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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JITENDRA SHAH,

Plaintiff, and Appellant,

v.

STEAM AND STARCH CORPORATION
et al.,

Defendants and Appellants.

B221487

(Los Angeles County
Super. Ct. No. BC379727)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Michael Solner, Judge. Affirmed.

Marcarian Law Firm, Marc L. McCulloch and Armond Marcarian for Defendants and Appellants.

Burkhalter Kessler Goodman & George, Daniel J. Kessler and Joshua A. Waldman for Plaintiff and Appellant.

INTRODUCTION

Defendants Steam and Starch Corporation, doing business as Steamer Cleaners, Shahrokh Basseri and Nicole Basseri filed a notice of appeal from a judgment on special jury verdict in favor of plaintiff, Jitendra Shah (Shah), and from an order granting a new trial on the issue of damages. Shah filed a protective cross-appeal from the judgment and new trial order. Shahrokh Basseri filed a notice of appeal from a judgment of dismissal as to his cross-complaint. By order of this court, the appeals from the judgments on the complaint and cross-complaint were stayed pending further order of this court, in that there is no final judgment on the complaint due to the grant of a new trial. The scope of this appeal is limited to the order granting a new trial on the issue of damages.

This appeal involves the proper measure of damages for breach of an executory contract and the evidence as to damages presented in this case. We agree with the trial court as to the measure of damages and that a new trial as to damages is proper due to the erroneous admission of evidence on that issue. We therefore affirm the order granting a new trial on the issue of damages. In all other respects, we dismiss the appeals.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Contract and its Breach

Shahrokh Basseri and his wife Nicole were the owners of Steam and Starch Corporation, which operated Steamer Cleaners. The Baseris owned the real property on which Steamer Cleaners was located.

On June 26, 2007, Shah and Shahrokh Basseri executed the “Steamer Cleaners Purchase Offer,” by which Shah agreed to purchase Steamer Cleaners for \$2,850,000. The purchase offer was for the business only, not the real property on which it was located, and was contingent upon the execution of a lease for the real property.

Shah made a deposit on the purchase and arranged financing, as contemplated by the Purchase Offer.

Shah was unaware that the real property on which Steamer Cleaners was located was formerly the site of a gas station, and the property was severely contaminated. Shahrokh Basseri, however, was aware of this information.

When Shah learned that the property might be contaminated, he sought indemnity for contamination on the property. Shahrokh Basseri wanted Shah to indemnify him for any contamination to the property caused by Shah, and Shah sought to conduct intrusive testing of the property before he would agree to indemnify Basseri. Basseri initially agreed to the testing but later refused to allow it. The Basseris attempted to cancel escrow and refused to go through with the sale.

B. Shah's Lawsuit

Shah filed this lawsuit against the Basseris and their corporation. He sought \$9.6 million in damages for breach of contract, specific performance of the escrow instructions and damages for fraud based on suppression of material facts. Shahrokh Basseri filed a cross-complaint against Shah, seeking damages for fraud. The gravamen of his cross-complaint was that Shah had no intention of performing his obligations under the contract. The cross-complaint was dismissed following Shah's successful motion for nonsuit.

C. Financial Experts—Pretrial

Shah's financial expert, Richard Holstrom (Holstrom), is a certified public accountant with certification in financial forensics. In his deposition, Holstrom analyzed Shah's damages for breach of contract in terms of lost anticipated profits. His initial calculation was for a five-year period, in that he believed a calculation for a longer period would be too speculative. He later gave a revised calculation of lost profits for an additional 10-year period.

Defendants' financial expert, Phillip Allman (Allman), has a Ph.D. in economics. He testified in his deposition that lost profits were not an appropriate measure of damages resulting from an unconsummated business transaction. In his view, Shah suffered no damages because the transaction was merely an exchange of assets of equal value. Since the transaction was not consummated, Shah lost nothing.

Shah filed a motion in limine to exclude Allman's opinion "re lost profits." He claimed that Allman's analysis of damages was contrary to law. He also claimed it was inadmissible because it was based on an improper theory.

Defendants filed two motions in limine to exclude Holstrom's opinion. The first sought to exclude Holstrom's revised analysis of lost profits for a period extending beyond five years on the ground Holstrom himself testified that the calculation would be speculation. Defendants' second motion in limine sought to exclude evidence regarding the "proposed business model" which was the basis of Holstrom's revised lost profits calculation.

The trial court denied all three motions in limine, noting that it was denying defendants' motions without prejudice.¹

D. Financial Experts—Trial Testimony

1. Holstrom

Holstrom testified that he calculated Shah's lost profits, that is, the profits Shah would have received had the transaction been consummated. In order to calculate lost profits, Holstrom calculated Steamer Cleaners' forecasted revenue based on historical financial data. From this amount, he deducted the expenses Shah would have incurred to operate the business, including rent and interest on the loan to purchase the business.

¹ The conference at which the rulings were made was not transcribed, and the record contains no explanation of the trial court's rulings.

Holstrom testified that he did not deduct the purchase price of the business from the forecasted revenue. Neither did he include a credit for the value of the business based on what Shah could expect to receive if he sold it in the future.

Holstrom gave the jury different options for calculating lost profits. These included calculations based on both five- and 10-year forecasts. They also included calculations based on whether Shah's expenses were similar to those of the Bassaris or whether he was able to operate more efficiently, as he had operated other dry cleaning businesses he had owned.

It was Holstrom's opinion that Shah had lost profits in the amount of \$6,194,320. This opinion was based on a 10-year forecast of lost profits.

2. Allman

It was Allman's opinion that Shah had no lost profits, because he retained his purchase money, which the market dictated was equal to the value of Steamer Cleaners. Allman explained that "the exchange doesn't go through so you each keep your own asset, so you haven't lost anything; you still have your asset. And that's my fundamental opinion in this case."

Allman also challenged Holstrom's failure to include the cost of purchasing the business in his calculation. He explained that "when you have a voluntary agreement between people, let's say that you have cash and somebody else has a house and you want to buy that house. You give up your cash and they give you the house. Then they have the cash; you have the house. And then you get the benefits of the house as a result of that transaction and they get the cash. [But if the transaction] didn't go through. So you still have your cash and they still have all the benefits of the house going into the future.

"Now, according to [Holstrom's] theory of damages, you keep your cash and then you get the house as well. You never pay for it. You never hand it back over again. In other words, if this deal had been consummated, the cash would have had to be given up. That giving up of the cash was never placed into this analysis."

On cross-examination, Allman was asked whether there would “ever be a circumstance where [a] plaintiff such as Mr. Shah who is a purchaser of a profitable business but that contract is breached—in your opinion, that person can never obtain lost profits; right?” Allman initially stated, “No, that’s not right.”

Allman was then confronted with his deposition testimony, in which he responded, “. . . I don’t know about never, but I think the answer is yes. Never.” Allman claimed his deposition testimony was taken out of context. Shah’s counsel then read another portion of the deposition testimony, in which Allman was asked, “The theory of lost profits due to an unconsummated business purchase contract is nonexistent to you; right?” Allman’s response was, “Correct.”

Allman was also questioned regarding the jury instructions to be given in this case, CACI Nos. 352 and 3903. He acknowledged that neither one states that, in calculating lost profits, the purchase price of the business must be deducted from the expected revenue as one of the expenses. When later asked whether an “expense [is] the same as the cost of acquiring the business,” he responded, “Well, it is to me.”

3. Motions to Exclude

During Allman’s testimony, Shah renewed his motion in limine to exclude the testimony as “absolutely contrary to California law with regard to lost profits.” He also moved to strike the testimony for the same reason. The trial court denied the motions, explaining, “. . . I couldn’t find any law and none has been cited to me directly on point that says it’s in or it’s out, the cost of the business. But the CPA has opined that it’s a wash. If you put it in, you pull it out at the end, so don’t mess with it. The economist is taking a different point of view. I think the jury needs to consider this.”

Defendants then filed a motion in limine to exclude Holstrom’s trial testimony as lacking any evidentiary foundation, speculative, and irrelevant because not based on any matter that is a type that reasonably may be relied upon by an expert. This also was denied.

E. Jury Instructions and Verdict

The trial court instructed the jury on the question of damages as follows:

“No person can recover the greater amount for breach of an obligation than he could have gained from the full performance thereof on both sides.” (Defendant’s Special Instruction No. 7.)

“If you decide that Jitendra Shah has proved his claim against defendant Shahrokh Basseri, Nicole Basseri, and Steam and Starch Corporation for breach of contract, you must also decide how much money will reasonably compensate Jitendra Shah for the harm caused by the breach. This compensation is called damages.

“The purpose of such damages is to put Jitendra Shah in as good a position as he would have been if defendant Shahrokh Basseri, Nicole Basseri, and Steam and Starch Corporation had performed as promised.

“To recover damages for any harm Jitendra Shah must prove:

“One, that the harm was likely to arise in the ordinary course of events from the breach of the contract; or, two, that when the contract was made, both parties could have reasonably foreseen the harm as the possible result of the breach.

“Jitendra Shah also must [prove the] amount of his damages according to the following instructions:

“He does not have to [prove the] exact amount of damages. You must not speculate or guess in awarding damages.

“Jitendra Shah claims damages for the profits he would have earned as the owner of Steam and Starch Steamer Cleaners had the defendants not breached the contract.” (CACI No. 350.)

“To recover damages for lost profits, Jitendra Shah must prove that it was reasonably certain he would have earned profits but for Shahrokh Basseri, Nicole Basseri, and Steam and Starch Corporation’s breach of the contract.

“To decide the amount of damages for lost profits, you must determine the gross or total amount Jitendra Shah would have received if the contract had been performed and then subtract from that amount the costs, including the value of the labor, materials,

rents, expenses, and interest on loans invested in the business that Jitendra Shah would have had if the contract had been performed. You do not have to calculate the amount of the lost profits with mathematical precision, but there must be a reasonable basis for computing the loss.” (CACI No. 352.)

Over Shah’s objection, the trial court provided the jury with the special verdict form prepared by defendants. On the breach of contract cause of action, after finding breach and harm, the jury found damages as follows:

“7. What are Jitendra Shah’s damages?

“a. Past loss including lost profits from Steamer Cleaners’ operations: \$65,000.00

“b. Future loss including lost profits from Steamer Cleaners’ operations: \$ 0

“TOTAL \$65,000.00”

The jury found in favor of defendants on the remaining causes of action.

F. *New Trial Motion*

Shah then moved for a partial new trial on the issue of damages for breach of contract and on the issues of liability and damages on his remaining causes of action. Among the bases of his motion were inadequacy of the award of damages and the erroneous admission of Allman’s testimony, and that the verdict was contrary to law.

The trial court granted a new trial on the breach of contract cause of action. It explained: “The court determines that plaintiff is entitled to a new trial under the provisions of Code of Civil Procedure Section 657[, subdivision](6) because the jury verdict is contrary to law. The Court allowed the trial testimony of defense expert Dr. Allman as to damages, which testimony, as predicted by plaintiff in motions in limine, turned out to be contrary to California law. See, e.g., Civil Code Section 3358, Evidence Code [section] 803 and CACI [No.] 352. The erroneous admission of this testimony resulted in prejudice to plaintiff, and a new trial as to damages for breach of contract is mandated.”

DISCUSSION

A. *Standard of Review*

As a general rule, “a motion for a new trial is a matter resting so completely in the trial court’s discretion that its ruling will not be disturbed unless a manifest and unmistakable abuse of discretion appears, particularly where discretion is exercised in favor of a new trial [citations], and all presumptions are in favor of the order [citations].” (*Richard v. Scott* (1978) 79 Cal.App.3d 57, 63.)

Where the basis of the new trial order is excessive or inadequate damages, the order will be reversed only if there is no substantial support in the record for the order. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 386.) The order “““must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court’s] theory.” [Citation.] Moreover, “[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached” [Citation.] In other words, “the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the [new trial] order.” [Citation.]” (*Ibid.*, quoting from *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)

We give deference to the new trial order because “““the trial court, in ruling on [a new trial] motion sits . . . as an independent trier of fact.” [Citation.] Therefore, the trial court’s factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury’s factual determinations. [¶] . . . The trial court . . . is in the best position to assess the reliability of a jury’s verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons.” (*Horsford v. Board of Trustees of California State*

University, supra, 132 Cal.App.4th at p. 386, quoting from *Lane v. Hughes Aircraft Co., supra*, 22 Cal.4th at p. 412.)

Where a new trial is based on an error of law, the presumption in favor of the trial court's ruling does not apply. (*Richard v. Scott, supra*, 79 Cal.App.3d at p. 63.) Rather, we review the propriety of the new trial order independently, since the issue is a question of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Richard, supra*, at p. 63.) "An erroneous evidentiary ruling may, of course, be an error in law for which a new trial may be granted. [Citations.]" (*Richard, supra*, at p. 63, fn. 2.) We independently review such a ruling.

B. The Proper Measure of Damages for Breach of an Executory Contract for the Sale of a Business

The Supreme Court reviewed the proper measure of damages for breach of contract in *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960: "Damages awarded to an injured party for breach of contract 'seek to approximate the agreed-upon performance.' [Citation.] The goal is to put the plaintiff 'in as good a position as he or she would have occupied' if the defendant had not breached the contract. [Citation.] In other words, the plaintiff is entitled to damages that are equivalent to the benefit of the plaintiff's contractual bargain. [Citation.]" (*Id.* at pp. 967-968.)

"The injured party's damages cannot, however, exceed what it would have received if the contract had been fully performed on both sides. (Civ. Code, § 3358.) This limitation of damages for breach of a contract 'serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' [Citation.]" (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist., supra*, 34 Cal.4th at p. 968.)

The court explained that there are two types of contractual damages: "general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." (*Lewis Jorge Construction Management, Inc. v. Pomona*

Unified School Dist., *supra*, 34 Cal.4th at p. 968.) General damages are described as “those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. [Citations.] Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are ‘deemed’ to have contemplated them. [Citations.]” (*Ibid.*)

Special damages “are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). [Citations.] Special damages ‘will not be presumed from the mere breach’ but represent loss that ‘occurred by reason of injuries following from’ the breach. [Citation.] Special damages are among the losses that are foreseeable and proximately caused by the breach of a contract. [Citation.] (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, *supra*, 34 Cal.4th at pp. 968-969.)

The court observed that “[g]eneral damages for breach of a contract ‘are based on the value of the performance itself, not on the value of some consequence that performance may produce.’ [Citation.] Profits ““which are the direct and immediate fruits of the contract”” are ““part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.”” [Citation.]” (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, *supra*, 34 Cal.4th at p. 971.) Thus, “[u]nearned profits can sometimes be used as the measure of general damages for breach of contract.” (*Ibid.*)

Whether lost profits are a suitable measure of general damages for breach of contract will depend on the facts of the case. In *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, *supra*, which involved the breach of a construction

contract, the court noted that “[d]amages measured by lost profits have been upheld for breach of a construction contract when the breaching party’s conduct prevented the other side from undertaking performance.” (34 Cal.4th at p. 971.)

In *Ribiero v. Dotson* (1960) 187 Cal.App.2d 819, the parties had a contract for the sale of a bar business, but the seller refused to complete the sale. (*Id.* at p. 820.) The court approved a damages award based on lost profits. (*Id.* at p. 822.)

The case of *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442 involved the breach of a joint venture agreement. In discussing whether an award of lost profits was proper, the court noted that “[t]he rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.” [Citation.]” (*Id.* at p. 455.)

The court observed that in “[c]ontract cases not involving the sale of goods,” lost profits may be awarded as damages. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp., supra*, 226 Cal.App.3d at p. 456.) Where “profits and advantages are expressly stipulated for in the contract, and are the real purpose and direct and immediate fruit of a contract, they are part and parcel of it and must be considered as entering into and constituting a portion of its very elements.” (*Id.* at pp. 456-457.) That is, lost profits may be recovered where the purpose of the contract is the enjoyment of profits, and profits “are presumed to have been taken into consideration and deliberated upon before the contract was made.” (*Id.* at p. 457.)

In *Brandon & Tibbs*, the ultimate purpose of the joint venture agreement was for the plaintiff to acquire the defendant corporation and to generate profits from the business. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp., supra*, 226 Cal.App.3d at p. 458.) Under the circumstances, an award of lost profits was appropriate.

Appellants cite a number of cases which measured damages by the difference between the market price and the contract price. The facts of these cases distinguish

them from the instant case, however. Either the purpose of the contract at issue was not to generate profits, or a statutory measure of damages applied.

Wickman v. Opper (1961) 188 Cal.App.2d 129 involved the sale of a business, a cocktail bar. The buyer took possession of the business but subsequently repudiated the contract. The seller took possession and resold the business, at a lower price. (*Id.* at pp. 130-131.) The court held that “[t]o assure the [seller] the benefit of her bargain, the application of a measure of damages analogous to that generally prescribed with respect to sales of goods or an interest in real property is fair and reasonable under the circumstances of this case. Stated broadly, the general damages recoverable under such a measure are the difference between the contract price and the market price at the time of breach.” (*Id.* at pp. 132-133.)

In *Wickman*, the non-breaching seller’s purpose in entering into the contract was not to generate profits; it was to realize a certain amount of money from the sale of the business. In the instant case, it was the seller who breached the contract, not the buyer. While the seller’s loss can be measured in terms of the lost value of the business when resold following the breach, the buyer’s loss cannot.

In *La Rosa v. Glaze* (1936) 18 Cal.App.2d 354, the buyer sued for breach of a contract to sell a crop of grapes. (*Id.* at p. 356.) The measure of damages was that provided in Civil Code section 3354: “the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession.” (*Id.* at p. 358.)

Civil Code section 3354 applies to a contract for the sale of goods, not a business. In appropriate circumstances, the same measure of damages may apply to the sale of a business. (See, e.g., *Wickman v. Opper*, *supra*, 188 Cal.App.2d at pp. 132-133.) It does not apply to every sale of a business as a matter of law.

Al-Husry v. Nilsen Farms Mini-Market, Inc. (1994) 25 Cal.App.4th 641 is similarly inapposite. It involved the sale of real property, for which, as a matter of

statutory law, the measure of damages is the difference between the contract price and the market price. (*Id.* at pp. 650-651; see Civ. Code, § 3306.)

The purpose of the purchase of a business is the generation of profits from that business. That purpose is readily inferable from the purchase offer signed by the parties here. The offer is “to purchase the Dry Cleaning Business known as Steamer Cleaners.” It sets forth a price for the business. It then sets forth the terms for the lease of the property on which the business is located. After that, it provides that “[a] list of inventory and equipment is to be agreed to and delivered to escrow prior to the closing date.” Finally, it contains a “[s]tandard industry non-compete covenant” for a five-year period. That the parties will agree in future on the inventory and equipment to be delivered and that the purchase offer contains a non-compete clause demonstrates that the purpose of the purchase is the generation of profits from the business, not the transfer of goods.

It follows that the trial court correctly found that the proper measure of damages in this case was lost profits, not the difference between the contract price and the market value of the business at the time of breach. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, *supra*, 34 Cal.4th at p. 971; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, *supra*, 226 Cal.App.3d at pp. 456-458; CACI No. 352.)

C. Propriety of New Trial Order

It is the trial court which is “familiar with the evidence, witnesses and proceedings, and is therefore in the best position to determine whether, in view of all the circumstances, justice demands a retrial.” (*Richard v. Scott*, *supra*, 79 Cal.App.3d at p. 64.) Therefore, once an error of law is shown, we “may not substitute [our] judgment for that of the trial court on the question of prejudice; the sole issue on appeal is whether the [new trial] order, in light of the record, constituted a manifest abuse of discretion. [Citations.] The party prevailing below is not required to demonstrate that prejudice resulted from the error for which a new trial was granted. [Citations.]” (*Id.* at p. 65; accord, *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 285.)

Allowing the admission of expert testimony which is contrary to law may be prejudicial error for which a new trial may be granted. (*Redevelopment Agency v. Tobriner* (1984) 153 Cal.App.3d 367, 374 [erroneous valuation method]; *Richard v. Scott, supra*, 79 Cal.App.3d at p. 64 [expert's factual assumptions lacked evidentiary support].) Here, Allman's testimony was contrary to law, and the record supports the trial court's conclusion that it may have affected the jury verdict. We therefore find no abuse of discretion in the trial court's decision to order a new trial. (*Richard v. Scott, supra*, 79 Cal.App.3d at pp. 64-65.)

Defendants claim that Shah was not prejudiced by the introduction of Allman's testimony, because the jury's award of damages is supported by substantial evidence. As Shah points out, we are not reviewing the damages award. We are reviewing the trial court's exercise of discretion in granting a new trial motion, and we have found no abuse of discretion in that regard.

If we view the new trial order as having been granted based on inadequate damages, the result would be the same. We can find no abuse of discretion where ““the evidence is in conflict and a verdict for the moving party could have been reached.”” (*Horsford v. Board of Trustees of California State University, supra*, 132 Cal.App.4th at p. 386.) In such a case, we presume the new trial order is correct. (*Ibid.*)

Since Holstrom's testimony supports an award of lost profits in excess of the amount awarded by the jury, the record supports the trial court's order. We must give deference to the order and affirm. (*Horsford v. Board of Trustees of California State University, supra*, 132 Cal.App.4th at p. 386.)²

² Since Shah's protective cross-appeal is conditioned upon our reversal of the new trial order, we need not address the issues raised therein.

DISPOSITION

The order granting a new trial on the issue of damages is affirmed. The appeals from the judgments on the complaint and cross-complaint are dismissed as premature. Shah is to recover costs on appeal.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.