orig.

IN THE SUPREME COURT
STATE OF FLORIDA

ALAN CHEEK,

Petitioner,

vs.

DOCKET NO. 68,563

McGOWAN ELECTRIC SUPPLY COMPANY,

Respondent.

RESPONDENT'S ANSWER BRIEF

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INDEX

TABLE OF CITATIONS

Other Authorities

PRELIMINARY STATEMENT

Respondent, McGOWAN ELECTRIC SUPPLY COMPANY, will be referred to as McGowan. Petitioner, ALAN CHEEK, will be referred to as Cheek.

References to the Record on Appeal will be designated by "R" and the Supplemental Record by "Supp.R." followed by the appropriate page number in parentheses.

References to exhibits are prefaced "RX" for Respondent. References to the pages of the Appendix which is incorporated in this Brief are designated by "App" and the page number in parentheses.

Respondent does not accept the Statement of the Case and Statement of the Facts set forth in Petitioner's Initial Brief and therefore submits a separate Statement of the Case and Statement of the Facts.

STATEMENT OF THE CASE

McGowan was the plaintiff in an action filed on March 16, 1979, in the Circuit Court of Leon County seeking recovery on a promissory note executed by Cheek and one Thomas Cook. (R-1-2). Cheek filed his answer and affirmative defenses. (R-4-7).

Plaintiff's motion for summary judgment was denied. (R-14). Cheek filed an offer of judgment dated March 19, 1980 and served an amended offer of judgment by hand delivery on March

24, 1980. (R-13,16). Neither of these offers was accepted by McGowan and the cause proceeded to a jury trial commencing April 3, 1980. (Supp.R-3). Cook was a nominal party only at the trial since he was never served with process.

After all testimony and evidence was presented at the first trial, the court withdrew the cause from the jury and continued the case for final argument on April 23, 1980. (R-220-228; Supp.R-3). Subsequently, a judgment was entered for McGowan in the amount of $17,712.37 with structured payments. (R-19-20). Attorney's fees were also ordered recoverable by McGowan in the amount of $9,500. (R-307,308).

On appeal to the District Court, the final judgment was vacated and the cause remanded to "proceed with a jury trial on all issues." Cheek v. McGowan Electric Supply Co., 404 So.2d 834 (Fla. 1st DCA 1981).

The second trial commenced on December 14, 1982, lasting two days. (R-493-869). At the conclusion of Cheek's case, McGowan moved for a directed verdict in its favor. (R-703-707). The court reserved ruling on this motion (R-708-709) and McGowan presented rebuttal evidence directed to Cheek's affirmative defenses. McGowan's renewed motion for a directed verdict at the conclusion of the case was denied. (R-769-772).

The trial court submitted a special interrogatory verdict to the jury (R-357-358), a part of which was objected to by McGowan. (R-811-815, 865). The jury returned its verdict

finding that there were charges to the account which were not within the contemplation of the agreement; that there were $17,163 in improper charges to the account, 65 percent of which was attributed to McGowan's fault and 35 percent to Cheek's fault. (R-357-358) (App-2-3).

Following return of the verdict, McGowan moved for a judgment in accordance with its motion for directed verdict or, in the alternative, for a new trial. (R-361-365). Its Motion for Attorney's Fees and Motion to Tax Costs followed. (R-366-372, 373-374), Cheek filed his Motion to Enter Final Judgment for Defendant (R-375,376), Motion to Tax Costs (R-377), and Motion to Impose Statutory Penalty Re: Finance Charges. (R-378-380). The court disposed of these motions by order entered on April 27, 1983, denying all motions other than the motions to tax attorney's fees and costs and to enter final judgment. (R-386).

The court entered its final judgment on April 27, 1983, awarding McGowan $7,223.93, plus interest of $3,268.55, computed at 9 percent from April 18, 1978, and the court reserved jurisdiction to tax costs and attorney's fees. (R-397-400).

Following entry of the final judgment, Cheek filed a Motion to Alter Judgment. (R-401-403). McGowan renewed its Motion for Attorney's Fees and both parties sought to tax costs in their favor. By an order entered July 15, 1983, the court denied Cheek's Motion to Alter Judgment; denied McGowan's Motion for

Attorney's Fees; taxed costs in favor of McGowan; and denied Cheek's Motion to Tax Costs. (R-427-428).

McGowan timely filed a Motion to Reconsider Its Entitlement to Attorney's Fees on the basis of case authority reported after the initial hearing on the attorney's fees question. (R-429-430). The trial court granted the motion and receded from its previous ruling that McGowan had waived its entitlement to attorney's fees. (R-474-475).

Notices of Appeal and Cross-Appeal to the District Court of Appeal, First District, were filed by Cheek and McGowan respectively. (R-473,476). On August 20, 1985, the district court affirmed the decision of the trial court, but certified the question regarding the recovery of attorney's fees. Cheek v. McGowan Electric Supply Co., 483 So.2d 1373 (Fla. 1st DCA 1985). (App-14-23). The court also affirmed the trial court's denial of McGowan's motion for directed verdict. In a separate order, McGowan's motion for appellate attorney's fees was denied. (App-23).

Petitions for rehearing and clarification were filed by the parties. On March 11, 1986, the court entered its opinion on rehearing certifying four additional questions of great public importance, all of which relate the efficacy of Cheek's amended offer of judgment hand delivered on the tenth day before the first trial. The opinion also reaffirmed McGowan's motion for attorney's fees on appeal.

STATEMENT OF THE FACTS

On April 18, 1978, Alan Cheek and Thomas L. Cook each signed and delivered to McGowan a promissory note for $22,620.66. (R-2; App-1; RX-1). The note was delivered in satisfaction of a past due account receivable for goods purchased by Cook from McGowan under a credit arrangement participated in by Cheek. (R-644-646). The note provided:

> The makers and endorsers hereof each expressly waive presentment, protest, notice of protest and notice of dishonor and agree to pay all costs, including a reasonable attorney's fee, whether suit be brought or not, if after maturity of this note or default hereunder counsel shall be employed to collect this note or any installment of principal or interest due hereunder.

(R-2; App-1).

Cheek made three $1000 payments on the note and defaulted. Subsequent discussions between Cheek and McGowan resulted in the note being called. Cheek then sought the advice of his attorney and this litigation ensued. (R-648-649). The story of this lawsuit is as follows:

McGowan is an electrical wholesaler dealing primarily with electrical contractors. McGowan had been selling materials to Thomas Cook, an electrical contractor, for some time. Although working closely with Cook to help him keep his account under control, when the account grew to a "rather large size," McGowan advised Cook he could no longer buy merchandise on credit. (R-714). Cook announced he had been talking with some people about

coming into his business to assist him financially in keeping the business going. McGowan informed Cook that they would be glad to work with him if he could bring someone in to guarantee paying his bills, but that it would not sell him "any more merchandise based on [his] credit, period." (R-715).

One of the people to whom Cook had been talking was Alan Cheek. Cook told McGowan that he had worked out something with Cheek and that Cheek would be getting in touch with McGowan. (R-716).

After several jobs in the automotive-related area, Alan Cheek settled into full-time construction in early 1975. (R-612-613). Most of Cheek's construction work was residential jobs and involved mainly "spec" houses. (R-614-615). Cheek first met Cook when he was 20 years old. When Cheek went into the construction business, Cook became his electrical subcontractor. (R-615-619). Cook had done all of Cheek's electrical work for about two years before Cheek's involvement with McGowan. (R-618).

Some time in 1977, Cook approached Cheek and told him that "he was running a little bit tight" and that in order to continue to work on Cheek's jobs, he needed more collateral for his account with McGowan. Cheek agreed to co-sign on the account with him. (R-619).

L. R. (Skeeter) McGowan returned Cheek's telephone call on February 17, 1977. They discussed the fact that Cook had no credit with McGowan. Cheek indicated he might be willing to guarantee

some purchases. Cheek had previously opened credit accounts at McGowan's lighting fixture business which he handled well and therefore was considered credit-worthy by McGowan. (R-721-723). McGowan advised Cheek he would be happy to extend credit to him, but would not extend any more credit to Cook. McGowan told Cheek that he would work with him any way he wanted to; that he would send him the copies of the invoices; that he would issue him purchase orders; or, that he would do it any way Cheek wanted to to help Cheek monitor the account; but that he was looking to Cheek to guarantee the account. (R-723).

Cheek gave McGowan no instructions for handling the account. Cheek indicated that he would put something in writing either on his own letterhead or on McGowan's form. (R-723-724). Sometime after their conversation, Cheek came down to McGowan's and signed McGowan's credit application. (R-724; RX-1).

When Cheek went to McGowan's to sign on the account for Cook, he testified that he told the McGowan people that he would be responsible for or guarantee the materials for "my jobs and my jobs only." (R-620). The credit application that was signed by Cheek contained the following wording:

> "We the undersigned do hereby give our personal guarantee of payment for all debts incurred and any finance charges incurred due to late payments on open account with McGowan Electric Supply Co. by Thomas L. Cook - Special Account - Alan Cheek Jobs or by us and agree to pay all court costs and seller's attorney's fees if legal action should ever become necessary to collect any amounts owing."

(RX-1).

Cheek never gave any thought to the fact that Cook might charge materials to the account that would be used in jobs other than Cheek's. Cheek never requested anything from McGowan about invoices or things of that nature and just assumed McGowan would police the account to see that Cook did not charge anything to the account that was not to be used in Cheek's jobs. (R-621-623). Cheek himself did not know how many jobs he had going on at one time and did not furnish McGowan with a list of jobs for which charges would be permitted. (R-621-622).

After the credit application was signed by Cheek in March 1977, the account became past due in mid-June prompting Skeeter McGowan to telephone Cheek and advise him of the account status. Cheek indicated he had been paying Cook all along; that he owed Cook some money at that time and implied that he would have some money coming to McGowan. (R-724).

McGowan next contacted Cheek on August 18, 1977, and advised that the account balance was then over $8,600. Cheek stated that he had paid Cook to date, but that "he would make some calls." McGowan indicated to Cheek that he was not "dunning him" at that time but wanted to keep him informed as to what was going on with the account. (R-725).

Cheek called McGowan on August 29, 1977, and expressed concern that the account balance was too large; that McGowan was not being paid; and, that he, Cheek, would have to pay for the materials

twice. McGowan again advised Cheek that Cook had no credit; that only he, Cheek, had credit with McGowan and that McGowan would not keep the account open unless Cheek continued to guarantee it. Cheek resolved to keep the account open. McGowan suggested that Cheek start using joint checks (checks made payable jointly to Cook and McGowan) so that Cook could not cash the checks without McGowan's endorsement and thereby ensure payment for the materials. However, McGowan never received any joint checks. (R-727-728).

McGowan telephoned Cheek the next day to let him know that the account was larger than they had previously discussed; that although a $3,000 payment had been applied against the account, it was still over $9,000 as of August 25, 1977. Cheek expressed concern that if he "cut off" Cook, he would never get even and that he had to keep Cook in business in order to get even with him. McGowan again admonished Cheek that the account was based solely on his (Cheek's) credit and that as long as he was guaranteeing it, McGowan would keep it open; that when Cheek said to close it, it would be closed. (R-728).

Cheek and McGowan next conversed about the account on September 15, 1977. McGowan informed Cheek that the account had increased "a little, but very little," and that if Cheek wanted it closed, he would close it. (R-729).

The next discussion between Cheek and McGowan was on October 31, 1977. Cheek was informed that the account was now over

$15,000. Cheek indicated he would get with Cook to see what could be done about it. (R-730).

On November 30, 1977, further discussion took place. The balance was then over $17,000. Cheek indicated that he had not been using joint checks because he knew Cook needed the money for other materials and to meet payroll. McGowan suggested that Cheek use two checks to pay Cook; one a joint check with McGowan for materials and a single check to Cook to be used for other things. (R-730-731).

Approximately three weeks later, on December 20, 1977, McGowan advised Cheek that the account was "now over $20,000." Cheek indicated that "that was it; he could not go any further." Cheek instructed McGowan to cut the account off and that he would send him a check for approximately $2,600 the following week. McGowan cut the account off, but did not receive the promised check. (R-731).

After the account was cut off, Cheek called McGowan on three different occasions and requested that Cook be allowed to charge materials to the account. These were all approved by McGowan. (R-731-732). When no payments were forthcoming on the account, McGowan informed Cheek that he would be glad to work with him on setting terms for paying the account. This led to Cheek signing the promissory note as related above. (R-732-733).

Cheek recalled discussing the account balance from time to time with McGowan and following up those discussions with inquiries

to Cook. Cook told him that he was expecting draws from other jobs and would use this money to take care of the account. (R-623-629). When the account reached $15,000, Cheek really became upset and "raked Cook over the coals" as to why he was not paying on the account. After Cook explained that he was having personal problems, Cheek agreed to "ride with him a little but more" until it could be straightened out. (R-630-631). Cheek remembered freezing the account when it reached $20,000 and directing McGowan not to permit any more charges to it. (R-632). Cheek then hired a new electrical subcontractor to handle his new jobs and a few of the old jobs that Cook had worked on. (R-639).

It never dawned on Cheek that Cook may have charged materials to the account which were not used on his jobs, until, after defaulting on the note to McGowan, Cheek conferred with his lawyer. Cheek simply trusted McGowan to keep up with the materials that went to his jobs even though he himself did not know how many jobs he had going during the time span of the account. (R-648-663).

Cheek acknowledged that he gave McGowan no information about his jobs at the time the account was set up. He further acknowledged that he did not tell McGowan that he was guaranteeing only materials that were going to be incorporated in his jobs, as opposed to materials purchased for his jobs. (R-657,661). He was also aware that McGowan sold its material over the counter, as opposed to delivering goods to a job site. (R-661-662). The

$20,000 account balance did not alert Cheek to the possibility that Cook may have been charging other materials to the account, because, during the time span of the account, Cheek was running $200,000 per month through his construction account. (R-664-666).

As Cheek interpreted his obligation on this account, McGowan was totally responsible for any materials which were charged to the account and diverted by Cook to jobs which were not Cheek's. This would also hold true for any goods expressly authorized by Cheek to be charged to the account after it was frozen and likewise diverted by Cook. (R-667-668).

In response to McGowan's action on the promissory note, Cheek asserted three defenses which are relevant to this proceeding: (1) the promissory note was mistakenly given as payment of an account balance for which Cheek, in fact, had no liability since charges to the account were not in compliance with the limitations of Cheek's guarantee; (2) the promissory note failed for lack of consideration in whole or in part; and, (3) Cheek was discharged from any liability on his guarantee because McGowan was aware that improper charges were being made to the account and failed to inform Cheek of that fact at any time. (R-6;25).

McGowan presented his case-in-chief on the promissory note and rested. The balance of the testimony (including the rebuttal by McGowan), was directed to Cheek's defenses.

In an effort to substantiate his defenses, Cheek's evidence focused principally on the questions of whether and what quantities

of materials charged to the account were actually used in jobs which were not Cheek's.

Bobby Johnson, an electrician working for Cook during 1977 when the account was operational, testified that Cook was working on jobs for persons other than Cheek. (R-500-501). Johnson recalled that Cook bought all of his electrical supplies from McGowan and "just about everything we got was charged to that account." (R-501). Johnson and Cook's other employees were told by Cook to charge all materials to the account for Cheek's jobs even though Cook was intending to use the materials on other jobs. Cook said he would "take care of it" with Cheek. (R-502).

At times, Johnson would give the McGowan people a job number or tell them to charge the materials to "Alan Cheek's account." At other times, the McGowan people would charge materials to the Cheek account without being told to do so by Johnson and his co-workers. If the invoice had a job number, more than likely it went to Cheek's jobs; if there was no job number on the invoice, Johnson indicated the materials may or may not have gone to Cheek's jobs. (R-504). On cross-examination, Johnson acknowledged that he never told the McGowan people that materials which were being charged to the Cheek account were being diverted to other jobs. (R-514-515,518) Johnson also acknowledged that on some of the occasions when Cook's men said nothing to the McGowan people behind the counter, the order had been called in by Cook personally and had

already been charged to the Cheek account when Johnson and the others arrived to pick up the materials. (R-518-519).

Fred Hartsfield, Cheek's accountant, testified that he had reviewed all of the books and available records for Cheek Construction Company for the period when the account with McGowan was operational. (R-524-525). Based on the records he examined, Hartsfield prepared a schedule of Cheek's jobs that were started or in progress during the period of the account. (R-527-528). During this period, Hartsfield found that the payments from Cheek to Cook totaled $42,558.58. (R-529). Hartsfield acknowledged that he first conducted his review of Cheek's records in February 1979; that his findings were based only on the invoices which Cook had given to Cheek; and, that he had found additional payments from Cook to Cheek after his initial examination. (R-535-537).

Walter Reinhart, an assistant finance professor at Florida State University, was called by Cheek as an expert witness. (R-543-548). Reinhart reviewed the invoices for the materials charged to the account and classified them into four categories. (R-551-552). The first category consisted of invoices containing a specific job reference coinciding with a job Cheek had in progress during this period of time. These invoices totaled $8,634.21. (R-552). The second category was comprised of invoices identified by reference to the name "Alan Cheek" with no specific job reference. The total for the second category of invoices was $5,594.40. (R-552-553). The third category had no job

identification reference at all and was only identified by the legend "Special Account, Alan Cheek Jobs." These invoices totaled $15,981.10. (R-553). The fourth category was invoices bearing job identification references which were not related to any jobs that Cheek had in progress during the period. These totaled $1,182.28. (R-553-554).

Testifying over McGowan's objections, Reinhart opined that in his examination of the invoices, he found two categories of materials that physically would not be included in Cheek's jobs; the first being various tools such as saws, drill bits, fish tape, et cetera, and the second being heavy duty commercial type wiring. (R-566-567). Using three different techniques, Reinhart estimated the actual cost of electrical materials that should have gone into Cheek's jobs was something like $16,500. (R-565-582).

In the special interrogatory verdict, the jury quantified the amount of "improper charges" to the account as $17,163. (R-358). This coincides almost to the penny with the total of the invoices which Reinhart found were not referenced in any way to Cheek's jobs [$15,981.10 + $1,182.28 = $17,163.38]. (R-553-554). The jury also found that McGowan knew or should have known that there were "improper charges" to the account and that Cheek did not act reasonably in order to avoid "improper charges" being made to the account. McGowan was assigned 65 percent and Cheek 35 percent of the total fault found by the jury. (R-357-358).

The trial court multiplied McGowan's percentage of fault times the "improper charges" and gave Cheek a credit for this amount against the note balance. He also made a credit adjustment for finance charges attributable to the set off credit allowed to Cheek. After making these calculations, the court determined that the balance owed to McGowan by Cheek was $7,723.93, plus interest of $3,268.55, for a total of $10,492.48. (R-399-400).

SUMMARY OF ARGUMENT

Attorney's Fees

McGowan should be allowed to present evidence of attorney's fees at a postjudgment hearing. The attorney's fees provided by the Cheek/McGowan promissory note, similar to statutory attorney's fees, are not compensation for the injury which gave rise to the action. Instead they are uniquely separable from the cause of action proved at trial and more logically and practically can be determined by the court during a postjudgment hearing. The constitutional right to a trial by jury simply does not apply to an attorney's fee provision of a note any more than it proscribes or limits statutes authorizing attorney's fees to be assessed by the court.

Offer of Judgment

Cheek's amended offer clearly was not valid as it was not served within the time prescribed by Rule 1.442. Nothing in the rule suggests that time requirements for serving an offer should be changed if discovery is permitted to intrude on the 10-day period before trial. To permit the amended offer to relate back to the original offer for timing purposes would open the door to the abusive practice of making timely unreasonable offers followed by tardy amended offers, giving opposing counsel no time for review. Thus, Cheek's amended offer should not be considered valid.

Application of Verdict

The jury's special interrogatory verdict assigning fault to both Cheek and McGowan was correctly applied solely to improper charges made to the Cheek account. The verdict should not be applied to discharge Cheek's obligation to pay for materials actually used in his jobs. The fact that the jury found McGowan responsible in part does not translate to misconduct sufficient to effect a discharge under the law of guaranty.

Directed Verdict in Favor of McGowan

The Court should order a directed verdict for McGowan. The district court was misguided in excusing Cheek from the traditional requirement of proving his affirmative defense of mistake. The record evidence simply fails to substantiate a proper basis for Cheek to be excused of his obligation on the promissory note sued upon by McGowan. The failure by Cheek to prove his affirmative defense of mistake should entitle McGowan to a directed verdict.

Attorney's Fees on Appeal

Finally, the district court should have allowed McGowan's attorney's fees on appeal. Although McGowan's motion did not state the grounds for attorney's fees, Cheek did not object. There is no valid reason that failure to state the grounds for fees should be a jurisdictional flaw rendering the court powerless to consider them. In this case, the legal basis for the fees is not in some obscure statute, but is clearly stated in the promissory note quoted extensively in Appellant's brief to the district court.

ISSUE I

WHERE ATTORNEY'S FEES ARE PLED IN A SUCCESSFUL SUIT FOR RECOVERY PURSUANT TO A PROMISSORY NOTE, AND THE NOTE PROVIDES THAT THE MAKER SHALL PAY "REASONABLE ATTORNEY'S FEES," MAY THE PROOF OF SUCH FEES BE PRESENTED FOR THE FIRST TIME AFTER FINAL JUDGMENT PURSUANT TO A MOTION FOR ATTORNEY'S FEES BY THE PREVAILING PARTY?

The District Court, relying on Taggart Corp. v. Benzing, 434 So.2d 964 (Fla. 4th DCA 1983), on appeal after remand, 451 So.2d 1046 (Fla. 4th DCA 1984), concluded that McGowan was not barred from presenting its claim for attorney's fees in a postjudgment proceeding.

Until recently, it appeared to be a settled concept of Florida jurisprudence that attorney's fees could not be taxed as costs in any cause unless provided for by contract or by statute. Dorner v. Red Top Cab & Baggage Co., 160 Fla. 882, 37 So.2d 160 (Fla. 1948); Shavers v. Duval County, 73 So.2d 684 (Fla. 1954); Lutsch v. Smith, 397 So.2d 337 (Fla. 1st DCA 1981). The corollary of this rule was simple. If attorney's fees were provided by contract or statute, the trial court was empowered to award attorney's fees incident to its traditional function of setting costs.

A departure from the foregoing rule began emerging with Ronlee, Inc. v. P.M. Walker Co., 129 So.2d 175 (Fla. 3d DCA 1961), and Riess v. Goldman, 196 So.2d 184 (Fla. 3d DCA 1967). In these cases, the Third District reasoned that attorney's fees arising from a contractual provision were not to be awarded as costs; holding rather they were substantive damages arising from a breach

of the contract itself and therefore were determinable by the jury. The Ronlee and Riess decisions have been followed almost uniformly by the Third District.[1] See Commodore Plaza at Century 21 v. Cohen, 350 So.2d 502 (Fla. 3d DCA 1977), cert. denied, 362 So.2d 1051 (Fla. 1978), and cases cited therein; Machado v. Foreign Trade, Inc., 478 So.2d 405 (Fla. 3d DCA 1985).

Other districts have followed the lead of the Third District: Newcombe v. South Florida Business Negotiators, Inc., 340 So.2d 1192 (Fla. 2d DCA 1976), and Holiday Gulf Builders, Inc. v. Tahitian Gardens Condominium, Inc., 443 So.2d 143 (Fla. 2d DCA 1983), by the Second District; Mystery Fun House, Inc. v. Magic World, Inc., 417 So.2d 785 (Fla. 5th DCA 1982), and Lhamon v. Retail Development, Inc., 422 So.2d 993 (Fla. 5th DCA 1982), by the Fifth District.

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[1] But see Marrero v. Cavero, 400 So.2d 802 (Fla. 3d DCA 1981), where the court permitted attorney's fees based on contract to be recovered in a postjudgment motion even though not pleaded or proved at trial.

On the other hand, the Fourth and First Districts[2] have reached opposite conclusions: Taggart Corp. v. Benzing, 434 So.2d 964 (Fla. 4th DCA 1983), on appeal after remand, 451 So.2d 1046 (Fla. 4th DCA 1984); Cheek v. McGowan Electric Supply Co., 483 So.2d 1373 (Fla. 1st DCA 1985); Parham v. Price, 486 So.2d 34 (Fla. 1st DCA 1986).

How should this Court resolve these conflicting decisions? The cases cited above are not particularly helpful in offering a meaningful and comprehensive analysis of the considerations which should be reviewed incident to a resolution of the issue presented. Some of the factors which the Court should look to are suggested below.

Observance should be made of the traditional distinction between the award of attorney's fees incurred to enforce statutory or contractual rights and the recovery of attorney's fees as an element of damages to compensate for a wrong done. Traditionally, Florida courts have recognized the clear distinction between

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[2] In all candor, the First District appears befuddled by the issue. Compare Cheek v. Mcgowan Electric Supply Co., 483 So.2d 1373 (Fla. 1st DCA 1985) (affirming postjudgment award of attorney's fees based on a contract provision) with Nour v. All State Pipe Supply Co., 11 F.L.W. 1017 (Fla. 1st DCA May 1, 1986) (ignoring Cheek and requiring attorney's fees based on contract to be pled and proved as part of damages claimed) and River Road Construction Co. v. Ring Power Corp., 454 So.2d 38 (Fla. 1st DCA 1984) (holding that attorney's fees based on contract are part of substantive damages for purposes of the offer of judgment rule). The opposite view, voiced by the dissent, is preferred in H. Trawick's Florida Practice and Procedure, § 25-15, n.4 (1985).

attorney's fees awarded as costs incident to the main action and attorney's fees recoverable as an element of damages attributable to the breach, default or wrong sued upon in the main action.

> The right to recover attorneys' fees as a part of costs did not exist at common law. Attorneys' fees may not be taxed as costs unless provided for by statute or contract. The award of attorneys' fees being in derogation of the common law, any statute providing for an award thereof must be strictly construed. However, in appropriate cases attorneys' fees may constitute an element of recoverable damages.

Florida National Bank at Gainesville v. Alfred and Ann Goldstein Foundation, Inc., 327 So.2d 110, 111 (Fla. 1st DCA 1976) (citations omitted) (emphasis added). See also Sheridan v. Greenberg, 391 So.2d 234 (Fla. 3d DCA 1980); Miller v. Colonial Baking Co. of Alabama, 402 So.2d 1365 (Fla. 1st DCA 1981); Charles Stewart Agency, Inc. v. Doisy, 399 So.2d 127 (Fla. 1st DCA 1981); Ellis v. Flink, 374 So.2d 4 (Fla. 1979) (Boyd, J., dissenting) ("Attorneys' fees may be a proper element of damages when they are incurred in litigation or for legal services other than that involved in the main action, which litigation or other legal services were made necessary by the breach or violation being sued upon."); Glusman v. Lieberman, 285 So.2d 29, 31 (Fla. 4th DCA 1973) (distinguishing attorney's fees recoverable as an element of damages from so-called "pure attorney's fees, or attorney's fees per se" --that is attorney's fees allowed when authorized by statute, by contract or when a fund has been created or brought into court); Solar Research Corp. v. Parker, 221 So.2d 138, 139 (Fla. 1969) (distinguishing

between principles used for determining "attorneys [sic] fees awarded as costs and assessed against the party or parties in litigation" and those used for determining "attorneys [sic] fees earned by a lawyer and due him by his client for legal services rendered.").

Attorney's fees recoverable as an element of damages under these traditional observations and limitations are properly triable by the jury. Accordingly, if such fees are not proved up at trial they are waived just as any other element of damages. By the same token, attorney's fees awardable as "costs" incident to prosecution or defense of the main action pursuant to authority conferred by statute or contract are not traditionally considered elements of damages to be tried in the main action itself.

Under the Newcombe approach urged by Cheek, this traditional distinction is blurred if not eliminated. Moreover, the Newcombe rule will run counter to strong policy considerations.

Irrespective of whether the authority for the award of attorney's fees is conferred by statute or contract, attorney's fees incurred in prosecuting or defending the main action cannot be adjudicated conveniently and practically as part of (and at the same time as) the presentation and resolution of the merits of the underlying controversy. As noted in Taggart:

> We do not perceive this to be an unhappy result. To require each side to be put to the proof when both cannot prevail is a waste of time. Furthermore, one of the factors to be considered in arriving at the amount of a

> reasonable fee is the outcome. That is obviously an easier task after the fact.

434 So.2d at 966.

Moreover, where the allowance of attorney's fees is predicated on a "prevailing party" test, the interjection of an offer of judgment could have a profound effect on the ultimate determination of which party has prevailed. In such a situation, it is not inconceivable that a jury could award fees to the non-prevailing party.

The fact that a party is likely to continue to incur attorney's fees for undertaking post-trial proceedings likewise presents perplexing problems. If attorney's fees must be proved up at trial on the merits, should the party seeking fees estimate attorney's fees expected to be incurred during the post-trial proceedings? Alternatively, the proceeding could be bifurcated and the jury could be re-empaneled after all post-trial effort has been expended for finalization of the attorney's fees award. While bifurcation might work, the expense attendant such a process could prove prohibitive.

Finally, what happens to attorney's fees awarded on appeal? Must the jury which heard and determined the initial fee award be re-empaneled to adjudicate the appellate fees? Clearly, applying the Newcombe rationale, appellate attorney's fees are equally a part of the "damages" sustained and must be determined by the jury.

It is respectfully submitted that the procedure employed under the reasoning and rationale of Taggart avoids all of the policy

pitfalls referenced above. The adjudication of attorney's fees in a post-trial proceeding can readily accommodate all of these considerations. See Vaughan v. Progressive American Insurance Co., 435 So.2d 889 (Fla. 1st DCA 1983). This is reason alone to commend the Taggart rationale for adoption by this Court.

This Court's recent decision in Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), accommodates certain policy considerations inherently favoring postjudgment determination of attorney's fees and should be expanded to include fees derived from contractual provisions as well.

Finkelstein holds that a statutory attorney's fee provided to a prevailing party in a medical malpractice action could be determined in a postjudgment motion where the final judgment did not expressly reserve jurisdiction to award attorney's fees and the motion for fees was filed after the time to appeal the final judgment had expired. At first blush, the application of Finkelstein to the issue at hand may seem somewhat removed. Close scrutiny, however, proves illuminating.

In reaching its conclusion in Finkelstein, the Court adopted the reasoning and holding of the United States Supreme Court in White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982) to the effect that a "postjudgment" motion for prevailing party attorney's fees raises a "collateral and independent claim." Finkelstein, 484 So.2d at 1243. In the words of the U.S. Supreme Court:

> [42 U.S.C.] Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits --an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements. Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial. See Hutto v Finney, 437 US, at 695 n 24, 57 L Ed 2d 522, 98 S Ct 2565 [sic].

White, 455 U.S. at 451-52.

Since prevailing party attorney's fees can arise from contractual provisions as well as statutory provisions, Finkelstein seems to blaze a trail for postjudgment determination of all such fees. If so, it does not make much sense to have a different rule or procedure for the determination of such fees under a "unilateral" attorney's fees provision as opposed to a "prevailing party" provision. Irrespective of whether the attorney's fees provision is a unilateral provision as in this case or a prevailing party provision as discussed in Finkelstein, the attorney's fees award requires an inquiry separate from and collateral to the merits and it should be treated and resolved postjudgment.

Cheek suggests without any supporting authority that his constitutional right to trial by jury encompasses trial of the attorney's fees issue. This argument is illusory.

The promissory note sued upon by McGowan contained the following provision:

> The makers and endorsers hereof each expressly waive presentment, protest, notice of protest and notice of dishonor and agree to pay all costs, including a reasonable attorney's fee, whether suit be brought or not, if after maturity of this note or default hereunder counsel shall be employed to collect this note or any installment of principal or interest due hereunder.

(RX-1) (emphasis added). Clearly, the agreement between the parties indicates that attorney's fees are to be recovered as a part of McGowan's costs. Since "costs" uniformly are not triable by the jury, McGowan's attorney's fees are not triable by the jury. Indeed, if this Court adopts the Newcombe rule and holds that the "cost" designation in the note is obviated by the rationale of that case, it is suggested that practitioners will soon develop attorney's fees provisions substantially as follows:

> Maker agrees to pay holder's attorney's fees incurred for the prosecution or collection of this note and such fees shall be determined by the court and not the jury in a proper proceeding after the amount of the principal indebtedness and accrued interest has been determined or adjudicated.

Such a contractual provision would not appear to offend constitutional sensibilities involving the right to trial by jury any more than myriad statutes which authorize attorney's fees to be assessed by the court[3]; standard arbitration agreements which

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[3] See § 73.091, Fla. Stat. (1985), which provides that the petitioner in an eminent domain proceeding "shall pay all reasonable costs of the proceedings in the circuit court,

eliminate jury trial altogether; or even traditional liquidation of damage clauses or contract limitations on consequential damages which limit the amount of recovery by an aggrieved party. The constitutional right to jury trial simply does not impact the attorney's fees provision of the subject note any more than it proscribes or limits the rights reflected in such statutes.

If adopted, the Newcombe rule should be implemented prospectively. Unless this Court is prepared to bottom its reasoning on an expanded concept of the constitutional right to trial by jury, any decision implementing the Newcombe rule should be expressly applied prospectively, especially in view of the status of the law existing in the First District at the time this case was tried. See Ship Shape v. Taylor, 397 So.2d 1199 (Fla. 1st DCA 1981). Alternatively, if prospective application is not warranted, the Court should remand this cause to the trial court for a jury trial only on the issue of attorney's fees recoverable by McGowan. Cf. The City of Miami v. Harris, 11 F.L.W. 771 (Fla. 3d DCA Apr. 1, 1986).

Finally, even under application of the Newcombe rule, fairness suggests that McGowan did not waive its claim to attorney's fees in light of the approach to the issue of fees expressly authorized in the first trial.

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including a reasonable attorney's fee to be assessed by that court." (emphasis added).

At the first trial of this cause, Cheek was content to have the matter of attorney's fees determined by the court while insisting that other features of the case be resolved by the jury. In this context Cheek's counsel observed:

> The attorneys' fees and costs, that's to be worked out by the court, and I don't think that should enter into the picture. That turns on a lot of factors that we should argue at a separate time, and that can be set down for a separate hearing and resolved at that time . . .

(R-62).

Therefore, the issues presented to the district court in the first appeal had nothing to do with the issue of a jury trial on the question of attorney's fees. Upon retrial, Cheek did nothing to suggest that he had changed his mind over the procedure to be followed in awarding fees, and, therefore, at least tacitly consented to the identical post-trial procedure for determining fees which was utilized in the first trial.

For the reasons set forth above, the question certified should be answered in the affirmative.

ISSUE II

THE "AMENDED OFFER OF JUDGMENT" SERVED BY CHEEK BY HAND DELIVERY ON MARCH 24, 1980, DID NOT COMPLY WITH RULE 1.442 AND THEREFORE WAS INVALID AND OF NO EFFECT.

In its opinion of August 20, 1985, the district court held:

> Initially, we note that the March 24 offer of judgment was not served more than ten days before trial, as required by Rule 1.442, Florida Rules of Civil Procedure. This requirement is necessary to afford the adverse party at least ten days before commencing trial in which to consider and accept the offer. Since the second offer was not served in compliance with the rule, it was invalid and of no effect.

483 So.2d at 1379. (App-20).

On motion for rehearing, the court certified the following three questions relating to the timeliness of the March 24 offer.

> 1. WHETHER AN AMENDED OFFER OF JUDGMENT RELATES BACK TO THE DATE OF SERVICE OF THE ORIGINAL OFFER OF JUDGMENT FOR PURPOSES OF THE TIME REQUIREMENTS IN RULE 1.442, FLORIDA RULES OF CIVIL PROCEDURE?
>
> 2. WHETHER, WHEN THE ELEVENTH DAY BEFORE TRIAL FALLS ON A SATURDAY, HAND DELIVERY OF AN OFFER OF JUDGMENT ON THE FOLLOWING MONDAY IS EFFECTIVE UNDER RULE 1.442, FLORIDA RULES OF CIVIL PROCEDURE?
>
> 3. WHETHER AN OFFER OF JUDGMENT HAND-SERVED ON THE NINTH DAY BEFORE TRIAL IS VALID WHERE THE PARTIES HAVE AGREED BY PRETRIAL ORDER THAT THE DISCOVERY CUTOFF DATE SHALL BE THE NINTH DAY BEFORE TRIAL?

Additionally, the court certified the following question which it had answered in the affirmative in its original opinion.

> 4. WHETHER AN OFFER OF JUDGMENT REMAINS VALID AND OUTSTANDING AFTER A NEW TRIAL HAS BEEN GRANTED?

483 So.2d at 1382. (App-23).

If this Court answers the first three questions in the negative, as McGowan contends it should, it need not address the fourth question in order to dispose of this matter.

QUESTION 1

Rule 1.442 provides in pertinent part:

> At any time more than ten days before the trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer with costs then accrued. An offer of judgment shall not be filed unless accepted or until final judgment is rendered. If the adverse party serves written notice that the offer is accepted within ten days after service of it, either party may then file the offer and notice of acceptance with proof of service and thereupon the court shall enter judgment.

There are two critical components to the operation of the time requirements of the Rule. The offer must be served more than ten days before the trial begins. Timely service of the offer allows the adverse party ten days after it is served and before trial commences to consider acceptance of the offer. The intended operation of the Rule is eviscerated if a "relation back" concept is adopted. If Cheek's untimely amended offer served on March 24 is allowed to relate back to the time of service of the original offer, what is to keep the unscrupulous practitioner from tendering an unrealistic offer more than 10 days prior to trial, then serve an additional "amended offer" on the eve of trial? An adversary

facing such a ploy would be allowed only a few days or perhaps hours to assess the new offer, a result hardly in keeping with the intent and spirit of the Rule. Moreover, if a relation back concept is adopted, would not all of the costs incurred after the original offer be subject to control by the so-called amended offer? In other words, if the amended offer relates back for computation of timeliness, should it not relate back for all purposes of the Rule?

Finally, the Rule simply does not contemplate amended offers and the concomitant relation back concept inherent therein. Successive offers, of course, are expressly countenanced by the Rule. Each successive offer, however, must individually meet the time requirements of the Rule.

QUESTION 2

The district court queries whether an offer of judgment served by hand delivery on Monday, the tenth day before trial commences, is nevertheless effective since the eleventh day falls on a Sunday.

Rule 1.442 requires the offer to be served more than 10 days prior to trial. Fla.R.Civ.P. 1.080(b) provides: "Service on the attorney or party shall be made by delivering a copy to him or by mailing it to him at his last known address . . ." There is nothing in Rule 1.442 to suggest that service either by mail or by delivery cannot be effected on Saturday or Sunday. Cheek therefore was not powerless to effect service of his offer of judgment by

delivery of same on either the Saturday or Sunday preceding Monday the 24th.

The present situation is somewhat analogous to the situation addressed in Henry Stiles, Inc. v. Evans, 206 So.2d 65 (Fla. 4th DCA 1968), where the court was confronted with whether an opposing affidavit served by mail on the day prior to a summary judgment hearing was effective under the Fla.R.Civ.P. 1.510 requirement that such motion be served "prior to the day of hearing." The court reasoned that service by mail was not effective since the additional 3 day period[4] provided in Fla.R.Civ.P. 1.090(e) had not expired prior to the date of hearing. Evans, 206 So.2d at 67.

As applied to the present case, the rationale of Evans is straightforward: Cheek could have served his offer of judgment by delivery on or before March 23, 1980; or by mail on or before March 20, 1980. Of course, if Cheek had served his offer by mail on March 21, 22 or 23, a problem akin to that addressed in Evans would be presented to the court. Clearly, however, service by delivery on the 24th was not effective within the time requirements of Rule 1.442.

By further analogy to the summary judgment procedure, it is hardly logical to reason that where a summary judgment hearing is scheduled for a Monday or on a day following a legal holiday, the adverse party is given latitude to file an opposing affidavit on

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[4] Now 5 days.

the day of the hearing. Under the same reasoning, the district court's second query should be answered in the negative.

QUESTION 3

The district court's third inquiry focuses on whether a discovery cut-off date should play a role in shortening the ten-day period under Rule 1.442. Simply put, there is nothing in Rule 1.442 to suggest that if discovery is permitted to intrude into the ten-day period prior to trial, then the time requirement for serving an offer is shortened to coincide with the discovery cut-off date. In effect, to answer this question affirmatively, a substantial rewording of Rule 1.442 would be required.[5]

Finally, it should be pointed out that Cheek was in no way compelled to wait until the eve of discovery cut-off to complete his pre-trial discovery efforts. The fact that he drug his feet on completing discovery should not relieve him of the time requirement of Rule 1.442.

QUESTION 4

As noted above, this Court need not address this question if it negatively resolves the three preceding questions. However, if this Court determines that the March 24 offer was timely, then it

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[5] The Legislature has recently enacted an extensive review of the offer of judgment procedure. Obviously, the 30-day period in the new procedure will likely collide with discovery cut-off dates; however, the Legislature does not speak to the issue of modifying the 30-day period to coincide with a shorter discovery cut-off. See CS/CS/SB 465, et al. (Second Engrossed) § 58 (Fla.Legislative Acts 1986).

should resolve the question of the efficacy of the offer as related to a subsequent trial proceeding.

McGowan does not particularly quarrel with the district court's conclusion that the initial $4,500 offer was not nullified by the second trial.[6] Indeed, the notes of the Advisory Committee on the Federal Rules of Civil Procedure reinforce this conclusion:

> The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits-- as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues-- whether there be a first, second or third trial-- and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained.

Notes of Advisory Committee on 1946 Amendment to Rules, Fed.R.Civ.P. 68. McGowan, therefore, concurs that the fourth question should be answered in the affirmative, and the district court's reasoning upheld.

Other Considerations

Even if this Court is inclined to view the March 24, 1980, offer of judgment as timely, the offer to pay $7,500 together with

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[6] Clearly, Cheek's original offer of judgment of $4,500 was not as favorable to McGowan as the final judgment.

interest and taxable costs is improperly ambiguous and no more favorable than the $10,492.48 judgment finally obtained by McGowan.

The offer of "$7,500 together with interest and costs" provides no indication of how to calculate the amount proposed to be paid as interest. Is this interest at the statutory rate (6 percent), the rate set by the note (9 percent), or the rate applicable to Cheek's guaranty account with McGowan (18 percent)? Is interest to accrue from the date of execution of the note, the date of the offer, or some other date? The offer contains no hint of the answers to these questions.

Cheek, of course, must argue that interest was to be calculated in the same manner as the final judgment here appealed; namely: "the sum of $7,223.93, together with interest at nine percent in the sum of $3,268.55, for a total of $10,492.48" (R-400). Obviously, Cheek's $7,500 offer of judgment must embrace at least $2,992.48 in interest in order to exceed the judgment amount of $10,492.48 so as to trigger McGowan's responsibility for post-offer costs.

Had Cheek's offer been accepted in the form made, it is not unreasonable to suggest that Cheek might logically argue that interest was only to be calculated prospectively from the date of the offer until payment. Since the offer was rejected, Cheek now argues, of course, that interest was to accrue from the date of the note, not the offer, this being the only formula by which his offer can attain "more favorable" results than the judgment. Rule 1.442

should not be construed to permit ambiguous offers which provide litigants an opportunity to pick and choose their interpretation with the benefit of 20-20 hindsight.

Accordingly, the March 24 offer should be disregarded in its entirety as ambiguous and improper. If, in the alternative, the offer is to be given any effect, the reference to "interest" should be stricken as indeterminable. Under either construction, McGowan is permitted to recover for post-offer costs since the $10,492.48 judgment is more favorable than the $7,500 offer.

Finally, Petitioner's reliance on C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla. 1985), is misplaced. Petitioner suggests this case stands for the proposition that a formal offer of judgment, in compliance with the time requirements, is not necessary; and that any settlement offer prior to trial will suffice. C.U. Associates, however, concerned an action to foreclose a mechanics' lien, and § 713.29, Fla. Stat. (1981), provides for attorney's fees to the prevailing party in that type of action. The instant case is not affected by Section 713.29 and Petitioner's attempt to use it by analogy with this situation is simply erroneous. This Court clearly stated in C.U. Associates that Rule 1.442 and Section 713.29 are separate and serve different purposes. C.U. Associates, 472 So.2d at 1178.

ISSUE III

ASSUMING THE TRIAL COURT WAS CORRECT IN PERMITTING THE JURY TO APPORTION RESPONSIBILITY BETWEEN THE PARTIES, NO ERROR WAS COMMITTED IN ITS APPLICATION OF THE VERDICT TO FACTS PRESENTED; NOR WAS CHEEK ENTITLED TO BE DISCHARGED FOR ANY PORTION OF THE PROPER CHARGES.

This is the third time Cheek seeks to challenge application of the verdict by the trial court. The identical arguments were made to and rejected by the trial court. (R-397-400). The district court reviewed these same arguments at length and in detail and found them to be unmeritorious. Although the Court certainly has the power and privilege on certiorari review to review the entire record and decision below, Rupp v. Jackson, 238 So.2d 86,87-88 (Fla. 1970), and to review other issues raised by the parties, Trend Coin Co. v. Honeywell, Inc., 11 F.L.W. 75 (Fla. Feb. 28, 1986), it has likewise acknowledged a policy of refraining from using its authority to decide such ancillary issues unless they "affect the outcome of the petition after review of the certified case." Trushin v. State, 425 So.2d 1126,1130 (Fla. 1983). However, at the risk of burdening the Court with argument it need not consider, the following is offered in rebuttal to Cheek's Point III.

Percentage of Fault and the Verdict

The special verdict in this case was a "creature" devised by the trial court after rejecting as inappropriate the verdict forms submitted by the parties. (R-793-807). After announcing the special verdict form, the court was pressed by Cheek's counsel to

comment on what would happen if the jury found both parties at fault:

> MR. TURNER: Let me pose this-- let me follow the Court's thinking through. Suppose the jury finds 50/50 at fault in the question. That may - -
>
> THE COURT: Then I would say - -
>
> MR. TURNER: Where are we?
>
> THE COURT: I would say, then, whatever amount is found to be improper charges would apply that percentage to it. If the improper charges are-- we will say, for the sake of argument-- are $16,000, then . . .

(R-795).

Following return of the jury's verdict, Cheek argued as he does now, that the verdict should be applied to relieve him not only of 100 percent of the amount of "improper charges," but also of 65 percent of all proper charges as well. Cheek contended then as he does now that he is entitled to be discharged to the extent of 65 percent of materials which he concedes were charged to the account and actually used in his jobs. Stated differently, under Cheek's logic, he is legally obligated to pay McGowan for only 35 percent of the goods actually used in Cheek's jobs. The jury was never instructed that its fault-finding assessments would be applied to anything other than "improper charges." See Cheek, 483 So.2d at 1378 n. 6. (App-19).

Moreover, there are certain common sense considerations which clearly support the trial court's application of the jury's findings. Materials totaling $31,391 were charged to the

account. Of this sum, Cheek's expert found $17,163.38 in materials which were not identified on the invoices as being related to Cheek's jobs. It is more than coincidental that this calculation, rounded to the nearest dollar, is identical to the amount of "improper charges" determined by the jury. By the same token, Cheek's expert estimated the cost of materials required to be used in Cheek's jobs at $16,500. Subtracting this figure from the total materials of $31,391 leaves $14,841 in materials which, according to Cheek's own expert, were not used in Cheek's jobs. Since the jury selected the $17,163 representing unidentified invoices as "improper charges," rather than the $14,841 representing Cheek's expert's estimation of materials not used in Cheek's jobs, it stands to reason that the jury did not equate its "improper charges" with the quantity of materials not used in Cheek's jobs. By labeling as "improper" the total charges which could not be specifically identified by reference to Cheek or his jobs, common sense dictates that the jury intended simply to establish a rational foundation for assigning the legal responsibility for such "improper charges" (i.e. charges which on the face of the invoices were questionable or unexplained) to the parties in accordance with their respective fault percentages. Under Cheek's suggested verdict application, Cheek bears no responsibility for these charges even though the jury specifically found he was 35 percent responsible for them.

The trial court's application of the jury's special verdict in this case harmonizes the verdict in accordance with the facts presented and is a fair and reasonable interpretation of the jury's findings in light of the controlling law. Thus, the judgment entered by the trial court is consistent with the overall duty of the trial court in construing a special verdict:

> A special verdict should be construed reasonably and fairly, without heed to slight defects and subtle and refined distinctions. Pleadings do not supply an analog for guidance in construing and giving effect to a special finding, since the latter, like a special verdict, must be considered as a whole, without dissection into fragmentary parts and successful attack in detail. If, taken as a whole, a finding legitimately supports the judgment, it will be upheld. However, the law favors special verdicts and will sustain them whenever it can be done consistently with the rules by which they are governed. Hence, where the findings will fairly admit of an interpretation which will harmonize them with one another and with the general verdict, that interpretation should be given, rather than one which will overturn and destroy the findings and the verdict.

76 Am.Jur.2d Trial § 1207 (1975).

The Discharge Defense

Both the trial court and the district court properly rejected Cheek's discharge defense. The jury found that McGowan knew or should have known that there were charges to the account which were "improper." However, as noted above, the jury obviously classified as "improper charges" all of the charges for materials which were not identified specifically on the face of the invoice as being referenced to Cheek or Cheek's jobs. Since McGowan prepared the

invoices or shipping tickets, it stands to reason that McGowan "knew or should have known" that these invoices (invoices totaling $17,163) did not contain a reference to Cheek or Cheek's jobs. Only within the framework of this particular parlance, is it therefore true that McGowan knew or had reason to know of such "improper charges." However, such knowledge is a "far cry" from a factual finding that McGowan was guilty of conduct sufficient to warrant a legal conclusion by the court that Cheek should be discharged of his liability to McGowan for any portion of the charges to the account which were in fact used in Cheek's jobs.

Relying on Wishart v. Gates Rubber Co. Sales Division, Inc., 163 So.2d 503 (Fla. 3d DCA 1964), the district court reasoned that the mere fact that charges were included in the account in excess of a stated limitation did not operate to discharge Cheek of his liability for those charges which did not exceed the limitation. Cheek, 483 So.2d at 1379. (App-20). Further, the district court found inappropriate the authorities advanced by Cheek which were bottomed on misconduct of a creditor in the nature of fraudulent activity; there being no evidence of such misconduct on McGowan's part.

> The authorities cited by Cheek either involve factual situations where the debtor's misconduct is in the nature of fraudulent inducement in persuading the guarantor to enter into the guaranty agreement or involve a party who is a surety, not a guarantor. The cases and authority dealing with suretyship involve a totally different legal concept. We

> find no authority to support Cheek's argument that he is discharged from liability because of any misconduct on the part of McGowan.

Id.

Simply put, the fact that the jury found McGowan was responsible in part for the occurrence of the so-called "improper charges" does not translate into misconduct on McGowan's part sufficient to effect a discharge of Cheek under the law of guaranty.

ISSUE IV

THE DISTRICT COURT ERRED IN NOT ORDERING THE TRIAL COURT TO ENTER JUDGMENT FOR McGOWAN FOR THE FULL AMOUNT OWED ON THE PROMISSORY NOTE.

If this Court is going to examine the merits of the district court's decision in terms of features not related to the certified questions, the court's reluctance to mandate a directed verdict for McGowan should be rectified.

The principal affirmative defense raised by Cheek to McGowan's suit on the promissory note was that of "mistake." Cheek claims essentially that the promissory note was delivered to McGowan under the mistaken notion or belief by Cheek that he was obligated to McGowan for the full amount of the note. However, Cheek never plead rescission or reformation of the promissory note. (R-4-7). Instead, Cheek's proof at trial focused on attempting to shift to McGowan the risk of any loss occasioned by Cheek's own mistake. The trial court permitted this loss shifting to occur despite the fact Cheek had failed to establish the required showing to obtain equitable relief under the established doctrine of mistake.

The district court recognized the controlling principle necessary to establish the defense of mistake when it observed:

> First of all, as maker of a promissory note, appellant was required, in establishing his defenses of mistake, misrepresentation, and/or failure of consideration, to negate negligence or lack of diligence on his part. The signer of a promissory note is responsible for that which he knew, or should have known, at the time he executed the note. Second, an equitable maxim of long standing applicable to guaranty agreements is that party who trusts

> the debtor is responsible in the event the debtor defaults. In this case, Cook was working on Cheek's jobs, and Cheek solicited McGowan to extend the credit. As between Cheek and McGowan, both "innocent" parties, the responsibility for Cook's failure to pay rests with Cheek, the party who was in the better position to protect himself and who also initiated the credit arrangement.

Cheek, 483 So.2d at 1377 (App-18).

This pronouncement by the district court is wholly consistent with the concept of unilateral mistake noted by this Court in Maryland Casualty Co. v. Krasnek, 174 So.2d 541,543 (Fla. 1965):

> Jurisdictional conflict established, we now turn to the alternative grounds for the holding below. There is no doubt that the law was correctly stated therein as preventing equitable relief on ground of unilateral mistake in instances in which the mistake is the result of a lack of due care or in which the other party to the contract has so far relied upon the payment that it would be inequitable to require repayment. 3 Corbin on Contracts Sec. 606 (1960).

Incident to his defense of mistake, Cheek not only failed to show that he was free from a lack of due care in precipitating or allowing the so-called mistake to occur, but also offered no proof that McGowan did not in fact rely upon Cheek's continuing acknowledgment that he was obligated for the materials purchased by Cook.

First, it was Cheek who armed Cook (the wrongdoer) with the authority to purchase materials on credit from McGowan. (R-619-620,721-723). Cheek eschewed McGowan's offer at the outset to institute procedures to help Cheek monitor the account. (R-723-

724). Secondly, McGowan repeatedly kept Cheek informed of the ever increasing account balance; admonishing Cheek that he would only keep the account open if Cheek continued to guarantee it. Cheek elected to keep the account open. (R-727-728). McGowan clearly relied upon the implied if not expressed assurances of Cheek that he was obligated for the full amount of the account. This reliance was reinforced when McGowan accepted Cheek's promissory note, which extended monthly payment terms to Cheek.

The district court reasoned that Cheek was excused from the traditional limitations of the mistake defense because there were a series of transactions involved and because McGowan acknowledged at trial that Cheek was not obligated for materials which McGowan knew or should have known were diverted from Cheeks jobs. Cheek, 483 So.2d at 1378. (App-19). In this respect the district court apparently confused the jury's assignment of responsibility for failing to avoid[7] "improper charges" (charges which were not identified on the invoices as designated for Cheek's jobs) as being equivalent to legal fault on McGowan's part sufficient to excuse Cheek of his burden of satisfying the requirements of the mistake

[7] The verdict establishes Cheek as being 35% responsible for failing to act reasonably to avoid "improper charges" being made to the account. The 65% responsibility assigned to McGowan obviously also represents a failure to act reasonably to avoid improper charges being made to the account. Admittedly, both parties could have done more to "police" the account. However, any such failure by McGowan does not translate into active knowledge on its part that materials were being diverted from Cheek's jobs by Cook.

defense. Review of the evidence, however, shows clearly that the fault assigned to McGowan was not based on any complicity on McGowan's part in knowingly permitting materials to be charged to the special account and thereafter to be diverted by Cook.

In summary, Cheek simply failed to establish a proper basis to apply the doctrine of mistake so as to relieve him of his obligation on the note. The trial court, therefore, should have directed a verdict on this defense in McGowan's favor. The reasoning and logic employed by the district court in excusing the failure of the trial court to so act is misguided.

ISSUE V

THE DISTRICT COURT SHOULD HAVE ALLOWED ATTORNEY'S FEES TO McGOWAN FOR DEFENDING CHEEK'S APPEAL TO THAT COURT.

McGowan timely filed a motion for attorney's fees with the district court. (App-8). The motion failed to state the "ground upon which recovery is sought" as required by Fla.R.App.P. 9.400(b). No objection to the motion was proffered by Cheek. Simultaneous with its original opinion, the court entered an order denying the motion; Judge Booth dissenting. (App-723). On motion for rehearing, the court noted that the basis for its denial of fees was McGowan's failure to state the grounds for recovery therefor under Rule 9.400(b).

The requirement that a motion identify the grounds for recovery of fees was added by the 1977 revision to former Fla.R.App.P. 3.16(d) (1977)[8]. Ostensibly, the purpose of the requirement was to assist the court in ascertaining the legal basis for the recovery of fees in view of the increasing number of statutory provisions allowing fees. There is no valid reason to conclude that a failure to identify the basis for attorney's fees in a motion is a jurisdictional flaw rendering the appellate court powerless to consider the fee question. Moreover, the determination of fees at the appellate level is not simply a

[8] Former Rule 3.16(e) required only that the motion be filed at or before the filing of the moving party's initial brief and be on a separate paper. McGowan's motion fully complied with these provisions.

ministerial function which is handled solely by the clerk's personnel. See Noel Enterprises, Inc. v. Smitz, 11 F.L.W. 1238 (Fla. 5th DCA May 29, 1986) (holding failure to comply with separate document requirement for requesting oral argument operates as a bar because of ministerial necessities).

Finally, this is not a situation where the legal basis for the fees sought on appeal reposes in some obscure statute or other source. The promissory note provision providing for attorney's fees to McGowan was quoted extensively in Appellant's brief. Indeed, the district court expressly acknowledged the contractual source for the fees in its certified question to this Court.

In its order in this cause, the Court should direct the district court to allow appropriate attorney's fees to McGowan for defending Cheek's appeal to that court.

CONCLUSION

For the reasons set forth above, the district court's opinion should be affirmed and the certified questions should be answered as suggested by McGowan. If the Court is inclined to determine issues other than those presented by the certified questions, the Court should remand this cause for entry of a directed verdict in favor of McGowan. The order of the district court denying McGowan attorney's fees in defense of Cheek's appeal to that court should be quashed and the cause remanded for entry of an appropriate order directed to such fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to M. STEPHEN TURNER, ESQUIRE, Post Office Drawer 11300, Tallahassee, FL 32302, this 30th day of June, 1986.

WILLIAM C. OWEN