's Appendix, A – 3, p. 2.). Leon's counsel also stated—without any objection—that "when they sold the warehouses for 11 million dollars and paid off a mortgage that allegedly Leon had an ownership interest in . . . . [n]o one sent Leon any money" (R65., Ex. T9, 42-43). Moreover, Enrique later testified that the proceeds from those sales were reinvested and eventually lost due to the recession, and that he never received any distributions from the sales (A. 326-29). Thus, the jury did not hear evidence that Bernardo and Enrique profited personally from the sale of the warehouse and shopping center.

Enrique's single case does not support his argument. In *Sossa v. Newman*, 647 So. 2d 1018 (Fla. 4th DCA 1994), the plaintiff alleged injuries from a car accident and defendants noted that the plaintiff failed to visit any medical providers after her initial treatment. The court, although noting that the "general rule is that during trial no reference should be made to the wealth or poverty of a party," nonetheless found that "[p]laintiffs should have been able to elicit testimony . . . that the reason Plaintiff [ ] did not return to her doctors was due to the family's financial inability to pay for further medical treatment." *Id*. at 1019-20. Similarly here, evidence of the sale of the warehouse and shopping center was proper because it concerned key issues in the case—Bernardo and Enrique's

exercise of control over those assets and their refusal to distribute any funds to Leon notwithstanding their oral agreement to repay him $5 million.

Enrique also argues, without citation to authority, that "bad acts are not admissible" (br. at 37). But the "bad act" at issue—Defendants' failure to pay Leon out of the proceeds of the sale of the warehouse and shopping center—is directly relevant to Leon's contention that neither Defendant has repaid the $5 million that he loaned. Nevertheless, Enrique complains that the "prejudice and confusion injected into the case worked; the jury awarded $10,000,000 on the unjust enrichment count" (br. at 38). But any "prejudice" arose from directly relevant evidence, not an unrelated "bad act." And Enrique cannot rely on *Pierard v. Aerospatiale Helicopter Corp.*, 689 So. 2d 1099, 1101 (Fla. 3d DCA 1997), in which the court held that the amount of damages found by the jury "admittedly is a large sum of money, but is in accord with the evidence adduced." So too here, where the damages awarded by the jury are entirely consistent with the evidence that Leon's $5 million loan was never repaid.

CONCLUSION

For the reasons stated above and in the initial brief, this Court should quash the Opinion and reinstate the judgment.

Respectfully submitted,

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I certify that a copy of this brief was served by e-mail on September 15, 2014, on:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

By: /s/ Raoul G. Cantero
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