In the Supreme Court of Florida

No. SC12-0100

FIRSTATE INSURANCE HOLDINGS, INC.; FIRSTATE INSURANCE BY ELDRIDGE; FIRSTATE INSURANCE COMPANY PR, INC.; CHARLES ELDRIDGE; and RENEE ELDRIDGE,
Petitioners,

v.

FIDELITY WARRANTY SERVICES, INC.; and JIM MORAN & ASSOCIATES, INC.,
Respondents.

On Petition for Discretionary Review from the District Court of Appeal of Florida, Fourth District (L.T. Case No. 4D09-2411)

RESPONDENTS' BRIEF IN OPPOSITION TO JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Firstate's statement excludes almost all of the facts relevant to the portion of the opinion below that it challenges. Those facts are as follows.

1. Petitioners (collectively "Firstate") are two insurance agencies and their affiliates; respondents (collectively "JM&A") market and sell automotive service contracts. Firstate and JM&A entered into a written agreement authorizing Firstate to sell JM&A's service contracts in Puerto Rico. Shortly thereafter, a contractual dispute arose when Firstate failed to make timely payments to JM&A. Over the course of the dispute, JM&A's books showed that Firstate owed a growing debt to JM&A—a debt that, at one point, exceeded $600,000. 74 So. 3d 506, 508-09 (Fla. 4th DCA 2011).

Believing that Firstate was diverting funds contractually owed to it, JM&A terminated the agreement and sued Firstate, asserting breach-of-contract and other claims. Firstate counterclaimed, asserting, as is relevant here, a claim for tortious interference. 74 So. 3d at 509-10.

2. At trial, Firstate sought to establish damages on its tortious-interference counterclaim through its expert, Ronald Patella, who proposed using an income-based approach to business valuation. In a proffer, Patella estimated that Firstate had been worth approximately $9.1 million as of the termination date. Patella based his estimate on a projection of Firstate's purported lost profits five

years into the future. The trial court excluded Patella's testimony, however, as too speculative on the ground that JM&A indisputably possessed the right to terminate the agreement *for any reason* with only 90 days' notice. 74 So. 3d at 510.

Left with no evidence on damages, Firstate requested a recess to determine if Patella could testify using a different, asset- or market-value-based approach to valuation. 74 So. 3d at 510. JM&A objected on the ground that permitting Patella to change his opinion midstream would be highly prejudicial. *Id.* After the recess, Firstate abruptly announced that its intention had "always" been to establish "business destruction" damages through a "market value analysis" offered not by Patella, but by petitioner Charles Eldridge, one of Firstate's co-owners. *Id.* Over JM&A's objection, the trial court permitted Eldridge to testify, reasoning that "the owner of property can *always* testify to what he or she believes the value of the property to be." *Id.* (emphasis added).

Eldridge, however, did not base his valuation testimony on his knowledge as Firstate's owner; instead, he relied on a mathematical formula, purportedly drawn from his experience in the industry more generally, to quantify Firstate's "market value." 74 So. 3d at 510-12. Specifically, Eldridge testified that the industry would value an insurance agency by multiplying its "previous year's gross commissions by a multiplier somewhere between one and three." *Id.* at 510. Applying that formula, Eldridge multiplied by three an "annualized" six-month stream of

gross commissions and concluded that Firstate had been worth about $6.6 million as of the termination date. *Id.* at 510-11. Based on Eldridge's testimony, the jury awarded Firstate $3.25 million on its tortious-interference counterclaim. *Id.* at 511.

3. The Fourth DCA reversed in relevant part and remanded with instructions to direct a verdict for JM&A on the tortious-interference counterclaim.

At the outset, the Fourth DCA expressly acknowledged that an owner may ordinarily testify to the value of his property. 74 So. 3d at 512. But the court determined that "Eldridge's testimony turned into 'expert' testimony when he claimed to have specialized knowledge regarding the proper mathematical formula which should be used to calculate the market value of a niche insurance agency in Puerto Rico." *Id.* The court reasoned that Eldridge thereby ventured beyond a layperson's account of valuation based on personal knowledge of his business and instead gave "the very essence of expert testimony." *Id.* The court explained that "surprise, changed, or undisclosed expert testimony may result in prejudice sufficient to require a new trial," and added that a party could not "circumvent" that rule simply by offering the expert testimony through an owner. *Id.*

The Fourth DCA then found another defect in Eldridge's testimony: namely, that "it was based on speculation and conjecture." 74 So. 3d at 513. While recognizing that the ordinary remedy for the failure to cure the prejudice caused by Eldridge's surprise testimony would be a new trial, the court concluded that, be-

cause the testimony was also speculative and conjectural, JM&A was entitled to the entry of judgment in its favor. *Id.* at 515. The court reasoned that, because Firstate had presented no other evidence on damages, it was "not entitled to a second bite at the apple" on that essential element of its claims. *Id.* (internal quotation marks omitted).

4. The Fourth DCA denied Firstate's motions for rehearing.

SUMMARY OF ARGUMENT

In its jurisdictional brief, Firstate fails to identify a single decision that "expressly and directly conflict[s]" with the Fourth DCA's decision "on the same question of law." Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). To the contrary, the Fourth DCA properly applied familiar and settled principles of Florida law governing fact witnesses who offer undisclosed expert testimony, and ordered the appropriate remedy when a party introduces nothing but speculative evidence of damages at trial. The Fourth DCA's unanimous decision in this case is unexceptional, and the petition for discretionary review should therefore be denied.

ARGUMENT

I. THE FOURTH DCA'S DECISION THAT ELDRIDGE GAVE SURPRISE EXPERT TESTIMONY DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER DCA

Firstate contends (Br. 3-5) that, by determining that Eldridge gave surprise expert testimony, the Fourth DCA created a conflict with decisions of other Districts. That contention lacks merit.

Firstate first suggests that the Fourth DCA announced a new rule that "an owner whose background in his own business might otherwise qualify him as an expert *cannot* provide lay testimony on the value of that business." Br. 4. But that is not what the Fourth DCA did in the opinion below. The Fourth DCA simply reasoned that the generally applicable rule—that a witness who gives expert testimony is subject to the rules governing experts—applies equally to the owner of a business. Accordingly, the court explained, the testimony of an owner as to the value of his business may constitute expert testimony where, as here, the owner's testimony is based on "specialized knowledge . . . acquired through his experience in the [relevant] industry." 74 So. 3d at 512; *see also* § 90.701(2), Fla. Stat. (2008) (providing that a lay witness cannot offer opinion testimony where the opinion requires "a special knowledge, skill, experience, or training"). Eldridge did not base his valuation opinion on his lay knowledge *of Firstate*; rather, he based it on his purported knowledge about the industry more generally. For that reason, the Fourth DCA properly concluded that his testimony was "the very essence of expert testimony," and that permitting it would "circumvent" the rule barring the introduction of "surprise, changed, or undisclosed expert testimony." 74 So. 3d at 512.[1]

[1] Contrary to Firstate's repeated contentions (Br. 3, 7), the Fourth DCA did not characterize Eldridge's testimony as expert testimony simply because he *possessed* knowledge about the industry more generally, much less that he possessed "*too much*" knowledge; rather, it did so because his testimony was *dependent* on such knowledge. *See, e.g.*, 74 So. 3d at 512.

Firstate alternatively suggests that the Fourth DCA "failed to apply the established rule that an owner, upon proper foundation, may offer lay testimony as to the market value of his business." Br. 4. But again, that is not what the Fourth DCA did. To the contrary, as Firstate concedes (Br. 4), the Fourth DCA acknowledged the general rule that an owner may ordinarily offer lay testimony as to property value; it merely concluded that the general rule was inapplicable here because Eldridge was offering undisclosed *expert* testimony. *See* 74 So. 3d at 512.

It is not the law in Florida, or anywhere else, that a property owner has *carte blanche* to offer testimony as to the value of that property. Rather, under Florida law, "[t]he presumption that an owner is sufficiently familiar with property to give an admissible opinion as to its value is a fragile one." *Craig v. Craig*, 982 So. 2d 724, 729 (Fla. 1st DCA 2008) (internal quotation marks omitted). Just as an owner may not opine on the value of his property when he lacks familiarity with the property, so too an owner may not opine on the value of his business as a lay witness unless his valuation is based on, and tied to, his familiarity with the business itself, as opposed to knowledge about the industry more generally. As the opinion below makes clear, Eldridge applied a mathematical formula purportedly used in the industry generally to value insurance agencies; he did not rely at all on any characteristic unique to Firstate or with which he was familiar as its owner. *See* 74 So. 3d at 510-11, 512. Under those circumstances, the Fourth DCA's conclusion that El-

dridge was testifying as an expert is unremarkable—and consistent with the broader principle that testimony based on specialized industry knowledge constitutes expert testimony. *See, e.g.*, *Vega v. State Farm Mut. Auto. Ins. Co.*, 45 So. 3d 43, 44 (Fla. 5th DCA 2010) (per curiam); *Weese v. Pinellas County*, 668 So. 2d 221, 223 (Fla. 2d DCA 1996).

None of the cases Firstate cites presents an even remotely comparable situation to the one presented here. Instead, those cases primarily deal with the question of when an owner's *lay* testimony is too speculative to have been admitted. And far from suggesting that a property owner has *carte blanche* to offer testimony as to the value of that property, those cases reiterate the "fragility" of the presumption that an owner is sufficiently familiar with his property to offer a lay opinion. Thus, in *Fritts v. State*, 58 So. 3d 430 (Fla. 1st DCA 2011), an owner guessed at the value of his stolen electronics; the court rejected the owner's testimony because it was speculative. *Id.* at 432. Similarly, in *Christopher Advertising Group, Inc. v. R&B Holding Co.*, 883 So. 2d 867 (Fla. 3d DCA 2004), a business owner opined on the value of his business's stolen advertising database; the court excluded the testimony on the ground that, just like other witnesses, an owner may not give speculative testimony. *Id.* at 871, 872 & n.4. And in *Craig*, *supra*, the owner valued his real property, but admitted that he had no "expertise in real estate development"; the court held that, while the testimony was "lay opinion," it should have

been excluded as speculative. 982 So. 2d at 726-27, 729.[2] None of those cases addresses the situation in which the owner's undisclosed testimony depends on general knowledge about the industry, rather than familiarity with his own business.

Finally, and critically, the Fourth DCA held that Eldridge's testimony should also have been excluded for the entirely independent reason that it "was based on speculation and conjecture." 74 So. 3d at 513. In its jurisdictional brief, Firstate does not challenge that determination. Thus, even if the asserted conflict as to owner testimony existed, the speculative and conjectural nature of Eldridge's testimony would independently justify its exclusion, and the result here would be the same. Further review on this issue is unwarranted.

II. THE FOURTH DCA'S DECISION NOT TO ORDER A RETRIAL DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER DCA

Firstate next contends (Br. 5-7) that, by ordering judgment in JM&A's favor rather than remanding for a new trial, the Fourth DCA created a conflict with a decision of the Third DCA. That contention also lacks merit.

The Fourth DCA explained that, if the only flaw with Eldridge's testimony

[2] In the fourth case cited by Firstate, *Reliance Insurance Company v. Pro-Tech Conditioning & Heating*, 866 So. 2d 700 (Fla. 5th DCA 2003), the court held only that a company's officer, who had not been included on the company's list of expert witnesses, should have been permitted to give testimony as to damages based on his familiarity *with the specific property at issue*. *Id.* at 702.

were that it constituted impermissible expert testimony, a new trial would ordinarily be warranted. 74 So. 3d at 513. The court ultimately ordered judgment in JM&A's favor, however, because the testimony was also "based on speculation and conjecture"—and, without that testimony, there would be a failure of proof on damages. *Id.* at 513, 515. That conclusion comports with the well-established principle that a plaintiff is not entitled to a new trial when he fails to introduce any competent evidence of damages, because a retrial would give him an unfair "second bite at the apple." *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1131 (Fla. 4th DCA 2007) (internal quotation marks omitted); *accord Allard v. Al-Nayem Int'l, Inc.*, 59 So. 3d 198, 201 (Fla. 2d DCA 2011); *Van Der Noord v. Katz*, 481 So. 2d 1228, 1230 (Fla. 5th DCA 1985).

In asserting a conflict, Firstate relies exclusively on—and dramatically overstates—a two-paragraph, per curiam opinion from the Third DCA. *See All American Pool Surface, Inc. v. Jordan*, 870 So. 2d 885 (Fla. 3d DCA 2004) (per curiam). The supposed conflict is illusory. To begin with, the Third DCA's opinion does not suggest that the defendant had requested a directed verdict, as JM&A did here, rather than a new trial. In addition, it does not address whether the plaintiff introduced other proof on the correct measure of damages—proof that was conspicuously missing here. And the absence of conflict is confirmed by an earlier decision in which the Third DCA reversed the trial court's judgment, without remand-

ing for a new trial, after determining that "there was no substantial competent evidence to support the award of damages or at best the damages, if any, suffered . . . were too speculative." *Eshkenazi v. Las Fabricas, Inc.*, 360 So. 2d 430, 432 (1978) (per curiam).

Finally, even if Firstate could establish the requisite express and direct conflict, there is no valid justification for the rule Firstate espouses. If a plaintiff were not required to present admissible damages evidence the first time around, it would subject a defendant to endless retrials on evolving damages theories, with no guarantee of finality. And given the circumstances of this case—where Firstate effectively bet and lost on a deficient damages expert, then unexpectedly sought to present testimony through its owner that otherwise would have been impermissible—it would be particularly inequitable to permit a new trial. The Court should deny the petition for review and bring this long-running litigation to a close.

CONCLUSION

The petition for discretionary review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2012, I sent a true and correct copy of Respondents' Brief in Opposition to Jurisdiction by third-party commercial carrier for delivery overnight to the following counsel:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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